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PETER COLLIN
AGUSTÍN CASAGRANDE (EDS.)

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Manuel Bastias Saavedra

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MAX PLANCK INSTITUTE
FOR LEGAL HISTORY AND LEGAL THEORY

Manuel Bastias Saavedra

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1 Introduction

The problematic relationship between law and diversity can be attributed to a fundamental incommensurability that exists among different loci of structured observation in contemporary society. These problems did not exist for the *ancien régime* society which operated on assumptions of natural unity and difference. This construction of unity and difference was based on the unity and indivisibility of God and the order he gave his Creation, while difference was sustained through the image of the body and the harmony achieved by the necessary diversity and autonomy of its organs.[1] This worldview thus presupposed the existence and the necessity of hierarchies and inequalities, and the function of law was to sustain these differences through status and privilege, which were seen as the place occupied by these persons in the natural order.[2] Early modern juridical culture thus functioned under the conception that what existed in the world had to have a correlate in the juridical realm: social differences considered to be natural were thus understood through diverse *iura singularia* or *privilegia*, giving groups of persons or social circumstances a defined correlate in the juridical sphere.[3]

The reorganization of law around the principle of equality in the 18th century, however, meant that law could no longer recognize differences that were not produced by law itself. Social categorizations hitherto considered to be natural were replaced with the abstract principle of equality before the law, which created a fracture between socially and legally relevant differences. The principle of equality enshrined in many constitutions of the 18th and 19th centuries eroded the relative commensurability between societal and juridical dif-

1 Hespanha (2016) 71.
2 Hespanha (2008) 26–28.
3 Duve (2007).

ference. The fixing of differences through privileges was replaced principally with legal distinctions that no longer necessarily corresponded with social differences outside of law. In the newly founded Latin-American republics, for example, the indigenous condition and the condition of women were differences no longer observable to law. This does not mean that these differences ceased to exist; but rather that they had to be considered solely in terms of the distinctions relevant to the legal system (citizen / non-citizen; owner / non-owner; buyer / seller; and so on). Seen in this way, the question of diversity becomes necessarily more complex because diversity within law no longer corresponds with diversity in society. This fracture is at the root of contemporary demands on law for increased awareness of social, racial, ethnic, linguistic, and sexual diversity. The heightened awareness of contemporary legal discourse as to the problem of diversity is nothing more than a reflection of the way society is revealing these silences and blind spots of the legal system.

This contribution takes these tensions between different forms of societal observation of diversity to rethink the problem of difference in the Chilean constitutions from 1810 to 1980. Seen from this perspective, the historical evolution of constitution-making can be seen, beyond its claims to formal equality, as a continuous process of constructing legal difference. Thinking about difference and the constitution poses methodological and even epistemological problems that are not easily solved. On the one hand, there is the question of sources and how the legal historian is supposed to see that which has been rendered invisible in the legal codes. The second problem runs deeper, and it refers to the assumption that there is an objective reality which, if accurately scrutinized, will reveal groups of people neglected by law. Elsewhere, I have examined the methodological and epistemological questions that arise from looking for diversity, or the absence thereof, in law.[4] In this contribution, I should like to take another route by reflecting on how various forms of difference were constructed in 19th- and 20th-century Chile. In the first section, I shall illustrate how categories of difference were constructed or concealed through population registers and censuses. I shall endeavor to illustrate how widely different categories of racial, ethnic, or national adscription were applied to relatively similar social situations, and

4 Bastias Saavedra (2020).

then reflect on what this means in terms of the difference that the (legal) historian can effectively detect through the sources. In the following section, I shall focus on the differences constructed through Chilean constitutions from 1810 to 1980. This does not attempt to be a comprehensive survey; it seeks only to illustrate how, despite the semantics of equality traditionally associated with it, the constitution actually sustained and reinforced many differences.

2 Counting people: constructing and concealing differences

The census is a good point of departure since it demonstrates the difficulties posed by counting 'population'. Even though the persons who were charged with counting began with the assumption that, through this procedure, they were merely producing a representation of reality, the process of creating censuses implied a process of serialization, standardization, stabilization of differences, complexity reduction, and disaggregation. "In the census form, reality and discourse intersected almost immediately. The form allowed reality to enter the realm of words and numbers, but it functioned as a gate, keeping out many aspects that were of no interest to administration."[5] Census taking was therefore not simply a process of counting people living in a given territory, but rather its very operation constructed the population according to certain arbitrary categories which were functional to government.

The variation in social categories represented in the Chilean censuses since the late 18th century is illustrative of this situation. General population counts were not common during the colonial period, but provinces and bishoprics usually kept some sort of register of their population for the purpose of tribute and tithe collection. One count made by the Bishopric of Santiago in 1778 that also included the province of Cuyo, then under the jurisdiction of the government of Chile, counted the population as follows: white: 190,919; mestizos: 20,650; Indios: 22,568; blacks: 25,508.[6] These categories were, however, less stable than we may think since other population counts followed different distinctions. On taking possession of his posi-

5 Göderle (2016) 78.
6 Quoted by Silva Castro (1953) VII.

tion as Intendant of the province of Chiloé in 1784, Francisco Hurtado was given the order to create "an exact general register and census of all the inhabitants of those islands, with a clear account of the towns they belong to and distinguishing between the sexes".[7] Hurtado's register was as follows:

Castro:
Spaniards 10,035
Indios 8,750
Chacao:
Spaniards 3,107
Indios 1,474
Calbuco:
Spaniards 1,934
Indios 1,403

A register of the Bishopric of Concepción in 1812 again provided different categories, distinguishing between men, women and children, according to sex, and counted 'Spaniards', 'Indians', and 'mestizos, blacks and mulattos'. The latter were counted in the same category. This register additionally counted the 'infidels in missions' and the 'infidels in the whole territory'.[8] The 'infidels' counted by this census were most probably the *Wenteche*, the *Nagche*, or the *Lafkenche*, the autonomous indigenous sub-groups inhabiting the region adjacent to the province of Concepción.

