

**University College London**

**A Transformative Approach to Anti-  
Discrimination Law in Latin America**

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## **Declaration**

I, Alberto Raul Coddou Mc Manus confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

## **Abstract**

In Latin America, a region with particular problems and challenges, anti-discrimination legal provisions have been rapidly growing, although without much scholarly attention. Recent reforms can be framed as mere improvements of the right to equality, as guarantees required to smooth market interactions or, alternatively, as cynical progress that prevent more radical understandings. Against these approaches, this thesis provides an account of the emancipatory potential of anti-discrimination law (ADL) in Latin America and its place within progressive political projects. Rather than providing a doctrinal reconstruction, a complete theoretical account, or a detailed legal framework of this field of law, this research builds on contemporary constitutional debates and critical social theories to see how the practice of ADL in Latin America provides ‘spaces of anticipatory illumination’ of what a transformative account of ADL would look like. For this purpose, I develop two main argumentative lines, which structures this work in two parts. According to the first, we need a constitutional conception of ADL that can make sense of the recent constitutional (trans)formations in the region, committed at tackling discrimination. Taking into account the raw materials we have at hand, the vast repertoire of anti-discrimination provisions enacted in the last decades, it develops a constitutional conception of ADL that can create the conditions for an effective enforcement of the generous anti-discrimination commitments. The second argumentative line rests on the need to advance a critical social theory of ADL in Latin America. Without it, the first argumentative line is doomed to fail. In concrete terms, this second line rests on the need to critically understand the phenomenon under study, in this case, discrimination in Latin America, and the role of law in addressing it. By looking at the recent practice of ADL in Latin America through the lens of a critical social theory, we can understand the strengths and limits, the opportunities and dangers that derive from this emergent field of law. Drawing mainly on the work of Nancy Fraser, I argue that ADL in Latin America could be an example of ‘nonreformist reform’, which ‘changes more than the specific institutional features they explicitly target’, and ‘alter the terrain upon which later struggles will be waged.’ A ‘normative reconstruction’ of recent reforms and practice in ADL allows us to develop six principles that set the case for a transformative approach suitable for the challenges the region is currently facing: state intervention, group dimension, challenging stance, socio-economic lens, political axis, legal empowerment/mobilization. In particular, this research starts from existing anti-discrimination provisions in the region, and seeks a roadmap of further legal reforms within a transformative approach.

## **Impact Statement**

The thesis constitutes a significant contribution to the scarce literature on anti-discrimination law in Latin America. Avoiding the image of the ‘failed law’ of Latin America, this work recovers the possibility that this region can have a say in comparative equality law. In that regard, it constitutes a contribution to anti-discrimination legal scholarship, which underestimates the precise ways in which it constitutes a legally-driven field of social change.

The principles of a transformative approach to anti-discrimination law, developed in the second part of this thesis, can play a crucial role for one of the tasks of ‘normative reconstruction’, that is, the design of political strategies that seek to change current legal-institutional arrangements and the imagination of alternative institutional choices for the advancement of human freedom in all its forms.

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n general, these principles could be better characterised as normative standards that are immanent in legal practices and that illustrate the character of anti-discrimination law as a case of ‘non-reformist reform’. They are separate normative standards through which to evaluate different aspects of anti-discrimination law, specially crafted to evaluate current reforms that are being discussed in Latin America and provide a roadmap for the much needed consolidation of these regimes of law. For example, by resorting to the principle of the challenging stance, we may want to loosen rules of evidence, allowing victims of discrimination to resort to the social context in order to understand the expressive meaning of discriminatory practices. Or, by studying the different ways in which Latin American anti-discrimination law observes a socio-economic lens, we may develop a more detailed account of the ways in which class, poverty, or other social conditions could be incorporated as grounds of protection, or to understand better the possibility of implementing public sector equality duties to address socio-economic issues. Although considered as separate normative standards, the principles together constitute a normative framework to which we can resort for discussing the ability of anti-discrimination law to address structural issues or widespread practices of discrimination. In concrete, these principles can help us in the translation of the transformative approach of anti-discrimination law into concrete rules, institutions, procedures or schemes for tackling discrimination. Moreover, these principles could be considered as the backdrop against which to consider the application of doctrinal issues that require resolution. In that sense, although immanent, they are available to orientate or serve as a source of

arguments for strategic litigation or judicial resolution, and thus have a practical impact even in the absence of concrete reforms in positive law. In a way, these principles are legal principles that constitute the backdrop against which many of the most progressive landmark cases are built.

In the near future, the contributions of this work could be further reinforced by developing studies that explore concrete institutional articulations of anti-discrimination law in the region. The thesis will be developed into several different papers with more detailed studies about particular anti-discrimination regimes, including a collective work with authors from the Latin American countries included as examples here.

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## **Abbreviations**

ACHR American Convention of Human Rights  
ADL Anti-Discrimination Law  
ADLARG Anti-Discrimination Law (Argentina)  
ADLBOL Anti-Discrimination Law (Bolivia)  
ADLCHI Anti-Discrimination Law (Chile)  
ADLCOL Anti-Discrimination Law (Colombia)  
ADLMEX Anti-Discrimination Law (Mexico)  
CEDAW Committee on the Elimination of Discrimination against Women  
CCCOL Constitutional Court (Colombia)  
CCCHI Constitutional Court (Chile)  
CCPER Constitutional Court (Peru)  
CJEU Court of Justice of the European Union  
CONACOD Comisión Nacional contra la Discriminación (Peru)  
CNDHMEX Comisión Nacional de Derechos Humanos (México)  
CONAPRED Consejo Nacional para Prevenir la Discriminación (México)  
ECLAC Economic Commission for Latin American and the Caribbean  
ECHR European Convention of Human Rights  
ECtHR European Court of Human Rights  
EU European Union  
IAHRS Inter-American Human Rights System  
IACHR Inter-American Commission of Human Rights  
IACtHR Inter-American Court of Human Rights  
ICCPR International Covenant on Civil and Political Rights  
ILO International Labour Organization  
INADI Instituto Nacional contra la Discriminación, la Xenofobia y el Racismo (Argentina)  
INDH Instituto Nacional de Derechos Humanos (Chile)  
NHRI National Human Rights Institution  
OAS Organisation of American States  
PSED Public Sector Equality Duties

## Chapter 1 Introduction

*Picket lines  
School boy-cots  
They try to say it's a communist plot  
All I want is equality  
for my sister my brother my people and me*

Nina Simone, Mississippi Goddam Blues

### 1.1. The context (1): recent boom in anti-discrimination legislation

Discrimination constitutes a central problem in the agenda of Latin American governments and regional organisations, and appears frequently in social struggles. Furthermore, it constitutes a widespread phenomenon, experienced by Latin Americans in households, workplaces, public facilities, the media, and their dealings with authorities. For the last two decades, Latin American governments of all political ideologies have enacted particular anti-discrimination provisions and, in some cases, special and unified bodies of legislation.<sup>1</sup> Recent constitutional transformations have created the perfect conditions for a Latin American boom in anti-discrimination legislation. To start with an example, in 2012, after a tragic hate crime against a gay young man, Chile enacted its first anti-discrimination law. In the presidential speech to launch this new law, Sebastian Piñera, a right-wing millionaire, stated that ‘despite the clarity of the constitution in protecting equality, we had until today no integral norm to protect and promote the principle of non-arbitrary discrimination and no adequate judicial action to sanction acts of discrimination’.<sup>2</sup> Moreover, he added, ‘finally Chile decided to take this step that will make a more just, plural, inclusive and tolerant society’.<sup>3</sup> After six years, different social actors and scholars that had participated in the legislative proceedings are now frustrated with the impact of this law in tackling or redressing discrimination.<sup>4</sup> This case is representative of a wider regional trend because of several notable features: along with

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<sup>1</sup> see appendix (tables 1-2).

