ESTUDIOS

LAW AND GENDER IN PRACTICE AND EDUCATION

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GOBIERNO DE ESPAÑA · MINISTERIO DE CIENCIA, INNOVACIÓN Y UNIVERSIDADES · AGENCIA ESTATAL DE INVESTIGACIÓN

Unión Europea
Fondo Europeo de Desarrollo Regional
"Una manera de hacer Europa"

RTI2018-097917-B-100
Retos del Derecho del Trabajo español ante la doctrina del Tribunal de Justicia en materia de política social y derechos fundamentales

LAWGEM Master's Study Program Law and Gender

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First edition, 2022

THOMSON REUTERS PROVIEW™ eBOOKS
Incluye versión en digital

Editorial Aranzadi, S.A.U.
Camino de Galar, 15
31190 Cizur Menor (Navarra)
ISBN: 978-84-1391-370-4
DL NA 732-2022
Printed in Spain. Impreso en España
Fotocomposición: Editorial Aranzadi, S.A.U.
Impresión: Rodona Industria Gráfica, SL
Polígono Agustinos, Calle A, Nave D-11
31013 – Pamplona

Índice General

Página

Página

Página

Foreword

It is a great honour and satisfaction for me to attend to the proposal made by the coordinators of this book to write the foreword to this important book on "Gender and law in practice and education". The attention and concern for gender analysis in the social sciences and, especially, in the field of legal sciences, is still relatively recent and, therefore, there is still a need to deepen into a matter of enormous impact on our daily lives. To this end, a transversal understanding of the elements involved is especially important for the long-awaited achievement of achieving, in the shortest possible time, effective equality for women in all social relations, especially in what involves achieving the full integration of women in the labour market on a level of genuine parity, without the assumption of family responsibilities by all or the persistence of certain cultural stereotypes that hinder the materialization of equality, as well as of glass ceilings that have not just been brought to light to eliminate them definitively. Specifically, the legal norm, within a model of the Rule of Law in which we operate, is decisive in offering protection instruments that pave the way and guarantee elements of protection that are essential for effective and real equality.

It is in this context that this book has been produced, in the context of the Erasmus+ project KA203 "New Quality in Education for Gender Equality – Strategic Partnership for the Development of Masters Study Program Law and Gender". It is a project of marked significance for all its partner Universities, but in a singular way for the Cádiz University, which on this occasion has piloted a meeting to disseminate the studies included in this work. Specifically, it is the result of the organization of a Congress, where the emphasis was placed on university education as a vehicle for contributing to gender equality.

The set of studies presented in the work are characterized by an accentuated transversal perspective, so that they as a whole allow showing the wide range of aspects involved in the materialization of gender equality. Specifically, the book focuses with particular intensity on issues related to labour relations. In some cases, central issues that trigger

the traditional neglect of women in the labour market are addressed, among which the following stand out: access to the labour market, the underrepresentation of women in certain types of professions, the salary gap connected in a singular way with the more intense assumption of family responsibilities by women, the salary differences in university teaching, the double discrimination derived from special situations of women such as those related to disability, etc. At the same time, this monograph identifies new emerging perspectives, which are having a significant impact on the subject, among which we would highlight the following: discrimination against women through the development of artificial intelligence and special algorithmic systems, behaviours cyber attack at work with a clear gender bias, workplace harassment from the approval of the Convention of the International Labour Organization on this important issue. The study is complemented by other broader analyzes from a legal perspective, such as criminal or historical, even sociological. Finally, in view of the always double condition of researchers in their additional work of transmitting knowledge through teaching, the book also contains important contributions in relation to pedagogical aspects, such as those related to the use of information and communications technologies for adequate teaching on gender equality, or the interaction between cooperative teaching and learning as a method of study in the field of Labour Law.

In short, these are serious and rigorous studies, which invite congratulations to the authors for their results, while encouraging those who come across this book to read it for the practical impact that it deserves to have.

Jesús Cruz Villalón

Full Professor of Labour and Social Security Law
Seville University

Prólogo

Constituye para mí todo un honor y satisfacción atender a la propuesta formulada por los coordinadores del presente libro para realizar el prólogo a este importante libro sobre "Gender and law in practice and education". La atención y preocupación por los análisis de género en las ciencias sociales y, especialmente, en el ámbito de las ciencias jurídicas, todavía resulta relativamente reciente y, por ello, aún falta profundizar en una materia de enorme impacto sobre nuestra vida cotidiana. A tal efecto, un conocimiento transversal de los elementos implicados resulta especialmente trascendente en aras del logro tan ansiado de lograr en el tiempo más breve posible una efectiva igualdad de las mujeres en el conjunto de las relaciones sociales, especialmente en lo que comporta la consecución de la plena integración de la mujer en el mercado de trabajo en plano de auténtica paridad, sin que constituyan obstáculos o dificultades ni la asunción de responsabilidades familiares por parte de todos ni la pervivencia de determinados estereotipos culturales que frenan la materialización de la igualdad, así como de techos de cristal que no se acaban de sacar a la luz para eliminarlos definitivamente. En concreto, la norma jurídica, dentro de un modelo de Estado del Derecho en el que nos desenvolvemos, es decisiva para ofrecer instrumentos de tutela que allanen el camino y garanticen elementos de tutela imprescindibles para la igualdad efectiva y real.

Es en ese contexto en el que se ha elaborado este libro, en el contexto del proyecto Erasmus+ KA203 "New Quality in Education for Gender Equality – Strategic Partnership for the Development of Master's Study Program Law and Gender". Se trata de un proyecto de marcada significación para el conjunto de las Universidades socias del mismo, pero de manera singular para la Universidad de Cádiz, que en esta ocasión ha pilotado un encuentro de divulgación de los estudios incluidos en esta obra. En concreto, el mismo es el resultado de la organización de un Congreso, donde se puso el acento en la educación universitaria como vehículo de contribución a la igualdad de género.

El conjunto de los estudios que se presentan en la obra se caracterizan por una acentuada perspectiva transversal, de modo que los mismos en su conjunto permiten mostrar el amplio abanico de aspectos involucrados en la materialización de la igualdad de género. En concreto, el libro se enfoca con particular intensidad a las cuestiones relacionadas con las relaciones laborales. En algunos casos, se abordan cuestiones centrales desencadenantes de la tradicional postergación de la mujer en el mercado de trabajo, entre las que destacan las siguientes: el acceso al mercado de trabajo, la infrarrepresentación de la mujer en cierto tipo de profesiones, la brecha salarial conectada de manera singular con la asunción más intensa de las responsabilidades familiares por parte de las mujeres, las diferencias retributivas en la docencia universitaria, las dobles discriminaciones derivadas de situaciones especiales de las mujeres como son las relativas a la discapacidad, etc. Al propio tiempo, esta monografía identifica perspectivas nuevas emergentes, que están teniendo un impacto relevante sobre la materia, entre los que resaltaríamos los siguientes: la discriminación de la mujer a través del desarrollo de la inteligencia artificial y especial de los sistemas algorítmicos, las conductas de ataque cibernético en el trabajo con claro sesgo de género, el acoso laboral a partir de la aprobación del Convenio de la Organización Internacional del Trabajo sobre este importante asunto. El estudio se complementa con otros análisis más amplios desde la perspectiva jurídica, como son los de carácter penal o histórico, incluso sociológico. Finalmente, a tenor de la siempre doble condición de los investigadores en su labor adicional de transmisión del conocimiento a través de la docencia, el libro contiene igualmente importantes aportaciones en relación a los aspectos pedagógicos, como son los relativos al uso de las tecnologías de la información y las comunicaciones para una adecuada enseñanza en materia de igualdad de género, o bien la interacción entre enseñanza y aprendizaje cooperativos como método de estudio en el ámbito del Derecho del Trabajo.

En definitiva, se trata de estudios serios y rigurosos, que invitan a felicitar a los autores por sus resultados, al tiempo de animar a su lectura a quienes lleguen a sus manos este libro por el impacto práctico que el mismo merece que tenga.

Jesús Cruz Villalón

Full Professor of Labour and Social Security Law
Seville University

Cover note

This volume is the result of the fruitful collaboration of five European universities (The University of Belgrade, leading the project as main partner, University of Cádiz, University Libera Universita Maria SS. Assunta di Roma, Lumsa University Palermo, Orebro University and Universitat des Saarlandes), within the framework of the Erasmus+ KA203 Programme "New Quality in Education for Gender Equality – Strategic Partnership for the Development of Master's Study Program Law and Gender". The general objective of the project is to contribute to gender mainstreaming of legal studies. In this regard, from the very beginning numerous initiatives have been carried out by the partner universities in a climate of scientific and research exchange. As a starting point, a questionnaire was drawn up to carry out a diagnosis of the gender perspective in the different universities. Thus, a curriculum was developed for a Master's degree programme on Law and Gender and, in addition, a book was published highlighting the critical points regarding gender in the different areas of the legal system at international and EU level. Finally, a website has been built containing these resources available to the international community. Undoubtedly this will contribute to disseminate the results of the objectives achieved.

Therefore, this book is an additional result to the Project. In this sense, the University of Cadiz held online an international congress, from 19th to 20th July 2021, to address the impact of gender in education and professional practice, as the second LLT. The impressive agenda were categorized into two axes. The first axe regarding Gender perspective in Education included two topics: How Can We Leverage the Internet to Effectively Teach Comparative Equality in a Comparative Context? Prof. David B. Oppenheimer, Clinical Professor of Law. Director, Berkeley Center on Comparative Equality & Anti-Discrimination Law, Faculty Co-Director, Pro Bono Program. International and National Arena Interplay – Gender Perspective; Prof. Laura Carballo, Nippon Foundation Chair of Maritime Labour Law and Policy, Head, Maritime Law and Policy, WMU (World Maritime University). And the second axe was about Gender perspective in practice, containing the following two issues: Impact of Gender Perspective

on Legal Profession – Useful or Harmful; Dr. Julianne Kokott, Advocate General at the Court of Justice of the ECJ and Gender Action Plans in Academia; Prof. Daniel Pérez, Lecturer of Carlos III University, Madrid.

After a brilliant foreword in Spanish and English by Prof. Cruz Villalón, Full Professor of Labour and Social Security Law at the University of Seville, the content of the volume is comprised of two parts: Part I, dealing with the importance of gender in professional activity. This first part begins with the literal transcription of the lecturer given at the Congress by the Advocate General at the Court of Justice of the European Union, Dr. J. Kokkot, entitled "Impact of Gender Perspective on Legal Profession: useful or harmful". The following papers are based on a comprehensive review on the impact of gender on Labour and Social Security Law, firstly by Dr. L. Kovačević, Associate Professor of the Faculty of Law, University of Belgrade, addressed "Access to employment and gender-based discrimination". Secondly, Dr. T. Kahale Carrillo, Professor of Labour and Social Security Law, Polytechnic University of Cartagena, tackled on "Discrimination against women in the implementation of artificial intelligence systems and algorithms". Thirdly, the PhD student at the Faculty of Law of the University of Belgrade, Ms. M. Kuzminac, approached "The relation between family duties and gender pay gap as manifestation of gender inequality in the European Union. Afterwards, Dr. M.T. Alameda Castillo and Dr. D. Pérez del Prado, Associate professors of Labor and Social Security Law at Carlos III University presented the study on "Talking about Gender and Remuneration in Higher Education in Spain". This part is reinforced with two contributions on ILO Convention 190 on violence and harassment at work, by Dr. F. Fuentes Rodríguez, Associate Professor, Department of Labour Law and Social Security, University of Cádiz, analyzing "Gender-based cyberviolence at work", on the other hand, the Master's Student at the Department of Labour and Social Security Law, University of Sao Paulo Faculty of Law, Ms. C. Valadares Chaves presented a paper on "Harassment and Gender: an analysis of ILO Convention no. 190 during the Covid-19 crisis". Within this first part, other disciplines offer their perspective about Law and gender. Thus, Dr. A.I. Berrocal Lanzarot, Professor of Civil Law at the Complutense University of Madrid, deals with "The comprehensive protection of minors in front of violence. Present and future in Spain". Closing the section, several Master's and PhD students submitted papers: Ms. L.A. Schmitz, PhD candidate, Criminal Law, Criminal Procedure, Philosophy of Law and Comparative Law at the University of Cologne, presented the chapter on "The role of gender for the legitimisation of behavioral and sanctioning norms", next Ms. A. Pavlović, PhD student, University of Belgrade – Faculty of Law, dealt with "Gender equality and

women with disabilities". Finally, Ms. M. Hernández Romero, student in the master's in international Relations and Migrations (University of Cádiz) provided a written study about "Gender coloniality: a study of the role of Sahrawi women in the struggle for self-determination".

The second part of the book is devoted to the role of education in raising awareness of gender equality. The first contribution consists of a literal transcription of the lecturer given at the congress by the Full Professor at the University of Berkeley, Dr. D. B. Oppenheimer on "Leveraging technology to teach gender equality Law. Two papers were presented in this axe: the first on "The gender perspective and the cooperative teaching-learning method in the study of Labour Law, by Dr. R. Poquet Catalá, Labour Law and Social Security Lecturer, University of Valencia, and the second, by Dr. G. González Agudelo, Professor in Criminal Law, Universidad de Cádiz, which deals with "Gender and Criminality, how are intersectionality and the decolonial turn incorporated into social studies?

In short, the book offers an analysis of gender from different perspectives, which encourages us to continue working. Lastly, I would also like to acknowledge the collaborators, keynote speakers and authors. Additionally, to recognize the important role of the Erasmus+ KA203 Programme "New Quality in Education for Gender Equality – Strategic Partnership for the Development of Master's Study Program Law and Gender and the consortium members. On the other hand, I would like to acknowledge the Institutions that financially contributed to this publication: the University of Cadiz, through the Faculty of Labour Sciences, the Faculty of Law and the Rector's Delegate to the Equality and Inclusion Policy, and the collaboration of the project "RTI2018-097917-B-100. Retos del Derecho del Trabajo español ante la doctrina del Tribunal de Justicia en materia de política social y derechos fundamentales". I hope that these pages will be extremely useful for all those read and study their contents.

Finally, it should be noted that each author is exclusively responsible for the content and linguistic correctness of his or her participation in this work.

In Algeciras, March 8th, 2022, International Women's day.

Isabel Ribes Moreno

Coordinator of the Erasmus+ KA203 Programme "New Quality in Education for Gender Equality – Strategic Partnership for the Development of Master's Study Program Law and Gender" in the University of Cádiz

PART I
Gender in Practice

Impact of Gender Perspective on Legal Profession – Useful or Harmful[1]

Juliane Kokott

Advocate General at the Court of Justice of the European Union, Luxembourg, LL.M. (Am. Univ.), S.J.D. (Harvard)

I. INTRODUCTION

[Dear Students, dear Colleagues, Ladies and Gentlemen,]

It is a pleasure for me to speak to you today, thereby contributing to this very interesting conference on a topic that, as you can easily imagine, is very close to my heart. In this perspective, I fully support the project to set up a masters study program on Law and Gender within a network of collaborating universities. As a coincidence, I noted that one of the entities participating in this program is the university of my homeland in Germany, the Saarland.

The subject on which I was asked to intervene is *"Impact of Gender Perspective on Legal Profession – Useful or Harmful?"* and I must confess that, when I read this title, my first reaction was to wonder how a gender perspective on legal profession could possibly be harmful. However, when reflecting on this point, it appeared to me that one could understand the question of whether a gender perspective on legal profession could be harmful as aiming to trigger reflections under *two points of view*:

First, when checking women's presence in some –not all but, in essence, the most prestigious– sectors of legal profession, it quickly turns out that they are often significantly underrepresented. At my own Court, for example, out of 38 judges and advocates-general, only seven are women and, in our lower tier General Court, out of 50 judges, only

1. Literal transcription of the lecture given in the International Congress "Gender and Law and Practice and Education", Universidad de Cádiz, 19th July 2019, available at <https://lawgem.uca.es/congress/>.

15 are women. In other international courts, tribunals and jurisdictional bodies, the situation is in many cases alike, as I recently discussed during an online conference dedicated to the under-representation of women in international justice[2].

In view of this, the need for positive discrimination might seem obvious. Indeed, how to achieve gender equality if not through the instauration of quota and the like? But then, detractors of such kind of measures could argue that this is not fair towards male candidates. And, more generally, the impression could arise that women promoted via such mechanisms are mere token women, whose qualifications compared to those of their male counterparts are doubtful. From this point of view, a gender perspective on legal profession might it be harmful?

In addition, a gender perspective on legal profession might eventually be harmful from a *second* point of view. Thus, one could have the idea that for a given case or the interpretation of a given legislative provision, there necessarily is one right solution. Objectivity of the law. However, promoters of the accession of more women to judicial professions often argue that those women would make decisions that would be substantially different from those made by their male counterparts. This corresponds to the idea that women in judicial functions could bring about an added value in the sense that they would have another view on legal issues, notably those relating to human and women's rights, and an increased sensibility for those issues than male judges. But does this thesis fit with the idea according to which, for every given case, there is one legal solution? Or is it so that, in reality, it is only the confrontation of different perspectives and backgrounds that makes us discover the "right" legal solution? This would then plead for as much diversity on the bench as possible.

My reflections on these two issues, the under-representation of women in the most prestigious judicial functions on the one hand, and the question of what is the added value of gender equality on such benches on the other hand, constitute the background of my intervention today.

This being said, in this intervention, I will focus on **three points**:

1. **First**, I will shed a glimpse on the current state of under-representation of women in many high profile judicial functions and address the question of how to improve this deplorable situation.

2. See <https://www.wfm-igp.org/event/the-under-representation-of-women-in-international-justice/>. See also the contributions to the Symposium "Feminist Critiques of International Courts", available at <https://voelkerrechtsblog.org/de/symposium/feminist-critiques-of-international-courts/>.

2. **Second**, I will address the contribution of the European Court of Justice and the EU legislator to gender equality;
3. And, finally, **third**, I will discuss the question of the possible impact of the composition of the bench in terms of gender equality for the outcome of judicial decisions.

II. THE CURRENT UNDER-REPRESENTATION OF WOMAN IN INTERNATIONAL JUSTICE AND ACADEMIA AND HOW TO IMPROVE THE SITUATION

As I am an Advocate General at the European Court of Justice, but also a law professor, the two sectors of legal profession I will mainly refer to in my speech will be the judiciary and academia.

As I already mentioned, at my own Court, out of 38 judges and advocates-general, only seven are women. It is true that, in October this year, we will have a partial renewal of the Court's members and there will probably be some more new female colleagues nominated then. However, women will still be significantly underrepresented among the judges and advocates general.

As far as our lower tier General Court is concerned, its situation in terms of gender parity has even been subject to an intervention by the EU legislator. When the EU legislator decided in 2015 to increase the number of judges at the General Court from 28 to 56 (now, after Brexit, 54), which means two judges for each Member State, it highlighted in the relevant regulation the "high importance of gender balance within the General Court" and stipulated that each Member State "should" nominate one woman and one man[3].

However, as for today, out of 50 judges, only 15 are women. It is true that, when I spoke about this issue for the last time in 2016, women judges at the General Court were merely 12 out of 50. This shows that the situation is certainly getting better gradually, but very slowly – if the rhythm does not accelerate, it will still take more than fifteen years from now to reach gender parity at the sole General Court, let alone the Court of Justice.

The composition of the CJEU's bench depends mainly on national nomination mechanisms, as judges are nominated by the EU member states. And there the problem is that there are still far more high profile male lawyers among the possible candidates. For example, in my home

3. See Recital 11 of Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union (OJ L 341, p. 14).

country, Germany, judges and advocates general for the CJEU are mainly chosen among university professors. However, less than 20% of law professors in Germany are female[4], notwithstanding the fact that among law students, there are today more women than men. But women traditionally mainly do not chose the most high profile posts in the judicial profession – university professorships, presidencies of courts and tribunals etc. They more often stay in lower positions in the judiciary, in the first instance courts and tribunals.

This limitation of women is to a great extent due to the framework conditions for the combination of work and family life – in the first place the lack of child care structures and the fact that care work is still mainly done by women. Consequently, if they have a professional career, they have the double charge of working in this professional career and doing most of the family work at home.

The maintain of these bad framework conditions and traditional work allocation prevents women from engaging in high profile judicial and academic careers from the outset – and then, when it comes to nomination procedures for institutions such as the ECJ, they are not there to run for nomination.

Yet, unfortunately, the current pandemic has even worsened the work-family-balance conditions for women, as is impressively documented by the Global Gender Gap Report 2021 issued recently by the World Economic Forum[5]. According to this report, it will statistically take more than 135 years to reach gender parity – against 95 years calculated in 2019.

This deplorable trend will unfortunately indirectly also affect women's participation in high profile international judicial positions, if there are no measures of positive discrimination taken in order to reach a more gender equitable composition of these benches.

Moreover, as I recently wrote in an editorial published in a German Newspaper[6], it is crucial to encourage young women to combine maternity and a career. Too often, they still think they have to choose one or the other.

This is because (1) the family generally provides little or no support to working mothers in the West European individualized society; (2) a role model of mothers as the only caregivers for small children is promoted by (a) tax incentives for stay at home mothers in Germany and (b) tax disincentives for domestic help. Women judges possibly would have

4. <https://www.faz.net/aktuell/karriere-hochschule/uni-live/maennerberuf-jura-professor-diversere-themen-durch-mehr-frauen-17192094.html>.
5. <https://www.weforum.org/reports/global-gender-gap-report-2021>.
6. Die K-Antwort", Frankfurter Rundschau, 8 July 2021.

declared such tax measures incompatible with gender equality because they (factually) disadvantage women and reinforce stereotypes.

As I wrote in my editorial and as I keep on repeating in my speeches, to encourage the combination of motherhood and a career, we need (1) good and affordable all-day-childcare-structures, (2) fair wages for people working in the care– and nursing-sectors and (3) a taxation system that allows to set off costs for childcare and housekeeping against tax liability and that encourages both partners to work (family-splitting).

Good framework conditions really make a difference. Take the example of our law clerks at the ECJ: We have a generous regime of five months paid maternity leave plus – and this is important – the possibility of having a good replacement for the mother at leave. Furthermore, there are very good childcare structures here in Luxembourg. Consequently, most women at the Court combine very nice legal careers with having a family. Under the highly qualified legal secretaries of the ECJ we meanwhile have 43% women (73/170). One could certainly object that these women are in a privileged situation, which is true. Nevertheless, the aim should be to offer this kind of possibilities to combine work and family life to all women. This is also important because the state has an interest in generational change and a high level of employment for women.

Last but not least, we also need to empower women, and especially young women and students like you, to be confident about their potential and opportunities. This is important to prevent women from auto-limiting themselves, which often starts at a very young age.

One example of empowering girls is an initiative by the Luxembourgish Ministry for Gender Equality. The ministry distributes books in the nursery, who tell stories in which Mum is a mayor and Dad is on parental leave, and where the little girl likes to drive go-carts and repair cars and the little boy likes sewing. The fact that the latter kind of books needs to be produced on command and sponsored by the Ministry for Gender Equality shows that this kind of narrative is still not part of normality yet and that their production amounts to a kind of positive discrimination. But this example also shows that positive discrimination is important, because it helps building new role models for girls and helps breaking up traditional role models that still prevent too many women from reaching the top today.

It is important to work on people's mindset, to change mentalities, to create new role models. This is why I also engage in a mentoring program and try to encourage young women with my own example.

But often, it takes a lot of time to change mindsets and mentalities. This is why the legal conditions of women in a society are so essential for their

empowerment. This brings me to my second topic today, the promotion of women's rights by the European Court of Justice and the EU legislator.

III. THE PROMOTION OF WOMEN'S RIGHTS BY THE EUROPEAN COURT OF JUSTICE AND THE EU LEGISLATOR

The status of women is intimately linked to the legal framework that a society has established for itself. None of the important progresses that have been made over the past decades and centuries in the area of equal treatment would be conceivable without concrete legal provisions and case law implementing them: Take the example of women's right to vote in national elections, which was introduced by many European states in the first half of the last century. The achievement of this right was preceded by a long struggle of the women's movement, which started in the 18th century.

Sometimes legal rules on the status of women merely mark the end of an evolution in society that has been going on for decades. For example, there was a time when women needed the agreement of a man – usually their husband or father – to choose their place of residence, to enter into an employment contract or even to open a bank account. When this anachronism was finally abolished, this was only the logical consequence of a more modern way of thinking that had gradually taken hold in people's minds. The same is true for the legislation on divorce.

However, there is also the opposite situation, in which a proactive policy takes the lead in order to favor the adoption of legislation on the status of women, which subsequently proves to be an "initial ignition" that ultimately changes our society and the role that women play in it. It is precisely in this last category that I would place most of the rules on the status of women that originate at the European level.

In this regard, the principle of equal treatment between women and men has always been one of the founding principles of European construction (now Article 3 TEU[7], Articles 8[8] and 19[9] TFEU, Article 23

7. Article 3 paragraph 3 TEU: "[The Union] shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child".
8. Article 8 TFEU: "In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women".
9. Article 19 paragraph 1 TFEU: "Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action

of the Charter[10]). Its concrete implementation began with the insertion of a provision in the Treaty of Rome (Article 119 EEC, which has now become Article 157 TFEU[11]) establishing the principle of equal pay for male and female workers for equal work or work of equal value. In the 1950s, this was a particularly progressive clause that did not correspond at all to economic reality. But France, which already had such a rule in its domestic law and feared competitive disadvantages for its industry, insisted on the need for an equivalent provision throughout the common market[12]. The initiative was therefore motivated, at least initially, by economic rather than by social considerations. However, one can assume that the development of the status of women in many member states, including in my home country Germany, has been greatly accelerated by the establishment of the principle of equal pay at European level. Thanks to this rule, the so-called "gender pay gap" has been reduced over the years, even if it has not yet been possible to close it completely in all sectors.

In the 1970s, the CJEU took the opportunity to emphasize the dual purpose of this principle of equal pay now enshrined in Article 157 TFEU. It ruled that gender equality is also a principle of social law that must be implemented not only through legislation but also through case law. Thus, in the context of three famous rulings bearing the name of Mrs. Defrenne[13], a stewardess of the former airline company Sabena, the Court established, among other things, the direct effect of the principle of equal remuneration. Through its jurisprudence, the EJC has contributed to making this rule a key element of European social law.

Several acts of secondary legislation were subsequently adopted on the basis of the current Article 157 TFEU. These acts aim to implement the principle of gender equality in all aspects of working life.

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to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".

10. Article 23 of the Charter ("Equality between women and men"): "Equality between women and men must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex".
11. Article 157 paragraph 1 TFEU: "Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied".
12. See Kokott, J., "Le statut des femmes et l'état de droit: la perspective européenne", in: Grosjean, A. (ed.), *Le statut des femmes et l'état de droit*, Brussels, 2018, p. 63.
13. ECJ, judgments of 25 May 1971, Defrenne I (80/70, EU:C:1971:55), of 8 April 1976, Defrenne II (43/75, EU:C:1976:56), and of 15 June 1978, Defrenne III (149/77, EU:C:1978:130).

Among the most recent legislative works, it is important to mention the so-called "anti-discrimination" directive of 2004 (Directive 2004/113/EC), which extends the principle of equal treatment beyond the classical field of work to prohibit discrimination also in access to goods and services, such as insurance contracts. Against this backdrop, the Court issued its famous Test Achat ruling (2011)[14], which resulted in an end to the [unfortunate] practice of insurance companies applying unequal insurance premiums according to the gender of the policyholder. The Test Achat decision is thus, in a sense, the origin of the so-called "uni-sex" rates you are offered today when you want to insure your vehicle, obtain supplemental health insurance or purchase life insurance.

IV. DO WOMEN JUDGES MAKE THE DIFFERENCE IN TERMS OF SUBSTANTIVE OUTPUT?

It is interesting to note, that the founding stones of this highly protective jurisprudence for women came from a Court that was, for many years, composed exclusively of men. This is a good example that shows that you don't necessarily have to be a woman, let alone a feminist, to advance the equality of treatment between men and women.

That brings me to the third and last point of my speech today, the question of whether women judges do make a difference in terms of substantive output of judicial decisions?

Even if the jurisprudence of the EU Court of Justice I just outlined provides some encouraging examples, otherwise I am convinced that women do make a difference and that gender balance in all courts is a must in order to have courts which are able to see the full picture and all sides and facets of conflicts of interests in the society.

Diversity in the bench is very important, and this should also play a role in judges' nomination processes. In my Land in Germany, we have a system that just takes the persons who have the best law degrees. Other factors such as experience or personality are not important. I think that this is wrong, even though women have excellent exams.

I have read many judgments full of stereotypes about women which would certainly not have been handed down that way with women on the bench.

A very early example of such a judgment is a US Supreme Court's judgment of 1872 that states that "[t]he natural and proper timidity and

14. ECJ, judgment of 1 March 2011, Association belge des Consommateurs Test-Achats and Others (C-236/09, EU:C:2011:100).

delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life", including that of an attorney[15].

I also doubt whether women judges would understand the German Federal Constitutional Court's reasoning in an order from 1977 that "in granting a tax reduction for domestic help expenses, mothers who take care of their own children's education might feel disadvantaged"[16].

Conversely, only a few years later, in 1991, the same chamber of the court, whose composition had nevertheless changed, meanwhile, to comprise five men and **one women**, decided that the rule according to which, in case future spouses didn't agree on their married name, the name of the husband automatically prevailed, was contrary to the constitutional principle of gender equality[17].

When comparing these two judgments, one really gets the impression that the presence of even one single woman on the bench made a real difference (maybe together with some societal and ideological progress that had meanwhile taken place as regards gender equality).

But the presence of women on the benches of international judicial bodies is not only important for the concrete outcome of single judicial decisions, but also for the overall legitimacy of these decisions.

In a recent judgment of the European Court of Human Rights concerning quotas for women candidates in elections, the Court not only noted that the promotion of gender equality is one of the main objectives of society today. Moreover, it considered that a pronounced imbalance between men and women in politics could jeopardize the very legitimacy of democracy[18].

The same is true for judicial entities such as courts, tribunals and other jurisdictional bodies.

The principle of gender equality is therefore not only an instrument to promote the rights of individuals. Today, gender equality has a societal dimension. At the level of the European Union, this is perfectly illustrated by the references to this principle found in cross-cutting provisions [such as Article 3 TEU or Articles 8 and 19 TFEU, to which I have already referred earlier in my speech today.]

15. 83 U.S.130(1872).
16. BVerfG, Order of 11 Oct. 1977, BvR 343/73, 83/74, 183 and 428/75, BVerfGE 47,1.
17. BVerfG, Order of 5 March 1991, 1 BvL 83/86 and 24/88, BVerfGE 84, 9 – Married names.
18. ECtHR, judgment of 12 November 2019, Zevnik v. Slovenia (CE:ECHR:2019:1112DEC005489318, § 34).

This brings me to the end of this speech. Overall, I conclude that a gender perspective on judicial profession is useful and that it would on the contrary be harmful to refrain from examining legal and judicial questions from such a perspective. This is why I am delighted that the universities taking part in the LAWGEM-program have set up this master study program and I wish you a lot of success in implementing this program!

Access to Employment and Gender-Based Discrimination[1]

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I. INTRODUCTION

Freedom is innate to every human being. In the world of work, this is primarily manifested as the freedom of workers to perform professional activity of their choice, i.e. to seek employment suited to their abilities, professional aspirations, as well as life and work experience. As a master of one's skills and profession, one is free to use one's time and labour in a manner and under the conditions suited to one's interests. This freedom is a supplement to the right to education, as the guarantee of the right to work implies the effort of the State to provide not only a sufficient number of jobs in the labour market, but also jobs of a sufficient quality, where every worker will be able to show and develop his/her skills and abilities. This *freedom of choice of occupation and employment* confirms that work, in addition to providing means of subsistence, also contributes to the self-realization of individuals, because it allows them to choose an occupation and employment that will give their lives meaning[2]. The need for economic security is one of the basic needs of every human being. It can be satisfied by entering into employment relationship, where the worker, in addition to procuring means of subsistence, gets the opportunity to develop his personality by working for the employer. This

1. This paper was developed in the framework of the Erasmus + KA203 scientific project "New quality in education for gender equality – Strategic partnership for the development of master's study program Law and Gender – LAWGEM".

2. Dermine, E., The Right to Work: A Justification for Welfare-to-work, In: Eleveld, A., Kampen, T. and Arts J. (eds), *Welfare to Work in Contemporary European Welfare States. Legal, Sociological and Philosophical Perspectives on Justice and Domination*, Bristol: Policy Press, 2020, p. 57.

is a prerequisite for effective exercise of all other human rights and for the full participation of workers in the (social, economic and political) life of the community[3].

The freedom to choose employment may, on exception, be restricted, if justified by objective, non-discriminatory reasons, and if the restriction is in proportion to the desired objective. This is because the labour market is limited, not only by territorial borders, but by the requirement that only the persons who meet the *general conditions for employment* can participate in the market. These requirements have a primarily protective role, while *special requirements for employment* are objectively determined by the characteristics of the work process at a particular job. On the other hand, the limitations of the freedom of choice of employment are set by the economic situation in the country, since, for the State, the guarantee of the right to work does not represent an obligation to provide employment to every citizen. Instead, the State has to set up the labour market and frame it with legal and other instruments to protect the interests of all market participants, from measures aimed at eliminating forced labour, labour exploitation and discrimination, to the educational policy, active employment policy and active labour market policy.

For the employer, on the other hand, the purpose of entering into employment relationship is to select and recruit workers who are expected to perform their working tasks to the best of their abilities. This further means that an employer's freedom of enterprise, freedom of contract, as well as responsibility to ensure proper functioning of the undertaking allows for significant freedom in choosing future employees. This freedom of choice may threaten the interests of workers, especially in terms of the risk of not being selected for the job for non-professional reasons, including sex and gender as personal characteristics which constitute grounds for discrimination. The law seeks to prevent such practices and even imposes an obligation on employers to hire certain persons. Within these boundaries, an employer has prerogatives that enable him to best assess the abilities of the candidates – the prerogative to manage the hiring process, the prerogative to establish the recruitment requirements and the prerogative to select the person for the job, considering that a job advertisement does not create an obligation for the employer to hire

3. Mundlak, G., "The Right to Work: Linking Human Rights and Employment Policy", *International Labour Review*, vol. 146, Issue 3-4/2007, p. 189; Linhart, Danièle, Introduction: Que fait le travail aux salariés? Que font les salariés du travail? Point de vue sociologique sur la subjectivité au travail, In: Linhart, D. (dir.), *Pourquoi travaillons-nous? Une approche sociologique de la subjectivité au travail*, Ramonville-Saint-Agne*:* Édition érès, 2008, p. 14.

a candidate, or to hire the best candidate. This position of the employer is not only determined by his legal prerogatives, but his economic dominance, as well as the fact that there are very few people who can afford the luxury of not having to earn a living off of their work. This is why labour legislation is so important for the effective exercise of the right to work, and, consequently, for the effective exercise of other economic and social rights, as well as civil and political rights, bearing in mind the connection and interdependence of human rights of different generations.

The hiring process represents a set of actions and acts entered into or enacted by the participants, in order to establish a legal relationship that serves as a framework for performing dependent and subordinate work. Different stages of this process will enable the transformation of the relationship between a worker and an employer from a certain legal bond, over a civil law relationship, to the establishment of an employment relationship. Taking this path means the following steps have to be taken: establishing occupational requirements; announcing job vacancies; submitting job applications; possibly testing applicants' work abilities; deciding on the job applications; entering into an employment contract. The main objectives of the hiring procedure are related to the exercise of workers' right to work and the objectification of the selection of candidates for employment. In this sense, the hiring procedure must be based on the principle of relevance, i.e. it must be directed only towards finding a job, and towards assessing the professional abilities of candidates and their selection for employment. This, finally, means that employment is also tied to the important interests of the State, which cannot allow its citizens to waste or squander their abilities. Besides, the State has a duty to create conditions for effective exercise of the right to work and freedom of entrepreneurship, which is why regulation of employment should enable the interests of these three parties to be satisfied. More specifically, the State has a duty to do everything in its power to provide all job seekers with good and productive jobs, while promoting full and productive employment, which will enable workers to work with dignity and provide the society with economic growth and development, higher standards of living as well as overcoming the problems of underemployment, unemployment, poverty and social exclusion. These efforts inevitably include the elimination of discrimination and the creation of conditions for achieving the *de facto* equality in the world of work. This is why the principle of equality and the principle of non-discrimination appear as basic principles of contemporary labour law.

An important segment of protection of job applicants from discrimination is their protection from gender-based discrimination.

The labour law is, in this regard, traditionally conceived according to the model of male worker who is employed on the basis of an open-ended full time employment contract, which results in failure to take into account experiences typical for female workers and to identify the specific consequences that the seemingly neutral labour law rules or practices had on women. This approach survived after intensive inclusion of women in the labour market, while biological and functional differences between men and women were considered to be the key reason for making qualitative differences between male and female workers (maternity protection, special protection of women due to their weak constitution, absolute ban on night work of women in industry, etc.)[4].

In the 1980s, social sciences started applying the feminist method, which opened up a new set of labour law issues, with the insistence on abandoning socially constructed roles related to men and women[5]. Consequently, the past decades were marked by progress in building a legal and institutional framework for protection against gender-based discrimination in the exercise of labour rights. However, in practice, the increase in the number of economically active women is not accompanied by equal quality of employment of men and women[6]. Instead, women, even highly skilled women, often have difficulty finding and retaining employment, largely because of *prejudices and stereotypes* related to their work and their commitment to family duties (e.g. the stereotype that it is more expensive to hire a woman than to hire a man due to special health and safety protection at work related to risks that endanger the reproductive function of female workers, as well as the fact that women are not available for work during maternity leave, and there is no guarantee that they will return to work after the

4. Kollonay-Lehoczky, C., Article 20 – The Right to Equal Opportunities and Equal Treatment in Matters of Employment and Occupation without Discrimination on the Ground of Sex, In: Bruun, N., Lörcher, K., Schömann, I. and Clauwaert, S. (eds), *The European Social Charter and the Employment Relation*, Oxford/Portland: Hart Publishing, 2017, p. 359.

5. Conaghan, J., "Labour Law and Feminist Method", *International Journal of Comparative Labour Law*, vol. 33, Issue 1/2017, p. 100; Marry, Catherine, Genre, In: Bevort, A., Jobert, A., Lallement, M. and Mias A. (dir.), *Dictionnaire du travail*, Paris: Quadriage/PUF, 2012, pp. 342-343.

6. Across the EU, in 2016, the employment rate for women was 65.3% compared to 76.8% for men. In the same year, women represented 3/4 of workers who pursue paid work on a part-time basis and they tend to work in lower-paying sectors and at more junior levels than men. Acc. to: Gender Equality at Work – European Working Conditions Survey 2015 Series, Luxembourg: Publications Office of the European Union, 2020, p. 13; European Group on Ethics in Science and New Technologies, Future of Work, Future of Society, Luxembourg: Publications Office of the European Union, 2019, p. 32.

birth of a child; the stereotype that the mother of a small child will be late for work more often if she works in the first shift; the stereotype that female workers are more often absent from work due to family duties, etc.)[7] Also, we must not lose sight of the so-called statistical stereotypes that have influenced the institution of (male) sex as a special requirement for certain jobs only because the physical capabilities of an average woman are less than the physical capabilities of an average man[8]. Due to statistical stereotypes, employers often make unfavourable decisions regarding the participation of workers of a certain sex in an job advertisements, believing they have the characteristics typical of a certain sex, such as the stereotype that, in certain jobs, workers of one sex are less productive than the workers of the opposite sex[9], which regularly leads to *occupational segregation*, in terms of giving preference to workers of one sex when hiring for certain jobs.

We should also have in mind that women are more likely than men to get a job in lower-paying sectors (which is why the average pay for men is higher than the average pay for women in both the public and private sectors), while also making up a smaller portion of the total number of employees in the more promising sectors, such as the information and communication technologies, science, engineering and mathematics. On the other hand, men are underrepresented in the areas of education (which is true for the primary and secondary, and not the higher education), health care and social protection. In this regard, we should bear in mind that work in female dominated fields is often paid less than work in male dominated fields, regardless of the level of education and experience of workers. In addition to the stereotypes regarding lower productivity of women, there are other contributing factors, such as the secrecy of salaries, the fact that most job candidates, especially women, are uncomfortable with the idea of negotiating wages when entering into an employment relationship, or the inadequate evaluation of skills, commitment and responsibility of female workers (certain job requirements in which women are predominantly employed are often not evaluated/e.g. due to the belief that women have "innate" abilities to care for others/, while

7. Fenwick, H. and Hervey, T., "Sex Equality in the Single Market: New Directions for the European Court of Justice", *Common Market Law Review*, vol. 32/1995, p. 446.
8. Holzleithner, E., "Gender Equality and Physical Requirements in Employment", *European Equality Law Review*, Issue 1 (2017), pp. 16-17; Timmer, A., "Gender Stereotyping in the Case Law of the EU Court of Justice", *European Equality Law Review*, Issue 1 (2016), p. 38.
9. Equality in Employment and Occupation. General Survey by the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 75th Session, Report III (Part 4B), Geneva, 1988, par. 97.

other requirements are insufficiently evaluated/e.g. lifting and carrying adults dependent on others for care and assistance, as opposed to lifting loads on typically male jobs/)[10]. This practice exists in almost all modern countries, with the consequences of segregation differing from one country to another. This *de facto gender-occupational segregation* does not exist only between sectors or between occupations, but can equally exist within a particular work environment. In this regard, one should take into account that many women work in modestly paid, insecure jobs[11], often without a legal basis or in other form of undeclared work, and that many female workers encounter invisible barriers to working in managerial positions (in terms of ingrained stereotypes about male and female roles in society, difficulties in reconciling professional and family duties and the greater participation of women in performing unpaid jobs). On the other hand, we should not lose sight of double working engagement of women: for most women, working for an employer is not the only employment, and is accompanied by unpaid housework and child care and care for adult family members dependent on assistance from others. This represents a great challenge for the female workers and their employers, as well as for the society as a whole.

Confirmation of the principle of equality is not enough to eliminate all cases of unjustified discrimination in the field of employment, and the Sate must intervene in order to establish the *de facto* equality of workers. Its intervention in particular involves taking positive action measures, which facilitate employment or otherwise favours groups of workers who have traditionally faced unfavourable treatment in the labour market, as well as vulnerable groups of workers who would not be able to improve their position without these types of measures. The content of these measures can cover assistance and encouraging as many members of these groups to apply for jobs and gain skills that will allow them to apply for jobs. Also, positive action measures can consist of employment quotas, which are accompanied by certain controversies[12]. Given the expansion

10. Müller, T., *She Works Hard For the Money: Tackling Low Pay in Sectors Dominated by Women – Evidence From Health and Social Care*, Brussels: ETUI aisbl, 2019, pp. 20-21.
11. Auvergnon, P., Les logiques du droit social confrontées aux évolutions des rapports de genre, In: Auvergnon, P. (dir.), *Genre et droit social*, Bordeaux: Presses universitaires de Bordeaux, 2008, pp. 13-14.
12. This is particularly evident when *giving preference to candidates of the under-represented sex in the field of higher education*, because the number of full professors at higher education institutions in EU Member States is far beneath the expected, given the gender structure of graduates at universities (European Commission. She Figures, Luxembourg: Publications Office of the European Union, 2019, p. 115). As higher education institutions are financed mainly from the budget, it is important that the structure of employees reflects the demographic structure of a country. However,

of instruments used in contemporary law to combat discrimination and achieve gender equality, caution should be exercised in legally qualifying positive action measures, as some similar instruments, such as the duty of reasonable accommodation, strategy for gender mainstreaming or strategy for promoting social inclusion, cannot be qualified in this way as these measures are introduced for different reasons and are subject to different legal regimes[13].

Finally, we should not lose sight of the fact that although female workers are more likely to face unfavourable treatment and are more likely to be discriminated against than men, labour law have to take into account special needs of men in the world of work, as well as their role for consistent application of the principle of gender equality and

implementation of quotas in this field is accompanied by serious dilemmas regarding their justification, bearing in mind that giving preference to candidates of the underrepresented sex may diminish the importance of the merit system. This is because, in principle, candidates at higher education institutions are selected solely on the basis of pedagogical and scientific results. In this sense, introduction of quotas can be seen as limiting the autonomy of universities and faculties in choosing the best candidates, since it is considered that members of the hiring committee know best which candidate can contribute the most to the development of existing and creation of new knowledge in a particular scientific field. This is the reason why quotas are understood as *ultima* (or *extrema*) *ratio*, with preference given to other measures aimed at more equal participation of men and women (precise determination of special requirements for employment which are integral parts of scientific and academic excellence; adoption and implementation of plans for achieving gender equality; dormancy of the election period and employment during absence from work due to family duties; financial incentives for hiring female lecturers; establishing awards for women who achieve outstanding results in science, etc.). This is because increasing the total percentage of female full professors takes time, and implementation of quotas (or targets), as a rule, does not include the creation of new jobs for full professors, but requires filling existing jobs only after they have become vacant. Finally, the justification of quotas should be evaluated from the point of view of the expectation that new generations of academics will be less burdened by the problem of gender inequality, because they are more aware of the problem and committed to overcoming it, thanks to a different attitude towards the need to reconcile professional and family duties. In this sense, it can be expected that more women will work as full professors, precisely because they will have better support from partners, universities and the community. However, there is a different prediction, that says that the number of men and women employed as full professors will decrease, due to the difficulty of employees (of both sexes) to reconcile their professional and family duties. Wallon, Gerlind, Bendiscioli, Sandra and Garfinkel, Michele S., *Exploring Quotas in Academia*, Heidelberg, R. Bosch Stiftung, 2015, pp. 6-9, 16; Gender Equality in Academia and Research GEAR tool, Vilnius–Luxembourg: European Institute for Gender Equality/Publications Office of the European Union, 2016, p. 42.

13. Waddington, L. and Bell, M., "Exploring the Boundaries of Positive Action under EU Law: A Search for Conceptual Clarity", *Common Market Law Review*, No. 48 (2011), p. 1503.

women's empowermen[14] (e.g. reviewing pressures on boys and men to accept and abide by gender stereotypes in the world of work, including the stereotype that measures concerning the reconciliation of professional and family duties of employees should only be addressed to women)[15]. Therefore, for the successful application of the principle of equality, it is paramount to strive for a more substantial participation of men in family duties, through fair rules on paternity leave and leave for (special) child care, just as there is a need for special protection for young male workers working dangerous jobs.

II. ESTABLISHING OCCUPATIONAL REQUIREMENTS

One of the basic duties of an employer in the hiring process is to respect the dignity of job candidates and treat them in accordance with their skills and abilities that are crucial for their performance, and not based on prejudices and stereotypes related to their personal characteristics including sex/gender. An employer is, therefore, obliged to select candidates for the job in good faith. He/she can make a difference between them, not discriminate against them[16].

The risk of gender-based discrimination is, first and foremost, expressed in terms of establishing recruitment requirements, i.e. special conditions for employment. As these conditions must be *directly related to a specific job*, direct gender discrimination will exist if certain sex is established as a requirement for a job in which it isn't necessary for successful performance of duties. An example of direct discrimination would be a decision of the editorial staff of an all-male fishing magazine, not to hire a woman for the position of a journalist, due to the belief that she would be uncomfortable and unhappy to work in an all-male work environment[17]. On the other hand, indirect discrimination is established by seemingly neutral provisions, criteria or practices, the application of which puts job

14. *Men and masculinities: promoting gender equality in the world of work*, Geneva: International Labour Office, 2013, pp. 2-3.
15. Resolution concerning Gender Equality at the Heart of Decent Work, adopted by the General Conference of the International Labour Organization at its 98th Session on 17 June 2009, par. 6.
16. Lanquetin, M.T., "Le principe de non-discrimination", *Droit ouvrier*, 2001, p. 187; Bauduin, B. and Boddaert, J., L'appréhension de l'égalité par le droit social et le droit civil, In: Akandji-Kombé, J. F. (dir.), *Égalité et droit social*, Paris: IRJS Édition, 2014, p. 121.
17. Equality Act (2010) Code of Practice on employment, par. 3.14 [viewed date: 5 August 2021], <https://www.equalityhumanrights.com/sites/default/files/employercode.pdf>

seekers of one sex at a disadvantage compared to other workers, as is the case with prescribing certain physical characteristics as special conditions for employment (height, weight or Body Mass Index, strength, endurance and physical ability and other conditions that are impossible or much harder for women to meet), although they aren't necessary for successful performance of duties.

The general prohibition of establishing personal characteristics as special requirements for employment is not to be confused with the permissible differentiation between jobseekers by sex. In these situations, the prohibition of differentiation could jeopardize the jobs and the proper functioning of the company, because for the jobs in question, sex is a *genuine and determining occupational requirement*. Reasons of professional necessity that in exceptional cases justify sex as a special requirement for employment can be numerous, starting with *authenticity*, which allows an employer to hire only persons of a specific sex due to their physical appearance, as is the case with models hired to present a collection of men's or women's clothing, theatre artists, ballet or opera artists, as well as models in painting and photographic studios. Nevertheless, artistic freedom enables employers in these businesses to entrust certain female acting, opera or ballet roles to women, or men, if the director of the play decides to abandon the conventional approach[18].

Sex can be determined as a special requirement for *reasons of decency*, in jobs that involve physical contact of an employee with employer's clients

18. We also shouldn't forget the reversal of gender roles on stage in the past, most famously in the Elizabethan era when all theatrical roles were played by men, because women weren't allowed to act on stage. The history of opera is full of examples in which both male and female opera singers played the roles of the opposite sex. This is particularly true of opera in the early Romantic period in which certain male opera characters are sung by mezzo-sopranos, such as the operas of Gioacchino Rossini, where male characters were played by women, e.g. in the operas "Tancredi" (in which the leading male part was sung by the famous Maria Malibran), "Semiramide" and "Lady of the Lake", in which the male roles are mezzo-sopranos. The same goes for "Capuleti and Montecchi", in which Vincenzo Bellini envisioned female roles for both lead characters of the love duet. This streak is continued in "Anna Bollena" by Gaetano Donizetti, where the role of the page by the name of Smeton was written for the female voice, opera "Cinderella" by Jules Massenet, in which the role of the prince is sung by women, opera "Ivan Susanin" by Mikhail Glinka, in which the role of Vanja, the son of Ivan Susanin, is performed by women and operas by Nikolai Rimsky-Korsakov "Snow Maiden" (role of the shepherd Lel) and "Sadko" (the role of the folk guslar Nejata). On the other hand, an example of an opera in which male opera singers play female characters on stage is "Love for Three Oranges" by Sergei Prokofiev, in which the role of the female cook Kreonta is played by men. Examples listed pursuant to the text that the editor Zorica Premate read in the radio show "Time of Music", broadcast on January 13, 2020 on Radio Belgrade 2.

or where clients do not wear clothes in front of an employee, with the risk that gender prejudices and stereotypes related to certain professions can be hidden behind reasons of decency (concerning certain social and cultural expectations)[19].

Furthermore, sex may be established as a special employment requirement when prescribed by the *nature of the institution* in which the work is to be performed, such as penitentiaries for men or women, or institutions in which persons requiring special care or supervision are housed, if they are exclusively male or exclusively female. In addition, sex can be specified as a special requirement if the worker is expected to work or live in the household of the employer or the employer's client, which includes intensive contact with certain persons and access to intimate details of their lives. The same is true if, due to the location of the institution where the worker works, it is not practical for the employee to live outside the employer's premises, and it is not reasonable to expect the employer to provide separate dormitories and sanitary facilities for men and women (e.g. lighthouse keepers, workers on an oil rig in the middle of the sea, etc.). Sex can also be a special requirement for employment if certain tasks cited in the vacancy are performed in a country where, due to specific national cultural circumstances, women wouldn't be able to perform them successfully.

