DIGNITAS
Revija za človekove pravice
Slovenian journal of human rights
ISSN 1408-9653

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Article information:
To cite this document:
Añón, M. S. (2018). The Antidiscrimination Principle and the Determination of Disadvantage, Dignitas, št. 59/60, str. 251-278.

Permanent link to this doument:
https://doi.org/ 10.31601/dgnt/59/60-18

Created on: 07. 12. 2018
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The Antidiscrimination Principle and the Determination of Disadvantage

María José Añón

ABSTRACT

This paper examines some of the limits of antidiscrimination law in its present form, focusing on the major trends that underlie it from the perspective of legislation and case law. It reflects on the traditional principles of interpretation and the impediments to incorporating standards offering both justification and explanation in the test of equality; standards that might detect the patterns or social structures of discrimination and identify individuals with greater accuracy. To this end, it proposes to further develop the debate on indirect discrimination and material equality through additional interpretative criteria that originate in categories such as structural discrimination and the intersectionality of discrimination.

Keywords: disadvantage, equality test, indirect discrimination, structural discrimination, intersectionality

Načelo nediskriminacije in določanje ranljivosti

POVZETEK

Ta članek preučuje nekatere omejitve protidiskriminacijske ureditve v njeni sedanji obliki, s poudarkom na glavnih trendih, ki so njena osnova z vidika zakonodaje in sodne prakse. To kaže na tradicionalna načela razlage in ovire za vključitev standardov, ki ponujajo utemeljitev in obrazložitev na preizkusu enakosti, standardov, ki lahko natančneje zaznajo vzorce ali družbene strukture diskriminacije in identifikacijo posameznikov. V ta namen prispe-

vek predlaga, da se še naprej razvije razprava o posredni diskriminaciji in materialni enakosti prek dodatnih razlagalnih meril, ki izvirajo iz kategorij, kot sta strukturna diskriminacija in intersekcionalna diskriminacija.

Ključne besede: ranljivost, test enakosti, posredne diskriminacije, strukturne diskriminacije, intersekcionalnost

I. Unresolved issues in antidiscrimination law

Virtually from the outset, antidiscrimination law has had to deal with several issues, some of a dilemmatic nature,[1] at the different legislative, judicial or dogmatic levels in which it has been taking shape in both domestic and international legal systems.[2]

These issues may be broken down into, among others, three areas that constitute the context or background of this reflection on antidiscrimination law, and which I shall present as unresolved challenges, ordered from lowest to highest degree of abstraction.

First, legislative and judiciary developments are affected by a series of questions that, despite everything, require still more refined responses. Thus, the legal system has difficulties in correctly identifying the specific categories of those who are discriminated against. There are two central issues in this regard: the identification of individuals, classes and categories, and recognition that the origins of discrimination lie in the social structures of oppression, domination and subordination. Hence, as noted by Barr re and Morondo[3], at present there are no clearly defined parameters in

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**This article was written within the framework of the PROMETEO/2010/099 research project of the Generalitat Valenciana (Valencia Regional Government) and the CONSOLIDER CSD2008-00007 project, *El tiempo de los derechos* (*The age of rights*), of the Spanish Ministry of Education and Science.

For the dilemmas posed by antidiscrimination law, see S. Fredman, *Discrimination Law,* Oxford, Clarendon Press, 2011, 2nd ed., 109 et seq.

[2] In this regard, it is important to take note of the extent to which, in the evolution of international human rights law, changes in the international human rights legal order, in Europe and universally, have been marked by the development of legal categories in the framework of antidiscrimination law. N. Bamforth; M. Malik; C. O'Cinneide; G. Bindman, *Discrimination Law: Theory & Context, Text and Materials*, London, Sweet & Maxwell, 2008: 19-22, 95 et seq.

[3] M. A. Barr re and M. D. Morondo, "Subordinación y discriminación interseccional: elementos para una teoría del derecho antidiscriminatorio", *Anales de la Cátedra Francisco Suárez* n 45, 2011, p. 35.

case law or legislation that justify the category of 'disadvantaged group'.

The second category of issues to be considered is those of a conceptual and metatheoretical nature, which call into question how legal systems detect and address processes of discrimination. This entails distinguishing between the evolution of legislation and case law, national or international, and doctrinal developments, which are more critical yet make proposals intended to not stray too far from established law. We find ourselves in a domain in which a plural, substantive and critical theoretical development has always gone before legal responses. Moreover, legal systems have often been slow and lacklustre in taking on these theories. I intend to examine the concept of discrimination and the various forms of discriminatory processes as they are seen by legal systems, showing, in turn, the prevailing approaches to discrimination.

Third, a more general reflection on the link between discrimination and equality. Cases on equality and discrimination reviewed by the courts generally reflect how equality is understood in the context of each society. There is an ongoing debate as to whether antidiscrimination law implies a material conception of equality. The interpretation and application of equality clauses, as noted by O'Cinneide[4] (2008: 84), tends to be an uncertain and complex process which often provides only minimal protection for individuals and groups who suffer discriminatory treatment. Taking this as our starting point, it is important to also recognise that the perspective introduced by antidiscrimination law has led to changes in the interpretation of more formal equality clauses, and there seems to be no doubt that this area of law must not fail to provide protection to disadvantaged groups subjected to discriminatory treatment. Protection, however minimal, that must take into account the social reality behind these groups as well as the impact of regulations, and the effect of policies, on them; it needs to go beyond a formalist interpretation of equality that has long since been superseded in theoretical terms and, at least in part, in its practical application (Nussbaum, 2007). It is for this reason that the provisions made by courts in this area of regulation could make a major contribution to the protection of human rights if

[4] C. O'Cinneide "The Right to Equality: A Substantive Legal Norma or Vacuous Rhetoric?" *UCL Human Rights Review,* vol. 1, 2008, p. 84.

they succeed in conveying at least a clear idea of what constitute unacceptable forms of disadvantage, discrimination and inequality, as O'Cinneide emphasises[5].

These starting points may be useful to reflect on two types of issues. On one hand, that rational analysis of the antidiscrimination clause gives rise to elements that offer compelling reasons for vitiating the dichotomous view on types of discrimination and understanding that the distinction between direct and indirect discrimination is too limited and insufficient to encapsulate social patterns of discrimination or structures of domination. On the other hand, that some parameters have to be introduced to the test of equality that require inclusion of information characteristic of material equality in the legal argument, such as: social context, social impact and the various consequences of legal norms, and structural assumptions in place as a result of regulations or stereotypes that are still being used to justify differential treatment. This means that the range of justificatory arguments needs to be broadened. The meaning and origin of these arguments are to be found in approaches that take into account systemic or structural discrimination and the perspective of intersectionality in discriminatory processes.