<sup>2</sup> ‘Piñera recuerda a Daniel Zamudio durante promulgación de la Ley Antidiscriminación’ Emol (Santiago, 12 July 2012) <<http://www.emol.com/noticias/nacional/2012/07/12/550327/pinera-recuerda-a-daniel-zamudio-durante-promulgacion-de-la-ley-antidiscriminacion.html>> accessed 12 October 2017. All of the bibliographical sources in Spanish that have no published translation in English are my own.

<sup>3</sup> *ibid.*

<sup>4</sup> L Casas and C Lagos, ‘Análisis crítico de la acción de no discriminación arbitraria a la luz de los primeros casos’ (2014) 10 *Anuario de Derechos Humanos* 127; MOVILH, *Informe Anual de Derechos Humanos: Diversidad Sexual y de Género en Chile 2016* (December 2016).

dignity or the rule of law, a commitment to non-discrimination now constitutes a crucial element of how governments define themselves before their domestic constituencies and the broader international community; the principle of non-discrimination no longer seems to be a patrimony of progressive social movements and left-wing political parties; it acknowledges that the constitutional protections of equality and non-discrimination are not enough for an effective fight against discrimination; moreover, the Chilean case is representative because of the constant frustration and ineffectiveness of even the most progressive reforms of anti-discrimination law (hereafter, 'ADL') in Latin America.

The recent boom in anti-discrimination legislation has not met the heightened expectations of Latin American civil societies, which have seen a decade of stability, democratic consolidation and economic progress. Despite its constitutional support, Latin American ADL has met with a social/cultural backlash, a lack of institutional capacities, insufficient doctrinal consolidation, and other factors that constrain its emancipatory potential, that is, the capacity to improve the lives of the subjects of those laws. Although Latin American ADL prohibits all forms of discrimination, includes some of the most extended lists of protected grounds, and provides several remedies for addressing it, the consolidation and effectiveness of the recently created legislation is constantly being put into question.

### **1.2. The context (2): the perils and possibilities of anti-discrimination law**

Even in this scenario, however, those who are disadvantaged by institutional arrangements or social practices deploy the means of ADL, either by using special judicial actions to redress discrimination, resorting to constitutional or legislative anti-discrimination provisions, or complaining before the special bodies or commissions for tackling discrimination at the local or regional levels. ADL seems to cover everything that progressive political projects require: distribution, recognition and political equality. It seems that we can resort to equality and anti-discrimination provisions in any of our justice claims. And, in some sense, that is the way in which it works, at least rhetorically, in the 'mouths', and practically, in the 'hands', of those who are economically disadvantaged, or who lack enough resources to sustain their living; of those who are permanently disrespected by cultural value patterns, made invisible, or subject to alien cultural paradigms; and those who see themselves as taking no part in the basic definition of what constitutes equal membership in the political community or in the debate on how should we address our shared concerns. A common picture, in this regard, portrays

individual and social movements basing their broader social claims or interests on the constitutional or legislative clauses of equality and non-discrimination. There seems to be an important moral and social weight in resorting to equality and non-discrimination in the struggles of our age.

Considering what I said before, ADL seems to be at risk of promising more than what it can deliver. This feature explains why policy-makers and legislators who craft anti-discrimination legislation are aware of the tension between the ambitious and all-encompassing promises of ADL, and the potential dangers it may trigger.<sup>5</sup> As we will see in future chapters, there is a tension between the expectations raised by a government committed to the constitutional principle of equality and non-discrimination and the effective regulatory schemes of ADL. Notwithstanding their imperfections, equality and anti-discrimination clauses seem to be continually reshaped by the reality of the individuals and groups resorting to them. That is just the way it is, we could say, as equality and anti-discrimination seems to appeal to a natural language through which we make daily normative claims as social peers, as the lyrics of Nina Simone illustrate. It is precisely in this context where an analysis of both the strengths and limits of ADL is pressing.

Latin American ADL is now in a crucial phase for its future development. It is well developed at the level of substantive provisions in both regional human rights law and domestic constitutional orders. At the sub-constitutional level, we are also witnessing a boom in anti-discrimination legislation across the region. Nevertheless, the region is in much need of an approach that can make sense of what it already has and what is needed for the future. The starting question is how can we make sense of the recent constitutional transformations, which include a vast repertoire of anti-discriminations provisions, and how can we move forward towards the consolidation of an emergent field of law and the effective enforcement of the existing provisions? In this scenario, if recent constitutional transformations in Latin America are reduced to improvements in the liberal guarantee of fair, equal or impartial treatment, then all we need is to concentrate our efforts on the effectiveness of the longstanding promises of the rule of law. Instead of embarking on ambitious projects of social engineering, we could take liberal commitments seriously and apply the Aristotelian formula of equality with the help of a renewed republican

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<sup>5</sup> see 5.3.1.

ethos. Therefore, one possibility is to focus our efforts on developing a conception of ADL where strong and effective protections against discrimination and social exclusion can be derived from the minimum requirements of liberal standards. However, as will be explained in this work, the recent constitutional transformations in Latin America entail something more. Indeed, they are based on the idea that tackling discrimination at all levels entails not merely a desirable social policy, but proper constitutional imperatives, which commit all state institutions to redressing discrimination from a structural point of view.

### **1.3 The argument: a transformative approach to anti-discrimination law in Latin America**

This dissertation provides a normative reconstruction of the emancipatory potential of ADL in Latin America and its place within progressive political projects. Rather than providing a doctrinal reconstruction, a complete theoretical account, or a detailed legal framework of this field of law in the region, this research project builds on contemporary constitutional debates and critical social theory to see how the practice of Latin America ADL provides ‘spaces of anticipatory illumination’ in terms of what a transformative approach to ADL would look like. In that regard, this work attempts to develop a particular conceptual approach to an emergent field of law, in a region with particular problems and challenges concerning discrimination. Considering law as a social construct, the concepts and arguments offered in this work assume that legal scholarship is not external to law, but constitutive of it, which may have an impact on reality, transforming and improving the lives of those who live under Latin American legal regimes.<sup>6</sup> To develop my arguments, I adopt a method Nicola Lacey calls ‘normative reconstruction’, which refers broadly to ‘the critique of existing legal and social arrangements; the imagination of different ethical values, relationships and institutions; and the design of political strategies that seek to change current legal-institutional arrangements’.<sup>7</sup> This method may seem at odds with mainstream legal scholarship, as it appears to neglect the tasks of doctrinal analysis, which attempts to provide a systematic exposition of a certain area of law, or of whole legal regimes. However, starting from

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<sup>6</sup> The kind of legal scholarship I attempt to do here relies on the basic idea that ‘refined concepts help to better construct reality, organize, develop and critique the law’. A von Bogdandy and others, ‘*Ius Constitutionale Commune en América Latina: A Regional Approach to Transformative Constitutionalism*’, in A von Bogdandy and others (eds), *Transformative Constitutionalism in Latin America* (OUP 2017) 5.

<sup>7</sup> Following Nicola Lacey, I understand ‘normative reconstruction’ to be part of the broader current of critical legal theories. ‘Normative Reconstruction in Socio-Legal Theory’ (1996) 5 *Social & Legal Studies* 131.

positive law and legal practice, that is, ‘existing legal and social arrangements’, the method of ‘normative reconstruction’ expands the purposes of legal scholarship, imagining different ethical values, relationships and institutions’, and designing the ‘political strategies’ for that to occur. Although ‘normative reconstruction’ entails the usage of empirical claims, the nature of these claims differs from the traditional claims of doctrinal analysis, which have been historically linked to the status of legal scholarship as science.<sup>8</sup> Indeed, the empirical claims I make in this work are not intended at a project of systematically exposing ADL in Latin America, but rather to understand the starting points, that is, the raw legal materials from where to build a transformative approach to ADL. Another important part of this research project rests on normative claims, which are inscribed in a broader theory of law and social change, and on critical accounts of law and legal institutions.