The first national census was attempted in 1813. Here, men and women were divided according to their marital status (single, married, widower). It should be noted that, as in other Catholic countries, divorce and separation were not available options. The census form also divided age groups into five cohorts (1–7; 7–15; 15–30; 30–50; 50–100) and provided space for including the profession. Finally, it contemplated distinctions of 'origin and caste' as follows: American Spaniards; European Spaniards; Asian, Canarian, and African Spaniards; foreign Europeans; Indios; mestizos; mulattos; and blacks.[9] The 1835 census did not use any kind of ethnic, racial, or national distinction, enumerating only the population of single and married men and

7 Silva Castro (1953) VII–VIII.
8 Un censo del obispado de Concepción en 1812 (1916) 266–267.
9 Egaña (1953).

women.[10] The 1865 census constructed quite different categories: Sex, age, marital status, literacy, nationality, and 'physical or moral' disability.[11] The 1875 census asked about the parish the individual belonged to and distinguished between urban and rural dwellings.[12] The 1885 census did not include these items, but attached a new one on primary education to the question on literacy in addition to a question on vaccination.[13]

Through the way they counted, population registers and the census were suggesting that certain differences were more or less relevant. Until 1813, for example, ethnic or racial categorizations were the most prominent way of making distinctions. Thereafter, we find other forms of difference: man / woman; profession; single / married / widower; able-bodied / disabled; literate / illiterate; national / foreigner; urban-dweller / rural-dweller; vaccinated / unvaccinated. Of course, not all of these differences were completely relevant to the everyday life of the population surveyed, and other forms of difference that may have had effects on daily life, such as religion or language, were not considered. Nevertheless, the process of census making precisely implied the transformation of the complex social realities of the individuals into standardized and uniformly comparable units. The process of serialization required this: "The real achievement of the census operation reached far above the collection of population data: it serialized the social realities of the citizens in a uniform way. Every single citizen could be described individually by the same criteria, once the census was completed."[14]

If we focus only on the racial / ethnic / national differences as they evolved over time (as synthesized in table 1), we see how serialization leveled the population to properties that were considered more relevant for administration and erased other forms of difference that were considered more salient by pre-republican society: by the mid-19th century, nationality became the sole marker that the census registered.

10 *Repertorio Chileno. Año de 1835* (1835) 171 ff.
11 *Censo Jeneral de la República de Chile* (1866).
12 *Quinto Censo Jeneral de la Población de Chile* (1876).
13 *Sesto Censo Jeneral de la Población de Chile* (1889).
14 Gödderle (2016) 80.

Racial / Ethnic / National categories:

1778	1784	1812	1813	1835	1865	1875	1885
White	Spaniards	Spaniards	American Spaniards	None	Nationality	Nationality	Nationality
Indios	Indios	Indios	European Spaniards				
Mestizos		Mestizos	Asian, Canarian, African Spaniards				
Blacks		Mulattos	Foreign Europeans				
		Blacks	Indios				
			Mestizos				
			Mulattos				
			Blacks				

The table is particularly illustrative of how differences were both constructed and concealed in the process of counting. The item on nationality was quite evidently intended to supersede other kinds of ethnic or racial adscription. The distinction of 1813, for example, between different categories of Spaniards is, however, particularly interesting in that it shows that categories of difference also contain differences within themselves. The category 'Indios', which is a constant in our samples from 1778 until 1813, is also a case in which difference could be found within difference. Do they belong to the *Picunche*, the *Huilliche*, the *Pehuenche*, or the *Puelche*? Are they *Wenteche*, *Nagche*, or *Lafkenche*? Are they perhaps Christian or non-Christian? – and do these further distinctions matter at all?

These observations are simply made to suggest that categories of difference cannot avoid, at the same time, concealing differences, and, in my view, this means that the (legal) historian cannot simply name what has been made invisible without going down a rabbit hole of further distinctions. This does not mean that the counterfactual critique of existing or past law is not valuable; it is necessary. However, this manner of proceeding has to rely on informed knowledge about the differences that are actually being produced by law. The first step is thus methodological, and it is asking: what differences are produced through the constitution? The following section

addresses this issue by looking at the Chilean regulations and constitutions that were enacted between 1810 and 1980.

3 Constructing and concealing difference in Chilean constitutional history

Like other Latin-American states, Chile has had several constitutional documents throughout its history. Four provisional regulations and one provisional constitution characterized the independence era, between 1810 and 1818, while four constitutions were enacted during the period of republican consolidation in the decade between 1822 and 1833. From 1833 until the present, Chile has only had two constitutional documents: one from 1925, when Arturo Alessandri successfully derogated the 1833 Constitution to strengthen the powers of the presidency; and that of 1980 enacted during the dictatorship of Augusto Pinochet. This latter constitution is still in force, though subject to several reforms since 1989, the reforms of 2005 being arguably the most important.