A final remark. In my examination of the arguments for the antidiscrimination clause, I will refer to some judgments of the European Court of Human Rights, although the analysis may also apply to the task of the legislature. I start from the premise that the key to making discrimination understandable and manageable in the eyes of the law is recognition of the social structures of oppression, subordination and domination. This has to be done through categories or approaches that are rooted in structural discrimination and the perspective of intersectionality. However, it is precisely the characteristics and indeterminacy of structural discrimination that compound the difficulty of the judicial process being an effective means of overcoming this type of discrimination or even of compensating injustice. The future of non-discrimination is also linked, as suggested by Guiraudon[6], to the development of equality standards and to the actions of civil society

[5] C. O'Cinneide, "The Right to Equality: A Substantive Legal Norma or Vacuous Rhetoric?" *UCL Human Rights Review,* vol. 1, 2008, pp. 81-82, 97. Also M.C. Barranco, *Diversidad de situaciones y universalidad de los derechos,* Madrid, Dykinson-Instituto Bartolomé de las Casas, 2011: 38 and 39.
[6] V. Guiraudon, "Equality in the making: implementing European non-discrimination law", *Citizen Studies*, vol. 13, no. 5, October, 2009, p. 527.

and social partners in keeping this issue on the political agenda. Indeed, along with the more technical difficulties of incorporating legal categories, principles of interpretation, and appropriate responses to these processes of systemic discrimination into the law, we should not underestimate the limitations of the law itself for eliminating deep-rooted inequalities.

II. The category of disadvantaged group

The focus on disadvantaged or vulnerable groups rests on a number of theoretical and political premises that propose incorporating the idea of social justice, the analysis of social structure, and the institutional context that often helps determine distribution models. This is essentially because it is an approach that values the importance of the institutional, structural and relational environment for human life.

For its part, and as pointed out by Giménez Gluck[7], the specific non-discrimination clause, which is present in international and constitutional legal texts, performs a dual function. On one hand, it is prohibited from being used to occasion harm to certain groups or collectives who, because of their history of denigration, subjugation and social neglect, have not, in fact, taken part in the process of drawing up regulations. Rey and Giménez describe these groups as "absent and marginalised ... by informal, but substantial, barriers."[8] According to the democratic ideal, society is made up of individuals who recognise each other as moral agents of equal dignity, and public decision-making reflects the principle of equal capacity of people for self-government, the right of each and every individual to make their voice count on equal terms. There are, however, social groups that have historically been treated unfavourably, pushed away from positions of power, from the law-making process, and from the public sphere. The idea of 'suspicious traits' symbolises, or makes explicit, a history of discrimination that has engendered, and continues to engender, significant disadvantages and prejudices that are the core of social discrimination.

[7] D. Giménez Gluck, *Juicio de igualdad y Tribunal Constitucional,* Barcelona, Bosch, 2004, pp. 171-173

[8] F. Rey and D. Giménez, *Por la diversidad, contra la discriminación. La igualdad de trato en Espa a: hechos, garantías, perspectiva,* Madrid, Fundación Ideas, 2010, 23-24.

On the other hand, the clause protects these same groups through a demanding legal determination of equality. Giménez Gluck explains that under the Spanish constitutional model the Constitutional Court may adopt two levels of aggravated scrutiny and a minimum scrutiny[9]. The first two consist of a strict scrutiny of the regulations that are prejudicial to the aforementioned groups. In this case, protection takes the form of a presumption of unconstitutionality or of illegality with respect to the regulation, when the said persons have been unfavourably treated on the basis of these elements. There is also an intermediate scrutiny for regulations that benefit these groups. This ground, in turn, introduces the criterion of material equality (Article 9.2 of the Spanish Constitution) as an integral part of the constitutionally desirable aim of justifying unequal treatment. Finally, minimum scrutiny applies to cases in which equality does not take into account any of these criteria, either harmful or beneficial, and is characterised by a presumption of constitutionality in favour of the legislature.

The fundamental issue in antidiscrimination law is, without doubt, identification of the category "disadvantaged group" or "particularly vulnerable group". This is a central theme, although it has not yet been resolved. Taking into account both the basic features of the social group to which political philosophy refers,[10] and those that have been accepted by some courts of reference, we can highlight basically three: identification of the disadvantaged group, a history of discrimination and a situation, both past and present, of disadvantage.

(a) The social group is not only constituted by a number of individuals, but also by the fact that it contains relations of interdependence: "members of the group identify themselves – explain who they are – by reference to their membership in the group"[11]. The reason for this is that they share certain traits that identify

[9] D. Giménez Gluck, *op. cit.,* 2004, p. 173.

[10] Kymlicka 1996 Kymlicka, Will, 1996: *Ciudadanía multicultural*, Barcelona, Paidós, Buenos Aires, México, traducción, Carme Castells, Fiss 1999, Young 2000, Villoro 2001, De Lucas 2004. Fiss, Owen, 1999: "Grupos y cláusula de igual protección", *Derecho y grupos desaventajados,* R. Gargarella (comp.), Barcelona, Gedisa. Young, Iris Marion, 2000: *La justicia y la política de la diferencia,* Universidad de Valencia, traducción de S. Alvarez. **Justice and the Politics of Difference, Princeton University Press 1999. I. M. Young, Equality of Whom? Social Groups and Judgments of Injustice. Journal of Political Philosophy, no. 9, 1, 2001, pp. 1-18.**

[11] Fiss has, since the 1970s, been a leading proponent of an influential school of thought advocating the need for the U.S. Supreme Court to adopt an interpretation of the equal protection clause from the "subordinate group". O. Fiss "Grupos y cláusula de igual protección", *Derecho y grupos desaventajados,* R. Gargarella (comp.), Barcelona, Gedisa. 1999: 138-142. Currently Fredman 2011 and Young have argued in a similar vein. Also see O'Cinneide 2008: 87-88.

them as a group. This characteristic does not have to be involuntary and immutable, but it does have to be defining, i.e. the trait that defines a regulation is the reason for which the group has suffered a history of discrimination and been excluded from political decision making, and for which there are a number of social prejudices against members of these groups[12].

The notion of group, however, should not be interpreted as an essentialist or naturalistic entity, characterised by a specific set of common attributes. This means that there is not something akin to a common nature shared by those who are members of the same group[13].

