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1 Towards a conceptual history of discrimination

Discrimination is a social phenomenon that can be studied historically through the exploration of the societal patterns, behavioral strategies, cultural symbols, and economic arrangements that organize, materialize, and reproduce the multiple and heterogeneous sources of structural disadvantage that affect various human groups as a whole within past and present societies. The word *discrimination*, however, is also a linguistic convention that brings these phenomena to our minds when pronounced; a concept that condenses them semantically. For this reason, it is also possible to approach historically the social phenomenon that we now call discrimination using as an entry point the study of the construction, circulation, and appropriation of the concept that bears this name, the concept of discrimination, in order to understand its place within our sociopolitical vocabularies and to cast light on its continuities and changes over space and time.

The idea that discrimination is a concept that forms part of our fundamental sociopolitical vocabulary follows from the theory of historical concepts articulated by Reinhart Koselleck. Developing Nietzsche's aphorism that only that which lacks history can be defined, Koselleck[1] established a difference between 'mere' words, which can be defined because their uncontroversial use in everyday speech endows them with a relative stability in their meaning, and concepts, which present an irreducible ambiguity not despite but because of their being central components of sociopolitical discourse. Participants in processes of social communication use these concepts to articulate what, drawing from hermeneutics, Koselleck[2] termed their "space of experience" and their "horizon of expectations", a use that gives

1 Koselleck (2004) 76.
2 Koselleck (2004) 259.

them considerable fluidity; on top of that, their fundamental role in expressing sociopolitical experiences and expectations meant, as Carl Schmitt[3] had already observed, that these concepts tend to be used in connection with some of the fundamental conflicts that divide the respective society and therefore in a polemical sense. Concepts employed in sociopolitical discourse appear from this perspective as words loaded with history; and conceptual history becomes not a history of words, but rather an attempt to study social beliefs, experiences, and expectations in a temporal perspective.

The concept of discrimination manifests itself in a variety of words. Using the root morpheme *discrimin-* to create verbs *(to discriminate)*, adverbs *(discriminatorily)*, nouns *(discrimination)*, and adjectives *(discriminatory)*, it is possible to construct a rich conceptual vocabulary on discrimination that allows us to express an infinite variety of statements about the social phenomenon in question, including the expression of abstract ideas and the description of concrete actions and behavioral patterns of individual, institutional or collective agents. These words draw their meaning from a socially shared understanding of what kinds of phenomena we would describe using them, and serve as semantic support to the elaboration of subsequent conceptual neologisms such as *reverse discrimination* and *anti-discrimination law*.

The words that make up the constantly growing vocabulary about discrimination, however, are far from being the only elements that determine semantically and pragmatically the concept of discrimination. In fact, they are not necessarily the most useful ones for a true understanding of its meaning. We find in its orbit a variable constellation of concepts such as *prejudice*, *stereotype*, *disadvantage*, and many others with which the concept of discrimination maintains relations of semantic similarity or opposition, that can often be expressed in various degrees of intensity, and relations of pragmatic complementarity or exclusion, manifested in whether speakers need to use them or need to refrain from using them in order to avoid confusion or embarrassment and to gain clarity and expressivity. These related concepts, the precise identity of which at any given place and time is a matter of social convention always open to challenge and change, allow speakers to explain without falling into tautology or repetition the abstract conceptual meaning of discrimination and the concrete discursive uses of its cognate vocabulary.

3 Schmitt (2008) 89.

In the case of discrimination, constellations of semantically related concepts also allow us to differentiate discrimination as a concept that describes the historical phenomenon of structural disadvantage from discrimination as a 'mere' word that means, as the Oxford English Dictionary puts it, the "recognition and understanding of the difference between one thing and another". One of the questions that conceptual history as an approach opens up is, in fact, what is the historical relation between fundamental sociopolitical concepts and their associated 'mere' words. Certainly, that there actually is a difference between discrimination as a fundamental concept of sociopolitical vocabulary and discrimination as a 'mere' word is a historical intuition that demands historical justification, both in terms of the primeval emergence of this semantic and pragmatic differentiation and of its effective existence in more discrete and circumscribed historical contexts.

The concept of discrimination maintains a close connection with the legal world, from which it seems to extract in part its distinctive meaning. This is not to deny the role that the social experiences of discrimination play in giving actual historical content to the concept; the point in question is what the semantic and pragmatic specificity of using the conceptual vocabulary about discrimination is. In this sense, it seems safe to suggest that discrimination is conceptually conceived of in the contemporary world even by non-lawyers as an unjust harm inflicted on an undeserving victim by a blameworthy agent basing his actions on impermissible reasons. For this reason, whenever the terms of this vocabulary are used to describe existing events or phenomena of the social world, they are performatively used almost inevitably in an accusatory and reproachful manner that calls for determining the responsibility of the agent behind the act or situation in question. It seems difficult to describe an action or a phenomenon through this vocabulary in a way that does not imply a negative judgment about the action or fact referenced by the discourse. Its use always therefore implies a potential factual and normative inquiry, even a non-legal one that justifies it by demonstrating the negative character of what it describes. The use of the conceptual vocabulary about discrimination is, to be sure, nevertheless not inevitable; speakers always have at their disposal alternative conceptual and terminological systems that would discursively silence all its implications, describing the same phenomena in a neutral, positive, or just different way.

Describing actions as discriminatory calls into question the responsibility of the agent that controls a certain course of events, but, while a consciously

discriminatory intention may be present in agents whose actions are described as discriminatory, it is also possible that this is not the case, as complex social causes and dynamics can create discriminatory effects out of innocuous behavior. The concept of discrimination, therefore, not only involves the potential formulation of normative and factual questions about individual responsibility, about who discriminates and who is discriminated against, it also raises questions about social causality with regard to which social markers trigger a specific form of discrimination, what the historical background is which has made it possible in the longue durée, and how it can be overcome.

These broader social questions implicit in the concept of discrimination are worth noting as we reflect on the conceptual history of discrimination. The very possibility of raising them did not exist within the conceptual framework of the liberal system of individual responsibility articulated during the 19th century in Europe and the Americas by "classical legal thinking".[4] They would have been regarded as incoherent by the Eurocentric, patriarchal, and bourgeoise constitutional culture of the era, characterized by exclusionary constitutional definitions of citizenship, the confinement of the judiciary to protecting property and contracts and punishing criminality, and a doctrinal focus on political institutions rather than on rights. Those questions are intelligible only within the structuralist legal mentality that arose in democratized constitutional orders during the first half of the 20th century as a response to the challenges to those older constitutional ideas and legal doctrines raised among others by Léon Duguit and the American legal realists; a mentality that gave conceptual coherence to the 'social' initiatives to achieve distributive justice through systems of social and labor protection that redistributed some capitalist wealth and through systems of civil liability that redistributed some of the costs of industrial risks. The conceptual history of discrimination, in that sense, seems to be deeply linked in modern constitutional democracies with the rise and crises of what can be broadly described as social law. To use a Foucaultean term, the concept of discrimination seems to have as its 'historical a priori' significant transformations in the fundamental principles and values of the modern constitutional tradition that made it possible for us to regard the prohibition and reparation of certain forms of social disadvantage

4 Kennedy (2006).

as an international human-rights imperative, an intrinsic consequence of the constitutional principle of equality, and a meta-guarantee of constitutional rights.

The concept of discrimination, as a component of our vocabulary that, over time, has acquired social meaning and political legitimacy, has gained such an importance in the modern world that many legal systems and jurisdictions have deemed it necessary to include it, define it, and employ it in constitutional and other fundamental legal documents. This suggests that the conceptual history of discrimination can be approached through the study of constitutional and other legal materials, including not only constitutional clauses but also their application to the concrete ordering of society through landmark legislation or paradigmatic judicial opinions with the aim of finding in them concrete contexts of employment of this concept that we can arrange diachronically and compare synchronically in order to gain an idea of its variations through space and time. Bearing in mind the conceptual difference and sometimes the substantive distance between fundamental concepts of sociopolitical discourse and those same concepts as defined by authoritative and doctrinal sources, these materials nevertheless offer us the possibility of understanding how constitutional drafters, political and judicial authorities, legislators, and even scholars try to influence through their conceptual definitions and rhetorical uses not only future decision-making processes and actions but also the underlying social understandings of those fundamental concepts, as well as to assess to what extent they recognize and reflect these social understandings in their operations.