This section does not seek to provide a comprehensive review of Chilean constitutional history. Instead, I focus on four ways in which Chilean constitutions have created difference either through distinctions it produced or by omission. These are only intended to serve as examples of the manner in which constitutions, despite the semantics of equality, have constructed different forms of difference. The following sections thus deal with the treatment of corporate and individual representation, of nationality and citizenship, and of religious diversity to illustrate how the constitution produces and reproduces forms of societal difference through its text, and the implicit assumptions that surround it. The final section, by looking at the problems of economic inequalities, gender and sexual diversity, and the status of indigenous peoples, addresses how the abstract principle of legal equality conceals and reinforces the implicit assumptions and societal prejudices on which constitutional texts are based.

3.1 Corporate and individual representation, 1810–1833

During the process of independence from Spain (1810–1818), several self-appointed bodies, the *juntas*, drafted provisional regulations. The first of these texts was the *Reglamento Provisional de la Junta Gubernativa del Reino* from 1810, followed by the *Reglamento para el arreglo de la Autoridad Ejecutiva Provisoria de Chile* from 1811.[15] These first two regulations were not properly constitutions and were intended to regulate the government of the Kingdom of Chile during the French occupation of Spain. The regulation of 1812 began to lay the groundwork for the independence of Chile from Spain by removing recognition of Spanish sovereignty in favor of "the People of Chile".[16] It declared, in its second article that "[t]he People shall make its constitution through their representatives" and declared in article 5 that "[n]o decree, provision or order emanating from authority or court outside of the Chilean territory shall have any effect".[17] The regulation of 1814 created the role of the Supreme Director, which concentrated the power of the executive in one person.[18] This constitutional period of the Independence concluded in 1818 with the enactment of a *Provisional Constitution for the State of Chile*.[19] In the period of republican con-solidation, the constitutional drafts shifted the sovereignty from the people to the nation. The constitutions of 1822, 1823, and 1828 began with defining 'The Chilean Nation and Chileans' and declared that the Nation was the ultimate source of sovereignty. While the 1833 constitution also declared the Nation as the source of sovereignty, its structure was different, beginning with the territory and including the definition of the Nation within the section on the form of government.

José María Portillo, through his analysis of the Hispanic-American constitutional process, has argued that "reducing the diversification of the constituent power and 'nationalizing' it, in the sense of making it function only within the spaces that are defined as nations, was therefore the first visible characteristic of the constitutionalism immediately following the independence."[20] At the heart of this push towards 'nationalization' was the question

15 *Reglamento para el arreglo de la autoridad ejecutiva provisoria de Chile.*
16 *Reglamento constitucional provisorio del Pueblo de Chile* (1812).
17 *Reglamento constitucional provisorio del Pueblo de Chile* (1812).
18 *El reglamento para el gobierno provisiorio.*
19 *Proyecto de Constitución Provisoria para el Estado de Chile* (1818).
20 Portillo (2016) 70.

of sovereignty and representation. With the crisis of the Spanish monarchy and its repercussions among the American kingdoms, sovereignty was understood to have reverted to the 'pueblos' as the basic corporate units of representation. The formation of *juntas* in different territories of the Americas and their transition to forming congresses responded to the idea of reconstructing the legitimacy of the larger political units that had collapsed after the Napoleonic invasion. The first Chilean juntas therefore sought to recreate the kingdom as the general political body of the *pueblos* and provinces of Chile. The whole process of independence was, however, riddled with conflict over where to place the ultimate source of sovereignty: in the local republics constituted by *pueblos* and provinces, or in the larger political body identified with the nation or the people. As Portillo notes, the nation was not a predetermined outcome of this constituent process because, as happened to be the case in many places, the constituent power manifested itself in provinces and towns, leading potentially to the appearance of countless sovereign and self-constituted republics.[21]

This tension was already evident in the formation of the First Congress of Chile. After its dissolution by the Spanish regiment in 1811, José Miguel Carrera wrote that the Congress had been "null since its inception […]".

> "The *pueblos* elected their representatives before their number of inhabitants had been counted and before knowing how many [representatives] they were entitled to. Thus, a field with four huts had as much representation as the most populous neighborhood […]. Chile has committed the same errors of the Spanish courts, which it is repeating."[22]

Carrera's comments signaled the tensions between individual and corporate representation that was at the heart of the early constitutional process. These tensions began to be addressed during the period of republican consolidation when the nation was placed as the source of all sovereignty. The 1822 Constitution stated in "Art. 1. The Chilean Nation is the union of all Chileans: in it essentially resides the Sovereignty, the exercise of which it delegates according to this Constitution";[23] the 1823 Constitution says: "Art. 1. The State of Chile is one and indivisible: National Representation is distributed across the Republic";[24] and the 1828 Constitution declared in "Art. 1.

21 Portillo (2016) 41.
22 Quoted by Silva Castro (1953) X.
23 *Constitución política del Estado de Chile* (1822).
24 *Constitución política del Estado de Chile* (1823).