In the case of women, as has been repeatedly pointed out, the idea of a group is highly controversial. In this context, writes Ballestrero[14] what gives a gender community a value of a 'group' is the fact that, for certain situations – employment, high-level professional positions, positions of responsibility, passive suffrage etc. – women appear to be a 'disadvantaged group' in that they are systematically under-represented. They thus constitute a gender community to which it is permissible to attribute different meanings and implications but which, however, is not yet accepted. Nor is it appropriate, in this context, to resort to the legal category of minority as a concept analogous to that of group. Barrère and Morondo[15] also draw attention to the limitations that arise from defining antidiscrimination law and discriminated groups in terms of minorities, in keeping with an ethnic or ethnocultural minority model. This concept creates a certain ambiguity in the identification of differences, inequalities and interrelationships and is particularly inadequate when applied to women[16]. Women are not a numerical minority nor do they share a particular identity; rather, they make up half of any majority or minority group. Moreover, the parameters of the conceptual model that defines the rights of ethnic minorities are inadequate when applied to situations of su-

[12] D. Giménez Gluck, *op. cit.,* 2004, p. 232.
[13] J. De Lucas, Javier, "Algunas tesis sobre el desafío que plantean los actuales flujos migratorios a la universalidad de los derechos humanos", *Una discusión sobre la universalidad de los derechos humanos y la inmigración,* I. Campoy (ed.), Madrid, Dykinson, Instituto de Derechos Humanos Bartolomé de las Casas, 2006, pp. 59-129.
[14] M.V. Ballestrero "Acciones positivas. Punto y aparte", *Revista Doxa,* nº 19, 1996, pp. 91-107.
[15] M. A. Barrère María and D. Morondo, "Subordinación y discriminación interseccional: elementos para una teoría del derecho antidiscriminatorio", *Anales de la Cátedra Francisco Suárez* nº 45, 2011, pp. 35-36.
[16] A. Phillips "Defending Equality of Outcome", *The Journal of Political Philosophy,* vol. 12, no. 1, 2004.

bordination and oppression to which other classes of individuals, including women, are subjected.

However, what is important with respect to this first requirement is an awareness that the process of discrimination has an indelible group or collective dimension. Discrimination as unfavourable or unjust differential treatment towards a person because of their sex, racial or ethnic origin, religion, beliefs, age, sexual orientation etc. is by definition a group or collective bias since it originates in, and is experienced from, characteristics that an individual shares with a group, despite the internal heterogeneity that occurs in all groups[17]. It is true that the thesis of a group dimension in discrimination has been obscured by the claim that the demands of disadvantaged groups can only be articulated through collective rights[18]. In this case, ours is a different position. It is about taking into consideration the fact that discrimination and structural inequality have a defining collective or group facet or dimension. Unequal and unjust treatment is experienced by individuals, but the reason for this treatment is that they share, or are attributed with, characteristics or prejudices associated with a group.

Recognition of the collective or group dimension of discrimination has taken root in a legal culture steeped in individual legal categories. Therefore, the concept of discrimination used in legislation and case law texts interprets discrimination as a conflict between specific individuals, and tends to turn the problem into an intersubjective matter[19]. Although there has been progress, the logic of equality developed by way of legal mechanisms, writes

[17] M. A. Barrère, *Discriminación, derecho antidiscriminatorio y acción positiva a favor de las mujeres*, Madrid, Cívitas, 1997 and "Iusfeminismo y derecho antidiscriminatorio: hacia la igualdad por la discriminación", *Mujeres, derechos y ciudadanías,* R. Mestre (coord.), Prólogo de M.J. A ón, Valencia, Tirant Lo Blanch, 2008, pp. 60-62.

[18] See Ansuátegui for discussions on this category. The debate on the category of collective rights opened up an excessively dichotomous divide between liberals and communitarians. The notion of collective rights may have different meanings: (i) rights that may be reconciled with individual rights inasmuch as their justifying motives are shared with individual rights; (ii) rights granted to non-individual subjects who have some kind of legal personality; (iii) individual rights that may only be exercised through a group or where the group is necessary for the right to be effective, as with the right to language or the right to strike; (iv) rights of which the holder may only be a collective that also has a collective interest, which cannot be protected as if it were an individual interest. Examples: the right to collective bargaining, the right of peoples to political self-determination. F. J. Ansuátegui, *Una discusión sobre derechos colectivos,* Madrid, Dykinson-Instituto de derechos Humanos Bartolomé de las Casas, 2002.

[19] A. Rubio, "Las políticas de igualdad: de la igualdad formal al *maisntreaming*", *Políticas de igualdad de oportunidades entre hombres y mujeres en la Junta de Andalucía,* Sevilla, Junta de Andalucía, 2003.

Squire[20], is straitjacketed in a model of individual equality, poorly prepared to implement the concept of group-based equality and to cope with more complex structural aspects of discrimination, as is the case of intersectional discrimination.

(b) Second, the group has to have a history of discrimination that is projected onto its current situation and that can be tested. As noted above, in these cases the courts proceed through an aggravated determination of equality, or strict scrutiny, which is justified by the suspicion that the legislature may have laid down certain regulations in a discriminatory manner, in keeping with two criteria: "Because a situation of historical neglect may be noted and secondly, social and/or political disadvantage persists".[21]

In this context, the European Court of Human Rights, like other courts, proposes a set of parameters designed to identify whether there is a history of discrimination based on any of the prohibited criteria relating to a particular right affecting the case examined. It may thus be ascertained if the group has been excluded from access to, or the exercise of, one or more rights in the past, and if there is a correlation between the current regulation of a right or benefit, and the discriminatory policies and practices of the past. Such questions have been widely raised in cases such as those of gypsies in Romania or violence against women in Turkey. In the Timishev case, the European Court of Human Rights considered that "ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds" (*Timishev v Russia*, 13 December 2005, paragraph 55). In the case of *Sejdíc and Finci v Bosnia and Herzegovina*, 22 December 2009, after repeatedly explaining the relationship between race and ethnicity, it added that "discrimination on account of a person's ethnic origin is a form of racial discrimination". On the other hand, one case in which the Spanish Constitutional Court has recognised the category of a particularly protected group, even if not explicitly

[20] J. Squire, Judith, "Intersecting Inequalities", *International Feminist Journal of Politics,* December, 2009, p. 507.
[21] D. Giménez Gluck *op. cit*., 2004, p. 174.

described as such in Article 14 of the Spanish Constitution, is that of people with disabilities.[22]

(c) The third condition requires proof that the group is in a situation of subordination. The social, economic and cultural position that its members occupy in the community, the persistence over time of this position, or the social prejudices that it is subject to, are evidence of subordinate status.

The condition of subordination is proven by demonstrating a social situation of material inequality, produced not only by a history of deracination, but also by the fact that the group or one or some of its characteristics are seen in a negative light by society, so that the conclusion may be reached that there is social prejudice against the group. Thus, the *Convention on the Rights of Persons with Disabilities* defines disability as the situation of those "who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".