I shall briefly explore three episodes in the conceptual history of discrimination in order to illustrate these points. The first seeks to provide historical support for the intuition that, at some historical point, a differentiation emerged between discrimination as a 'mere' word and discrimination as a fundamental sociopolitical concept. The second and third episodes proceed to examine the appropriation and application of the concept of discrimination in Chilean constitutional law. The second episode examines the incorporation of the concept of discrimination in the constitution that the dictatorship led by Augusto Pinochet enacted in 1980, a step that gave the political forces that stood behind the regime the opportunity to overdetermine the field of political and legal dispute for years to come. The third episode examines a set of judicial decisions on the rights of sexually diverse persons in order to examine whether the concept of discrimination has contributed

in postdictatorial Chile to further judicially the rights of groups who, historically, have suffered from discrimination.

2 The emergence of the concept of discrimination

It seems advisable to recognize from the outset that it is often impossible to identify specific moments in which 'mere' words become fundamental concepts of sociopolitical vocabularies; we can only identify the main historical tendencies that led to that result. Furthermore, it would seem as though a certain reification, the formation in the mind of individuals of the belief that there exists as a matter of fact a social phenomenon endowed with such prevalence and significance that deserves to have a name of its own, is necessary for a concept such as discrimination actually to exist as something different from a 'mere' word that comes up in social and political speech. In that sense, the conceptual history of discrimination has as its background deep and still ongoing cultural changes that have brought significant parts of modern societies to believe that long-standing social hierarchies and exclusions are incompatible with the common dignity of humans and with egalitarian understandings of the rule of law. Those processes, that can only be hinted at here, also form part of the 'historical a priori' of the concept of discrimination.

Etymologically, the versions of the word *discrimination* that exist in modern languages find their common root in the late Latin word *discriminare*, which comes from *discrimen*, an older Latin substantive meaning distinction or difference, a substantive that is in turn derived from the verb *discernere*, the prefix of which, *dis-* indicated division or separation, while its morpheme, *cerno*, a cognate of the Greek word κρίνω, indicated the capacity to perceive, to separate, or to judge.[5] During the Middle Ages, this word family accumulated connotations of both concreteness and risk. At least two words were used in Latin at the time, as attested to by the French historian Charles Du Cange in his 1678 *Glossarium mediae et infimae Latinitatis*. One of them was *discrimen*, which Du Cange[6] presented as an equivalent of διάκριμα, the ancient Greek word for a concrete distinction; the other was

5 Gómez de Silva (1998) 228.
6 Du Cange (1844) 3:133.

discriminare, which he defined as *periclitari*, a cognate of *periculum*. *Distinction* and *danger*, in other words, were the semantic cognates that helped define this word family in the Middle Ages.

Descendants of the Latin words *discriminare* and *discrimen*, however, fared differently in different modern languages. German, for example, did not include the word *Diskriminierung* until the 20th century; none of the editions of the great dictionaries of that language published during the 19th century, the *Deutsches Wörterbuch* first authored by Jacob and Wilhelm Grimm and the *Etymologisches Wörterbuch der deutschen Sprache* produced by Friedrich Kluge, defined any term belonging to this word family. Neither did the *Dictionnaire de l'Académie française* in its first seven editions, which span from 1694 to 1879, define any word related to it.

There is lexicographic evidence of the use in Castile of both *discriminare* and *discrimen* during the Renaissance. In his 1490 *Universal Vocabulario en Latin y en Romance*, the humanist Alfonso de Palencia defined *discriminare* in this way: "es partir entre sacar discerner, assi que discriminator es apartador y desatador de las cosas embueltas"; and defined *discrimen* as "peligro; distancia; trabajo; y algunas vezes muestra apartamiento de dos cosas que primero estavan iuntadas: como en el atavio delalas *[sic]* mugeres se dice discriminalia los ramales que son puestos para partir la crencha delos cabellos delas donzellas".[7] The destiny of this word family in Spanish in the following centuries, however, was to languish over the centuries until revived from outside its linguistic boundaries. At the beginning of the 18th century, the third volume of the *Diccionario de Autoridades*, the first dictionary published by the Real Academia Española, did not include among its entries the word *discriminar*; and, while it defined the word *discrimen* as "riesgo, peligro, o contingéncia", it stated that it was "voz puramente Latina".[8] The successor to the *Diccionario de Autoridades*, the *Diccionario de la lengua castellana*, maintains to this present day in its entry for the word *discrimen* a lexicographic symbol indicating that it has fallen into disuse. Neither *discriminar* nor *discriminación* appeared in any of the several editions of the *Diccionario de la lengua castellana* published by the Real Academia in the 18th and 19th centuries; the word *discriminar* made its first appearance only in the 1925 edi-

7 Palencia (1967 [1490]) 118.

8 Real Academia Española (1732), tomo 3, 298.

tion of the *Diccionario*, with the meaning of "separar, distinguir, diferenciar una cosa de otra" and accompanied by a symbol denoting it as a word used only in Argentina and Colombia. The first time that the Spanish *Diccionario* defined *discriminar* as "dar trato de inferioridad a una persona o colectividad por motivos raciales, religiosos, políticos, etc." was in 1970.

The same word family experienced a different trajectory in English, where it was regularly employed throughout the modern age. In his influential *Dictionary of the English Language*, the prolific writer Samuel Johnson[9] defined several words belonging to it, and illustrated the use of these terms by quoting reputed English writers from the previous two centuries such as the natural philosopher Francis Bacon, the chemist Robert Boyle, and the theologian Edward Stillingfleet. *To Discriminate* was defined as "1. To mark with notes of difference; to distinguish by certain tokens from another" and "2. To select or separate from others". *Discriminateness* was given as synonyms "Distinctness; marked difference". *Discrimination* was given three meanings: "1. The state of being distinguished from other persons or things"; "2. The act of distinguishing one from another; distinction; difference put"; and "3. The marks of distinction". *Discriminative*, lastly, was defined as "1. That which makes the mark of distinction; characteristical" and "2. That which observes distinction". The closest semantic relative of *discrimination*, in other words, was *difference*. This, however, is clearly not 'difference' in the sense given to the word by contemporary literary theory or social studies, but in the socially and politically innocuous sense that something is dissimilar to something else.

The definitions in Johnson's *Dictionary* show that, at the beginning of the 19th century, the verb *to discriminate* and the noun *discrimination* were commonly used in the English language. They do not, however, seem to suggest that they were used to express fundamental but contentious social and political claims; instead, they suggest that their role was to stand semantically for the action of making differences, the capacity to recognize differences, differences themselves that have been made or recognized, and the formal or material embodiment of the differences in question. Certainly, as is the case with many other 'mere' words, *to discriminate* and *discrimination* were sometimes employed in political and legal discourse; the question from

9 Johnson (1755) 606.

the perspective of a conceptual history of discrimination is whether they were used to articulate any experiences, expectations, or conflicts characteristic of that age or rather were used in discourse merely as a grammatical complement to the expression of those historical realities.