The Chilean Nation is the political union of all Chileans, natural and legal."[25] Finally, the 1833 Constitution declared in Art. 3 that "[t]he Republic of Chile is one and indivisible" and in Art. 4 stated that "[t]he sovereignty resided essentially in the Nation which delegates its exercise to the authorities established in this Constitution."[26] The first and foremost interest of the constitutions that were enacted during the early republican period was thus to dissolve the representative power of the provinces and the *pueblos*, and create new forms of general representation. The local diversity of political power was therefore the first victim of the leveling effect of the constitution and its creation of the Chilean nation.[27]

3.2 Nationality and citizenship, 1810–1980

The second way differences were reconstructed was through the creation of 'Chileans', the category that grouped the individual members of the nation. In the Constitution of 1822, Chileans were defined as those "born in the territory of Chile"; "the children of Chilean father and mother, even if born outside the country"; "foreigners [men] married to Chilean [woman], after three years of residence"; and "foreign men married to foreign woman, after five years of residence" having a certain income and property.[28] The 1823 Constitution with certain variations adopted these definitions and included those individuals given the nationality through grace by the legislative branch.[29] The 1828 Constitution distinguished between natural and legalized Chileans, and the 1833 Constitution simplified the distinctions to birthplace, blood, and naturalization by residence or grace.[30] The operative cat-

25 *Constitución política de la República de Chile* [1828].
26 *Constitución de la República de Chile* (1833).
27 The *Federal Laws* of 1826 took the older principle and established in article 1 that "[t]he Republic is divided into provinces, municipalities, and parishes"; article 5 established that each province would have an assembly, and following articles granted the assemblies great powers in administration, taxation, and appointment of judges, among others. These laws prompted a protracted civil war that ended in 1832 and led to the enactment of the 1833 Constitution, which definitively eliminated the representation of the provinces. See *Proyecto de un reglamento provisorio para la administración de las provincias, presentado al Consejo Directorial por el Ministro del Interior, en 30 de Noviembre de 1825*.
28 *Constitución política del Estado de Chile* (1822).
29 *Constitución política del Estado de Chile* (1823).
30 *Constitución política de la República de Chile* (1833).

egories that had been functional in the previous period – Spaniards, Indios, mestizos, mulattos, blacks – were thus rendered irrelevant as primary identity markers for the constitutional order.

Though found in the same section of the 1833 constitution, nationality was understood throughout the 19th century as a category that was distinct from citizenship. The 1822 Constitution indicated in Art. 14: "Citizens are all those who have the qualities contained in Art. 4 [of Chileans] as long as they are over twenty-five years of age, or married, and can read and write."[31] The 1823 Constitution placed higher requirements on citizenship. Art. 11 indicated that the active citizen had to be of twenty-one years of age or married, Catholic, be able to read and write (in 1840) and fulfill certain formal requirements. Citizens also had to have at least one of the following: real estate of at least 200 pesos; commercial activity of at least 500 pesos; an industrial profession; to have taught or brought invention or industry to the country; to have fulfilled their civic merit.[32] The 1828 Constitution defined active citizens as Chileans who had achieved twenty-one years of age, or earlier if they were married or served in a militia; and practiced a science, art or industry, or held employment, or had capital, or had landed property off which to live.[33] Finally, the 1833 Constitution defined citizens in Art. 8 as Chileans of twenty-five years of age, if single, and twenty-one, if married, and able to read or write. It also required one of the following: 1) property or capital invested in an industry; 2) the practice of an art or employment or being in receipt of rent or income.[34]

Citizenship could also be lost or suspended for different reasons. According to the 1822 Constitution, citizenship could be suspended as a result of "legal incompetence owing to moral or physical incapacity"; because of debt; for those in the station of "salaried domestic servant"; in cases of "unknown mode of living"; or if the individual was going through criminal proceedings.[35] In the 1823 Constitution, citizenship was lost, among others, in cases of "fraudulent bankruptcy". Citizenship was suspended in cases of judicial conviction; owing to "physical or moral ineptitude that allows free and reasoned action"; because of debt; on account of a lack of employment

31 *Constitución política del Estado de Chile* (1822).
32 *Constitución política del Estado de Chile* (1823).
33 *Constitución política de la República de Chile* [1828].
34 *Constitución de la República de Chile* (1833).
35 *Constitución política del Estado de Chile* (1822).

or "known way of life"; if one was a domestic servant; as a result of criminal conviction; or because of "habitual inebriation or gambling".[36] The 1828 Constitution suspended citizenship because of "physical and moral ineptitude, for those in the station of domestic servant, or for being in arrears with taxes. Citizenship was lost, among other things, owing to conviction for notorious criminal activity, and fraudulent bankruptcy.[37] The 1833 Constitution followed the same articulation.[38] Since many articles of the constitution protected or granted certain faculties to citizens, and not to nationals, the manner in which citizenship was defined had consequences not only for representation, but also for constitutional guarantees more generally.