In the context of proof, or in the search for evidence, of a disadvantaged situation, increasing importance is being attached to data collection.[23] In this regard, various activities, such as the processing of statistical data, the work of antidiscrimination watchdogs,[24] the actions of equality bodies, research, the expositi-

[22] Spanish Constitutional Court Decision 269/1994, of 3 October, on the allocation of jobs for people with disabilities in the Canary Islands Administration. The Court considered that discrimination obstructs the adoption of treatments that, on the whole, hamper equal treatment and equal opportunities for certain groups of individuals, such treatment having its origin in the combination in these individuals of a number of differentiating factors that the legislature considers to be explicitly prohibited because they violate human dignity. But this range of factors is not a closed list. If the legislature uses the trait of disability to harm the group, the court considers that this should be subject to a strict equality test.

[23] European Parliament Report, of 6 July 2007, on the application of Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, draws attention to data collection in this area. It stresses the importance of data that should be disaggregated in demonstrating indirect discrimination, as well as informing policy and developing positive action strategies; but that at the same time raises serious ethical and legal questions. In this respect, it prohibits the use of individual privacy (identities) as a basis for ethnic or racial profiling. Guiraudon "Equality in the making: implementing European non-discrimination law", *Citizen Studies*, vol. 13, no. 5, October, 2009, p. 540. Also see J. García Añon, "Discriminación, exclusión social y conflicto en sociedades multiculturales: La identificación por perfil étnico", en José García A ón y Mario Ruiz Sanz (eds.), *Discriminación racial y étnica: balance de la aplicación y eficacia de las garantías normativas*, Valencia, Tirant lo Blanch, 2013, pp. 281-316.

[24] By way of example we can mention, in the context of the United Nations, the *United Nations Statistics Division* and the *Sub-Commission on Prevention of Discrimination and Protection of Minorities*. In Europe, the *European Monitoring Centre for Racism and Xenophobia* and the *Eurobarometer*. Also worth mentioning is the *Eurostat Working Group* run by EU DG Employment for the measurement of discrimination.

on of cases of discrimination practices and best practice models,[25] are essential means for revealing the presence of different forms of discrimination in society. Coincidentally, General Recommendation No. 31 of the Committee on the Elimination of Racial Discrimination (CERD), *on the prevention of racial discrimination in the administration and functioning of the criminal justice system*, highlights the importance of factual and legislative indicators in identifying cases of discrimination, especially in the case of indirect discrimination.[26]

III. Determination of disadvantage and the test of equality

Identifying discrimination as a disadvantage has certain limitations. Discrimination is articulated through social processes that are difficult to eradicate, are deeply engrained in our systems of socialisation, and have a great ability to mutate and adapt to the medium that best enables it to stay invisible. In order to overcome such difficulties as far as possible, I will look at the factors, criteria and arguments that, developed in the context of the equality test, help to clarify the meaning of disadvantage or subordination.

The approach typical of some courts of reference, such as the European Court of Human Rights, in the test of equality mainly comprises three stages. The first is really a pre-stage that should determine the level of the scrutiny – strict, intermediate or minimum – as described above. The second stage is the rational basis review, whereby the court considers whether there is sufficient cause for action, i.e. if there is a situation of unequal treatment that requires justification and, for this purpose, it examines the rationality of the regulation, its basis or reasons for existing. The third is the proportionality test. In this, the court proceeds on the basis of two questions: whether the differentiation pursues a legitimate aim and whether there is proportionality between the means employed and the aim that must be achieved. The thesis propoun-

[25] Since its inception in 2000, the RAXEN network has provided data and examples of best practice to the *European Union Agency for Fundamental Rights*, especially in the field of antidiscrimination measures in the labour market.

[26] Attention has also been drawn to the fact that the measurement of discrimination involves difficulties similar to those found in the measurement of poverty or welfare, which have been around for longer and may be used as a model (J. Wrench, John, "Diversity management and discrimination: experiments in diversity management in the European Union" 2008: 77; V. Guiraudon "Equality in the making...", *art. cit.,* 2009, pp. 538-539, 543.

ded here introduces the determination of disadvantage, and what this entails, in the second stage of the approach.

The aim of the rational basis review, as I have already noted, is to establish the rationality, the basis or reasons for existing of a regulation and the individuals that are subject to it. It entails identifying the disadvantage of the group, specifying social patterns of discrimination and determining, as proposed by Timmer[27], specific social stereotypes and prejudices prior to entering into arguments on the justification of the regulation. It is at this moment that factors most associated with disadvantage should be examined: the historical context of the group, past and present effects of the regulation under scrutiny, and social prejudice or pattern of discrimination.[28]

(a) Examination of the historical context shows that the severity of the patterns of domination, prejudices or stereotypes depends largely on the social environment in which they occur. The European Court of Human Rights has shown signs of being aware of this. In the case *Andrle v The Czech Republic*, which analyses the pension system in the Czech Republic, the court found that such a system is clearly based on the stereotype of a man as a breadwinner and a woman as a housekeeper. In the case *D.H. and Others v The Czech Republic*, which ruled on the practice of segregating Roma children in primary schools, the state constitutional court answered allegations that the education of these children had not been adequately supervised and that they had little possibility of accessing schools with a standard or ordinary curriculum, by declaring that "it was not its role to assess the social context" and that the parents of the children had not proven that they had shown interest in their children progressing in formal education (paragraph 28).

[27] A. Timmer "Towards an Anti-Stereotyping Approach for the European Court of Human Rights", *Human Rights Law Review,* 2011, 11/4, 2011, p. 722.

[28] The decision that marks a significant change in the relatively formalistic case law of the European Court of Human Rights is *D.H. v The Czech Republic* (Application No. 57325/00), Judgment of 13 November 2007, in which the court holds that the educational policies of the Czech Republic led to an outcome which de facto segregated the Roma/Gypsy children in special schools, and that this is contrary to Article 14 of the European Convention on Human Rights. This is an interpretation that could potentially widen the scope of the convention. Dissenting opinions critically point to the fact that the court made an assessment of the social context in relation to the position of Roma in Czech society. In a similar vein, in *Andrle v The Czech Republic*, No. 6268/08, 17 February 2011, the dissenting opinions call into question the adoption of the perspective of the "disadvantaged group", arguing that it is a deviation from the model represented by formal equality, which is at the heart of the rule of law in Europe. Also see the case *Alajos Kiss v Hungary* (No. 38832/06, 20 May 2010, paragraph. 42-44).

(b) With regard to assessing the current impact of the regulation, the court may question what kind of damage it causes and to whom, and investigate its effects. The social impact of all kinds – psychological, economic, cultural – should be examined: an impact that can affect people's material or social status. This is the area best suited to considering the intersectional approach to the effects of applying regulations.

(c) Finally, the court proceeds to 'unmask' the stereotype, to identify the prejudice more precisely, to determine the pattern of structural discrimination, making clear its adverse consequences, as well as the international obligations of states, which may be used to combat this type of discrimination. This analysis aims to highlight the kinds of experiences that society considers 'natural', are fully internalised, and that are often part of the reasons that states invoke to justify discriminatory regulations.