In this regard, it is necessary to assess in each case whether a job requires an employee of a certain sex, so that the permitted exception wouldn't lead to the widespread exclusion of women from certain professional fields. This was confirmed in the case law of the European Court of Justice, e.g. in the case of unjustified exclusion of women from all military tasks involving the use of weapons, resulting in women only

19. Holzleithner marks this professional reason as a *reason of privacy* (Holzleithner, E., "Gender equality and physical requirements in employment", *op. cit.*, p. 14). For example, the British Employment Appeal Tribunal found that there is no violation of the prohibition of discrimination if a special requirement for the job of a manager in a women's wellness centre is to be female, because it is assumed that the employee will have to show potential clients all the centre's premises, including changing rooms, saunas and tanning salons (*Lasertop Ltd* v *Webster*/1997/, *Industrial Relations Law Reports* 498, acc. to: Sargeant, M. and Lewis, D., *Employment Law*, Harlow: Pearson Education, 2006, p. 203). On the other hand, one British industrial tribunal concluded that the male sex could not be a real professional qualification for the job of a salesman in a men's clothing store, because an employee in this job is not necessarily required to come into physical contact with the customers when taking the measures for clothing repairs. This is primarily because the store also employs male sellers who can perform those tasks, so both men and women can be hired for the job in question. *Wylie* v. *Dee & Co (Menswear) Ltd* (1978), IT, *Industrial Relations Law Reports* 103, acc. to: Deakin, S. and Moris, G., *Labour law*, Oxford/Portland: Hart Publishing, 2005, p. 650.

being hired for military health service jobs and military orchestras[20]. The Court has also confirmed in a number of judgments (e.g. with regard to the work of police officers and the marines)[21] that EU Member States enjoy the discretion to exclude certain professional activities from the scope of secondary anti-discrimination legislation in the EU. This prerogative is, however, limited by the requirement that the exclusion concerns only certain activities, and the obligation for states to periodically review the legitimacy of the exclusions, as they may become illegal after a period of time. The same view is found in the jurisprudence of the European Court of Human Rights, which has repeatedly concluded that banning the employment of women in public companies because they have not served in the military, which is only served by men, represents discrimination of the right to respect for private and family life[22].

20. ECJ judgement in Case C-285/98 (*Tanja Kreil* v. *Bundesrepublik Deutschland*) of 11 January 2000 (ECLI:EU:C:2000:2), par 27.

21. This has been confirmed, for example, with regard to the work of police officers [ECJ judgement in Case C-222/84 (*Marguerite Johnston* v. *Chief Constable of the Royal Ulster Constabulary*) of 15 May 1986 (ECLI:EU:C:1986:206)] and the marines [ECJ judgement in Case C-273/97 (*Angela Maria Sirdar* v. *The Army Board and Secretary of State for Defence*) of 26 October 1999 (ECLI:EU:C:1999:523)]. The first case refers to women in the police force not being allowed to attend training in the use of firearms, which is why their employment wasn't extended after expiration of the fixed-term employment contract. This measure was applied at the time of the escalation of the conflict in Northern Ireland, which led to the belief that the lives and safety of the female police officers would be further endangered had they carried firearms. The Court concluded that prescribing a ban on women's participation in firearms training was not a prerequisite to protect women, but that carrying a weapon in a situation characterized by such serious disturbances could be contrary to public safety requirements. This underscores the importance of the principle of proportionality in assessing the admissibility of exceptions to the prohibition of discrimination against workers by sex. In the second case, The Court was deciding on the admissibility of prescribing the male sex as a special requirement for employment in a small elite troop of naval infantry, due to the organizational principle on which the work of that group is based. This refers to the principle of interoperability, according to which every marine, regardless of his specialization, must be able to fight in a commando unit. The Court decided that there is a permissible exception to the ban on discrimination of workers by sex, due to the inability of women to fight "on an equal footing" with their male colleagues. Some authors, however, rightly warns that the Court failed to address gender stereotypes expressed by the military representatives (women are not meant to fight, their presence would undermine the unit's operational cohesion, as marines would be preoccupied with a "chivalrous" need to protect their female colleagues, while the need to protect male colleagues is perceived as a heroic act, etc.), which was pointed out by Mr Advocate General La Pergola (Opinion delivered on 18 May 1999, ECLI:EU:C:1999:246). The authors also draws attention to gender stereotypes in the first verdict (e.g. the stereotype that a female police officer with a weapon is an "easy target" for murderers), which the Court also did not address (Holzleithner, E., "Gender equality and physical requirements in employment", *op. cit*., p. 16).

22. The Court qualified the dismissal of a worker as discrimination against the enjoyment of the right to respect for private and family life, due to the fact that

III. JOB ADVERTISEMENTS AND APPLICATIONS

Restriction of employers' prerogatives in the field of employment also includes a ban on publishing discriminatory advertisements for job vacancies. Namely, public employment services are obliged to prevent the publishing of advertisements whose employment conditions are related to sex/gender. In addition, prohibition of advertisements with discriminatory content includes *gender-neutral advertising of vacancies* by omitting from the advertisement the illustrations suggesting that a job should be performed by a worker of a specific sex. Employers should also refrain from using terms that imply preference for candidates of a certain sex, or age and other restrictions related to the personal characteristics of workers. This also includes a ban on gender wording of job titles, such as stewardess, midwife, fireman, etc. because such job titles indicate an employer's intention to discriminate against workers. It is considered good practice to clearly state in the advertisement that persons of both sexes may apply for the job, either by explicitly stating this, by announcing the job title in the male and female gender, or by marking it "m/f"[23]. However, with regard to the third option, it can be argued that presented labels in advertisements could lead to discrimination against non-binary people, and that preference should be given to the existing gender-neutral advertising, or to advertisements indicating that jobs are available for "m/f/x". This rule may be derogated when, due to professional necessity, specific sex is established as a special (actual and decisive) requirement for employment, as well as for positive action measures, provided that the advertisement indicates the reason for the different treatment.

Anonymous (depersonalised) job applications or "blind hiring" can contribute to preventing the collection of data on personal characteristics of candidates. Blind hiring is a procedure in which the candidates submit applications that do not contain their name and maiden name, information on their sex and marital status, as well as other personal information that can (in)directly indicate their sex such as information on

such a drastic measure, as dismissal for being a female, violates the worker's self-esteem and, consequently, her private and family life, especially bearing in mind the possibility to work in future jobs she specializes in, since she had passed the professional exam for work in the public sector. ECtHR judgement in Case *Emel Boyraz* v. *Turkey*, of 2 December 2014 (application No. 61960/08). See: ECtHR judgement in Case *Hülya Ebru Demirel* v. Turkey, of 19 June 2018 (application No. 30733/08).

23. *Vid*. Gaucher, D., Friesen, J. and Kay, A., "Evidence That Gendered Wording in Job Advertisements Exists and Sustains Gender Inequality", *Journal of Personality and Social Psychology*, vol. 101, Issue 1/2011, pp. 109-128.

military service or career breaks due to maternity/parental leave[24]. The same goes for information on age/year of birth and year of enrolment in college/year of graduation, in order to minimize the risk of denying employment to women of childbearing age and older workers, against whom employers also harbour certain prejudices and stereotypes. Also, the risk of gender-based discrimination can be mitigated by asking for personal information separately, or by separating that part of the form from the rest of the form so that the information is available to the hiring committee only after the so-called short-listing[25]. Implementation of these procedures is based on the premise that sex/gender-specific prejudices affect the employer much more at the stage in which he/she has to make a decision based solely on documents submitted (selecting candidates who will, based on the reviewed proper and timely applications, be invited to an interview) than at the stage in which the decision is made on the basis of impressions from personal contact with the candidate (decision based on performance testing or the final selection)[26]. We should note that experiences with anonymous job applications are varied, although they certainly enable, at a lower cost, greater selection objectivity, at least in the initial stages of the recruitment process. Introducing such practices requires the standardization of job applications, in terms of designing forms that do not include sensitive information and should be filled with gender-neutral language, which is considered in the literature to be the most effective method of anonymous application[27]. An alternative would be to obscure the information indicating the candidate's sex, although this method carries the risk of errors occurring and requires more time than filling out standardized application forms. There is no mandatory anonymous application in any country, at least not such that is regulated by legally binding instruments, but line ministries in several European countries have experimented with anonymous applications with some large employers, because it was concluded that anonymous applications

24. Krause, A., Rinne, U. and Zimmermann, K., "Anonymus Job Applications in Europe", *IZA Journal of European Labour Studies*, Issue 1/2012, p. 19.
25. Equality Act (2010) Code of Practice on employment, par. 5.39.
26. Rinne, U., "Anonymous Job Applications and Hiring Discrimination", *IZA World of Labour*, Issue 3-4/2014, pp. 1-10.
27. Krause, A., Rinne, U., Zimmermann, K., *op. cit*., p. 6; Lewis, Joan and Thornbory, Greta, *Employment Law and Occupational Health: A Practical Handbook*, Chichester: Wiley-Blackwell, 2010, p. 10. The practice of anonymous application has existed for decades in philharmonic orchestras around the world, and involves submitting applications without sensitive information and selecting candidates based on an audition that takes place behind a curtain, on a carpeted stage to soften the sound of heels. Hausman D., "How Congress Could Reduce Job Discrimination by Promoting Anonymous Hiring", *Stanford Law Review*, vol. 64, Issue 5/2012, p. 1352.

should not be considered as a universal means applicable in any context and capable of preventing any form of discrimination[28].

IV. PRE-EMPLOYMENT PHYSICAL ABILITY TESTS

The small number of women engaged in physically demanding occupations can be explained by the fact that *pre-employment physical ability tests* are often designed to give preference to men. To be more specific, females score substantially worse than males in these tests, which is problematic considering that women are increasingly applying for employment in physically demanding occupations[29]. Differences in test results may be caused by. personal characteristics of the candidates, but above all their sex, age, health, race, or ethnicity[30]. This is especially true for *tests of muscle strength, cardiovascular endurance and movement quality*[31]. The most important factors affecting the test results, which employers can control, are: a) *test design* (direct measurement of specific elements of physical ability or simulation of physically demanding tasks); b) *specificity of measurement of candidates' physical characteristics* (especially measuring certain physical characteristics or adding them up to get a higher score, or redirecting measurements of the muscular strength of the whole body to the muscular strength of certain body regions), and c) *training of workers*[32]. It should be noted that physical ability tests are mostly designed with male worker (& dominant ethnicity) in mind, as a kind of a "universal worker", against whom the abilities of all workers are evaluated. Taking into account the results of various studies, Courtright *et al*. reviewed the gender dimension of these tests and their findings are as follows: the results of physical ability tests of male and female candidates differ significantly

28. Krause, A., Rinne, U., Zimmermann, K., *op. cit*., p. 1.
29. Holzleithner, E, "Gender equality and physical requirements in employment", *op. cit*., p. 18.
30. What we are referring to here are the biological differences between members of different groups in terms of physical characteristics, and not the differences related to certain stereotypes and prejudices that employers often have against members of certain groups.
31. These tests should be distinguished from *psychomotor skills* tests, that test visual acuity, reaction time and dexterity, which are often more favorable for women, as they get better scores than when testing their muscle strength, cardiovascular endurance and quality of movement. Courtright, S., McCormick, B., Postlethwaite, B., Reeves, C. and Mount, M., "A Meta-analysis of Sex Differences in Physical Ability: Revised Estimates and Strategies for Reducing Differences in Selection Contexts", *Journal of Applied Psychology*, vol. 98, Issue 4/2013, p. 624.
32. Courtright, S. H., McCormick, B. W., Postlethwaite B. E., Reeves, C. J., Mount, M. K., *op. cit*., p. 625.

in terms of muscular strength and cardiovascular endurance, because male candidates score substantially better than female candidates[33]. There are also differences in terms of muscular strength across different body regions of workers, while there are no meaningful differences on movement quality tests. It was also concluded that test design does not decisively affect sex differences, but that they are smaller if narrow segments of physical ability are evaluated separately e.g. differences are biggest for muscle tension evaluation, but decrease for endurance and muscle strength evaluation[34]. Sex differences are further reduced when muscle strength tests are applied to specific regions of the body than to the worker's entire body, because sex differences are biggest when testing whole body strength. On the other hand, training led to greater performance increases for female workers, on both muscular strength and cardiovascular endurance tests, with differences in post-training results again in favour of men[35]. Finally, there are no differences between men and women in terms of movement quality, which is why employers, in order to create conditions for effective implementation of the principle of gender equality in physically demanding occupations, are urged to focus their testing on movement quality. Employers are therefore restricted from using physical ability tests unless they are necessary for a complete and proper assessment of workers' abilities and can be used only if they are valid, reliable and useful. This includes the requirement that the tests be designed so that the adverse effects of their application on certain categories of workers are kept to a minimum.

V. INTERVIEWS WITH JOB CANDIDATES

Gender-based discrimination should also be prevented in further stages of the hiring process. This especially goes for the interviews with the candidates, conducted by the employer (or the hiring committee) and, of course, for the selection decision itself. For example, interviews with the management candidates are regularly focused on issues that make it harder for women than men to demonstrate their abilities, such as previous management experience or the ability to fit into the organizational culture, when the organization is dominated by men, as well as other aspects of the so-called social capital[36]. In practice, women are often asked about family planning, which is difficult to prove in the anti-discrimination

33. *Ibid*., pp. 633-634.
34. *Ibid*., pp. 629-633.
35. *Ibid*., p. 633.
36. Hawcroft, Z. and Dewhurst, E., *The Recruitment Practices in Top Management and Non-executive Directors Positions in Europe*, Strasbourg: European Parliament, 2013, p. 6.

proceedings (e.g. in Greece, Hungary, Germany, Croatia and the Czech Republic); especially because many female workers decide not to initiate proceedings against the employer due to the economic pressure to ensure subsistence from employment, but also for fear of victimization when applying for other jobs[37]. Oversight of the recruiting process is, therefore, very important, especially via the participation of the labour inspectorate, while some countries try to prevent the use of the off limits questions in interviews by having the trade union or works councils representatives present. Furthermore, in some legal systems, there is a rule stating that a candidate has the right not to answer the employer's off limits questions and that his actions will not be considered illegal[38]. Moreover, in some legal systems, candidates have the right to provide false answers to the employer's off limits questions, which cannot be considered a violation of the principle of good faith[39]. This principle requires the participants in the hiring process to inform each other only of the facts of decisive importance for entering into a contract, and this is certainly not the case with private life information not directly related to the performance of duties. The employer, therefore, cannot claim mistake of fact regarding essential characteristics of the contracting party, and, accordingly cannot seek the annulment of the employment contract[40]. The same solution is provided by the International Labour Organization standards, which prohibit the possibility of disciplinary punishment of an employee (including dismissal, as the most severe of the disciplinary measures) who gave false answer to a question not directly related to the performance of working tasks, unless there are exceptional reasons that justify the collection of sensitive personal data[41]. Furthermore, it is important for the members of

37. Masselot, A., Caracciolo Di Torella, E. and Burri, S., *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood: The Application of EU and National Law in Practice in 33 European Countries*, Brussels: European Network of Legal Experts in the Field of Gender Equality, 2012, pp. 13-14.
38. French Labour Code (Code du travail/2018/, Art. L1225-2), Slovenian Law on Employment Relations (Zakon o delovnih razmerjih, Uradni list, št. 21/13, 78/13, 47/15, 33/16, 52/16, 15/17, 22/19, 81/19, 203/20, 119/21, Art. 29, par. 2); Croatian Labour Law (Zakon o radu, Narodne novine, No. 93/14, 127/17, 98/19, Art. 25). The European Committee of Social Rights has not directly formulated such a requirement as a condition for the effective application of Article 20 of the Revised European Social Charter, but its "jurisprudence" shows that it positively rates national regulations that explicitly prohibit questions on pregnancy, adoption or family planning. Kollonay-Lehoczky, C., Article 20, *op. cit.*, p. 368.
39. Popović, O., "Pravni problemi prilikom zasnivanja radnog odnosa lica zaraženih *HIV*-virusom", *Anali Pravnog fakulteta u Beogradu*, vol. 42, Issue 3-4/1994, p. 354.
40. *Ibid*.; Radé, C., *Droit du travail et responsabilité civile*, Paris: L.G.D.J., 1997, p. 128.
41. Protection of Workers' Personal Data. An ILO Code of Practice, point 6.8. in connection with points 6.5-6.7.

the hiring committee to get acquainted with the anti-discrimination legal framework and, whenever possible, ensure that the committee consists of members of different sex, different age and ethnic structures[42]. There is also a need to reasonably adjust the conditions of the interview or the implementation of another method to the special needs of the candidates, such as scheduling the interviews during preschool working hours, so that workers with family duties can attend without hindrance.

VI. CONCLUSIONS

Protecting the right to equal access to employment means not only banning the exclusion of women or men from the labour market, but also implementing programs that can help workers return to the world of work or improve their position in the labour market after a career break due to family duties (e.g. by refreshing their knowledge and acquiring skills needed to adapt to innovations in technology or science that have occurred in the meantime)[43]. Furthermore, states are obliged, through employment services, to implement measures to employ vulnerable categories of workers who encounter problems during professional reintegration (e.g. victims of domestic violence, Roma people and workers from other marginalized groups). This includes the obligation of *public employment services* to ensure equal access to their services for workers of both sexes, but also to encourage employment and self-employment of the underrepresented sex, and inclusion of a larger number of persons of the underrepresented sex in certain active employment policy measures.

Measures taken by *private employment agencies* contribute to the prevention of gender/sex based discrimination, in addition to the measures taken by public employment services. In this sense, examples of good practice include organizing training of employees in private agencies for recognizing and preventing discrimination and promoting gender equality, confirming the obligation of employees in private agencies not to accept offers from employers for vacancies with discriminatory requirements for employment, or the introduction of an SOS hotline for workers working through temporary employment agencies who feel discriminated against[44].

42. Sargeant, M., Age discrimination, In: Sargeant, M. (ed.), *Discrimination law*, Harlow: Pearson Education Limited, 2004, p. 228.
43. Kollonay-Lehoczky, C., *Article 20*, *op. cit*., p. 366.
44. *Guide to Private Employment Agencies – Regulation, Monitoring and Enforcement*, Geneva: International Labour Office, 2007, p. 25.

Since role of laws, as instruments for achieving social change related to implementation of the principle of gender equality, is rather limited, *collective agreement* is extremely important instruments for achieving gender equality. This is because its normative part can regulate gender issues, as well as because all the working conditions can be reviewed from a gender perspective[45]. The same applies to the re-examination, from a gender perspective, of the criteria for the selection of candidates for employment and other issues where we have to take into account the special needs that workers of a certain sex/gender as well as workers with family duties have in connection with the exercise of certain labour rights or with the taking on of certain obligations deriving from an individual employment relationship. Gender issues, however, are rarely regulated by collective agreements, while greater prospects for promoting gender equality through social dialogue exist precisely in countries with a solid legal framework for combating gender-based discrimination, as well as legislative incentives to regulate gender issues at branch and company level[46]. Effective implementation of the principle of gender equality, therefore, presupposes equal participation of men and women in trade unions and in their governing bodies (which, if necessary, can be ensured by applying positive action measures in favour of the underrepresented sex). In addition, trade unions, employers and employers' organizations can play a significant role in developing a culture of tolerance in work environments, as well as in overcoming cultural, social and economic barriers that make it impossible or difficult for women to become managers and employers. This will lead to improvement of the position of workers as well as employers, who will, due to the consistent application of the principle of gender equality, have the opportunity to choose the best candidate for the job, to ensure good functioning of the work environment and benefit from greater productivity because the workers will be more satisfied with the working conditions.

An important instrument in approaching the ideal of gender equality is the implementation of *gender mainstreaming policies*. More precisely, this represents a need to analyze and evaluate their impact on achieving gender equality when making decisions related to employment. This includes

45. *ABC of Women Workers' Rights and Gender Equality*, Geneva: International Labour Office, 2007, p. 70. *Cf.* Blackett, A. and Sheppard, C., Collective Bargaining and Equality: Making Connections, In: Lansky, M–, Ghosh, J., Méda, D. and Rani, U. (eds), *Women, Gender and Work. Vol. 2: Social Choices and Inequalities*, Geneva: International Labour Office, 2017, p. 669.

46. Briskin, L. and Muller, A., *Promoting Gender Equality through Social Dialogue: Global Trends and Persistent Obstacles*, Working Paper No. 34, Geneva: International Labour Office, 2011, pp. 8-9.

the obligation or recommendation to adopt gender equality action plans. In some countries, the obligation or recommendation to adopt these plans is not exclusively related to achieving gender equality, but also to achieving equality in general, in terms of laying the groundwork for a broader anti-discrimination strategy, which addresses different personal characteristics and different types of inequality (e.g. in Hungary)[47]. Some authors suggest that even though the general anti-discrimination strategy of an employer deals with the issue of gender inequality it should not be automatically considered as a gender equality action plan[48]. As the role of laws is rather limited, it is extremely important to use the possibilities of these and other instruments to encourage and preserve employment of the underrepresented sex. Their implementation should lead to what Hepple termed as *transformative equality*[49]. This is especially important for developing a culture of tolerance and sensitivity of employers, employees and social partners to the problems that accompany the process of ensuring gender equality, and for reconciling the legitimate interests of employers and workers in achieving gender equality.

47. Kollonay Lehoczky, C., De 'l'émancipation' à 'l'égalité': les effets des lois européennes sur la condition des femmes en Hongrie, In: Auvergnon, P. (dir.), *Genre et droit social*, Bordeaux: Presses universitaires de Bordeaux, 2008, p. 148.
48. *Gender Equality in Academia and Research GEAR tool*, p. 8.
49. Hepple, B., "The Key to Greater Gender Equality", *The Equal Rights Review*, vol. 12/2014, p. 59.

Discrimination Against Women in the Implementation of Artificial Intelligence Systems and Algorithms

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I. INTRODUCTION

The European Union has warned of the risks to fundamental rights as a result of the use of computer algorithms, Artificial Intelligence systems and automated decisions*, and that "a distinction should be made between quantity and quality of data in order to facilitate the effective use of big data (algorithms and other analytical tools); and that poor quality data and/or procedures underpinning decision-making processes and analytical tools could lead to biased algorithms, false correlations, errors, underestimation of ethical, social and legal implications, the risk of using data for discriminatory or fraudulent purposes and the marginalisation of the role of human beings in these processes, which may result in poor decision-making processes with negative impacts on the lives and opportunities of citizens, in particular marginalised groups, as well as negative impacts on societies and businesses"[1].

* This work is framed within the research work developed by the author in the Project funded by the Autonomous Community of the Region of Murcia through the call for Aid to projects for the development of scientific and technical research by competitive groups, included in the Regional Program for the Promotion of Scientific and Technical Research (Action Plan 2019) of the Seneca Foundation-Agency of Science and Technology of the Region of Murcia: 20976/PI/18: The impact of Industry 4.0 at work: An interdisciplinary vision; also, this work is one of the results of the research stay carried out at the Training Centre of the International Labour Organization (ITC-ILO); and is part of the project: Bargaining upfront in the digital age (VS/2019/0280), funded by the European Commission.

1. European Parliament resolution of 14 March 2017 on the fundamental rights implications of big data: privacy, data protection, non-discrimination, security and law enforcement (2016/2225(INI)).

In the same vein, the International Labour Organisation (ILO) has indicated that "technological advances also require regulation of the use of data and accountability over the control of algorithms in the world of work (…) It has been shown that algorithms used to find jobs can perpetuate gender bias"[2].

In this context, voices have been raised stating that "although artificial intelligence has advanced by leaps and bounds in recent times, it is still 'intelligent' only in the narrowest sense of the term. It would probably be more useful to interpret what we have been experiencing as a revolution in computational statistics than in intelligence (…) the central idea of machine learning is that you can create an algorithm that is able to ask itself new questions if it sees that something is wrong. It learns from its mistakes. With each mistake, the algorithm tweaks its equations, so that next time it will act differently and not trip over the same stone. That's why access to data is so important: the more examples these smart algorithms have to work on, the more experience they will accumulate and the more they will get better with each tweak"[3].

As can be seen, there is great concern about the use of data and the functioning, including biasing effects, of algorithms. In which the birth of digital discrimination or algorithmic discrimination is claimed. In this context, the present study focuses on whether the implementation of algorithms and artificial intelligence systems leads to discrimination against women.

II. SOME DEFINITIONS

Before determining whether the implementation of artificial intelligence algorithms and systems leads to discrimination against women, it is necessary to refer to some definitions. The first of these is big data, which, according to the Pan-Hispanic Dictionary of Legal Spanish of the Royal Spanish Academy, is the "set of techniques that make it possible to analyse, process and manage extremely large sets of data that can be analysed by computer to reveal patterns, trends and actions, especially in relation to human behaviour and user interactions".

The Opinion of the European Economic and Social Committee on Artificial intelligence: the implications of artificial intelligence for the (digital) single market, production, consumption, employment and

2. International Labour Organization, *Working for a brighter future*, ILO, 2019.
3. Du Sautoy, M., *Programados para crear*, Acantilado, Barcelona, 2021, pp. 86-87.

society (own-initiative opinion) (2017/C 288/01) defines Artificial Intelligence (AI) as 'a concept that encompasses many other (sub) areas such as cognitive computing: algorithms capable of higher-level –human– reasoning and understanding), machine learning (machine learning: algorithms capable of teaching themselves tasks), augmented intelligence (augmented intelligence: human-machine collaboration) or AI robotics (AI embedded in robots). However, the fundamental goal of AI research and development is the automation of intelligent behaviours such as reasoning, information gathering, planning, learning, communicating, manipulating, observing and even creating, dreaming and perceiving.

Artificial Intelligence has also been defined as those "software (and in some cases also hardware) systems designed by humans78 that, given a complex goal, act in the physical or digital dimension by sensing their environment through data collection, interpreting the structured or unstructured data they collect, reasoning about the knowledge or information processing derived from that data, and deciding the optimal action or actions to take to achieve the stated goal. AI systems can use symbolic rules or learn a numerical model; they can also adapt their behaviour by analysing how the environment is affected by their previous actions"[4].

Finally, AI has also been defined as "a set of scientific methods, theories and techniques that aim to reproduce, by means of a machine, the cognitive abilities of human beings. Current developments aim to have machines perform complex tasks previously performed by humans. However, the term artificial intelligence is criticised by experts who distinguish between "strong" AI (but capable of contextualising specialised and varied problems in a fully autonomous way) and "weak" or "moderate" AI (high performance in its fi training field). Some experts argue that "strong" AIs would require significant advances in basic research, and not just simple improvements in the performance of existing systems, in order to be able to model the world as a whole. The tools identified in this paper are developed using machine learning methods, i.e. "weak" AI"[5].

From the above definitions it can be inferred that the algorithm plays an important role, given that it represents the basic and central role

4. Independent Group Of High-Level Experts On Artificial Intelligence, *Ethical Guidelines for Trustworthy AI*, European Commission, Brussels, 2019, p. 48.
5. *European ethical charter on the use of artificial intelligence in and around judicial systems* of 4 December 2018.

within those technologies and, therefore, it has been presented as an imposing tool in labour relations. The Real Academia Española defines algorithm in two meanings[6]. On the one hand, as that ordered and finite set of operations that allows the solution of a problem to be found. On the other hand, the method and notation in the different forms of calculation.

The European Ethical Charter on the Use of Artificial Intelligence in Justice Systems and their Environment of 4 December 2018 defines an algorithm as a "finite sequence of formal rules (logical operations and instructions) that allows a result to be obtained from the initial input of information. This sequence can be part of an automated execution process and take advantage of models designed through machine learning". Mathematicians, however, define it as "a set of rules that, when systematically applied to appropriate input data, solve a problem in a finite number of elementary steps"[7]. Algorithms therefore contribute, on the one hand, to formalising a set of decision rules; on the other hand, to performing chains of calculations that allow the analysis of multiple variables, selecting the best among them[8].

Having clarified the definitions of big data, artificial intelligence and algorithm, we will proceed to study the discrimination that the implementation of all of these can produce for women. However, it is anticipated that algorithmic management, AI, tracking technologies, the Internet of Things and big data may cause workers to lose control of their data; as well as data protection issues, ethical issues, information inequality with respect to health and safety at work, and pressure on workers' performance[9].

III. DISCRIMINATION

Algorithms are being used in recruitment, promotion, performance appraisal, job assignments, remuneration and dismissal processes[10].

6. www.rae.es
7. Peña Mari, R., *De Euclides a Java, la historia de los algoritmos y de los lenguajes de programación*, Nívola, Madrid, 2006.
8. Mercader Uguina, J., "Algoritmos y derecho del trabajo", *Actualidad Jurídica Uría Menéndez*, No. 52, 2019, p. 64.
9. European Agency For Safety And Health At Work, *Prospective study on new and emerging occupational safety and health risks associated with digitisation by 2025*, Publications Office of the European Union, Luxembourg, 2018, p. 19.
10. Fernández García, A., "Trabajo, algoritmos y discriminación", en AA.VV., *Vigilancia y control en el Derecho del Trabajo Digital*, Thomson Reuters– Aranzadi, Cizur Menor, 2020, p. 512.

Therefore, areas of Human Resources in which discriminatory manifestations based on sex are more prominent.

Digital work platforms, for example, use algorithms to assign tasks or match customers and employees. In other words, platform design and algorithm management define the day-to-day experience of workers on digital platforms. The ILO notes that these "platforms use algorithms to match workers to clients through a process in which the ratings workers receive are decisive. These ratings are in turn determined algorithmically according to a number of criteria, such as acceptance and rejection rates, which limit the ability and freedom of workers to refuse jobs in practice. A significant number of taxi and delivery drivers working through these apps indicated that they could not refuse or cancel jobs because it affected their rating levels and, as a result, the platform could reduce their access to work, take away bonuses, charge fines or even terminate their employment.

Job rejections or low qualifications are common on digital work platforms, although workers often feel that the reasons for rejections are not always justified. Most platform workers are not aware of formal mechanisms for filing complaints or seeking help in such cases. On freelance platforms, when workers are aware of and use these mechanisms, they often get favorable results. On location-based platforms, on the other hand, approximately half of the workers who challenge the deactivation of their account obtain favorable results[11].

This has led to a transformation of a classic HR process that normally involved human interaction. Traditional human resources practice base personnel selection largely on levels of education and experience. In this context, algorithmic selection is shaped by a set of indicators such as ratings, customer or consumer reviews, job cancellation or acceptance rates and employee profiles.

In the same vein, the term digital whip is born, which is known as those new forms of discipline and control established through the use of information and communication technologies, such that workers' schedules are set and monitored by computer, often with an integrated continuous improvement algorithm based on the average time it takes workers to complete certain tasks[12].

11. International Labour Organization, *Global Employment and Social Outlook. The role of digital platforms in transforming the world of work*, ILO, Geneva, 2021.
12. European Agency For Safety And Health At Work, *Prospective study on new and emerging occupational safety and health risks associated with digitisation by 2025*, Publications Office of the European Union, Luxembourg, 2018, p. 45.

The algorithmic allocation process, in turn, may take into account the worker's subscription plans and optional packages purchased. This type of process may run the risk of excluding some workers from accessing assignments, particularly those from developing countries and those on lower incomes. As well as vulnerable groups, in this case women. Algorithms, as mentioned above, assess, evaluate and rate the performance and behaviour of workers on platforms using a range of parameters, such as reviews and customer feedback.

WG29 (now the European Data Protection Committee) has highlighted in its Guidelines on automated individual decisions and profiling for the purposes of Regulation 2016/679 (WP251rev.01) that "profiling and automated decisions can pose significant risks to the rights and freedoms of individuals that require adequate safeguards. These processes can be opaque. Individuals may not be aware that they are being profiled or understand what is involved. Profiling can perpetuate existing stereotypes and social segregation. It can also pigeonhole a person into a specific category and limit them to suggested preferences […] In some cases, profiling can lead to inaccurate predictions. In others, it can lead to denial of services and goods and unjustified discrimination".

The doctrine, in turn, has been vocal in stating, on the one hand, that "algorithms may be extremely precise, but they are blind to emotions unlike people, but when they incorporate feelings they lose their cold logic, they become humanised and can also discriminate. This happens because the air that algorithms breathe, the data, can be flawed so that the resulting automated decisions will also be corrupted (biases, discrimination, etc.)"[13].

On the other, that "companies using the same reasonable big data analytics or AI algorithms will struggle to differentiate themselves strategically. People with highly developed social skills are able to appreciate the emotional context and connections of strategic decisions. They can argue back, ask difficult or illogical questions. They have imagination and intuitive leaps that AI will be slow to replicate"[14].

All of this results in the creation of a new type of discrimination: "algorithmic discrimination", which is discrimination that arises when an individual or group receives arbitrary treatment as a result

13. Mercader Uguina, J., "Algoritmos: personas y números en el Derecho Digital del trabajo", *La Ley*, No. 2.394, 2021, p. 9.
14. Cassiman, B., "Las personas son la ventaja competitiva", *Insight*, No. 150, 2018, p. 10-11.

of automated decision-making[15]. In this context, discrimination against women by algorithms also comes into play. Thus it is argued that the differences in opportunities in the world of work for women have diversified as follows:

"a) in access to employment, with serious disadvantages even with high levels of training for women;

b) in the conditions of permanence in the labour market, especially because women continue to face the majority of household and family responsibilities and due to the persistence of the wage gap for work of equal value[16]; (…)

c) professional promotion to positions of special responsibility or requiring leadership skills, which responds to sophisticated filter systems of choice/exclusion of women or glass ceiling"[17].

Big data-based technologies sometimes exacerbate discrimination as a result of implicit biases in the data, reinforcing the sexist, even racist and classist biases they were intended to address. Collective bargaining plays an important role in avoiding such discrimination against women and a robust review of decision-making in the use of AI is advocated. Checking for bias and discrimination is therefore key, as such systems need to be as inclusive and sustainable as possible. Adequate checks are therefore required to ensure that there are no biases for particular categories of workers, age, gender, persons with disabilities, ethnic minorities or socio-economic determinants. In other words, "the utmost care is required to avoid unlawful discrimination and targeting of certain persons or groups of persons, defined in relation to race, colour, ethnic or social origin, genetic characteristics, language, religion or belief, political or other opinion, property, birth, disability, age, gender, gender expression or identity, sexual orientation, residence status, health or membership of a national minority, which is often the subject of ethnic profiling or heightened policing, in addition to individuals who may be defined by

15. Mercader Uguina, J., "Algoritmos: personas y números en el Derecho Digital del trabajo", *La Ley*, No. 2.394, 2021, p. 9.
16. *Vid*. Álvarez Cuesta, H., "Discriminación de la mujer en la industria 4.0: cerrando la brecha digital", in AA.VV. (Dir. Rodríguez Sanz De Galdeano, B.), *La discriminación de la mujer en el trabajo y las nuevas medidas legales para garantizar la igualdad de trato en el empleo*, Thomson Reuters-Aranzadi, Cizur Menor, 2020, p.331-359.
17. Ramos Quintana, M., "El futuro de las mujeres. El futuro de la humanidad: más derechos efectivos para un empoderamiento real", in AA.VV., *Conferencia Internacional Tripartita. El futuro del trabajo que queremos, Iniciativa del Centenario de la OIT (1919–2019)*, Ministerio de Empleo y Seguridad Social, Madrid, 2017, p. 245-246.

particular characteristics; calls for adequate training of frontline data collectors and users of information obtained from data analysis"[18].

Lack of transparency of algorithms: Lack of transparency about how AI analyses data and learns could lead it to behave in unpredictable and unsafe ways. In the case of deep learning algorithms, it is not possible to determine what factors the programme uses to reach its conclusion. If workers do not understand how the systems work, it may be difficult for them to interact with them correctly, to recognise when they are not working well, and to know how to react in such cases. Workers may also experience stress if they do not know what is happening, what data can be collected about them and for what purposes.

Consequently, it can lead to health and wellbeing problems, as well as to low productivity and increased sick leave. If workers were to be told how their performance compares with that of others – or perhaps with that of machines – it could lead to performance pressure, anxiety and low self-esteem. However, from another perspective, new types of analytical/intelligent algorithms combined with access to large data sets could facilitate more effective real-time occupational health and safety monitoring and a better understanding of those risks in general[19].

Trade unions advocate that "collection, processing of employee data and algorithm design should be regulated through collective bargaining and particular attention should be paid to the risk of excessive monitoring and opacity in algorithms. The RLT (workers' legal representation) must be informed of the conditions and criteria for automated process decisions to ensure that the rights and working conditions of employees are respected"[20].

In the same vein, the Spanish legislator has reacted and has recently enacted Royal Decree-Law 9/2021, of 11 May, which amends the revised text of the Workers' Statute Law, approved by Royal Legislative Decree 2/2015, of 23 October, to guarantee the labour rights of persons engaged in delivery in the field of digital platforms[21], and introduces a new letter d) in Article 64.4 of the Workers' Statute, stating that the works council,

18. Resolución del Parlamento Europeo, de 14 de marzo de 2017, sobre las implicaciones de los macrodatos en los derechos fundamentales: privacidad, protección de datos, no discriminación, seguridad y aplicación de la ley (2016/2225(INI)).
19. European Agency For Safety And Health At Work, *Prospective study on new and emerging occupational safety and health risks associated with digitisation by 2025*, Publications Office of the European Union, Luxembourg, 2018, p. 12.
20. Comisiones Obreras, *Guía de negociación colectiva y digitalización 2020*, Cuadernos de acción sindical, CCOO, septiembre, 2020, p. 25.
21. BOE No. 113, de 12 de mayo de 2021.

as often as appropriate in each case, shall have the right to "be informed by the company of the parameters, rules and instructions on which the algorithms or artificial intelligence systems that affect decision-making that may affect working conditions, access to and maintenance of employment, including profiling, are based".

The doctrine has provided, on the one hand, that "it must be borne in mind that, however broad the list of matters (…) the employer must inform the workers' representatives, it is not complete, leaving certain gaps. From this point of view, what the new rule does is to use a general criterion of introducing the need for information in all those cases in which algorithms and artificial intelligence systems are used for the adoption of business decisions, regardless of the subject matter or phase to which the corresponding business decision refers. Thus, by way of example, all organisational or management decisions involving the use of these technologies must be reported, without the need to specify a specific case of those contemplated by law; any exercise of the employer's disciplinary powers using these technologies must be reported, regardless of whether or not a very serious offence will be involved; the selective criteria for hiring workers and the corresponding profiles must be reported via these technologies, regardless of whether the model contracts or basic copies of those already delivered are provided; the selection criteria for hiring workers and the corresponding profiles must be reported via these technologies, regardless of whether the model contracts or basic copies of those already delivered are provided; information must be provided on the selection criteria for the purposes of professional promotion or the allocation of work assignments, especially for those who provide services by results, such as, for example, the prototypical case of riders; information must be provided on the criteria taken into account for the designation of workers affected by objective dismissals when the thresholds that require processing as collective dismissals are not exceeded, etc".[22].

On the other hand, "it is worth noting that the new regulation has left a number of areas that have not been sufficiently clarified, which could constitute areas for collective bargaining.

Among these matters that could be implemented by collective bargaining, I would point out the following.

22. Cruz Villalón, J., "La participación de los representantes de los trabajadores en el uso de los algoritmos y sistemas de inteligencia artificial", Blog by Jesús Cruz Villalón: Reflexiones y comentarios de cuestiones sociales y laborales de actualidad26 de mayo de 2021, <https://jesuscruzvillalon.blogspot.com/2021/05/la-participacion-de-los-representantes.html?fbclid=IwAR37Tu4QnRQIMEnGOjPtsJft_H-oO7FxxLJvX27OegaacdtFBFA-RwPcuQc>.

Firstly, the rule does not make it clear when representatives should be informed, especially whether this information should be provided on an ad hoc basis when algorithms or artificial intelligence are used, or whether information should be provided on a regular basis regarding the use of these technologies. This could be subject to clarification by collective bargaining.

Secondly, the standard only targets information regarding the use of such technologies, but in addition to this, collective bargaining could introduce a duty to provide subsequent information regarding possible evaluations of the results of the use of such algorithms or artificial intelligence systems.

Thirdly, given the technical complexity of this information, it may be difficult to process and understand by workers' representatives, who do not have to be experts in this field. Irrespective of the fact that the duty of cooperation and good faith implies that the information to be transmitted should be accessible, collective bargaining could also provide for training mechanisms for workers' representatives on how these technologies work and how to assimilate the consequences of their practical use in the field of business decision-making"[23].

IV. CONCLUSIONS

The EU has pointed out that "the use of artificial intelligence alone does not guarantee truth and fairness, as biases may arise in the way the data is collected and the algorithm is written which may derive from biases present in society; that the quality of the data, together with the design of the algorithms and the processes of constant re-evaluation, should prevent the emergence of biases". Therefore, "the dissemination of artificial intelligence and robotics must be carried out in full respect of human rights and that in no case should stereotypes against women or any other form of discrimination be reproduced in machines and robots"[24].

23. Cruz Villalón, J., "La participación de los representantes de los trabajadores en el uso de los algoritmos y sistemas de inteligencia artificial", Blog by Jesús Cruz Villalón: Reflexiones y comentarios de cuestiones sociales y laborales de actualidad26 de mayo de 2021, <https://jesuscruzvillalon.blogspot.com/2021/05/la-participacion-de-los-representantes.html?fbclid=IwAR37Tu4QnRQIMEnGOjPtsJft_H-oO7FxxLJvX27OegaacdtFBFA-RwPcuQc>.
24. Resolución del Parlamento Europeo, de 12 de febrero de 2019, sobre una política industrial global europea en materia de inteligencia artificial y robótica (2018/2088(INI)).

It has also been pointed out that "AI development takes place in a homogeneous environment composed mainly of young white males, which leaves an imprint (conscious or not) of cultural and gender disparity, not least because AI systems learn on the basis of training data. That data must be correct, and also of good quality, varied, sufficiently deep and fair. There is a widespread tendency to believe that data is by definition objective, which is not true. Data are easy to manipulate, can be biased, can reflect cultural, gender or other biases and preferences, and can contain errors"[25].

It therefore stresses "the importance of addressing developer bias and therefore the need for a diversified workforce in all branches of the IT sector, and safeguard mechanisms to avoid gender and age-based distortions in artificial intelligence systems"[26].

Therefore "Calls on the Commission, the Member States and data protection authorities to define and adopt all necessary measures to avoid or minimise algorithmic discrimination and bias and to develop a robust common ethical framework for the transparent processing of personal data and automated decision-making to guide the use of data and the application of EU law (…). stresses that any artificial intelligence system must be developed in compliance with the principles of transparency and algorithmic accountability so that humans can understand its actions; points out that in order to build trust in artificial intelligence and enable it to progress, users must be aware of how their data, other data and data derived from their data are used when communicating or interacting with an artificial intelligence system or with humans relying on an artificial intelligence system; considers that this will contribute to better understanding and trust between users; stresses that decision intelligibility should be a Union standard in accordance with Articles 13, 14 and 15 of the [General Data Protection Regulation] GDPR; recalls that the GDPR already provides for a right to be informed about the logic behind data processing; stresses that, according to Article 22 of the GDPR, individuals have the right to human intervention when a decision based on automated processing significantly affects them (…). The Committee stresses the need to be able to explain the results, processes and values

25. Dictamen del Comité Económico y Social Europeo sobre la "Inteligencia artificial: las consecuencias de la inteligencia artificial para el mercado único (digital), la producción, el consumo, el empleo y la sociedad" (Dictamen de iniciativa) (2017/C 288/01).
26. Resolución del Parlamento Europeo, de 12 de febrero de 2019, sobre una política industrial global europea en materia de inteligencia artificial y robótica (2018/2088(INI)).

of artificial intelligence systems in a way that is understandable to non-technical recipients and that provides them with meaningful information, a necessary condition for assessing fairness and gaining trust (…). algorithm designers must ensure that essential requirements such as fairness or explainability are met from the start of the design phase and throughout the development cycle"[27].

AI brings new challenges, as it allows machines to learn and make decisions and execute them without human intervention. Decisions made by algorithms can give incomplete and therefore unreliable data, which can be manipulated by cyber-attacks, leading to bias or simply being wrong. Thoughtless application of technology as it develops would produce problematic results; as well as reluctance of citizens to accept or use it.

To address the permeability of AI and algorithms to invisible gender bias, the following recommendations are proposed[28]:

a) The use of unbiased data to create algorithms.

b) Building more diverse and inclusive programming teams to help identify and prevent gender, age and racial bias in the data used.

c) Increasing the presence of women specialists in programming and software development.

d) Gender-sensitive training of ICT professionals.

e) Conducting audits of algorithms with the aim of deciphering the assumptions on which they base their conclusions and legislation on discrimination, gender equality and human rights to regulate their operation and coding. In this context, WG29 notes that the algorithms used and developed by machine learning systems should be checked to ensure that they work as intended, and that they do not produce discriminatory, erroneous or unjustified results[29].

f) Accountability and the establishment of ethical frameworks to regulate algorithms.

27. Resolución del Parlamento Europeo, de 12 de febrero de 2019, sobre una política industrial global europea en materia de inteligencia artificial y robótica (2018/2088(INI)).

28. Mateos Sillero, S. y Gómez Hernández, C., *Libro Blanco de las Mujeres en el ámbito tecnológico*, Secretaría de Estado para el Avance Digital, Ministerio de Economía y Empresa, Ministerio de Economía y Empresa, Madrid, 2019.

29. Article 29 Data Protection Working Group, *Guidelines on automated individual decisions and profiling for the purposes of Regulation 2016/679*, (WP251rev.01), Adopted on 3 October 2017 and last revised and adopted on 6 February 2018, p. 36.

g) The task of increasing transparency in algorithmic decision-making processes.

WG29 recommends that "rather than providing a complex mathematical explanation of how algorithms or machine learning work, the controller should consider using clear and comprehensive ways of providing information to the data subject, such as: (i) the categories of data that have been or will be used in the profiling or decision-making process; (ii) why these categories are considered relevant; (iii) how the profiles used in the automated decision-making process are constructed, including the statistics used in the analysis; (iv) why this profile is relevant to the automated decision-making process; and (v) how it is used for a decision relating to the data subject"[30]. The ILO recommends promoting transparency and accountability in algorithmic programming for workers and companies[31].

It is also up to the legal standard, from the ethical-social point of view, to "trace the due transactional balance in order to create the conditions of use or algorithmic management that maximise its advantages and minimise the risks"[32]. Therefore, as already mentioned, in the case of the Spanish legislator, it has already echoed that the legal representation of workers has the right to "be informed by the company of the parameters, rules and instructions on which the algorithms or artificial intelligence systems that affect decision making that may affect working conditions, access and maintenance of employment, including profiling, are based".

Finally, the doctrine recommends, from an employment perspective, that "various mechanisms can contribute to improving this situation: the collective agreement on selection criteria beyond the definition of the job, collective complaints against decisions arbitrarily based on algorithms, a possible control of the legality of opaque selection criteria, or the open description of the selection algorithm after the selection process for candidates for the job. In addition to the need to discipline these practices as far as possible from a legal point of view with content such as the specification of the right "to an explanation" or algorithmic transparency, the limits to the use of automated decisions in the management of the employment contract, the rights of participation of workers, or the scope

30. Article 29 Data Protection Working Group, *Guidelines on automated individual decisions and profiling for the purposes of Regulation 2016/679*, (WP251rev.01), Adopted on 3 October 2017 and last revised and adopted on 6 February 2018, p. 35.
31. International Labour Organization, *Global Employment and Social Outlook. The role of digital platforms in transforming the world of work*, ILO, Geneva, 2021, p. 12.
32. Molina Navarrete, C., "'Duelo al sol' (digital). ¿Un algoritmo controla mi trabajo? Sí; a tu empresa también", *Revista de Trabajo y Seguridad Social. CEF*, No. 457, 2021, p. 7.

of the information to be shared with workers affected by such decisions, without forgetting the possibility of restricting the use of certain applications in the adoption of particularly sensitive decisions, such as those that may have a discriminatory impact, with regard to which the external audit of algorithms, the regulatory centre for algorithmic governance or the nominative option chosen should also be regulated at the employment level, apart from the provision of the corresponding resources and specialised training for the Labour and Social Security Inspectorate. It is undeniable that the progress of artificial intelligence (promoted both at EU level and in the national strategy for artificial intelligence and full digitalisation of society in Spain, even reinforced as an effect of the global health crisis of 2020) is fully compatible, even at company level, with the establishment of certain limits that allow its ethical and respectful use with the rights of workers and especially in the most sensitive areas such as fundamental rights, in particular in the face of algorithmic discrimination.

From an extra-occupational perspective, action on social networks and gender training in IT degrees would be appropriate preventive mechanisms integrated into a broader, cross-cutting public policy, which should also be considered"[33].

It must be emphasised that "bias is objectifiable and accreditable, that the algorithmic model must not be opaque, that the statistical result is accreditable of discrimination as a result of its application, and that the persons affected by its application have the right to information on the mechanisms or parameters of operation, in accordance with the principle of transparency. It is no less true that the reactive possibilities must remain secondary, since, under current positive law, access to the reasons for an automated decision is extremely complex for the technical and even legal reasons already mentioned, so that the current legal mechanisms provide only partial and clearly insufficient protection"[34].

33. Rivas Vallejos, P., *La aplicación de la Inteligencia Artificial al trabajo y su impacto discriminatorio*, Thomson Reuters-Aranzadi, Cizur Menor, 2020, pp. 405-406.
34. Rivas Vallejos, P., *La aplicación de la Inteligencia Artificial al trabajo y su impacto discriminatorio*, Thomson Reuters-Aranzadi, Cizur Menor, 2020, p. 404.

The Relation between Family Duties and Gender Pay Gap as Manifestation of Gender Inequality in the European Union

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I. INTRODUCTION – THE CONCEPT OF GENDER PAY GAP AND FAMILY DUTIES AS ITS CAUSE

'But humanity can only be at its best when gender equality becomes a reality for all, everywhere. We must and will make it happen'[1].

One must admit that the struggle for achieving gender equality in all spheres of life has led to significant changes and has shaped the 21st century world, to a certain extent, in a gender equal way[2]. Today's world promotes gender equality and provides for normative framework to establish such equality. However, there is still a lot that remains to be done as gender inequality remains present in practice and it manifests very often in many aspects of life, including employment. One clear manifestation of gender inequality is the so-called gender pay gap. By definition, gender pay gap refers to "difference in average gross hourly earnings between women and men. It is based on salaries paid directly

1. *ILO Director-General: Let us invest in women as part of a human-centred recovery* [viewed date: 12 June 2021], <https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-director-general/statements-and-speeches/WCMS_774827/lang--en/index.htm>. It should be mentioned also that one of the UN sustainable goals refers to achieving gender equality. *UN sustainable development goals, Goal 5: Achieve gender equality and empower all women and girls.* [viewed date: 8 July 2021], <https://www.un.org/sustainabledevelopment/gender-equality>.
2. In that sense, it is important to take into account the struggle of many women around the world to achieve equality in all spheres of life, including employment. Silwanowicz, K., "Women's rights in the workplace: The struggle is still real", *University of Detroit Mercy Law Review*, vol. 97, No. 1/2019, pp. 101-124.

to employees before income tax and social security contributions are deducted"[3]. It is stated for the gender pay gap that it is "one of the more visible examples of structural gender discrimination stemming from the horizontal and vertical segmentation of labour forces"[4]. On one hand, the gender pay gap in the European Union (EU) appears as a result of the violation of equal pay (renumeration) for the work of the equal value principle. On the other hand, it also appears as a result of women being employed in a higher percentage in lower paid jobs and flexible forms of work which has a negative effect on their salary.

Once defined, it is crucial to ask ourselves what are the roots of such inequality resulting in gender pay gap in employment in the EU. Namely, the analysis of gender pay gap undoubtably poses the issue of (unjustified) reasons causing such difference in pay, and in this regard special attention must be devoted to family duties. As a rule, employers find family duties to be a special sort of burden which leads to discrimination of employees with family duties, i.e., most often of women with family duties. Metaphorically speaking, the tree of inequality often grows from bias and stereotypes relating to women and ("their") family duties as its roots[5]. Common understanding is such that "this (family duties) can make it particularly difficult for women (relative to their male peers) to be available at the drop of a hat on a Sunday evening after working a 60-hour week"[6]. Simply, if both man and woman have demanding jobs and children, it requires (at least) one of them to make a sacrifice, and it is almost an unspoken rule that woman is the one making the compromise. Unfortunately, such a stance is no surprise since the years, decades and centuries of putting family duties on shoulders of women and excluding women from the labour market have resulted in existence of social norms which block the path towards equality. Even though EU legislation promotes equal share of family duties by males and females,

3. *Understanding the gender pay gap: definition and causes*, [viewed date: 10 June 2021], <https://www.europarl.europa.eu/news/en/headlines/society/20200109STO69925/understanding-the-gender-pay-gap-definition-and-causes>.
4. *Understanding the gender pay gap,* International Labour Office, Geneva, 2018, p. 5.
5. What is more, one should not forget that besides being discriminated based on gender and family duties, certain groups of women such as migrant workers are in a particularly difficult situation in the labour market: "This means that women face a higher poverty risk, particularly women belonging to disadvantaged groups such as migrant workers, lone parents and the older workers seeking employment, who suffer the consequences of discrimination on two or more fronts", Tiraboschi, M. *et al*., *Let's improve bargaining, relations and agreements on work and life times balance,* ADAPT Associazione – c/o Centro Studi Marco Biagi, Modena, 2013, pp. 16-17.
6. Schieder, J. and Gould, E., *Women's work' and the gender pay gap*, Economic Policy Institute, Washington, D.C., 2016, p. 6.

it seems to be not so easy to let go of the social norms almost set in stone. Whether it is the bias and judging mothers or women taking care of the elderly family members harsher than other candidates for employment or employees, or the fact that women are often in a position they do not have a choice but to decide on occupations which provide more flexibility due to the fact they have family duties, it is certain that women are faced with more challenges than men in employment[7].