For the purpose presented before, I develop two main argumentative lines, which divide this work into two parts. According to the first, we need a constitutional conception of ADL that can make sense of the recent constitutional (trans)formations in the region, committed to tackling discrimination, which is considered a constitutional evil.<sup>9</sup> Taking into account the raw materials we have at hand, the vast repertoire of anti-discrimination provisions enacted in the last decades, it develops a constitutional conception of ADL that can create the conditions for its own effective enforcement. Based on recent constitutional scholarship, I claim that this conception should be grounded in a contemporary current I call egalitarian-dialogic constitutionalism (hereafter, ‘EDC’), which endorses a double commitment to collective self-determination and individual autonomy, and advances a specific mode of enforcement of constitutional duties that relies on effective schemes of cooperation, participation and dialogue.

The second argumentative line rests on the need to advance a critical social theory of ADL in Latin America. A critical social theory attempts to address reality with a practical aim, that is, emancipation, seeking an improvement in human freedom in all its forms. Without this, the first argumentative line is doomed to fail. This second part starts by

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<sup>8</sup> A von Bogdandy, ‘The past and promise of doctrinal constructivism’ (2009) 7 *International Journal of Constitutional Law* 364; R Posner, ‘The present situation in legal scholarship’ (1980) 90 *The Yale Law Journal* 1113.

<sup>9</sup> A constitutional conception of ADL attempts to describe, explain and justify the fact that constitutions provide robust support for the development of ADL. Within the classic concept-conception distinction, this conception stands as an alternative to others, like the employment-based conception, or the developmental conception.

asking, what do we need for a constitutional conception of Latin American ADL, grounded in the commitments and concerns of EDC, to develop the reforms needed to display its normative strength? Without a critical social theory of ADL, the commitments of EDC will hardly move forward, and will remain as ineffectual as the many different currents of ‘aspirational constitutionalism’ in the region. Specifically, this second line rests on the need to critically understand the phenomenon under study, in this case, discrimination in Latin America, and the role of law in addressing it. By looking at the recent practice of ADL in Latin America through the lens of critical social theory, which extends the scope of analysis beyond constitutional texts, we can understand the strengths and limits, and the opportunities and dangers that derive from this emergent field of law.

Although there are many different uses of the adjective ‘transformative’ in legal scholarship, my use of the term points to the place of ADL within an emancipatory politics. For example, some scholars have used the term ‘transformative’ to describe the expansion of the scope of equality regimes into private relationships,<sup>10</sup> the merely instrumental role of law in achieving social change,<sup>11</sup> or with a view to using ADL as an all-encompassing device for progressive politics.<sup>12</sup> Here, drawing mainly on the work of Nancy Fraser, I argue that a transformative approach to ADL in Latin America could be an example of ‘non-reformist reforms’, which

set[s] in motion a trajectory of change in which more radical reforms become practicable over time. When successful, nonreformist reforms change more than the specific institutional features they explicitly target. In addition, they alter the terrain upon which later struggles will be waged. By changing incentive structures and political opportunity structures, they expand the set of feasible options for future reform. Over time their cumulative effect could be to transform the underlying structures that generate injustice.<sup>13</sup>

Why and how can ADL be considered as a starting point in a broader trajectory of emancipatory social change? In what way can ADL change the legal and political opportunity structures? In what way can ADL be understood to ‘expand the set of feasible

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<sup>10</sup> E Muir, ‘The Transformative Function of EU Equality Regime’ (2013) 5&6 *European Review of Private Law* 1231, 1234.

<sup>11</sup> K Klare, ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *South African Journal on Human Rights* 146.

<sup>12</sup> This is my view of Fredman’s account of ADL. S Fredman, *Discrimination Law* (2nd edn, OUP 2011) 25-33.

<sup>13</sup> N Fraser, ‘Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation’, in Fraser and Honneth, *Redistribution or Recognition?: A political-philosophical exchange* (Verso 2003) 79.



options for future reform’? In a word, is Latin American ADL a case of ‘non-reformist reform’? These are the main questions I will attempt to answer throughout this work. Through a normative reconstruction of the practice and recent reforms in the area of ADL, I will set out the case for a transformative approach that is suitable for the challenges the region is currently facing. Together, the above-mentioned argumentative lines are bound together through the normative reconstruction of Latin American ADL, which starts from recent (constitutional) transformations in positive law and the impacts on current legal practices. This normative reconstruction, however, attempts to move the project forward, placing Latin American ADL within broader progressive political projects, although without dismissing the advancements made within current legal arrangements. In particular, this research starts from current anti-discrimination provisions in the region, which are mainly the product of legal reforms of the last decades, and seeks the normative basis or orientation of further reforms within a transformative approach. In the second part of this thesis, I will develop six principles that I claim can provide a roadmap for these reforms, helping us in the translation of the transformative approach of ADL into concrete rules, institutions, procedures or schemes for tackling or redressing discrimination. The concrete institutional articulation of ADL in different parts of the region, however, constitutes a different object of research.

Throughout the work, it will become clearer that I am arguing both against a narrow liberal interpretation of ADL, and against recent critical accounts of ADL that come from the radical left. For traditional liberal interpretations of ADL, I have in mind ideas such as the ‘color-blindness’ approach, which reduces the state to an impartial and blind arbitrator of social differences and asymmetries, or the neutrality stance that equality clauses seem to endorse under narrow approaches to the issue.<sup>14</sup> Against this approach, which merely aspires to give effect to the basic premises of the rule of law, my approach starts from the fact that recent constitutional transformations go beyond liberal approaches, especially when we study the ways in which social mobilization has deployed ADL in its different struggles. In sum, I attempt to go beyond the received liberal wisdom of ADL. Each principle developed in the second part of the thesis constitutes a challenge against the way in which equality and anti-discrimination law has been understood as entailing state neutrality, the denial of a group dimension, the policy choice of purely judicial models of ADL triggered by individual causes of action, the separation between

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<sup>14</sup> For an example of a traditional liberal account of ADL, see L. Alexander, ‘What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies’ (1998) 18 OJLS 167.

anti-discrimination claims and socio-economic issues, or as a denial of the political dimension of ADL. Furthermore, the thesis constitutes an attempt to answer critical positions against ADL that come from the radical left, which argue that the recent consolidation of equality regimes has provided legitimacy to unjust institutional arrangements, become the ‘darling of progressive neoliberalism’, foregone issues of redistribution, or that prevents more radical social and political transformation of the current state of affairs.<sup>15</sup>

#### 1.4 Definitional issues

Here, I will introduce three important definitional issues to explain precisely the way in which I use the term ADL, which will be present throughout this work. First of all, following Bayefsky, I will treat the concepts of equality and non-discrimination as the ‘positive and negative statements of the same principle’.<sup>16</sup> Therefore, ‘[o]ne is treated equally when one is not discriminated against and one is discriminated against when one is not treated equally’.<sup>17</sup> Thus, I will refer to ADL or, alternatively, to equality and anti-discrimination law as synonyms, despite the many different conceptual debates that currently exist regarding whether ADL is grounded in equality or, rather, if it articulates a fundamental freedom in a liberal society.<sup>18</sup> Moreover, I understand ADL as comprising what the surface structure of ADL around the world illustrates. Briefly, we can claim that this emergent field of law is constituted by the prohibitions of direct and indirect discrimination, and by the duties of reasonable accommodation.<sup>19</sup> Within these legal structures, we can find several institutional configurations and articulations, such as the penalisation of hate crimes, the regulation of sexual harassment, and specific positive equality duties. Thirdly, we must advance some theoretical issues concerning the possibility of speaking of ADL as a distinctive field of law. For Tarunabh Khaitan, there are several necessary and sufficient conditions that can help us in distinguishing the norms of ADL from other legal norms: the personal grounds condition requires a

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<sup>15</sup> For an example of a critical account from a radical left position, see A Somek, *Engineering Equality: An Essay on European Anti-Discrimination Law* (OUP 2011).

<sup>16</sup> A Bayefsky, A Bayefsky, ‘The principle of Equality or Non-discrimination in International Law’ (1990) 11 Human Rights Quarterly 1, 5.