These three steps enable a stereotype to be identified and determined to be wrong or unjust; in short, an injury or a social evil. Cook and Cusack[29] underline the need for such a diagnosis in order to establish guidelines for both dealing with and eliminating it. Assessing the context and the effects of the regulation, and identifying the pattern of discrimination, are necessary not only to detect stereotypes but, above all, as noted by Timmer[30], to understand to what extent they are harmful.

The test of rationality is essentially legal pondering on the justification of a regulation. Identifying underlying patterns of discrimination or social prejudice, in accordance with the elements I have outlined, and reaching the conclusion that it is indeed a regulation whose rationale responds to these same patterns, could have significant consequences. It could also introduce certain interpretative guidelines, for which I would draw attention to two criteria:

On one hand, stipulating that negative social prejudices regarding vulnerable groups or identified patterns of structural discrimination may not be considered valid arguments for establishing a regulation and therefore may not be accepted as grounds for justifying differential treatment. States must provide reasons

[29] R. Cook, Rebeca and S. Cusack, Gender Stereotyping: Transnational Legal Perspectives, Philadelphia, University of Pennsylvania, 2010, p. 40.
[30] A. Timmer "Towards an Anti-Stereotyping Approach for the European Court of Human Rights", *art. cit.,* p. 718.

to justify their laws according to rational criteria or principles, not to social patterns that subscribe to the need to preserve cultural norms, traditions or the status quo. In the case *D.H. and Others v The Czech Republic*, which looked into the segregation of Roma children in primary schools, the court demonstrated the inadequacy of the reasoning of the state education authority, which denied the existence of discrimination and noted "a tendency on the part of the parents of Roma children to have a rather negative attitude to school work" (paragraph 26), as justification for the education policy under review. Nor did the European Court accept the arguments of the Russian constitutional court in the case *Konstantin Markin v Russia* (7 October 2010), that "as far as parental leave is concerned, the different treatment of male and female military personnel is justified by the special social role of mothers in the upbringing of children" (paragraph 48).

On the other hand, questioning an element usually required in the test of equality: the point of comparison. According to this parameter, discrimination occurs whenever different treatment is given to people in the same or a comparable situation without objective reasons and without reasonable justification. Recourse to this criterion has been exposed for various reasons. These include the fact that it is not applied in most cases of indirect discrimination, or to prove intersectional discrimination, or even that there are cases in which there is no point of comparison.[31] On this point, some writers suggest replacing the comparability test with a "test of disadvantage", such as Gerards[32], stating that the disadvantage or damage caused does not depend on comparison with another group of people[33], or that it makes use of substantive principles or criteria that are part of human rights law and that enable a theoretical standard to be employed in reviewing a case.

[31] Reasoning adduced in the case *Konstantin Markin v Russia* (Application No. 30078/06, 7 October 2010).
[32] J. Gerard *Judicial Review in Equal Treatment Cases*, Leiden and Boston, Martinus Nijhoff, 2005, pp. 669-675.
[33] S. B. Goldberg, "Intersectionality in theory and practice", in Grabham, E. Cooper, D. Krishnadas, J and Herman D. (eds.), *Intersectionality and Beyond: Law Power and the Politics of Location*, London Routledge, pp. 124-158.

IV. On justificatory arguments in cases of discriminatory treatment

I shall now look at the arguments that should be included in the antidiscrimination clause and that must necessarily refer to types of discrimination which both transcend the dichotomy between direct and indirect discrimination and call for the antidiscrimination principle as a standard of material equality. I will focus on reasons that may be provided by looking at indirect discrimination and to what extent it should be based on assumptions that arise in the field of structural and intersectional discrimination, expanding the justificatory arguments in cases of discriminatory treatment. Thus, in view of the limits of antidiscrimination law, consideration may be given to other arguments derived from more complex approaches that address the social structures in which subordinate status arises.

a) Direct discrimination

We use the term direct discrimination to refer to differential and harmful legal treatment of a person by reason of any of the prohibited grounds of differentiation.[34] It is a situation in which, depending on the traits that have special protection, a person is or may be treated less favourably than another in an analogous or comparable situation.[35] In these cases, the prohibited ground is explicitly invoked as a motive for differentiation or exclusion – for example, when women are prohibited from pursuing a profession, or when racial distinctions are imposed for entitlement to a right, or when persons with disabilities are prohibited access to a public office or employment – and, conversely, in the case of failure to comply with a legally imposed obligation or affirmative action measure. For example, when a notice is displayed in a public place, such as a bar or restaurant, prohibiting the entry of persons of a particular race/ethnicity.

[34] European Directive 2000/78/EC of 27 November 2000, *establishing a general framework for equal treatment in employment and occupation*. In the Spanish legal system, Article 28.1.b of Law 62/2003 (law transposing European equality directives) incompletely incorporated Article 2.2 of Directive 2000/43 concerning the situation in which a person is treated worse than another on the basis of protected characteristics, and when he/she has been treated worse in the past and he/she may be so in the future. Organic Law 3/2007, of 22 March, for effective equality between women and men, more adequately transposes, in Title I, the contents of the two European directives on discrimination.

[35] F. Rey and D. Giménez Gluck *Por la diversidad, contra la discriminación. La igualdad de trato en Espa a: hechos, garantías, perspectiva,* Madrid, Fundación Ideas, 2010, p. 33

At the core of direct discrimination lies differential treatment of an individual. Therefore, the first element of direct discrimination is evidence of less favourable treatment, which can be relatively easy to identify. For example, refusal of entry to restaurants and shops, lower pensions or salaries, verbal abuse and violence, checkpoint refusal, exclusion from certain professions, denial of inheritance rights, exclusion from mainstream schools, deportation, denial or withdrawal of social security allowances. Proof of direct discrimination renders the regulation or practice in question invalid.

The essence of the grounds for this kind of discrimination lies, for courts, in comparative reference. As discrimination supposes less favourable treatment of another person or a class of individuals who are in a similar situation, a comparative reference is required: a person or a class of individuals who are in substantially similar circumstances and whose main difference from the other is a "protected ground".[36] However, the requirement of a point of comparison in cases of direct discrimination owing to specially protected traits has changed. An example of this is pregnancy in the workplace. The long case law of the Court of Justice of the European Union, which began with the key case *Dekker v Stichting Vommingscentrum voor Jong Volwassenen (VJV-Centrum) Plus,* Case C-177 (1990) ECR I-3941, 8 November 1990, clearly states that if the damage suffered by a person is due to her pregnancy, the situation qualifies as direct discrimination without recourse to a comparative reference.

b) Indirect discrimination

Indirect discrimination arises from a regulation or practice based on a factor of differentiation considered 'neutral' and whose application results in an effect or result that excludes a group or collective without objective justification. Discrimination is a consequence of the social impact of the regulation on a specially protected group. Indirect discrimination is also referred to in terms of its impact, as opposed to treatment in the case of direct discrimination, because it ultimately entails an assessment of the different impact that legal difference in treatment (theoretically neutral, i.e. not characterised by suspect, specially protected traits) causes to

[36] ECHR case *Luczak v Poland*, No. 77782/01, 27 November 2007

protected group members as compared to the majority. To this end, in order to assess an unequal impact it is possible and convenient to use statistics.