However, such a situation in practice has to change as no employee or candidate for employment should be discriminated due to having family duties. Moreover, it is necessary to change the common understanding are family duties are only women's duties, and instead fight for and achieve equality in terms of performing family duties. In that sense, "due to structural changes in family patterns and new demands in modern working life, reconciliation of work and family life has become a key issue in European employment policy"[8].

II. NORMATIVE FRAMEWORK AIMED AT ELIMINATING THE GENDER PAY GAP

1. THE INTERNATIONAL LABOUR ORGANIZATION STANDARDS FOR GENDER EQUALITY IN TERMS OF PAY AND THEIR IMPORTANCE FOR THE EUROPEAN UNION

The International Labour Organization (ILO) has devoted the necessary attention to the issue of equal pay (and more generally equality in employment) since the beginning of its existence. Namely, the Preamble of the ILO Constitution guarantees for equal renumeration for men and women[9]. Besides the ILO Constitution, ILO conventions and recommendations

7. The existence of the relation between family duties and the pay gap is confirmed by the following that was stated in the 1990s: "Over the past few decades, as the gap in pay between women and men has been narrowing, the gap between women with children and those without children has been widening". Waldfogel, J., "Understanding the family gap in pay for women with children", *Journal of economic perspectives*, vol. 12, No. 1/1998, p. 137.
8. *Combining family and full-time work,* European Foundation for the Improvement of Living and Working Conditions, Dublin, 2007, p. 2.
9. The preamble of the ILO Constitution stipulates the "recognition of the principle of equal remuneration for work of equal value". It should be mentioned that ILO documents provide for the understanding that the term equal pay for equal work can be considered as narrower and referring to employees working in the same job, i.e., performing work of the same value. On the other hand, the term equal remuneration for work of equal value can be considered wider and referring to working in different jobs as well. *Equal remuneration for work of equal value*, [viewed

also play a great role in securing equality in terms of pay. Namely, ILO Convention No. 100[10] is extremely important in the sense of guaranteeing equality as it is the first convention which provides for principle of equal renumeration for men and women. Further on, ILO Convention No. 111[11], even though dealing with equality in employment and occupation in general, is a great step forward and the guarantee that ILO has a clearly determined stance regarding gender equality in employment[12].

The importance of taking into account the ILO standards regarding equal pay for the EU countries is based on two crucial reasons. On one hand, all of the EU countries are ILO members and all of them have ratified the mentioned ILO conventions. On the other hand, the ILO and the EU are partners for decent work and social justice[13], and their cooperation is becoming stronger each day.

2. EQUALITY IN THE EUROPEAN UNION – NORMATIVE FRAMEWORK PROVIDING FOR GENDER WISE EQUAL PAY

As for the normative framework guaranteeing gender wise equal pay and more broadly gender equality in the EU, the Treaty on EU (TEU) provided for a provision referring to equality as a fundamental value on which the EU is built upon[14]. Further on, the Treaty on the Functioning of the EU (TFEU) devotes attention not only to the issue of equality as such, but also precisely to the issue of equal pay gender wise by stipulating that "each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied"[15]

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date: 18 June 2021], <https://www.ilo.org/global/topics/wages/minimum-wages/rates/WCMS_433906/lang--en/index.htm>.

10. International Labour Organization C100 – Equal Remuneration Convention, 1951 (No. 100).
11. International Labour Organization C111 – Discrimination (Employment and Occupation) Convention, 1958 (No. 111).
12. However, examples from practice show us that even though there are binding standards provided by ILO regarding pay equality, it is often the case that the situation in practice is far away from standards provided by ILO. In the words of director general of ILO, Guy Rider: "It is clear to me that just adopting laws, just doing the obvious good things – important as they are – is not enough" (*Understanding the gender pay gap*. *op. cit*., p. 5).
13. *The ILO and the EU, partners for decent work and social justice, Impact of ten years of cooperation*, International Labour Organization Office, Brussels, 2012.
14. Consolidated version of the Treaty on European Union (*Official Journal* C 326, 26/10/2012, pp. 1–390), Preamble and Art. 2.
15. Consolidated version of the Treaty on the Functioning of the European Union (*Official Journal* C 326, 26/10/2012, pp. 1–390), Art. 157.

What is more, the Charter of Fundamental Rights of the European Union provides f.or guarantee of equality of men and women "in all areas, including employment, work and pay"[16].

Besides the founding treaties and the Charter, one must not overlook the importance that the EU directives, as the source of secondary EU law, have. For the issue at hand, especially important is Directive 2006/54/EC[17] which provides that "for the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated"[18]. What is more, a proof of constant efforts to achieve gender equality in the EU is the 2020 – 2025 Gender Equality Strategy aimed at combating gender inequality and gender-based violence.

Further on, it should be mentioned that the issue of equal pay was not so rarely discussed in front of the European Court of Justice (ECJ) – in this regard the ECJ has provided the stance that equal pay for men and women is to be considered a fundamental principle in the EU[19]. ECJ has also held that the principle of equal pay is not to be considered confined to "situations in which men and women are contemporaneously doing equal work for the same employer"[20], while the issues of indirect discrimination leading to difference in payment were also disputed in front of the ECJ[21].

16. Charter of Fundamental Rights of the European Union (*Official Journal of the European Union* C 326/391), Art 23.
17. European Parliament and of the Council, Directive 2006/54/EC of the 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).
18. The Directive determines the principle with even more details in Art. 4 by specifying that "in particular, where a job classification system is used for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex". In order to eliminate potential dilemma regarding the understanding of the term pay, the Directive stipulates in Art. 2 that the term pay refers to "the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his/her employment from his/her employer".
19. ECJ Judgment in Case 43-75 (*Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*) of 8 April 1976, ECLI:EU:C:1976:56. The Court dealt with the issue of gender equality in terms of equal pay as flight attendant Defrenne has filed a claim referring to violation of gender equality in Belgium and the ECJ has took the stance that the principle of equality between men and women has to be applied.
20. ECJ Judgment in Case 129-79 (*Macarthys Ltd v Wendy Smith*) of 27 March 1980, ECLI:EU:C:1980:103.
21. ECJ Judgment in Case C-33/89 (*Maria Kowalska v Freie und Hansestadt Hamburg*) of 27 June 1990, ECLI:EU:C:1990:265. The ECJ dealt with the issue of paying severance payment once the employment is terminated. Namely, the Court concluded that it is not allowed to exclude part-time workers from receiving the severance pay based on a collective agreement, if considerably more women are working part time in

In its more recent court practice, the ECJ has once again took a stance that equality in terms of pay between men and women must be guaranteed by referring to article 157 TFEU[22].

III. THE RELATION BETWEEN GENDER PAY GAP AND FAMILY DUTIES IN THE EUROPEAN UNION – THE ENDURING RELATION?

1. EXISTENCE OF GENDER PAY GAP IN THE EUROPEAN UNION

Even though there is a rather developed normative framework regarding pay equality in the EU, there is still a long way to go in order to eliminate the discrepancy between the normative framework and the situation in practice[23]. The figures show us that the gender pay gap remains, to a certain extent, present in the EU[24]. Namely, the most recent data show that "women earn 14.1% less than men per hour in the EU"[25]. As for the precise data regarding each of the EU countries, most recent data show the highest existing gender pay gap in the EU is present in Estonia (21.8%) while the lowest being in Luxembourg" (1.4%)"[26]. Further on,

comparison to men, i.e. the Court found such a provision to go against the principle of gender equality.

22. ECJ Judgment in Case C-624/19 (*K. and Others v Tesco Stores Ltd*) of 3 June 2021, ECLI:EU:C:2021:429.

23. In that sense we should also take into consideration data from almost two decades ago (2006) when it was stated that "almost 40% of all female employment is in the low-skilled, non-manual occupations, whereas this accounts for only around 14% of male employment" (*Gender and career development*, European Foundation for Improvement of Living and Working Conditions, Dublin, 2007, pp. 2-3). Even though the situation has improved, women are still in a much higher number present in low-paid industries.

24. Also, taking a look at the ILO Reports shows us the current situation globally, but unfortunately does not provide us with good news – namely, the ILO Global Wage Report from 2018 testifies to the fact that "global wage growth has been weak while the gender pay gap, at about 20 per cent globally, remains unacceptably high" (*Global wage growth lowest since 2008, while women still earning 20 per cent less than men*, [viewed date: 19 June 2021], <https://www.ilo.org/moscow/news/WCMS_650551/lang--en/index.htm>). As for the most recent report (ILO wage report for 2020/2021) it has a focus on employment in times of COVID-19. In that sense, it is emphasized that many workers (especially low paid workers and women) have lost their jobs, and by this stopped being recognized by the statistics in terms of pay gap.

25. *Equal pay? Time to close the gap!*, [viewed date: 10 June 2021], <https://ec.europa.eu/info/sites/default/files/aid_development_cooperation_fundamental_rights/2020_factsheet_on_the_gender_pay_gap.pdf>.

26. As for data relating to specific countries, the gender pay gap in 2020 stood at: Estonia (21.8%), Austria (20.4%), Germany (20.1%), the Czech Republic (20.1%), while the

based on Eurostat data, in 2020, the gender employment gap was 11.3%[27]. Finally, it is important to take into account that "even though the situation is improving, progress is very slow in the European Union with the gap only decreasing by just under 2% over the last 8 years"[28]. What is more, the COVID-19 pandemic has had an even more devastating effect for female workers so that in 2020 "for women, the total wage bill would have declined by 8.1 per cent, compared to a decline of 5.4 per cent for men. Such a discrepancy was mainly caused by reduced working hours, more than by the difference in the number of lay-offs"[29].

When analyzing the statistical data, one should bear in mind that as we climb up the ladder jobs based on pay, the number of women decreases more and more meaning that women undoubtably are faced with the glass ceiling effect in the EU – "Women don't make it to the top. Less than 6.9% of top companies' CEOs are women"[30]. Namely, figures from 2019 testify to the fact that women as managers earned 23% less than men in the EU[31].

To summarize, the stated data provides us with the information that, despite efforts to achieve gender equality and the existence of a comprehensive legal framework, the gender pay gap remains.

2. FAMILY DUTIES AS THE ROOTS OF THE GENDER PAY GAP

Relating family duties (only) to women is one of the main sources of gender inequality reflecting negatively on women in terms of renumeration for the performed work. In regard to family duties as a reason of gender pay gap, EIGE has in 2019 provided the information that "the biggest

lowest gender pay gap can be found in Luxembourg (1.4%), Romania (2.2%) and Italy (3.9%). In terms of comparison, the figures in 2019 were as follows: "Estonia (21.7%), Latvia (21.2%), Germany (19.2%), the Czech Republic (18.9%), Slovakia (18.4%) and Hungary (18.2%). The lowest numbers in terms of gender pay gap in 2019 were in Poland (8.5%), Slovenia (7.9%), Belgium (5.8%), Italy (4.7%), Romania (3.3%) and Luxembourg (1.3%)", *Gender pay gap statistics*. Eurostat, 2021 [viewed date: 30 June 2021], <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Gender_pay_gap_statistics>.

27. Eurostat database can be viewed at: <https://ec.europa.eu/eurostat/web/main/data/database>.
28. *Equal pay? Time to close the gap!, op. cit*.
29. *Global Wage Report 2020-21: Factsheet for the European Union*, International Labour Office, Geneva, 2021, pp. 1-23.
30. *Equal pay? Time to close the gap!, op. cit*.
31. *The gender pay gap situation in the EU*, [viewed date: 10 June 2021], <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/equal-pay/gender-pay-gap-situation-eu_en>.

gap in earnings is among couples with children – showing that the financial cost of having a family falls heavily on women's shoulders"[32]. Further on, such unjustified differences have a result on pensions so that women's pensions are in average 37% less than men's in the EU[33]. On the other hand, results of research demonstrate that women tend to be judged more harshly than men when applying for a certain position by the employers, but also that the description of an employee as having minor children has a sort of a "repelling" sound to the potential clients, which also leads to discriminating women with family duties by the employers[34]. Furthermore, when analyzing the issue, one should bear in mind that most jobs today require the employee to be available anytime and anywhere. In this regard, one could not help but wonder whether the person with family duties can (or cannot) "have the luxury" of constant availability. As family duties are usually placed on the shoulders of women, it is clear that women, as a rule, "fail to fulfil" the request of being available 24 hours, seven days a week[35]. Its further effects lead to painting "an inaccurate picture of a sharp, gendered divide between work that brings in the family's financial resources, and home, where love and caregiving are central but economically valueless"[36], which seems to have the time machine effect by returning us to the situation regarding gender inequality in employment that existed decades ago. Namely, "women's housework, in particular, helps men earn more, whereas women seem not to take much advantage in terms of wages from their partners' domestic work. This finding is true for the overall wage gap as well as for the within couple gap. Overall, the results support a picture of 'the wife as a resource' "[37].

32. *Better work-life balance would shrink the gender pay gap*, [viewed date: 10 June 2021], <https://eige.europa.eu/news/better-work-life-balance-would-shrink-gender-pay-gap>.
33. *Ibid.*
34. Correl, S.. J and Stephen B. and In Paik, "Getting a job: Is there a motherhood penalty?", *American journal of sociology*, vol. 112, No. 5/2007, pp. 1297-1339. In that sense it is especially important to pay attention to indirect discrimination, which is not always so easy to notice and sanction. Doyle, Alison, *Types of Discrimination in the Workplace*, The Balance Careers, 2020, [viewed date: 10 June 2021], <https://www.thebalancecareers.com/types-of-employment-discrimination-with-examples-2060914>.
35. This stance is confirmed by ILO research which "shows that enterprise cultures that predominately require 'anytime, anywhere' availability create an unfair impact on women, who generally carry greater household and family responsibilities". *The business case for change*, International Labour Office, Geneva, 2019, part xii.
36. Roush, E., "(Re)entering the workforce: An historical perspective on family responsibilities discrimination and the shortcomings of law to remedy it", *Washington University Journal of law & policy*, vol. 31, 2009, p. 249.
37. Mateazzi, E. and Scherer, S., "Gender wage gap and the involvement of partners in household", *Work, employment and society*, vol. 35, No. 3/2021, p. 502.

3. THE "MOTHERHOOD PENALTY" AS MANIFESTATION OF CHALLENGES WOMEN ARE FACED WITHIN EMPLOYMENT

In the sense of family duties, special attention must be devoted to motherhood as a common reason for discrimination of women resulting in the existence of the gender pay gap. The greatness of the issue relating to motherhood can be observed from the fact that there is a widely used term "motherhood penalty"[38]. Motherhood penalty refers to unequal treatment working mothers experience due to discrimination and the lack of understanding from the employers. One research regarding motherhood penalty provides us with the conclusion that "the motherhood penalty is higher, and it contributes more significantly to the overall gender wage gap when policies are unsupportive of maternal employment, as seen in the CEE countries"[39].

4. "FEMALE OCCUPATIONS" AND FLEXIBLE FORMS OF WORK AS THE ONLY CHOICES FOR WOMEN WITH FAMILY DUTIES

Besides women being subjected to discrimination in terms of violation of equal pay for the work of equal value principle, we should take into account the fact that women are often left without a choice except to work in lesser paid industries or flexible forms of work as a consequence of having family duties[40]. In this respect, ways for creating a gender pay gap also refer to women working in the "female" industries which generally have lower wages, as well as working less hours, i.e. in flexible forms of work in order to balance professional and family duties[41]. "A high pay gap is usually characteristic of a labour market in which women are more concentrated in a restricted number of sectors and/or professions, or in which a significant proportion of women work part-time"[42]. Besides that,

38. Offenberger, S., *Reproductive and care functions: from caring to sharing*, *Background paper – Prepared for the Working group on discrimination against women in law and practice*, United Nations Office of the High Commissioner for Human Rights, 2014, p. 6.
39. It is the data based on research conducted in 2017. Cukrowska-Torzewska, Ewa and Anna Lovász, *The impact of parenthood on the gender wage gap: A comparative analysis of 26 European countrie*s, Budapest Working papers on the labour market, no. BWP – 2017/15, Hungarian Academy of Sciences/Institute of Economics/Centre for Economic and Regional Studies, Budapest, 2017, p. 31.
40. *Tackling the gender pay gap in the European Union*, Publication Office of the EU, Luxembourg, 2011, pp. 5-7.
41. Nytia, S. *Why and how the gender gap affects health*, EuroHealthNet, 2015, [viewed date: 1st July 2021], <https://eurohealthnet.eu/media/blogs/why-and-how-gender-pay-gap-affects-health-nitya-sarma?gclid=CjwKCAjwuIWHBhBDEiwACXQYsbR8va1NFHpDSbTOvN64Okjjw5UYuyYJKtyvVW17tF0rG5RoCOfkQAvD_BwE>.
42. *Equal pay? Time to close the gap!*, *op. cit*.

in relation to working in flexible forms of work, "only 8% of men in the EU in 2019 worked in part-time, almost a third of women across the EU (30.7%) did so"[43].

As for "female professions", many stereotypes "made of steel" are responsible for defining certain professions as being male of female without any professionally justified basis for such a determination. In that sense, certain professions are being categorized as female due to stereotypes referring to the ones performing them as women with family duties. Due to such segregation, "women are often concentrated in sectors that are under-valued – such as care work – even though they involve high levels of responsibility and effort, and multiple specialized skills"[44]. Hence, it is no surprise that "around 30% of the total gender pay gap is explained by the overrepresentation of women in relatively low-paying sectors, such as care and education. On the other hand, the proportion of male employees is very high (over 80%) in better-paid sectors, such as science, technology, engineering and mathematics"[45].

As for flexible forms of work, women are often working in flexible work arrangements due to lack of other choice, since the capability of women with family duties to de devoted "sufficiently" to their job is often being called into question, so the employers engage them only in flexible work arrangements[46]. Namely, "in high-income economies, many women – if they do decide to participate in the labour market – choose to work part time. In middle-or low-income countries, many women seeking paid work are pushed into the informal economy, where they more easily find work that is flexible in terms of schedule and duration, or are constrained to opt for home-based work"[47]. Such a vicious circle in countries with lower income within the EU can have devastating consequences regarding the position of these women – not "only" is their work in such a case not being properly and equally evaluated and rewarded (paid), but in fact it is not at all legally recognized. That leads to these women not being

43. *The gender pay gap situation in the EU*, *op. cit.*
44. *Equal pay for work of equal value*, Equal Pay International Coalition, 2018, [viewed date: 5 July 2021], <https://www.equalpayinternationalcoalition.org/equal-pay/>.
45. *The gender pay gap situation in the EU*, *op. cit.*
46. It is true that it may also be a request of the employee to work in flexible work arrangements in order to balance professional and family duties. Namely, in this situation, even though it is a request of the employee, employers often turn to (in) direct discrimination of the ones (most often women with family duties) that are working in flexible forms of work.
47. *Global wage report 2018/19: What lies behind gender pay gaps,* International Labour Office, Geneva, 2018, p. 20.

included in the statistical data and are often being exploited as they have no other choice but to work "under the radar".

As it seems, one of the main problems causing gender pay gap in relation to family duties is precisely inequality in sharing family duties, i.e. relating family duties only to women and discriminating women due to family duties they have. However, as times and society have changed and are changing by acknowledging gender equality in any sphere, including employment, it is time to reevaluate the traditional stance and fight for achieving equality by eliminating the gender pay gap.

IV. CLOSING THE GENDER PAY GAP – CLOSING THE PANDORA'S BOX?

Eliminating the gender pay gap as crossing a part of the road towards substantive equality in the EU is by no means an easy task. Therefore, it is not surprising the EU has decided to take further steps in order to close the gender pay gap. Proposed solutions refer to stipulating more transparency, as well as promoting and stipulating the reconciliation of professional and family duties.

Regarding the issue of transparency in terms of pay, the European Commission has presented a Proposal for a Directive in order to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms with the intention to ensure gender equality in payment[48]. The Proposal focuses on the issue of transparency as having mechanism to compare the workers' pay is the first step towards achieving pay equality. It also identifies the difficulties women face in the labour market and emphasizes the burden carried by women in the times of COVID-19 pandemic. It can be said that the Proposal deals with gender gap issues in a comprehensive manner by stipulating the obligation of big employers to disclose information relating to salaries, but also by guarantee of providing precise information to candidates for employment[49]. In the words of President of European Commission,

48. *Pay transparency: Commission proposes measures to ensure equal pay for equal work*, European Commission, 2021, [viewed date: 5 July 2021], <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_881>.

49. The Proposal can be viewed at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0093>. In this sense, some EU countries have already introduced mechanisms securing transparency. For example, "Germany allows workers in medium-size and big companies to get information on how their salaries compare with those of other colleagues in corresponding jobs".

Ursula von der Leyen: "Equal work deserves equal pay. And for equal pay, you need transparency"[50]. Namely, "lack of pay transparency thus creates a grey zone favoring the perpetuation of gender bias in the setting of salaries"[51]. In this respect, transparency is of crucial importance when it comes to making the equal renumeration principle more than just the legal framework.

Besides transparency which provides for control of the implementation of the equal pay principle, there remains an issue regarding fighting discrimination based on family duties in practice[52]. In this regard, family-friendly policies are of special importance. Such policies should have a special focus on the issue of parental leave and the possibility of both parents to use the parental leave[53]. Besides the parental leave, the family-friendly policies should generally promote equality between men and women in any sense in regard to having family duties. In this respect, promoting equality in sharing family duties as the EU goal is manifested also in the EU Work-life Balance Directive that came into force in 2019[54]. The Directive focuses on equality in sharing family duties and securing the employees with family duties the possibilities to truly have a balance between professional and family duties (both as parents but also in terms of taking care of elderly family members) without being faced with discriminatory actions[55]. Another important aspect of family friendly policies is focusing on childcare services in order to achieve balancing professional and family duties of employees. In this regard, the Work-life Balance Directive also stipulates that member states should have affordable and accessible childcare services[56]. Without a doubt, there is

Sardon, M., *EU moves to end gender pay gap with transparency rules*. The Wall Street Journal, 2021, [viewed date: 5 July 2021], <https://www.wsj.com/articles/eu-moves-to-end-gender-pay-gap-with-transparency-rules-11614887136>.

50. *Pay Transparency: Commission proposes measures to ensure equal pay for equal work*, *op. cit.*
51. *Questions and Answers – Equal pay: Commission proposes measures on pay transparency to ensure equal pay for equal work*, European Commission, 2021, [viewed date: 7 July 2021], <https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_961>.
52. In that regard, many family-friendly policies in the Nordic countries seem to have given a positive result in sense of overcoming the gender pay gap. *Is the gender pay gap here to stay?* DW, 2021, [viewed date: 6 July 2021], <https://www.dw.com/en/is-the-gender-pay-gap-here-to-stay/a-56823066>.
53. *Eligibility for parental leave in EU member states*, European Institute for Gender Equality/Publications Office of the EU, Luxembourg, 2020, pp. 7-10.
54. Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU.
55. The Directive introduces a three years deadline for the countries to comply with it.
56. The example of Slovenia speaks to the importance of adequate childcare services. Namely, Slovenia has been considered as having less problems relating to pay

no solution that would completely eliminate the gender pay gap in a moment. It takes time and constant effort in order to eliminate gender pay gap and its relation to family duties. However, the proposed solutions represent a step forward.

V. CONCLUSIONS

'Achieving equal pay is an important milestone for human rights and gender equality. It takes the effort of the entire world community and more work remains to be done'[57].

Gender pay gap is an issue of extreme importance as it represents a great problem itself, but also a manifestation of gender inequality in general in employment. Even though a long and heavy road has been crossed, there is still a long way to go in order to eliminate the gender pay gap existing in the EU.

Globally speaking, there is a centuries-long "tradition" of discriminating women in terms of access to employment and enjoying rights deriving from employment relationship. Unequal treatment of women is being even worse in case women have family duties which leads to generally worse position in the labour market and employment and consequently to being paid less, i.e., leads to creating a gender pay gap. In that sense, eliminating the gender pay gap means prohibiting employers from discriminating women with family duties in practice. Besides that, in order to achieve gender equality, it is necessary to promote equal share of family duties for both men and women instead of attaching family duties (only) to women. In this regard, the EU has put in strong efforts aimed at eliminating gender-based discrimination. Namely, the EU has a rather developed legal framework in terms of gender equality and precisely gender equality in terms of pay, as well as many mechanisms and policies constructed in order to make that framework a reality. However, the fact the gender pay gap continues to exist speaks of the need to put in more effort and focus even more on the issue of gender equality in employment in the EU. Providing and constantly improving normative framework is, without a doubt, necessary, but one should bear in mind that it is only the

equality, while having very well-developed childcare services. Kresal, B., *Reconciliation of work and family life – the role of labour law in the changing economic and social conditions*, Asociación Española de derecho del trabajo y de la seguridad social/ Sociedad internacional de derecho del trabajo y de la seguridad social, Sevilla, 2011.

57. *Equal pay for work of equal value*, [viewed date: 2 July 2021], <https://www.un.org/en/observances/equal-pay-day>.

first step towards equality. In order to make the principle of equality more than (only) provisions in the normative framework, it takes a lot of effort and time. In short, substantive equality refers to employees truly being equal in their rights and duties in practice and achieving professional goals based on objective and professional criteria.

Therefore, based on everything said, it can be concluded that the existence of the gender pay gap shows us the necessity of putting more efforts in order for men and women to be equal in terms of pay in the EU. In this ever-changing world, one is certain – equality is a condition that needs to be fulfilled in order to speak of justice. That is especially true for employment where social justice is one of the crucial goals, and social justice remains only an abstract concept without ensuring equality between men and women.

Talking about Gender and Remuneration in Higher Education in Spain[1]

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I. INTRODUCTION. GENDER AND REMUNERATION IN UNIVERSITY

It is widely known that there are multiple factors that have an impact on labour inequality between men and women, such as occupational segregation, the structure of salary and the criteria for the attribution of bonuses, the complicated compatibility between productive and reproductive tasks, or the impact of part-time work as a result of the distribution of care work and family care[3].

Specially at the University, in the context of a competitive excellence, in which the academia is involved (to publish more and better sooner than later), the gender discourse has been a long time in coming…and it's an obstacle to that. In recent years, in the name of efficiency, productivity and academic excellence, university institutions are increasingly managed as corporations. Both at state and regional levels, but also internally – within

1. This work is carried out within the framework of Project through H2020 *Science with and for Society* (SwafS-2017-1). *ACT CoPs for Accelerating Gender equality and Institutional Change in Research and Innovation across Europe*. GenBUDGET (Gender Budgeting in research organisations). May 2018-April 2021. Grant Agreement No. 788204.

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3. Martínez Moreno, C., "Brecha salarial y discriminación laboral por razón de sexo", in AA.VV., (Acale Sánchez, M.), Brecha de género y Universidad: dos realidades que se retroalimentan, Bomarzo, Albacete, 2020, p. 25.

the universities themselves – new management instruments are emerging as a means of allocating resources to maximise efficiency (performance indicators, incentive mechanisms and evaluation procedures). These financial and management procedures are presented as rational, efficient and accountable for achieving the academic goal of excellence. Nevertheless, this hegemonic international discourse in the academy, that is, the university is planned towards excellence, is often at the expense of gender equality: gender is uncomfortable for excellence[4].

Despite regulatory and institutional efforts to maintain a fair, balanced and equal participation of women and men –promotion of equality standards that started with the Organic Law 3/2007 for effective equality between women and men, also called Equality Act–, gender continues to be a differentiating factor. Being a woman, and especially the association with motherhood, is perceived and made visible as a burden that slows down the academic career of female teachers, minimises their research results and reduces their economic and social value[5]. The high levels of dedication, effort and time required by an academic career (teaching, research, management) are, many times, difficult to reconcile with the family and domestic roles that many female university professors still assume on their own.

In the field of remuneration, in Spain, there is gender pay gap, also at University. Important regulations have recently been approved aimed at overcoming it, such as Royal Decree Law 6/2019 and Royal Decree 902/2020. The second develops the first and specifies aspects as important as the criteria to be taken into account for comparative purposes –value of work (equal pay)– or the remuneration record. They are key aspects to achieve pay transparency, reduce the gender pay gap and eliminate salary discrimination against women[6]. The equal pay regulation is applied to workers in the Public Administration (Additional Provision 4)– to whom it also applies the remuneration system in the public budgets (state, regional and university budgets).

University professors, as workers in a Public Administration, have many peculiarities established in their specific legislation, among others, in the field of remuneration and in accordance with budgetary rules and principles. Here, decision making involves a commitment to set economic

4. Steinþórsdóttir, F,S., Brorsen Smidt, T., Einarsdóttir, Þ., Le Feuvre, N, et alt., "New managerialism in the academy: gender bias and precarity", Gender, Work & Organization, núm. 26 (2019), p.126.
5. Garrido Pérez, E., "Prólogo" en Brecha de género y Universidad: dos realidades que se retroalimentan, ps. 13 y 14.
6. Political Guideline in the UE *Gender Equality Strategy 2020-2025*.

policy in a certain direction. Thus, the existence of pay gaps, will depend on the decision maker and the gender sensitivity. The first difficulty is the structural gender inequality in the university: decisions on financial and managerial procedures and processes are often taken by bodies/positions with a majority presence or held by men. As example, in Spanish universities, women are often far removed from the centres of power: there are only 9 female chancellors compared to 41 male chancellors, and women hold only 22% of full professor positions. The total percentage of female university professors is 41.3%, with a very significant presence among non-permanent professors[7].

It is clear the need to include a gender perspective in financial and managerial decision-making in academic institutions. It is also essential to uncover the differential impact of budgeting on women and men in academia, in order to reconstruct resource allocations to promote gender equality. This implies a broader approach to academic excellence within the contemporary university, through new public management to overcome gender inequality[8] and here, the shaping of the variables considered in the rankings or the criteria for the allocation of research funds can play an important role (gender measures/equality plans)[9]. Today, we can't be excellence without being inclusive.

II. SOME EXPERIENCES OF GENDER BUDGETING AND A FEW MEASURES FOCUSED ON GENDER IN REMUNERATION IN UNIVERSITY

Budgets are not gender-neutral, indeed, budgets can also be an instrument for equality. From this perspective, gender-sensitive budgeting or gender budgeting means gender mainstreaming of the entire budgetary process with a view to incorporating a gender equality perspective to all decisions on revenue and expenditure[10]. Effective implementation of gender budgeting has the potential to improve gender equality, ensure

7. About specific results in Carlos III University, *vid., infra,* III.
8. Steinþórsdóttir, F. S., Heijstra, T. M., & Einarsdóttir, T., "The Making of the 'Excellent' University: A Drawback for gender Equality". Ephemera. Theory & Politics in Organization, núm. 17, (2017), pp. 557 y ss.
9. Gabriel, M., European research and innovation days. Get ready: a new era for equality is calling (22.9.2020) (<https://icmab.es/equality-plans-will-be-an-eligibility-criterion-in-the-future-horizon-europe-programme>).
10. Simoes, C., Calatozzolo, R., EU Gender budgeting: where do we stand?, >https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/660058/IPOL_BRI(2020)660058_EN.pdf>, European Parliament, October 2020, p. 1., *Vid.,* Addabbo, T., Gunluk-Senesen, G. y O'Hagan. A, "Gender budgeting: perceptions of current

a sense of fairness and contribute to inclusive economic growth[11]. Its origin is at the Beijing World Conference on Women (China, 1995) where governments were urged to incorporate a gender perspective in the design, development, adoption and implementation of all budgetary processes to achieve gender equity.

The EU began to engage in the promotion of gender budget analysis at the beginning of the 21st Century, with the organisation of an International Conference on Gender Responsive Budget Processes promoted by the Belgian Presidency of the EU in 2001. The final communication of the conference urged governments and other actors to incorporate gender analysis at all stages and levels of the budget process, to promote transparency and accountability, and to report on the impact of budgets on gender equality objectives. It also proposed a deadline of 2015 for implementation in all Member States. Since that Conference, both the Commission and the European Parliament have been in favour of incorporating gender budgeting as a relevant instrument for mainstreaming gender in public policy. Countries as Sweden, Finland, Norway, Austria, Belgium, France, Italy and the United Kingdom[12] began to do it. In this context, the first practical experiences also began to be carried out in Spain[13] even before the Organic Law 3/2007 included

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methodologies and experiences in Europe", Journal of Economic Policy, XXXI (2), 2015, ps. 125 y ss.

11. Downes, R., Nicol S., Designing and implementing gender budgeting – a path to action, OECD, 2020.

12. Bellamy, K., Gender Budgeting. A Background paper for the Council of Europe's Informal Network of Experts on Gender Budgeting, UK Women's Budget Group. November 2002 (<https://wbg.org.uk/wp-content/uploads/2016/11/Gender-Budgets-Council-of-Europe-Bellamy-2003.pdf>); Budlender, D., Elson, D., Hewitt, G., Mukhopadhyay, T., Gender Budgets Make Cents, Commonwealth Secretariat, IDRC CRDI, UNIFEM, 2002.

    However is highlighted an insufficient application of gender budgeting in practice and the absence of progress in terms of gender-budgeting between 2015-2017 (Simoes, C., Calattozolo, [European Parliament] R., EU Gender budgeting: where do we stand?, cit., p. 1).

13. Jubeto Ruíz, Y., "El análisis presupuestario con enfoque de género: un instrumento feminista clave para avanzar en la equidad socioeconómica", Ekonomiaz, núm 1 (2017), ps. 306-307. Initially, 6 initiatives were developed at different political-administrative levels in Spain (state, regional and provincial): a) Central government, whose legal framework represents the umbrella for the rest of the initiatives and, in addition, the importance of the feminist movement in the process is significant in this case (*vid*., Manifiesto feminista ante los presupuestos del Estado para 2021, <http://impactodegeneroya.blogspot.com/p/pge-2021.html>), b) At the regional level, the Basque Autonomous Community and the Junta de Andalucía, pioneers, followed by the Generalidad Valenciana, c) At the provincial level, the Consell de Mallorca and the Diputación Foral de Guipúzkoa (Gil

an express provision in this sense: "*The principle of equal treatment and opportunities between women and men shall inform, in a cross-cutting manner, the actions of all Public Authorities. Public administrations shall actively integrate it in the adoption and execution of their regulatory provisions, in the definition and budgeting of public policies in all areas and in the development of all their activities as a whole*".

At the state level, gender impact reports have been drawn up on the basis of a common methodology (reality, representation and resources/results) and each budget programme is classified according to its gender relevance (high, medium and low). For its part, at the regional level, the Junta de Andalucía has a longstanding experience that started in 2003; a strategy of gender mainstreaming in general policies through the public budget, as a complementary (and necessary) way to specific equality policies[14]. Here the 3R methodology is accompanied by the 3T (past, present and future) and the report transcends the annual budget calculation by measuring each of the 3Rs in terms of the 3Ts, configuring an evaluation in three sections: Equality in reality (past and present), representation (present and future) and resources (future)[15].

In Spain, this regional level is important because education is a competence transfered and a large part of the money received by universities and their staff comes from this source. In the *Gender Impact*

Junquero, M., Los presupuestos con perspectiva de género en el Estado Español, Tirant lo Blanch, Valencia, 2018).

14. In the Community of Madrid, the 2018 general budgets incorporate the gender impact report for the first time (Resolution CAM 19/2017, of 1 June). The experience is, for the time being, quite limited, and is reduced to the analysis by sections and spending programmes with disaggregated indicators and with reference to gender impact, where appropriate. The Madrid City Council, for its part, initiated the experience for the 2017 budgets.

15. <https://www.juntadeandalucia.es/organismos/haciendayfinanciacioneuropea/areas/presupuestos/genero/paginas/genero-informe-indice.html>. In the development of the strategy, the need arose to design a working system that would make the process of institutionalising the gender dimension in the diagnosis, definition, execution and monitoring of budgetary policies sustainable and provide depth to the process, which led to the adoption of the G+ Programme methodology in 2007. The objective of this programme is to identify and classify budget programmes according to a scale designed for this purpose called the G+ Scale, based on their capacity to influence the obstacles that impede effective equality between women and men. Subsequently, to achieve a commitment on the part of the management centres and, finally, to monitor and evaluate the actions implemented and the progress achieved. (<https://www.juntadeandalucia.es/organismos/haciendayfinanciacioneuropea/areas/presupuestos/genero/paginas/genero-gplus.html>).

Report of Andalusia budget 2021[16], in the section on Resources-results in the university sphere[17], the following are identified as relevant factors for advancing gender equality:

A.1. The preparation of reports on the evolution of Teaching and Research Staff (PDI) and Administration and Services Staff (PAS), according to sex and including their inequalities. It can be seen that women face an important conflict between family and success in academic life, a conflict that exists to a lesser extent for men. Secondly, men's chances of promotion to full professor are significantly higher than those faced by a woman with similar personal and professional characteristics. Women, especially when they have family responsibilities, face a glass ceiling in their promotion to the highest academic positions.

A.6. The promotion of work-life balance. Directly related to the above mentioned point, university work-life balance plans can encourage women to take on positions of responsibility or to devote more time to research, on which access to full professor positions depends. For this reason, one of the coordination and support plans include the recognition of the effort made to achieve gender parity.

Despite all, we can affirm that, at the state and the regional levels, where University professors and researchers' salaries are set in Spain, the projection of gender budgeting as a tool of gender equality is, by the moment, very limited (even in Andalusia). Nevertheless, there is also a third level of wage setting. Universities themselves can locate some instruments inspired by the logic of gender-sensitive budgeting, trying to compensate the time dedicated to care by women so that, in the context of competitive excellence, they are not harmed in remuneration. At Carlos III University (UC3M hereinafter), after the approval of Organic Law 3/2007, some measures were adopted to support research for effective equality between women and men, which would later be incorporated into the University's First Equality Plan[18]. These measures are aimed, on the one hand, at correcting the negative gender impact of rigid schemes based on time and productivity by extending the periods subject to evaluation

16. Since the 2005 budget year, the gender impact report has accompanied the budget act in Andalusia. Furthermore, since 2009, the report has the status of documentation annexed to the preliminary draft of the budget law and, therefore, it is sent to the Governing Council for approval. The report is a key part of the gender budgeting strategy.
17. Regional Ministry of Economic Transformation, Industry, Knowledge and the University (<https://www.juntadeandalucia.es/export/proy-presupuestos2021/genero/informe-5-2-7.pdf>).
18. Approved by the Governing Council UC3M on 8 April 2010.

after maternity and, on the other hand, at compensating for the necessary greater dedication to the child in the first stage, by recognising reductions in the teaching load while maintaining the salary. Specifically:

1. Extension of the assessed period, from 5 years to 7, for women with children. Without measures like this, women in a certain age group (female childbearing age) will be penalized in their productivity bonus assessment (publications) in favour of men.
2. Reductions in the teaching load (50%) without a cutting in salary during the following two years after the maternity leave[19].
3. Only for permanent staff, in the specific allocation for productivity in research (*sexenios*), the enlargement of the assessed period (from 6 to 8 years).

Measures 1 and 2 are applied to permanent and non-permanent staff at the University but, for the second group, their effect is important as they do not have a high salary level. However, these are internal measures focused essentially on women and, today, the legal framework goes in the direction of equality with co-responsibility (Royal Decree Law 6/2019). Revisiting the current model is required for women and men with care responsibilities (negative impact on their professional careers as researchers). Doing nothing means not overcoming the exclusive role of caretaker women and here the law could encourage the social change.

III. PARTICULAR ANALYSIS FROM DATA: NON-PERMANENT PROFESSORS' WAGES AND GENDER PAY GAP AT CARLOS III UNIVERSITY

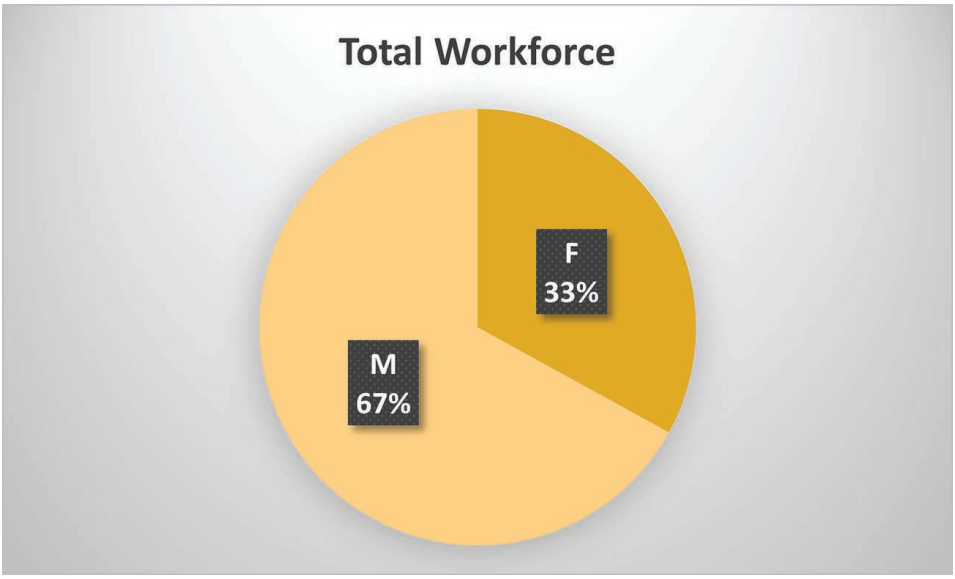
Within this framework, our research focuses on analysing gender pay gap at UC3M. Particularly, the University has provided data on remuneration, disguising among gender, wage bonuses and charge supplements.

Before analysing this data, it is necessary to take into account the general structure of the workforce at UC3M. According to the following graph, employees are divided, from a gender perspective, in thirds. Concretely, male employees mean two thirds of the total workforce, whereas female employees represent a third. This distribution is generally kept if it is distinguished between permanent and non-permanent

19. The University's Human Resources Service budgets the affected Departments for the hiring of substitute professors to take on the other 50% of the uncovered teaching load.

employees. Whereas the first ones show a repartition of 60% and 40% respectively; the second ones give figures of 34% and 65%. Hence, despite the small differences, we can assume that the whole workforce follows a gender distribution of two third-one third. This situation is particularly important in order to analyse the subsequent data and, particularly, to know if females o males are *infra* or *supra*-represented compare to their weight in the workforce.

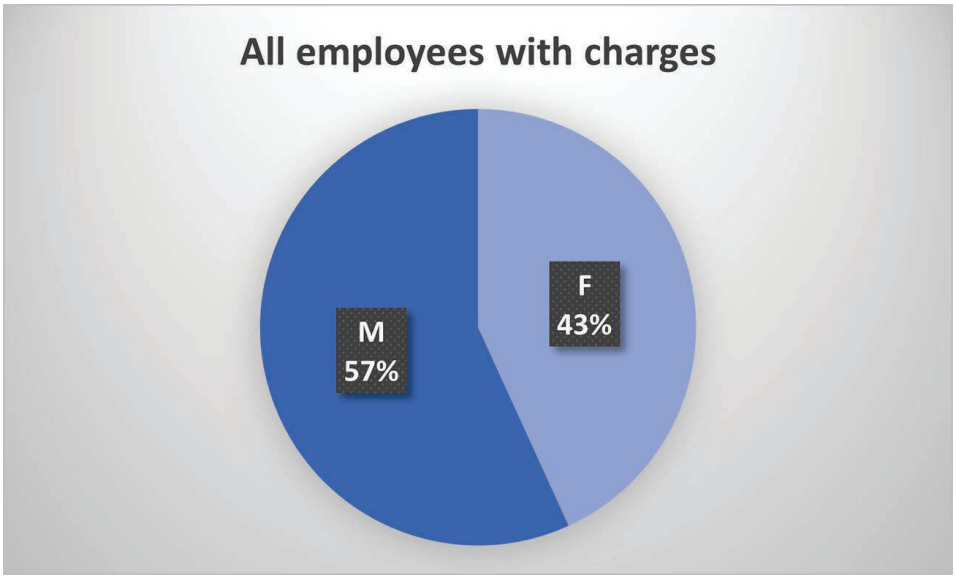
Graph 1



Source: own elaboration based on UC3M's data.

Consequently, keeping in mind this distribution, the following step is to know how salary supplements regarding charges are assigned. As it was explained above, charges can be remunerated or non-remunerated. Within the first ones, two types can be distinguished. On the one hand, those attributed by the University itself (general charges). Oh the other hand, those assigned by departments, institutes and other minor entities (specific charges). The following Graph shows the gender distribution of employees with remunerated charges. This includes all kind of employees, both permanent and non-permanent. As it can be seen, the repartition is slightly favourable to female employees as they have a representation which is 10 p.p. above their weight in the workforce.

Graph 2

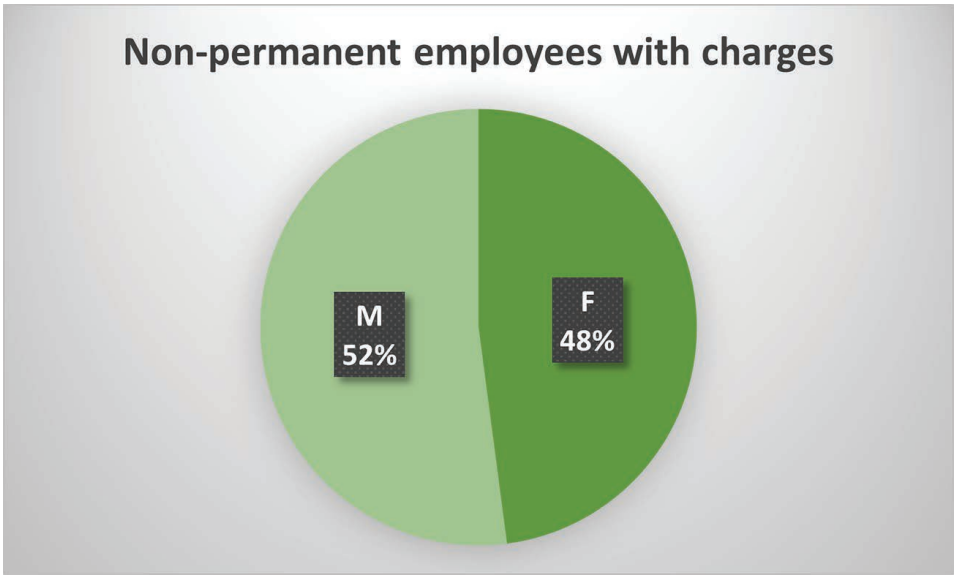


Source: own elaboration based on UC3M's data.

Nevertheless, the situation can be even better. Whether it focuses on non-permanent employees (Graph 3), this difference increases up to 15 p.p. This means that, among non-permanent employees, charges with wage supplements are distributed almost equally. This apparently good news can hide, however, a perverse effect linked to the idea that charges could be used to compensate structural precarity. If female employees are worse remunerated or have more unstable (and worse paid) positions than male employees, this more balanced situation could show, not a higher consideration, but an officious form of compensation[20].

20. Steinþórsdóttir, F,S., Brorsen Smidt, T., Einarsdóttir, Þ., Le Feuvre, N,y otros, "New managerialism in the academy: gender bias and precarity", *op, cit*., pp. 124-139.

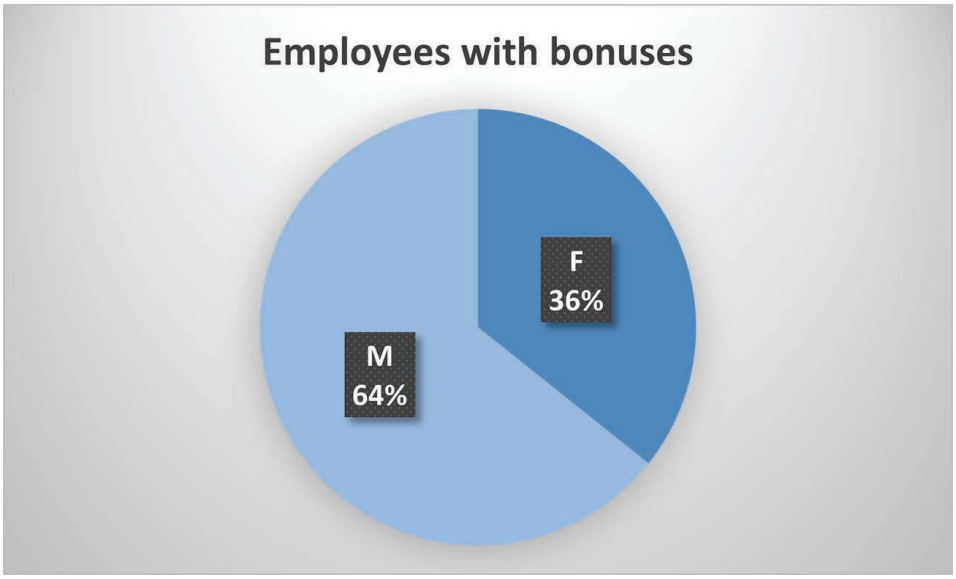
Graph 3



Source: own elaboration based on UC3M's data

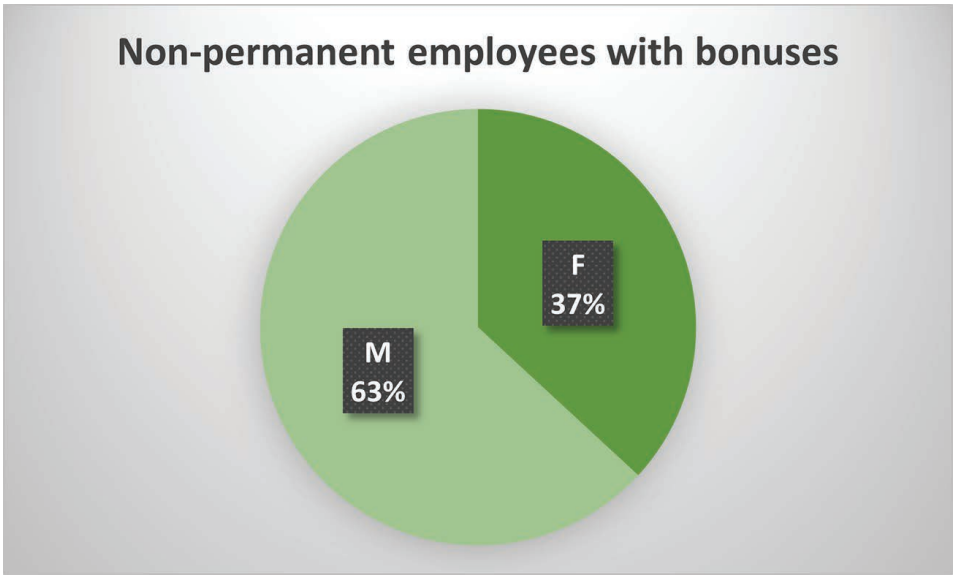
If it pays attention to wage bonuses, the following two graphs show the distribution among females and males employees for the total workforce and for non-permanent employees. This includes all types of wage bonuses, that is, those which are recognized by the collective bargaining agreement and those which assigned according to the UC3M's wage incentive program. The first ones are quite stable and provide a flat amount of money which is distributed almost proportionally. As a consequence, most important differences are explained by the type of contract and the wage incentive program. Here, we are going to focus on the program solely.

Graph 4



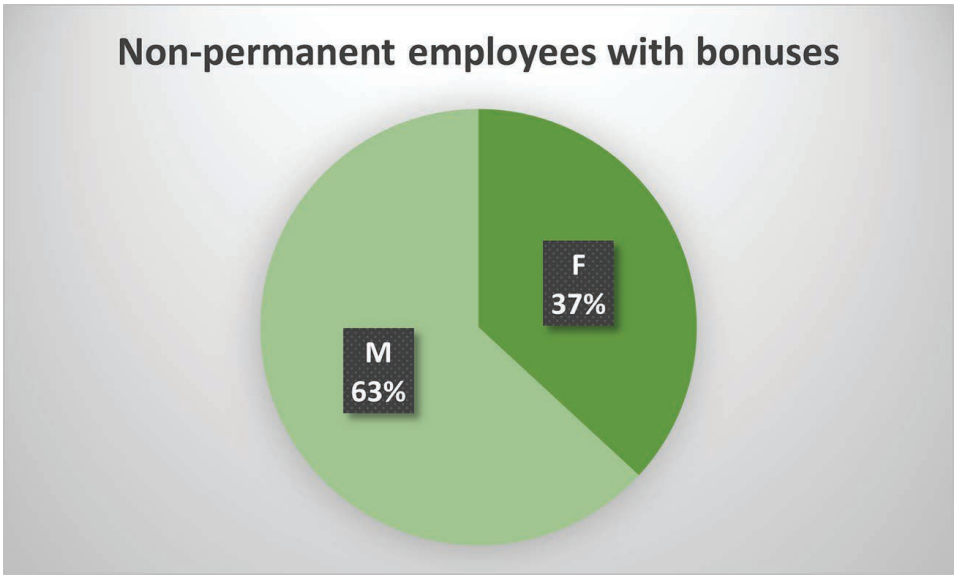
Source: own elaboration based on UC3M's data

Graph 5



Source: own elaboration based on UC3M's data

Graph 6



Source: own elaboration based on UC3M's data

As it can be seen, the proportion of bonuses for both the whole workforce and non-permanent follows a distribution which is quite similar to the weight of each sex in the whole workforce. This means that, if differences exist, they must be connected to the type of bonus which is assigned to each group, but not with the number. As a consequence, our analysis also aims to determine who the different levels of bonuses are distributed among female and male employees, besides the remuneration assigned to each kind of contract excluding bonuses.