A letter that King Charles I of England sent in 1648 to the Prince of Wales offers us an interesting example to address that question. In it, the King gives his heir the following advice: "Take heed of abetting any Factions, or applying to any publick Discriminations in matters of Religion, contrary to what is in your judgment, and the Churches well settled."[10] A similar example comes from more than a century later and from the other side of the Atlantic, where, in 1777, the New York Constitution guaranteed "the free exercise and enjoyment of religious profession and worship, without discrimination or preference". These two examples are challenging because, to the contemporary ear, they might sound like ordinary expressions of the idea of religious discrimination, i. e. of the structural disadvantage experienced by religious minorities in intolerant societies. However, if that were the case, the pragmatic implications of that conceptual sense indicate that in English sources of the 17th and 18th centuries we should find examples of individuals complaining in the first person about the "Discriminations" they suffered because of their religion, or of intellectuals discussing from the observer's perspective the widespread problem of religious "discrimination or preference". To put it in Wittgensteinian terms, that is the kind of language game that our concept of discrimination calls for and that would prove its presence at that time.

Such language games, however, are not available in the sources of that era, though certainly not because individuals in England did not experience prejudice and even persecution because of their religion during the first centuries of the modern age; it is instead because, at the time, other conceptual vocabularies were employed to think and to speak about those problems, from the traditional Christian discourse about heresy to the novel conceptual language of tolerance among similar Reformed Christian churches popularized by John Locke in his 1689 *A Letter Concerning Toleration*. In contrast, however, the two examples under scrutiny employ the word *discrimination* in a way that suggests its association with something

10 Sanderson (1658) 1142.

more abstract and ahistorical than the experiences of those persecuted in an age of religious factionalism. When Charles directed his son to refrain from "discriminations" because they were communicative signals that could create political instability, he seemed to be using the word in the same way as those New Yorkers who employed the coordinating conjunction "or" to present "discrimination" as a terminological alternative, as a synonym, to the word "difference". They all seemed to be using the word simply to mean the opposite of equality and the same as difference. We could say that, in these examples, *discrimination* is an analytical concept but not a historical one; a term of basic comparison, not a fundamental component of sociopolitical discourse – a 'mere' word.

While the word *discrimination* was employed in England during the 19th century, the concept of discrimination does not seem to have been generally employed or known. In 1871, it was still possible to publish in London a dictionary called, precisely, *Synonyms Discriminated*[11] that defined the word *discrimination* as "discernment in minute particulars, and of such a kind as leads to the acting upon the differences observed" and that put it in the same semantic category as the words *discernment*, *penetration*, *judgment*, and *discretion*. A second edition, published in 1890, made no changes or addition, and would still say, when defining the word *distinguish*, that "[i]n the sense in which Distinguish is a synonym with Discriminate, it is used additionally in regard to physical objects, while Discriminate is only used of moral things."[12]

Words related to *discrimination*, in sum, were scarcely used during the 19th century in Western Europe in languages other than English, and, in England, where the word was employed, it was not used as a fundamental concept of sociopolitical vocabulary, but rather as a 'mere' word. Both the word and the concept, however, were known and employed across Western languages early in the 20th century, as attested to by its use in a few provisions of the Treaty of Versailles in 1919, where it was employed to ban discrimination against Polish people (art. 104.5) and to prohibit discrimination among economic actors (arts. 50 Annex, 265, 323, and 329). The question then is how to account for this rapid reception of both the word and the

11 Smith (1871) 252.

12 Smith/Smith (1890) 345. Small caps in the source.

concept of discrimination in these languages. In light of the evidence, it seems reasonable to search for the emergence of the concept of discrimination in historical processes and social debates that took place in English-speaking communities outside Great Britain during the 19th century, processes resulting, at some point, in some widespread experience of unjust social disadvantage beginning to be communicated in a way that led to the association of that phenomenon with the word discrimination. The best candidate for being the place of origin of the concept of discrimination is, in consequence, the postbellum United States.

The written opinions of the Supreme Court of the United States offer a valuable archive in which to search for those processes and debates. They suggest that discrimination did not begin its transformation from 'mere' word to fundamental sociopolitical concept in a linear and simple way. The first stage in that process seems to have been the increasing use of the word *discrimination* during the first half of the 19th century as a technical legal term to denote the act of drawing distinctions among economic actors, a usage that, over time, filled the word with connotations of impermissibility and unlawfulness. It is in that sense that the word family begins to be used at the time that John Marshall sat as Chief Justice of the Supreme Court. For example, in *The Samuel* (1816), Marshall wrote that a certain law "makes no discrimination between foreign and domestic wines and spirits, but deals with all alike". In *Trustees of Darmouth College v. Woodward* (1819), referring to whether the constitutional protection of contracts extended to the charters of private corporations, the Chief Justice ruled affirmatively arguing that "[t]here is no distinction or discrimination made by the constitution itself, which will exclude this case from its protection", and, in *Brown v. State of Maryland* (1827), he warned of the risk that a state usurping the power of the federal government to conclude international treaties "may make a discrimination among foreign nations". The Court continued to use the term in this sense after the Marshall era. While *Thurlow v. Commonwealth of Massachusetts* (1847) denied the constitutionality of "any discriminating tax" instituted by the states or the federal government outside their respective competencies, *New Jersey Steam Navigation Co. v. Merchant's Bank of Boston* (1848) declared that, in the case under review, "Congress meant to discriminate between seizures on waters navigable". This use reached its culmination in 1887 with the *Interstate Commerce Act*, which declared "unlawful" the "unjust discrimination" committed by all common carriers, who, in the transport of pas-

sengers and merchandise, established "greater or less compensation for any service rendered" for different people or gave any of them "any undue or unreasonable preference or advantage".

During the second half of the 19th century, however, an important social phenomenon was taking place in the country after the Civil War: the emancipation of the population of African descent had created a new category of citizen, black men, who faced widespread forms of prejudice that prevented them from exercising the legal and political rights linked to citizenship, including the right to vote and the right to be judged by a jury of their peers. The XIV Amendment in 1868 and the XV Amendment in 1870, respectively, had recognized this new black male citizenship by guaranteeing all citizens the "equal protection of the laws" and prohibiting the restriction of suffrage "on account of race, color, or previous condition of servitude". It is in this context that the word *discrimination* begins to appear in Supreme Court decisions to conceptualize illicit conduct motivated specifically by the race of the victim, reflecting the crystallization of social and political meanings around that word that was taking place and contributing to its definitional update.

The mentions of the word *discrimination* in the case law of the Supreme Court give us a glimpse into this process of conceptual crystallization. Interpreting for the first time the XIV Amendment in the Slaughter-House Cases (1873), the Court doubted that "any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision". In *U.S. v. Reese* (1875), the Court declared that the XV Amendment guarantees the right to "exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude", while, in *Strauder v. West Virginia* (1880), it asked itself whether citizens had "a right to have a jury selected for the trial of his case without discrimination against all persons of his race or color, because of their race or color". During the 1880s, this use of the term continued, even as the Court embarked on the course that took it to validate racial segregation in *Plessy v. Ferguson* (1896). In the *Civil Right Cases* (1883), the Court said that "it would be running the slavery argument into the ground" if African-American litigants were allowed to invoke the protections of the XIV Amendment in the face of "every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or

admit to his concert or theater, or deal with in other matters of intercourse or business"; "there must be some stage" in the life of the freedman, said the Court, "when he takes the rank of a mere citizen and ceases to be the special favorite of the laws, and when his rights as a citizen or a man are to be protected in the ordinary modes by which other men's rights are protected". In *Pace v. Alabama* (1883), the Court denied that, in legislation forbidding interracial marriage, "a discrimination is made against the colored person" and declared that "whatever discrimination is made in the punishment", "is directed against the offense designated and not against the person of any particular color or race". *Yick Wo v. Hopkins* (1886) enriched the nascent concept of discrimination both by employing it to describe the plight of another racial group, Chinese immigrants in California, and by recognizing the possibility that a law "fair on its face and impartial in appearance" can be applied "with an evil eye and an unequal hand, so as to practically to make unjust and illegal discriminations between persons in similar circumstances", a doctrine that would have to wait almost a century to be taken seriously again by the Court.