The distinction between nationality and citizenship is illustrative of how the constitution contained and sought to reconcile the tensions between equality and difference. As seen in the previous section, one way in which nationality acted for equalization was by detaching representation from the corporate bodies and tying individual representation to the nation-state. In the early constitutional documents, having Chilean nationality guaranteed equal treatment under the law, allowed the occupation of public office, and was tied to the obligation to help shoulder the 'burden of the State'.[39] The 1828 Constitution tied the constitutional guarantees less to nationality and rather bound them to the idea of 'men'. In Art. 10, it stated that the "nation guarantees every man, as unalienable and imprescriptible rights, *liberty, security, property, the right to petition, and the faculty to publish opinions*".[40] In Art. 125, it went on to declare "[a]ll men equal before the law". The form of the 1828 Constitution pertaining to the guarantee of the rights of *man* presumably shows, as Bartolomé Clavero has argued, that what was understood here was effectively the individual male who enjoyed "both freedom in the public domain and power in the private sphere".[41] This, of course, did not include women or those considered dependents, such as workers or servants. Equality before the law was, until 1828, thus understood in a rather restrictive manner.

36 *Constitución política del Estado de Chile* (1823).
37 *Constitución política de la República de Chile* [1828].
38 *Constitución de la República de Chile* (1833).
39 *Constitución política del Estado de Chile* (1822); *Constitución política del Estado de Chile* (1823).
40 *Constitución política de la República de Chile [1828].*
41 Clavero (2005) 21.

This was changed in the 1833 Constitution, which declared in Art. 12 that "every inhabitant of the Republic" is guaranteed "equality before the law" alongside other rights listed in the article.[42] The 1925 Constitution sustained this formulation by guaranteeing equality before the law to "every inhabitant of the Republic".[43] The 1980 Constitution provided guarantees of "equal protection before the law and exercise of rights" to "every person".[44] Chilean legal scholars understood this function of nationality after 1833 as establishing for 'all inhabitants' the bond between individual and State.[45] Equal rights and obligations derived from this bond were understood to be guaranteed by the political constitution irrespective of class, race, and gender.

While nationality undergirded the principle of equality before the law, the idea of citizenship was of a different nature altogether. The implicit expectation of citizenship, as granting political rights, was that it could only be exercised by restricted segments of the population. This was elaborated upon in Chilean constitutional scholarship by Jorge Huneeus, who, in his 1888 analysis of the Constitution of 1833, in force at the time, argued that citizenship should not be regarded as a right but as the exercise of a public office. With this in mind, restrictions on the exercise of suffrage rights, as for any public office, had to be based on the "*capacity, intelligence and independence* of voters".[46] Suffrage rights were thus "restricted and entrusted only to the persons who satisfy the mentioned conditions",[47] which, as we have seen, ranged from literacy to having property or a profession. The issue of women's suffrage was also a question on which that the constitution was silent. Huneeus addressed this issue in the same study, arguing that, though not "literally and categorically excluded from suffrage" in the constitutional text, women would not be qualified to suffrage rights since they were also usually excluded from holding public office.[48]

The 1925 Constitution sustained these differences between nationality and citizenship. Citizenship was granted to "Chileans who have reached twenty-one years of age, can read and write, and are enrolled in the elec-

42 *Constitución de la República de Chile* (1833).
43 *Constitución Política de la República de Chile* (1925), Art. 10,1.
44 *Constitución Política de la República de Chile* (1981), Art. 19.
45 Matta Vial (1922) 249.
46 Huneeus (1890) 87. Italics in the original.
47 Huneeus (1890) 67.
48 Huneeus (1890) 89.

toral registers."[49] The suspension of citizenship was reduced to two conditions: "1. Physical or mental ineptitude that impedes free and reflexive reasoning; and 2. The citizen being prosecuted for a felony that carries a grievous sentence". Citizenship could be deemed forfeit through the loss of Chilean nationality and "For conviction of a grievous sentence."[50] Again, though the Constitution did not explicitly exclude women from suffrage, they did not gain the right to vote in local elections until 1935 and had to wait until 1952 to vote in presidential elections. The 1980 Constitution only restricted citizenship to Chilean nationals over the age of eighteen, thus reflecting the overall trend toward universal suffrage that played out throughout the 20th century.[51]

Thus, until the around the 1960s, citizenship was qualitatively different from nationality insofar as it was considered to encompass only a very narrow segment of the total population. José María Portillo has noted that the constitutional construction of nationality and citizenship implied a "double process of re-personalization".[52] On the one hand, the process of republican constitutionalism created a general process of inclusion through nationality. On the other hand, indigenous peoples, women, and other subaltern groups were often deprived of citizenship through its requisites, the conditions for suspension, and by underlying assumptions about requirements of individual quality and worth. The overall process can be described as one of general inclusion, through the act of leveling out differences on the marker of nationality, and one of selective disenfranchisement through the reintroduction of economic, social, ethnic / racial, and gendered differences through the system of citizenship. The moment of equalization and the moment of differentiation of the constitution cannot be separated from one another.

3.3 Religious unity or diversity, 1810–1980

Chilean constitutional history has also managed the issues of religious diversity and freedom of religion in different ways. While ready to break politically from the Spanish crown, early constitutional texts were more ambivalent about breaking with the prominent role of the Catholic faith in public

49 *Constitución Política de la República de Chile* (1925), Art. 5.
50 *Constitución Política de la República de Chile* (1925), Arts. 8 and 9.
51 *Constitución Política de la República de Chile* (1981), Art. 13.
52 Portillo (2016) 70.

life. The constitutional debate throughout the 19th century would focus more on the question of religious tolerance rather than on questions of the separation of Church and state or freedom of religion. Different constitutional texts followed different political projects, and the wording of the relationship between state, nation, and the Church varied accordingly.