IV. CONCLUSIONS

Despite regulation on equal treatment was set more than a decade ago, some areas of implementation, such as gender budgeting has been scarcely developed in Spain. This poor result includes the application of gender budgeting approach to salary incentives or remuneration systems.

The lack of attention to these issues determines serious difficulties in the development of females' academic career, including the part of the salary which depends on their teaching and researching results. Particularly, taking UC3M as case of analysis, it can be concluded that, despite charges with wage supplements are distributed almost equally, this apparently

good news can hide, however, a perverse effect linked to the idea that charges could be used to compensate structural precarity. If female employees are worse remunerated or have more unstable (and worse paid) positions than male employees, this more balanced situation could show, not a higher consideration, but an officious form of compensation.

On the other hand, if it pays attention to wage bonuses, the distribution among female and male employees for the total workforce and for non-permanent employees. This means that, if differences exist, they must be connected to the type of bonus which is assigned to each group, but not with the number. As a consequence, our analysis also aims to determine how the different levels of bonuses are distributed among female and male employees, besides the remuneration assigned to each kind of contract excluding bonuses.

Gender-Based Cyberviolence at Work

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I. INTRODUCTION

If there is a situation in which human rights are clearly violated, it's one in which a human being is harassed, humiliated or attacked by another human being. When this act of harassment occurs in the workplace, we speak of moral harassment as a form of violence at work. When it occurs against a woman for the fact of being a woman, we speak of sexual or sexist harassment as manifestations of gender violence. When aggression occurs through information and communication technologies, we speak of cyberviolence. When all these elements come together we find ourselves faced with gender-based cyberviolence at work, a reality that may seem easy to acknowledge but which in practice is not so easy to define or deal with from a current legal point of view.

The goal of this work is to analyse if the only difference between cyberviolence and others forms of violence is the use of technological means, or if, on the contrary, it has specific profiles, which create one type of violence against which the measures provided by the legislator may be insufficient.

In the first part, we attempt to provide an analysis of "the terms of the equation". To do this, we have reviewed the Spanish legal framework in both the international and European Union contexts.

The second part addresses the result of the conjunction of these elements. It deals with the concept of gender-based cyberviolence at work and its peculiarities; and it provides some (few) data about the prevalence of this type of violence. It should be noted that the concept we are dealing with in this study is broader than "direct harassment" and includes other behaviours likely to cause harm in the context of work.

The peculiarities of this violence (it can occurs outside of the physical scope of the company's facilities; during non-working time; with means that may be personal; being involved not only superiors, colleagues or clients, but even unknown people) highlight the difficulties of providing an adequate response by the legal system. But, despite the difficulties, we cannot give up. On the contrary, we must seek solutions within the standards of each country, in the context of both the international and European Union frameworks (for European Union countries, obviously). In this sense, the third part of this work deals with the possible legal remedies that we can obtain today, specifically in the Spanish legal system.

The main idea we deal with is the necessity to deepen in the study of this reality in order to avoid risks in the context of work, to evaluate them in case that they cannot be avoided, and to combat them when they occur, all within the framework of the legislation and labour practice of each country.

II. THE TERMS OF THE EQUATION

1. WORKPLACE VIOLENCE

Workplace violence, Occupational violence, Work-related violence, Violence on the Job… are expressions that have been used to name a reality that is almost impossible to define due to the enormous variety of behaviours it encompasses, on which there is not even a coincidence in their denomination (harassment, mobbing, bulling, stalking…) or characteristics.

In the European Union context, despite being a widespread phenomenon[1], there is no a legal definition applicable in all member states[2]. Until now, the most effective and decisive intervention has been the European framework agreement on harassment and violence at work[3] negotiated in 2007 by the European cross-industry social

1. The 6th European Working Conditions Survey (2015, last available today) reports that "around 16% of workers – more women than men – report exposure to adverse social behaviour" (Executive summary, page118), <https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1634en.pdf>.
2. "Definitions used in legal provisions differ between countries", Eurofound (2015), Violence and harassment in European workplaces: Causes, impacts and policies, Dublin (page 7) <https://www.eurofound.europa.eu/sites/default/files/ef_comparative_analytical_report/field_ef_documents/ef1473en.pdf>.
3. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2007%3A0686%3AFIN>.

partners. This agreement declared that "harassment and violence are due to unacceptable behaviour by one or more individuals and can take many different forms, some of which may be more easily identified than others", and "may be carried out by one or more managers or workers, with the purpose or effect of violating a manager's or worker's dignity, affecting his/her health and/or creating a hostile work environment". About the comportments, the text states that "they can be physical, psychological and/or sexual; be one off incidents or more systematic patterns of behaviour; be amongst colleagues, between superiors and subordinates or by third parties such as clients, customers, patients, pupils, etc.; range from minor cases of disrespect to more serious acts, including criminal offences, which require the intervention of public authorities".

World Health Organization (WHO) and International Labour Organization (ILO), jointly[4] and separately[5] have been stating for a long time that Workplace violence – physical or psychological – has become a global problem that cuts across borders, work contexts and professional groups.

To respond to the preoccupation for that reality, the ILO has adopted the C190-Violence and Harassment Convention 2019[6], according to which "the term "violence and harassment" in the world of work refers to a range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and harassment.

There are many positive aspects of the C-190 Convention (recognising the right of everyone to a world of work free from violence and harassment, including gender-based violence and harassment; recognising that violence and harassment in the world of work can constitute a human rights violation or abuse…[7]) but the most relevant for the purposes that

4. "Workplace violence has grown in importance in recent years and now is a priority concern in both industrialized and developing countries", *Directrices marco para abordar la violencia laboral en el sector de la salud*, OIT-OMS, Ginebra, 2002. <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_160911.pdf>.
5. Chappell, D. and Di Martino,V., *Violence at Work,* Geneva, International Labour Office, First edition, 1998; Third edition, 2006, <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_publ_9221108406_en.pdf>.
6. First ILO Convention dedicated to this matter. Adopted in 2019, at this moment it has been ratified by Argentina, Ecuador, Fiji, Mauritius, Namibia, Somalia, South Africa, Uruguay and, as the only European countries, Greece and Italy.
7. Lousada Arochena, J.F., "El convenio 190 de la Organización Internacional del Trabajo sobre violencia y acoso en el trabajo", Revista de Derecho Social n° 88,

interest us at this moment is the extensive delimitation of its scope of application.

The Convention protects workers and other persons in the world of work, including employees as defined by national law and practice, as well as persons working irrespective of their contractual status, persons in training, including interns and apprentices, workers whose employment has been terminated, volunteers, job seekers and job applicants, and individuals exercising the authority, duties or responsibilities of an employer; and applies to violence and harassment in the world of work occurring *in the course of, linked with or arising out of work* in several places (in the workplace, including public and private spaces where they are a place of work; in places where the worker is paid, takes a rest break or a meal, or uses sanitary, washing and changing facilities; in employer-provided accommodation) and circumstances (during work-related trips, travel, training, events or social activities; when commuting to and from work), expressly including "through work-related communications, including those enabled by information and communication technologies".

In the Spanish legal system the only references we have to understand workplace violence is provided by the Instituto Nacional de Seguridad y Salud en el Trabajo (National Institute for Occupational Safety and Health). According to which "we speak of workplace violence when the staff of a work center suffers abuses, threats or attacks related to their work activity, which put in danger, implicitly or explicitly, their safety, well-being or health (physical or mental), including both physical violence and psychological violence"[8].

Common themes in the international texts mentioned are the breadth of the definition in terms of the behaviours and in terms of the subjects who may be victims or aggressors. The main element is that the behaviours occur or have their consequences not necessarily in the workplace but in the work context. One of the most important actions of national legislation in different countries should be to specify these terms so that the standards described would be truly applicable.

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páginas 55 a 74; Fernández Avilés, J.A., Nuevos instrumentos internacionales para combatir la violencia y acoso en el mundo del trabajo. (Parte I: fundamentos y elementos conceptuales) <http://www.observatorioriesgospsicosociales.com/sites/default/files/publicaciones/Boletin%2030%202019%20WEB.pdf>; (Parte II: medidas de actuación y obligaciones) Observatorio de riesgos psicosociales de UGT. Boletín Informativo n° 30, septiembre de 2019 y n° 31, noviembre 2019, <http://www.observatorioriesgospsicosociales.com/sites/default/files/publicaciones/Boletin%2031%20WEB.pdf>.

8. <https://www.insst.es/violencia-en-el-trabajo>.

2. GENDER-BASED VIOLENCE

The Platform for action of the United Nations Fourth World Conference on Women (Beijing 1995)[9] states that the term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life".

For the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention, 2011) "violence against women" is understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life".

In the European Union there is no general normative instrument in relation to gender-based violence, although a definition of it can be found in the Directive 2012/29/EU about victims of crime[10], which express that "violence that is directed against a person because of that person's gender, gender identity or gender expression or that affects persons of a particular gender disproportionately is understood as a gender-based violence".

Nevertheless, the specific manifestations of this kind of violence in relation to work have been regulated for a long time by the Directive 2002/73/EC[11]. At present Directive 2006/54/EC[12] defines "harassment" as "unwanted conduct related to the sex or a person occurs with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment"; a "sexual harassment" as "any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect

9. Inheriting the notions elaborated in the Convention on the Elimination of all Forms of Discrimination against Women, New York (1979) and the Declaration on the Elimination of Violence Against Women (1993).
10. Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.
11. Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.
12. Directive 2006/54/EC of the European Parliament and of 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).

of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment".

According to these international instruments, it is clear that any act of violence against women will be considered gender-based violence, regardless of the area in which it occurs, including (obviously and notably) a labour context, but the Spanish law that specifically regulates this matter at the time chose to limit the legal concept of "gender-based violence" to that which occurs within affective relationships, leaving out the violence that is exercised against women in other contexts, such as that of labour relations. Thus, despite the fact that at the state level we have a Comprehensive Protection Law against gender-based violence, we do not have a law that defines and treats gender-based violence in a "comprehensive" way. However, the norms adopted in the different autonomous regions do reflect a broad notion of gender violence, which includes all its manifestations and all the areas in which it may occur[13].

This does not mean, however, that gender violence in the workplace does not have a response from the Spanish regulatory system. What it implies is that you have to look for that answer in different precepts of different laws. Specifically, in relation to the concept, it will be the Law of effective Equality between women and men which, transposing the community regulations to which we have just alluded, defines sexual harassment and harassment based on sex as manifestations of gender violence, meaning sexual harassment "any behaviour, verbal or physical, of a sexual nature that has the purpose or produces the effect of undermining the dignity of a person, in particular when an intimidating, degrading or offensive environment is created"; and as harassment based on sex "any behaviour carried out based on the sex of a person, with the purpose or effect of undermining their dignity and creating an intimidating, degrading or offensive environment". Although these concepts do not refer exclusively to the workplace, they are perfectly transferable to it (it could not be any other way, since it is the transposition into Spanish law of a specifically labour law) and allow us to fix, therefore, this term of the equation[14]

13. As a sample of this, the Law 13/2007 on prevention and comprehensive protection measures against gender-based violence in Andalusia, which defines gender-based violence as "that which, as a consequence of a sexist culture and as a manifestation of discrimination, situation of inequality and the power relations of men over women, is exercised over these by the fact of being and that extends as a form of vicarious violence against the victims that are contemplated in this Law", including "any act of gender-based violence that implies or may entail for women damage or suffering of a physical, psychological, sexual or economic nature 'as well as' threats to carry out said acts, coercion or arbitrary deprivation of their liberty, whether they occur in public and private life".

14. Pérez del Río, T., *La violencia de género en el ámbito laboral: el acoso sexual y sexista*, Bomarzo, Albacete, 2009; Fuentes Rodríguez, F., "Violencia de género en el ámbito

3. CYBERVIOLENCE

It is nothing new to point out that for some decades the essential transformations that are taking place in the organisation of work, in the economy and, in general, in society, come from the hand of digital technologies. The pace of evolution of these technologies is such that, except perhaps for the so-called "digital natives", it is difficult to monitor them, even in the use of language. In this context, personal relationships have been radically transformed by the application of these technologies to the field of information and communication.

Social networks, as the most obvious form of these new technologies, have been a great advance for society in terms of communication possibilities. It's enough to think about how confinement would have been during the pandemic without the existence of these means, which have facilitated that the population in general, and the elderly in particular, have been able to cope much better with the situation of isolation. But, at the same time, these powerful technologies are facilitating unwanted behaviours that take advantage of the characteristics that they offer (amplification, difficulty of control, anonymity) and that are becoming generalised, in a highly worrying way.

We can find a wide variety of behaviours (cyberbullying[15]; grooming[16]; sextorsión[17]; cyberstalking[18], cyberharassment[19], etc.), in constant

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laboral: acoso sexual y acoso por razón de sexo en el ordenamiento jurídico español", en AA.VV., *La universidad como sujeto transformador de la realidad social en materia de igualdad de género*, QBook, Cádiz, 2018, p. 51-65; Bernal Santamaría, F. and Benito Benítez, M.A., "El acoso sexual y sexista: análisis normativo y doctrinal", en AA.VV., *Análisis de la realidad del acoso sexual y sexista en la universidad y propuestas de mejora: un análisis de caso*, Tirant Humanidades, Valencia 2020 p. 57-92.

15. "Harassment behaviour between equals in the ICT environment, and includes acts of blackmail, humiliation and insults of children to other children"; *Guide to action against cyberbullying* of the National Institute of Communication Technologies, in <http://www.injuve.es/convivencia-y-salud/guia-de-actuacion-contra-el-ciberacoso>.
16. "Harassment exercised by an adult and refers to actions carried out deliberately to establish a relationship and emotional control over a child in order to prepare the ground for the sexual abuse of the minor. It could be said that they are situations of harassment with an explicit or implicit sexual content"; *Guide to action against cyberbullying,* cit.
17. A situation that occurs "when someone threatens to distribute your private and sensitive material if you do not provide images of a sexual nature, sexual favors or money"; *Sextortion: this is how online sexual blackmail works*, in <https://protecciondatos-lopd.com/empresas/sextorsion/#En_que_consiste_la_sextorsion>.
18. This denomination is assigned to various behaviours: on the one hand, as a form of aggression in which the perpetrator repeatedly bursts into the life of the victim, disruptive; on the other hand, such as spying on a person.
19. Action to carry out "threats, harassment, humiliation or other type of attacks carried out by an adult against another adult through telematic communication technologies; definition contained in *Guide to action against cyberbullying,* cit.

evolution, in line with the development of the same technologies that serve as support. In general, these behaviours receive the generic name of "cyberviolence" defined as "the use of computer systems to cause, facilitate, or threaten violence against individuals that results in, or is likely to result in, physical, sexual, psychological or economic harm or suffering and may include the exploitation of the individual's circumstances, characteristics or vulnerabilities"[20].

Some conclusions can be drawn from the studies that are being carried out in relation to this (not so) emerging and progressive reality:

- Although these behaviours are not something totally different from the harassment behaviours that develop in the life that we call "real", they have specific elements that make them even more harmful.
- It is not about eliminating the use of technology (which would be a totally unrealistic approach), but knowing where the dangers are in order to avoid them.
- Although these behaviours don't happen *only* against women and girls, they *mostly* happen against women and girls[21].

This interrelation between cyberviolence and gender-based violence is receiving increasing attention and, as an example of this, in Spain some of the regional norms on gender violence to which we referred already contemplate this type of behaviour[22].

20. *Mapping study on cyberviolence*, Working Group on cyberbullying and other forms of online violence, especially against women and children, Council of Europe, july 2018, page 5, in <https://rm.coe.int/t-cy-2017-10-cbg-study-provisional/16808c4914>.

21. Cyberviolence against women and girls, European Institute for Gender Equality (2017), in <https://eige.europa.eu/publications/cyber-violence-against-women-and-girls>; Cyberviolence against women and girls: a world-wide wake-up call, A report by the Broadband commission for digital development working group on broadband and gender, in <https://www.unwomen.org/~/media/headquarters/attachments/sections/library/publications/2015/cyber_violence_gender%20report.pdf?v=1&d=20150924T154259>.

    In Spain, El ciberacoso como forma de ejercer la violencia de género en la juventud: un riesgo en la sociedad de la información y del conocimiento, Delegación del Gobierno para la violencia de género, Ministerio de Sanidad, Servicios Sociales e Igualdad, in <https://violenciagenero.igualdad.gob.es/violenciaEnCifras/estudios/colecciones/pdf/Libro_18_Ciberacoso.pdf>.

22. Thus, the aforementioned Andalusian Law on prevention and protection against gender violence (art. 3.4.m) defines cyberviolence against women as "that gender violence in which social networks and information technologies are used as means to exercise damage or dominance, including cyberbullying, cyber threats, cyber defamation, non-consensual pornography, insults and harassment on the basis of gender, sexual extortion, the dissemination of images of the victim and threats of rape

The unwanted use of digital technologies can occur in any field, and the labour context is not excluded, as shown by the studies published on the subject[23] and the reports made in this regard[24], to which we will have the opportunity to refer.

III. THE RESULT

The result of the conjunction of these three elements is situations of gender-based cyberviolence at work, which, at first, we can define as acts that cause or may cause harm or suffering to women in the workplace committed using the technologies of the information and communication.

ILO Violence and Harassment Convention 190, to which we have already referred, focuses attention on the elements of this reality. On the one hand, specifically addresses "gender-based violence and harassment", which is defined as "violence and harassment that are directed against people based on their sex or gender, or that disproportionately affect people of a specific sex or gender, and includes sexual harassment". On the other hand, it expressly includes violence and harassment "that occurs in the framework of communications that are related to work, including those made through information and communication technologies"[25]. In this sense, as has been pointed out, the agreement is a "child of its time"

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and of death". In similar terms Law 3/2011, of March 1, on prevention, protection and institutional coordination in matters of violence (La Rioja), Law 4/2018, of October 8, for a society free of gender violence (Castilla-La Mancha; Law 5/2008, of April 24, on the right of women to eradicate sexist violence (Cataluña) recently modified by Law 17/2020, of December 22, incorporating in its article 4.2.f the definition of digital violence. Nevertheless, this precept has been the subject of a constitutional review (n° 1719-2021), so it will be necessary to pay attention to see the result of it.

23. In the Spanish labour doctrine: De Vicente Pachés, F. *Ciberacoso en el trabajo*, Atelier, Barcelona, 2018; López Rodríguez, J., "Caracterización jurídica del ciberacoso laboral, en AA.VV., *La revolución tecnológica y sus efectos en el mercado de trabajo. Un reto del s. XXI*, Wolters Kluwer, p. 361-38; Molina Navarrete, C., *El ciberacoso en el trabajo. Como indentificarlo, prevenirlo y erradicarlo en las empresas*, La Ley, Madrid, 2019; Álvarez del Cuvillo, "El ciberacoso en el trabajo como categoría jurídica", Temas Laborales n° 157, 2021, p. 167-192.

24. "System needs update": Upgrading protection against cyberbullying and ICT-enabled violence and harassment in the world of work, <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_736235.pdf>.

25. Coto Aubone, M., "El Convenio N° 190 de la OIT y su regulación respecto a las tecnologías de la información y la comunicación en el mundo del trabajo", Noticias Cielo n° 9, 2020, en <http://www.cielolaboral.com/wp-content/uploads/2020/10/coto_noticias_cielo_n9_2020.pdf>.

and it does not forget that violence carried out through these technologies, which is becoming widespread, is also present in the workplace[26].

In the same sense, within the European Union these elements are connected and it is stated that "sexual and psychological harassment continue to be serious problems in different social settings, including the workplace, public spaces, virtual spaces. such as the internet and political life and which are carried out more and more frequently using new technologies, for example websites or social networks, which allows their authors to feel safe under the protection of anonymity"[27].

1. BEHAVIOURS

In the development of these attacks, the communication systems used can be very diverse (email, WhatsApp or other instant messaging systems, social networks …); the means used (computers, tablets, mobile phones …) may belong to the company, the harassers or even third parties; behaviours can be very varied and the possibilities of harm infinite. It is therefore necessary that the notions that are handled are broad enough to be able to cover all possible phenomena. However, it is also necessary to make a list, even if it is indicative, of the behaviours to which we refer so that we know what are we facing. In this sense, and without the intention of being exhaustive (which would be impossible given the evolutionary speed of this type of phenomenon) the following behaviours have been described, which may have repercussions in the context of work[28]:

- Direct cyber harassment: the perpetrator repeatedly directs unwanted electronic communications to the victim. Specifically, messages with sexual content or sexist content. These may be the behaviours that can be better identified as traditional forms of harassment in "real" life.
- Indirect cyber harassment: the perpetrator directs unwanted electronic communications only once, being other subjects who are in charge of reiterating the harmful behaviour through forwarding to other people, thereby achieving an amplification of the message

26. Fernández Avilés, *op. cit.,* p. 16.
27. European Parliament resolution of 11 September 2018 on measures to prevent and combat mobbing and sexual harassment at workplace, in public spaces, and political life in the EU (2018/2055(INI).
28. Protocolo de detección e intervención en la atención a víctimas de ciberdelincuencia de género, Instituto Andaluz de la Mujer, en <https://violenciagenero.org/sites/default/files/protocolo_ciberdelincuencia_iam.pdf>.

that is difficult to control. Notably, co-workers expenses, but they can be clients or users (and even strangers), who would serve as a transmission belt for the message sent by the first sender.

- Dissemination of messages that affect the reputation of the victim (be they insulting or not) and that may affect their possibilities of employment (job interview), their maintenance or their consideration by colleagues within the company.
- Dissemination of images that, in the same way, affect the reputation of the victim. As a specific form of harm, the dissemination of images of sexual content of the victim. Although this behaviour has been called "revenge pornography", we must be clear that the use of this terminology implies a new victimisation of the woman who is already a victim, attributing the qualification of pornographic to her sexual behaviour.
- Impersonation of the victim in social networks to damage their image or to have negative consequences, such as pouring opinions against the company that may lead to a negative consequences in their professional development, or even dismissal.
- Discovery and disclosure of secrets. Stealing data, photos, videos, accounts, profiles, etc. of the victim through whose use the described conducts, or others, can be carried out.

As has already been said, the means by which they occur cause these behaviours to have notes that make them especially noxious.

In the first place, the use of these technologies makes it easier for attacks to occur anytime and anywhere (24 hours a day, 7 days a week), so there are no "safe" spaces or times. There is no separation between the work space, in which the harassment attacks are suffered, and the personal space, in which the victim can feel safe and makes it easier for them to "recover" psychologically.

On the other hand, moral disengagement, understood as a socio-cognitive process by which human beings are capable of harming others without having a bad conscience, is much greater in cyberbullying. The absence of physical contact causes less empathy with the victim, who is "objectified" in some way, and less remorse.

This distance between the real world and the virtual world can embolden the aggressor: the home and personal spaces of the victim can be invaded, who may feel less capable of protecting themselves from the bully. And this is aggravated by the feeling of impunity caused by the

possibility of maintaining anonymity and by the lack of direct observers, fewer "witnesses", which creates more possibilities to carry out the conduct.

Specifically in the labour field, the use of information and communication technologies means that this type of violence has a difficult approach, insofar as it occurs outside the physical scope of the company's facilities; during non-working hours; with means that may be personal; being involved not only superiors, colleagues or clients, but even unknown people.

However, as a counterpart, the use of telematic means could mean a possibility of greater control of these behaviours as all the activity that occurs is recorded. But it's required the collaboration of both the company itself (within the scope of its competencies) and the large communication companies, which up to now are more interested in protecting customers than in collaboration in this type of attack, with the justification (excuse) of the protection of personal data[29].

2. THE EFFECTS

Harassment, whatever the means by which it occurs or the way it manifests itself, is a multi-offensive action, which violates the rights of victims as persons (right to dignity, right to honor and to their own image, right to privacy, right to equality) and as workers (right to health, right to work in an environment free of violence). In this sense, one of the most innovative aspects of Convention 190 of The ILO has been precisely starting from this premise and focusing attention on the fact that "violence and harassment in the world of work can constitute a violation or abuse of human rights".

The effects for the victim that have been described in the cases of harassment in the "real" world, which are those that have been the object of study until relatively recently, are devastating and occur on different dimensions[30]:

29. In this sense, in Spain the Bill for the comprehensive guarantee of sexual freedom, presented last july, includes an article about "Prevention measures in the digital and communication field". One of these measures is the adoption of "agreements with companies and service providers in the information and communication technologies to participate in the preparation and application of prevention and awareness plans and measures in the digital field, and promote good practices in relation to treatment of cases".
30. "System needs update": Upgrading protection against cyberbullying and ICT-enabled violence and harassment in the world of work, cit., p. 22.

- At the physical level, headaches, digestive disorders, decreased physical strength, musculoskeletal disorders, increased risk of cardiovascular diseases …
- At the psychological level, depression, anxiety, chronic fatigue, sleep problems, post-traumatic stress syndrome …
- At the emotional level, fear, sadness, shame, helplessness, anger, helplessness, despair.
- At the professional level, the consequences range from a deficit in professional skills to a higher prevalence of absenteeism from work.
- At the family and social levels, there is greater conflict and the abandonment of relationships and circles of friendship.

As a more dramatic effect, suicide[31].

A study by Amnesty International[32] reveals that this impact also occurs when the situation of harassment occurs using technological means, providing the following data: 61% of women who have suffered cyberbullying state that, as a consequence of this, they have the self-esteem low or has lost self-confidence; 55% have experienced stress, anxiety, or panic attacks; 63% have had trouble sleeping; 56% report having had concentration problems for long periods.

As this study points out, it is easy to imagine how these effects can affect job performance but, above all, how they can increase exponentially when harassment occurs precisely related to work, either by place or by the person(s) aggressor subject(s). Additionally, the use of information and communication technologies to perpetrate attacks will cause negative consequences specifically derived from their characteristics, which will have a very important impact on the workplace.

Thus, the damage to the reputation and the loss of prestige and social devaluation of the victim can affect their position within the company; their self-censorship in professional personal spaces and the distancing

31. In this sense, it has been pointed out how "at this time, the suicide-work relationship reveals the existence of important gaps in the protection of victims of sexual harassment or work stress in the workplace" Amezcua Ormeño, Emilio (2021), "El enfoque psicosocial del suicidio en el ámbito laboral: prevención y manejo del riesgo autolítico". *Revista de Trabajo y Seguridad Social. CEF,* 456, página 214.
32. <https://www.es.amnesty.org/en-que-estamos/noticias/noticia/articulo/cuando-usas-las-redes-y-amenazan-con-violarte/>.

from social networks and technologies, in general, will put a pause on personal and professional development and a loss of job opportunities[33].

In Spain, unfortunately we can find well-known evidence of these effects in the so-called IVECO case, in which a female worker committed suicide after the harassment to which she was subject to when images of her sexual content were made public by WhatsApp among her co-workers[34].

But the perverse effects of violence and harassment are not produced solely for the victim. A recent ILO study recalls that "violence and harassment in the workplace can also have detrimental effects on the mental health and well-being of other people who are not actual victims, such as witnesses, co-workers, patients and clients, as well as family and friends of victims. The associated costs for organizations are related to worker absenteeism; the highest staff turnover; increases in the costs of hiring, incorporation and training; demotivation and lower performance and productivity; damage to reputation, and increased insurance premiums, among others. Violence and harassment in the workplace can also have consequences for society as a whole, in terms of costs related to medical consultations, treatment and/or rehabilitation, as well as expenditure for social welfare/benefits due to premature retirement – and the most intangible costs related to loss of productive workers at a premature stage"[35].

3. SOME (FEW) DATA

Although these are increasingly frequent situations, the recent report already cited "*System needs update: Upgrading protection against cyberbullying and ICT-enabled violence and harassment in the world of work*" shows that it's difficult to accurately determine the incidence of cyberbullying in today's world of work given the lack of objective and comparable data. And, if there are no general data, obviously they are not disaggregated by sex either. However, in specific studies carried out in relation to violence

33. *Guía informativa sobre ciberviolencias y delitos de odio por razón de género*, Federación de Mujeres Progresistas, Ministerio de Sanidad, Consumo y Bienestar Social, en <https://violenciagenero.org/sites/default/files/guiaciberacosofmp_2020.pdf>.
34. About this case, Molina Navarrete, "Redes sociales digitales y 'ciberacoso sexual en el trabajo': ¿Qué lecciones del 'caso Iveco' para los departamentos de RRHH en una era digital?", in <https://www.laboral-social.com/ciberacoso-laboral-caso-iveco-gestion-prevencion-riesgos-obligacion-responsabilidad-empresarial.html>
35. *Safe and healthy working environments free from violence and harassment*, ILO, 2020, page 25, in <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/publication/wcms_751832.pdf>.

against women, the role of technologies is being analysed in some way, so we can have some (very scant) information:

In the European Union sexual harassment against women involves a range of different perpetrators and can include the use of 'new' technologies: one in 10 women (11%) has experienced inappropriate advances on social websites or has been subjected to sexually explicit emails or SMS messages. These modes of sexual harassment disproportionately affect younger women[36].

In Spain we do not have specific information because the latest Macro-survey on violence against women of the Government Delegation against gender violence (2019) does not contain a specific section on violence at work and, therefore, on cyberviolence in the workplace; however, from the different categories contemplated we can extract some data.

With regard to violence at work in general, women who have suffered physical violence by "someone from work" are 2.6% of all women who have suffered physical violence from someone who is not their partner. Women who have suffered sexual violence by "someone at work" are 5.5% of all women who have suffered sexual violence from someone who is not their partner. In 6.6% of the cases that have suffered sexual violence from someone who is not their partner, the place has been the workplace.

The above data, insofar as its refers to actions of a violent nature, would give us an idea of the prevalence of sexual harassment with aggression, but they would not reflect other types of sexual harassment or environmental harassment. To obtain some information about these behaviours, one should go to the questions related to "type of sexual harassment", in which it seems to be possible to distinguish between "sexual blackmail" (women aged 16 or over who have suffered threats with unpleasant consequences in the work if they did not accept sexual proposals are 2.1% of all women over 16 years of age) and other harassment behaviours (women who have suffered sexual harassment by a boss or supervisor are 6.5% of all women who have suffered sexual harassment and the women who have suffered sexual harassment by another person at work are 12.5% of the total of those who have suffered sexual harassment.

Specifically, regarding situations that we can identify as cyberviolence, we find that 7.4% of women over the age of 16 have received inappropriate, humiliating, intimidating, or offensive insinuations on internet social networks such as Facebook, Instagram or Twitter. And 6.4% of women

36. Violence against women: an EU-wide survey (2014), <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2014-vaw-survey-main-results-apr14_en.pdf>.

over the age of 16 have received inappropriate emails, WhatsApp messages, or sexually explicit text messages that have made them feel offended, humiliated, or intimidated.

Although there is no data on the relationship of the source of these messages with the victims, which allows us to know if it happened in the workplace, there is still some additional information in the section on "stalking", many of whose "items" are related to the use of telematic media and social networks[37]. Thus, 4.1% of women who have suffered stalking, the perpetrator was a boss or supervisor, while those who experienced stalking by a coworker constitute 7.3% of the total.

As far as we can see, the management variables are not specifically related to workplace violence, so they do not give us concrete data on the subject we are dealing with, but they do give us an idea of the seriousness of the situation. In the future it would be useful for gender violence surveys to include specific items on the workplace, that would allow us to obtain a better image of reality in our labour relations.

IV. RESPONSE OF THE LEGAL SYSTEM

The characteristics we have been pointing out highlight the difficulties that may imply giving an adequate response by the legal-labour order to gender violence at work occurring through the use of information and communication technologies.

In the first place, because aggressive behaviours are not going to develop in a "workplace", in a physical space that could be controlled by the employer, nor do they necessarily have to occur during working hours, or using company material means (computers, electronic messaging systems, institutional emails …), which raises the question of what should be understood as "the workplace".

About this question, the report "System needs update": Upgrading protection against cyberbullying and ICT-enabled violence and harassment in the world of work" indicate that the ubiquity of ICT justifies a way of understanding violence and harassment in the world of work

37. Have you been sent unwanted messages, phone calls, emails, letters or gifts? Have you been made offensive or embarrassing comments about yourself, have you been made inappropriate proposals on the internet or on social media? Have you been posted photos, videos or information very personal information about you in places like your neighborhood, work, school, internet, or social networks like Facebook or Instagram, or have you been sent this information to other people through mobile phones or applications like WhatsApp?

that is not subject to certain physical or temporal limits and that extends to behaviours whose origin, whatever the moment and the instead, is at work. This broad notion of what should be understood as a "workplace" is what, as we have already pointed out, is reflected in ILO Convention 190, which is declared applicable to violence and harassment in the world of work that occurs not only during work, but also in relation to work or as a result of it, including behaviours that occur in the framework of communications that are related to work, including those carried out by means of information and communication technologies.

And it is the perspective that must be adopted by national legislation, regardless of whether or not Convention 190 has been signed, since it is the only one that could provide a sufficient response to the actions of aggression that occur through the use of the technologies of the information and communication.

Secondly, because, as it has been told above when defining behaviours, the amplification in social media and instant messaging makes it easier for others to cause harm without involving the elements that, traditionally, have been identified as defining harassment, and that must be given in environmental sexual or in sexist harassment as it is configured by the Spanish courts of justice (not necessarily in sexual harassment, in which as we know, a single conduct can be considered as harassment if it is of the sufficient entity), that is to say: reiteration in the conducts; prolongation of these over time and unequal power relationship (it does not have to refer to the subordinate relationship inherent to the employment relationship, but it can refer to an imbalance of power of another type: in social relationships, in the position among the companions….As we already know, a single action can be amplified until it causes harm to the victim and the power position of the aggressor does not have to be prior but, in some cases, it is acquired with the act itself (power position is given by the capability to perpetrate the aggression anonymously, through the control of victim's life without having the possibility of even "responding").

Regarding the intention to cause harm to the victim, which has been required in moral harassment as a necessary element, it has to be remarked that it is not as such in cases of gender violence because, as we have seen, violence will be considered as such that "causes or may cause harm or suffering" (Beijing Platform), "that implies or may imply harm or suffering for women" (Istanbul Convention) or, in terms of the Spanish Equality Law, "It has the purpose or produces the effect of undermining the dignity of a person, in particular when an intimidating, degrading or offensive environment is created", whether it is of a sexual nature (sexual harassment), or whether it is carried out based on a person's sex

(sexist harassment). Therefore, it should not be ruled out that those acts that are committed without a specific intention of injuring the victim (retweet, forward …) may be considered harassment to the extent that they contribute to causing that damage or to magnify it.

Despite the difficulties that we have pointed out, we cannot give up, on the contrary, seeking solutions that must be sought within the standards of each country, within the framework of international and European standards (where appropriate). In the following pages we will try to make a brief approach to the situation of the Spanish legal system.

1. OCCUPATIONAL RISK PREVENTION AS A FRAMEWORK FOR ACTION

Although there are many rights that are affected when harassment situations occur in the workplace, we have already pointed out the important effects that manifest on the psycho-physical health of the victims, which causes that in the first instance the issue has been treated as an occupational health problem. The issue is addressed from this perspective both at the European[38] and international[39] level and, of course, in the Spanish labour law.

In this sense, Article 4 of the Spanish Workers' Statute provides that, within the employment relationship, workers have the right "to their physical integrity and to an adequate policy for the prevention of occupational risks" and "to respect for their privacy and the consideration due to their dignity, including protection against harassment based on racial or ethnic origin, religion or belief, disability, age or sexual orientation, and against sexual harassment and harassment based on sex". Additionally, article 19 of the aforementioned legal text recognises that "the worker, in the provision of his services, shall have the right to effective protection in terms of safety and health at work".

These precepts, developed by the Occupational Risk Prevention Law and the corresponding regulatory standards, mean the right of the worker

38. European Framework agreement on harassment and violence at work is the final result of a process that begins with the opening by the European Commission of a period of consultation with the social partners on violence in the workplace *and its effects on safety and health in the job*.

39. Although, as we have already pointed out, the ILO Convention 190 has the novelty of incorporating a broader perspective, based on respect for human rights in the employment relationship, it does not forget the perspective of occupational health when remembering that "violence and harassment in the world of work affects people's psychological, physical and sexual health, their dignity, and their family and social environment".

to be protected against all risks suffered by reason or occasion of work. Obviously, this right supposes the existence of a correlative duty of the employer to protect workers against occupational risks, in compliance with which it must guarantee the safety and health of the workers in its service[40].

In the Spanish legal system, the legislator has chosen to attribute to the social partners, representatives of employers and workers, the responsibility of assuming an important regulatory role in this matter, as well as part of the equality plans that need to be negotiated in some companies[41], either autonomously, through the Action Protocols against harassment, which will be revealed as the most powerful tool in the fight against the phenomenon … provided they are activated, of course[42].

The case of cyberviolence cannot be different[43] but the first barrier, knowledgelessness, must be overcome. To avoid risks, to evaluate them in the event that they cannot be avoided, and to combat them in the event that they occur; so that the social partners can adopt measures within the scope of their competencies; for the legislator to be able to undertake the pertinent legislative initiatives, the first requirement is to know them. The acts of aggression perpetrated through the use of information and communication technologies with repercussions in the workplace are a matter little treated to date, so it is difficult to find actions of the mencioned subjets in relation to them. As an example of what we say, a recent study on Action protocols against harassment shows that although sexual harassment through new technologies, mainly social networks, not only exists but can aggravate existing problems, no protocol of the analysed contemplates this type of behaviour[44].

40. According to the provisions of Spanish Occupational Risk Prevention Law, the principles of the preventive action are: avoid risks; evaluate the risks that can't be avoided; combat the risks at source; adapt the job to the person; planning prevention, seeking a coherent set that integrates technique, work organization, working conditions, social relations and the influence of environmental factors at work; Giving appropriate instructions to workers.

41. According to the Law of effective equality between women and men, Equality plans may contemplate, among others, the matters of access to employment, professional classification, promotion and training, remuneration, organization of working time to favor, in terms of equality between women and men, the work-life balance, personal and family, and prevention of sexual harassment and harassment based on sex…".

42. In the IVECO case, to which we have referred before, the Protocol was not activated because the company considered that the situation was not related to work.

43. Extremley interesting in this sense the analysis of Molina Navarrete, C., "Redes sociales y "Redes sociales digitales y gestión de riesgos profesionales: prevenir el ciberacoso sexual en el trabajo, entre la obligación y el desafío", Diario La Ley n° 9452, 9 de julio de 2019, Wolters Kluwer.

44. Ramón Sánchez, M.,Torres López, J. and Rodríguez Muñoz, A. (2021) "Management of sexual harassment at work in Spanish companies. A proposal for the improvement of existing protocols", Revista de Trabajo y Seguridad Social, CEF, 458, p. 191.

This situation of ignorance that we raise does not occur only in our country but is generalised and, in fact, to overcome it, the European Parliament asks the Commission and the Member States "to forge a clear idea of the problem of sexual harassment in the Union, taking into consideration new challenges such as cyberbullying, through better quality studies with a more solid scientific basis[45].

In Spain, the only legislative measure at the national level that, up to now, has been adopted taking into account the use of technologies is the Royal Decree-Law 28/2020, which regulates remote work, whose article 4 provides that "companies must take into account the particularities of remote work, especially telework, in the configuration and application of measures against sexual harassment, harassment based on sex, harassment for discriminatory reasons and workplace harassment", a precept in which we want to see a first sample of the national legislator's attention regarding the prevention of the behaviours that we have been describing.

In the area of the autonomous regions, the only law that we have found that contemplates this reality is Law 5/2008, of April 24, on the right of women to eradicate sexist violence (Catalonia), which refers to violence in the workplace digital violence and pointing out that it can occur in the public or private sphere during the working day, or outside the center and the established hours if it is related to work.

2. SANCTIONING MEASURES

Even though, as indicated above, the objective of the preventive policy is to prevent the risk of this happening, this primary prevention, when it comes to harassment behaviours, is not always effective because its fundamental characteristic is the will of a human being to behave violently towards another[46]. This is the reason why sanctioning measures must also be foreseen to react against the harmful behaviour, serving not only as punishment for the belligerent, but also as an unequivocal sign that the company (or the State) is not going to accept this type of aggression. To avoid that, as stated in the *European Parliament resolution*

45. European Parliament resolution of 11 September 2018 on measures to prevent and combat mobbing and sexual harassment at workplace, in public spaces, and political life, cit.

46. *Algunas orientaciones para evaluar los factores de riesgo psicosocial* (edición ampliada 2015), del Instituto Nacional de Seguridad e Higiene en el Trabajo (INSHT), Madrid, 2015, p. 80, <https://www.insst.es/documents/94886/96076/Maqueta+18+4+Angel+lara.pdf/9b38de84-a9e0-4c08-bce4-92b5ff4f0861>.

on measures to prevent and combat sexual and psychological harassment, the lack of response to less serious offenses motivates the commission of more serious offenses[47].

In the Spanish legal system, as in any other democratic system, the sanctioning regime is subject to the principle of typicity, which is why the lack of classification and definition of the offending conducts makes protection against them extremely difficult. This general premise is accentuated in situations as complex as harassment behaviours in such a way that, although there is a general prohibition against them, if there is no definition of what they are, they will hardly be punishable.

A normative solution to this difficulty came with the Law of effective equality between women and men which, as already mentioned, define the categories "sexual harassment" and "harassment for reasons of sex", thus providing the general concepts of prohibited conducts.

The subject we are dealing with, however, still presents two difficulties; the first, common to any offending conduct in the workplace, that the sanctioning regime will be conditioned by the quality of the harasser, which implies a diversity of applicable rules; the second, specifically related to cyberviolence at work, which is not defined, and although some behaviours may be more easily included in the concept, in other cases it is not easy to identify the offending actions with those taking in place the "real" environment" and that are defined as harassment.

2.1. Sanctioning measures and employers

Regarding administrative responsibility, the illegal acts that give rise to the exercise of the sanctioning power of the Labour Administration are contemplated in the Law of Infractions and Sanctions of the Social Order[48]. This text classifies as a very serious offense both sexual harassment and harassment for reasons of sex, although with a difference between both cases that is not only of nuance.

Thus, the Law classifies as a very serious offense "*sexual harassment*, when it occurs within the scope of the business management powers, *regardless of the active subject thereof*", while considers as a very serious

47. European Parliament resolution of 11 September 2018 on measures to prevent and combat mobbing and sexual harassment at workplace, in public spaces, and political life, cit.

48. Real Decreto Legislativo 5/2000, de 4 de agosto, por el que se aprueba el texto refundido de la Ley sobre Infracciones y Sanciones en el Orden Social.

offense "harassment for reasons of racial or ethnic origin, religion or beliefs, disability, age and sexual orientation and *harassment for reasons of sex*, when they occur within the scope of the powers of business management, whatever the active subject of the same, provided that, *known to the employer*, *he has not adopted the necessary measures to prevent it*".

As can easily be seen, the difference between one and the other is that the employer will always be liable in cases of sexual harassment, while for harassment based on sex it's required that the employer had known them and had not adopted the necessary means to prevent it (obviously, this provision makes sense only when the harasser is not the employer himself).

By the wording of the precept, it must also be understood that the employer will be responsible not only in cases of harassment produced by himself or by the company's workers, but in any harassment that occur in relation to work, therefore including harassment situations whose active subjects are clients, users or suppliers of the company, and even students in the case of schools.

In any case, what we are interested in highlighting is that responsibility, in both cases, is generated when the actions occur within the scope of the business management powers, at this point one of the essential issues when we talk about cyberbullying: How far do the business management faculties reach? That is the great question to be resolved in this matter.

From our point of view, without attempting to enter into a promising analysis, the answer must come from ILO Convention 190, in the sense of considering that harassment in the world of work is the harassment that occurring *in the course of, linked with or arising out of work* in different places (in the workplace, including public and private spaces where they are a place of work; in places where the worker is paid, takes a rest break or a meal, or uses sanitary, washing and changing facilities; in employer-provided accommodation) and circumstances (during work-related trips, travel, training, events or social activities; when commuting to and from work), expressly including "through work-related communications, including those enabled by information and communication technologies".

2.2. Sanctioning measures and harassing workers

When the harassing subject is a worker of the company, the answer that the legislator offers us is the provisions of article 54 of the Workers Statute, which states that the employment contract may be terminated by decision of the employer, through dismissal based on a serious and

culpable breach of the worker, considering as a contractual breach, among other actions, "sexual harassment or by reason of sex of the employer or the people who work in the company".

But, obviously, this is not going to be the only possible answer, because the termination of the contract provided by the norm is an extreme sanctioning measure that would require severity (intensity of the conduct, duration in time and effects on the worker's psycho-physical health) and guilt (imputation of the conduct). But, also, because in cases of not being able to be sanctioned with dismissal, the harassing behaviour would go unpunished, since no other different sanctions are provided in the Workers Statute itself.

In Spain, the central role in the regulation of labour relations is played by collective bargaining, so the collective agreements in force in each area will regulate the infractions and sanctions regime in each case. This regulation will allow not only the classification of harassment behaviours within the offenses but also the establishment of different sanctions, more proportional to the harassing behaviour produced. Indeed, the usual practice has been for collective agreements to classify as a very serious offense the cases of sexual harassment and harassment on grounds of sex, with the sanctions that the agreement itself establishes.

At the present time, it can be stated that the vast majority of the agreements (if not all) do not contemplate gender-based cyberviolence at work. Under these conditions, at this moment cyberviolence can hardly be punished in the context of work.

Therefore, it is necessary to continue studying this matter, defining behaviours and regulating the consequences in the world of work. Otherwise, reality will continue to exceed the response capacity of legal systems and will continue to cause workers to be unprotected against cyberviolence.

V. CONCLUSIONS

Gender cyberviolence at work is a complex reality that lacks specific treatment in any of the regulatory areas that we take into account; for this reason, it is necessary to address the three variables that compose it as a way of making an approach as complete as possible to the matter.

Violence at work, despite being a widespread phenomenon, had not been the subject of normative treatment by the ILO until 2019, when the Violence and Harassment Convention 190 was adopted. Despite the

enormous importance of this convention, to date, it has only been ratified by a small number of countries, of which two are Europeans. In the European Union, the most relevant intervention has been the adoption by the social partners of the Framework Agreement on violence and harassment.

Gender-based violence has long been addressed in various international instruments, in which it is defined, broadly, as any act of gender-based violence that results or may result in physical, sexual or psychological harm or suffering for women. In the European Union there is no comprehensive regulation and its normative treatment has been carried out with respect to its specific manifestations in the workplace.

Cyberviolence can be defined as the use of computer systems to cause, facilitate, or threaten violence against individuals that results in, or is likely to result in, physical, sexual, psychological or economic harm or suffering. Some studies allow relevant conclusions to be drawn about this reality. On the one hand, although these behaviours are not something totally different from the harassing behaviours that develop in life that we call "real", they do have specific elements that make them even more harmful than these; on the other hand, although these behaviours not only occur against women and girls, they mostly occur against women and girls.

The result of the conjunction of these three elements is situations of gender-based cyberviolence at work, which, at first, we can define as acts that cause or may cause harm or suffering to women in the workplace committed using the technologies of the information and communication.

The behaviours in which this violence can manifest itself are of an enormous variety and they have quirks that make them different from harassment behaviours in the "real" world: the attacks can take place anytime and anywhere (24 hours a day, 7 days a week); moral disengagement is much greater; the distance between the real world and the virtual world can embolden the aggressor; the feeling of impunity caused by the possibility of maintaining anonymity and by the lack of direct observers is reinforced.

Specifically in the labor field, this type of violence has a difficult approach, because it can occur outside the physical scope of the company's facilities; during non-working hours; with means that may be personal; being involved not only superiors, colleagues or clients, but even unknown people. All these features highlight the difficulties to give an adequate response by the legal system.

This response must come both from the prevention of occupational risks and from the provision of sanctioning measures for when the prevention does not take effect.

To avoid risks, evaluate them if they cannot be avoided, and combat them when they arise, the first requirement is to know what we are talking about, so it is necessary to continue studying this reality in depth and ensure that public and private managers become aware of the need of adequate regulation.

Harassment and Gender: An Analysis of ILO Convention No. 190 During the Covid-19 Crisis

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I. INITIAL CONSIDERATIONS

The moment experienced by society as a result of COVID-19 is unique in our time. Although humanity has already gone through similar events, this is the first major global health crisis experienced in a context market with the particularities of time and space of the 21st century.

Even though the search for equalization of capital and labour is inherent to Labour Law, the 21st century indeed presents its own challenges. The attempt to reconcile work as an activity of recognition and material survival is experienced in a world of work in which personal and professional lives are mixed, living in constant and uninterrupted connection.

As it has been said by Sebastião Geraldo de Oliveira[1], work is increasingly dense, tense, and intense and the permanent approximation of personal and work lives is a fertile environment to foresee, perhaps with even more intensity, violence, and harassment in the world of work.

In the centenary of the International Labour Organization – ILO, during the 108th Annual Conference of Members, the approval of ILO Convention No. 190, together with Recommendation No. 206, represented the main breakthrough for the ILO's international regulation on the

1. De Oliveira, S. G.. Brazilian Labour Reform. Nova Lima, Minas Gerais, oct. 2017.

subject. Although violence and harassment in the world of work are topics covered by other ILO international documents, such as Convention No. 111 and Convention No. 155, this was the first time that has been approved a normative instrument exclusively to the theme.

It is important to highlight that Convention No. 190 and Recommendation No. 206 symbolize an ultra-qualified international consensus, whose expanded legitimacy is enhanced from a tripartite composition of the International Labour Organization – the only international organization with such formation. It must be also emphasized the timely intersectional approach to the theme, considering that vulnerable groups, such as women and LGBTQIA+, are more likely to be victims of violence and harassment.

Less than a year after the approval of the international instruments, the world was devastated by the COVID-19 pandemic which, in addition to the health crisis itself, generated a social crisis, strengthening the theme's essentiality. It is pertinent to realize, however, that we are not facing a new scenario. The word crisis refers to the apex of a pre-existing context, which means, therefore, that we are not fronting immediate adversities created by the spread of the virus, but rather mediate dysfunctions, resulting from the already existing economic, social, and political situation. Metaphorically, it can be said: what was a fracture has now become an open wound.

The culture of violence and harassment at work, notably in the face of the vulnerable groups, reflects a patriarchal and sexist society, in which the sexual division of work reflects from allocative problems, such as differences in remuneration and occupation of management positions, which can be easily recognized, to psychological violence, which can be more subtle and less explicit.

The psychological kind of violence gains particular importance in the current context, notably due to the technological means of communication. Behind computer and cell phone screens, the practices of violence and harassment tend to hide from the surrounding eyes. Added to the invisibility generated by the technological instruments, the emotional fragility somehow experienced by the entire working class, whether due to the psychic effects caused by long periods of confinement or the fear of the impossibility of remaining in social isolation, seems to work as a pretext to hide the existence of situations of violence and harassment at work.

Considering the outlined scenario, this paper intends to address the fundamental concepts brought by the wording of ILO Convention No. 190 and Recommendation No. 206, analysing them in comparison with the reality of the current world of work, through an empirical perspective.

II. VIOLENCE AND HARASSMENT AT WORK: RELEVANT CONTEXTS AND CONCEPTS

Within the International Labour Organization, discussions about harassment and violence at work gained effective centrality with the approval of the Declaration on Fundamental Principles and Rights at Work, in 1998.

Reinforcing the universal premise of social justice established by the constitution of the ILO, in 1919, which was ratified in 1948, by the Declaration of Philadelphia, the Declaration on Fundamental Principles and Rights at Work[2], as an instrument of mandatory observance to all and any member of the International Labour Organization, instituted as fundamental four axes of action:

Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

(a) freedom of association and the effective recognition of the right to collective bargaining.