At the turn of the century, in the year 1900, it was possible to read in volume 6 of the *Virginia Law Register* a short, unsigned note with the title "Discrimination against women in police regulations", where the constitutionality of this problem was discussed, exposing perplexedly that "it is somewhat strange that the element of discrimination has not been discussed in this class of cases".[13] The anonymous authors of this analysis seem to have been conscious of the newness of the debate, but it seems harder to say whether they were aware that they were also innovating by expanding the range of matters that could be labeled as discrimination in the new, conceptual sense. Since then, the conceptual history of discrimination is to a large extent the history of the expansion of the social problems that have come to be conceptualized as discriminatory.

3 Constitutionalizing the concept of discrimination under Pinochet

While various forms of discrimination have historically existed in Chile, both the word and the concept were unknown to the Chilean constitutions

13 Anonymus (1900) 580.

of 1818, 1822, 1823, 1833, and 1925. The concept of discrimination was added to this last document through a brief mention in a politically significant constitutional amendment enacted in 1971, but it would be the 1980 constitution drafted by the Military Junta headed by Augusto Pinochet that decisively incorporated the concept of discrimination into Chilean constitutional law by mentioning it directly in arts. 19.16 (the right to non-discrimination in the workplace), 19.22 (the prohibition of economic discrimination by the state), 98 (the prohibition of discriminatory requirements by the Central Bank), and indirectly in art. 19.2 (the right to equality before the law), and additionally by creating a judicial remedy to protect art. 19.2, among other constitutional rights, against arbitrary or illegal omissions or acts. While it might seem paradoxical that a dictatorship contributed so significantly to importing into a constitutional tradition a concept such as discrimination, the historical context and the actual substance of its authoritative definitions explain the rationality of this decision.

One could be tempted to find an antecedent to the concept of discrimination in art. 12.1 of the 1833 constitution, which identified among the rights recognized for all inhabitants of the republic "[l]a igualdad ante la lei. En Chile no hai clase privilegiada." Art. 10.1 of the 1925 constitution and 19.2 of the 1980 constitution copied this clause verbatim,[14] making it the way that the principle of equality has been expressed throughout Chilean constitutional history.[15] At the time that this clause was originally drafted,

14 Black slavery had been abolished in 1823 without compensation for slave owners during a period of liberal and progressive politics. The conservative 1833 constitution, recognizing this fact, declared in art. 132, among the "garantías de la seguridad i propiedad", that "[e]n Chile no hai esclavos, i el que pise su territorio queda libre. No puede hacerse este tráfico por chilenos. El estranjero que lo hiciere, no puede habitar en Chile, ni naturalizarse en la República." The drafters of the 1925 constitution decided to keep this declaration in their text, adding it as a second paragraph to art. 10.1, as a sign of their belief in a Chilean tradition of commitment to freedom. The drafters of the 1980 constitution followed their example for the same reasons.

15 The antecedent of this wording can be found in arts. 125 ("Todo hombre es igual delante de la ley") and 126 ("Todo chileno puede ser llamado a los empleos. Todos deben contribuir a las cargas del Estado en proporción de sus haberes. No hay clase privilegiada") of the 1828 constitution. This document embodied the progressive and liberal ideals of the government of the day, overthrown in 1829 by a reactionary military uprising organized and financed by the merchant Diego Portales. After the victory, Portales forced the election as president of José Joaquín Prieto, the general who led the army he had financed, and served as his Minister of Interior, Foreign Affairs, War, and Justice and Public In-

however, the principle of equality before the law and the prohibition of privileged classes were understood in Chile in the same way that similar constitutional principles and doctrines were understood by other bourgeois constitutional regimes of the 19th century: as little more than the establishment of a single, unified category of legal subjects, a universalistic notion conveniently restricted through exclusionary definitions of citizenship.[16]

The views of Jorge Huneeus, a congressman from the Liberal Party who taught constitutional law at the Universidad de Chile and published in 1880 a constitutional treatise titled *La Constitución ante el Congreso*, point in this direction. For Huneeus,[17] the principle of equality meant that laws had to be the same throughout the country and that everyone had to be judged according to the same laws – nothing less, but certainly nothing more. He descriptively observed that this principle had no other exception than those established by the constitution itself, by means of which not everyone was able to vote or to hold office. Outside of those cases, he asserted vigorously, the equality before the laws had to be perfect, something that he saw materialized in the fact that, according to the 1855 Civil Code, laws applied equally to Chileans and foreigners. After briefly discussing the legal status of priests, his conclusion was that "Las leyes hoy vigentes en Chile guardan completa conformidad con los principios que brevemente dejamos apuntados."[18]

What, however, did Huneeus have to say about the condition in his times of indigenous peoples or women from the perspective of constitutional principles? We do not know his views on race and ethnicity because, unlike the United States Constitution, the Chilean 1833 constitution was silent about relations with indigenous tribes.[19] It could be argued that there was

struction. The 1833 constitution was written by his close ally Mariano Egaña and the 1855 Civil Code by his protégé Andrés Bello. Hailed historically by conservatives as the true founder of the Chilean republic, Portales believed, as he wrote in 1834 to a friend, that "con ley o sin ella, esa señora que llaman la Constitución, hay que violarla cuando las circunstancias son extremas. ¡Y qué importa que lo sea, cuando en un año la parvulita lo ha sido tantas por su perfecta inutilidad!" [Romero/Romero (eds.) (1986) 167].

16 Tarello (1976).

17 Huneeus (1890), vol. 1, 102–103.

18 Huneeus (1890), vol. 1, 104.

19 This forms part of a continuous constitutional neglect of indigenous peoples that remained unmodified by the 1925 and 1980 constitutions. To this date, Chile is one of the few Latin-American countries that has not recognized its ethnic and cultural diversity in its constitutional document. There have been several legislative enactments throughout

nothing to say, since all indigenous inhabitants of the country, who during colonial times held the lesser legal status of "Naturales" that put them under the legal guardianship of "protectores de indios", had been granted Chilean citizenship, and therefore full legal capacity, through an edict signed on March 4, 1819 by Director Supremo Bernardo O'Higgins; in light of art. 12.1, they were thus subject to Chilean laws and had the same rights as any other inhabitant of the territory. Huneeus nonetheless did have the opportunity to express his views with respect to women, who, at the time, were entering into the public sphere and would soon be formally allowed to enroll in universities,[20] when answering a question that had been raised by a group of women who in 1875 had tried to register to vote: did women enjoy the franchise under the text of the 1833 constitution? Huneeus, after conceding that the constitution did not explicitly and conclusively exclude them from the vote, declared that

> "la mujer ha estado siempre excluída de toda participación en la organización y en el ejercicio de los Poderes Públicos. Esta exclusión, aunque la Carta Fundamental no la haya escrito en tipo visible, proviene de razones de un orden superior: del que Dios y la Naturaleza han establecido al atribuir á la mujer en la Sociedad, y sobre todo, en la familia, una serie de deberes verdaderamente incompatibles con el ejercicio activo de la Ciudadanía en toda su extensión."[21]

The 20th century slowly brought some changes. The 1925 constitution recognized a new social and political arrangement and established a normative framework for the regulation of markets and the protection of labor in the context of a protectionist economic policy. Women won the right to vote in the local elections of 1935, had it guaranteed through an amendment to the *Ley General sobre Inscripciones Electorales* enacted in 1949, and exercised it for the first time in presidential elections in 1952. Moreover, in a strictly legalistic sense, the concept of discrimination was incorporated into Chilean law in 1948 by the Universal Declaration of Human Rights through its arts. 7 (right to equality before the law without any discrimination) and 23 (right to equal pay for equal work without any discrimination), and was reinforced in 1969 by the American Convention on Human Rights through its arts. 1.1

history dealing with indigenous rights and land, recently compiled by Núñez (ed.) (2010), whose analysis exceeds the reach of this paper.

20 Errázuriz (2005).

21 Huneeus (1890), vol. 1, 89.

(guarantee of free and full exercise of rights and freedoms without any discrimination for reasons of race, sex, or any other social condition), 17.2 (principle of non-discrimination as a constraint on domestic marital laws), 24 (right to equal protection of the law without discrimination), and 27.1 (principle of non-discrimination as a constraint on the lawfulness of domestic emergency powers).