<sup>17</sup> *ibid.*

<sup>18</sup> Although I acknowledge the many different debates that exist on whether the value or the principle of equality constitutes the normative grounding of a theoretical account of ADL, I will not address these debates directly. In the next chapter, I will provide different reasons to support a constitutional conception of ADL, many of which address the relationship between equality and non-discrimination. Moreover, in chapter 5, I provide the reader with a brief overview of the debates around the philosophical foundations of ADL (see 5.2).

<sup>19</sup> S Moreau, ‘What is Discrimination?’ (2010) 38 Philosophy & Public Affairs 143.

connection between the act or omission prohibited or mandated by the anti-discrimination norm and certain traits or characteristics that persons have or observe, what we call grounds (eg, that a restaurant owner denies a person admission to its premises on the grounds of her skin colour);<sup>20</sup> moreover, these protected grounds (eg sex) must be capable of classifying persons into more than one class of persons, loosely called groups (eg men and women), and the members of at least one group must be significantly more likely to suffer abiding and substantial disadvantage than the members of at least one other group defined by the same ground (women in relation to men).<sup>21</sup> Additionally, the duty-imposing norm must be designed such that it is likely to distribute the substantive benefits or burdens in question to some, but not all, members of a protected group.<sup>22</sup> That is to say, ‘unlike a universal welfare benefit or a socio-economic right, even positive norms in discrimination law (...) are not designed to benefit every member of the target group’.<sup>23</sup> This last condition, which Khaitan calls the eccentric-distribution condition, is what allows us to distinguish norms of ADL from others that seem to be closely related, such as those associated with social or human rights.<sup>24</sup> In other words, anti-discrimination norms ‘do not, on their own, guarantee access to the substantive or tangible burden or benefit whose distribution is in question to any particular individual’.<sup>25</sup> In some cases, ADL interacts with other norms, especially social rights provisions, to struggle for a universal distribution of some tangible benefit. Take, for example, a norm that makes education available to everyone except those with learning disabilities. Challenged by an anti-discrimination norm, the former educational provision is extended to those with learning disabilities, making this norm more universally applicable than before: it removes the exclusion of some groups from the benefit in question, but the universality at issue here is the one guaranteed by the educational provision.

### **1.5 Considering Latin America as a whole<sup>26</sup>**

I must also face a challenge that is common in what is known as ‘area studies’, which consider the possibility of adopting different approaches and methodologies to the study

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<sup>20</sup> T Khaitan, *A Theory of Discrimination Law* (OUP 2015) 27-30.

<sup>21</sup> *ibid* 30.

<sup>22</sup> *ibid* 38-41.

<sup>23</sup> *ibid* 39.

<sup>24</sup> *ibid* 39-41.

<sup>25</sup> *ibid* 39.

<sup>26</sup> Today, the term Latin America is used to describe countries of the Americas where Castellan and Portuguese languages prevail. In general, English, Dutch and French-speaking countries or territories are not included.

of Latin America as a whole.<sup>27</sup> Comparative legal scholars dealing with regional approaches have to face the same problem, that is, in grouping countries with different legal regimes, practices and cultures under a single common thread in order to be able to make comparisons with other regional units. Regardless of their different political, economic and cultural realities, Latin American jurisdictions have many things in common, starting with their language - with Brazil as an exception - and their status as former colonies of Spain and Portugal.<sup>28</sup> Immediately after independence, Latin American countries started a gradual consolidation of a Latin American juridical space, resorting to the same legal sources, constituted mainly by the rejection of Spanish (Colonial) law and the endorsement of French codification processes or other Western European legal traditions (such as Italy or Germany), and later looked to US legal practices to find innovative solutions to problems that were not easily found within the family of civil law traditions.<sup>29</sup> Nowadays, Latin American jurisdictions influence each other, without any centralised or leading jurisdiction, and with several regional venues, such as the IAHRS, triggering common threads that allow several countries to converge on key legal institutions and practices.<sup>30</sup> Although each jurisdiction has its own legal language, the common Latin American legal space allows for a regional legal language to emerge, through which 'an Argentinian lawyer in a US-based law firm can coordinate the due diligence for projects all over Latin America'.<sup>31</sup> For several observers, for example, we can speak of a Latin American law of *amparo*,<sup>32</sup> a common approach to codification processes,<sup>33</sup> and an emerging regional consensus on the recognition of structural remedies for harms that affect a large part of the population.<sup>34</sup>

In recent years, some legal scholars have approached the study of Latin American constitutional law as a case *Ius Constitutionale Commune*, including both the practice of

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<sup>27</sup> B Hoffmann, 'Latin America and Beyond: The Case for Comparative Area Studies' (2015) 100 *European Review of Latin American and Caribbean Studies* 111.

<sup>28</sup> Nevertheless, 'Brazilian and Hispanic American lawyers do share a rather common map of legal influences, institutions, and ideologies.' D López-Medina, 'The Latin American and Caribbean legal traditions', in U Mattei (ed), *The Cambridge Companion to Comparative Law* (CUP 2012) 351.

<sup>29</sup> *ibid* 349.

<sup>30</sup> G Aguilar, 'Surgimiento de un Derecho Americano de los Derechos Humanos en América Latina' (2011)

24 *Cuestiones Constitucionales* 3.

<sup>31</sup> López-Medina (n 29) 356.

<sup>32</sup> J Esquirol, 'The Failed Law of Latin America' (2008) 56 *The American Journal of Comparative Law* 75, 122-4.

<sup>33</sup> MC Mirow, *Latin American Law: A History of Private Law and Institutions in Spanish America* (U of Texas Press 2004) ch15.

<sup>34</sup> F Piovesan, 'Ius Constitutionale Commune en derechos humanos e impacto del sistema interamericano', in A von Bogdandy and others (eds), *Ius Constitutionale Commune en América Latina: Rasgos, potencialidades y desafíos* (UNAM 2014) 67.

the IAHRs and domestic constitutional arrangements.<sup>35</sup> The constitutionalisation of human rights, including the right to equality and non-discrimination, is now considered a regional process of convergence produced by common legal and social practices rather than by political or institutional co-operation among regional actors.<sup>36</sup> This allows me to include, within a single object of research, both the IAHRs and domestic arrangements, and their interrelations, in spite of their legal, political and cultural differences. Here, I am interested in processes of reform in an emergent field of law that I claim are rooted both in a regional debate around what constitutes the constitutional conception of ADL and the principles that are immanent in the relatively young practice of six jurisdictions and the regional human rights venue from which I draw the main examples for my work.

Although I am not attempting to make a complete doctrinal reconstruction of ADL in Latin America, that is, to present the state of the art of this field of law in the region, I will consider six domestic jurisdictions (Argentina, Bolivia, Chile, Colombia, Mexico and Peru), together with the IAHRs, as my dataset. The reasons that motivated this decision are threefold. First, although there are common challenges concerning discrimination around the region, the jurisdictions considered here observe particular problems, such as a strong presence of afro-descendant communities (Bolivia, Colombia, and Peru), or major indigenous populations (Bolivia, Chile, Peru, and Mexico), which cover a reasonable range of problems that are being addressed by anti-discrimination regimes. Secondly, the chosen dataset include jurisdictions that are in different stages of development regarding equality and anti-discrimination regimes. Indeed, this dataset ranges from the Chilean case, which does not include a prohibition of discrimination in its constitution and leaves every innovation to the development of statutory law, to the Mexican case, which has recently amended its constitution to include a general prohibition of discrimination on an open list of grounds, and has a comprehensive body of legislation and an administrative body in charge of tackling discrimination. Finally, the dataset includes the IAHRs because of its central role in developing a common or regional understanding of human rights, including, of course, the right to equality and non-discrimination.<sup>37</sup> Although this dataset suggests I will attempt a comparative legal

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<sup>35</sup> A von Bogdandy, '*Ius Constitutionale Commune: una mirada a un constitucionalismo transformador*' (2015) 34 *Revista de Derecho del Estado* 3.