(b) the elimination of all forms of forced or compulsory labour.

(c) the effective abolition of child labour; and

(d) the elimination of discrimination in respect of employment and occupation.

Such fundamental axes, also called fundamental principles, translate what is called *core labour standards*, which should purpose as the backbone of the acting of all leading figures that make up the tripartite structure of the ILO – governments, workers' representatives, and representatives of employers within each of the Member States.

Following the guidelines outlined in the Declaration on Fundamental Principles and Rights at Work, the approval of the Decent Work Agenda, in the following year, in 1999, reaffirmed the importance of joining efforts to achieve a world of work that reflects the human being as a central element. As Gerry Rodgers ponders.

The goal of decent work is best expressed through the eyes of ordinary people. It's about your work and prospects for the future; of their working

2. International Labour Organization. Declaration on Fundamental Principles and Rights at Work, 1998. Available at: <https://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>. [Accessed on: 15 jun. 2021].

conditions; balancing work and family life, taking your children to school and getting them out of child labour. It has to do with gender equality, the differentiation of recognitions and the conditions to give women so that they can choose and take control of their lives. It's about being able to express yourself and being listened to at work and in the community. For many, it is the main way out of poverty. For many others, it has to do with being able to fulfil the personal aspirations of their daily life and with solidarity with others. And everywhere, for all people, decent work is about human dignity (2002)[3].

The search for a world of work free from violence and harassment is a direct reflection of the Declaration on Fundamental Principles and Rights at Work and the Decent Work Agenda, which lead to heated debates on the subject.

Although the Declaration on Fundamental Principles and Rights at Work represents a greater emphasis on discussions, the contribution of the International Instruments that preceded it, such as Convention No. 111 and Convention No. 155, should be explored.

The Convention No. 111, approved internationally in 1960, in addition to the symbolic mark it represented at the time, brought a fundamental definition to discrimination in the world of work. As provided in its article 1:

1. FOR THE PURPOSE OF THIS CONVENTION THE TERM DISCRIMINATION INCLUDES

(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of *opportunity or treatment* in employment or occupation.

(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of *opportunity or treatment* in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organizations, where such exist, and with other appropriate bodies[4].

3. Rodgers, G., Decent work as a goal for the global economy, 1999.
4. International Labour Organization. C111 – Discrimination (Employment and Occupation) Convention, 1958 (No. 111), 1958. Available at: <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111>. [Accessed on: 15 jun. 2021].

It should be noted that the inequality of opportunities and treatment as a result of distinctive, excluding, and preferential attitudes show that this articulation of cause and effect can demonstrate objective allocation problems – such as wage differences, access to certain positions and functions – or not, relating to subjective aspects.

This conceptual duality corroborates the approach brought by Convention No. 190 and Recommendation No. 206 of the ILO, expanding, and unifying the confrontation of the agenda of violence and harassment in the world of work, which can produce reflexes both objectively and subjectively.

The Convention No. 155, approved internationally in 1983, in turn, provides in its article 3, line 'e' that health at work "comprehends not only the absence of diseases or illnesses but also the physical and mental elements that are directly related to safety and hygiene at work", reinforcing the conception of the World Health Organization – WHO of "health" as a multifaceted concept, applicable with the same plurality and scope to the world of work.

From this perspective, the emphasis on health as a state that includes elements of physical and mental well-being meets the need that the combat of violence, harassment, and discrimination at work be articulated as an issue that also concerns the environment of work.

In this regard, André Sousa Pereira[5] explains that as a result of the organization of business activity, the so-called occupational psychosocial risks demand a holistic understanding of the situation, bringing the individual together with the social environment in which she/he is inserted.

According to Pedro Álvarez Briceño[6], "psychosocial risks are those characteristics of work conditions and, above all, of their organization that affects the health of people through psychological and physiological mechanisms"[7].

Following the reasoning outlined by André Sousa Pereira[8], it is possible to say that there are three social dimensions of interaction between the worker and the organizational structure of work in which he is included,

5. Sousa, A. P., The technical epidemiological link between mental disorders and work-related psychosocial risks. n. 81, mar. 2017. p. 313.
6. Álvarez Briceño, P., Psychosocial risks and their recognition as an occupational disease: legal and economic consequences. n. 11, 2009. (Journal of Interdisciplinary Studies in Social Sciences).
7. Original text: "los riesgos psicosociales como aquellas características de las condiciones de trabajo y, sobre todo, de su organización que afecta a la salud de las personas a través de mecanismos psicológicos y fisiológicos".
8. Sousa, A. P., The technical epidemiological link between mental disorders and work-related psychosocial risks. n. 81, mar. 2017. p. 314.

namely, relationships between individuals, between the individual and the group and the individual with himself. When situations potentially harmful to the worker's mental health emerge from these interactions, psychosocial risk materializes.

In a timely approach, Convention No. 190, in its article 9[9], correlated violence and harassment as potential generators of psychosocial risks. It is important to emphasize, however, that although there is a tendency to list psychosocial risks, to target the most common situations in which the risk will be characterized, there are many factors that can configure a psychosocial risk, especially in cases of violence and harassment, being indispensable, in practice, a detailed analysis of each case.

III. ILO CONVENTION NO. 190 AND RECOMMENDATION NO. 206

In the centenary mark of the International Labour Organization, during the 108th Session of the International Labour Conference, in June 2019, Convention No. 190 and Recommendation No. 206 were approved.

Although violence and harassment in the world of work have been subjects covered by other international documents of the ILO, such as Conventions No 111 and No 155, as previously analysed, Convention No 190, together with Recommendation No 206, represented a remarkable framework to the ILO's regulation on the topic.

Some points brought up by the signed texts deserve to be highlighted, either because of their relevance or considering the impact they will bring to the current confrontation on the issue.

9. "Article 9 – Each Member shall adopt laws and regulations requiring employers to take appropriate steps commensurate with their degree of control to prevent violence and harassment in the world of work, including gender-based violence and harassment, and in particular, so far as is reasonably practicable, to:

(a) adopt and implement, in consultation with workers and their representatives, a workplace policy on violence and harassment; (b) *take into account violence and harassment and associated psychosocial risks in the management of occupational safety and health*; (c) identify hazards and assess the risks of violence and harassment, with the participation of workers and their representatives, and take measures to prevent and control them; and (d) provide to workers and other persons concerned information and training, in accessible formats as appropriate, on the identified hazards and risks of violence and harassment and the associated prevention and protection measures, including on the rights and responsibilities of workers and other persons concerned in relation to the policy referred to in subparagraph (a) of this Article". International Labour Organization. C190 – Violence and Harassment Convention, 2019 (No. 190). 2019. Available at: <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:3999810:NO>. [Accessed on: 15 jun. 2021].

Although violence and harassment at work are usually treated as separate figures, Convention No. 190 and Recommendation No. 206 of the ILO purposefully brought a joint approach. The aim of the text, however, was not to generalize. The types of harassment and the most varied types of violence in the world of work (sexual violence, sexual harassment, gender violence, harassment based on gender, domestic violence, physical violence, psychological violence, psychological harassment, structural violence, organizational harassment, and virtual harassment – cyberbullying), continue to be recognized, with its own characteristics and concepts. The purpose was to systematize, and in a certain way to reinforce, the disapproval of a range of behaviours that are even more diversified.

As is inferred from the Final Report of the ILO Experts (ILO, 2016)[10], which preceded the approval of the normative instruments under discussion, "although the terminology may vary between countries, the expression 'violence and harassment' includes a continuum of behaviours and practices which may result in physical, psychological or sexual harm or suffering".

Rodolfo Pamplona Filho and Claiz Maria Pereira Gunça dos Santos (2019, p. 14)[11] emphasize that due to the interdependence of the consequences arising from the practices of violence and harassment, their joint approach is essential:

(…) the integrated concept encompasses the interdependence and interrelationship between the types of violence and harassment. This is because the practice of a type of violence encompasses, in a way, other types of violent and harassing behaviour, which should not be seen, therefore, in isolation. So, for example, when sexual harassment is practiced, sexual violence, psychological violence and physical violence are practiced simultaneously. In a similar sense, domestic violence includes physical, sexual, psychological, or patrimonial violence perpetrated within the domestic or family sphere. Indeed, the modalities of violence and harassment, despite the importance of concepts and distinctions, cannot be seen in isolation, as their natures, effects and consequences are interdependent.

10. International Labour Organization. Conditions of Work and Equality Department. Final report: Meeting of Experts on Violence against Women and Men in the World of Work. 2016. Available at: <http://cite.gov.pt/pt/destaques/complementosDestqs2/Relat_violencia.pdf>. Accessed on: 15 jun. 2021.

11. Pamplona Filho, R., Dos Santos, Claiz M. Pereira Gunça. ILO Convention 190: violence and harassment in the world of work. 2019. Available at: <www.andt.org.br>. Accessed on: 15 jun. 2021.

Another relevant aspect is the adoption of the concept that, for the characterization of violence or harassment, repeated harassing and violent events are not necessary, being enough, though, just a single episode. More important than the frequency of harassing and violent behaviour, therefore, is the concrete verification of the results produced. According to Article 1(a) of Convention No. 190[12].

The term "violence and harassment" in the world of work designates a set of unacceptable behaviours and practices or threats of such behaviours and practices, manifested once or several times, which are intended to cause or may cause physical, psychological, sexual, or economic harm and include gender-based violence and harassment.

This understanding seems to break with the concept of harassment traditionally adopted[13], for which the characterization of harassment depends on successive practices that occurred for an extended period.

Another key point is the affirmation of the effective scope of the provisions contained therein, their application not being limited to formally recognized employment relationships, covering all those who work, regardless of the contractual situation established. Its application from the public sector to rural areas was also explained[14]:

Article 2

1. This Convention protects workers and other persons in the world of work, including salaried workers, as defined in national law and practice, as well as persons who work, regardless of their contractual status, persons in training, including interns and apprentices, laid-off workers, volunteers, job seekers, and job seekers, and individuals exercising the authority, functions, or responsibilities of an employer.
2. This Agreement applies to all sectors, public or private, of the formal and informal economy, in urban or rural areas.

Another essential aspect is the intersectional approach from a gender perspective. Considering the patriarchal and sexist configuration of the

12. International Labour Organization. C190 – Violence and Harassment Convention, 2019 (No. 190). 2019. Available at: <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:3999810:NO>. [Accessed on: 15 jun. 2021].
13. In Brazil, the conception of harassment has the temporal aspect as a requisite for its characterization.
14. International Labour Organization. C190 – Violence and Harassment Convention, 2019 (No. 190). 2019. Available at: <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:3999810:NO>. [Accessed on: 15 jun. 2021].

society we live in and the reflection of such substrates in the organizational structure and business dynamics, the predilection of certain groups to appear as victims of moral and psychological aggression in the workplace is notorious, as it is the case of women and LGBTQIA+ people.

The gender dimension is a fundamental guideline for confronting violence and harassment, especially in a capitalist society, in which social relations are associated with the sexual division of work and perpetuate existing inequalities. As Candy Florêncio Thomé and Rodrigo Garcia Schwarz clarify, "capital does not create the subordination of women, but it integrates and reinforces the roots of the sexual division of labour"[15].

The various allocation problems that have arisen in practice, such as the lack of promotion in the career, the lack of equal wages, and the impossibility of reaching managerial positions, are situations that could at first give rise to a merely economic resolution. However, praxis seems to demonstrate that these are just the visible reflections of a relationship covered by psychic and moral violence, challenging an integrative perception, as brought by the international regulations under discussion.

Another point that draws attention is the correct use of the phrase "world of work" to replace the traditional "workplace". The concept brought by the ILO, relativizing the spatial and temporal understanding of the "work environment", is in line with a working model widely experienced today, in which personal and professional life are increasingly interconnected. For the avoidance of doubt, article 3 of Convention No 190 expounds[16]:

This Convention applies to violence and harassment in the world of work that occurs during work, in connection with or as a result of work:

a) in the workplace, including in public and private spaces when they are workplaces.

b) in places where the worker is paid, where he rests or eats, or where he uses sanitary or toilet facilities and in changing rooms.

c) on business trips, travel, events, or social or training activities.

d) in the scope of work-related communications, including those carried out through information and communication technologies.

15. Thomé, C. F.; Schwarz, R. G., Moral harassment at work and the right to health: consequences of bullying at work for the worker's right to health. July-December, 2017. Available at: <https://link.gale.com/apps/doc/A606483820/AONE?u=capes&sid=AONE&xid=b3afc5c6>. [Accessed on: 15 jun. 2021[. p. 132.

16. International Labour Organization, C190 – Violence and Harassment Convention, 2019 (No. 190). 2019. Available at: <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:3999810:NO>. [Accessed on: 15 jun. 202]1.

e) in the accommodation provided by the employer, and

f) when traveling between home and work.

As of the writing of this article (June 2021), only Argentina, Ecuador, Fiji, Namibia, Somalia, and Uruguay have ratified Convention No. 190. However, it is significant to note that, as they are instruments that guarantee the fight against discrimination in labour relations, the Convention No 190 and Recommendation No 206 are encompassed by the fundamental principle of "elimination of discrimination in matters of employment and occupation", as established in the Declaration on Fundamental Principles and Rights at Work, whose observance falls on all ILO Member States.

In any case, the fact that the ratification of a Member State has a symbolic representation cannot be ignored, especially in the current pandemic moment, so that an international mobilization in this regard would be particularly opportune.

IV. ILO CONVENTION NO. 190 AND RECOMMENDATION NO. 206 IN THE CONTEXT OF COVID-19

It can be said that the context generated by COVID-19 brought three main influences to the theme of violence and harassment in the world of work: (3.1) the considerably expansion of telework and, therefore, the intensified use of technologyy at work, (3.2) the significant increase of the working hours, the workload and the psychological pressure suffered by health workers and (3.3) the increased on the number of cases of domestic violence due to the adoption of social isolation measures.

Cyberbullying (3.1), also known as cyber harassment or digital harassment, is characterized when there is systematic intimidation on the world wide web or when its own instruments are used to denigrate, incite violence, adulterate photos, and personal data in order to create means of psychosocial embarrassment.

As can be seen from the Final Report of the meeting that preceded the elaboration of Convention No. 190 and Recommendation No. 206 (Meeting of Experts on Violence against Women and Men in the World of Work), held in October 2016, violence concealed by the use of technological apparatus deserves special reinforcement of action by Member States[17].

17. International Labour Organization. Conditions of Work and Equality Department. Final report: Meeting of Experts on Violence against Women and Men in the World of Work. 2016. Available at: <http://cite.gov.pt/pt/destaques/complementosDestqs2/Relat_violencia.pdf>. Accessed on: 15 jun. 2021.

The Worker Vice-Chairperson described various types of violence, including psychological violence and technology-based violence which have been on the rise at the workplace and would require stronger action, beyond legislation already passed in some countries.

Convention No. 190, in its article 3, line 'd'[18], expressly mentioned that the characterization of violence and harassment may occur in the scope of work-related communications, including those carried out through information and communication technologies.

It is interesting to note that this is not a new situation, but one that deserves to be highlighted, given the increased use of technological means and devices and their potential influence on the practices of violence and harassment at work.

As mentioned above, there are several internal business elements that can characterize psychosocial risks to the worker, and the use of technologies can favour the preferential emergence of some of them, such as the quantitative work overload and the lack of social support[19].

The excessive increase in workload, accompanied by the establishment of disproportionately reaching goals, characterizes the classic example of organizational harassment (or straining), in which harassing practices are part of the workflow structure and the interpersonal relationships in the business environment, including online.

According to the survey "The State of Burnout 2020", carried out by the American platform Blind[20], in April of that year, 73% of the workers interviewed said they were suffering mental exhaustion due to work, while in February this percentage was 61%. There were basically three reasons for exhaustion: lack of separation between professional and personal life,

18. "Article 3 – This Convention applies to violence and harassment in the world of work occurring in the course of, linked with or arising out of work: (a) in the workplace, including public and private spaces where they are a place of work; (b) in places where the worker is paid, takes a rest break or a meal, or uses sanitary, washing and changing facilities; (c) during work-related trips, travel, training, events or social activities; *(d) through work-related communications, including those enabled by information and communication technologies*; (e) in employer-provided accommodation; and (f) when commuting to and from work. International Labour Organization. C190 – Violence and Harassment Convention, 2019 (No. 190). 2019. Available at: <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:3999810:NO>. Accessed on: 15 jun. 2021.
19. Sousa, A. P., The technical epidemiological link between mental disorders and work-related psychosocial risks. n. 81, mar. 2017. p. 314.
20. Blind. The evolution of the burnout – Covid-19 edition. Available at: <https://usblog.teamblind.com/wp-content/uploads/2020/05/StateofBurnoutCovid19.pdf>. [Accessed on: 15 jun. 2021].

difficulties with the workload, and concerns about maintaining safety at work.

Concerning health workers (3.2), it is relevant to recognize that they are professionals who are on the front line to fight the pandemic, being exposed to strenuous working hours, not always adequately equipped, and living under psychological pressure never before experienced.

And at this point, the analysis under the gender perspective is again necessary, since the jobs in the health area are mostly occupied by women, who accumulate double, triple and even quadruple roles.

In Brazil, according to data from the National Council of Municipal Health Secretariats (CONASEMS), women represent 65% of the more than six million professionals working in the public and private health sectors, at all levels of care complexity. In some careers, such as Speech Therapy, Nutrition and Social Work, they surpass 90% of professionals and in others, such as Nursing and Psychology, they represent more than 80%. It is also estimated that 69.2% of people working in the direct public administration of the health area, in the federal management of the SUS[21], are women[22].

Aggravating the accumulation of journeys already experienced by women, changes in family dynamics caused by social distancing, adopted in the face of the pandemic context, place health workers in contexts of greater vulnerability to the risks of fatigue and psychological distress.

As a reflection of such changes, it should also be emphasized the considerable increase of domestic violence (3.3) faced by women since the beginning of the pandemic. In Brazil, it is estimated that, in Rio de Janeiro and São Paulo, the number of cases during home confinement has increased by 50%, as it may be miscalculated due to difficulties in communicating with responsible agencies[23]. And the influence of this condition on the world of work is undeniable.

This confluence was even brought by Convention No. 190 and Recommendation No. 206, as the note prepared by the ILO in May/2020 clearly emphasizes:

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21. Brazilian Public Health System.
22. The war has a woman's face: health workers in the fight against Covid-19. Available at: <http://anesp.org.br/todas-as-noticias/2020/4/16/a-guerra-tem-rosto-de-mulher-trabalhadoras-da-sade-no-enfrentamento-covid-19>. Accessed on: 15 jun. 2021.
23. Fernandes, M., Thomaka, É., Increase in the number of cases of domestic violence is a deleterious effect of quarantine. Available at: <https://www.conjur.com.br/2020-mai-13/fernandes-thomaka-aumento-violencia-domestica-quarentena#_ftn7>. [Accessed on: 15 jun. 2021].

To mitigate the impact of domestic violence in the world of work, COVID-19 lockdowns, and curfews force people to stay at home and, when possible, work from home. For many, the home is now their workplace, which comes with heightened risks of violence and harassment. Alarming spikes in domestic violence, particularly against women and people with disabilities, but also against men, have been recorded in many countries since the beginning of the COVID-19 outbreak. Domestic violence has an impact on terms of health, safety, and productivity of workers and other persons concerned, as well as on their capacity to enter, remain, and progress in the labour market[24].

It is essential, therefore, that the approach of violence and harassment at work in the pandemic context get managed with the outlined particularities.

V. CONCLUSION

Violence and harassment in the world of work represent a reality unfortunately still very present. International engagement to combat it, embodied in international diplomas, is essential.

International instruments providing the observation of human rights (such as those drawn up within the framework of the International Labour Organization) are material and formal sources of law. The ILO's International Conventions that deal with their fundamental bases of action demand immediate internal compliance, regardless of formal adherence.

Convention No. 190, approved within the ILO in 2019, brings, together with Recommendation No. 206, imperative measures, and guidelines, pursuant to the Declaration on Fundamental Principles and Rights at Work, observance of which falls to all ILO Member States.

The contexts generated by the COVID-19 pandemic crisis reinforce the importance of this agenda, which must be considered, in addition to the intersectionality proposed by the signed texts, the peculiarities that the moment presents.

24. International Labour Organization. ILO Violence and Harassment Convention, 2019 (No. 190): 12 ways it can support the COVID-19 response and recovery. 2020. Available at: <https://www.ilo.org/wcmsp5/groups/public/---dgreports/-gender/documents/publication/wcms_744782.pdf>. Accessed on: 15 jun. 2021.

The Comprehensive Protection of Minors in front of Violence. Present and Future in Spain

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I. INTRODUCTION

The protection of minors is a priority obligation of the public powers, recognized in article 39 of the Spanish Constitution and in various international treaties, among which the Convention on the Rights of the Child, adopted by the General Assembly, stands out. of the United Nations on November 20, 1989 and ratified by Spain in 1990. Together with the three optional protocols of the aforementioned Convention and the General Observations of the Committee on the Rights of the Child such as General Observation number 12, of 2009, on the the right to be heard, the General Observation number 13, of 2011, on the right of children not to be subjected to any form of violence and the General Observation number 14, of 2014, that the best interests of the child and the girl is considered primarily are the main normative referents of child protection.

In addition, two Conventions promoted by the Hague Conference on Private International Law are noteworthy: the Convention on the protection of the child and cooperation in matters of international adoption, of May 29, 1993, ratified on June 30, 1995 and the Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in matters of parental responsibility and measures for the protection of children, of May 28, 2010, ratified on September 6, 2010. On the other hand, three Conventions of the Council of Europe should also be highlighted, the one on the adoption of minors, made in Strasbourg on November 27, 2008, ratified on July 16, 2010, the one on the protection of children against exploitation and sexual abuse, done in Lanzarote on October 25, 2007, ratified on July 22, 2010, as well as the European Convention on the Exercise of Children's Rights, done in Strasbourg on January 25, 1996, ratified on

November 11, 2014. And, finally, Council Regulation (EC) No. 2201/2003 of November 27, 2003, on jurisdiction, recognition and enforcement of judicial decisions in matrimonial matters and liability parental, repealing Regulation (EC) No. 1347/2000.

The European Union, for its part, expresses the "protection of the rights of the child" through article 3 of the Lisbon Treaty and is a general objective of the common policy, both internally and in external relations.

In accordance with the aforementioned Convention on the Rights of the Child, Spain must promote all the legislative, administrative, social and educational measures necessary to guarantee the right of the child or adolescent to develop free from any form of violence, harm, physical abuse or mental, neglect or neglect, abuse or exploitation. In this regard, the Spanish legal system has incorporated important advances in the defense of the rights of minors, as well as in their protection against violence. In this evolution fits the reform operated in Organic Law 1/1996, of January 15, on the Legal Protection of Minors, partial modification of the Civil Code and the Civil Procedure Law, by Organic Law 8/2015, of 22 of July, and Law 26/2015, of July 28, both modifying the child and adolescent protection system, which introduces as a guiding principle of administrative action the protection of minors against all forms violence, including those produced in their family environment, gender, human trafficking and smuggling and female genital mutilation, among others. In addition, the public authorities have the obligation to develop awareness, prevention, assistance and protection actions against any form of child abuse, as well as to establish those procedures necessary to ensure coordination between the competent public administrations and, in this order, review in depth the functioning of the institutions of the protection system for minors and thus constitute an effective protection against situations of risk and distress.

On the other hand, as the Committee on the Rights of the Child indicates in the aforementioned General Comment number 13, the serious repercussions of violence and mistreatment suffered by children and adolescents are well known. These acts, among many other consequences, can cause injuries that can lead to disability; physical health problems, such as delayed physical development and subsequent disease development; learning difficulties including performance problems in school and at work; psychological and emotional consequences such as affective disorders, trauma, anxiety, insecurity and destruction of self-esteem; mental health problems such as anxiety and depressive disorders or suicide attempts, and unhealthy behaviors such as substance abuse or early initiation of sexual activity.

In this context, the Organic Law 8/2021, of June 4, on comprehensive protection of children and adolescents against violence –LO 8/2021– has recently been approved in Spain, which aims to combat violence against children and adolescents from a comprehensive approach, in an extensive response to the multidimensional nature of its risk factors and consequences and gives an essential priority to prevention, socialization and education, both among minors and among families and civil society itself[1]. The norm establishes protection measures, early detection, assistance, reintegration of violated rights and recovery of the victim, which find their inspiration in the comprehensive care models identified as good practices when it comes to avoiding secondary victimization.

This study will center on analyzing the aforementioned norm and its practical implementation and in the situation of violence in the family environment, specifically, in situations of nullity, separation or divorce –marital crisis– and the custody and custody of children. minor children.

II. ANALYSIS OF THE ORGANIC LAW 8/2021, OF INTEGRAL PROTECTION OF CHILDREN AND ADOLESCENTS AGAINST VIOLENCE

Violence against minors is an execrable reality and extended to a plurality of fronts. In addition, sociological, educational, cultural, health, economic, administrative and legal variables frequently converge in these violence scenarios, which requires that any legislative approach to the issue requires a broad multidisciplinary approach.

Ultimately, the law addresses the right of children and adolescents not to be subjected to any form of violence and goes one step further with its comprehensive nature and incorporates articles 3, paragraphs 2 to 4, 6 and 9 into Spanish law. paragraphs a), b) and 9 of Directive 2011/93/EU, of December 13, on the fight against sexual abuse and sexual exploitation of minors and child pornography. The text introduces modifications in the Criminal Procedure Law, in the Civil Code, in the General Penitentiary Law, in the Organic Law of the Judicial Power, in the General Advertising Law, in the Penal Code, in the Law of free assistance, in the Law of legal protection of minors, in the Law of Civil Procedure, in the Law of

1. BOE, number 134, of 5 June 2021, pp. 68657-68730.
   Twenty-fifth final provision. Entry into force notes that "This law will enter into force twenty days after its publication in the "Official State Gazette" –specifically, on June 25, 2021–. However, the provisions of articles 5.3, 14.2, 14.3, 18, 35 and 48.1.b) and c) will take effect six months after the entry into force of the law. The provisions of the fourteenth final provision will take effect from January 1, 2022".

Comprehensive Protection Measures against gender violence, in the Law of criminal responsibility of minors, the Law on infractions and sanctions in the social order, the Law regulating the autonomy of the patient, the Law of organization of the health professions, in the Law of voluntary jurisdiction and, in the Organic Law 7/2015, of July 21 (modifying the Organic Law of Judicial Power –LOPJ–).

The law is structured in sixty articles, distributed in a preliminary title and five titles, nine additional provisions, a repealing provision and twenty-five final provisions.

For the purposes that are of interest to us, it aims to guarantee the fundamental rights of children and adolescents to their physical, mental, psychological and moral integrity against any form of violence, ensuring the free development of their personality and establishing protection measures. comprehensive, including awareness, prevention, early detection, protection and reparation of damage in all areas in which your life develops. Violence is understood to be any negligent action, omission or treatment that deprives minors of their rights and well-being, that threatens or interferes with their orderly physical, mental or social development, regardless of the form and means of commission, including the carried out through information and communication technologies, especially digital violence. Likewise, it constitutes physical, psychological or emotional abuse, physical, humiliating or degrading punishment, neglect or negligent treatment, threats, insults and slander, exploitation, including sexual violence, corruption, child pornography, prostitution, bullying, sexual harassment, cyberbullying, gender-based violence, genital mutilation, trafficking in human beings for any purpose, forced marriage, child marriage, unsolicited access to pornography, sexual extortion, dissemination public private data as well as the presence of any violent behavior in your family environment.

It is applicable to minors who are in Spanish territory, regardless of their nationality and administrative situation of residence, and to minors of Spanish nationality abroad in the terms established in article 51[2] and, the established obligations. In this law, they will be enforceable from

2. The article 51. Embassies and Consulates: *"1. It corresponds to the Embassies and Consular Offices of Spain abroad, in accordance with the provisions of article 5 h) of the Vienna Consular Relations Convention and other international regulations in this field, the protection of the interests of minors of Spanish nationality who are abroad. Said protection shall be guided by the general principles contained therein. 2. The Ministry of Foreign Affairs, European Union and Cooperation, through the General Directorate of Consular and Spanish Affairs Abroad, will coordinate with the General Directorate of Child and Adolescent Rights of the Ministry of Social Rights and Agenda 2030 or with the Unit to be determined, the actions of Spanish minors abroad, especially in cases in which their return to Spain is expected"*.

all natural or legal persons, public or private, who act or are in Spanish territory. For these purposes, it will be understood that a legal person is in Spanish territory when it has a registered office, headquarters of effective management, branch, delegation or establishment of any nature in Spanish territory.

In this regard, the norm also establishes the purposes and general criteria of the law –among them, the prohibition of all forms of violence against children and adolescents, the priority of preventive actions and the promotion of good treatment of minors–, regulates the specialized training of professionals who have regular contact with minors and includes the necessary cooperation and collaboration between public administrations, creating the Sectoral Conference on Children and Adolescents and public-private collaboration.

Among its purposes: a) To guarantee the implementation of awareness-raising measures for the rejection and elimination of all types of violence against children and adolescents, providing the public powers, children and adolescents and families, with effective instruments in all areas, of social networks and the Internet, especially in the family, educational, health, social services, the judicial field, new technologies, sports and leisure, the Administration of Justice and the Forces and Security Forces; b) Establish effective prevention measures against violence against children and adolescents, through adequate information for children and adolescents, specialization and improvement of professional practice in the different areas of intervention, accompaniment of the families, providing them with positive parenting tools, and reinforcing the participation of minors; c) Promote the early detection of violence against children and adolescents through interdisciplinary, initial and continuous training of professionals who have regular contact with children and adolescents; d) Reinforce the exercise of the right of children and adolescents to be heard, heard and to have their opinions duly taken into account in contexts of violence against them, ensuring their protection and avoiding secondary victimization; e) Strengthen the civil, criminal and procedural framework to ensure effective judicial protection of children and adolescents who are victims of violence; f) Guarantee reparation and restoration of the rights of underage victims and special attention to children and adolescents who are in a situation of special vulnerability; g) Guarantee the eradication and protection against any type of discrimination and the overcoming of stereotypes of a sexist, racist, homophobic, biphobic, transphobic nature or for aesthetic reasons, disability, illness, aporophobia or social exclusion or for any other personal, family, social or cultural circumstance or condition; h) Establish the protocols, mechanisms and any other necessary measure

for the creation of safe, well-treated and inclusive environments for all children in all the areas developed in this law in which the underage person develops their life. A safe environment shall be understood to be one that respects the rights of children and promotes a protective physical, psychological and social environment, including the digital environment; and i) Protect the image of the minor from her birth until after her death.

Now, in addition, to the general principles and criteria for the interpretation of the best interests of the minor, set out in article 2 of Organic Law 1/1996, of January 15, on the Legal Protection of Minors, the autonomy and training of minors is reinforced. minors for the early detection and adequate reaction to possible situations of violence exerted on them or on third parties; the measures are individualized taking into account the specific needs of each child or adolescent victim of violence; and, one of the important goals, is the incorporation of the gender perspective in the design and implementation of any measure related to violence against childhood and adolescence and, the transversal approach of disability to the design and implementation of any measure related to violence against childhood and adolescence.

However, all this regulation would not be complete, if it were not expressly established, on the one hand, the rights of children in the face of violence, among which are their right to information and advice, to be heard, to care integral, to intervene in the judicial procedure or to free legal assistance.

In relation to the right of victims to be heard, adopting measures to prevent theoretical approaches or criteria without scientific endorsement that presume interference or adult manipulation, such as the so-called parental alienation syndrome, from being taken into consideration; and on the other, the specialized and continuous training of professionals who have regular contact with minors.

Thus, public administrations, within the scope of their respective competences, will promote and guarantee specialized, initial and continuous training on the fundamental rights of children and adolescents for professionals who have regular contact with minors. Specifically, the design of the training actions will take into account, especially, the gender perspective, as well as the specific needs of minors with disabilities, with a diverse racial, ethnic or national origin, in a situation of economic disadvantage, minors belonging to the LGTBI group or with any other sexual orientation or option and/or gender identity and unaccompanied minors.

The duty to communicate situations of violence is also correctly regulated. A generic duty is established for all citizens to immediately

notify the authorities of the existence of signs of violence against children or adolescents. Along with it, a qualified communication duty for those who by their position, profession or activity are entrusted with the assistance of minors: qualified personnel from health, school, sports and leisure centers, child protection and criminal responsibility of minors, reception, asylum and humanitarian care and establishments where children or adolescents habitually reside. To this end, the provision by public administrations of the necessary means is foreseen so that the children and adolescents who are victims of violence or who have witnessed a situation of violence can communicate it safely and easily, for which the law is legally recognized. importance of electronic means of communication, such as toll-free helplines. In addition, any person who notices content on the Internet that constitutes a form of violence against any child or adolescent is obliged to report it to the authority and, if the facts could constitute a crime, to the security forces, the Prosecutor's Office or the judge.

In this context, in the area of prevention and awareness that this fight against violence against minors and, in general, gender violence for families requires, the obligation of the Administrations to provide them, in its multiple forms, is established. support to prevent risk factors from early childhood.

To this end, the competent public administrations must carry out, as a minimum, an analysis of the situation of the family in the territory of their competence, which allows them to identify their needs and set the objectives and measures to be applied. They should be focused on: a) Promoting good treatment, co-responsibility and the exercise of positive parenting. For the purposes of this law, positive parenting is understood as the behavior of the parents, or of those who exercise guardianship, care or foster care, based on the best interests of the child or adolescent and aimed at the minor grow up in an affective and non-violent environment that includes the right to express their opinion, to participate and be taken into account in all matters that affect them, education in rights and obligations, promote the development of their capacities, offer recognition and guidance, and allow its full development in all orders; b) Promote education and the development of basic and fundamental strategies for the acquisition of values and emotional competencies, both in parents, or in those who exercise guardianship, care or foster care, as well as in boys and girls according to the grade maturity of the same. In particular, co-responsibility and the rejection of violence against women and girls, education with an inclusive approach and the development of strategies during early childhood aimed at acquiring parenting skills that allow the establishment of an affective bond will be promoted. strong, reciprocal

and secure with their parents, or with those who exercise guardianship, care or foster care; c) Promote care for women during the gestation period and facilitate good prenatal treatment. This care should influence the identification of those circumstances that may negatively influence the pregnancy and well-being of the woman, as well as the development of strategies for the early detection of risk situations during pregnancy and preparation and support; d) Provide a safe obstetric and perinatal environment for the mother and newborn and incorporate protocols, with proven scientific evidence, for the detection of diseases or genetic alterations, aimed at early diagnosis and, where appropriate, treatment and healthcare early of the newborn; e) Develop training programs for adults and children and adolescents in skills for the negotiation and resolution of intra-family conflicts; f) Adopt programs aimed at promoting positive forms of learning, as well as eradicating punishment with physical or psychological violence in the family environment; g) Create the necessary information and professional support services for children and adolescents so that they have the necessary capacity to early detect and reject any form of violence, with special attention to the problems of girls and adolescents by gender and age are victims of any type of direct or indirect discrimination; h) Provide the guidance, training and support required by the families of children and adolescents with disabilities, in order to allow adequate care for them in their family environment, while promoting their degree of autonomy, their active participation in the family and its social inclusion in the community; and i) Develop training and awareness programs for adults and children and adolescents, aimed at avoiding the intra-family promotion of child marriage, dropping out of studies and assuming work and family commitments that are not in accordance with age.

As we have pointed out, they should also promote family policy measures aimed at supporting the qualitative aspects of positive parenting in parents or those who exercise guardianship, care or foster care. And special attention will be paid to protecting the best interests of children and adolescents in cases of family breakdown and those who live in family environments marked by gender violence[3].

3. Magro Servet, V., (2021): "The peaceful resolution of conflicts and the measure of positive parenting. New forms of compliance with the TBC penalty and suspension of execution in the Child Protection Law", *Diario La Ley, núm. 9866, sección Doctrina 88 de junio*, pp. 8-10 establishes as parameters of positive parenting workshops in cases of domestic violence of article 153.2 of the CP the following: "a. There is no right to correction that legitimizes parent-child violence; b. Right to correction without violence. It means to warn, admonish, reprimand; c. Learning and peaceful conflict resolution; d. The exercise of violence in the home to "correct" children is not covered

To this end, the social and child and adolescent protection services will ensure: a) The detection and specific response to situations of gender violence; b) Referral and coordination with specialized care services for minors who are victims of gender violence.

Not only the family, but the involvement of the educational centers in the prevention of violence is required, for this, together with the coexistence plan, the need for protocols of action against signs of abuse and mistreatment, school bullying, cyberbullying, is established. sexual harassment, violence, gender, domestic violence, suicide, self-harm and any other form of violence. A welfare and protection coordinator is established in all educational centers and learning to use digital media that is safe and respectful of human dignity and fundamental rights, particularly with personal and family privacy and the protection of personal data, will be guaranteed.

On the other hand, the involvement of the health field is also necessary, hence the requirement to promote action protocols for the promotion of good treatment, the identification of risk factors and the prevention and early detection of violence against children and adolescents, as well as comprehensive repairing and age-appropriate mental health care. A Commission will be created against violence in children and adolescents, which will draw up a common protocol for health action.

Regarding the role of social services, civil servants who perform functions related to the protection of children and adolescents are assigned the status of agents of authority. It is provided that the social services will design and carry out an individualized family intervention plan in a coordinated manner, as well as a system for monitoring and registering

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in article 20.7 of the CP; and the right of correction will always be "in the interest of the minor". Violence can never have an "educational" purpose, e. The right to correction is educational, but it is not protected by the exercise of violence, f. Violent behaviors that cause injuries cannot find protection in the duty of correction, g. The minor offense of injury from father to son is not covered by the right to correction".

For its part, the judgment of the Supreme Court, Criminal Chamber, of January 8, 2020 (Roj. STS 14/2020; ECLI:ES:TS:2020:14) regarding the duty of correction from parents to children, it states that "after the reform of article 154.2 of the Civil Code, the right of correction is an inherent power of parental authority and its existence does not depend on express legal recognition, but on its character as an autonomous right, so it is still valid"; and adds "a different thing is the determination of its content and its limits after its formal suppression; In this sense, violent behaviors that cause injury – understood in the criminal legal sense as those that require first medical assistance and that constitute a crime – cannot find protection in the right to correction. As for the rest of the conducts, they must be analyzed according to the circumstances of each case and if it turns out that they do not exceed the limits of the right to correction, the action will not have criminal or civil consequences".

the cases. Statistical information on cases of violence against children will be incorporated into the Unified Registry of Child Abuse, which is now called the Unified Registry of Social Services on violence against violence against Children (RUSSVI).

We cannot fail to mention the importance of new technologies and promote a safe and responsible use of the Internet by minors, adolescents, families, educational personnel and professionals who work with minors; hence, the need to develop educational campaigns on the risks derived from inappropriate use that may generate phenomena of sexual violence against children and adolescents, such as cyberbullying, grooming, gender cyber violence or sexting, as well as access and consumption of pornography among minors. The text expressly provides that public administrations will promote parental control mechanisms that help protect minors from the risk of exposure to harmful content and contacts, as well as from reporting and blocking mechanisms.

Likewise, the field of sports and leisure needs to be involved in the eradication of violence, hence the need to have protocols for action against violence and which must be applied in all centers that carry out sports and leisure activities, regardless of their ownership and, in any case, in the Network of High Performance Centers and Sports Technification, Sports Federations and municipal schools. Entities that regularly carry out sports or leisure activities with minors will be obliged to designate a protection delegate.

In relation to the Security Forces and Bodies, the text establishes that they must have specialized units in the investigation and prevention, detection and action of situations of violence against minors. It also establishes the criteria for police action in these cases, which will be governed by respect for the rights of children and adolescents and the consideration of their best interests. Among them, that only strictly necessary procedures will be carried out with the intervention of the minor and that, as a general rule, the declaration of the minor will be made on a single occasion and always through specifically trained professionals. It is also essential the intervention of the Embassies and Consular Offices in relation to the protection of the interests of Spanish minors abroad, as well as the functions of the Spanish Agency for Data Protection, which must guarantee the availability of an accessible channel and insurance for reporting illegal content on the Internet that seriously undermines the right to protection of personal data. Those over fourteen years of age may be sanctioned for acts constituting an administrative offense in accordance with the regulations on data protection. If the author is under eighteen

years of age, their parents, guardians, legal guardians, and de fact legal guardians will be liable jointly with her for the fine imposed, in this order.

Finally, the creation of a Central Registry of information on violence against children and adolescents is foreseen, to which the public administrations, the General Council of the Judiciary and the Security Forces and Bodies must send information.

It also provides that it will be a requirement for the access and exercise of any professions, trades and activities that involve regular contact with minors, not to have been convicted by a final sentence for a crime against sexual freedom and indemnity or human trafficking, This must be proven by negative certification from the Central Registry of Sex Offenders and Human Trafficking. This obligation extends to all self-employed or employed workers, both in the public and private sectors, and to volunteers.

After this brief *excursus* on the new Organic Law 8/2021, it is necessary to analyze, on the one hand, situations of risk and abandonment and, on the other, gender violence in the family environment, specifically, in situations of separation, nullity and divorce in relation to joint custody and custody and visitation.

III. SITUATIONS OF RISK AND HELPLESS

In Law 26/2015, of July 28, on the modification of the child and adolescent protection system, the aim is to carry out the necessary changes in the Spanish legislation on the protection of children and adolescents in order to continue guaranteeing minors a uniform protection throughout the territory of the State.

To this end, the Public Administrations are obliged to provide minors with adequate assistance for the exercise of their rights, including the support resources they require; and, likewise, articulate comprehensive policies aimed at the development of childhood and adolescence.

In addition, to the main guiding principle of administrative action in the protection of minors, such as the fight against any form of violence, including that produced in their family environment, gender, human trafficking and smuggling, and female genital mutilation, among other. Other guiding principles of such action are specified that are essential to define the actions of the public powers, such as: a) The supremacy of their superior interest; b) Maintaining their family of origin, unless it is not convenient for their interest, in which case the adoption of stable family

protection measures will be guaranteed, prioritizing, in these cases, foster care over institutional care; c) Their family and social integration; d) The prevention and early detection of all those situations that may harm their personal development; e) Sensitization of the population to situations of lack of protection; f) The educational nature of all the measures adopted; (…) i) Protection against all forms of violence, including physical or psychological abuse, humiliating and degrading physical punishment, neglect or negligent treatment, exploitation, that carried out through new technologies, sexual abuse, corruption, gender violence or violence in the family, health, social or educational sphere, including school bullying, as well as human trafficking, female genital mutilation and any other form of abuse; j) Equal opportunities and non-discrimination for any circumstance; k) The universal accessibility of minors with disabilities and reasonable adjustments, as well as their full and effective inclusion and participation; l) The free development of their personality according to their sexual orientation and identity; and m) Respect and appreciation of ethnic and cultural diversity.

In accordance with them, the public powers will have to develop awareness, prevention, assistance and protection actions against any form of child abuse, establishing the procedures that ensure coordination between the competent Public Administrations.

Closely related to the foregoing, this protection of minors by the public powers will be carried out through the prevention, detection and repair of risk situations –which are reinforced in the recent LO 8/2021–, with the establishment of services and resources suitable for this purpose, the exercise of guardianship and, in cases of declaration of abandonment, the assumption of guardianship by operation of law.

In any case, it is emphasized that, in the protection actions, family measures should prevail over residential measures, stable measures over temporary ones, and consensual measures over those imposed. Therefore, the necessary support must be guaranteed so that minors under the parental authority, guardianship, custody or foster care of a victim of gender or domestic violence can remain with the same. These principles, the backbone of the system, had already been established in the Guidelines on alternative childcare modalities of the United Nations General Assembly, dated February 24, 2010 and in various documents approved by the International Social Service.

In this context, the authorities and public services are obliged to provide the immediate attention required by any minor, to act if it corresponds to their area of competence or to transfer in another case to

the competent body and to make the facts known. of the minor's legal representatives or, when necessary, of the Public Entity and the Public Prosecutor's Office. Therefore, the actions of the Public Administrations range from the obligation to provide immediate attention, such as action in risk situations, or, where appropriate, the declaration of distress.

Immediate attention requires the provisional custody of a minor, provided for in article 172.4 of the Civil Code by the Public Entity competent in the protection of minors and will be communicated to the Public Prosecutor's Office, simultaneously proceeding to carry out the necessary procedures to identify the minor, investigate their circumstances and verify, where appropriate, the real situation of helplessness.

On the other hand, a risk situation will be considered one in which, due to circumstances, deficiencies or family, social or educational conflicts, the minor is harmed in his personal, family, social or educational development, in his well-being or in his rights so that, without reaching the entity, intensity or persistence that would base its declaration of a situation of distress and the assumption of guardianship by operation of law, the intervention of the competent public administration is required, to eliminate, reduce or compensate the difficulties or maladjustment that affect him and avoid his helplessness and social exclusion, without having to be separated from his family environment. For such purposes, it will be considered a risk indicator, among others, to have a sibling declared in such a situation unless family circumstances have clearly changed. The concurrence of circumstances or material deficiencies will be considered a risk indicator, but it can never derive to separation from the family environment[4]. The risk situation will be declared by the competent public

4. Article 17.2 of Organic Law 1/1996, of January 15, on the Legal Protection of minors, partially modifying the Civil Code and the Civil Procedure Law –amended by this Organic Law 8/2021– will consider risk indicators: "A) The lack of physical or mental care of the child or adolescent by the parents, or by the persons who exercise the guardianship, care, or foster care, which entails a slight damage to the physical or emotional health of the child, girl or adolescent when it is estimated, by nature or by the repetition of the episodes, the possibility of their persistence or the worsening of their effects; b) Negligence in the care of minors and lack of medical follow-up by parents, or by persons exercising guardianship, care or foster care; c) The existence of a brother or sister declared to be at risk or in distress, unless family circumstances have clearly changed; d) The use, by the parents, or by those who exercise guardianship, care or foster care, the habitual and disproportionate punishment and violent correction guidelines that, without constituting a severe episode or a chronic pattern of violence, harm their developing; e) The negative evolution of the intervention programs followed with the family and the obstruction of their development or implementation; f) Discriminatory practices, on the part of parental responsibilities, against children and adolescents that harm their well-being and their mental and physical health, in particular: 1° Discriminatory attitudes due to

administration in accordance with the provisions of the applicable state and autonomous legislation by means of a motivated administrative resolution, after hearing the parents, guardians, guardians or foster carers and the minor if they have sufficient maturity and, in all case, from the age of twelve. The administrative resolution will determine the measures aimed at correcting the minor's risk situation, including those related to the duties of parents, guardians, guardians or foster carers. Faced with the administrative resolution that declares the risk situation of the minor, an appeal may be filed in accordance with the Civil Procedure Law.

In any case, in a situation of risk of any kind, the intervention of the competent public administration must guarantee, in any case, the rights of the minor and will be aimed at reducing, precisely, the risk and difficulty indicators that affect the personal situation, family and social in which it is, and to promote measures for its protection and preservation of the family environment. To this end, when the urgency of the case requires it, the action of the social services will be immediate (article 14 bis of Organic Law 1/1996).

In short, the assessment of the risk situation will entail the development and implementation of a family social and educational intervention project that must collect the objectives, actions, resources and forecast deadlines, promoting the protection factors of the minor and maintaining the this one in his family environment. The participation of parents, guardians, guardians or hosts in the development of the project will be sought. In any case, their opinion will be heard and taken into account in the attempt to reach a consensus on the project, which must be signed by the parties, for which it will be communicated to them in an understandable and accessible format. He will also communicate and consult with the minor if he has sufficient maturity and, in any case, from the age of twelve.

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gender, age or disability may increase the possibilities of confinement at home, lack of access to education, few leisure opportunities, lack of access to art and cultural life, as well as any other circumstance that due to gender, age or disability, prevent them from enjoying their rights on an equal basis. 2° The non-acceptance of the sexual orientation, gender identity or sexual characteristics of the minor; g) The risk of suffering cutting, female genital mutilation or any other form of violence in the case of girls and adolescents based on gender, promises or forced marriage agreements; h) The identification of mothers as victims of trafficking; i) Girls and adolescents who are victims of gender violence in the terms established in article 1.1 of Organic Law 1/2004, of December 28, on comprehensive protection measures against gender violence; j) Multiple admissions of minors in different hospitals with recurrent, unexplained symptoms and/or those that are not diagnosed diagnostically; k) The habitual consumption of toxic drugs or alcoholic beverages by minors; l) Exposure of the minor to any situation of domestic or gender violence; and, m) Any other circumstance that involves violence against minors that, if it persists, may evolve and lead to the abandonment of the child or adolescent".

Faced with such a situation, the parents, guardians, guardians or foster carers, within their respective functions, must actively collaborate, according to their capacity, in the execution of the measures indicated in the aforementioned project. The omission of such collaboration will give rise to the declaration of the risk situation of the minor and, where appropriate, the situation of abandonment.

Precisely, a situation of helplessness will be considered that which occurs in fact due to non-compliance, or the impossible or inadequate exercise of the protection duties established by the laws for the care of minors, when they are deprived of the necessary moral assistance or material.

The situation of poverty of the parents, guardians or guardians may not be taken into account for the assessment of the situation of helplessness. Likewise, in no case will a minor be separated from her parents due to a disability of the minor, of both parents or of one of them.

An indicator of helplessness is understood, among others, that there is a brother declared in a situation of helplessness, unless the family circumstances have changed clearly.

In particular, it will be understood that a situation of helplessness exists when one or more of the following circumstances occurs with sufficient gravity that, assessed and weighed in accordance with the principles of necessity and proportionality, pose a threat to the physical or mental integrity of the minor: a) The abandonment of the minor, either because the persons who by law correspond to the exercise of guardianship, or because they do not want to or cannot exercise it; b) The course of the period of voluntary custody, either when their legal guardians are in a position to take charge of the custody of the minor and do not want to assume it, or when, wishing to assume it, they are not in a position to do so, except in exceptional cases in which the voluntary custody can be extended beyond the period of two years; c) The risk to the life, health and physical integrity of the minor. In particular when there is serious physical abuse, sexual abuse or gross negligence in the fulfillment of food and health obligations by the people of the family unit or third parties with their consent; also when the minor is identified as a victim of human trafficking and there is a conflict of interest with the parents, guardians and guardians; or when there is repeated consumption of substances with addictive potential or the execution of other types of addictive behaviors repeatedly by the minor with the knowledge, consent or tolerance of the parents, guardians or guardians. It is understood that such consent or tolerance exists when the necessary efforts have not been

made to alleviate these behaviors, such as requesting advice or not having sufficiently collaborated with the treatment, once they are known. It is also understood that there is helplessness when there is serious damage to the newborn caused by prenatal abuse; d) The risk to the mental health of the minor, their moral integrity and the development of their personality due to continued psychological abuse or the lack of serious and chronic attention to their emotional or educational needs by parents, guardians or guardians. When this lack of attention is conditioned by a serious mental disorder, by a habitual consumption of substances with addictive potential or by other habitual addictive behaviors, the absence of treatment by parents, guardians or guardians or the lack of sufficient collaboration during it; e) The non-compliance or the impossible or inadequate exercise of the guardianship duties as a consequence of the serious deterioration of the environment or of the family living conditions, when they give rise to circumstances or behaviors that harm the development of the minor or the mental health of her; f) Inducing begging, crime or prostitution, or any other exploitation of the minor of a similar nature or gravity; g) The absence of schooling or repeated and not adequately justified attendance at the educational center and the continued permissiveness or induction of school absenteeism during the stages of compulsory schooling; h) Any other situation seriously detrimental to the minor that brings cause of non-compliance or of the impossible or inappropriate exercise of parental authority, guardianship or guardianship, the consequences of which cannot be avoided while they remain in their coexistence environment.

It is an extreme measure that determines that the Public Entity, in accordance with the provisions of articles 172 and 174 of the Code Civil, assumes the guardianship of the former by operation of the law, adopting the appropriate protection measures and making it know of the Public Prosecutor and, where appropiate, of the Judge who agreed to the ordinary guardianship. Both to protect minors from a member State of European Union of State of 1996 Hague Convention and Spanish minors abroad, cross-border foster care is regulated in articles 20 ter to 20 quinquies of the Law Organic 1/1996.

Regarding the cross-border foster care in Spain of minors from a Member State of the European Union or by a State party to the Hague Convention, applications for foster care must be made in writing and accompanied by the documents that the Spanish Central Authority –Ministry of Justice– required to assess the suitability of the measure for the benefit of the minor and the aptitude of the establishment or family to carry out said foster care. In any case, in addition to that required by the applicable international regulations, a report must be provided on the

child or adolescent, the reasons for their foster care proposal, the type of foster care, the duration of the same and how it is expected to follow up on measure.