Under the 1925 constitution, however, Chilean courts had no jurisdiction to enforce international human rights treaties directly. Indeed, it seems safe to say that international law, for the Chilean legal profession between the 1920s and the 1970s, was something closer to the sphere of foreign affairs than to those of legal doctrine or legal practice.[22] Furthermore, neither this nor the previous document, the 1833 Constitution, had provided for the judicial protection of any fundamental rights other than freedom from arbitrary arrest. Unlike other courts around the world looking for ways to perform a juridical coup d'état,[23] Chilean courts during the lifetime of the 1925 constitution never tried to reach for its clauses or principles to strengthen their authority or expand their jurisdiction.

These are only some of the many elements that should make us refrain from thinking of Chile as a historical beacon of constitutional governance and respect for the rule of law merely because presidents elected through some kind of election governed the country almost without interruptions between the end of the 1829 civil war and the 1973 coup under the rule of two generally respected constitutions enacted in 1833 and 1925. These con-

22 A significant exception was the new field of labor law scholarship, characterized by a heterogeneous approach to relevant materials. While classic textbooks on civil law such as Luis Claro Solar's *Explicaciones de Derecho Civil Chileno y Comparado*, published in several volumes between 1898 and his death in 1945, employed exegetic and conceptual approaches to explain systematically the meaning of the elegantly written clauses of the Civil Code, textbooks on labor law such as those authored by Luis Barriga and Alfredo Gaete (1939) or by Alfredo Gaete and Exequiel Figueroa (1946) mixed pragmatically legal and extralegal materials such as historical explanations of the rise of modern capitalism and its workforce, lengthy references to international labor treaties, outlines of sociological approaches to the study of labor, descriptions of minute details of the relevant administrative institutions, analyses of contending economic ideologies, and dry explanations of the clauses of the decrees and legislative enactments that in 1931 had been put together under the rubric of *Código del Trabajo*. Nevertheless, they gave no clue as to how the contents of international labor norms could be invoked in Chilean labor courts.

23 Stone Sweet (2010).

tinuities, however, were bolstered in both centuries by the constant use of military and police violence commanded by presidents against political dissent, social unrest, and territorially peripheral populations, sometimes outside the rule of law but often within the wide authority that the 1833 and 1925 constitutions gave them "a todo cuanto tiene por objeto la conservacion del órden público en el interior, i la seguridad esterior de la República", as both constitutional texts put it.[24] As Loveman and Lira[25] have shown, a constant flux of legislative and administrative enactments has, throughout the life of the republic, given shape to a political architecture aimed at preserving the interior security of the Chilean state. Long before the 1973 coup, Chilean presidents enjoyed and often employed wide emergency powers without much control from either Congress or the judiciary, and as Hilbink[26] demonstrates, historically, the judiciary had been particularly very weak in its relations with the Executive; presidents often interfered with their decisions, and judges generally deferred to the authority of presidents when they exercised their powers. Chile, in that sense, has been a great example of the repressive regimes of exception employed historically in Latin-American constitutionalism, which Brian Loveman[27] described as establishing a "constitution of tyranny".[28]

24 As to elections, we must keep in mind that, in the 19th century, they were tightly controlled by the executive; and that fraud and other forms of vote control were widespread, particularly in the countryside, until the enactment in 1958 of a comprehensive reform to electoral procedure. Nevertheless, as Ponce de León (2017) rightly points out, elections played an important role in state building, bringing state authorities during the first century of the republic to negotiate with local elites the terms of political order and preparing the ground for the professionalization and bureaucratization of electoral administration in the 20th century.

25 Loveman / Lira (2002).

26 Hilbink (2007).

27 Loveman (1993).

28 The role of the Presidency has been recognized and glorified by Chilean conservative intellectuals from Alberto Edwards (2001), a reader of Oswald Spengler who argued in the 1920s that the erosion of presidential authority at the end of the 19th century had put in charge of the country a self-indulgent "parliamentarian Fronde" unfit to meet the political challenges and confront the social malaise of the modern world, to Bernardino Bravo Lira (1996), recipient of the 2010 *Premio Nacional de Historia*, who sees the Presidency as the fundamental continuity between Colonial and Republican times and has vindicated historical exercises of presidential power outside the constitution. If, for Edwards, the man who would solve the secular erosion of authority in Chilean politics and society at large was the dictator Carlos Ibáñez del Campo, that man for Bravo was

The first inclusion of the concept of discrimination in Chilean constitutional norms occurred in 1971 with Law No. 17.398, a constitutional reform that the centrist Christian Democratic Party (PDC) demanded from socialist candidate Salvador Allende in exchange for supporting his congressional ratification as President of the Republic after he won the 1970 election without an absolute majority of the popular vote. The cold-war context instilled in members of this party the fear that the left grouped in *Unidad Popular*, Allende's Marxist coalition, could enact restrictions on social liberties and political rights and led them to view the approval of a constitutional amendment expanding the existing bill of rights as a guarantee against this outcome. Several political and social rights were expanded to express the substantive agreements that progressive Christian Democrats shared with the left; but the wording of some of them was also evidence of the anxieties that moderates and conservatives within the PDC still harbored. It is in this last sense that the concept of discrimination was mentioned in the *Estatuto de Garantías*, in what became art. 10.3 par. 5 of the amended 1925 constitution:

> "La importación y comercialización de libros, impresos y revistas serán libres, sin perjuicio de las reglamentaciones y gravámenes que la ley imponga. Se prohíbe discriminar arbitrariamente entre las empresas propietarias de editoriales, diarios, periódicos, revistas, radiodifusoras y estaciones de televisión en lo relativo a venta o suministro en cualquier forma de papel, tinta, maquinaria u otros elementos de trabajo, o respecto de las autorizaciones o permisos que fueren necesarios para efectuar tales adquisiciones, dentro o fuera del país."

The report sent to Congress by the joint committee of Christian Democrats and *Unidad Popular* stated that "la prohibición de discriminar arbitrariamente que se establece" in that article would also apply to the guarantees that state authorities had to grant in certain cases for the acquisition on credit of machinery, tools and equipment. The fear that some wanted to placate with this amendment was that Allende would start putting in place administrative restrictions to the exercise of the free press. To make things more complicated politically, shortly after his inauguration, Allende gave an interview in which he described the *Estatuto* as a "necesidad táctica", an expression that was quickly spun by the conservative press to present Allende

Augusto Pinochet Ugarte. Bravo Lira (2016) has gone on to assert that authoritarian presidentialism has saved Chile from decay and poverty two times, first after the dissolution of the Spanish empire, then when it was almost drawn into the orbit of the Soviet empire during the *Unidad Popular* years.

as a trickster who was determined after taking power to violate the same rights he had sworn to uphold. This was the beginning of a campaign from the conservative media, the right and some in the Christian Democratic party to present the left as dangerous and treacherous, an image that later on was crucial in constructing the discourse that the Military Junta invoked to justify repression and to claim support for its projects, particularly for the 1980 constitution. Allende and the left were portrayed as enemies of democracy who had sought to destroy it from within; one of the most important roles that the new constitution had to play was to establish a "democracia protegida" that could count on strong powers to defend itself against any "enemigos internos".

The first conceptual appearance of the notion of discrimination in Chilean constitutional documents was formed in a moment of political distrust toward the socialism that was on the verge of gaining the presidential office. Its expansion took place through the 1980 constitution, which was itself the result of a political reaction materialized through a coup against the socialist exercise of the wide legal powers held by the presidency. Lacking congressional majorities to enact new legislation for implementing his program of creating a socialist economy, Allende took over hundreds of companies invoking the ample seizure powers granted by Law Decree No. 520, a decree enacted during a short de facto government in 1932, and invoked the *Ley de Seguridad Interior del Estado* to stop courts from expelling *pobladores* and peasants from illegal *tomas*. These practices were labeled "resquicios legales" by the opposition, who accused Allende of riding roughshod over the separation of powers and violating the constitution through them. Adding to this, an institutional deadlock over a constitutional amendment backed by the Christian Democrats embroiled the President in a series of conflicts with Congress, the Constitutional Tribunal, and the Controller-General. In August 1973, the Lower House passed a resolution accusing the president of violating the constitution, and, on September 11, 1973, the Military Junta employed the same arguments to justify the coup.