<sup>36</sup> M Gongora-Mera, *Inter-American Judicial Constitutionalism: On the Constitutional Rank of Human Rights Treaties in Latin America through National and Inter-American Adjudication* (Institute of Human Rights 2011).

<sup>37</sup> von Bogdandy and others (n 6).

work, it could be better described as a platform to seek for examples that illustrate the transformative approach to ADL I defend in this work.

### **1.6 Avoiding the ‘Failed Law’ of Latin America**

Finally, closely related to the previous point, my research project is shaped by the need to present to a global audience the possibilities of developing a transformative approach to ADL in particular social and historical formations currently present in Latin America. Instead of presenting a detailed legal analysis or impact assessments of particular anti-discrimination legislation, or the performance of the IAHRs in redressing discrimination across the region, I present the case for a transformative approach to ADL through a general descriptive account of recent anti-discrimination reforms; thus I use the term ‘Latin American ADL’ to refer to a general account of what a common approach to this field of law should look like in the region. Nevertheless, writing a thesis on Latin American law for an audience in the Global North entails generalisations that generate risks and challenges.

First, there is a burden of justification upon Latin American legal scholars in presenting a common account of regional/local legal practices that is of value for legal analysis. In recent years, several legal scholars have been writing in English about law in Latin America, usually for audiences that have a powerful impact on development projects, processes of diffusion of legal ideas, or comparative legal practices, or that have an indirect impact on international relations.<sup>38</sup> In the US, Latin American law has become a field of study in itself, especially because of the increasing need for co-ordinating legal services, demanded by law firms and international agents.<sup>39</sup> For example, the need to reduce the complexities of ‘doing business’ in Latin America has created a demand to present the legal space of the continent as a whole, disregarding the fact that there is no institutional integration as it exists in Europe.<sup>40</sup> However, in these cases, there is a certain background assumption, driven by different interests, which makes Latin American Law a messy object of analysis.

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<sup>38</sup> J Esquirol, ‘Legal Latin Americanism’ (2013) 16 Yale Human Rights & Development Journal 145.

<sup>39</sup> Harvard Law School, ‘Renewing Latin American Legal Studies’ (2010) <<http://www.harvardiglp.org/uncategorized/november-13-renewing-latinamerican-legal-studies/>> accessed 10 October 2017.

<sup>40</sup> J Sánchez, *Los Informes Doing Business Del Banco Mundial: Reflexiones Mexicanas* (UNAM 2016).

Initially, among ‘Law and Development’ scholars, it ‘stood to reason that if development and democracy were lacking, and law was assumed to have something to do with it, then there must be something seriously wrong with Latin American law’.<sup>41</sup> The basic premise was that law provided no precise insight into how political power was implemented in the region, so it was better to turn to law-and-society approaches that could highlight the real social factors that had a determinant account on the individual and collective behaviour of Latin Americans regarding their legal orders.<sup>42</sup> Furthermore, the incorporation of Latin American legal systems within comparative legal studies favoured the ‘Europeanness approach’, which made Latin Americans believe that although they were part of a transnational body of law, in the end were they depicted ‘as a second-rate copy of European models’.<sup>43</sup> In terms of this approach, if we are to study Western European legal systems, it is better to go for the direct sources rather than their imperfect versions.<sup>44</sup>

These two areas of law, among others, reinforced the idea of a ‘Failed Law of Latin America’, which may be of interest to social sciences, interested in how law actually operates in different social contexts, but not to legal scholars. When writing for the Global North, legal scholars are tempted to seek validation from a transnational community and legal authorities that are distant from local and regional debates, and that embed particular interests that are not always transparent.<sup>45</sup> Once the discourse of the ‘failed law’ has been raised and reproduced by different sources, the doors are open for discourses facilitating legal reform, which simultaneously tend to disregard current legal institutions, which are now doomed to fail. In the words of Esquirol,

reformers in or concerned with Latin America have chosen to condemn entire segments or the legal system as a whole in order to effectuate change. That is, characterizations of failure are used to replace entire areas of Latin American institutionality with different models, systems, and traditions. Rather than recognize specific policies or politics that are advanced by existing legality or by their opposition to them, reformers have chosen to frame their projects in terms of the broad deficiencies of the system as a whole.<sup>46</sup>

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<sup>41</sup> Esquirol (n 39) 149.

<sup>42</sup> M García Villegas, ‘A Comparison of Sociopolitical Legal Studies’ (2016) 12 *The Annual Review of Law and Social Science* 25.

<sup>43</sup> Esquirol (n 39) 150.

<sup>44</sup> A Garro, ‘Shaping the Content of a Basic Course on Latin American Legal Systems’ (1988) 19 *University of Miami Inter-American Law Review* 595.

<sup>45</sup> D Bonilla, ‘Introduction’, in *Constitutionalism of the Global South* (CUP 2013).

<sup>46</sup> Esquirol (n 23) 124.

In other words, the main negative effect of this discourse of the ‘Failed Law of Latin America’ is that it discredits existing state law and legal institutions as unworthy of consideration, and also keeps off the table ‘the interests they may express and the political forces they may represent’.<sup>47</sup> Esquirol speaks of an ‘*acquis legaux*’ (legal capital) that is not considered in the permanent struggles of legal reform that are taking place in the region. Legal alternatives, which are usually brought from the Global North, with the sponsorship of international, European or US aid and development institutions, are not compared or balanced with their counterparts in Latin America. The problem we are facing now is that the urgent need for legal reforms and the institutionalisation of ADL in the region, as I will explain in the first part of this thesis, may push towards another legal transplant that could devalue the advances that Latin American ADL is already producing. In order to address that danger, the overall challenge is to present legal discourses in Latin America, which ‘refers to the vast array of academic and societal debate about law in specific national legal communities in Latin America’, and integrate them into a general account of Latin American ADL, without losing the specificity of some legal discourses that are articulated in local legal languages.<sup>48</sup> In that way, we can undertake a comparative analysis of what may be of value, of what can be imitated, and of what foreign sources can be followed, transplanted or imported. Thus, the challenge is to write about Latin American ADL with a sufficient level of generality as to be of value for global audiences, but to significantly engage, when possible, with ‘the substance of mainstream local legal debate in particular Latin American countries’.<sup>49</sup>

### **1.7 Preliminary contributions to the scholarship**

Although it will become clear in the concluding chapter, this work attempts to contribute to the scholarship in different ways. First, the thesis constitutes a significant contribution to the scarce literature on ADL in Latin America. In this region, there is no treatment of ADL either from a regional or domestic perspective. Every new reform or innovation in the area of ADL is considered as a gloss to the equality clauses that have been present since the early republican times, but there is no literature beyond that.<sup>50</sup> Moreover, there is a lack of critical assessments of the recent boom of anti-discrimination legislation, which is considered as a necessary force for good. In sum, it constitutes the first overview

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<sup>47</sup> *ibid* 116.

<sup>48</sup> *ibid* 145.

<sup>49</sup> *ibid* 148.

<sup>50</sup> It is revealing, for example, that there is no domestic comprehensive study on the impact of recent anti-discrimination reforms, or on the role of recently created anti-discrimination agencies.



of the current status and future possibilities of anti-discrimination legal projects in Latin America. Secondly, and avoiding the image of the ‘failed law’ of Latin America, this work attempts to recover the possibility that this region can have a say in broader legal debates, such as those taking place in comparative equality law. Although this contribution would entail more sophisticated doctrinal analyses for each legal regime, my work relies on the idea that we should start valuing the anti-discrimination ‘*acquis legaux*’ (legal capital) in Latin America. Thirdly, this work purports to become a contribution to anti-discrimination legal scholarship, which underestimates the precise ways in which ADL constitutes a legally-driven field of social change. Even if many legal scholars working on the field of ADL are aware of its transformative potential, there is no critical account of the place ADL may occupy within progressive political projects. Moreover, the thesis makes a specific contribution to debates around Latin American constitutionalism and the particular roles that law plays in advancing social progress. Against approaches that present Latin American constitutionalism under an overarching project of transformative constitutionalism, a more careful and detailed study of Latin American legal scholarship shows us different places and sites of academic debate that have become important sources and catalysers for currents or schools of thought that have developed different versions of Latin American constitutionalism. In concrete terms, the thesis addresses the concrete articulations of ADL within different forms of constitutionalism in Latin America. Lastly, and considering the many different ramifications of Nancy Fraser’s multi-dimensional theory of social justice, my thesis contributes a novel application of Fraser’s approach to the struggles currently being waged through the means of ADL.