In any case, said requests must be sent by the Central Authority of the requesting State in order to obtain the mandatory authorization of the competent Spanish authorities prior to the placement.

Upon receipt of the request for cross-border foster care, the Spanish Central Authority will verify that the request meets the content and requirements indicated in the preceding lines and will transmit it to the competent autonomous administration for approval. Once the request has been evaluated, the latter will forward its decision to the Spanish Central Authority, which will forward it to the Central Authority of the requesting State. The maximum period for processing and responding to the request will be three months.

Only if the foster care is favorable, the competent authorities of said requesting State will issue a resolution ordering the foster care in Spain, notify all interested parties and request its recognition and enforcement in Spain directly before the territorially competent Spanish Court or Tribunal. In any case, the foster care requests and their attached documents must be accompanied by a legalized translation in Spanish.

However, the Spanish Central Authority may reject requests for cross-border foster care when: a) The object or purpose of the foster care request does not guarantee the best interests of the minor person, for which the existence of links will be especially taken into account. with Spain; b) The application does not meet the requirements for processing. In this case, it will be returned to the requesting Central Authority indicating the specific reasons for the return so that it can correct them; c) The displacement of a minor person who is involved in a criminal or sanctioning procedure or who has been convicted or sanctioned for the commission of any criminal or administrative offense is requested; and, d) The fundamental right of the minor to be heard and heard, as well as to maintain contact with their parents or legal representatives, has not been respected, except if this is contrary to their superior interest (article 20 quater of the LOPJM).

Regarding requests for cross-border foster care of minors from Spain to another Member State of the European Union or a State party to the 1996 Hague Convention, they will be sent in writing to the Spanish Central Authority, which will forward them to the authorities. competent authorities of the Member State required for its processing. The processing and approval of said requests will be governed by the National Law of the requested Member State. In any case, the Spanish Central Authority

will forward the decision of the required foster care to the requesting Authority. Lastly, foster care requests and attached documents that are addressed to a foreign authority must be accompanied by a translation into an official language of the State required or accepted by it (Article 20 quinquies of the LOPJM).

On these bases, the truth is that LO 8/2021 reinforces awareness, prevention and early detection of violence against children by public authorities. In addition, intervention plans and programs for risk factors –already addressed in the previous regulations, and expanded in this–. Hence, the importance of, on the one hand, the obligation of Public Administrations to provide families, in its many forms, support to prevent risk factors from early childhood. Likewise, the prevention of violence in educational centers in which, together with the coexistence plan, action protocols are imposed against signs of abuse and mistreatment, school bullying, cyberbullying, sexual harassment, gender violence, domestic violence, suicide, self-harm and any other form of violence –will especial importance the work of the welfare and protection coordinator in all educational centers–. Also in the health field, action protocols will be promoted to promote good treatment, the identification, again, of risk factors, and the prevention and early detection of violence against children and adolescents, as well as attention to comprehensive restorative and age-appropriate mental health. Likewise, in the matter of social services, civil servants who exercise functions of protection of children and adolescents are attributed the status of agents of the authority. In addition to the design and implementation of an individualized family intervention plan in a coordinated manner, as well as a system for monitoring and registering cases. In short, a safe and responsible use of the Internet is promoted by children, adolescents and families, educators personal and professionals who work with minors and the development of educational campaigns on the risks derived from the inappropriate use that it can generate phenomena of sexual violence against children and adolescents, such as cyberbullying, grooming, gender cyber violence and sexting, as well as access to and consumption of pornography among minors. Hence, the importance of promoting parental control mechanisms that help protect minors from the risk of exposure to harmful content and contacts, as well as a reporting and blocking mechanism.

IV. GUARDIANSHIP AND SHARED CUSTODY, VISITING REGIME AND GENDER VIOLENCE

The World Health Organization defines violence as "the deliberate use of physical force or power, whether threatening or effective, against

oneself, another person, or a group or community that causes or has a high probability of cause injury, death, psychological damage, developmental disorders or deprivation".

However, situations of violence against women also affect minors who are within their family environment, direct or indirect victims of this violence. The Law also contemplates its protection not only for the protection of the rights of minors, but also to effectively guarantee the protection measures adopted with respect to women.

We are faced with a complex phenomenon in which it is necessary to intervene from different legal perspectives, which has to encompass civil and procedural norms.

The United Nations Organization at the IV World Conference in 1995 recognized that violence against women is an obstacle to achieving the goals of equality, development and peace and violates and undermines the enjoyment of human rights and fundamental freedoms. Furthermore, it broadly defines it as a manifestation of historically unequal power relations between women and men. There is even a technical definition of the battered woman syndrome that consists of "the aggressions suffered by women as a consequence of the sociocultural conditions that act on the male and female gender, placing them in a position of subordination to men and manifested in the three basic areas of the person's relationship: mistreatment within a couple's relationships, sexual assault in social life and harassment in the workplace".

While, domestic or intrafamily violence is "that which takes place between ascendants, descendants, siblings, own or of the spouse or partner, or on minors or incapacitated persons who are subject to parental authority, guardianship, guardianship, foster care, guardianship fact of the spouse or partner or that they live with him or on another person protected by any relationship for which they are integrated into the nucleus of family coexistence"; Gender-based violence is that which is committed against women by her partner or her former male partner, whether it is a marriage, or another similar affective relationship (Rodríguez Fernández, 2019, 53-54; Guirado and Ramón, 2020, 686)[5].

Therefore, Gender-based violence includes any act of physical and psychological violence, including attacks on sexual freedom, threats, coercion, or arbitrary deprivation of liberty.

5. Rodríguez Fernández, A. (2019). "Considerations about family violence against minors", *Revista sobre la Infancia y la Adolescencia, núm. 16, abril,* pp. 53-54; Guirado, S., Ramón, F., (2020). "Shared custody and gender violence: present and future perspectives", *Actualidad Jurídica Iberoamericana, núm. 12*, *febrero*, p. 686.

Faced with this scourge or destructive phenomenon of human life, it is necessary to intervene from different legal perspectives –civil, criminal, procedural and administrative regulations of general scope–, up to the provisions relating to the care of victims, an intervention that is only possible with specific legislation.

This gender violence is exercised on women by those who are or have been their spouses or by those who are or have been linked to them by similar emotional relationships, even without coexistence.

However, situations of violence against women affect, as we have indicated, also minors who are within their family environment, direct or indirect victims of this violence. Thus, Organic Law 1/2004, of December 28, on Comprehensive Protection Measures against Gender Violence, also contemplates their protection not only by protecting the rights of minors, but also by effectively guaranteeing the protection measures adopted regarding of the woman.

Gender-based violence against a minor is unjustifiable. This form of violence affects minors in many ways, affecting their well-being, development, and causing serious health problems. In addition, they become an instrument to exercise domination and violence over women. With this, the intergenerational transmission of these violent behaviors towards women by their partners or *ex* partners is favored[6].

For all these reasons, it is necessary to recognize the minor victims of gender violence by considering them as direct victims, which also makes it possible to make visible this form of violence that can be exercised against them. For this reason, section 1 of article 1 of Organic Law 1/2004, of December 28, on Comprehensive Protection Measures against Gender Violence is modified by Organic Law 8/2015, of July 22, modifying the system protection for childhood and adolescence.

Their recognition as victims of gender-based violence entails the obligation of the Judges to rule on the precautionary and assurance measures, in particular, on the civil measures that affect minors who depend on the woman against whom violence is exercised. Thus, the Judge may suspend for the accused of gender violence the exercise of parental authority, guardianship and custody, foster care, guardianship,

6. The World Health Organization defines child abuse as "the abuse and neglect that children under eighteen years of age are subjected to and includes all forms of physical or psychological abuse, sexual abuse, neglect, neglect, and commercial or other exploitation, that cause or may cause harm to the health, development or dignity of the child or endanger their survival in the context of a relationship of responsibility, trust or power".

curatorship or de facto guardianship, with respect to the minors who depend on him. This broadens the situations that are the object of protection in which minors may find themselves in the care of women who are victims of gender violence; and, likewise, the Judge may order the suspension of the visitation, stay, relationship or communication of the accused of gender violence with respect to the minors who depend on him (articles 65 and 66 of Organic Law 1/2004), understanding with This is the visiting regime and understanding it in a global way as stays or ways of relating or communicating with minors.

In this context, gender-based violence plays a fundamental role in nullity, separation and divorce processes, as it prevents the establishment of joint custody and custody or a visitation regime in the event of exclusive custody by the other parent in order to protect the other parent and the minor or adolescent child.

In any case, the shared exercise of the custody of the children can be agreed, when the parents so request in the proposed regulatory agreement or when both reach this agreement during the procedure and there is no case of violence. intrafamily.

However, before agreeing on a custody and custody regime –exclusive or shared or joint–, the Judge must obtain a report from the Public Prosecutor's Office, will hear the minors who have sufficient judgment, when it is deemed necessary ex officio or at the request of the Prosecutor, the parties or members of the Judicial Technical Team, or of the minor himself, and will assess the allegations of the parties, the evidence taken, and the relationship that the parents maintain with each other and with their children to determine their suitability with the custody regime.

In any case, joint custody will not proceed when either of the parents is involved in a criminal process initiated for attempting against the life, physical integrity, liberty, moral integrity or sexual freedom and indemnity of the other spouse or of the children who live with both. Nor will it proceed when the Judge notices, from the allegations of the parties and the evidence practiced, the existence of well-founded indications of domestic or gender violence (article 92.7 of the Civil Code modified by Organic Law 8/2021)[7].

7. The Plenary of the Constitutional Court, by order of December 15, 2020, has agreed to admit for processing the question of unconstitutionality number 4701-2020, raised by the Court of Violence against Women No. 1 of Jerez de la Frontera in contentious divorce proceedings no. 23-2020, in relation to the first paragraph of article 92.7 of the Civil Code (BOE, number 332, of December 22, 2020, page 11750).

It is applicable whether there are convictions for gender violence, whether a procedure for gender violence has been initiated before the competent court –gender violence– or whether it is confirmed for the judge that there are indications of domestic violence[8].

It is a doctrine, precisely, of the Civil Chamber of the Supreme Court that, shared custody implies as a premise the need that, between the parents, there is a relationship of mutual respect in their personal relationships that allows the adoption of attitudes and behaviors that benefit to the minor who does not disturb their emotional development and that despite the emotional breakdown of the parents, a family frame of reference is maintained that supports a harmonious growth of their personality. One thing is the logical conflict that may exist between the parents as a result of the breakup and another is that this relationship framework is crossed out by a conviction for a crime of gender violence, or by signs of violence. It is required that the life and development of the minor take place in an environment "free of violence" and that "in the event that all competing legitimate interests cannot be respected, the best interests of the minor must prevail over any other legitimate interest that may concur"[9].

Regarding the visitation regime, the judge, ex officio or at the request of the child himself, of any relative or of the Public Prosecutor's Office, may agree to the precautionary suspension in the exercise of parental authority and/or in the exercise of custody, the precautionary suspension of the visitation, communication regime established in a judicial resolution or judicially approved agreement and, in general, the other provisions that it deems appropriate, in order to remove the minor from danger or to avoid damage in their family environment or in front of third parties people.

Related to this matter, likewise, the Judge, *ex officio* or at the request of the child himself, of any relative or of the Public Prosecutor's Office, will dictate the necessary measures to prevent the abduction of minor children by any of the parents or by third parties and, in In particular, the following: a) Prohibition of leaving the national territory, unless prior

8. However, following Ureña Carazo, B. (2016): "Conflict between parents as a criterion for attribution of joint custody. Special reference to gender violence", *LA LEY. Derecho de Familia, núm. 11, julio-septiembre*, p. 10 "as long as there is no final sentence of conviction for any of these crimes, this would constitute a violation of the principle of presumption of innocence, which is being sacrificed in the best interests of the minor".

9. Vid., The judgments of the Supreme Court, Civil Chamber, of February 4, 2016 (Roj. STS 288/2018); of May 26, 2016 (Roj. STS 2304/2016); of March 29, 2021 (Roj. STS 1226/2021); and, of May 31, 2021 (Roj. STS 2255/2021).

judicial authorization; b) Prohibition of issuing the passport to the minor or withdrawing it if it has already been issued; c) Submission to prior judicial authorization of any change of address of the minor (article 158 of the Civil Code).

Recently, in Spain we have witnessed the murder by a father of his daughters and a mother of this daughter this visitation period. They constitute cases of domestic violence –vicarious violence– with the unique purpose of causing irreparable and permanent damage to the parent. This vicarious violence is included with this Organic Law 8/2021 within the concept of gender violence referred to in article 1.1 of Organic Law 1/2004, specifically, regarding men who exercise power over women with those who are or have been linked in a relationship of affection or analogous to it even without coexistence. In any case, gender violence includes any act of physical and psychological violence, including attacks on sexual freedom, threats, coercion or arbitrary deprivation of liberty. This comprehensive law against gender violence is intended to prevent, punish and eradicate this violence and provide assistance to women, their minor children and minors subject to guardianship and custody, victims of this violence[10].

Preventive protection formulas should be established, *ex ante*, in order to avoid these situations; with the maximum implications of the authorities, forces and bodies of State Security; of society in general and in particular, the family in order to eradicate gender violence as a permanent scourge in our country.

Likewise, it supposes a notable advance that, in the exercise of parental authority (deprivation of it), the exercise of custody, or the visitation and communication regime already established in a judicial resolution or judicially approved agreement, is provisionally suspended when a danger to the minor is found or to avoid harm from a danger; or even save your life. What has not been possible with the last three minors murdered by one of their parents during the visitation regime for harming the other custodial parent.

10. For Guirado, S., Ramón, F., (2020): "Shared custody and gender violence: present and future perspectives", *Actualidad Jurídica Iberoamericana, núm. 12, febrero*, p. 687 this Organic Law 1/2004 "uses two criteria when explaining its scope, these are one of an objective nature and the other of a subjective nature. Regarding the objective nature, only those criminal offenses observed in the Law are considered gender violence, these falling within the jurisdiction of the Courts on women. As for the second criterion of a subjective nature, there must be a relationship, be it conjugal or similar; between the victim and the aggressor, whether or not there is coexistence between them".

Now, Law 8/2021, of June 2, which reforms the civil and procedural legislation to support people with disabilities in the exercise of their legal capacity has modified article 94.4 of the Civil Code –in the line of article 544 ter section 7 of the Criminal Procedure Law (amended by Organic Law 8/2021)–. After declaring in its section 1 that *"the judicial authority will determine the time, manner and place in which the parent who does not have minor children with him may exercise the right to visit them, communicate with them and have them in his company"*, point out that in its section 4 that *"the establishment of a visit or stay regime will not proceed, and if it exists, it will be suspended, with respect to the parent who is involved in a criminal process initiated for attempting against life, physical integrity, liberty, moral integrity or the sexual freedom and indemnity of the other spouse or their children. Nor will it proceed when the judicial authority notices, from the allegations of the parties and the evidence practiced, the existence of well-founded indications of domestic or gender violence"*.

Regarding both sections, it can be affirmed in relation to the visitation, stay and communication regime that: 1. The non-custodial parent will enjoy such right of views, stay and communication that the judicial authority establishes, after hearing the child and the Public Prosecutor's Office. However, the judicial authority may limit or suspend such visitation, stay and communication regime: a) If relevant circumstances arise that make it advisable; or b) The duties imposed by judicial resolution are seriously or repeatedly breached; 2. The State Pact against gender violence ratified in December 2017 by the different Parliamentary Groups, the Autonomous Communities and the Local Entities represented in the Spanish Federation of Municipalities and Provinces consists of the Report of the Equality Subcommittee of the Congress of the Deputies with 214 measures and the Senate Report with 267 measures, specifically in the Report of the Equality Subcommittee, measures 145 and 146 are imposed: establish the imperative nature of the suspension of the hearing regime in all cases in which the minor have witnessed, lived or lived with manifestations of violence –without prejudice to adopting measures to promote the application of articles 65 and 66 of Organic Law 1/2004–; and, prohibiting the visits of minors to the father in prison convicted of gender violence. This article 94.4 takes as a reference, precisely, the content of such an agreement in relation to the visitation regime, establishing as an imperative measure for the civil judge: the suspension of the visitation, stay and communication regime: if the parent is involved in criminal proceedings initiated for attempting against the life, physical integrity, liberty, moral integrity or sexual freedom and indemnity of the other spouse or children; or when the existence of well-founded indications of domestic or gender violence is appreciated, in accordance with the allegations of the parties and of

the evidence practiced. In the first case, there must be a criminal process already initiated regardless of the procedural moment in which it is found; in the second case, there is, however, no criminal proceeding, but only well-founded indications of domestic or gender violence, deduced from the allegations of the parties or the evidence taken. As López Calderón rightly points out, it is difficult to reconcile such imperativity in the situations indicated with the presumption of innocence and, in any case, with the right of defense within a civil proceeding with respect to which the guarantees of a criminal proceeding are unrelated[11].

It is not the same for the judge to agree to the precautionary suspension in the exercise of parental authority and/or the exercise of custody or visitation and communication when it is intended to remove the minor from danger or to avoid damage to their family environment or in front of third parties as provided for in the aforementioned article 158 of the Civil Code; that, on the contrary, imperatively impose that the regime of views, stay or communication already agreed upon is not agreed or suspended before the beginning of a criminal process without yet a conviction, or the existence of well-founded indications of domestic or gender violence deducted of the allegations of the parties and of the tests carried out.

However the manifested, a certain margin of action is left to the civil judge, because despite both situations, the judicial authority may establish a regime of visits, stay and communication, when the best interest of the minor or the will, wishes and preferences of the elderly with disabilities in need of support and prior assessment of the situation of the parent-child relationship, as required. Although, it will have to be done by means of a reasoned resolution. The accreditation of such circumstances corresponds to the judicial authority with the collaboration of the Public Prosecutor as guarantor of the minor's interest in family proceedings.

In this context, Service Note 1/2021 of the State Attorney General's Office on guiding criteria in the interpretation of the new wording of articles 544 ter LECrim and 94.4 of the Civil Code concludes that as guiding criteria "when there are minor sons or daughters that live with women who are victims of gender violence, Ms. Prosecutors will not be interested in the establishment of a hearing regime in the appearance of a protection order as the current regulation of article 544 ter LECrim prevents this pronouncement – if there was a current hearing regime agreed by any previous judicial resolution, Ms. it is. Prosecutors will

11. Ortega Calderón, J. L. (2021): "The suspension of the regime of visits, communications and stay under the protection of article 94 Civil Code after the reform by Law 8/21, of June 2", *Diario La Ley, núm. 9892, sección Tribuna, 15 de julio*, p. 12.

request its suspension if the minors have witnessed, suffered or lived with the violence and only exceptionally, may they be interested in maintaining it when the best interest of the minor advises, evaluating the parent-child situation". To which it adds that this is part of the obligations assumed in the State Pact against Gender Violence, following the recommendations of the Ombudsman and the Group of Experts in the Fight against Violence against Women and Domestic Violence (GREVIO) and in line with the aforementioned legislation, "the possibility of agreeing a visitation regime in the context of the protection order is no longer contemplated to regulate the exclusive possibility of suspending the existing one, where appropriate, or agreeing motivated based on the superior interest of the minor its maintenance".

The foregoing represents the present in Spain in the situation of violence in general and gender in particular. The future lies in how Organic Law 8/2021, of June 4, for the comprehensive protection of children and adolescents against violence is implemented.

In any case, as Magro Servet (2021, 2-3) rightly points out "that if we assume that one of the key matters in the fight against gender violence is to act from the field of prevention (…), to prevent it from being repeat the acts of abuse". Artificial Intelligence can contribute to this, because "it learns from what has happened and foresees what may happen with an approximation of predictability that is certainly very exact and real". It also helps "the judge of violence against women when acting in the issuance of precautionary measures"[12].

V. CONCLUSIONS

* This Organic Law 8/2021 aims to guarantee the fundamental rights of children and adolescents to their physical, mental, psychological and moral integrity in the face of any form of violence, ensuring the free development of their personality.

* Comprehensive protection measures are established that include awareness, prevention, early detection, protection and repair of damage in all areas in which their life develops. Among which are, acting on risk situations, in case of emergency, homelessness and residential, family and cross-border foster care, among others. To this end, the General State Administration must adopt a Strategy for the eradication of violence

12. MAGRO SERVET, Vicente (2021): "Artificial intelligence to improve the fight against gender violence", *Diario La Ley, núm. 9898, sección Doctrina, 23 de julio,* pp. 2-3.

against children and adolescents, with special emphasis on the family, education, health, social services, new technologies, sports and the leisure and the State Security Forces and Bodies. In addition to prevention plans for the eradication of violence against children and adolescents, identifying risk groups and early detection measures.

* In the family sphere, the obligation of the Public Administrations to provide families, in its many forms, support to prevent risk factors from early childhood is established. Also promote positive parenting measures between parents, or those who exercise guardianship, care or foster care; pay special attention to the protection of the best interests of children and adolescents in cases of family breakdown and with respect to those who live in family environments marked by gender violence; and, in promoting parental control mechanisms that help protect minors from the risk of exposure to harmful content and contacts, as well as reporting and blocking mechanisms.

* In the educational centers, together with the coexistence plan, protocols for action must be drawn up against signs of abuse and mistreatment, school bullying, cyberbullying, sexual harassment, gender violence, domestic violence, suicide, self-harm and any other form of violence; guarantee the learning of a safe use of digital media and respectful of human dignity and fundamental rights, particularly with personal and family privacy and the protection of personal data; and appoint a welfare and protection coordinator in all educational centers.

* In this comprehensive and multidisciplinary care, in addition to a generic duty of all citizens to immediately communicate to the authority the existence of indications of violence against children or adolescents, there is a qualified communication duty of situations of violence for those who by their position, profession or activity are entrusted with the assistance of minors: qualified personnel of health centers, schools, sports and leisure, child protection and criminal responsibility of minors, reception, asylum, and humanitarian care and establishment in the that habitually reside children or adolescents. Likewise, the Public Administrations must provide the necessary means so that children and adolescents who are victims of violence or who have witnessed a situation of violence, can communicate it easily and safely – the importance of electronic means such as lines free helplines.

* Likewise, the rights of children and adolescents against violence are recognized as the right to information and advice, the right to be heard or heard, to comprehensive care, to intervene in judicial proceedings or to free legal assistance. The parental alienation syndrome should not be

established in the adoption of measures in relation to children, as the interference or adult manipulation of one parent against the other does not have scientific endorsement.

* The best interests of the minor are reinforced in the processes of separation, annulment and divorce, as well as to ensure that there are the necessary precautions to comply with the custody and custody regimes (Article 92 of the Civil Code); It is possible for the Judge to agree to the precautionary suspension in the exercise of parental authority and/or the exercise of custody or visitation and communications, in order to remove the minor from danger or to avoid damage to their family environment or in front of third parties (article 158 of the Civil Code); and with the reform by Law 8/2021, the suspension of the right to views, stay and communication is imperatively imposed on the civil judge with respect to the parent who is involved in a criminal process initiated for threatening life, physical integrity, liberty, moral integrity or the sexual freedom and indemnity of the other spouse or their children, or when the judicial authority notices, from the allegations of the parties and the evidence practiced, the existence of well-founded indications of domestic or gender violence. Measure that may not "fit well" with the presumption of innocence and the right of defense of the alleged guilty of family violence.

* In matters of social services, the personnel who exercise the functions related to the protection of children and adolescents have the status of agents of authority. For this, the social services will have to design and carry out an individualized family intervention plan, as well as the follow-up and registry of cases. To this end, statistical information on cases of violence against children will be incorporated into a Unified Registry of Social Services on Violence against Children (RUSSVI).

* Given the use of new technologies, it is decided to promote a safe and responsible use of the Internet by children, adolescents, families, educational personnel and professionals who work with minors. Likewise, the development of educational campaigns on the risks derived from the inappropriate use of new technologies is foreseen, which may derive in the event of sexual violence against children and adolescents, such as cyberbullying, grooming, gender cyber violence or sexting, as well as the access and consumption of pornography among minors. It is the responsibility of the Public Administrations to promote parental control and reporting and blocking mechanisms that help protect minors from the risk of exposure to harmful and dangerous content, contacts and relationships.

The Role of Gender for the Legitimization of Behavioral and Sanctioning Norms

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I. INTRODUCTION

The debate about the meaning of gender in criminal law is still in its infancy in Germany. Comments often do not go beyond a reference to article 3 (2) sentence 1 of the *Grundgesetz* (the German constitution, "GG") which states that men and women are with equal rights, and to article 3 (3) sentence 1 GG, which, inter alia, states that no one may be disadvantaged or preferred because of his or her gender. The importance of article 3 should not be underestimated. Nevertheless, there are still criminal offenses in today's German criminal law that make a distinction between the male and female gender. This raises the question of the conditions under which criminal law norms can differentiate on the basis of gender – or whether such norms can be legitimized at all.

The aim of the present considerations is thus to debate the question of whether existing criminal law norms in Germany that are explicitly linked to the gender of the perpetrator or victim are legitimate, and if so, under which conditions. In addition, the considerations to be made may also serve to examine the legitimacy of any criminal offenses that may be called for in the future.

The starting point of the following considerations will be the norm theory, which is particularly associated with the name of *Karl Binding*, but has since undergone some modifications. After the key aspects of

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the theory have been presented, the following section will show criminal offenses in German criminal law that explicitly differentiate on the basis of gender – either because only the perpetrator of a certain gender can realize an offense, or only the victim of a certain gender is included in the norm.

Insofar as the question is raised as to what extent norms can differentiate on the basis of gender, the question must be raised at the same time as to which categories are to be used to differentiate genders from one another. In Germany, it has been recognized at least since a decision of the German Constitutional Court[2] that there are not just the classifications "male" and "female". Gender can be described in several ways, such as biological, psychological, or social[3]. Nevertheless, there are legal regulations in Germany which speak solely of "men" and/or "women"[4]. It would be preferable, when speaking of "woman", to mean any person who feels that she belongs to the female gender – just as "man" should encompass any person who feels that he belongs to the male gender. However, it will be seen that this approach is problematic when it is precisely the male or female sexual organ that is of importance.

II. STARTING POINT: THE THEORY OF NORMS

To examine criminal law norms in terms of their legitimacy, it is first necessary to lay a scientific foundation. The approach chosen for this purpose is the norm theory, significantly advanced by Binding and here in particular based on the further development by Freund and Rostalski.

1. SEPARATION OF NORMS OF BEHAVIOUR AND NORMS OF SANCTIONS

Every punishment interferes with the liberty rights of the person affected and thus requires legitimisation[5]. Its purpose could be explained by the protection of legal interests. The problem is, however, that criminal

2. BVerfG, NJW 2017, 3643.
3. Rädler, J. *Das dritte Geschlecht*: *Rechtsfragen und Rechtsentwicklung* (Berlin: Duncker & Humblot, 2019), p. 27; Deutscher Ethikrat, *Intersexualität*: *Stellungnahme vom 23. Februar 2012* (Berlin: Deutscher Ethikrat, 2012), p. 28 ff.
4. See for example article 3 paragraph 2 GG, and the following norms dealt with in this article.
5. Rostalski, F. *Der Tatbegriff im Strafrecht*: *Entwurf eines im gesamten Strafrechtssystem einheitlichen normativ-funktionalen Begriffs der Tat* (Tübingen: Mohr Siebeck, 2019), p. 16; Timm, F. *Gesinnung und Straftat*: *Besinnung auf ein rechtsstaatliches Strafrecht* (Berlin: Duncker & Humblot, 2012), p. 40.

law itself only comes into play when a certain legal interest has already been violated or endangered[6]. A norm that announces criminal sanctions if a perpetrator kills a victim only takes effect after the victim is dead. Thus, no criminal law norm can help to protect this particular victim. What does serve to protect this specific victim, however, is the avoidance of conduct that endangers or damages legal interests[7]. Consequently, prior to criminal law there are certain norms of behaviour.

According to the so-called norm theory, norms of behaviour and norms of sanctions are to be distinguished from each other. In the pre-punitive area, there are commands or prohibitions of behaviour. They serve the direct protection of a legal interest, and they serve as the basis of a freedom-based society[8]. If these norms of behaviour are violated, norms of sanctions can be a reaction to this that is enforced by punishment. The exact purpose of punishment is subject of various theories, which can only be mentioned in broad outline below.

In German criminal law, a delinquent does not act against a particular criminal statute but, according to the wording, precisely in accordance with a criminal statute[9]. If, for example, section 242 (1) of the *Strafgesetzbuch* (the German Criminal Code, "StGB") states that "Whoever takes movable property belonging to another away from another with the intention of unlawfully appropriating it for themselves or a third party incurs a penalty of imprisonment for a term not exceeding five years or a fine", then the thief does not violate section 242 (1) StGB when he takes someone else's property but does exactly what the statute requires. The delinquent, instead, violates a legal norm of behaviour, that is, a specific commandment or prohibition.

2. LEGITIMATION OF NORMS OF BEHAVIOR

Behavioral norms contain legal prohibitions or commandments and thus serve to protect legal interests and to ensure peaceful coexistence in

6. Rostalski, F. *Der Tatbegriff im Strafrecht, above footnote* 5, p. 16.
7. *Ibid.*, p. 17; Heinrich, J. *Die gesetzliche Bestimmung von Strafschärfungen*: *Ein Beitrag zur Gesetzgebungslehre* (Berlin: Duncker & Humblot, 2016), p. 39; Timm, *Gesinnung und Straftat, above footnote* 5, p. 41 f.; Georg Freund, *Erfolgsdelikt und Unterlassen*: *Zu den Legitimationsbedingungen von Schuldspruch und Strafe* (Köln: Carl Heymanns Verlag KG, 1992), p. 80 f.
8. Rostalski, F., *Der Tatbegriff im Strafrecht, above footnote* 5, p. 18.
9. Freund, G., Rostalski, F., "Warum Normentheorie?: Zur selbstständigen Bedeutung vorstrafrechtlich legitimierter Verhaltensnormen, auch und gerade im strafrechtlichen Kontext", Goltdammer's Archiv für Strafrecht (2020): pp. 617-33.

a society[10]. It could be assumed that norms of behavior can be derived from the written norms of criminal laws. However, norms of behavior are always formed in each situation in a context-specific and addressee-specific manner and not every norm of behavior enjoys protection by a norm of sanctions.

Every behavioral norm interferes with the freedom rights of citizens and must thus be legitimized in a legal system that serves the freedom of individuals and furthermore to be constitutionally tenable[11]. Thus, for the legitimation of behavioral norms, it is required that they serve a legitimate purpose and are suitable, necessary, and adequate for achieving this purpose[12].

2.1. Legitimate purpose

The first, and a significant, step is thus to ask whether a behavioral norm serves a legitimate purpose at all. If such a purpose cannot be established from the very beginning, then a norm of conduct cannot be legitimized. The decisive factor is that the purpose being pursued is compatible with the constitution[13].

2.2. Suitability, necessity and adequacy

The norm of behavior is suitable for the protection of legal interests if it is generally capable of protecting them[14]. Such suitability may be lacking, for example, if there are no reasons for a rational citizen to act in accordance with it[15]. The necessity of a norm presupposes that the desired

10. Rostalski, F., *Der Tatbegriff im Strafrecht*, *above footnote* 5, p. 64.
11. Freund, G. "Tatbestandsverwirklichung durch Tun und Unterlassung.: Zur gesetzlichen Regelung begehungsgleichen Unterlassens und anderer Fälle der Tatbestandsverwirklichung im Allgemeinen Teil des StGB", in H. Putzke, B. Hardtung, T. Hörnle, R. Merkel, J. Scheinfeld, H. Schlehofer, J. Seier (eds.), *Strafrecht zwischen System und Telos: Festschrift für Rolf Dietrich Herzberg zum siebzigsten Geburtstag am 14. Februar 2008* (Tübingen: Mohr Siebeck, 2008), p. 228 f.
12. Freund, G., "Vorbemerkung zu § 13", in W. Joecks, K. Miebach (eds.), *Münchener Kommentar zum Strafgesetzbuch, Band 1: §§ 1-37 StGB* (München: C.H. Beck, 2020), Rn. 163 ff.; Rostalski, *Der Tatbegriff im Strafrecht*, *above footnote* 5, p. 71; Heinrich, *Die gesetzliche Bestimmung von Strafschärfungen*, *above footnote* 7, p. 45; Timm, *Gesinnung und Straftat*, *above footnote* 5, p. 65; Katharina Reus, *Das Recht in der Risikogesellschaft*: *Der Beitrag des Strafrechts zum Schutz vor modernen Produktgefahren* (Berlin: Duncker & Humblot, 2010), p. 81.
13. Timm, *Gesinnung und Straftat*, *above footnote* 5, p. 65 f.
14. *Ibid.*, p. 65.
15. Heinrich, *Die gesetzliche Bestimmung von Strafschärfungen*, *above footnote* 7, p. 47.

goal of the protection of legal rights cannot be achieved just as effectively, but with a less severe interference[16]. In the area of adequacy, the conflicting goods and interests must be weighed against each other[17]. It is necessary to ask how serious the reduction of the sphere of freedom of third parties is, and what reasons there are on the part of the person acting for such a reduction[18].

3. LEGITIMATION OF NORMS OF SANCTIONS

Not all behavioral norms benefit from the protection of sanctioning norms to restore their validity, but punishment is always a reaction to an individual violation of behavioral norms[19]. The peculiarity of criminal law however does not lie in a specific commandment or prohibition imposed on individual citizens – the same applies, for example, to various civil law rules. Rather, the special characteristic of criminal law lies in sanctions and thus in considerable encroachments of the fundamental rights of the citizen concerned[20]. Against this background, it is necessary that any punishment serves a legitimate purpose[21]. Here, again, the principle of proportionality and the balancing of conflicting interests are crucial[22]. As mentioned, this requires that these norms serve a legitimate purpose and are suitable, necessary and adequate to achieve it.

3.1. The purpose of norms of sanctions: Theories of punishment

As any punishment, regardless of whether it is a custodial sentence or a monetary penalty, interferes with the liberty rights of the particular offender, these state interventions must be legitimized in the same way as any other state interventions[23]. For state interventions to be constitutionally legitimate, they must – at least according to German criminal law – comply with the principle of proportionality. This is the case if the penalty pursues a legitimate purpose and is suitable, necessary,

16. Timm, *Gesinnung und Straftat, above footnote* 5, p. 65.
17. Freund, "Vorbemerkung zu § 13", above footnote 12, Rn. 166.
18. Heinrich, *Die gesetzliche Bestimmung von Strafschärfungen, above footnote* 7, p. 47.
19. Rostalski, *Der Tatbegriff im Strafrecht, above footnote* 5, p. 65.
20. *Ibid.*, p. 16; Heinrich, *Die gesetzliche Bestimmung von Strafschärfungen, above footnote* 7, p. 17.
21. Rostalski, *Der Tatbegriff im Strafrecht, above footnote* 5, p. 16.
22. Timm, *Gesinnung und Straftat, above footnote* 5, p. 71.
23. Freund, G. Rostalski, F., *Strafrecht allgemeiner Teil*: *Personale Straftatlehre* (2019), p. 1.

and proportionate to achieve that adequate[24]. Regarding the purpose of punishment, there is already an extremely broad debate, which will not be taken up in depth here. The prominent theories shall only be briefly named and characterized, and the theories relevant for the following course of the work shall be identified.

Common theories of punishment encompass absolute theories on the one hand and relative theories on the other. The latter, in turn, are mainly divided into general preventive and special preventive theories. Absolute theories do not require a purpose of punishment. According to the German understanding of criminal law, however, such a conception of punishment cannot be legitimized under constitutional law. As a state intervention in the liberties of the individual, punishment cannot be free of any purpose[25]. Supporters of general prevention theories of punishment see the purpose of punishment in deterring potential future offenders or in reinforcing the continuing validity of the behavioral norm[26]. However, the objection that the perpetrator is inadmissibly instrumentalized in the interest of third parties speaks against general prevention theories. According to article 1 (1) GG, the dignity of the individual is inviolable. This means that individuals must never be degraded to the status of mere objects. However, if a person is punished for the sole purpose of deterring third parties, this constitutes inadmissible instrumentalization[27]. Theories of special prevention focus solely on the individual offender and aim to deter him from committing new crimes through punishment or to prevent him from committing further crimes through educational means[28]. The argument that the offender is merely being instrumentalized cannot, in any case, be held against these theories. If, however, any education or deterrence of the offender is sought through punishment, this contradicts the image of human beings in a liberal society. Even the person who violates a behavioral norm maintains the status of a citizen who is in principle capable of reason. Education as well as deterrence through punishment must therefore be rejected[29].

Against the background of the aforementioned critique of the common theories of punishment, the following remarks will be based on Freund's restitutive theory and Rostalski's retributive expressive theory. The restitutive theory of punishment advocated by Freund sees the purpose

24. *Ibid.*
25. *Ibid.*, p. 4.
26. *Ibid.*, p. 7; Rostalski, *Der Tatbegriff im Strafrecht*, *above footnote* 5, p. 37.
27. Rostalski, *Der Tatbegriff im Strafrecht*, *above footnote* 5, p. 38.
28. *Ibid.*, p. 37.
29. For details see *ibid.*, p. 47 f.; 50.

of punishment in the compensatory punishment of a committed norm violation in order to restore the law[30]. In contrast to general or special prevention theories, the starting point is solely the abusive response to the past crime, without any future – preventive – considerations[31].

On the other hand, as an advocate of the retributive expressive theory of punishment, Rostalski understands verdict of guilt and punishment as a response to the crime committed to confirm the status of the offender as an equal under the law[32]. By violating a norm of behavior, the offender has made it clear that this norm does not apply to him, at least at certain points. He has thus entered into communication with the other members of society and made it clear that he places his own maxims above the law[33]. In doing so, the perpetrator has allowed himself an extra degree of freedom to which he is not entitled on the basis of the social contract[34]. This act of communication by the perpetrator must not go unanswered by society in order to confirm the status of the perpetrator as an equal in law[35].

These communicative theories of punishment may overlap in parts with preventive theories, particularly because the latter also view punishment as a symbol of society's affirmation of social identity. Society contradicts the offender's norm-breaking and thus confirms the validity of the law[36]. However, expressive theories of punishment guarantee offense-appropriate responses to individual offense. The act alone is relevant for the criminal response[37].

3.2. The proportionality of norms of sanctions

The legitimate purpose of a sanction norm thus lies either in restoring the validity of the violated norm of behavior or in confirming the offender as an equal under law. A more detailed distinction between the two theories will not be made at this point. The suitability of a sanction norm is given if it can restore the validity of the violated behavior norm at all[38]. Necessity might be lacking if a milder but equally effective means than

30. Rostalski, F., *Strafrecht allgemeiner Teil, above footnote* 23, p. 13.
31. *Ibid.*, p. 2.
32. *Ibid.*, p. 14.
33. Rostalski, *Der Tatbegriff im Strafrecht, above footnote* 5, p. 20.
34. *Ibid.*, p. 21.
35. *Ibid.*, p. 22.
36. *Ibid.*, p. 26.
37. *Ibid.*, p. 27.
38. Timm, *Gesinnung und Straftat, above footnote* 5, p. 72.

conviction and punishment is available for the stated purpose, which is likely to be rare in criminal law[39]. Within the question of adequacy, the role of the behavioral norm to be protected is relevant. The more important this norm is for the peaceful coexistence of citizens, and the more significant the protected legal interest is, the more likely it is that a corresponding sanction norm can be legitimized[40].

III. THE ASPECT OF GENDER IN CURRENT GERMAN CRIMINAL LAW

The majority of norms in the German Criminal Code are formulated in a gender-neutral manner. In most cases, the word "who" commits a particular act is used; in some cases, the term "the perpetrator" is used. Insofar as section 211 (1) StGB speaks of "*der Mörder*" and section 212 (1) StGB speaks of "*der Totschläger*", using the masculine form, there is no question that this refers not only to men, but to all potential perpetrators, regardless of gender[41]. Nevertheless, there are still a few criminal law norms that differentiate on the basis of gender. In the following, these norms that are explicitly linked to the gender of the perpetrator or victim will first be presented before norm theory and German criminal law are linked in the following chapter.

1. SECTION 218 (3) STGB: THE ABORTION BY THE PREGNANT WOMAN HERSELF

According to section 218 (1) sentence 1 StGB abortion is in general punishable, regardless of whether the abortion is undertaken by the pregnant woman herself or by a third party. Section 218a StGB contains specifications as to when the elements of the criminal act of abortion are not fulfilled. If the abortion is nevertheless a statutory abortion, section 218 (3) StGB contains a reduced sentence in the case that the pregnant woman herself commits the act. This reduction of punishment for the pregnant woman herself is – by common consent – based on the special conflict situation that she is in[42].

39. For further details see Rostalski, *Der Tatbegriff im Strafrecht, above footnote* 5, p. 79 ff.
40. *Ibid.*, p. 82.
41. Wolters, G. "Der kleine Unterschied und seine strafrechtlichen Folgen: Eckhard Horn (1.12.1938 bis 14.10.2004) anlässlich seines zehnten Todestages gewidmet", Goltdammer's Archiv für Strafrecht (2014): pp. 556-71.
42. Eser, A., Weißer, B., "§ 218", in A. Schönke, H. Schröder (eds.), *Strafgesetzbuch Kommentar* (München: C.H. Beck, 2019), Rn. 63; Walter Gropp, Liane Wörner, "§ 218", in W. Joecks, K. Miebach (eds.), *Münchener Kommentar zum Strafgesetzbuch, Band 4: §§ 185-262 StGB* (München: C.H. Beck, 2017), Rn. 68.

2. SECTION 183 (1) STGB: THE PUNISHABILITY OF EXHIBITIONISM

Section 183 (1) StGB contains the punishability of exhibitionism. According to this norm, a man who "vexes another person by an act of exhibitionism"[43] is liable to prosecution. The norm thus explicitly implies that men alone may be liable to prosecution for this conduct. According to the legislator's intention, exhibitionist acts are those by which a man presents his exposed penis to another person without that person's consent in order to satisfy himself sexually either by doing so alone or additionally by observing the other person's reaction or by masturbating[44]. The legislator justified the introduction of the norm because exhibitionist acts could hurt individuals in their moral or aesthetic sensibilities. As a result, the psychological well-being is also affected to a greater or lesser extent[45]. Others consider individual sexual self-determination as to be the protected property of this norm[46]. The German Federal Constitutional Court has already in 1999 dealt with the constitutionality of this statute[47], but even today it is widely questioned[48].

3. SECTION 226A STGB: THE PUNISHABILITY OF FEMALE GENITAL MUTILATION

According to section 226a (1) StGB, whoever mutilates the external genitalia of a female person incurs a penalty of imprisonment for a term of at least one year. The background of the norm is the protection of the female physical integrity[49]. Partially, the protection of the female sexual self-determination is also considered to be included in the norm[50].

43. German criminal code, translated by Bohlander, M., available: <https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1727>.
44. BT-Drs. VI/3521, p. 53.
45. BT-Drs. VI/3521, p. 53.
46. Theo Ziegler, "§ 183 StGB", in B. von Heintschel-Heinegg (ed.), *BeckOK StGB* (München: C.H.Beck, 2020), Rn. 2; Jörg Eisele, "§ 183", in A. Schönke, H. Schröder (eds.), *Strafgesetzbuch Kommentar* (München: C.H. Beck, 2019), Rn. 1.
47. BVerfG decision of 22.3.1999 – 2 BvR 398/99.
48. Thomas Weigend, "Tatbestände zum Schutz der Sexualmoral", Zeitschrift für die gesamte Strafrechtswissenschaft 129(2) (2017): pp. 513-28; see for example Wolters, "Der kleine Unterschied und seine strafrechtlichen Folgen", above footnote 41.
49. Ralf Eschelbach, "§ 226a StGB", in B. von Heintschel-Heinegg (ed.), *BeckOK StGB* (München: C.H.Beck, 2020), Rn. 1; Bernhard Hardtung, "§ 226a StGB", in W. Joecks, K. Miebach (eds.), *Münchener Kommentar zum Strafgesetzbuch, Band 4: §§ 185-262 StGB* (München: C.H. Beck, 2017), Rn. 2.
50. Eschelbach, "§ 226a StGB", above footnote 49, Rn. 1. Different view: Hardtung, "§ 226a StGB", above footnote 49, Rn. 2.

IV. THEORY OF NORMS AND GENDER IN GERMAN CRIMINAL LAW

The central question now is which claims of norm theory can help to examine the legitimacy of the above-mentioned criminal offenses. Thereby, the focus will solely be on aspects of gender.

1. THE BEHAVIORAL NORM LEVEL

As previously stated, norms of behavior are legal commands or prohibitions that can be enforced with coercion. They serve the preventive protection of legal interests and the balancing of spheres of freedom. Prohibitions of abortion as well as prohibitions of exhibitionism and female genital mutilation can only be legitimate if they serve a legitimate purpose for the achievement of which they are suitable, necessary and adequate.

1.1. The prohibition of abortion

Any act of abortion, regardless of the person who performs it, prevents the right to live of the unborn child. This right to live is undoubtedly a legal interest worthy of protection. The prohibition of abortion thus conversely promotes this right to live and is therefore in general terms suitable to promote the protection of the legal interest. This may be different in individual cases only if the unborn child would not be able to live even in the natural course of events. In that specific case, a prohibition of abortion would also not be suitable to protect the unborn life. An equally suitable but milder measure in terms of necessity is not apparent.

Within the framework of adequacy, it can be stated that on one hand the interest of the unborn life is at stake, and now it is of importance which interests are opposed to it. Any uninvolved third party who carries out the abortion may show his general freedom of action alone. A physician may, under certain conditions, bring forward professional legal circumstances. After all, not every medical abortion falls under a prohibitive norm. On the part of the pregnant woman in particular, however, there may be weighty reasons of her own, which is why in individual cases her own right to live stands in opposition to the right to live of the unborn child. Whether the right to live of the unborn child ultimately prevails is, of course, always a question of the individual case.

However, it must be taken into account that section 218 (3) StGB does not differentiate in the actual sense on the basis of gender. Rather, the norm is gender-neutral in its essence, but can in fact only be implemented

by women, since only they are capable of becoming pregnant[51]. Indeed, it seems evident that the legislator did not specifically intend to treat women differently from men, but rather to take into account the special situation of the pregnant woman. If it were conceivable that any genders were capable of pregnancy, it should be assumed that the behavioral norm would also adapt accordingly to any pregnant person. The central connecting factor of this norm is thus not gender, but pregnancy itself. This norm can nevertheless be used to illustrate the potential of norm theory for the precise analysis of behavior and sanction depending on gender-specific characteristics of offenders.

1.2. The prohibition of exhibitionism

For the prohibition of exhibitionism to be legitimate, the sphere of freedom of others must be affected by such behavior in the first place. As described above, psychological well-being and sexual self-determination are predominantly regarded as legal interests that are restricted by exhibitionism[52]. These legal interests are to be protected irrespective of the gender of the specific person concerned. However, if it is argued that exhibitionism already does not interfere with any liberty rights[53], then a prohibition of exhibitionism would already serve no legitimate purpose and would thus not be legitimizable.

But if a legitimate purpose can be identified, such as the protection of psychological well-being or sexual self-determination, then in individual cases there will also regularly be a suitability of the prohibition of exhibitionism for the protection of these purposes. And again, no milder but equally effective means can be identified at this point than a prohibition of exhibitionism in specific situations.

Now the question arises as to the adequacy of the prohibition of exhibitionism. Therefore, it is necessary to weigh the conflicting individual goods and interests against each other. On one hand, the behavior of the person to whom the norm is directed is restricted by the prohibition. In any case, he or she experiences a restriction of his or her general freedom

51. Wolters, "Der kleine Unterschied und seine strafrechtlichen Folgen", above footnote 41, p. 557.
52. Insofar as reference is made solely to social customs and moral aspects, no legal prohibitions can be derived from this in any case. As the guarantor of the greatest possible freedom within a society, behavioral norms can only intervene if the sphere of freedom of others is somehow affected.
53. See for example Weigend, "Tatbestände zum Schutz der Sexualmoral", above footnote 48, p. 519.

of action (guaranteed in article 2 (1) GG). On the other hand, there is the legal interest of psychological well-being and sexual self-determination to be protected. The prohibition of exhibitionist behavior would therefore have to lead to a predominance of the interests of the victims that are worthy of protection in order to meet the requirements of legitimacy.

In principle, the legal interests of psychological well-being and sexual self-determination may prevail, insofar as these are actually affected. Above all, the restriction of third parties must not be limited to mere moral embarrassment. An actual restriction of freedom, and thus the crossing of a legally relevant materiality threshold, are necessary preconditions for the interests of third parties to prevail. At this point, it would be conceivable to distinguish between exhibitionist acts by men and women. Both biological aspects and our social views regarding the different sexual organs could be of relevance here. The significance of confrontation with the male sexual organ may not be equated with confrontation with female sexual organs, simply because of the difference in the way they function and the way they are used for sexual acts. Also, on a social level, a male sexual organ and its conscious display for sexual gratification may express a completely different dimension of dominance. As far as in the area of behavioral norms different spheres of freedom are at stake, then it must be stated that at least taking into account the state of society in which we find ourselves today, the exposure of the male sexual organ and the accompanying expression of sexual desire affects the sphere of freedom of the other person – regardless of the gender of this other person – in a different way.

But then, the determination of gender affiliation could then turn out to be problematic. It has already been mentioned in the introduction that dealing with the gender categories "man" and "woman" is problematic because these two categories are not conclusive. There is also no unambiguity as to when a person belongs to which category. But if – as in the case of male exhibitionism – there is a clear relevance of the male sexual organ, then logically every person who possesses a male sexual organ should also be a possible perpetrator of this norm. However, it is questionable whether this would do justice to the significance of gender.

If it were the case in a hypothetical concrete situation that the affected legal interests of third parties would regularly prevail in the case of male exhibitionism, but would regularly recede in the case of female exhibitionism due to a lack of materiality (admittedly an assumption that would have to be discussed, but is now to be presupposed here), then the question of the relevance of article 3 GG arises. If different considerations regarding the adequacy of a behavioral norm are made depending on

gender, then the question arises as to whether these differentiations can be compatible with the equality of the sexes under article 3 (2) and (3) GG[54].

Thereby, article 3 (2) GG constitutes a concrete specification of the general principle of equality in article 3 (1) GG and contains a prohibition against favoring or discriminating against a person because of his or her sex[55]. The exact relationship between article 3 (2) sentence 1 and article 3 (3) sentence 1 GG, however, is unclear. Partially, an identical prohibition of differentiation is taken from both standards[56], others see in Art. 3 (2) sentence 1 a "group-related prohibition of domination" or a prohibition of hierarchization[57].

According to basic understanding, the general principle of equality includes that the state must not arbitrarily treat substantially equal unequal or arbitrarily treat substantially unequal equal[58]. With reference to Article 3 (2) sentence 1 GG, it now follows that the state may not per se differentiate between the sexes in order to be able to favor or discriminate against one sex. In particular, article 3 (2) GG is intended to overcome traditional gender roles[59]. However, the German Constitutional Court allows different regulations for different sexes if they are based specifically on objective biological differences. This is the case if the regulations solve problems which, by their nature, occur either only in men or in women. This would be the case, for example, in the event of specific burdens in the context of pregnancies[60].

1.3. The prohibition of female genitale mutilaton

Finally, there is the matter of the legitimacy of the behavioral norm that includes the prohibition of female genital mutilation. This prohibition

54. Art. 3 (2) states "Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist". And Art. 3 (3) sentence 1 states "No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith or religious or political opinions"., translated by Toumschat, Currie, Kommers and Kerr, available online: <https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0026>.
55. Langenfeld, C. "Art. 3 Abs. 2 GG", in T. Maunz, G. Dürig (eds.), *Grundgesetz Kommentar* (München: C.H. Beck, 2020), Rn. 12; Pieroth, B., "Die Herstellung der Rechtsgleichheit zwischen Frauen und Männern: Erfolgsgeschichte und Zukunftsaufgabe", Juristische Ausbildung (7) (2019): pp. 687–94.
56. Langenfeld, "Art. 3 Abs. 2 GG", above footnote 54, Rn. 16.
57. *Ibid.*, Rn. 17.
58. Pieroth, "Die Herstellung der Rechtsgleichheit zwischen Frauen und Männern", above footnote 54, p. 690.
59. *Ibid.*, p. 691.
60. *Ibid.*

protects the physical integrity and sexual self-determination of the respective victim. This is valid with regard to male as well as with regard to female sexual organs. A legitimate purpose of the prohibition of genital mutilation can thus undoubtedly be identified.