Employing the *resquicios legales* and other actions of Allende presented as breaches to the rule of law as rhetorical devises to legitimize its exercise of the constituent power, the Military Junta and its civil supporters promoted a constitutional project that would serve, as Barros[29] has shown, not as a

29 Barros (2002).

limitation to its power but as the institutional framework to consolidate it and to project its ideological program. This is evident in the way that the constitutional text employs the concept of discrimination to articulate fundamental neoliberal principles.

Art. 19.16 proclaims the "libertad de trabajo y su protección" – a diluted version of what other constitutions conceive as the right to work – and bans in its par. 3 "cualquiera discriminación que no se base en la capacidad o idoneidad personal", enabling legislation to establish Chilean nationality or age limits as requirements in certain cases. This wording does not attribute to the notion of discrimination itself a prejudicial character, focusing only on prohibiting those differences that can be characterized as arbitrary to the extent that they are not based on individual capacities and skills. While it cannot be denied that this article puts forward a technical legal concept of discrimination, it remains open to discussion whether this formulation accounts for the social phenomenon that sociopolitical vocabulary calls by that name.

In the two decades that followed the enactment of the 1980 constitution, however, the ban on arbitrary discrimination in the workplace remained as a 'dormant' constitutional clause. It was only in 2001 that a reform to the Labor Law Code gave effective applicability to the principle of non-discrimination in labor relations. It redefined discrimination, for the sole purposes of labor law, as any "distinciones, exclusiones o preferencias basadas en motivos de raza, color, sexo, edad, estado civil, sindicación, religión, opinión política, nacionalidad, ascendencia nacional u origen social, que tengan por objeto anular o alterar la igualdad de oportunidades o de trato en el empleo y la ocupación" and assigned labor-law judges jurisdiction over these cases through a new judicial remedy for the protection of fundamental rights in the workplace, the so-called *recurso de tutela laboral*. The *tutela laboral* is until today, even after the creation in 2012 of a judicial remedy against discrimination, the most effective judicial remedy for the protection of rights in the Chilean judicial procedure system.

Art. 19.22 establishes the principle of "no discriminación arbitraria en el trato que deben dar el Estado y sus organismos en materia económica", the right of not being arbitrarily discriminated against by the state in economic matters. To protect this fundamental right even further, among the many laws that the Junta enacted in its last day of government in 1990, there was a new judicial remedy, the *recurso de amparo económico*. This right has never

been understood in Chilean constitutional practice and doctrine as something different from the protection of market freedom. In theory, one could say that the state discriminates economically against those who have no guaranteed job or source of income, but that kind of conceptual creativity has not characterized the interpretation of this right. Art. 19.22, in connection with the directive in art. 98, which forbids the Central Bank from making decisions that directly or indirectly establish "normas o requisitos diferentes o discriminatorios en relación a personas, instituciones o entidades que realicen operaciones de la misma naturaleza", codifies within constitutional document the historical subjectivity of the conservative propertied classes under the *Unidad Popular* as a prohibition against interventions of the state in the economic field considered, in Hayekian vein, as too disruptive of the spontaneous market order.

These new concepts were introduced in the constitution by the lawyers who prepared for the Military Junta a preliminary draft of the new constitution, the members of the *Comisión de Estudios de la Nueva Constitución* (CENC), who began working right after the coup on September 1973. CENC members included its chair, Enrique Ortúzar, a former minister of justice under conservative president Jorge Alessandri; Enrique Evans, a former undersecretary of justice in the administration of Christian Democrat president Eduardo Frei; Alejandro Silva, the Christian Democrat president of the Bar Association who had published in 1963 a *Tratado de Derecho Constitucional*; a former congressman from the Conservative party; two lawyers close to the armed forces; and a young activist and professor of constitutional law named Jaime Guzmán, who would later be identified as the main political intellect behind the long-term neoliberal project of the regime (Cristi 2000). In their circumscribed heterogeneity, they were representative of the ideological sensibilities that had opposed the Allende government, and, with the departure of PDC members Evans and Silva in 1977 in protest for the official illegalization of that party and their replacement with Opus Dei member Raúl Bertelsen, the composition of the CENC reflected the political shifts in the regime.

The transcripts of the CENC meetings have been considered by constitutional judges and scholars as an authoritative source in interpreting the constitutional text since Pinochet declared them "material de consulta" by decree in March 1983. Nevertheless, the best guarantee for the continuity of the 'original' intent of constitutional clauses, of the understanding that the

jurists who assisted the dictatorship assigned to the text to the writing of which they had contributed, was that those same jurists remained powerful and influential after the demise of the dictatorship.

The CENC transcripts show that its members believed that the protection of private property and economic and social freedoms was the justification for a coup that they saw as a legitimate exercise of the right to rebel as outlined in the Thomistic tradition of natural law. The novel conceptual vocabulary that they introduced in the constitutional text,[30] which referred to *personas* instead of *habitantes del territorio* or *ciudadanos* as the holders of constitutional rights, declared in its art. 1 that families are the "núcleo fundamental de la sociedad", and that invoked the "bien común" as the ultimate purpose of the state, drawing heavily from the modern understanding of the Thomistic tradition elaborated by the social teaching of the Church. In this way, natural law was instituted as a significant source of contemporary Chilean constitutional law.[31]

In what ways did these ideological coordinates affect the reception of the concept of discrimination in Chilean constitutional law? In the 1980 constitution, the traditional declaration guaranteeing the "igualdad ante la ley" was complemented with a new paragraph stating the following: "Ni la ley ni autoridad alguna podrán establecer diferencias arbitrarias." This textual innovation has been interpreted in Chilean constitutional law as establishing the concept of "discriminación arbitraria" as a kind of private or public behavior that is the object of a constitutional prohibition. The content of this ban has been understood throughout the decades in a remarkably originalist way, invoking as the normatively correct way to interpret it the understanding that the persons who had the idea of writing down this sentence had about it. The origins of this clause can be found in the 93rd session of the CENC, held on December 5, 1974.[32] In that session, Alejandro Silva suggested that

30 This was not the only new conceptual vocabulary that CENC members introduced into the constitution; others included the jargon spread by the United States through the School of the Americas, which was obsessed with "seguridad nacional", and the neoliberal lingo that employed words such as "actividades empresariales".

31 Muñoz (2014).

32 That same day, while Pinochet's secret police still kidnapped people in broad daylight in the center of Santiago and threw tortured bodies into the Mapocho River, CENC chairman Enrique Ortúzar said that they were having a "very interesting debate about all the implications of consecrating the right to life in the Constitution" (which was in the end

the right to equality could be understood in two different forms: as banning any distinction between persons based on a "motivo sociológico" such as their "raza, sexo, estirpe, u otras condiciones", a sense that he observed: "se ha sostenido clásicamente"; but also in another sense that seemed to excite him more as he saw it: "comprendido sustancialmente en el principio básico de la igualdad ante la ley", and that meant that "el constituyente tiene que asegurar que, incluso, sobre la base de respetarla en el primer sentido, ninguna autoridad, ni siquiera el legislador, haga distinciones o discriminaciones manifiesta y notoriamente arbitrarias".

