

FEMINIST CRITIQUE OF THE CONCEPT OF DISCRIMINATION (presentation)

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First of all, I would like to thank the organizers of this event for the invitation and opportunity to share some ideas with all of you.

I was asked to give a 10 minute presentation on any topic related to Feminist Political and Legal Theories, and I have chosen to focus on the Feminist Critique of the Concept of Discrimination because much of the research that I have done along my career is focused on Antidiscrimination Law, so I'm really interested in this critique.

Let me start with a preliminary question: should the concept of discrimination be criticized from a feminist perspective to begin with?

Feminism could be defined as an intellectual and political movement aimed at achieving equality between men and women. We could infer that the legal concept of sex discrimination has exactly the same aim, so in that vein, the concept of discrimination could be considered a feminist category.

Nevertheless, there are some feminist authors (for instance, Iris Young) that point out that the real issue is not discrimination, but systemic oppression of women.

These authors claim that the concept of discrimination does not point to the heart of the problem, because it focuses mainly on the agents, rather than the victims, and on individual cases, rather than the systemic unbalance of power. The logic of discrimination tends to be applied to particular cases in which the agents can be identified and held liable in court, and the victims can actively mobilize their rights. That kind of individualization and de-politicization of women's oppression may contribute to obscuring the actual issues at hand. Certainly these authors recognize that the concept of 'indirect discrimination' or 'disparate impact' could have some potential in acknowledging systemic subordination, but they are disappointed in the practical application of this notion by the courts.

We should also take into account that nowadays 'discrimination' is widely condemned and rejected in the mainstream discourse in liberal democracies. In the dominant liberal ideology, the formal equality of all citizens is recognized as an important principle of the legal and political system. Therefore, 'discrimination' is considered an

anomaly, that is quite rare and occurs only when the system fails. In this context, in liberal societies with patriarchal cultures some situations are normalized because they are related to the mainstream cultural patterns and firmly embedded in the normal functioning of the system, so they cannot be seen as discriminatory practices at all.

A different perspective for analyzing this issue would be to consider that two different paradigms coexist in our modern notion of discrimination, despite the fact that they are mutually contradictory. Catharine MacKinnon refers to the 'Sex differences approach' and 'Sex inequality approach', but I prefer to label them as the individual and social notions of discrimination.

The individual notion of discrimination is attached to formal equality, namely the Aristotelian idea of equality, which implies that things that are alike should be treated alike, whereas things that are unlike should be treated unlike.

The problem is that, as MacKinnon denounces, in real practice, women are more often than not unlike men. Sometimes, biological differences can be relevant. For example, the Supreme Court of US originally ruled that dismissal based on pregnancy was not sex-discriminatory, because they could not determine a term of comparison, given that it was impossible to find a pregnant man that would serve as a point of comparison.

But anyway there are many differences between women and men that have been socially created through gender patterns, but have a great impact in all aspects of life. For instance, it is a well-known fact that the unequal distribution of household and care work in the family implies real disadvantages for women in the labor market. Nevertheless, from the perspective of formal equality, this distribution could be seen as the result of individual, free choices of many women. This way, the penalisation of family responsibilities in the workplace could be seen as non-discriminatory.

This situation results in the creation of a vicious circle: the greater social differences between women and men are, the more justified the pejorative treatment of women will be from a legal point of view. As a consequence, the individualistic notion of discrimination tends to protect only, as MacKinnon says, "the exceptional individual whose biography approximates the male one" or "women who for all purposes are socially men", but not the women that are the object of stronger victimization by the system.

On the other hand, there is an alternative paradigm for understanding the legal concept of discrimination: the social perspective. From this point of view, sex discrimination consists in the systematic disadvantage of women. Therefore, the problem is not that 'sex' was an arbitrary criterion for distinguishing between

people in an abstract way. The real problem is that women in particular have been, and still are, historically mistreated.

Although this concept of discrimination seems to be more appropriate for fighting women's oppression, it could be confused with sociological and political categories, weakening its usefulness from a legal point of view. For instance, we could say that the unequal distribution of care work in the family is 'discriminatory', but, how could we grant the right of not being discriminated in the courts if we cannot find anyone liable in the courts?

In my opinion, the legal concept of discrimination has to be accurate, precise and operative in court, which implies that we could not abandon the idea of liability, nor the perspective of the agent. How can we do this, while still maintaining the social perspective of discrimination? I will try to summarize my conclusions in two statements.

First statement: it is important that we make a distinction between the legal sense of discrimination with the idea of women's oppression and the systemic inequalities between women and men.

Discrimination always implies some kind of treatment that can be attributed to someone. Of course, this includes collective treatment and indirect discrimination, but in the end we have to find a person or an entity that can be held liable in court. We cannot sue Patriarchy.

That is why discrimination is just a part of the problem, and not the problem as a whole. In fact, it is usually the last resort of Patriarchy, because discrimination and physical violence usually appear when the symbolic violence of gender patterns is not strong enough to maintain the unbalance of power. This implies that an Antidiscrimination Law could be helpful in fighting the oppression, but it is not enough. We need other tools, like affirmative action and gender mainstreaming.

Second statement:

We should emphasize on the social dimension of the legal concept of discrimination. From this perspective, Sex discrimination could be defined as a treatment that potentially or actually tends to put women in a subordinate position in society. This idea could have an impact on the identification of discriminatory conduct, the evaluation of affirmative action measures and the usefulness of the 'indirect discrimination' construct.

But this is another story and shall be told another time. Thank you very much for your kind attention.