In the case of section 226a StGB, it has above been stated that female bodily integrity and, depending on the viewpoint, female sexual self-determination can be considered as an object of protection. At the same time, however, it must be noted that male physical integrity and male sexual self-determination also constitute legal interests worthy of protection. Nevertheless, different behavior between female and male genital mutilation could be recorded if female genital mutilation is precisely about gaining control over female sexuality. If genital mutilation is linked to gender, for example because women's sexual sensations are to be disturbed, or because gender stereotypes are associated with the mutilation, a fundamentally different behavior could be justified. Any ban on genital mutilation is thereby suitable to protect these legal interests. In this respect, there is also no equally effective but milder means apparent. With regard to adequacy, on the one hand there are the aforementioned legal interests of the victims, but on the other hand there are no obvious weighty interests of the perpetrators[61].

2. THE SANCTION NORM LEVEL

Insofar as a specific behavioral norm has been formed, the question arises as to how to react to its violation. The task of the sanctioning norm is, as previously stated, to restore the validity of the behavioral norm or to confirm the offender's status as an equal under law. With regard to the legitimate purpose, this does not result in any gender-specific differences.

If it has already been established at the level of the behavioral norm that different standards can be established depending on gender, then this distinction can also be reflected at the level of the sanctioning norm. However, it would be worth considering whether, in the case of an essentially gender-neutral behavioral norm, only the behavior of a particular gender could be subject to additional criminal sanctions. If, in the case of exhibitionism, it was argued that the exposure of the sexual organs, regardless of whether they are female or male, is one and the same behavior (or must in any case

61. Insofar as it is stated in some cases that the difference in legal treatment is based, among other things, on the religiously based male circumcision, such considerations cannot be upheld. If circumcisions or other interventions are not carried out against the will of the person concerned, then there is no interference with another person's sphere of freedom. There is therefore no legal prohibition in such case.

be treated as such regarding article 3 GG) then the question would have to be asked here as to why only male behavior is punishable under section 183 (3) StGB. In this respect, it would be conceivable to consider a norm of sanctions with regard to female exhibitionist behavior as unnecessary[62]. In this case, however, suitable but milder means would have to be evident. On the level of adequacy, the sanction norm could be defeated by the purpose of confirming the perpetrator as an equal in law within the framework of the balancing of interests. If, however, it has been concluded that there is in fact an equal violation of behavioral norms, then it becomes difficult to justify unequal treatment on the basis of article 3 (2) sentence 1 and article 3 (3) sentence 1 GG at this point.

Perhaps article 3 (2) sentence 2 GG could provide the basis for differentiating sanction norms on the basis of gender. Article 3 (2) sentence 2 contains a commitment to equal rights, according to which the state shall promote the actual implementation of equal rights for women and men and shall work towards the elimination of existing disadvantages. The aim of this norm is to achieve gender equity in the future[63]. Thus, according to this norm, unequal treatment is in turn permitted when affirmative action measures are taken for women that are aimed precisely at gender equality. Necessarily, these measures in turn involve unequal treatment of men[64].

As the norm contains a mandate for the state to achieve actual gender equity, it could be argued that the different sanctioning of certain behavior, for example with reference to male exhibitionism, also has to do with the goal of gender equity. Sanction norms could only be used for this if their purpose is in any case also seen in achieving social changes and in preventive considerations. However, as previously stated, it cannot be the function of sanctioning norms to change social conditions, and according to the understanding in this thesis, any preventive considerations regarding the purpose of punishments cannot be legitimized either.

For the area of the sanction norm, it must thus be stated that it is indeed incompatible with the equality requirement from the German Constitution if the same behaviors are sanctioned differently depending on gender. However, if the behavioral norms are different from the outset, then it must also be possible to analyze their sanctionability separately.

62. It must be taken into account, however, that male genital mutilation can in any case be sanctioned as bodily injury, possibly also as dangerous or grievous bodily injury.
63. BVerfG decision of 18.11.2003 – 1 BvR 302/96; Ute Sacksofsky, *Das Grundrecht auf Gleichberechtigung* (Nomos Verlagsgesellschaft mbH & Co. KG, 1996), p. 399.
64. Pieroth, "Die Herstellung der Rechtsgleichheit zwischen Frauen und Männern", above footnote 54, p. 692.

V. CONCLUSION

If existing criminal laws are to be examined with regard to their legitimacy, the norm theory presented offers a well-founded approach. It succeeds in separating the level of behavior from the level of reaction to a behavioral norm violation and illuminating them precisely in a manner that is consistent with the constitution.

Whether and to what extent norms of behavior and sanctions can be linked in detail to gender is debatable and cannot be conclusively determined within the scope of this paper. However, the general reference to the fact that Article 3 (2) sentence 1, (3) sentence 1 of the German Constitution contains the equality of the sexes and thus no gender differentiation can be legitimized per se is not sufficient.

It could be shown on the basis of existing German criminal offenses that behavior can certainly entail different requirements depending on gender and thus can also lead to different reactions at the level of sanction norms. At the same time, however, questions must always be raised about the consequences of gender differentiations, especially from a societal perspective. However, as shown, it is not the task of criminal law to change social realities. But if the same behavior has actually been revealed, then it is not convincing to sanction it differently according to gender.

What could not be analyzed in depth within the framework of this contribution were the problems of recognizing that there are not only the genders male and female, and thus criminal sanctions must also record corrections in this respect. Thus, underlying behavioral norms must also expand their scope of protection or their addressees, depending on their content.

Gender Equality and Women with Disabilities

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I. INTRODUCTION

The very important aspect of gender equality is the position of women with disabilities. The statistical data of World Health Organization say that around 15% of world population are persons with disabilities and one half are women. Practically, it means that almost one in five women is woman with disability[1]. Women are many years ago faced discrimination and unfortunately it exists today. On the other hand, persons with disabilities have always suffered from stigma, prejudice, and exclusion from society[2]. Women with disabilities face multiple and intersectional discrimination based on sex, gender and disability which makes their position very complex and difficult. In that sense, they are more likely to be discriminated against than men and boys with disabilities and the larger population of women and girls[3]. The full integration and participation of women with disabilities in all aspects of life is practically impossible because of numerous negative stereotypes and prejudices: "the able-bodied norm is pervasive and exclusive: from public transport and pavements to working arrangements, to leisure and social facilities"[4].

This paper tends to describe multiple discrimination of women with disabilities and different and most frequent violations of their human rights, as well as to analyse international legal framework and problems in

1. *World report on disability*, World Health Organization/The World Bank, Geneva, 2011.
2. Fredman, S., *Discrimination law*, Oxford University Press, New York, 2011, p. 95.
3. Lawson, A., United Nations Convention on the Rights of Persons with Disabilities, in: Ales, E., Bell, M., Deinert, O. and Robin-Olivier, S. (eds), I*nternational and European labour law – a commentary*, Nomos/Verlag C.H. Beck/Hart Publishing, Baden-Baden – München – Oxford, Portland, 2018, p. 458.
4. Fredman, S., *op. cit*., p. 95.

practice and to give some proposals and recommendations. The authoress will also explain different concepts of disability – medical, social and biopsychosocial approach to disability.

Although their rights are incorporated into "general" human rights guaranteed by constitutions of modern countries and international instruments for the protection of human rights and fundamental freedoms, persons with disabilities often face significant obstacles in achieving and enjoying formally recognized rights and freedoms. Intense activities of United Nations, Council of Europe and European Union aimed at creating conditions for equal opportunities and equal treatment of persons with disabilities therefore represent an important reason that the fight against disability-based discrimination was made a priority in the contemporary law and public policy.

Various international legal documents guarantee human rights. At global level, United Nations adopted very important instruments – Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child. However, those instruments have not specified protection for the persons with disabilities nor even *explicit* listed disability as one of the grounds to be protected against discrimination, with the exception in relation to disabled children (Convention on the Rights of the Child states that they have the right to decent living, special care, education and training designed to help them to achieve full and active life in society)[5]. Also, a number of soft law sources has been adopted on the issue of disability-based discrimination, including Standard Rules on the Equalization of Opportunities for Persons with Disabilities (1993).

For our research the most important international instrument is Convention on the Rights of Persons with Disabilities (CRPD)[6], and we will focus on this convention in order to explain real situation of human rights of women with disabilities. This Convention is the first international instrument that is binding for the States parties, asking them to ensure

5. Spencer, J. and Spencer, M., International law and discrimination, in: Sargeant, M. (ed.), *Discrimination law*, Pearson Education Limited, Harlow, 2004, p. 68.

6. Convention on the Rights of Persons with Disabilities, United Nations, *Treaty Series*, vol. 2515. For (dis)continuity in regulating legal status of persons with disabilities at international level see: Kayess, R. and French, P., "Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities", *Human Rights Law Review*, No. 1/2008, pp. 1-34; Gauthier de Beco, *Disability in International Human Rights Law*, Oxford University Press, Oxford, 2021, pp. 11-28.

and protect the rights of the largest "minority" in the world, one that has more than 650 million "members"[7]. On the other hand, universal standards for employment of persons with disabilities are enshrined in the International Labour Organization Convention No. 159 concerning Vocational Rehabilitation and Employment (Disabled Persons), which requires States parties to formulate, implement and periodically re-evaluate national policies on vocational rehabilitation and employment of persons with disabilities, while being guided by twofold objectives: the availability of vocational rehabilitation measures to all categories of persons with disabilities, and improving the opportunities for the persons with disabilities to get a job in the open market. It is also useful to mention the Convention for the Protection of Human Rights and Fundamental Freedoms by Council of Europe and Charter of Fundamental Rights of the European Union which are basic instruments for protection of human rights at regional (European) level.

The persons with disabilities should be treated in such a way that ensures effective enjoyment of the rights allocated to every individual[8]. The most frequent violated human rights, which we will try to analyse are accessibility, respect for home and the family, work and employment, as well as participation in political and public life. At the end, we will give the short review of Serbian legislation related to gender equality and disability.

II. DISCRIMINATION AND DISABILITY

The legal documents and scholars define discrimination on the similar way as preventing, restricting, excluding and nullifying rights of someone. The essential problem is putting person in unfavorable position comparing with others.

The discrimination on the basis of disability is defined by provisions of the UN Convention on the Rights of Persons with Disabilities as any distinction, exclusion or restriction which has the purpose or effect of

7. Some authors argue that "minority" analysis sets persons with disabilities apart as "different and distinct", which can has as an effect that they are pitted against the needs, wants and rights of the rest of population. In that sense, alternative "universalist view" is prefered, which means that disablitiy policy is not policy for some minority group, but policy for all. Fredman, Sandra, *op. cit*., pp. 96-97.

8. Schömann, I., *The right of disabled persons to vocational training, rehabilitation and resettlement*, in: Bruun, N., Lörcher, K., Schömann, I. and Clauwaert, S– (eds), *The European Social Charter and employment relation*, Hart Publishing, Oxford – Portland, Oregon, 2017, pp. 333-334.

impairing or nullifying the recognition, employment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field[9]. The Convention proclaims the non-discrimination as one of the general principles[10], while States parties shall guarantee effective legal protection against discrimination on all grounds[11].

The Convention recognizes women and girls with disabilities as a multiple discriminated group and defines the obligations of States parties related to them. More precisely, the States parties are obliged to take appropriate measures to ensure full development, advancement and empowerment of women with disabilities to exercise their human rights and fundamental freedoms[12].

The Committee on the Rights of Persons with Disabilities, which was established by the Convention[13], adopted *General comment No. 3* related to women and girls with disabilities, where are explained the most frequent forms of their discrimination[14]. In that sense, *direct discrimination* happens when women with disabilities are treated less favorably than others in similar situation. On the other hand, *indirect discrimination* refers to laws, policies and practices that appears neutral, but they have disproportionately negative impact on women with disabilities. For example, indirect discrimination can be instituted via the occupational requirement that specify special strength, as they unjustifiably restrict employment of persons with disabilities (as well as old people, minors and women), if such ability is unnecessary for the successful performance of the job. Similarly, indirect discrimination of persons with disabilities can occur when a driver's license is unjustifiably required for employment, since people with a significantly impaired vision or other forms of disability are unable to meet such a requirement[15].

9. CRPD, Article 2.
10. CRPD, Article 3.
11. CRPD, Article 5.
12. CRPD, Article 6.
13. CRPD, Article 34.
14. United Nations, CRPD/C/GC/3, Committee on the Rights of Persons with Disabilities, General comment No. 3 (2016) on women and girls with disabilities, paragraph 17.
15. About the dilemma that remains if the reasons of professional necessity can justify a driver's license as a requirement for jobs where driving is rare and this working task can be fulfilled by using public transportation or by delegation to another employee see: Doyle, B., "Employment rights, equal opportunities and disabled persons: The ingredients of reform", *Industrial Law Journal*, Vol. 22, No. 2/1993, p. 94.

Discrimination by association is discrimination against persons associated with persons with disabilities, for example, employed mothers who have children with disabilities[16]. *Denial of reasonable accommodation* is also recognized as a form of discrimination, and it happens in case of lack of necessary and appropriate modifications and adjustments. To be more precise, CRPD is the first UN treaty that includes failure to provide reasonable accomodation in the definition of disability-based discrimination. This is followed by introduction of obligation to make adjustments to standard practices, policies or environments with the aim to place persons with disabilities on an equal footing with others[17]. Finally, *structural or systemic discrimination* refers to discriminatory institutional behaviour, discriminatory cultural traditions and discriminatory social norms. This form of discrimination is sometimes hidden discrimination, and it is based on stereotypes and prejudices especially in context of gender equality. On the other hand, we should not forget that most of barriers in attitudes and in the built environment exists because "societies have until very recently not recognized that the systematic way in which they discriminate against disabled people when backed by discriminatory laws and practices of the state, often amounts to oppression"[18].

Implementation of the equality principle does not exclude all differentiation between members of a society. In that sense, it is necessary to make the distinction between discrimination and affirmative action. Last form of different treatment aims to empower, by taking appropriate special measures, discriminated group of persons to achieve equal position in society with others. This further means that affirmative action, just like the prohibition of indirect discrimination, is aimed at ensuring a *de facto* equality, with a focus on protection of certain groups of people. This conceptual similarity does not mean, however, that the prohibition of indirect discrimination against certain categories of people automatically implies their "positive discrimination"[19], since in selected cases, different treatment can be justified.

16. This was elaborated, among much else, in judgment of the European Court of Jurstice in Case C-303/06 (*S. Coleman* v *Attridge Law and Steve Law*) of 17 July 2008, ECLI:EU:C:2008:415; for analysis of importance of this landmark judgement see: Andrea Eriksson, "European Court of Justice broadening the scope of European nondiscrimination law", *International Journal of Constitutional Law*, vol. 7, No. 4/2009, 749-750.
17. Lawson, A., *op. cit.*, p. 456.
18. Rieser, R., Disability equality: Confronting the oppression of the past, in: Mike Cole (ed.), *Education, equality and human rights – Issues of gender, 'race', sexuality, disability and social class*, Routledge, 2006, p. 134.
19. De Vos, M., *Beyond formal equality: Positive action under Directives 2000/43/EC and 2000/78/EC*, European Commission, Luxembourg, 2007, p. 14.

Women with disability face multiple and intersectional discrimination. *Multiple discrimination of women with disabilities* refers to women who experiences discrimination on two or more grounds. In case of women with disabilities it is the discrimination based on disability, gender and sex[20]. On the other hand, *intersectional discrimination* of those women refers to a situation where several grounds interact with each other in same time.

Understanding the position of women with disability is impossible without the *definition of disability*. The definition of this notion depends on accepted model of disability. There are following dominant models of disability – medical, social and biopsychosocial model of disability[21]. *Medical model* defines persons with disability as patients who need health care and rehabilitation and as the result of medical treatments, sheltered employment and education in special schools they can be fully included in society. The focus is usually on the impairment and on dependence, backed up by stereotypes that disability initiates pity, exclusion and patronizing attitudes[22]. The World Health Organization in its International Classification of Impairments, Disabilities and Handicaps accepted this model of disability (1980): "In the context of health experience, a disability is any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being"[23]. Respecting this model, disability points to functional limitations of an individual[24], while the inclusion of persons with disabilities depends of their health status, rehabilitation and ability to perform daily activities as others. The terminology was also based on medical status, for example, blind person, partially sighted person, disabled person.

At the end of 20th century, the *social model of disability* appeared. It includes the medical and social factors of persons with disabilities and in the first place are the measures for supporting their normal life. Universal design and reasonable accommodation are the most important aspects for the inclusion of persons with disabilities as human beings with specific adaptations which help them to live independently. This was reaffirmed

20. United Nations, CRPD/C/GC/3, Committee on the rights of persons with disabilities, General comment No. 3 (2016) on women and girls with disabilities, paragraph 4.
21. Tatić, D., *Zaštita ljudskih prava osoba sa invaliditetom*, JP Službeni glasnik, Belgrade 2013.
22. Rieser, R., *op. cit*., p. 134.
23. *International Classification of Impairments, Disabilities, and Handicaps: A Manual Classification relating to the Consequences of Disease*, World Health Organization, Geneva, 1980.
24. Fredman, S., *op. cit*., p. 95.

in a series of UN soft laws, including Standard Rules on the Equalization of Opportunities for Persons with Disabilities (1993), while CRPD "in a powerful contrast to domestic legislation, manifests a culmination of the development of the social model in relation to disability law"[25]. In practice, the organizations of persons with disabilities had the most important role in changing the approach to disability. This new approach means that independent living and personal autonomy are the key points for the integration of persons with disability. Disability is not illness, and the problem does not consist only in functional limitations but in attitudinal, physical and/or political disabling barriers, since social institutions, attitudes, the way society is organized and the built of environment are constructed for persons with no disabilities[26]. This further means that social distinction which attaches to disability, and not disability itself – should be in the heart of State intervention (e.g. a person using wheelchair faces barriers to employment not because of the wheelchair, but the design of the buses, buildings, work environment, etc.)[27]. Non-governmental organizations by lobbying and campaigning increased awareness of the position of persons with disabilities and terminology which is using phrase "persons with disabilities" puts the person at the first place instead the disability[28].

Both of those models have some disadvantages, and the *biopsychosocial model of disability* appears as a compromise between medical and social model. World Health Organization also accepted the biopsychosocial model of disability in its International Classification of Functioning, Disability and Health (2001)[29]. It means the combination of different aspects of disability – biological, individual and social perspective. In that sense, disability can be defined as "having any long-term physical, sensory, intellectual and mental impairment that hinders participation on an equal basis with others through interactions with barriers[30].

25. *Ibid*, p. 98.
26. *Ibid*.
27. *Ibid.*
28. On the other hand, the social model has empowered many disabled persons to organize and to unite previously disparate organizations in order to ensure effective self-representation of persons with disabilities. This is very important if we have in mind organizations "for" persons with disabilities that were not run and controlled by persons with disabilities, providing help and support without finding out what persons with disabilities want. Rieser, Richard, *op. cit*., p. 139.
29. *International classification of functioning, disability and health*, World Health Organization, Geneva, 2001.
30. Guzmán, K.F. *The intersectional perspective on women and girls with disabilities: a comparative analysis*, Master's thesis, City College of New York, Colin Powell School for Civic and Global Leadership, New York, 2021, pp. 7-8.

In accordance with General Comment No. 3, notion "women with disabilities" refers to all women, girls and adolescents with disabilities[31]. It includes all types of disabilities: mental, physical, sensory and intellectual disability. In this comment the difference is made between sex and gender, where sex refers to biological differences and gender refers to the characteristics that a society or culture views as masculine or feminine. In that sense, gender equality means social context of equality between men and women.

III. ACCESSIBILITY

Accessibility is specific human right of persons with disabilities. That right is a condition for realizing and enjoying other human rights, since it refers to freedom of movement, access to public spaces, products and services, and access to information[32]. For example, health care is not possible without accessible services and trained staff for giving support to persons with disabilities. In that sense, States have to ensure that persons with disabilities have the same range, quality and standard of health care, as well as access to health services needed specificaly by persons with disabilities particulary of their disability, as well as accessible services (e.g. suitably atapted tables for gynaecological examinations and modifed mammography facilities)[33]. The same situation is in transportation, information and communications and other aspects of daily life of those persons, since accessibility ensures acceptance of persons with disabilities as part of human diversity and humanity.

Accessibility, as human right, is defined in CRPD[34]. Namely, States parties of the Convention are obliged to take appropriate measures to ensure to persons with disabilities access to physical environment, transportation, information and communications and other public services.

It can be concluded that accessibility is condition for living. Women with disabilities, suffering multiple discrimination, and obstacles have inaccessible services in all aspects of life. Women with physical

31. United Nations, CRPD/C/GC/3, Committee on the rights of persons with disabilities, General comment No. 3 (2016) on women and girls with disabilities, paragraph 4.
32. Davaki, K., Marzo, C., Narminio, E. and Arvanitidou, M., *Discrimination generated by the intersection of gender and disabiliy,* European Parliament, Brussels, 2013, p. 3.
33. Fredman, S., p. 99; Beleza, Maria Leonor, *Discrimination against women with disabilities*, Council of Europe Publishing, Strasbourg, 2003, p. 42.
34. CRPD, Article 9.

impairments have not possibility to visit medical institutions because of architectural barriers and inaccessible medical facilities. Inaccessible transportation is also obstacle for education, employment, participation in public life, cultural activities etc. On the other hand, inaccessible information and communications are barriers for women with sensory disabilities, for example, lack of sign language interpreters, information on Braille, inaccessible websites for users of text to speech software[35]. Also, mobility of women with disabilities is very limited. Women with visual impairment often are afraid to use white cane and to move alone as men with same disabilities because of inaccessible public areas, lack of mobility aids, devices, assistive technologies and training mobility skills.

The concept of universal design is very important for persons with disabilities. It means that products and environment are accessible for all people without any kind of adaptation. The similar concepts are *inclusive design and design for all*[36]. Community must encourage women with disabilities to move, to participate in society and to decide about their life, but also to provide accessible services, information and communications.

IV. RESPECT FOR HOME AND FAMILY

Respect for home and family is especially important for women with disabilities. Patriarchal cultures consider that the role of women in family is to take care about husband, children, house and other daily activities. Women with disabilities have difficulties to realize these obligations and sometimes it is not possible for them to participate actively in family life, particularly when they do not have to have necessary resources to obtain the help they need. Also, women with disabilities can suffer enforced dependence on others for the accomplishment of everyday activities[37]. On the other hand, many girls with disabilities are brought up to believe that they cannot expect to have a children and found a family, while women with disabilities feel that the medical professionals discourage them from having sexual relations, and can even be subjected to genetic screening,

35. Center for Society Orientation from Belgrade (Serbia) has investigated the accessibility of web sites of 22 public institutions in Republic of Serbia for persons with visual impairment – all of them were accessible for persons with disabilities. See: Pavlović, A., Danilović, I. and Lončar, G., *Sistemski monitoring: Monitoring zakona i politika u oblasti invalidnosti*, Centar za orijentaciju društva, Belgrade, 2013.
36. Počuč, M., Pristupačnost i dizajn za sve, in: Trkulja, J., Rakić, B. and Tatić, D. (eds), *Zabrana diskriminacije osoba sa invaliditetom*, Pravni fakultet Univerziteta u Beogradu/ Nacionalna organizacija osoba sa invaliditetom Srbije/JP Službeni glasnik, Belgrade, 2012, pp. 325-338.
37. Beleza, M. L., p. 45.

sterilisation, and abortion without properly informed consent[38]. It seems that obtaining recognition of the right to parenthood is harder for women with disabilities than it is for men with disabilities.

The CRPD guarantees the respect for home and the family[39], and States parties shall take appropriate measures to prohibit discrimination of persons with disabilities in cases related to marriage, parenthood and relationships.

Persons with disabilities must freely and responsibly decide about pregnancy and number of children. Women with disabilities must have accessible information about pregnancy, contraception, as well as accessible health care before and during the pregnancy. Unfortunately, women with disabilities are sometimes considered as asexual beings and medical staff is not trained to give them adequate support. On the other hand, very serious situation happens to women with disabilities in institutions. They without consent and often without their knowledge receive invasive reproductive health interventions as insertion of intrauterine devices for the birth control. Unfortunately, it still happens in many countries[40]. For example, in one institution in Serbia, 40 women with disability have inserted intrauterine device for birth control (almost 50% of women) and rest of 43 women get oral contraceptive pills without their consent[41].

Also, we should take into account the fact that institutionalisation affects whole family and special attention should be given to children with disabilities. States parties of CRPD need to take appropriate measures and provide information and services aimed to prevent institutionalisation of children with disabilities. We must say that specialized schools for children with disabilities are also institutions and in case of those children, right to education is related to institutionalisation[42].

Persons with disabilities must have adequate service as parents assistance which would teach mothers and fathers with disabilities how to organize house and childcare. Mother or child with disability cannot be reason for family disintegration.

38. *Ibid.*, p. 44.
39. CRPD, Article 23.
40. Fundación CERMI mujeres/European Disability Forum, *Ending forced sterilisation of women and girls with disabilities*. *Report adopted on General Assembly of European Disability Forum*, Madrid, 2017, pp. 26-27.
41. *Zaboravljena deca Srbije*, Disability Rights International/Inicijativa za prava osoba sa mentalnim invaliditetom MDRI-S, Belgrade, June 2021, p. 10.
42. See: Rieser, R., Inclusive education or special educational needs: Meeting the challenge of disablitiy discrimination in schools, in: Mike Cole (ed.), *Education, equality and human rights – Issues of gender, 'race', sexuality, disability and social class*, Routledge, 2006, pp. 157-179.

V. WORK AND EMPLOYMENT

Equal employment opportunity is a key element of freedom of work and right to work (in addition to free choice of profession and employment as well as prohibition of forced labour), while equal conditions of work and equal career advancement opportunities represent an integral part of the right to fair and just conditions of work. Work of women with disabilities is in many cases related to inaccessible education. Namely, inaccessible transportation, books in inaccessible formats, architectural barriers, special schools often far of place of residence, not inclusive educational system – are some of the obstacles for children with disabilities which later reflect themselves in the world of work via difficulties of workers with disabilities to obtain and to maintain (decent) job.

On the other hand, many employers have no interest to offer a job to women with disabilities because of negative stereotypes regarding their abilities, working skills and potential absence caused by health status (medical rehabilitation). Also, employers are not informed about reasonable accommodation of workplace and assistive technologies which can improve integration of women with disabilities in the work process with other employees. This further presupposes a request to adjust the job design, work process, tasks, schedule and organisation of the working hours, workplace, machines and other equipment – to the abilities and needs of persons with disabilities (e.g. providing an assistant to an employee with mental problems)[43]. Along with stereotype that they would not be able to do the job as well as persons with no disability, job interviews focused on their health problems and failure to provide reasonable accommodation, women with disabilities suffer other forms of discrimination in the labour market. Those are, among much else, different treatment by employer and colleagues because of disability and dismissal because of health problems or disability[44]. Also, they are often not allowed reasonable time off for treatment, they are denied opportunities for promotion because of disability, they are given less of a challenging role because of disability, or they are not allowed to work flexible hours to cope with disability[45].

The CRPD proclaims the right to work and employment of persons with disabilities[46]. States parties of the Convention have to ensure that

43. *Achieving equal employment opportunities for people with disabilities through legislation: Guidelines*, International Labour Office, Geneva, 2007, p. 30.
44. Sargeant, M., The context, in: Sargeant, Malcom (ed.), *Discrimination law*, Pearson Education Limited, Harlow, 2004, p. 8.
45. *Ibid.*
46. CRPD, Article 27.

persons with disabilities can participate in *open, inclusive and accessible work environment*. Also, States parties must protect right of persons with disabilities to equal opportunities, to equal remuneration for work and to healthy and safe working conditions. Furthermore, States parties shall promote self-employment, entrepreneurship, one's own business, as well as employment of persons with disabilities in both public and private sector. Finally, States parties have to prohibit slavery or servitude and to protect persons with disabilities on equal basis with others from forced or compulsory labour.

Women with disabilities often suffer multiple discrimination at the labour market because of negative gender stereotypes, as well as negative stereotypes connected with disability, family planning and maternity. Also, many workplaces are not accessible and occupations for persons with disabilities are limited, which leads to low employment rates of women with disabilities.

Many countries are facing high rates of unemployment of persons with disabilities[47]. Like so many European countries, the Republic of Serbia is facing high rates of unemployment among persons with disabilities: data of National Employment Service of the Republic of Serbia say that at the end of 2014, 20.780 persons with disabilities were unemployed and 6.981 were women with disabilities[48]. This can be explained by various factors, including indirect discrimination of persons with disabilities within the school system (more than 50% of persons with disabilities in Serbia have completed only primary school) and recruitment/hiring procedures, as well as the fear of some of them of forfeiture of social benefits upon entering into an employment contract[49].

VI. PARTICIPATION IN POLITICAL AND PUBLIC LIFE

Persons with disabilities have traditionally been faced with political powerlessness, based on characteristics that are beyond their control and on absence of means of making their voice heard[50]. In that sense, women with disabilities are often excluded from participation in political and public

47. *From exclusion to equality: Realizing the rights of persons with disabilities*, United Nations, Geneva, 2007, p. 2.
48. *Ljudska prava u Srbiji 2015: Pravo, praksa i međunarodni standardi ljudskih prava*, Beogradski centar za ljudska prava, Belgrade, 2016.
49. Kovačević, L., "Protection of persons with disabilities from employment discrimination, with a focus on Serbian legislation and practice", *Pravni vjesnik*, Vol. 30, No. 2/2014, p. 57.
50. Fredman, Sandra, *op. cit*., p. 96.

life, to the detriment of society as a whole. The task of each democratic society is to encourage those women to include in political life (at local, regional, national or international level) and public life, to make decisions about their position and to be consulted on major issues, particularly those which directly relates to them[51]. This further means that there is also a need to promote their full social integration and participation in the life of community, encompassing both the public and private spheres[52].

The CRPD guarantees to persons with disabilities the right to participate in political and public life[53]. States parties shall ensure to persons with disabilities the participation in political and public life on equal basis with others. It means that these persons must have opportunity to vote and to be elected, to have accessible voting process, voting places and material. In that sense, it is important to have in mind that persons with visual impairment have not possibility to vote alone without support of other person because the material on Braille is not provided. For example, the Center for Society Orientation from Belgrade investigated accessibility of elections during the election process in 2014 in the Republic of Serbia and the conclusion of the final report was that persons with visual impairment have not voting material in accessible formats, while wheelchair users sometimes have not architectural access to polling place[54]. On the other hand, some countries try to include women in political and public life by providing the quota system. The same situation is with organizations of persons with disabilities, since in many of those organizations, men with disabilities hold important positions. It is the cause why these organizations should also adopt quota system. The Committee on the Rights of Persons with Disabilities also takes into account gender balance between its members[55]. These few examples show that integration and participation of women with disabilities in political and public life is of great importance for their interests and good representation in society. At the same time, society can benefit from the experience and knowledge of women with disabilities, so they have to enjoy both the right to participate and the opportunity to influence the destiny of communities[56].

51. Beleza, M. L., p. 41.
52. Schömann, I.,, *op. cit*., p. 336.
53. CRPD, Article 29.
54. Lončar, G. (ed.), *Pristupačni izbori: Monitoring učešća osoba sa invaliditetom u političkom i javnom životu*, Centar za orijentaciju društva, Belgrade, 2014.
55. Achieving gender balance and equitable geographical representation in the elections of members of the Committee, Statement of the Committee on the rights of persons with disabilities, adopted during the Committee's seventeenth session (20 March-12 April 2017).
56. Beleza, M. L., pp. 39-40.

VII. GENDER EQUALITY IN THE REPUBLIC OF SERBIA

Serbian society in some aspects is still patriarchal society with defined roles of man and woman. Stereotypes, prejudices and discrimination are obstacles for women to participate in all fields[57]. In 2009 National Assembly of the Republic of Serbia adopted the Law on Equality of Sexes[58]. This law proclaims the equality of opportunity between men and women and guarantees realizing their human rights on equal basis, while employment, health and social protection, family life, education, and participation in political and public life must be accessible for all. Law doesn't include women with disabilities as one of marginalized groups but do introduce quota system of 30% of less represented sex in public sector. Also, in 2014 the Government of the Republic of Serbia established the Coordination Body for Gender Equality, with the task to consider all matters and coordinate the work of public authorities with respect to gender equality.

The Committee on the Rights of Persons with Disabilities in its Concluding observations on Serbian Initial report submitted to Committee, observed that Serbia has not implemented specific actions and measures to prevent and combat multiple and intersectional discrimination that women with disabilities face especially in access to justice, protection against violence and abuse, health, education and employment. The Committee recommended the consultations with women with disabilities through their representative organizations about all measures and programs which affect them directly[59].

In 2021 National Assembly adopted Law on Gender Equality[60], that defines general and special measures for realizing and advancing gender

57. Vujadinović, D., Country report on legal perspectives of gender equality in Serbia, in: Efremova, Veronika *et al.* (eds), *Legal perspectives of gender equality in South East Europe*, Centre for South East European Law School Network, Skopje, 2012, p. 161.
58. Law on Equality of Sexes ("Official Journal of the Republic of Serbia", No. 104/2009).
59. United Nations, CRPD/C/SRB/CO/1, Convention on the Rights of Persons with Disabilities, Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Serbia, 23 May 2016.
60. Law on Gender Equality ("Official Journal of the Republic of Serbia", No. 52/2021). This law defines gender equality as: "equal rights, responsibilities and opportunities, equal participation and balanced representation of women and men in all areas of social life, equal opportunities for realizing rights and freedoms, using personal knowledge and capacities for personal development and development of society, equal opportunities and rights in access to goods and services, and realizing equal benefits as the results of work respecting biological, social and cultural differences between men and women and different interests, necessities and priorities of women and men in process of making decissions about public and other policies, and

equality. Also, this law considers persons with disabilities as a vulnerable group[61], and defines measures to provide equal opportunities for enjoyment of different rights – employment and self-employment, health care, participation in political and public life, protection against violence. This has been supported by Strategy for Combating and Fighting Against Gender-based Violence Against Women and Family Violence (2021–2025).

It can be concluded that legal and institutional framework for achieving gender equality in Serbia is advancing, mainly due to the effect of internationalisation of human rights of persons with disabilities, women and girls. However, the struggle against gender-based and disability-based discrimination is not yet finished. Especially if one takes into account the serious effects of the economic and health crisis, as well as unfavourable demographic trends, which are even more pronounced for the vulnerable categories of people. In practice there are still many challenges and obstacles for effective enjoyment of right to protection against gender-based and disability-based discrimination. Whole society and all its members need to work on and raise awareness of the importance of integration and equal opportunity for women with disabilities who are still marginalized, since prejudicial attitudes towards persons with disabilities and all other minority groups are not inherited. They are learned through contact with prejudice and ignorance of others[62].

VIII. CONCLUSION

In this paper we tried to emphasize some key aspects of gender equality of women with disabilities. In perspective of gender equality, they are still marginalized and their position is not defined in many legal documents. It seems that the best solution and recommendation will be the dialogue and consultations with women with disabilities, their representative organizations and their families. Practice of segregation and isolation in specialized institutions must stop. Women with disabilities must enjoy their human rights, make decisions, take responsibilities and be part of society. They are human beings with emotions, pain and opinion and must be treated on this way, while States have obligation to ensure normal and accessible life to these persons through their legal, institutional and all other available mechanisms.

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making decissions about rights and obligations and provisions based on law and the constitution" (Article 3).

61. Law on Gender Equality, Article 6.
62. Rieser, R., *op. cit*., p. 138.

"Gender Coloniality": A Study of the Role of Sahrawi Women in the Struggle for Self-Determination

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I. INTRODUCTION

"We, Sahrawi women, have laid the foundations of a neutral feminism that applies to all, we do not want to brand our feminism as Islamist, African, European or white, we simply defend a feminism that respects identity and fights against anything that hinders the advancement of women's struggle for their rights"[1].

Jadiyetu El Mohtar Sidahmed

For more than forty years, women have been organising and leading the resistance in Africa's last colonialist hotspot: Western Sahara. Women were crucial for laying the republic's foundations during the years of war and survival, which were proclaimed in exile in one of the world's most inhospitable places. Today, they have managed to establish one of the most progressive Arab societies from the point of view of gender equality[2].

1. Taleb Alisalem, ECS (2020). "Feminismos. (Entrevista) En un Sáhara Occidental independiente, las mujeres saharauis serán un modelo de feminismo árabe, musulmán y también occidental". Revista Resumen Latinoamericano. <https://www.resumenlatinoamericano.org/2020/09/23/feminismos-entrevista-en-un-sahara-occidental-independiente-las-mujeres-saharauis-seran-un-modelo-de-feminismo-arabe-musulman-y-tambien-occidental/>.
2. Grande, M. L., & Ruiz, S. (2016, septiembre). Análisis del conflicto saharaui desde una perspectiva de género. *Index Enferm, Granada, vol.25, n.3. <http://scielo.isciii.es/scielo.php?script=sci_arttext&pid=S1132-12962016000200013>.*

Their struggle for rights from a post-colonial feminist perspective is inseparable from their tireless quest for freedom and self-determination for their people.

This paper will examine the role of Sahrawi women as political figures in their fight to achieve autonomousness and to decolonise their territory. In section II of this paper, I will analyse postcolonial feminism from the perspective of the concept of "gender coloniality". Additionally, sections III and IV will present the historical context of the Sahara conflict by emphasizing the active role of Sahrawi women, their struggles, achievements, ideology, and knowledge. Lastly, this paper will discuss the position of Sahrawi women in their society by examining the influence that colonisation had on them.

II. POSTCOLONIAL FEMINISM

From the 1970s onwards, the antecedents of a critical feminist genealogy subsequently known as decolonial, postcolonial, peripheral, anti-racist, non-Western or third wave feminisms emerged. Decolonial feminism is defined as the awareness of a gender system based on the human-non-human dichotomy and the reduction of people and nature to "genderless" things for the use of Eurocentric and capitalist men and women[3]. Fundamentally, they denounced how certain Western femininity (which corresponds with white, middle-class, heterosexual women) was set up as representative of "the woman" within Eurocentric feminisms. Even feminism as the West has defined and appropriated it is just another form of cultural imperialism. The conflict with Western civilization was even more destructive for women's rights since it was done under the pretence of a "civilising mission" whose imperialist vocation produced "painfully visible" wounds that are still felt today. New feminist readings thus appeared that interpreted "race", class or ethnicity as constitutive variables of diverse gender subordination, conceptualising gender as always ethnicised and racialised, and race as always gendered.

Sahrawi women are a collective made up of Sahrawi, African, Arab, Muslim and refugee women under military occupation. Taking into account the geopolitical, religious, cultural and economic relevance of each of these items, the experiences of these women imply a remarkable change

3. Medina Martín, R. (2014) "Resistencias, identidades y agencias en las mujeres saharauis refugiadas". Revista Internacional de Pensamiento Político – I Época, vol. 9. Recuperado a partir de <https://www.upo.es/revistas/index.php/ripp/article/view/3629>.

in which Western feminism is understood. Indeed, we are dealing with a type of anti-colonial feminism, in which the discourse of women's liberation is the same as that of the liberation of the nation. There is no doubt that Saharawi women are an example of sisterhood, and their struggle should be much more visible so that girls and women from all over the world, not only Arabs, Muslims or Africans, feel inspired and take themselves as a model to follow for the individual struggle, as well as the collective difficulties to conquer their rights. In fact, some Sahrawi women's rights activists refuse to identify with the label "feminism" in order to distance themselves from Eurocentric feminism and the Eurocentric accusation that the term carries[4]. In other words, their ideological position stems from postcolonial feminism, a non-white and non-Western feminism. Others, on the other hand, have no qualms with identifying as such. As a way of illustration, the journalist Jadiyetu El Mohtar Sidahmed once said: "*In an independent Western Sahara, Sahrawi women will be a role model of Arab, Muslim and also Western feminism"* regarding her ideological position about feminism[5]. This type of feminism holds the idea that feminism in this geopolitical space is not imported from the first world, but originates from internal ideologies and socio-cultural factors.

1. GENDER COLONIALITY

One of the fundamental categories developed from decolonial feminism is "gender coloniality". This idea was elaborated on by the Argentinean philosopher María Lugones (member of the Modernity/Coloniality/Decolonization research group), and afterwards by other Latin American authors such as Breny Mendoza and Rita Laura Segato[6]. Lugones defines gender coloniality as the "*analysis of racialised and capitalist gender oppression as a complex interaction of economic, racialising and gendering systems…*". The central thesis of Lugones is that *"race is neither more mythical nor more fictional than gender, both are powerful fictions"*[7].

The colonial gender's perspective, which was influenced by Catholicism, made the domestic space and the care of the house the sole option for

4. Dauden, L., & Seini Brahim, C. (2020). Feminismo y libertad: la lucha de las mujeres saharauis. *Ritim. <https://www.ritimo.org/Feminismo-y-libertad-la-lucha-de-las-mujeres-saharauis>.*
5. Dauden, L., & Seini Brahim, C. (2020). Feminismo y libertad: la lucha de las mujeres saharauis.
6. Medina Martín, R. (2014) "Resistencias, identidades y agencias en las mujeres saharauis refugiadas".
7. Medina Martín, R. (2014) "Resistencias, identidades y agencias en las mujeres saharauis refugiadas".

women. Sahrawi women, on the other hand, had considerably more rights and privileges to get rid of them. They already possessed a great deal of autonomy in society before the Spanish colonisation, to the extent that women even controlled the economy[8]. Despite being boosted by the anti-colonial fight; the significance of Sahrawi women is entrenched in the Sahrawi tribal culture. Due to the limited amount of research in this area, studies show that, in comparison to other contemporary Arab societies, Sahrawi society has always reserved relatively large spaces of freedom and action for women, a characteristic that can be explained in part by the nomadic and cattle-herding culture that imposed the long absence of men[9]. Sahrawi women have always played a fundamental role in the traditional life of their people and through education, their knowledge and ideas have been passed down from generation to generation. Their situation differs from that of other Muslim women, as in the Sahrawi social world there is no gender segregation, women enjoy total freedom of movement, and share public and private spaces with men. However, and as a result of the Spanish colonization, women's social participation was diminished; subsequently, it was reinvigorated with the rise of the national liberation movement only to become the mainstay of life in the refugee camps.

III. HISTORICAL BACKGROUND

Intersectionality is important to understand the Sahrawi women's movement; considering the wide variety of labels attributable to Sahrawi women described above. Another noticeable trait, as Rocío Medina Martín (2014) points out, is the transgenerational and collective nature of their fight, which is shaped within the national liberation movement[10]. For this reason, it is essential to briefly summarise the key moments of this process that culminated in exile.

The territory of Western Sahara was occupied by Spain at the end of the 19th century and incorporated into the metropolis with the status of a province (the 53rd) in 1961. Fourteen years later, in an episode known as the Green March, more than 300,000 Moroccans marched on the capital of El Aaiun, marking the beginning of a conflict that would last more

8. Amorós, C. & De Miguel, A. (2005). Teoría Feminista: De los Debates sobre el Género al Multiculturalismo.
9. Juliano, D. (1998). La causa saharaui y las mujeres. Siempre hemos sido muy libres. Icaria: Madrid
10. Medina Martín, R. (2014) "Resistencias, identidades y agencias en las mujeres saharauis refugiadas".

than 15 years. The Sahrawis, organised in two major national liberation movements since the 1960s were expelled from their towns and fled across the desert to neighbouring Algeria. On the way, they were bombed with napalm and white phosphorus and, once in refuge, on 27 February 1976, they proclaimed their Sahrawi Arab Democratic Republic (SADR)[11]. This division of the country was crystallised in the 1980s with Morocco's construction of a 2.2 thousand kilometre sand wall – a structure that to this day divides families and prevents Sahrawis living in Algeria or in the territories controlled by the Polisario Front (the so-called liberated zones) from returning to their places of origin and longing. Likewise, in 1988, under UN mediation, a ceasefire was signed and a referendum was proposed through which the Sahrawis could freely express their right to self-determination. Three years later, the UN installed MINURSO, the United Nations Mission for the Referendum in Western Sahara; its mandate has been renewed annually ever since, but it has never succeeded in reaching the initial agreement[12].

It is undeniable that the people of Western Sahara have a right to self-determination as well as independence. However, far from the truth, the Sahara is not only a non-self-governing territory but it is also brutally occupied by Morocco, as introduced above. For more than fifty years, the Sahrawi people have seen how this conflict has led to serious human rights abuses against its inhabitants in the face of the indifference of other countries. While the diplomatic uncertainty and waiting persist, the Sahrawis continue to work to broaden international recognition of their struggle, whether through the establishment of bilateral relations, or by denouncing the human rights violations in the occupied territories and Morocco's persistent plundering of their natural resources. In exile, they are trying to lay the foundations for the structures of the society that will take place when they finally achieve independence. Furthermore and despite the fact that it is Morocco that exercises *de facto* control over the Sahrawi territory, the United Nations continues to consider Spain to be the *de jure* administering power of the territory, which continues to have the obligation to guarantee the decolonisation of the colony[13].

11. Ruiz Miguel, C. (2015). The principle and right of self-determination and the people of Western Sahara. *Anuario Español de Derecho Internacional*, *31*, 267–296. <https://doi.org/10.15581/010.31.267-296>.
12. Ruiz Miguel, C. (2015). The principle and right of self-determination and the people of Western Sahara.
13. Soroeta, F. (2006). *De Los Pueblos En El Siglo Xxi: Entre La Realidad Y El Deseo * the Right To Self-Determination of Peoples in the Twenty-First Century: Between Reality and Desire*. *10*.

1. NATIONAL UNION OF SAHRAWI WOMEN

An important milestone in this context was the constitution of the National Union of Sahrawi Women (UNMS) in 1974, within the liberation movement. Its objectives include making Sahrawi women visible and empowering them through their position in society and in the struggle, raising awareness of their rights and promoting their education, which is possible thanks to the organisation system in the camps that allows them to play an active role. In addition, in order to achieve its objectives, the UNMS organises congresses, conferences, meetings, studies and coordinates cultural and social activities, among others. The fruit of its work has been the presence of women in the Polisario Front and SADR: as Dauden and Seini Brahim note, the Secretariat of State for Social Affairs and Women's Emancipation became a ministry in 2003; there are currently two female ministers and two female governors, ten female parliamentarians and six women in the liberation movement[14]. Front Federation and the majority of political representatives in the wilaya and daira are women. Furthermore, the UNMS goes beyond the Polisario Front and the SADR, establishing relations with other organisations that also fight for women's rights, such as the Women's International Democratic Federation, the Pan-African Women's Organisation and the General Arab Women's Union, among others, and has a strong presence in the African Union and the United Nations, among others, taking an active role in denouncing violations committed against women's rights, not only in the Sahrawi context, but throughout the world[15].

As a result of all of this, a Sahrawi feminist movement has emerged, which differs from the Western feminist movement in that it seeks not just formal but also real equality. In this regard, Juliano (1998) claims that, unlike other Islamic nationalist movements, revolution and the fight for women's rights are inextricably linked, with gender demands forming one of society's axes[16]. Indeed, we are dealing with a form of anti-colonial feminism in which the narrative of women's liberation is identical to the discourse of national liberation. Without a doubt, Sahrawi women are role models for sisterhood, and their struggle should be made much more visible so that girls and women everywhere –not just Arabs, Muslims,

14. Coconi, L. (2008). Las mujeres del Sáhara Occidental (Máster en Estudios Internacionales). Universitat de Barcelona.
15. Grande, M. L., & Ruiz, S. (2016, septiembre). Análisis del conflicto saharaui desde una perspectiva de género.
16. Juliano, D. (1998). La causa saharaui y las mujeres. Siempre hemos sido muy libres. Icaria: Madrid

or Africans – are inspired and see themselves as role models for their struggles as well as the collective struggle for their rights[17].

IV. POLITICAL ROLE OF SAHRAWI WOMEN

Following on from the preceding, it is crucial to note that the role of Sahrawi women has developed in lockstep with the war, adjusting to various stages and historical landmarks; thus, their contribution is particularly crucial for the Sahrawi conflict. In this way, the configuration of Saharawi women as political subjects is closely related to the conflict process.

As a consequence of the hostilities, many of the men were deployed by the army to the freed territories, and it is the women who administer the refugee camps. During the first years in Algeria, Sahrawi women have had to face difficulties such as the harsh nature of the Hamada desert, the lack of minimum subsistence resources, the absence of the men who were on the battlefield, the low cultural, professional and political level of the women, the lack of experience in caring for the war wounded, or the external need to create conditions of security and stability for the displaced. Saharawi women were thus at the centre of the social and political organisation of the refugee camps, which became the basis for the political constitution of SADR and the government in exile[18].

However, in the course of the war, Sahrawi women fought alongside the men, both at the front by being trained at a military academy for women where they were trained at a military academy for women, allowing them to defend their country in the same way that men did, and in the back where they organized the resistance from underground and collaborated in quartermaster duties[19]. However, in the occupied zones, the situation for women is different as they are under the yoke of Morocco, where human rights violation are the norm: more than 20% of women in the Sahrawi territories have been victimized by police or agents in the last 20 years, accounting for more than half of all women living under occupation. Furthermore, women account for 30% of disappearances in

17. Alisalem, T. (2020, 19 septiembre). En un Sahara Occidental independiente, las mujeres saharauis serán un modelo de feminismo árabe, musulmán y también occidental. *ECSaharaui.*
18. Besslan, A. (2020, 17 septiembre). La mujer saharaui como agente político en el conflicto del Sahara Occidental. *ONGDCoopera Euskadi.* <http://coopera.eus/2020/09/17/la-mujer-saharaui-como-agente-politico-en-el-conflicto-del-sahara-occidental-2/>.
19. Grande, M. L., & Ruiz, S. (2016, septiembre). Análisis del conflicto saharaui desde una perspectiva de género.

occupied regions and 24.8 percent of political detainees[20]. Internationally recognized figures like Aminetu Haidar, Fatma Ayach, and Djimi el Ghalia are only a few of the numerous victims of Moroccan persecution; yet, rather than being hushed, their voices are elevated to encourage women in occupied regions to continue resisting.

Furthermore, and taking into account Sahrawi women's education, it is important to highlight that when the Sahrawi were exiled to Algeria in 1975, women had a very low level of education and a very high illiteracy rate. In the African, Arab, and Muslim social environments, all women born or raised in refugee camps today have a level of education equal to the Spanish baccalaureate, and many have secondary or higher degrees. Nevertheless, today, they enjoy a higher social status and position, greater gender equity and opportunities, promoted by orientation and literacy campaigns, formal education, and activities promoted by the aforementioned women's organisation, the National Union of Saharawi Women. Saharawi women claim their status as citizens and not as members of a family.

An example of Saharawi women's struggle is Maima Mahamud, director and founder of the women's school in Dakhla (one of the Saharawi refugee camps) and Secretary of State for Social Affairs and Women's Promotion of the Polisario Front, who states that *"one day, when our country achieves freedom, we Saharawi women can be an example not only for other Arab nations but for the whole world"*[21]. Moreover, the cases of internationally recognised personalities such as Aminetu Haidar, Fatma Ayach or Djimi el Ghalia are just a few of the many examples of this Moroccan repression, although their voices, far from being silenced, are raised to inspire women in the occupied areas to continue resisting.

V. DISCUSSION

The abovementioned presents Sahrawi women as active political subjects in the conflict, capable of designing resistance strategies at different stages of the confrontation. This idea contradicts the role of passive victims that it is usually attached to women in conflict contexts. This is where we see the difficulty women have in making their political implications visible. Furthermore, when discussing Sahrawi women,

20. Dauden, L., & Seini Brahim, C. (2020). Feminismo y libertad: la lucha de las mujeres saharauis.
21. Dauden, L., & Seini Brahim, C. (2020). Feminismo y libertad: la lucha de las mujeres saharauis.

certain factors must be considered, such as the Sahrawi people's anti-colonial struggle, which resulted in the formation of the Polisario Front; the 16-year-long war; a 45-year-long refuge; and cultural aspects such as the Bedouin and nomadic traditions of the Sahrawi people. Likewise, Saharawi women, through their experience, have configured themselves as political subjects and subjects of thought, capable of exhibiting their authority and legitimacy in their discourse and experiences.

As a result of all of this, a Sahrawi feminist movement has emerged, which differs from the Western feminist movement in that it aims for both formal and practical equality. In this regard, Juliano (1998)[22] claims that, unlike previous Islamic nationalist movements, revolution and the fight for women's rights are inextricably linked, with gender demands being one of society's axes[23]. Consequently, it is not only a matter of paying attention to "patriarchal dominations over Sahrawi women", but of understanding how the anti-colonial and nationalist experience, armed resistance, prolonged refuge, or contemporary *islamophobia*, are also constitutive variables of both gender subordinations and the strategies of resistance of these women.