The echoes of the *resquicios legales* could still be heard reverberating in Silva's evident preoccupation with the arbitrariness of the state, but behind his lingering trauma with economic statism lay a deeper concern. If, for Silva, a devout Catholic, even the holder of constituent power, "el constituyente", had to refrain from making "discriminaciones arbitrarias", that was possible because he believed in the existence of an objective preconstitutional criterion for determining the arbitrariness or the reasonableness of constitutional norms: nature as revealed through religious doctrine and time-proven tradition. This becomes evident when Silva was asked by other CENC members the question of how the ban on "discriminaciones arbitrarias" would affect the inequality between men and women characteristic of Chilean family law, which, as Salinas has demonstrated, was little more than a transplant of canon law on marriage into Chilean legal texts.[33] Silva answered that what the constitution was prohibiting was distinctions that were not based on nature; in his words, "lo grave es hacer distinciones que no estén basadas en la naturaleza, es decir, que el legislador inspire y concrete distinciones entre el hombre y la mujer o cree situaciones o las favorezca que produzcan diferencias entre el hombre y la mujer que no estén basadas en la naturaleza, sino en un concepto equivocado sobre la igualdad de derechos entre ambos". "Eso", concluded, "sería arbitrario". Guzmán seconded him in

included as art. 19.1 of the 1980 constitution, displacing "la igualdad ante la ley" from its previous position as the first right enumerated in the bill of rights in the 1833 and 1925 constitutions) and affirmed with emotion that "everyone knows, especially those who have read Solyenitzin, how torture or psychic torments are often used against human beings". Ortúzar seemed oblivious to the fact that the same government that appointed him as its constitutional advisor had at its service a considerable number of experts in murder and torture.

33 Salinas (2004).

defending the unequal legal structure of traditional marriage stating that "es evidente que la cabeza de la familia debe ser el hombre, el padre o el marido". To clarify his point, in the following session, Silva opposed the proposal of some CENC members to establish in the constitution that men and women had equal rights, characterizing this proposal as "demagógica", since "no es efectivo que sean iguales los derechos del hombre y de la mujer, porque la naturaleza no los ha hecho iguales a ambos".[34] Clarifying the constitutional meaning of equality with respect to women, Evans concluded that any differentiation affecting them that "no se funda en una distinción derivada de la naturaleza propia del hombre y de la mujer ni en la naturaleza propia de la institución de la familia" would be a case of arbitrary discrimination.

It is hard not to conclude that, by adjectivizing the idea of discrimination with the notion of arbitrariness, Silva sought to ban through the constitution only extreme forms of racial hatred or misogyny that would have offended the sensibilities of an upper-class Chilean, not features of the social structure that he would have taken as given. That Silva had difficulty imagining cases of discrimination that actually existed around him is revealed by the example that he gave of what would count as arbitrary discrimination: the hypothetical case of a legislative enactment providing for the retirement of private employees with only 35 years of service in the case of those whose last names began with the letters from A to M and with 40 years of service in the case of those whose last names began with letters M through Z. However, when asked whether the legislator could establish different retirement ages for public and private employees, Silva responded that he saw that as a differentiated treatment for different situations and hence acceptable within the margins of flexibility enjoyed by the authority.

In sum, CENC members put forward an understanding of the concept of discrimination that emphasized the element of arbitrariness, a conceptual cognate of irrationality rather than one of structural disadvantage. This emphasis has been followed by most courts and authors in the decades since the enactment of the constitution. Despite the well-known open-ended character of constitutional clauses and their resulting semantic and political

34 This was, in the end, included in the constitution in 1999 through a short amendment, boastfully called "Establece Igualdad Jurídica entre Hombres y Mujeres", which replaced the expression "Los hombres" with "Las personas" in art. 1 and added to art. 19.1 the phrase "Hombres y mujeres son iguales ante la ley".

malleability, in the case of the Chilean constitutional discourse enunciated from positions of academic and judicial authority, the concept of discrimination is still interpreted predominantly through understandings established during the military dictatorship.

4 The concept of discrimination and judicial decisions on sexual diversity in postdictatorial Chile

Widespread prejudice against all expressions of sexual and gender diversity has a long history in Chile, finding its roots in the cultural, religious, and legal traditions coming from the Spanish colonization. Continued prevalence of those prejudices during the 19th century found expression in art. 365 of the 1875 Penal Code, which declared that "[e]l que se hiciere reo del delito de sodomía sufrirá la pena de presidio menor en su grado medio". The concept of "sodomía" was not defined by the legislator, and its precise meaning was therefore contested among criminal law courts and scholar.[35]

Although the diversification of urban life in the mid-20th century allowed the emergence of clandestine spaces of gay, lesbian and trans socialization in various social spaces and classes, the prejudices that continued to prevail in public culture prevented these segments of the population from obtaining political recognition and legal protection against the discrimination and violence of which they were systematically victims.[36] During the *Unidad Popular*, when various forms of rebellion shook the traditionalism of Chilean society, there took place the first public demonstration of gay people, on April 22, 1973. The timing of this event should not be confused with support for this struggle from the left, whose media used derogatory and mocking terms to refer to this demonstration.[37] It was under Allende that art. 365 of the Penal Code was amended to punish more severely the act of "sodomía" when one of the parties raped the other or when one of them was a minor.

The first visible actors to vindicate sexual diversity through discourses that challenged traditionalist beliefs and conservative politics emerged during the last years of the dictatorship, in the second half of the 80s, when the self-

35 Bascuñán et al. (2011) 76.
36 Contardo (2017).
37 Acevedo / Elgueta (2009).

described "colectiva lésbica" *Ayuquelén* and the gay duo known as *Las Yeguas del Apocalipsis* published manifestos and carried out artistic-political interventions questioning not only the murderous violence of the dictatorship but also the indifference of the Chilean left to the discrimination that sexual minorities and gender non-conformists experienced. One of *Las Yeguas*, Pedro Lemebel, who later became a renowned chronicler of marginality and social and sexual dissidence, read in 1986 at a leftist function his text *Manifesto (Hablo por mi diferencia)*, where he provokes his supposedly progressive listeners in this way: "Yo no voy a cambiar por el marxismo / que me rechazó tantas veces / No necesito cambiar / Soy más subversivo que usted."[38]

During the last years of the 1980s and the first years of the 1990s, when the country was seemingly fixated on the possibilities of a pacted transition and oblivious to its costs, AIDS had become for the gay population a health threat and a source of renewed prejudice and discrimination. To face these challenges, in 1991 a group of gay activists founded the first Chilean gay rights organization, the *Movimiento de Liberación Homosexual*;[39] since then, various LGBT organizations have been created both to assist individuals in trouble and to represent the interests of the sexually diverse community before the authorities.

In the last decade, it has become evident that the new generations of Chileans, increasingly less religious and more connected through the media to global cultural changes, show not only a greater acceptance but also a growing appreciation of sexual diversity. Social and cultural change has given greater visibility to diverse and non-conformist gender and sexual expressions, as well as to the acts of violence that still threaten individuals who exercise their autonomy in these fields. Despite the resistance still entrenched in certain groups, an authentic "sexually diverse citizenship"[40] has emerged gradually in Chile, expressive of both the growing political agency of LGBT organizations and actors and the tendency to grant sexual diversity stronger legal protections, a tendency to date expressed in the enactment of a statute against discrimination in 2012, the creation of the civil union pact for same-sex couples in 2015, and the enactment of a gender identity statute in 2018. Only evangelical churches, the Catholic Church and

38 Lemebel (2011).
39 Robles (2008).
40 Muñoz (2018).

its conservative intellectuals in Catholic universities, and the traditionalist elements of the political right have shown open antagonism against the strengthening of this sexually diverse citizenship, opposing each and every one of the legislative proposals that today make up the package of rights of sexually diverse citizens and making effort to mobilize religious beliefs to affect secular law – an example of what has been called "religious citizenship".[41]

A significant milestone in the progress of sexually diverse citizenship was the amendment to art. 365 that in 1999 decriminalized sexual relations between adults of the same sex. This amendment, however, left intact the criminalization of sexual relations – defined as "acceso carnal" – between an adult and a minor over the age of consent.[42] During the discussion of this legal reform, congressman Iván Moreira, a staunch Pinochet devotee, defended the ban, arguing that, although in practice it did not lead to arrests or convictions, it was important to keep it as a sign that legislators and society at large were not indifferent to this threat to social values. Moreira warned that the abolition of the criminal ban represented the first step in a series of demands that would soon include the legalization of marriages between couples of the same sex and their right to adopt children and educate them. Moreira, in this sense, was not wrong.