Some of the pertinent factors or features of indirect discrimination can contribute to identifying disadvantage; they also have repercussions on the material dimension of equality. The fundamental grounds for this kind of discrimination would surely require – and this is worth noting at this juncture – an extension of the justificatory arguments in cases of differential treatment inasmuch as this leads, in varying degrees, to a material assessment of inequalities. Such an assessment is closely linked to the characterological traits of this type of inequality. Thus, (a) it consists of discriminatory treatment that assesses, or focuses on, the social impact of the regulations and prior acceptance that this impact may be both the intended and unintended outcome on the part of the individuals or authorities that adopt the regulation or recommendation. (b) It underlines the collective or group dimension of discriminatory processes, as indicated above. (c) It has been developed in conjunction with other principles of restitution. Categories have been developed within the framework of antidiscrimination law in relation to the recognition of principles regarding protection and reparation, which are of vital importance to the effectiveness of this set of rules. We may single out the more relevant of these principles: indemnity against complaints, claims or charges related to the principles of equal treatment and non-discrimination; the restitutionary principle of invalidating all acts that cause discrimination;[37] and the principle of legal guardianship, the right to demand the protection of the courts. (d) Due to its particular significance, separate mention should be made of the principle of sharing the burden of proof as this modifies evidentiary procedures and facilitates access to justice in such cases. Esteve[38] stresses the importance of properly applying the new "sharing of the burden of proof".

[37] 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). This restitutionary principle is complemented, on one hand, by the obligation to compensate for damage caused and, on the other, by a catalogue of sanctions against the person who discriminates, which must be effective and act as a deterrent, but which in no case should victimise those who suffer discrimination.

[38] F. Esteve "Las directivas europeas contra la discriminación racial y la creación de organismos especializados para promover la igualdad. análisis comparativo de su transposición en Espa a y en Francia", *Revista de Derecho europeo comparado.* Año 5, número 10, julio-diciembre, 2008, section 5.

After a long process, the Court of Justice of the European Union has established case law on gender equality,[39] recognising a new balance of evidence which abandons the element of intent and bases its approach on the objective observation of difference in treatment. Except, of course, in criminal matters, the Court of Justice of the European Union has recognised that in all other areas of law the rules regarding evidence were depriving victims of the opportunity to assert their right of action.[40]

Indeed, as Esteve argues, the effectiveness of any antidiscrimination legislation depends on its evidentiary rules, but the challenge lies not only in establishing a new legal system but in successfully changing traditional court proceedings with respect to methodology and evidence. Article 8 of Directive 43/2000 does not impose a reversal of the burden of proof, but a redistribution of the burden between the plaintiff and the defendant;[41] in fact, it postulates that only when the defendant cannot justify the legitimacy and proportionality of the measure may discriminatory treatment be determined. The plaintiff must provide sufficient evidence of the existence of a discriminatory measure. Nevertheless, evidence of indirect discrimination is extremely complex, difficult to expound, and has not always been applied consistently by the courts, which therefore do not realise the full potential that this legal institution might represent[42].

Ultimately, the scope of application of indirect discrimination entails, as we have seen, a necessary widening of justificatory arguments in cases of discriminatory treatment.

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[39] Court of Justice of the European Union, judgment of 27 March 1980, "Jenkins" Case 129/79

[40] European Court of Human Rights, *Shanaghan v United Kingdom* (*Application no. 37715/97*), 4 May 2001. The court recognised the practical difficulties of proving "racist motives". The most emblematic case is *Nachova and others v Bulgaria* (*No. 43577/98 and 43579/98*), judgment of 6 July 2005, which states that in cases in which racial discrimination is invoked, the burden of proof rests with the respondent government which, on the basis of additional evidence or a plausible explanation of the facts, will have to satisfy the court that the reported events were not inspired by a prohibited discriminatory attitude.

[41] In Spanish law, the provision on the burden of proof is regulated by Articles 32 and 36 of Law 62/2003 amending the Labour Procedure Act (Art. 96). This regulation modifies the burden of proof in labour, civil and administrative jurisdictions in a proper implementation of EU legislation. It is not applicable in criminal proceedings where the prevailing principle is that of presumption of innocence. In the case law of the Spanish Constitutional Court the principle of sharing the burden of proof had previously been included in court proceedings. The Social Chamber of the French Court of Cassation, as indicated by F. Esteve, is where the community approach was first incorporated in the late 1990s, constructing a theory of access to proof in union discrimination.

[42] N. Bamforth; G. Bindman, M. Malik, C. O'Cinneide, *Discrimination Law: Theory & Context, Text and Materials*, London, Sweet & Maxwell, 2008, p. 339.

c) Complementary interpretative criteria

The thesis that I have been supporting affirms that the line of reasoning relating to the situation of disadvantage affecting individuals and groups in the assessment of discriminatory treatment calls for a determination of the pattern of structural discrimination to be incorporated in the test of equality; likewise, the identification of social prejudice or stereotypes that constitute the rationale or the basis of the regulation under scrutiny. In this process of identification, the arguments proffered by direct and indirect discrimination are insufficient: additional motives or interpretative criteria need to be found in the structural discrimination approach and in the intersectionality perspective.

Although I have, at different times, highlighted the inadequacy – in terms of being exhaustive – of the classification of types of direct and indirect discrimination, and maintain that these two types of discrimination have to be supported or complemented by arguments proceeding from other approaches to discrimination, I do not intend to argue that the concept of "structural discrimination" be recognised as an independent legal category and on the same level as the legal concept of indirect discrimination. In this sense, I consider it important to state that the approach deriving from structural discrimination may be understood to be an interpretative standard additional to indirect discrimination. The reason for this is that we find reasons of greater weight or that are more justified if we add or incorporate other supporting motives, found in the concept of structural and intersectional discrimination, to the explanation given by indirect discrimination.

1. The perspective of structural discrimination

The concept of structural discrimination is a doctrinal proposal aimed at redefining the traditional legal concept of discrimination and including the notion of intergroup oppression in its definition[43]. This concept of antidiscrimination law requires or is based on the recognition of systems of oppression. The law, therefore, must address discrimination "as a qualified or signified action of these systems"[44].