### **1.8 Structure of the thesis**

The thesis is divided into two parts. The first deals with the constitutional groundings of ADL and the ways in which both the history of ADL in Latin America and the contemporary Latin American constitutional trends articulate a certain approach to the recent reforms of ADL. Here, I first explain four different types of arguments that can be used to support a constitutional conception of ADL that may rival alternative conceptions, such as a developmental or employment-based conception (chapter 2). Then, I give the reader a brief overview of the history of ADL in Latin America, which is closely connected with the early republican constitutional history, and current social and legal mobilisation processes that have produced a re-emergence of substantive equality and non-discrimination in Latin America (chapter 3). This part concludes with a general

account of the debate around three different contemporary currents of Latin American constitutionalism and argues for the development of a constitutional conception of ADL grounded in EDC. Indeed, for this emergent current, which is nowadays rooted mainly in a regional constitutional scholarship, the constitutional conception of ADL needs to stress the institutional articulation and co-ordination of the foundational commitments to equality and non-discrimination (chapter 4).

The second part is focused on developing a critical social theory of ADL in Latin America. Without this second part, the constitutional conception developed before is doomed to fail, as it will be incapable of acknowledging its strengths and limits, and its emancipatory potential in a region that has declared itself committed to tackling discrimination. In order to do that, in the first chapter of this second part, I will introduce the reader to the need to resort to critical theory to understand the current place of ADL within progressive political projects. Drawing from current debates around the philosophical foundations of ADL, I address their lack of attention to the emancipatory potential of ADL, and introduce the work of Nancy Fraser, a critical social theorist who has developed a framework to understand both the strengths and limits of an allegedly emancipatory project such as ADL (chapter 5). Then, I present the method for developing the principles of a transformative approach to ADL that I claim are grounded in the recent reforms and in the practice of Latin American ADL, and explain three principles that require a brief explanation in the current context (chapter 6). Subsequently, I present the principle of the challenging stance, which prompts ADL to be permanently putting into question the background cultural conditions that shape the meaning and operation of legal orders (chapter 7). In the last two chapters (chapters 8 and 9), I present to the reader the principles of the socio-economic lens and the political axis. According to the former, ADL is intimately connected with socio-economic rights struggles and poverty issues, which acquire an inevitable pre-eminence in a continent like Latin America, the most unequal region in the world, with high poverty or vulnerability rates; for the political axis, in its turn, ADL has an inevitable political dimension, even if at times it seems concerned with daily or merely private issues.

## **FIRST PART: ANTI-DISCRIMINATION LAW IN LATIN AMERICA**



## Chapter 2 Towards a Constitutional Conception of Anti-Discrimination Law

### 2.1 Introduction

This chapter maps out the different reasons for a constitutional conception of ADL. A constitutional conception of ADL attempts to describe, explain and justify the fact that constitutions provide robust support for the development of ADL. Within the classic concept-conception distinction, the idea of a constitutional conception of ADL stands as an alternative to others, like the employment-based conception, or the developmental conception. The employment-based conception has been advanced as a way to understand the origins of equality law in the UK, when protection from discrimination was granted in a narrow range of social contexts.<sup>1</sup> For its part, the developmental conception conceives of ADL as an ancillary device of economic policy, such as the developmental discourse of the Economic Commission for Latin America and the Caribbean (hereafter, 'ECLAC') at the beginning of the 1990s, which supported anti-discrimination legal reforms to promote the social cohesion required to enhance market adaptability.<sup>2</sup> Another interesting example of the developmental conception is the 'market integration model' of the social policies of the EU, which states that ADL's 'intervention in employment regulation is regarded as justified only where this is necessary to prevent unfair competition that could disrupt the smooth functioning of the internal market'.<sup>3</sup>

A constitutional conception of ADL should also acknowledge the different constitutional conceptions that arise from the different understandings of the role or purpose of constitutions. Therefore, a constitutional conception of ADL is closely associated with the debate around what constitutions (should) do. Nowadays, this debate is dominated not only by normative constitutional analysis, but by an emergent sociology of constitutions, which 'accounts for the motives underlying the constitutional construction of legitimacy, and it tries to cast light on the legitimating status of constitutions by examining societal functions and the objective social exigencies that are reflected in constitutional norms'.<sup>4</sup> Between normative and sociological analysis of constitutions, we can find different kinds of reasons that explain and justify why constitutions are so closely associated with ADL.

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<sup>1</sup> N Bamforth, 'Conceptions of Anti-Discrimination Law' (2004) 24 OJLS 693, 693-701.

<sup>2</sup> F Leiva, 'Towards a critique of Neo-Structuralism' (2008) 50 Latin American Politics and Society 1.

<sup>3</sup> M Bell, *Anti-Discrimination Law and the European Union* (OUP 2002) ch1.

<sup>4</sup> C Thornhill, *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective* (CUP 2011) 8. For my case of study, we could say, it entails an analysis of the role that constitutions play in the development of ADL, and the activity of individuals and groups that resort to ADL within a constitutional narrative.

This chapter will provide different reasons to support a constitutional conception of ADL, although the debate over what is the best constitutional conception will be left for the following chapters, where I will take into account the context of contemporary Latin American constitutional debates. The general question that this chapter will attempt to answer is, why do we need a constitutional conception of ADL to give an account of this emerging field of law? The different types of reasons provide independent support for the main claim, and together constitute a strong case in favour of a constitutional approach to the study of ADL.

## **2.2 A Constitutional Conception of Anti-Discrimination Law**

What is the distinctive quality of having a constitutional right to equality? Should it mean something more than the guarantee of general laws, addressing the critique on the ‘emptiness of equality’?<sup>5</sup> Or, as Moreau asks, ‘how can we make sense of what discrimination involves, in a way that might explain why we require constitutional protection from it by means of a distinctive right to equality?’<sup>6</sup> The first part of this fundamental question will be addressed throughout many different parts of this work, but especially in a future chapter that deals with the philosophical foundations of ADL.<sup>7</sup> The second part, which I am interested in here, can be addressed separately from the first, looking into constitutional theories and practices that consider that discrimination is an important constitutional evil to be redressed through the means of law. Furthermore, I will address the second part of Moreau’s question by looking into the relationships between constitutions and current developments in ADL.

To do that, I will enquire into the traditional debate about the role or purpose of constitutions. Constitutions perform many functions, so the debate about their role is not definitive, but merely emphasises one aspect as their key identity. For Jeff King, there are four possible accounts of the purpose of ‘democratic constitutions’ that highlight different relevant dimensions: first, the classical image of constitutions as a social contract (either actual, tacit or hypothetical), which comprises the ‘agreement between citizens on the

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<sup>5</sup> P Westen, ‘The Empty Idea of Equality’ (1982) 95 Harvard Law Review 537 (arguing that equality is an empty concept, which adds nothing to the proposition that laws are general and equally applicable to all the subjects covered by a certain norm).

<sup>6</sup> S Moreau, ‘Equality Rights and Stereotypes’, in D Dyzenhaus and M Thorburn (eds), *Philosophical Foundations of Constitutional Law* (OUP 2016) 284.