The *Reglamento Constitucional Provisorio* of 1812 was an example of ambiguity that drew condemnation from sectors aligned with the Church despite the prominent place the Catholic faith was granted in the text. In Art. 1, it declared: "the Catholic Apostolic faith is and always will be that of Chile."[53] Since it had failed to refer explicitly to the Roman Catholic Church and exclude the practice of other religions, this constitution was seen as providing cover for the practice of dissenting faiths.[54] The 1818 Constitution addressed these issues in Title II "Of the Religion of State", declaring in one sole article:

> "The Roman Catholic and Apostolic Religion is the only and exclusive religion of the State of Chile. Its protection, conservation, purity, and inviolability will be one of the primary duties of the leaders of society, who shall not ever allow other public worship or doctrine contrary to that of Jesus Christ."[55]

The distinction between public and private worship introduced by the 1818 Constitution provided the model followed by most 19th-century constitutions for reconciling the primacy of the Catholic faith with the embrace of religious tolerance. The Constitution of 1822 explicitly called attention to the distinction between public acts and private opinions in Art. 10:

> "The Religion of the State is the Roman Catholic and Apostolic with exclusion of any other. Its protection, conservation, purity, and inviolability are one of the primary duties of the Heads of State, as well as the utmost respect and veneration of the inhabitants of its territory, *regardless of their private opinions*."

Additionally, the constitution declared in Art. 11 that "[a]ny violation of the previous article is a crime against the fundamental laws of the country".[56] This constitution was exceptional in that it anchored its views on religious tolerance on the freedom of opinion. Subsequent constitutions focused instead on the prohibition of *public* worship, which, we shall see, had doc-

53 *Reglamento constitucional provisorio del Pueblo de Chile* (1812).
54 Quiroz González (2020) 2.
55 *Proyecto de Constitución Provisoria para el Estado de Chile* (1818).
56 *Constitución política del Estado de Chile* (1822). Italics are mine.

trinal consequences towards the late 19th century. The 1828 Constitution thus declared in Art. 3 that the religion of the Chilean nation "is the Roman Catholic and Apostolic with exclusion of the public practice of any other".[57] Art. 5 of the 1833 Constitution, finally, declared the Catholic faith the religion of the Republic of Chile, "excluding the public exercise of any other".[58]

Within the spectrum of early constitutional texts, the 1823 Constitution was an outlier, not only for suppressing the possibility of religious tolerance, either through freedom of opinion or through private worship, but also for making the profession of the Catholic faith an explicit requirement for citizenship. Art. 10 of the 1823 Constitution thus stated: "The Religion of the State is the Roman Catholic and Apostolic: excluding the cult and practice of any other."[59] Given the fact that the nascent Chilean state wished to benefit from closer economic ties to Britain and the United States and attract foreign migration, other constitutional texts had taken a pragmatic view toward religious tolerance. The framer of the 1823 Constitution, Juan Egaña, had argued against these pragmatic views in his *Examen instructivo sobre la Constitución Política de Chile, promulgada en 1823*, by pointing out that "without a uniform religion you can build a nation of merchants, but not one of citizens". He expanded on these views some years later in his *Memoria política sobre si conviene a Chile la libertad de cultos*,[60] in which he more emphatically defended the view that any concessions on religious tolerance would lead to a state of faithlessness and hence to unrest and to the potential destruction of the state. "To avoid these evils – he argued – the best remedy that politics has found has been to have a uniform religion and with this empire have found a long and solid consistency."[61]

These views on how to deal with religious diversity in the early republican order, however, did not become dominant in the 19th century. Instead, the issue of religious tolerance seems to have been settled by relying on the distinction between public and private worship. This distinction made it possible to sustain the official and public primacy of the Catholic faith while allowing the private practice of other religions. This was the solution pro-

57 *Constitución política de la República de Chile* [1828].
58 *Constitución de la República de Chile* (1833).
59 *Constitución política del Estado de Chile* (1823).
60 For a review of the context of this text, see Stuven (2016).
61 Egaña (1825) 26.

vided by the 1833 Constitution, which, through laws and refining the constitutional interpretation of Art. 5, eventually allowed a constitutional recognition of religious tolerance that did not go so far as to guarantee freedom of religion. An 1844 law, for example, allowed the marriage of non-Catholics without requiring them to appear before a Catholic priest, while, in 1852, the president allowed the construction of a Protestant church.[62] The enactment of the Interpretative Law of July 27, 1865, however, gave freedom of worship constitutional status just as increased migration from Northern Europe began to reshape the religious makeup of the country and as lawmakers increasingly took on more liberal and positivist positions.[63] This law made clear that Art. 5 of the Constitution allowed religious practice in privately owned spaces and allowed religious education in privately administered schools. Jorge Huneeus argued that this interpretative law, alongside the broadened freedom of press and gathering, meant that Chile enjoyed freedom of religion *in fact* even if it was not constitutionally enshrined among the guarantees.[64] The interpretative laws were complemented by a series of reforms in the 1880s that removed many public functions from the Church: the law of non-denominational cemeteries; the law of civil marriage; and the creation of the civil registry office, which took birth, death, and marriage certificates away from the Catholic Church. These steps toward freedom of religion were eventually enshrined in the 1925 Constitution, which guaranteed the "profession of all faiths, freedom of conscience and the free exercise of all cults that are not opposed to moral, good customs and public order […]".[65]