[43] M. A. Barrère and D. Morondo, "Subordinación y discriminación interseccional: elementos para una teoría del derecho antidiscriminatorio", *Anales de la Cátedra Francisco Suárez* nº 45, 2011, p. 17.
[44] M. A. Barrère and D. Morondo, "Subordinación...", *art. cit.*, p. 39 (Barrèère and Morondo 2011:

With this definition we can refer to situations of social inequality, subordination or domination in which it is not possible to individualise specific behaviour or identify treatment to which the legal prohibition of discrimination is attributed. These are, therefore, situations that fall outside the legal concept of discrimination. It is a type of inequality based on status, the power to define identity and decision making. These are recurrent social dynamics that lead to the persistence of structures of subordination and systematically disadvantageous outcomes for certain groups, even in the absence of explicit discriminatory motives that are protected by the law. In this case, and similar to the case of indirect discrimination, proving the existence of discrimination means providing empirical or statistical evidence to demonstrate this 'invisible' bias in decision making.

The characteristic features of structural discrimination show that it entails diffuse, systemic – beyond the intent or will of the individuals in question – social processes reproduced institutionally inasmuch as they penetrate, or are projected on, all dimensions of existence, both in the public and social and in the private and domestic spheres, and they intersect, in turn, with the most relevant social variables; hence the depth of their impression and their effect on the decision-making capacity and the formation of preferences. Revealing the processes of structural discrimination and ascertaining with greater precision the determinants in decision making enables the notion of opportunity to be interpreted in terms of personal capacity, recognition or guarantee of autonomy and decision-making power; the very limits of the notion of opportunity may thereby be transcended by attributing to it a meaning more consistent with the requirement of the principle of equal dignity[45].

On the other hand, failing to recognise, or concealing, patterns of structural discrimination may lead to the representation, as free choice, of something which in fact is nothing more than an adaptive preference or a choice marked by a state of necessity that invalidates the presumption of free and informed consent.[46] The Euro-

39. N. Also see Torbisco "La institucionalización de la diferencia: algunas notas sobre desigualdad estructural y democracia", *El derecho como objeto e instrumento de transformación,* Boullar Alfredo y otros, Editores del Puerto, 2003.

[45] D. Morondo, "Paritá" e "pari opportunità" nel pensiero femminile", *Donne, politica e processi desicionali,*L. Calfano (ed)., Torino, Giappichelli, 2004, p. 140.

[46] M. A. Barrère and D. Morondo analysed, with regard to consent and decision making, an interesting

pean Court of Human Rights addressed this crucial aspect in the case *D.H. v The Czech Republic* (Application No. 57325/00), 13 November 2007.[47] The Court questioned the validity of the consent of parents of Roma/Gypsy children to enrol their children in a type of school designated by law as special, but which were used to segregate Roma children in schools.[48] The interesting thing about these proceedings is that in all of them the corresponding governments maintain that there is no discrimination since education in separate special schools is protected by the umbrella of parental consent.[49] This consent is the decisive factor in deciding where and how the child is schooled. The government's arguments rely on defending parental consent against the charge of discrimination, based on the premise that parents are autonomous individuals who have the right to choose the kind of education they want for their children, even if it means that their education differs from that offered to other children or limits their future prospects.

This case is indicative of a mass or structural disadvantage that can compromise the capacity of individuals to give meaningful and informed consent on the level and type of education for their children. It is a fact that there are asymmetries in education among Roma children and other children; they receive a poorer education in terms of its curriculum, with lesser prospects for the future. This asymmetry, proven to exist in education, is also present in the information made available and the capacity for decision making. What is noteworthy in these cases is that the European Court considers the capacity and agency of the parents, taking into account the context of discrimination and conditions of severe mar-

judgment of the Court of Justice of the European Union. Case *G. Gruber v Silhouette International Schmied GmbH & Co. KG.*, 14 September 1999. Case C-249/97. See "La difícil adaptación de la igualdad de oportunidades a la discriminación institucional: el asunto Gruber del TJCE", *Igualdad de oportunidades e igualdad de género: una relación a debate*. Instituto Internacional de Sociología Jurídica de Oñati-Dykinson, 2005. Also M.J. Añón 2010: "Autonomía de las mujeres: una utopía paradójica" en *Los derechos humanos: la utopía de los excluidos,* M.A. Ramiro y P. Cuenca (eds), Madrid, Dykinson-Instituto Bartolomé de las Casas, 2010.

[47] Other concordant decisions: *Sampanis and Others v Greece*, 5/6/2008; *Orsus and Others v Croatia*, 16/3/2010; and *Horvath and Kiss v Hungary*, 2013.

[48] *D.H. v The Czech Republic* (Application No. 57325/00) Judgment of 13 November 2007. The court notes that the Czech state school administration placed the parents of Roma children in a dilemma which forced them to make decisions that would mean renouncing a right; decisions that, therefore, cannot be considered valid. See paragraph 204.

[49] General Comment No. 13, on the right to education, describes actions that constitute discrimination: "(b) The establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil's parents or legal guardians, if participation in such systems or attendance at such institutions is optional and if the education provided conforms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level".

ginalisation in which they make decisions. In this context, as an interpretative criterion Kosko[50] proposes the idea of a threshold. In the judgments that have been looked at, the European Court of Human Rights rejected parental consent and did so because, on one hand, it considered that it is not clear that the parents, who are extremely marginalised, gave their consent free from coercion and in full awareness of the consequences. On the other hand, it accepted that certain rights, such as freedom from discrimination in education, are so important that they may fall outside the scope of parental consent. Parental consent is and should be important, says Kosko, but only beyond a threshold that would mark the line below which unacceptable harm may be done to the children. In this sense, it cannot represent a triumph for the children's right to an education, or a defence of the education offered, because it would ultimately mean relinquishing those rights. Where this threshold is located, however, is something that has to be established through extensive deliberation and public consultation in each specific case.

Structural inequality is an interpretative criterion which places the origins of the state of deprivation in which most marginalised groups find themselves in the social processes and cultural practices that define their status, conditioning their options in life. Structural inequality is somewhat different from the idea of transient and incidental disadvantages that could be the result of bad luck or have their roots in misjudged individual decisions. In this sense, the approach based on structural discrimination may be considered an interpretative criterion in support of indirect discrimination because to understand the meaning or to evaluate, in this case, parental consent, we find reasons of greater weight or that are more justified if the argument proffered by indirect discrimination is bolstered by other supporting reasons that are found in the concept of structural discrimination.

2. The intersectionality approach

Intersectional discrimination can strengthen the arguments that are used to identify patterns of discrimination in regulations that are considered discriminatory. This is mainly because it is a

[50] S. J. Kosko, "Parental Consent and Children's Rights in Europe. A Balancing Act", *Journal of Human Development and Capabilities,* no. 3, 2010, pp. 425-448.

point of view that enables structures of discrimination to be detected in systems of oppression or subordination.