Courts have indeed had the opportunity to express their views on those demands. In 2004, the Supreme Court resolved a family dispute arguing that the protection of the best interest of minors demanded that Karen Atala, a lesbian mother of two, be deprived of the guardianship of her daughters in order to protect them from the prejudices existing in Chilean society against lesbianism. The *Atala* case has become well known because, after being decided by the Chilean Supreme Court, it landed in the Inter-American Court of Human Rights, becoming its first landmark case on sexual diversity rights. As justification for its decision, the Supreme Court wrote a short opinion which presented in stark terms the psychosocial dangers created by the family structure provided by the mother and her lesbian partner. It

41 Vaggione (2017).

42 In 2011, the Constitutional Tribunal declared that, since homosexual relations presented risks to minors of consenting age, it was constitutionally permissible to punish those adults who engaged in consensual sexual relations with them.

blamed Atala for neglecting her maternal role in order to pursue her sexual desires:

> "la madre de las menores de autos, al tomar la decisión de explicitar su condición homosexual, como puede hacerlo libremente toda persona en el ámbito de sus derechos personalísimos en el género sexual, sin merecer por ello reprobación o reproche jurídico alguno, ha antepuesto sus propios intereses, postergando los de sus hijas, especialmente al iniciar una convivencia con su pareja homosexual en el mismo hogar en que lleva a efecto la crianza y cuidado de sus hijas separadamente del padre de ésta."

The judges decided to deny Atala custody of her children arguing that, practically as a matter of definition, a same-sex couple could never provide a proper setting for raising children:

> "aparte de los efectos que esa convivencia puede causar en el bienestar y desarrollo psíquico y emocional de las hijas, atendida sus edades, la eventual confusión de roles sexuales que puede producírseles por la carencia en el hogar de un padre de sexo masculino y su reemplazo por otra persona del género femenino, configura una situación de riesgo para el desarrollo integral de las menores respecto de la cual deben ser protegidas."

It is a judgment that turns the reasoning of *Brown v. Board of Education* upside down. Unlike its counterpart, the Chilean Supreme Court preferred to be deferential to social prejudices instead of trying to change the structures and practices that embody and reproduce them.

Another important case in this sense was heard in 2011, when a substantial majority on the Constitutional Tribunal declined to declare unconstitutional the definition of marriage as the union between a man and a woman contained in art. 102 of the Civil Code, ruling that the constitution does not guarantee same-sex couples a right to marry. Only one judge considered the Code unconstitutional, while all nine of his colleagues voted jointly to reject its unconstitutionality, stating that the legal configuration of marriage was the competence of the legislator. Those nine judges, in turn, were divided into a majority of five moderate judges who concurred in inviting the legislator to create a legal alternative for same-sex couples, and a minority of four conservative judges who expressed their opposition, affirming that marriage is intrinsically heterosexual, since only couples composed of a male and a female enjoy a reproductive complementarity that is missing in couples composed of individuals of the same sex. For example, Raúl Bertelsen, the Opus Dei member of the CENC who had become a member of the Tribunal and would go on to become its president, wrote in his concurring opinion

that establishing procreation in art. 102 of the Civil Code as a fundamental purpose of marriage was consistent with "la importancia social del matrimonio" and that it was reasonable "que la ley reserve su celebración únicamente a personas de distinto sexo ya que sólo la unión carnal entre ellas es la que, naturalmente, puede producir la procreación, y excluya de su celebración a personas del mismo sexo". In his view, the reproductive complementarity between biologically different sexes provided sufficient justification for concluding that the differential treatment given by the legislator to heterosexual and same-sex couples did not amount to a discriminatory difference under art. 19.2.

The concept of discrimination, in sum, has practically played no role in significant judicial decisions on the rights of gay and lesbian people issued by the two highest Chilean courts in postdictatorial times. Law 20.609, the Antidiscrimination Statute that came into force in 2012, was supposed to solve these problems, but, as several scholars have noted, the Statute itself is plagued with shortcomings. It does not satisfy international standards for human-rights protection; its wording does not appear to offer protection against discriminatory acts as such but only against discriminatory acts that impinge on another constitutional right; and it does not create an administrative authority with the adequate powers to enforce it. It does not award damages to victims of discrimination, but rather it punishes them with the payment of a fine if they cannot prove they have, in fact, been discriminated against, and it does not instruct judges to shift the onus of proof from the plaintiff to the defendant, nor does it instruct them to examine the arguments with a stricter level of scrutiny. *Movimiento de Inclusión y Liberación Homosexual*, an LGBT rights organization that took part in the legislative discussion on the statute, has criticized the results of this Statute and has continuously called for its reform.

The blame for the unsatisfactory results stemming from the Antidiscrimination Statute, however, should not be attributed exclusively to the executive and to legislators. Judges, through their interpretation, have predominantly given the Statute a restrictive reading. This is largely due to the prevalence among them of a formalist understanding of the concept of arbitrary discrimination, which restricts it to 'irrational' and 'capricious' behavior, 'ungoverned by reason', and that lacks any justification whatsoever. This narrow understanding of the constitutional concept of arbitrary discrimination, which draws on the understanding of arbitrary discrimination that

characterized the CENC debates, was consolidated in the 1990s by the Supreme Court and has been used explicitly by judges to interpret the Antidiscrimination Statute. In light of this conceptualization of discrimination, it is not surprising that most rulings on cases brought under the Antidiscrimination Statute have found without much discussion that there was no discrimination. Another frequent conclusion reached by many judges was that the plaintiff had not sufficiently proved the alleged facts or their discriminatory character. These decisions show that judges have often applied a strict standard of proof and justification in evaluating claims of discrimination made by plaintiffs instead of using flexible standards of proof and scrutinizing the evidence and the arguments offered by defendants closely.[43] Unsurprisingly, in the very few cases when judges applied strict scrutiny to the normative and factual allegations of the defendants, they tended to side with the plaintiffs. Judges, as can then be seen, also bear a not inconsiderable share of responsibility when it comes to the shortcomings of the Antidiscrimination Statute.

5 Concluding remarks

Let me conclude with two brief reflections. The phenomenon of discrimination, owing to its complexity but more fundamentally to the particular human experiences that are summarized through this concept, requires a pluralistic approach. While employing constitutional documents to approach the conceptual history of discrimination can shed light on only a part of the whole story, i. e., on discourses that make use of positions of power and influence; undoubtedly, in order to gain a broader perspective of the reality under study, there are other voices that must be included. Approaches to history from below can complement this focus on institutions and on discourses from power with a concern over the use of fundamental sociopolitical concepts in everyday conversations and personal storytelling.

Last but not least, dealing with a concept such as discrimination makes evident the challenge of bringing to light the influence of power relations on the historical existence of legal institutions. From the point of view of legal doctrines, what is needed a specific system of knowledge, concepts, and words that express abstract ideas that can be employed in legal reasoning

43 Muñoz (2015).

in order to guide conduct in accordance with legality. Legal doctrine, for that reason, tends to have an idealized vision of its own concepts, which it sees as analytical instruments for the rationalization of fundamental values. However, as Reva Siegel has shown regarding American constitutional praxis, even a matter apparently as pristine as the content of the constitutional principle that prohibits discrimination is ultimately the product of political disputes over its interpretation and application even when it is invoked to claim, express and channel social concerns openly opposed or divergent among themselves.[44] Histories of legal doctrines must make visible the points where sociopolitical conflicts penetrate the autonomy of legal reasoning in order to expose these interactions between social reality and legal knowledge.

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44 Siegel (2004) 1475.

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