The Constitution of 1980 presented a different way of structuring the problem of religious diversity, freedom of conscience, and secular public policy. While point number 6 of Art. 19 on "Constitutional Rights and Obligations" guarantees the "freedom of conscience, the profession of all faiths and the free exercise of all cults that are not opposed to moral, good customs and public order",[66] the constitution is founded on and prescribes many elements of a doctrinal Catholic worldview. These clauses are found

62 Quiroz González (2020) 6.
63 On the latter, see Bastias Saavedra (2015b).
64 Huneeus (1890) 72.
65 *Constitución Política de la República de Chile* (1925), Art. 10,2.
66 *Constitución Política de la República de Chile* (1981), Art. 19,6.

mainly in Arts. 1 and 19 of the constitution. While previous constitutions had dedicated Art. 1 to the forms of government and the territory, the 1980 Constitution uses this article to provide the doctrinal framework of the entire constitutional text by placing individuals and the family at its core and giving the state a subsidiary role in the structure of society.[67] Art. 19, which lists the constitutional guarantees, declares in its first clause that the Constitution protects "The right to life and the physical and psychological integrity of the person", and subsequently declares that "[t]he law protects the life of the unborn",[68] thus giving the prohibition of abortion constitutional status. These ideas were explicitly taken from Catholic doctrine and philosophy and were criticized within the constituent commission as imbuing the constitutional text with "religious doctrine".[69]

Other issues on religious diversity were also noted within the constituent commission, particularly the fact that the Catholic Church enjoyed legal personality under public law, while other religions were considered legal persons under private law. This distinction had major consequences during the dictatorship, since the Catholic Church had enjoyed more robust protections against the authoritarian state than churches of other denominations. Decree laws put into force throughout the 1970s had given the military regime faculties to impede internal elections, supervise board meetings, install boards of directors, and supervise the funding of private corporate entities.[70] These differences among the legal status of Churches was eventually addressed by Law 19.638 of 1999, which provided a legal, though not constitutional solution, to this issue.[71]

3.4 Silences and blind spots in (Chilean) constitutional law

While issues of corporate or individual representation, nationality and citizenship, and religious diversity have been part of Chilean constitutional doctrine for almost two centuries, other differences have received less attention. In the remainder of this section, I should like to address briefly the

67 Cristi (2014) 29.
68 *Constitución Política de la República de Chile* (1981), Art. 19,1.
69 Cristi (2014) 35.
70 Quiroz González (2020) 14.
71 Quiroz González (2020) 16–17.

questions of economic differences, gender and sexual diversity and, perhaps the greatest silence of Chilean constitutional law, the status of indigenous peoples.

As we have seen from the discussions on the question of citizenship, economic differences had acquired constitutional status, by granting owners and holders of certain professions privileged access to suffrage rights. The constitutional texts operated in a way by generating constitutional (legal) differences by relying on preexisting economic conditions. The 1925 Constitution dealt differently with economic differences by giving the state certain constitutional powers vis-à-vis private actors.[72] Property rights, for example, were guaranteed but their exercise was "subject to limitations or rules required for the maintenance and progress of the social order".[73] The Constitution also protected work, industry, and social provision "as long as they refer to sanitary housing and the economic conditions of life, so as to secure a minimum of welfare to each inhabitant, according to the satisfaction of his personal needs and those of his family".[74] The social foundations of the 1925 Constitution were undone by the neoliberal infused text of the 1980 Constitution, which sought to "consolidate an economic structure based on economic freedom, non-discrimination, property rights, and an alleged technocratic neutrality of the state organs with competence in economic matters".[75]

Gender and sexual diversity were not considered in the different constitutions, though the justification for these omissions varied. The constitutions of the 19th century did not make explicit reference to the exclusion of women from holding public office or suffrage rights because it was presumed that a higher and natural order had given women a different role in society. This was addressed by Jorge Huneeus in 1888, as women began to demand access to voting rights:

> "This exclusion [of women from suffrage rights], even though not explicitly stated in the Fundamental Laws, has reasons of a higher order: that established by God and Nature by giving women in Society, and above all, in the family, a number of

72 Bastias Saavedra (2015a).

73 *Constitución Política de la República de Chile* (1925), Art. 10,10.

74 *Constitución Política de la República de Chile* (1925), Art. 10,14.

75 Ferrada (2000) 50. On the economic use of the concept of non-discrimination in constitutional law after 1970 see the article by Fernando Muñoz in this volume.

> obligations that are truly incompatible with the active exercise of Citizenship to its fullest extent."[76]

This passage reveals quite clearly how constitutional interpretations rested on social convention. The constitutional text never explicitly granted rights to women to hold public office and exercise suffrage rights, but the interpretation shifted throughout the 20th century. The 1980 Constitution operates on the assumption that both men and women enjoy all the rights of citizenship.