The perspective provided by intersecting or intersectional discrimination consists precisely in making us reflect on three important aspects: (a) challenging the dominant modes of understanding discrimination, considering that legal systems only partially recognise the structures of discrimination; (b) making clear how legal systems lay down their own antidiscrimination rules through unequal treatment types and paradigms, which are shown to be incapable of correctly identifying the specific categories of those who are discriminated against;[51] and (c) determining disadvantage as a form of identification of categories or classes of individuals.

The doctrinal development of the concept of intersectional discrimination tends to underline the thesis that we are faced with two or more sources of discrimination that, when combined, result in a situation of inequality qualitatively different from the sum of its parts or from the forms of discrimination considered separately[52]. Barrère and Morondo[53] refined the concept further in order to give it the greatest possible intension and to overcome or avoid the criticism that has been poured onto this category. The concept has to be accurate enough to not give rise to a "potentially infinite fragmentation of discriminated groups with grave consequences", to avoid creating hierarchies or priorities of discrimination[54] and to preserve a possible inflation of antidiscrimination law. It is more a question of – as the two authors remark – "overcoming contextual or specific forms of discrimination in order to find links in the structures or categories (in the systems of oppression) which may explain its cultural, class, religious, and other manifestations". "What matters are the subordination and discrimination practices with patterns (relating to gender, race, etc.) that uphold legal norms"[55]. Without ignoring the criticisms

[51] This issue was first addressed by Crenshaw (1989) who analysed discrimination against black women and talked, at that time, of "double discrimination" because the paradigm of gender discrimination is white women and the paradigm of racial discrimination is black men, so the doctrinal and judicial treatment of cases reflect theory.

[52] J. Squire, "Intersecting Inequalities", *International Feminist Journal of Politics,* December, 2009, pp. 497. R. Serra "La mujer como especial objeto de múltiples discriminaciones. La mujer multidiscriminada", *Multidiscriminación en los ordenamientos jurídicos español y europeo*, Valencia, Tirant lo Blanch.

[53] M. A. Barrère and D. Morondo, "Subordinación y discriminación interseccional...", *art. cit.,* 2011, pp. 34-35.

[54] M. Verloo Verloo, "Multiple Inequality, Intersectionality and the European Union", European Journal of Women's Studies, 13/3, 2006, pp. 211-228

[55] M. A. Barr re and D. Morondo, "Subordinación y discriminación interseccional...", *art. cit.,* 2011, p. 35.

that are levelled at this concept, of diverse order and scope, there needs to be an evaluation of its importance in efforts to identify discriminated categories or classes of individuals by demonstrating the disadvantages of all members of that category.

V. Concluding Remarks

A final assessment requires looking back to the relationship described at the beginning between discrimination and equality, particularly with respect to material equality. Given the ambiguity of basic concepts, such as equal opportunity or the notion of material equality, and recognising the fact that the interpretation and application of equality provisions is a complex and uncertain process, some conclusions may be drawn.

On the dimensions of equality and discrimination: The concept of discrimination that has been making headway in the international arena, as well as many of the techniques of antidiscrimination law, presuppose that equality of rights goes beyond formal equality, even in its broadest sense. Although this affirmation is not without resistance and difficulties on the part of both legislation and the decisions of the courts, making decisions in the framework of antidiscrimination law means recognising that the fight for equality has different dimensions[56]. On one side, equal treatment and the prohibition of all forms of discrimination. On the other, equal opportunities in the strict or broad sense – equality of outcome – that is, the mandate for public authorities to take measures to balance the position of social disadvantage of certain groups affected by deep-seated prejudices.[57] All of these areas have contact points, overlaps that in any case go beyond the sphere of formal equality.

[56] A. Ruiz Miguel, "La justicia como igualdad", *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid,* nº 2, 1998, pp. 131-144. .1998, M.C. Barranco, *Diversidad de situaciones y universalidad de los derechos,* Madrid, Dykinson-Instituto Bartolomé de las Casas, 2011, pp. 38-39.

[57] Articles 4 and 5 of CEDAW seem to embrace this thesis. Article 5 of CEDAW prescribes States to take appropriate measures "to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women".

According to the *General Recommendation of the CEDAW Committee*, States Parties have various obligations to: (i) ensure that there is no direct or indirect discrimination against women in their laws in both the public and private spheres, and that their protection is guaranteed through authorities and courts; (ii) improve the de facto position of women through concrete and effective policies and programmes; and (iii) address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions (*CEDAW temporary special measures*, para. 7).

On the implications of the direct and indirect discrimination dichotomy: In a somewhat ambiguous manner, international human rights texts often claim there is equal opportunity in the absence of direct or indirect discrimination.[58] This is an idea that conceptually may weaken interpretations closer to the material dimension of equality, but it also enables the development of a perspective from the notion of indirect discrimination which, as we have seen, entails the incorporation of material equality in legal systems or the material assessment of inequalities. The perspective of antidiscrimination law is related to the impact of law and policy on disadvantaged groups and is particularly focused on specific types of prejudice and discrimination, but it is also aimed at preventing disadvantage and at transforming structures of inequality. In this sense, we can say that it operates in the material domain of equality.

On the scope of antidiscrimination law: As I have repeatedly asserted, from the moment that antidiscrimination law is oriented towards recognition of the structures of domination and subordination, a definition of the notion of intergroup oppression and an identification of disadvantage, and that it openly questions the dominant modes in which legal systems contemplate the processes of discrimination, it becomes possible to conclude that the antidiscrimination principle may be understood as a standard of material equality. Moreover, it has to be understood as a standard of material equality if it is necessary to introduce, into the legal process, all those arguments designed to demonstrate a pattern of discrimination, identify a situation of disadvantage amongst individuals and groups, and thus assess life chances in terms of capacity, autonomy and decision making.

[58] As an example of this, Article 1.1 of *Law 51/2003, of 2 December, on equal opportunities, non-discrimination and universal accessibility for people with disabilities* (LIONDAU) states that "equal opportunities is understood to mean no discrimination, direct or indirect, which results from a disability, and the adoption of positive action measures to avoid or offset the disadvantages facing people with disabilities which prevent them from participating fully in political, economic, cultural and social life". The rules under the Convention and Spanish legislation on the rights of persons with disabilities provide the basis for arguing that the right to equal opportunities (Article 4 LIONDAU) means: (a) absence of direct and indirect discrimination, (b) absence of harassment, (c) compliance with accessibility requirements, (d) reasonable accommodation, and (e) compliance with positive action measures. See R. Jiménez Cano, "Hacia un marco conceptual adecuado de la normativa espa ola sobre personas con discapacidad" ("Towards a conceptual framework of Spanish legislation on persons with disabilities"), 83 et seq.

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