<sup>7</sup> see ch5

principles of government’;<sup>8</sup> second, the idea that constitutions exist in order to limit the power of governments that otherwise would rule arbitrarily (‘Unlike the idea of a contract, the concept of limited government does not require any consent, nor does it pretend to present itself as something one would consent to.’);<sup>9</sup> third, constitutions could also be seen as social conventions for the mutual advantage and stability of a certain polity, so ‘they may provide the seed for understanding why an arrangement not formally agreed to is legitimate’;<sup>10</sup> and finally, according to King, constitutions can be described as ‘mission statements’, as outlining the ‘the core, constitutive political commitments of the community, and are meant to guide the institutions of the state in dealings *inter se*, as well as in their dealings with citizens and foreign persons and organisations’.<sup>11</sup> To these accounts, one could add the role of constitutions in the allocation of competences between different actors according to issues of legitimacy, expertise or convenience (what I call the ‘organisational’ function). In other words, constitutions could be described not as contracts/conventions that serve to limit and guide governments in their institutional framework, or in the relation to citizens or people more broadly, but mainly as devices that distribute competences and tasks to different actors. This division and allocation of roles is done according to different degrees of democratic legitimacy, distinctive moral or social commitments, or different expertise. When declaring that fundamental rights should limit and orient public institutions, constitutions assign different roles in the protection of fundamental rights.<sup>12</sup> Granting a fundamental right generally implies giving a court the power to strike down legislation that contravenes this constitutional commitment, because it is thought that judges are usually isolated from the pressures of politics, which may have incentives to threaten a certain fundamental right. However, when protecting fundamental rights, constitutions sometimes go beyond that, and provide the groundings of an institutional system for the protection of these rights. For example, when granting the right to equality and non-discrimination, several constitutions establish

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<sup>8</sup> J King, ‘Constitutions as Mission Statements’, in D Galligan and M Versteeg (eds), *Social and Political Foundations of Constitutions* (CUP 2015) 75. In Rawlsian terms, a constitution would contain most of the basic structure of justice, the content of which is determined by the principles of justice that rational and reasonable individuals would adopt under certain conditions in the original position. J Rawls, *Political Liberalism* (Columbia University Press 2005) 227-30.

<sup>9</sup> King (n 8) 77; M Loughlin, ‘Rights, Democracy and Law’, in T Campbell, K Ewing and A Tomkins (eds), *Scepticism and Human Rights* (OUP 2001) 43.

<sup>10</sup> King (n 8) 78.

<sup>11</sup> *ibid* 81. This idea has also been promoted by Republican thought, which ‘emphasizes the role which constitutions perform not only in controlling the exercise of public power-the negative function- but also-the positive function- of ensuring that that power is guided towards socially desirable ends’. Loughlin (n 9) 43-4. The idea of ‘constitutions as mission statements’ is also connected with the issue of political identity.

<sup>12</sup> The organisational function goes a step further than the second dimension of constitutions presented by Jeff King. What is important is not only the limit to governmental powers, but the way in which a certain scheme for the exercise of public powers allows us to see constitutions as enablers of political action.

institutions that will be at the frontline of the struggle against discrimination. The constitutional inclusion of statutory duties to develop a comprehensive programme of anti-discrimination regulation, or the creation of administrative agencies in charge of implementing the constitutional commitment to the issue are but two examples of this ‘organisational’ function.

By analysing the different functions of constitutions, we could provide a picture of how power is distributed and exercised in a certain polity, and the reasons that justify a certain constitution. We could think that agreement/consent, limited government, stability, mutual advantage, constitutive commitments and organisational functions are essential to the idea of constitutions. In any case, however, these different accounts of the purpose or identity of modern democratic constitutions shape the way in which we understand how political power is lived in a certain polity.

With this brief explanation in mind, I will provide four different types of reasons to support a constitutional conception of ADL: historical, political, institutional and theoretical. The different functions that a constitution performs emphasise different dimensions, and the types of reasons that support a constitutional conception of ADL are inscribed within the above-mentioned discussion. In explaining these types of reasons, I will articulate arguments from constitutional theory with debates around the philosophical foundations of ADL, in order to present the case for a constitutional conception of ADL, which will later be translated to the Latin American constitutional context.

### **2.3 Historical reasons**

First, there are historical reasons to elaborate on a constitutional conception of ADL. General guarantees of equality, from which prohibitions of discrimination are usually derived, have been recognised by constitutions around the world for more than a century.<sup>13</sup> According to the database of the Comparative Constitutions Project, 97.4% of

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<sup>13</sup> There are usually three constitutional models in regard to approaching the relation between equality and discrimination: general provisions of equality, like the Equal Protection Clause of the US, which rely on courts for the task of establishing standards of scrutiny for different cases of unequal treatment; non-discrimination provisions that do not refer to general equality provisions, and proscribe discriminatory conducts or practices, like the constitutions of Norway and Denmark, which are exceptional in this regard; and, lastly, the most popular model, as expressed in the Constitution of Germany (1949), which includes, besides a general equality clause, a general prohibition of discrimination, and in some cases a list of particular grounds of protection. In the latter case, the role of identifying what is legitimate differential



the world's current constitutions include the right to equality, compared to 74% that recognise the right to life, allegedly the most basic right.<sup>14</sup> If the origins of the right to equality meant nothing more than basic political equality for some, as expressed in the liberal revolutions of the end of the eighteenth century, or the expression of basic standards of rule of law, nowadays it is also connected with substantive equality, and has given way to an expansion of its meanings.<sup>15</sup> Redistributive and anti-discrimination claims are but two extensions of this traditional right. During recent years, the boom in anti-discrimination legislation has been connected with constitutional law in the majority of jurisdictions that have decided that constitutional provisions are not enough for the effective protection of this right. Anti-discrimination legislation around the world is usually seen as developing and giving meaning to the pertinent constitutional equality clauses.<sup>16</sup>

Historically, the connection between anti-discrimination struggles and constitutional equality clauses derives from the fact that groups struggling for political recognition or emancipation usually use existing constitutional equality clauses as a basis for their claims to be incorporated as full members of the political community.<sup>17</sup> In other words, these groups refer to currently existing constitutional equality values or rights in order to reclaim their membership in a community of equals yet to be realised.<sup>18</sup> Constitutional equality clauses, then, observe a tension between the enshrinement of well-accepted fundamental values (equality before the law) and aspirations that are seen as a point of departure for social change (substantive equality).<sup>19</sup>

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treatment has not been left entirely to constitutions, and the role of courts has been essential. Sometimes, this last model includes a constitutional grounding for positive action or statutory duties to tackle discrimination. B Bryde and M Ashley Stein, 'General provisions dealing with equality', in M Tushnet, T Fleiner and C Saunders (eds), *Routledge Handbook of Constitutional Law* (Routledge 2013).

<sup>14</sup> Comparative Constitutions Project, 'Spread of Rights' (2012) <<http://comparativeconstitutionsproject.org/#>> accessed 15 December 2016.

<sup>15</sup> Bryde and Stein (n 13) 288.

<sup>16</sup> see, for example, the legislative proceedings of the different amendments to the ADLMEX (2014) <[http://sil.gobernacion.gob.mx/Librerias/pp\\_HPProcesoLegislativo.php?SID=&Seguimiento=2874713&Asunto=](http://sil.gobernacion.gob.mx/Librerias/pp_HPProcesoLegislativo.php?SID=&Seguimiento=2874713&Asunto=)> accessed 18 July 2016; Legislative History of the ADLCHI. Biblioteca del Congreso Nacional, 'Historia de la ley Anti-Discriminación n20.659' (2013) <<http://www.bcn.cl/historiadelailey/nc/historia-de-la-ley/4516/>> accessed 3 November 2016.

<sup>17</sup> H Irving, 'More Than Rights', in S Williams (ed), *Constituting Equality: Gender Equality and Comparative Constitutive Law* (CUP 2009) 86.

<sup>18</sup> N Lacey, 'Normative Reconstruction in Socio-Legal Theory' (1996) 5 Social & Legal Studies 131, 144.

<sup>19</sup> What Axl Honneth calls the 'structural openness' of the right to equality before the law. *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (MIT Press 1995) 110. For a critical history of the Equal Protection Clause in the US, and its contrasting anti-backsliding and aspirational accounts, see M Dorf, 'The Aspirational Constitution' (2009) 77 George Washington Law Review 1631.