Sexual diversity has also only become an issue of constitutional discussion especially since the early 2000s through jurisprudence. The decriminalization of same-sex relations in 1999, a statute against sexual discrimination in 2012, the creation of a civil union pact for same-sex couples in 2015, and the enactment of a gender identity statute in 2018 have led to an emerging "sexual diversity citizenship" in Chile.[77] At the level of constitutional interpretation, however, the Chilean Supreme Court and the Constitutional Tribunal have assumed a deferential attitude toward societal prejudices. In a 2004 case, the Supreme Court denied a mother guardianship of her daughters because of her sexual orientation, arguing that a "same-sex couple could never provide a proper setting for raising Children".[78] In 2012, the Inter-American Court of Human Rights reversed the decision in a landmark ruling on sexual diversity. In 2011, the Constitutional Tribunal declared that the definition of marriage as the union between a man and a woman found in Art. 102 of the Civil Code was not unconstitutional, and ruled that the constitution did not guarantee a right to marriage to same-sex couples.

Finally, indigenous peoples have not been part of Chilean constitutional doctrine, nor have they been part of constitutional debate as has been the case since the 1980s in other Latin-American countries. Only the 1822 Constitution mentions indigenous peoples, charging Congress in Art. 47, n. 6 with "[p]roviding the civilization of the Indians in the territory".[79] An edict signed in 1819 had taken an enlightened view by declaring that indigenous peoples, as Chileans, enjoyed the same protections and rights as any inhabitant of the territory:

> "The Indians who lived [under Spanish rule] without enjoying the benefits of society and died in infamy and misery, forthwith shall be called Chilean citizens

76 Huneeus (1890) 89.
77 For a more detailed analysis, see the article by Fernando Muñoz in this volume.
78 Quoted by Fernando Muñoz in this volume.
79 *Constitución política del Estado de Chile* (1822).

> and will be free, as other inhabitants of the State, with which they will have equal voice and representation, entering for themselves into any kinds of contracts, in the defense of their causes, in contracting marriage, commerce, and choosing the arts to which they are inclined, and have a profession in letters or arms, to obtain political and military employment according to their health."[80]

It is difficult to determine whether this was the view taken by constitutional doctrine. In any case, as we have seen, indigenous peoples would have rarely fulfilled the constitutional requirements of literacy or income for enjoying full citizenship rights. Additionally, it must be taken into consideration that an important number of the indigenous peoples of Chile lived beyond the reach of the Chilean State in territories that remained autonomous until the late-1880s. The gradual incorporation of these territories since the 1850s meant that indigenous populations were not governed by constitutional law, but rather through special laws for the territories in what amounted to living in a state of martial law. Even in the last decades of the 20th century, when nations such as Ecuador and Bolivia were moving toward defining themselves as plurinational states, Chile did not consider these issues seriously in constitutional debate.[81] Only in 2017 was there a consultation directed to indigenous communities as inputs for the framing of a new constitution.

4 Conclusions

This brief overview of the differences generated through the various Chilean constitutions between 1810 and 1980 illustrates that the constitution did not act as a par tout instrument of equalization. In the construction of its categories, it leveled the population and reintroduced new differences. Social differences, however, were not made invisible: they were there, evident if one followed the biases and assumptions of the time. The early constitutional projects were equalizing in some aspects, for example, against the division of the nation into autonomous local republics. To avoid this, the constitution created the nation and Chileans as its members, as the ultimate sources of political sovereignty. In other aspects, the constitution sustained the differ-

80 O'Higgins (1819).

81 During the discussion of Law n. 19,253 on indigenous peoples, congressional representative Mario Palestro tried to include the expression "pluri-ethnic State" in the bill during the session of January 21, 1993. This indication was voted down in the special commission. See Núñez Poblete (2010) 55.

ences that were evident to the societies of the 19th century. Women were not of the same quality as men; single men were not of the same quality as married men; domestic servants could not be included in the polity; individuals of low moral character could not be considered citizens; Catholics had access to guarantees that were not granted to non-Catholics; and sources of income and overall economic status provided some with protections that were not afforded to others. These were only some forms of difference that the constitution, explicitly or implicitly, constructed or sustained.

Focusing on the differences constructed through Chilean constitutional history, one can rethink the transition from the *ancien régime* to modern constitutionalism not as a process oriented toward or by equality, but rather as the construction and unfolding of new differences. Early modern juridical culture was founded on the assumption that natural social differences had to find a correlate in law. Accordingly, all kinds of differences were marked through the *iura singularia* or *privilegia*, through which different groups of persons or social circumstances found a correlate in the juridical sphere: nobles, poor and miserable persons, older people, the sick, merchants, and so on. Indigenous inhabitants of the Americas were included in the category of *personae miserabiles*. These differences were sustained in a different kind of constitutional order, one in which the unity of the natural and divine order presupposed the existence of different corporate bodies. The early constitutions of Chile show that this logic was no longer sustainable precisely because the creation of nation-states required the dissolution of local political representation. To achieve this, the creation of the nation and Chileans was a fundamental act of territorial equalization which however allowed the reintroduction of different forms of difference. If the colonial period had sustained differences between Spaniards, *Indios*, and foreigners, the constitutional process constructed new differences between Chileans, citizens, and foreigners. In this process, some forms of differences that had been prevalent during the colonial period, such as being Catholic, were explicitly sustained, while other forms of difference were implicitly reintroduced through the various requirements for citizenship. In all, the constitutional process shows that legal formulae did not produce a par tout equalization of the population; instead, equality and difference were reconstructed and adapted to the societies that emerged from the dissolution of the order of the *ancien régime*.

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