

NEW STUDY CLAIMS THAT SEX AND GENDER SHOULD NOT BE USED INTERCHANGEABLY DUE TO ITS LEGAL CONSEQUENCES

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Sex is not legally irrelevant. Therefore, sex and gender are not terms that should be used interchangeably from the point of view of legal discourse because of its legal consequences, as researcher at the [Universidad de Alicante](#) and lawyer [M.ª Concepción Torres Díaz](#) says. This first conclusion explains why the Draft Bill for the real and effective equality of trans people and for the guarantee of the rights of LGTBI people, which has just been approved by the Spanish Government, is mistaken in its approach. Hence the legal uncertainty and the legal conflicts that this might generate, which will have to be addressed immediately.

«Sex is not legally irrelevant», but is a basic category for the protection and guarantee of women's rights. «The legal discourse is not, and has not been, neutral from the point of view of the sexual corporeality of the subjects of law and the legal articulation of rights. When women are discriminated against, they are discriminated against on the basis of sex. Therefore, sex has been and is the suspected category of discrimination». The study focuses on the relevance of critical legal analyses around the categories 'sex' and 'gender' as core analytical categories and the dangers that arise when legal discourse fails to delimit and differentiate between the two analytical categories. Hence, the importance of signifying, from a legal dogmatic perspective, that 'sex' and 'gender' are not synonyms or interchangeable terms as it would entail denying the material reality of sex with the risk of reinforcing stereotypes and gender roles.



The thesis defended by the researcher on 29 June at the UA, whose title can be translated in English as "The Sex of the Constitution. The legal discourse of women's socio-sexual reality. A critical analysis of categories «sex» and «gender» as categories of constitutional relevance» investigates the terms in which the legal discourse has constructed women as legal-political subjects. From this point of view, the work focuses on women as subjects of rights linked to their biological-corporeal (sex), and socio-sexual (gender) realities. The study analyses the legal and political situation of women, taking as a reference point the constitutional text. In other words, what the Spanish Constitution of 1978 says and what it omits, and the infra-constitutional regulations that have been drawn up over the last fifteen years up to the present day.

The recent PhD holder appointed by the UA continues saying that «in this sense, when women are discriminated against, they are discriminated against because of their biological reality and because of the literature and the legal imaginaries that have been arbitrated about this biological reality from a false neutrality and objectivity in relation to the standard reference». This reference is not neutral: «the model is not neutral from the point of view of the corporeal reality of the subjects. On the contrary, it has and has had sex: the masculine sex». For this reason, this new PhD holder assures that «sex is not legally irrelevant. On the contrary, it is the core category on which anti-discrimination law has built and shaped the entire legal and constitutional scaffolding that has allowed, with some obstacles, to make progress in the area of gender equality.

The thesis highlights how women, in order to be equal to men, have had to fit into the «human standard model» represented by law. This implies gender biases insofar as it has not been a priority to determine the starting point of the subjects from their socio-sexual configuration. Thus, the preparation, application and interpretation of the norm has been carried out from the sexual abstraction of the subjects who give, apply and receive them. Consequently, the pact of social coexistence has not remained oblivious to this legal and, therefore, political construction of the subjects of rights. This is why feminist legal theories have been advocating for a gender-sensitive constitutional reform.



According to Concepción Torres, rights are built on a normative model of the human being, which has traditionally been referred to as male, although we were told that it was neutral. The fact that it has been articulated from the neutrality and abstraction of the body has had consequences for women. Take for instance the case of the law against gender violence or the law on sexual and reproductive health and the interruption of pregnancy. When we analyse them, it is necessary to identify the target subject in terms of sex in order to determine whether there is a difference between what the law says and how it is interpreted and applied». She adds that this neutral model does not take into account women's needs. This is where feminist legal theories say that women are discriminated against on the basis of sex, not gender. However, it is gender that allows us to identify these socio-sexual power structures (...).

The research was carried out using both qualitative and quantitative analyses and was directed by [Mar Esquembre Cerdá](#), UA senior lecturer in Constitutional Law, co-founder of the Feminist Network on Constitutional Law and member of the [UA Research Institute for Gender Studies \(IUIEG\)](#). Concepción Torres is also a lecturer in Constitutional Law at the UA.