However, this has not prevented doubts about what will happen once self-determination for the Saharawi people is achieved. In this sense, Bachir (2008)[24] wonders whether Saharawi women would have the same status they enjoy today if there were no Moroccan occupation and this struggle was not necessary. Hamoudi (2006)[25] continues in the same vein, recalling that in times of struggle, women have always occupied a place alongside men, but when peace is achieved, men occupy the most important positions in all areas, so that the Polisario Front representative is wary of the achievement of this much-desired autonomy, as it could lead to a setback in women's rights. In contrast, some people hold more optimistic views, such as Jadiyetu El Mohtar Sidahmed, who believes that if the Sahara becomes independent, Sahrawi women will be a model of Arab, Muslim, and even Western feminism[26]. This could be solved

22. Juliano, D. (1998). La causa saharaui y las mujeres. Siempre hemos sido muy libres.
23. Dauden, L., & Seini Brahim, C. (2020). Feminismo y libertad: la lucha de las mujeres saharauis.
24. Medina Martín, R. (2014) "Resistencias, identidades y agencias en las mujeres saharauis refugiadas".
25. Lourenço, I. (2020). El papel de la mujer en la lucha por la independencia en el Sáhara Occidental. <https://porunsaharalibre.org/2020/06/24/el-papel-de-la-mujer-en-la-lucha-por-la-independencia-en-el-sahara-occidental/>.
26. Taleb Alisalem, ECS (2020). "Feminismos. (Entrevista) En un Sahara Occidental independiente, las mujeres saharauis serán un modelo de feminismo árabe, musulmán y también occidental".

with the tools we possess: history and current affairs. Notwithstanding, Sahrawi women already possessed a great deal of autonomy in society before Spanish colonisation, so that women even controlled the economy. Moreover, the Polisario Front claims the status of free women as an integral part of the Saharawi national identity, while the UNMS aims to preserve all the achievements made during the national liberation process. This does not rule out the possibility of a reaction or the rise of conservative forces seeking to denigrate and deprive women of their rights (as it is occurring even in the West), despite the fact that this does not seem reasonable.

VI. CONCLUSIONS

This paper has examined the political and active role of Sahrawi women in the conflict of Western Sahara. It presents the connection between Sahrawi feminism with the struggle for self-determination and the continued violations of human rights that the Sahrawi people have suffered since their colonization. Sahrawi women's role has been examined under the concept of "gender coloniality", which evidences that the empowerment and significance of those women are entrenched in the Sahrawi tribal culture long before colonization arrive. Likewise, the presented study emphasizes the political action taken by Sahrawi women, such as the UNMS, or their very active political activity alongside the Polisario Front. Notwithstanding, the most important function these women play is in the village; via education, they pass on what has made them so strong for so long. This role is absolutely essential for future generations, especially for girls.

Furthermore, and as a brief personal conclusion, I believe that an interesting future work would involve an in-depth study of the history of the Sahrawi people before the Spanish colonization, because even in this period we can find the germ of the type of Sahrawi society, in which women already had certain rights. All of this to determine how the rights and freedoms they enjoy today is the results of the conquests made in their struggle for the liberation of their country, or how they would be in the same position if the conflict did not exist. This proposed study may give us a more accurate picture of what Sahrawi society will be like when they achieve their longed-for self-determination. Secondly, I consider that the contribution played by these amazing women should not be overlooked. As Spaniards, we have a moral obligation to assist and join them in their battle for the Sahrawi people's right to self-determination.

PART II
Gender in Education

Leveraging Technology to Teach Gender Equality Law[1]

David B. Oppenheimer

Berkeley Law

I. INTRODUCTION

David Oppenheimer is a clinical professor of law at the University of California, Berkeley School of Law. Professor Oppenheimer teaches Civil Procedure, Evidence, and Comparative Equality Law courses, and supervises an equality law practicum. In addition, Professor Oppenheimer directs the Berkeley Center for Comparative Equality and Anti-Discrimination Law, a center with activists, advocates, and academics from a wide array of disciplines all across the world, who partner together to study how different nations and legal systems address problems of inequality and discrimination. The Center for Comparative Equality holds conferences and publishes books and online courses on gender equality, pay equity, disability rights, global systemic racism, sexual harassment and violence in education and the workplace, COVID-19 and global inequality, LGBTQI rights, and digital equality. The Center publishes blog posts from students and scholars, and an E-Journal, which collects and promotes scholarship on comparative equality to a wide audience.

We invited Professor Oppenheimer to join our consortium meeting on gender equality law to discuss his work on leveraging technology to teach equality law. Here are his edited remarks.

1. Literal transcription of the lecture given in the International Congress "Gender and Law and Practice and Education", Universidad de Cádiz, 19th July 2019, available at <https://lawgem.uca.es/congress/>.

II. LEVERAGING TECHNOLOGY TO TEACH GENDER EQUALITY LAW

It's a great great pleasure to return to Spain, even if only virtually. I've made many wonderful visits over the years and a part of my family emigrated from Spain. They left Spain around 1500 during the Inquisition, and I assume they'd be very pleased to know I was invited to come back and give this talk. So, thank you very much for inviting me, and thank you to Jessie Davis and Zoe Hayes at Berkeley for helping me turn my remarks into a coherent essay.

As explained, I'm a professor at Berkeley. I teach civil procedure, evidence, and a course in comparative equality law. I write about comparative anti-discrimination law, civil rights history and affirmative action. I supervise students who work with me on comparative equality litigation in various parts of the world and on policy papers. I direct our Comparative Equality Center which has members from around the globe. We have members on every continent but Antarctica. They are academics, advocates, and activists. We do research and policy work, and we work mostly in working groups, a number of which I think would be of interest to this group.

Our working groups include a working group on sexual harassment and violence and a working group on pay equity. Recently we had a pay equity conference with 75 invited guests from 14 countries to talk about how pay equity – both gender and race – is a global issue and ought to be understood in global terms. We have a working group on global systemic racism, another on disability rights, one on LGBTQI+ rights, a working group on COVID-19 and global inequalities, and a new group very much centered in Europe at this point on digital equality.

We do a number of things which I think are similar to some of the things that this consortium is also working on. We hold scholarly conferences and offer webinars, some of which are in Spanish, although we mainly work in English. We offer this because we have many active members in Latin America, including in Colombia, Argentina, Mexico, and Brazil who are particularly active in our sexual harassment and violence group. Of course, the members in Brazil's first language is Portuguese but many of them also are fluent in Spanish.

We have a journal in which we collect articles in our field that have been published in other leading journals and distribute the abstracts and links to make it easier for people in the field to keep up with the new work. In fact the new editor-in-chief of that journal is herself Spanish, although teaching now at University College in Dublin.

We also publish books from time to time. Our most recent book is The Global #MeToo Movement. This book features writings of 48 authors from 28 countries talking about how the #MeToo movement is truly global. It's available on our website for our favorite price, free (as a download). You can also buy a soft cover copy on Amazon. We are developing massive open and free online courses in various areas of equality law. It's something that I'm going to urge you to do in your consortium as a way of extending the reach of your teaching mission. You have a teaching mission and a research mission, and I applaud you for that. We partner with academic centers and NGOs around the globe and we're very happy to be a partner with youn on this important project that you're working on – gender equality in Europe.

It seems to me that the greatest problem in our world today, the greatest threat to our globe, is climate change. I'm not going to be speaking about climate change, but I feel like we have to acknowledge it before we talk about anything else. Of course, I come from a country with a great deal of responsibility for the problem of climate change and so I try to do so with a certain amount of humility, but we have to fix it.

It seems to me that the second greatest problem that we face as a global community – and not unrelated – is the problem of inequality: gender inequality, racial, ethnic, religious inequality, inequality through the maltreatment of people with disabilities, sexual identity inequality, wealth inequality, intersectional inequality. These are all problems that exist locally, domestically, nationally, regionally and on a global basis. These are all global issues where we can learn from one another through the tools of comparative studies, and through the tools of comparative law. One important way of addressing the issue of inequality on a regional and global basis is to do exactly what your group is doing today; to form consortiums, alliances, and partnerships in order to reach a larger audience and in order to understand the problem from multiple dimensions.

So, what I'd like to do is to describe two of our initiatives that I think are easily replicated, with the hope that I can persuade you that this should be part of your initiative, and that I can offer some assistance based on our experience. In doing this we have not failed to make errors from which we've learned. (I like to tell my students the reason I know so much is that we learn from our mistakes.) So I'd like to be able to share those mistakes and therefore share what we've learned with others who are doing similar work. For that reason, I'm really pleased to be here with you today.

First, our multi-university courses. The technology that we're using here today so that we can join together from all over Europe and from the United States is a remarkable technology, and I think we're just beginning to realize some of the effective ways that we can use it. Last summer (2020), it became clear that in most parts of the world students would not be going back to the classroom, and university students would be studying by using Zoom or Microsoft Meet or the other technologies that make it possible for remote learning. Some colleagues and I, led by Panos Kapatos of the University of Portsmouth in the United Kingdom, pulled together a group from our center, with 25 colleagues from 15 universities, covering six continents, and we "on the fly" designed and got approval from each of our institutions, for an online live course on COVID 19 and global inequalities. We met weekly. The meetings were held over Zoom. We met in the morning in North America and South America. It was the afternoon in Europe and Africa. It was the evening in India and Malaysia and China. It was the middle of the night in Australia, and nonetheless we had Australian colleagues joining us. It's not easy to be an internationalist when you live in Australia, but of course it's also probably not easy to not be an internationalist when you live in Australia, or your community starts to feel very small.

What we did was to have a few lectures for each class talking about the newest inequality issues being raised by the pandemic, issues concerning gender, caregivers and essential and low-wage workers, issues involving problems of domestic violence, issues about the isolation of LGBTQI+ youth, and issues about racism and the distribution of medical resources and treatment. The classes were designed only briefly before they were presented because we were dealing with material that was brand new. We tried to have in each class meeting, a number of problems where students could discuss what was going on in their own country with regard to this issue of inequality within the pandemic and so much of the instruction occurred in breakout rooms where we'd have five or six students from five or six countries with a faculty member or a teaching assistant directing the discussion. The impact for the students was dramatic. The comments that we got at the end of the course suggested that the students found it incredibly valuable and frankly so did all of us who were teaching.

Now, this year, with considerably more planning because we have more time to plan and a somewhat smaller footprint, we have designed and we are currently (fall 2021) teaching a 12 university course on comparative equality law. We have a textbook. I'm one of the authors of a textbook on comparative equality law. I understand that you're writing a textbook on

European gender equality. I think that's a wonderful resource to begin with for designing a multi-university course around it.

Well, of course it's great to meet with our own students in a seminar room and study with them. It's why we do what we do. But the opportunity now exists through technology to meet with colleagues and students from multiple universities and together study material relevant to all of us. This is just an exponential benefit in terms of the effectiveness of our teaching and how much we learn, both in how much we learn from each other and how much our students learn from us. That's one of the ways that I think we can leverage the internet to effectively teach comparative equality in a comparative context.

The second is massive open online courses which are now readily available around the world through Edx and through Coursera. I have co-authored two such courses, and I'm working on more. I have an EdX course at Stanford on comparative equality law, with nearly 40 scholars and activists from around the globe giving brief lectures. Now at the Center we are designing Berkeley EdX courses. These courses are free (which again is my favorite price) but you can pay 75 or 99 dollars if you want a Stanford or Berkeley certificate (and what's amazing to me is that a lot of people do) so we have thousands of people in the Stanford course at any time and we have hundreds who are purchasing certificates so that they can say that they took a Stanford course and they've been certified in comparative equality law.

We are designing courses now through the center that will be Berkeley Edx courses. We've taken recordings of brief lectures from professors from around the globe, sometimes from our conferences, sometimes in direct interviews that we conduct on Zoom. We add reading material and discussion material and we can present it to a worldwide audience where anyone can be a student. We have a course on COVID-19 and global inequalities. The people at Edx told us that we shouldn't expect too much; they thought that in time we might enroll ten thousand students. I don't think I've taught civil procedure or evidence to ten thousand students over a very long career of teaching. It's an amazing way to leverage our work.

Next spring we will complete and publish our Edx course on the global #Metoo movement and I hope by the following summer or fall, our course on pay equity and fair wages. Others will follow, including a course on global disability rights law and a course on global systemic racism. We're happy at the center to partner with other schools and centers and to do courses that are joint projects. Again, I think this is

a technology tool that allows us to leverage existing technologies in order to more effectively teach and learn about comparative equality in a comparative context.

So, I want to thank you again for inviting me to come here and meet with you. I hope that we can find ways to work together to address issues of inequality. And I hope we can find ways to collaborate on leveraging technology to teach and address issues of inequality.

The Gender Perspective and the Cooperative Teaching-Learning Method in the Study of Labour Law

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I. INTRODUCTION. CONTEXTUAL AND REGULATORY FRAMEWORK

With the implementation of the European Higher Education Area (EHEA), the university teaching system has required a considerable adaptation and a modification of the teaching-learning process. One of the important aspects in the indicated adaptation has been to incorporate the gender perspective in the different studies, that is, the obligation for all university students to receive training in gender[1]. As a sector of the doctrine indicates, the introduction of this new parameter "requires transforming the consciences of future professionals and making them permeable to the generalized relationships that will be found in future jobs. The choice to teach a set of values, ideas, assumptions and information, and, in doing so, omits other values, other ideas, other assumptions and other information, becomes a political act"[2].

However, no indication has been given on the form and manner of carrying out the implementation of the gender perspective and the principle of equality in the curricular designs of the different grades. As it is indicated, "since they are not subjects incorporated into the structure of the study plan, that is, institutionalized, they appear and disappear

1. Bosch, E., et al., Incorporation of content on equal opportunities and gender in degree, Palma de Mallorca, University of the Balearic Islands, 2011.
2. Donoso Vázquez, T., "Gender perspective in the University as an engine of innovation", in Rebollo Catalán, M.A., The University in gender key, Barcelona, Octaedro Editorial, 2018. p. 35.

depending on the interest of the teaching staff"[3]. This is really important in the case of the degree in Law, where one of the fundamental principles is that of equality and non-discrimination. And, even more, in the branch of Labour Law and Social Security, where gender inequality persists in different areas of the labour relationship and Social Security.

In this sense, it is enough to go to the regulations, when more than 20 years ago, 29 European States signed the Bologna Declaration[4] where the pillars and guidelines of the new European Higher Education Area were laid. In this new university regulatory framework, several challenges were posed such as changes in the management of teaching and research staff, student mobility, or, for these purposes, the methodology of the teaching-learning process and the curricular structure.

Likewise, in the field of Labour and Social Security Law, and in general, all areas of Law, the approval of LO 1/2004, of 28th December, of comprehensive protection measures against gender violence, it has already considered the educational system as an essential area to contribute to the eradication of violence against women. Its art. 4 refers to the fact that universities will include and promote training in equality and non-discrimination in a transversal way in all academic areas. Subsequently, Organic Law 3/2007, of 22nd March, for effective equality between women and men, entailed changes that affected not only the social, labour and economic spheres, but also the university field, also modifying LO 6/2001, of 21st December, from Universities. In this sense, the art. 25 LO 3/2007 states that "in the field of higher education, public administrations in the exercise of their respective powers will promote teaching and research on the meaning and scope of equality between women and men". In addition, it adds in its section 2 that "public administrations will promote: a) The inclusion, in the study plans where appropriate, of teachings on equality between women and men". Hence, the Universities Law was modified by LO 4/2007, of 12th April, of universities, in whose explanatory memorandum it is indicated that "this Law does not forget the role of the university as an essential transmitter of values. The challenge of today's society to achieve a tolerant and egalitarian society, in which fundamental rights and freedoms and equality between men and women are respected, must, without a doubt, reach the university. This Law promotes the response of universities to this challenge through not only the incorporation of such values as the university's own objectives and the quality of its activity, but also through the establishment of systems

3. Buquet Colerto, A.G., "Mainstreaming the gender perspective in higher education", Educational Profiles, Vol. XXXIII, 2011. p. 215.

4. 19th June 1999.

that allows achieving parity in the governing bodies, representation and greater participation of women in research groups. (…) In addition, this reform introduces the creation of specific programmes on gender equality".

Specifically, it is RD 1393/2007, of 29th October, which establishes the organization of official university education, which provides for the incorporation of the principle of equal opportunities between women and men in university education. Its art. 3.5 includes the general principles that should inspire the design of the degrees, indicating that the study plans must take into account that any professional activity must be carried out "from the respect of fundamental rights and equality between men and women, and must be included, in the curricula in which it proceeds, teachings related to said rights".

The introduction of the gender perspective in university studies implies "incorporating this set of knowledge and practices that claim the right of people to be equal from difference, introducing an educational agenda to promote real equality between men and women that encompasses not only content or areas of attention but also strategies or forms of action of their own"[5].

Because of that, it is necessary to determine how to carry out an effective and efficient incorporation of the gender perspective in university studies, especially in the Labour Law subject of the Law degree. In our case, the experience has been executed in the subject of Labour Law II, specifically in the third year of the degree in Law.

II. OBJECTIVES

The pursued objectives with this experience of methodological innovation are the following ones:

- Developing a critical attitude towards gender and sex inequality.
- Promoting the values of equality and non-discrimination.
- Creating a culture around the use of non-sexist and coeducational language.
- Promoting in the students techniques to break with sexist stereotypes.

5. Rebollo Sánchez, E.M., The gender in the curricula of the degrees of Education in the Spanish Public Universities [Doctoral Thesis], Autonomous University of Barcelona, Barcelona, 2013. p. 4.

- Promoting the comprehensive development of students, based on the acquisition of knowledge and skills.
- Encouraging a positive attitude towards their own learning, applying the teaching methodology based on cooperative learning.
- Developing, through these methodologies, skills and personal and social capacities of the students.
- Enhancing and strengthening emotional intelligence, cooperative learning skills, critical spirit, creativity, conflict resolution or decision-making.

III. GENDER PERSPECTIVE IN TEACHING

In the first place, it should be clarified that, in the same way that "gender" is not synonymous with "sex", teaching with a "gender perspective" is not equivalent to "teaching about women", but rather the gender perspective it should be understood as one that starts from sex and gender as analytical and explanatory variables. "It involves paying attention to the similarities and differences in the experiences, interests, expectations, attitudes and behaviours of women and men, as well as identifying the causes and consequences of gender inequality, in order to combat it"[6]. That is, teaching with a gender perspective is one that takes into account both sex, or biological characteristics of people, as well as gender, that is, the social and cultural characteristics of women and men. In the words of the European Commission, sex refers to strictly biological characteristics, in terms of "reproductive organs and functions based on physiology, chromosomes and hormones", while gender refers to "social and cultural construction of women and men, which establishes models of behaviour for femininity and masculinity, which varies in time and space, and between cultures"[7].

There is no doubt that adopting this new model of teaching methodology contributes to improving the quality of teaching, and to deepening the understanding of the needs, behaviours and attitudes of the population as a whole. In addition, it stimulates the critical thinking of students and it develops skills that will allow them to overcome "gender blindness" when they have to enter the labour market. In short, it is about avoiding

6. Agència per a la Qualitat del Sistema Universitari de Catalunya, General framework for the incorporation of the gender perspective in university teaching. Barcelona, AQU Catalunya, 2019. p. 13.
7. European Commission, Guidance on Gender Equality in Horizon 2020, European Union, 2016. p. 7.

"gender blindness", which is defined as the "lack of recognition that the roles and responsibilities of women/girls and men/boys are attributed or imposed on them in specific social, cultural, economic and political contexts. Gender blind projects, programmes, policies and attitudes do not take into account these different roles and diverse needs and therefore maintain the status quo and do not help transform the unequal structure of gender relations"[8].

Therefore, with the incorporation of the gender perspective in university teaching, it is possible to make visible the condition and position of women with respect to men, separating sexual differences from the social representations of gender, as well as detecting inequality factors in the different areas, and planning actions to modify the elements that maintain inequalities between women and men[9].

All of this has its raison d'être in the androcentricity that exists in our society, where women find themselves displaced, occupying a second place or even non-existent one.

With this new approach, it is intended that students can carry out a critical reading and reflection that allows redefining the values of society that have been accepted and, however, are discriminatory. In short, it is about opening the eyes of the new generations to fight to remove discrimination and the gap that exists in all areas on the grounds of sex.

Therefore, the application of a teaching-learning process based on this perspective allows students to understand the factual data and make visible the unequal relationship in which women find themselves.

According to the doctrine[10] there are three ways to implement the gender perspective in university teaching. On the one hand, through the creation of specific titles such as Women's Studies or Gender Programmes. Second, by configuring a specific gender subject within all university degrees. Finally, through the Gender Mainstreaming methodology, that is, integrating the contents in any subject belonging to any study plan.

This third way is the one with the least application in the Spanish university, but which, in my opinion, is the one that allows a greater success and a excellent scope of application. Then, if it were achieved

8. EIGE, Gender Equality Glossary and Thesaurus. Vilnius: European Institute for Gender Equality, 2016.
9. Pacheco, C., Prácticas sexistas en el aula, UNICEF, Paraguay, 2004. Recuperado de: <http://www.unicef.org/paraguay/spanish/py_practicas_sexistas.pdf>.
10. Ménedez Menéndez, M.I. "Teaching innovation methodologies: the gender perspective in Audiovisual Communication", History and Social Communication, núm. 18 (2013). p. 702.

that in all studies there were one or more subjects impregnated with this gender perspective, a greater effectiveness could be achieved.

For this reason, in the experience presented, this third route has been chosen, in order to extend a methodology that is considered satisfactory, both for students and teachers.

IV. GENDER PERSPECTIVE METHODOLOGY IN TEACHING

The methodology used has been based on the combination of several elements, which are the following.

1. USE OF A COEDUCATIONAL LANGUAGE

No one doubts that the language used by each person transmits their values and their way of interpreting the world. The way in which language is used shapes the way of thinking and understanding the world, as well as the place that women and men occupy in it.

As it is noted, "far from being a neutral tool, language reflects the symbolic order and the sex-gender system of the community that speaks it"[11], and the use of the masculine gender as a supposedly neutral way to refer to both sexes is a clear example of how language subtly transmits the inequalities that exist between women and men. Therefore, sexist language arises, that is, that one contains discrimination against a group, but does not expressly appear in grammar or writing.

In order to avoid this, it is proposed, and that has been the experience carried out, to use neutral terms and words, that is, that encompass a group without opting for one sex or another. For example, instead of "student" (male, in Spanish) the term "student body" (collective noun that does not design male or female) is chosen, or instead of "teacher" (male, in Spanish) for "faculty" (collective noun that does not design male or female).

In the case of the Labour Law subject, an attempt has been made to promote and implement the culture of using "working person" instead of "worker" (male, in Spanish) or "company" instead of "employer" (male, in Spanish). They are, possibly, the most repeated terms in this subject

11. Women's Institute, Recommendations to introduce equality and innovate in textbooks, Madrid, Instituto de la Mujer, 2013. Available at <https://www.coeducacion.es/wp-content/uploads/2019/08/Recomendaciones-Igualdad-en-Libros-Texto.pdf#%5B%7B%22num%22%3A535%2C%22gen%22%3A0% 7D% 2C% 7B% 22name% 22% 3A% 22Fit% 22% 7D% 5D>.

and in which a lot of emphasis and stress has been placed in class so that students were aware of their use. Likewise, it has been shown how the new precepts of the ET and the new modifications that are made to the labour regulations opt for the use of these neutral terms, passing into oblivion the old concepts of "worker" or "employer"[12].

2. COOPERATIVE LEARNING METHODOLOGY

There is no only one definition of the cooperative learning methodology. According to Johnson and Johnson[13] this methodology consists of the instructive use of small groups so that students work together, making the most of their own learning and each other. With the application of this methodology, each member of the team must not only learn himself, but also must help the other members and teammates to learn, thus creating a strong group cohesion[14].

The elements on which this cooperative learning model sits are the following[15]. In the first place, positive interdependence in such a way that students are aware that they cannot achieve success if the other members do not. This, obviously, requires mutual trust and help among team members, and in order to achieve this, the teacher plays a fundamental role. Second, positive interaction, which is based on the efforts that each member must make, so that the others can also achieve the goal. This interaction is also positive because the students must help and support each other in every phases that must be followed until the common and final objective is reached. Third, individual responsibility, since, in parallel to group work, the teacher must evaluate the results of each student and must communicate them both to him or her and to the rest of the group. This means that each member is committed to the development of common work, since each member knows who of them needs the help of the rest to be able to carry out the task. Fourth, cooperative skills, since students are required to acquire a set of social skills and emotional intelligence in order to achieve the goal and make work group work. In this sense, the social skills of this methodology are leadership, decision-making capacity, conflict management, communication between

12. There is an exemplary list of non-sexist terms in the document by Aliaga Jiménez, J.L., Inclusive Language with a Gender Perspective, Government of Aragon. Available in <https://www.coeducacion.es/wp-content/uploads/2019/08/Lenguaje-inclusivo-con-perspectiva-de-g%C3%A9nero.pdf>.
13. Johnson, D.W.; Johnson, R., Cooperation and competition: theory and research, READ, 1990.
14. Balckom, S., Cooperative learning, Washington, 1992.
15. Johnson, D.; Johnson, J.; Holubec, E., The cooperative learning in the classroom, Paidos, 1990.

members … And, the learning and teaching of these skills constitutes a fundamental milestone in this methodology. Fifth, group self-analysis, that is, group assemblies on the functioning of the group and the achievement of common goals facilitate the learning of skills and that each member receives feedback from their participation.

One of the key elements of cooperative learning is work teams, which are characterized by their heterogeneity. Work teams must be heterogeneous, grouping together the greatest possible diversity of members, to avoid homogeneous groups. It is about enhancing the interaction between group members and promoting mutual help and collaborative skills.

Thus, in order to introduce the gender perspective, it must be guaranteed that there is gender parity in all groups, as well as diversity among the different members.

Within the work teams, a distinction is made between formal and informal teams and grassroots groups. Informal work groups are those that are based on their temporality, to carry out activities for a short period of time and to focus the student's attention on cognitively processing the material and helping to establish expectations about what the activity will cover[16]. For their part, formal working groups have a longer duration, and they ensure, in a certain way, that students are involved in a fair way to achieve shared objectives. The base groups are the teams of cooperative learning. These are permanent groups with heterogeneous members, whose main objective is that the members help each other. Lasting and trusting relationships are established between the members of the home group. According to Pujolàs[17] the optimal choice is the one based on the formation of heterogeneous teams, both in capacities, such as gender or skills, made up of four members and that will not be modified when they function efficiently.

In our case, starting from the basic work teams, teams of six people have been formed, specifically, three male and three female students, and also guaranteeing their heterogeneity. To constitute the base teams, a first filter experience was first carried out, where the students established their preferences to form a team.

Starting from the base work teams, the following cooperative activities have been carried out to promote teamwork as well as the gender perspective.

16. Johnson, D.; Johnson, J.; Holubec, E., The cooperative learning in the classroom, Paidos, 1999.
17. Pujolás, P., Learn different students together. Cooperative learning teams in the classroom, Eumo-Octahedron, 2004.

2.1. Analysis of wage discrimination based on sex

In order to do this, the concept of discrimination based on sex was first explained in class, differentiating between direct and indirect discrimination. Within discrimination based on sex, emphasis was placed on wage discrimination that still persists in our society, with two practical cases, one on direct wage discrimination and the other on indirect wage discrimination.

Likewise, the reality in the world of work is revealed through the Spanish National Statistics Institute, since statistics evince the existing wage gap, as according to them women receive an average annual salary of € 20,051.58, while men reach € 25,992.76. With this, the average annual salary for women represents 77.1% of that for men. 18.2% of women have a salary income lower than or equal to the Minimum Interprofessional Salary (MIS), compared to 7.4% of men. Specifically, within the highest salaries, 9.8% of men have salaries five times or more higher than the MIS, compared to 5.0% of women.

On the one hand, regarding direct wage discrimination, the reading of the STJUE Case McCarthys Ltd, of 27th March 1980, C-129/1979, where a female worker received a lower salary than the male who previously held the same position, was presented as an activity of the base team. Specifically, the activity consisted of the reading of the sentence, its subsequent debate in the base teams, and the answer to some questions about the aforementioned sentence where the students had to carry out a preliminary reflection and reach an agreement before proceeding to the answer.

On the other hand, to make the indirect wage discrimination visible, two sentences of the Spanish Constitutional Court were presented, specifically STC 145/1991, of 1st July, Hospital Gregorio Marañón case, and STC 58/1994, of 28th February, Antonio Puig case. In the first one, there was a remuneration difference established in the collective agreement between the professional category of labourer, mostly occupied by men, and the professional category of cleaners, mostly occupied by women, when both professional categories carried out manual jobs considered of equal value. In this sentence, the Spanish Constitutional Court already makes a reference to physical effort as a differentiating factor. The Spanish Constitutional Court considers physical effort as a recipient of "values corresponding to the average traits of single-sex workers to determine the extent to which a job requires effort or causes fatigue or is physically painful", producing in this case discrimination, because it "corresponds only and exclusively to a standard of the male worker".

In the second case, it carries out a more detailed study of the criterion of physical effort as a criterion of remuneration differentiation, admitting it only "if it is indubitably proven that physical effort constitutes an absolute determining element of aptitude for the development of the task, or, that it is an essential element in this, being necessary, even in these cases, that they be combined with other neutral typifying features from the point of view that we are interested in considering", exceptional circumstances that did not exist in the case.

Specifically, in this activity, a thorough reading of both sentences was proposed, and their subsequent debate within the base teams to answer the questions posed.

2.2. Analysis of discrimination based on sex in the prevention of occupational hazards

In this activity, it is presented a practical case about a breastfeeding worker to whom the company denies the adoption of the preventive measures of art. 26 LPRL, as well as the suspension of the employment contract due to risk during breastfeeding. The company refuses it on the basis that the general risk assessment existing in the workplacement does not reveal any risk to the health of the child or the woman. Once the practical case has been resolved, it is proposed to read the sentence from which said practical case has been extracted, which is the STJUE of 19th October 2017, Otero Ramos case, C-535/2015. The European Court considers the non-existence of risk assessment of the workplace of breastfeeding workers, according to art. 4.1 Directive 92/85, constitutes direct discrimination on grounds of sex for granting less favourable treatment to women linked to pregnancy or maternity leave.

2.3. Analysis of discrimination based on sex in access to the labor market

In this case, it is showed a practical case about a candidate for the competition to enter the Police School, who is denied access because of not having the height of 1.70 meters, an essential requirement for all people who are presented as candidates for this selection process. Each base group had to solve the practical assumption.

At the end, it is exposed the STJUE of 18th October 2017, Kalliri case, C-409/2016, where this assumption is prosecuted, considering that it constitutes indirect discrimination.

V. RESULTS. CONCLUSIONS

The results have been totally satisfactory, both for students and teachers. This is demonstrated by the marks obtained in the evaluation as well as in the satisfaction survey carried out with the students. In fact, the aforementioned satisfaction surveys are totally positive, since 77% are very satisfied with the activities proposed for the study of the gender perspective, as well as with the application of the cooperative learning method, and 12% state being satisfied. Only 4% indicate that they are not very satisfied and 2% not satisfied at all.

For teachers, it is an important challenge, but with good planning and preparation of stimulating, motivating and real activities, the proposed objectives can be achieved, as well as mutual satisfaction, both for students and teachers.

There is no doubt that the adoption of a gender perspective in the university teaching methodology will help to promote a positive attitude among future generations, as well as to adopt a critical and reflective stance on many values and situations that are accepted by society, when deep down they hide discriminatory situations for women.

In addition, cooperative learning encourages the development and acquisition of students' social and personal skills, which are increasingly necessary for today's society. With this methodology it is possible to enhance the ability to work in a team, conflict resolution, communication skills, active listening and mutual respect.

In short, this methodological experience has been totally satisfactory, so it will be implemented in the different class groups in the next course.

Gender and Criminality. How Are Intersectionality and the Decolonial Turn Incorporated into Social Studies?[1]

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I. INFLUENCE OF GENDER STUDIES IN CRIMINOLOGY

Until the 1970s, social theory showed little ability to see the impact that social forces had in women's public and private life. The denial of the importance of gender in sociology and other adjacent disciplines was "in part, a product of an uncritical acceptance of deeply-rooted assumptions about the nature of scientific endeavours and what could be considered knowledge"[2]. Explanations based on patriarchal ideologies validated social structures and the dominant culture through knowledge, which was set to favour men's interests[3]. Focusing on the criminal justice system, this situation resulted not just in a biased view and explanation of the reality on which crime is defined, but also in the legitimation of an entire system that controls and reproduces patriarchal patterns in the array of social control institutions.

Admittedly, women and girls have been systematically excluded or marginalized in Criminology. Firstly, as subjects of study, either from the theoretical point of view or from their practices and experiences. Secondly, from a professional point of view, as researchers, because they have occupied marginal positions in the knowledge system and have not been able to select the topics of interest and/or the appropriate

1. This paper is part of the Spanish Ministry of Education and Vocational Training's project PID2020-114739RB-I00.

2. Walklate, S., Gender, Crime and Criminal Justice, Willan Publishing, Cullompton, 2001

3. Wallace, D y Abbott, P., An Introduction to Sociology: Feminist Perspectives, Routledge, London, 1990.

methodologies. This is because until relatively recently women did not direct criminological research and/or this research was under-funded.

The main result from this is a distorted view of the reality that underlies the theoretical explanation of crime; as a consequence, the public policies that are built upon these are also distorted. Carol Smart's study *Women, Crime and Criminology* (1977)[4] had a huge impact in Criminology, as it placed gender at the centre of both the discourse of theoretical analysis and the practices of the criminal system. The study allowed the inclusion of feminist theory, which at the time corresponded with the so-called second wave, to the criminological field. This author's thoughts, as well as many others[5], reflected how in many criminological studies women were virtually non-existent, they were invisible, and therefore, were made unimportant in theoretical explanation. At the same time, it is also evidenced how the criminological explanation of crime and deviation is only taking into account the male experience, i.e., their rationale or motivations, thus silencing female experienced.

Since then, the incorporation of gender analysis in criminology following the evolution of feminist studies, albeit slow, has been constant. Starting from some common assumptions and multiple variations and interpretations (liberal feminism, radical feminism, Marxist/socialist feminism, postmodern/poststructuralist feminism and multiracial feminism), several interpretations and modes of action have been proposed, and this has been translated in criminal laws and public policies. It is worth noting, however, as Bodelon remarks, that working from the woman/criminal system axis does not necessarily imply rejecting the structures and doing so from a critical position, so the analysis can be done from outside or within feminism[6].

Including a feminist perspective in crime analysis has undoubtedly already left a permanent mark[7], both in the way scientific knowledge is generated and in its transmission. The impact can be even greater in the future, in line with the need of a paradigm shift in the criminological analysis of criminal offense, victimisation, criminality and process of criminal selection, so it takes gender into account, not just as a factor of differentiated criminalisation, but also of criminal selection.

4. Smart, C. Women, Crime and Criminology, Routledge, London, 1977.
5. Chesney-Lind, M. (2006). Patriarchy, Crime, and Justice. Feminist Criminology in an Era of Backlash. Feminist Criminology, 1(1), 6-26; Chesney-Lind, M., The Female Offender. Girls, Women and Crime, Sage, London, 1997.
6. Bodelón, E., Derecho y Justicia no androcéntricos, Quaderns de Psicología, Vol. 12, N°. 2, 2010, pp. 183-193.
7. Renzetti, C. Feminist Criminology, Routledge, London, 2013.

Gender and the socially constructed expectations on the way men and women are supposed to act and behave, typically recognised as femininity and masculinity, are a central component of the organisation of social life and the response of the system to these differences. Different rights movements have led to the recognition that neither in the case of men, much less in that of women, are they homogeneous groups. Multiple factor are intersecting and aligning to determine the specific experience of women in the criminal system, based not only on gender, but also race and ethnicity, social class, age and sexual orientation, among others[8].

Despite the important advances in this area, the development of feminist criminology is still incipient[9]. First of all, because the main criminological theories being used today to explain crime have been developed my male individuals, their vision is based on the male gender, and thus, the theories show a clear gender bias: the data on female criminality used is scarce and, furthermore, they show no interest in unveiling the sexual stereotypes projected on adult and young women on which this knowledge is based. Secondly, because, for a long time, Victimology has focused on the victim/offender relationship, studying it as the analysis of the criminal pair. This perspective treats women as guilty victims of their victimisation, especially in sexual offences[10].

Both aspects are still maintained in the general understanding of crime, specifically, in the transmission of knowledge done at university, mainly in the Faculties of Law, which are more focused on teaching the legal norm rather than the processes of selection and criminalisation. They are also mainly maintained in the jurisdictional response of the criminal system to the criminality of men and women that exert and suffer violence. This is due to the main actors of the judicial system (judges, tribunals, public servants) operating according to the biased knowledge they have learnt[11].

8. Crenshaw, K. "Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Color", Stanford Law Review, Vol. 43(6), 1991, pp. 1241-1299.
9. Muncie, J., Youth and Crime. Sage, London, 2009.
10. Herrera, M., "Discursos criminológicos sobre la mujer infractora y su prisionización, en Mapelli et al, Mujeres en las cárceles de Andalucía, Dykinson, Madrid, 2012.
11. Messerschmidt, J., Masculinities and Crime. Critique and Reconceptualization of Theory, Rowman & Littlefield Publishers, Maryland, 1993; Chesney-Lind, M. y Shelden, R., Girls, Delinquency and Juvenile Justice, Thomson Wasworth, Belmont, 2004, Bodelón, E., Derecho y Justicia no androcéntricos, cit.; Larrauri, E., Criminología crítica y violencia de género, Trotta, Madrid, 2007.

II. DIFFERENCE-BUILDING PROCESSES IN THE THIRD WORLD'S FEMINIST DISCOURSE AND THEIR IMPACT ON CRIMINOLOGY

Criminology allows multiple theorical and methodological approaches. The objects of criminological interest are many and varied, and this has traditionally hindered its recognition as an independent social discipline. One of the difficulties is that many of the criminological theories and their assumptions are designed from and for British and/or Anglo-Saxon criminology, where criminology has incredibly developed in the past 30 years, being increasingly present in universities, doctorates, forums, books and journals, and the media. This is in contrast to other countries and continents, where the development has not been equal. The slower of development is evident in Spain, where the first official studies in Criminology were sanctioned in 2003, and had little response at a university level, until the implementation of the European Higher Education Area and the approval of the Degree in Criminology in 2010, whose first graduates were in 2014.

Thus far, despite the approval and funding of these university degrees, the government and corresponding institutions have not engaged in a parallel effort to determine which are the specific professional functions these criminologists have to carry out and/or their role in the design of criminal policies. Criminological research has not been sufficiently supported to consolidate a robust body of principles and theories of its own, either. The situation is not essentially different in Latin America. Criminological knowledge does not have an academic correspondence that can support it except in Mexico, where these studies are recognised, so it mainly comes from jurists, sociologists, anthropologists, etc., that show an interest in crime and its context.

In this context, the critique of the Anglo-centrism of criminological knowledge is not without meaning. Indeed, the overall picture of the field shows that more relevant theoretical and methodological work of criminological theories mainly comes from English, American or Australian researchers (primarily men), without taking into account the political and social processes of continental European countries. This is even more serious when considering the transfer of this knowledge to peripheral countries with major public order issues and/or serious democratic deficits, as they use the criminal system as the appropriate tool of social reconciliation or to simply repress dissidence.

From this perspective, and in relation to the explanation of criminality, the greatest problem, however, stems from the uncritical translation of these contents to situations and contexts that do not have anything to do with the

environment they were developed in. Furthermore, it is not just the theoretical aspect that can be criticised, given that the more relevant consequences are found in the importation of laws and institutions completely removed from the realities for which they were originally proposed.

Both in knowledge-producing countries and those in the periphery, the discussion on fundamental questions for the criminological discipline is very much alive, and the answers to these are often diametrically opposed: What is criminology for? What is its impact? How is criminology meant to be done? What are the key issues and debates in criminology today? What challenges does criminology face? How has criminology as a discipline changed in recent decades?[12]

In this general questioning about the discipline, it is necessary to include in each of the answers the gender perspective. Furthermore, it is necessary to offer answers that take geopolitics into account, as these questions place us in a very important debate for criminology of the periphery: the discussion on the political function of criminology[13]. Thus, in the discussion on third world feminism according to Chandra Mohanty[14], the following should be addressed:

1. The internal critique of the hegemonic feminisms of the West, as it understands the mode of production of third world women as a monolithic subject. This translates into common and unmovable transnational criminal policies, often associated with the rhetoric of the protection of human rights, defined from "The Universal".
2. The wording of interests and strategies rooted in cultural and historic specificity.

Postcolonial studies place feminist theory in a world where intersections between colonialism, imperialism and nationalism make the oppressions from a globalized, heteropatriarchal and racist capitalism more complex[15].

12. Bosworth, M. and Hoyle, C., (eds), What is Criminology? Oxford University Press, New York 2011.
13. Zafffaroni, E., Criminología, Aproximación Desde un Margen, Temis, Bogotá, 1998; Morrison, W., Criminology, civilisation and the new world order, Routledge. Oxford, 2006.
14. Chandra Mohanty, "Bajo los ojos de Occidente. Saber académico y discursos coloniales", en AA.VV. Estudios Postcoloniales. Ensayos Fundamentales, Traficantes de Sueños, Madrid, 2008, pp. 69-111; Alexander, M.J./Mohanty, Ch.T. (2004) "Genealogías, legados, movimientos", en AAVV, Otras inapropiables. Feminismos desde las fronteras, Traficantes de Sueños, Madrid, 2004, pp. 137-184.
15. Iglesias, A., Violencia de género en América Latina. Aproximaciones desde la criminología feminista Revista de Direitos e Garantias Fundamentais, Vol. 15, N°. 1, 2014, pp. 199-237.

Because of this, new thought and analysis categories are built making sure to use an intersectional methodology[16] and to critique the coloniality found in institutional feminism.

III. FEMINISM AND PENALTY: PRODUCTION AND TRANSMISSION OF KNOWLEDGE

Despite criminology being established as an autonomous discipline, and its study being formally recognised, it still has not been able to completely detach itself from the rigid structures the Law uses to translate reality to rules. Furthermore, the knowledge criminology has contributed on gender matters has not been able to sufficiently permeate these rules. As Smart[17] points out, the Law is at the centre of our thinking and a double trap can be incurred: a)The maintenance and feedback of the androcentric standards in the knowledge hierarchy. b) The contribution to the continuation of the fetishization of the law.

In this outline, Criminal Law generates a discourse that establishes certain forms of sexual subjects, as a measure of all things. In this direction, investigations on how criminal law builds subjectivity in different ways, and in particular, what assumptions emerge around gender and sexualities[18] are key. Questioning from the gender perspective on this order of things raise serious questions about the role of the criminal system and public authorities, since there is not unanimity in the feminist movement on what role they play in the fight for equal rights and the protection of women. In this ambivalence, attention should be paid to the new and increasing demands of criminalization, but also to the omissions, selection, or reinterpretation of criminal legislation, which help to maintain the unequal application of Criminal Law, especially around the following[19]: a) Which gender-transcended social conflicts require punitive responses. b) The modelling of the victim (idealized fiction). c) The reduction of the problem to the victim/victimizer outline. d) The extension of legal categories as managers of a discursive space.

16. Crenshaw, K. "Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Color", Stanford Law Review, Vol. 43(6), 1991, pp. 1241-1299.
17. Smart, C., "La teoría feminista y el discurso jurídico", en Birgin, H., (comp.), El Derecho en el género y el género en el Derecho, Biblos, Buenos Aires, 2000.
18. Lacey, N., Unspeakable Subjects. Feminist Essays in Legal and Social Theory, Hart Publishing, Oxford, 1998.
19. Larrauri, E., Criminología crítica y violencia de género, Trotta, Madrid, 2007.

IV. PRODUCTION, TRANSMISSION AND USE OF KNOWLEDGE ABOUT CRIME

The main role of criminology continues to be to provide evidence-based information on crime. As the aetiological paradigm is overcome, however, this information is not exclusively focused on the specific ways crime appears, but also in the processes of selection and criminalisation and on the consequences of the selection and application of the conventionally used instruments to respond to delinquency. In fact, the question of production and use of criminological knowledge becomes relevant as it can aid in proposing, maintaining, or excluding certain politico-criminal guidelines[20].

The way in which knowledge on crime is produced; the way and quality of transmission of this knowledge to future criminologists and actors of the criminal policy (jurists and professionals of the legal system); and why and how this knowledge is used – or not used, or distorted – in the design and execution of the criminal policy is a question that involves criminology and cannot leave criminologists unfazed. This is how the debate on whether criminology must be "neutral" is reintroduced. It refers to only offering technical and verifiable knowledge, or if it should also take a clearly political stance in favour of democracy[21].

Taking this into account, as Loader/Sparks point out, one of the key roles of a criminologist is to understand the forces that shape the treatment of crime in the modern public sphere and the reasons why the (social) scientific knowledge on crime is, or does not manage to be, absorbed and used in the political debate and government action, which requires understanding "the circumstances of politics", although this does not mean maintaining *status quo*. Revaluation means reconnecting with those schools of thought that have insisted on crime being "politics", making clear the unavoidable connections between crime and its control and the repertoire of ideas (order, justice, authority, legitimacy, freedom, rights, gender, etc) and traditions (liberalism, conservatism, social democracy, feminism, republicanism, ecologism, etc) that make up the way modern politics thinks[22].

Thus, production of criminological knowledge is not aseptic, it is not exclusively conditioned by the experimental method, but rather, it

20. González, G., La "criminología pública" y su incidencia en la forma de producción y uso del conocimiento sobre el crimen en democracia, Jurídica: anuario del Departamento de Derecho de la Universidad Iberoamericana, N°. 44, 2014, págs. 77-90.
21. Loader, I and Sparks, R., Public Criminology? Routledge, London 2010.
22. Ibídem.

is inscribed in axiological models that place and determine the finality of teaching and research, and its use, extending the object beyond the specific techniques and methods that allow access to scientific knowledge on crime[23]. Hence, both the production, as well as the purpose, transmission and use of information on the criminal issue is also an object of criminological interest.

Patriarchal ideologies have the effect of masking the reality of male power. Along these lines, criminal system help maintaining the status quo and it build subordination relationships through direct or indirect discrimination and/or abstract equalisation. In recent years, the flow of ideas with a gender perspective has contributed to the advancement of academic knowledge –also in criminology–, and this has had a great impact on legislation and public policies. Nevertheless, a continuous examination of the theoretical perspectives that still predominates in the explanation of social life is necessary. This will help us to understand why, despite progress on these issues and even legislative changes, the situation of women continues to be one of subordination; gender violence is still present; and we are still far from reaching the true equality proclaimed in the norms.

23. Ruiz, L.,El problema metodológico en criminología: la interdisciplinariedad como ventaja a superar, en Lariguet, G., Metodología de la investigación jurídica. Propuestas contemporáneas, Brujas, Córdoba, Argentina, 2016; LARRAURI, E., Introducción a la criminología y al sistema penal, ed. Trotta. Madrid, 2015.

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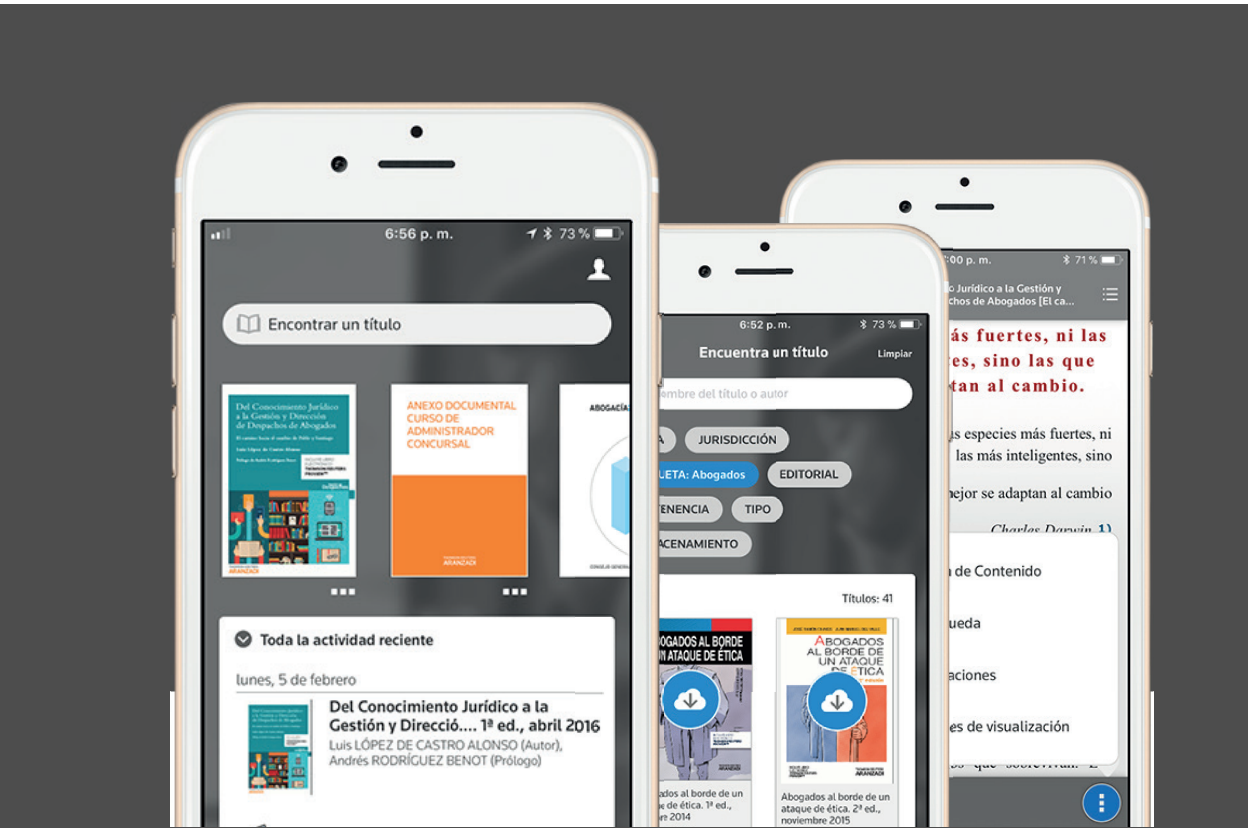

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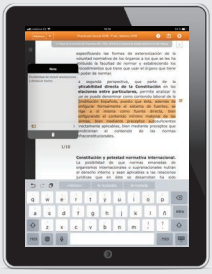

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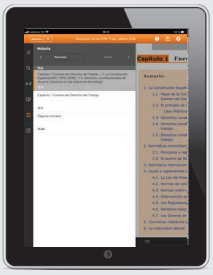

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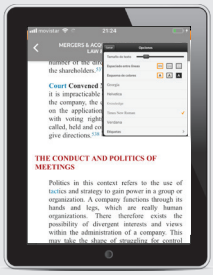

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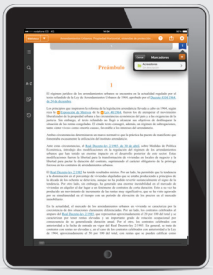

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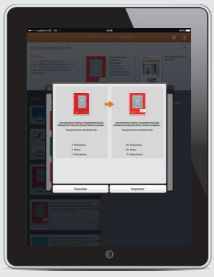

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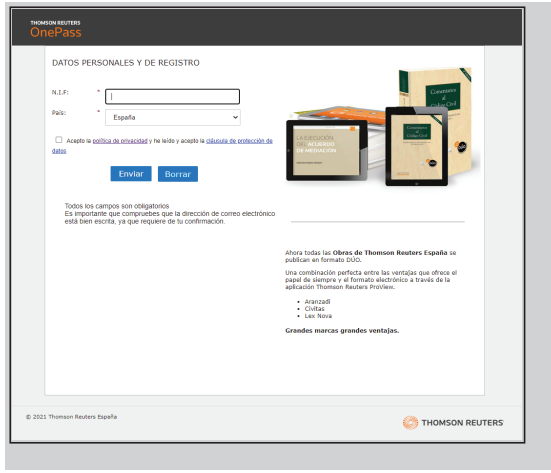

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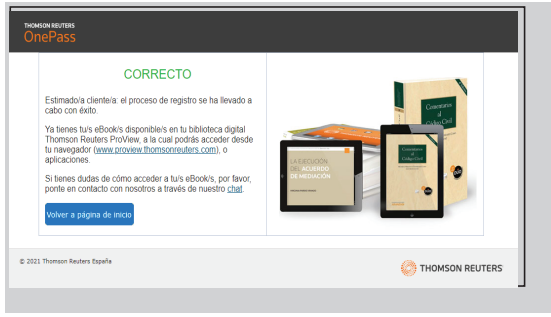

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