The influence of international human rights law in expanding the understating of traditional constitutional equality clauses has also been relevant. Indeed, constitutions drafted after the Second World War, when the evolution of international human rights law flourished, favoured the establishment of general equality clauses plus a general prohibition of discrimination.<sup>20</sup> In the language of international human rights law, moreover, we speak of a right to ‘equality and non-discrimination’, as if non-discrimination would be a natural extension, or even the negative side of the traditional right to equality.<sup>21</sup> The addition of non-discrimination to the principle of equality is in line with the fact that the consolidation of international human rights law came at a time when most domestic jurisdictions already granted, albeit in an imperfect way, a general right to equality before the law.<sup>22</sup> In that sense, a constitutional conception of ADL gives ‘adequate priority to the fact that anti-discrimination norms are articulated –and arguably given their principal focus- in constitutional (...) codes, at both national and international level’.<sup>23</sup>

All in all, the historical connections between constitutional equality clauses and the development of ADL are undeniable. Even if the philosophical debates on the foundations of ADL question whether equality is the grounding value for anti-discrimination rights,<sup>24</sup> most constitutions around the world have either created equality clauses that include an explicit prohibition of discrimination on the basis of certain protected grounds,<sup>25</sup> or amended the drafting of the right to equality before the law to include such a prohibition.<sup>26</sup>

## 2.4 Political Reasons

Regarding the political reasons, a constitutional conception of ADL relies not just on the idea that constitutions grant certain fundamental rights to limit the powers of government,

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<sup>20</sup> Bryde and Stein (n 13) 93.

<sup>21</sup> A Bayefsky, ‘The principle of Equality or Non-discrimination in International Law’ (1990) 11 Human Rights Quarterly 1, 5.

<sup>22</sup> J Clifford, ‘Equality’, in S Farrior, *Equality and Non-Discrimination under International Law* (vol 2, Routledge 2015) 9-10.

<sup>23</sup> Bamforth (n 1) 693-4.

<sup>24</sup> E Holmes, ‘Anti-discrimination Rights Without Equality’ (2005) 68 Modern Law Review 175; T Khaitan, *A Theory of Discrimination Law* (OUP 2015); S Moreau, ‘In Defense of a Liberty-based Account of Discrimination’, in D Hellman and S Moreau (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013).

<sup>25</sup> eg, Constitutions of Angola (2010), art 23; Fiji (2013), art 26; Somalia (2012), art 11. All of the English translations of the binding constitutional texts quoted in this work are taken from the website <https://www.constituteproject.org/>.

<sup>26</sup> eg, Constitution of Argentina (1853-1985, amended in 1994), art 75; Croatia (1991, amended in 2010), art 14; and Estonia (1992, amended in 2011), art 12.

but on the broader idea that they are a ‘mission statement’.<sup>27</sup> In that sense, these reasons assume that constitutions are not only a limit to what politics can do, but a roadmap on what politics should do to retain its legitimacy. In doing that, a constitution provides standards of political legitimacy.<sup>28</sup> Furthermore, these reasons are political in the sense that they constitute, articulate or frame the identity of a certain polity, what we have in common as members of the same polity, or the values and commitments that bring us together.

As noted by Khaitan, ‘like democracy, the rule of law, and human rights, a system of law regulating discrimination has become key to how states define themselves’, a marker ‘of what a “civilized society” is’.<sup>29</sup> It is precisely this idea that lies behind the political reasons to offer a constitutional conception of ADL. What does it mean then for a certain value or principle to gain the status of constitutional law? Not only the idea that it is supposed to have a higher hierarchy than the rest of the legal regime, but the recognition that the principle has become part of a certain country’s public governance.<sup>30</sup> Equality and non-discrimination have become part of what governments should do, but especially of what they should protect and promote among their citizens if they are to retain their political legitimacy.

In addition, the fact that general equality and non-discrimination clauses are included in constitutions has different political effects: it explicitly names a certain ‘constitutional evil’ to be redressed, gives priority to this problem in the political agenda of state institutions, provides legal legitimacy for political struggles around the meaning of these clauses, and gives the institutional instances that deal with discrimination a certain ‘constitutional weight’.<sup>31</sup> For example, even if judges are dealing with the adjudication of statutory ADL, they are aware that they are immersed in a constitutional issue. This is what explains the insistence of several groups and activists for an ‘equal rights

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<sup>27</sup> King (n 8).

<sup>28</sup> D Grimm, ‘The role of fundamental rights after sixty-five years of constitutional jurisprudence in Germany’ (2015) 13 International Journal of Constitutional Law 9.

<sup>29</sup> Khaitan (n 24) 4-5.

<sup>30</sup> The CJEU has declared that a general principle of equality is a foundational core value, what defines the *ethos* of European citizenship, a fundamental norm of the EU. Case C-144/04 *Mangold v. Helm* (2005) ECR I-9981.

<sup>31</sup> For the idea of ‘constitutional evil’, see J Balkin, *Constitutional Redemption* (OUP 2011) 7; for the idea of ‘constitutional weight’, see Robert Post, interviewed in M Mercat-Bruns, *Discrimination at Work: Comparing European, French, and American Law* (UC Press 2016) 18; for the idea of constitutions as providers of legal legitimacy for political activism, see S Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (University of Michigan Press 2004).

amendment’ in the US constitution. As demonstrated by a recent study, state constitutions that include a general equality clause have a statistically significant higher likelihood of a decision favouring an anti-discrimination claim.<sup>32</sup> However, as illustrated by feminist reports on comparative constitutional practice, ‘constitutional sex equality provisions are neither necessary nor sufficient to reduce gender gaps’.<sup>33</sup> To do that, constitutional provisions need political activism around them to achieve their aims: ‘constitutions by themselves do not constrain government power and do not produce social or legal change’, and its provisions ‘must be taken up, claimed, and used by political and social actors in the service of such goals in the political context of their time’.<sup>34</sup>

Furthermore, and in connection with the view of constitutions as ‘mission statements’, constitutional law not only offers a normative standard from which to judge the whole legal order, but may be seen as an expression of our factual sociological preconditions.<sup>35</sup> For Jürgen Habermas, law can be seen not only as a technical medium, ‘whose function is to create the optimal working conditions for the economic and administrative system’,<sup>36</sup> but mainly as belonging to the ‘societal component of the life-world’.<sup>37</sup> Here, constitutional law is of paramount importance, because its legitimacy does not derive directly from legality. Constitutional law not only serves as a technical medium of social coordination, but has a ‘regulative function in everyday human action, which [is] closely connected with moral expectation, and thus belongs to the “legitimate orders of the life-world”’.<sup>38</sup> In this regard, law, and especially constitutional law, can perform a social-integrative function, and ‘transpose the private interests of citizens into the public terms of the citizenship’.<sup>39</sup> The constitutional character of ADL, then, could also be seen as an expression of the constitutive commitments that stem from our life-world, while also performing a social-integrative function.<sup>40</sup> Thus, a constitutional conception of ADL is

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<sup>32</sup> L Baldez, L Epstein, and A Martin, ‘Does the U.S. Constitution Need an Equal Rights Amendment?’ (2006) 35 *The Journal of Legal Studies* 243.

<sup>33</sup> J Suk, ‘An Equal Rights Amendment for the XXIst century’ (2017) 28 *Yale Journal of Law & Feminism* 381, 399.

<sup>34</sup> P Lambert, D Scribner, ‘The Constitutional Recognition of Gender Equality in Chile and Argentina’ (Western Political Science Association Annual Meeting, Vancouver, April 2017).

<sup>35</sup> C Thornhill, ‘Political Legitimacy: A Theoretical Approach Between Facts and Norms’ (2011) 18 *Constellations* 135.

<sup>36</sup> C Thornhill, *Political Theory in Modern Germany: An Introduction* (Polity Press 2000) 166.

<sup>37</sup> J Habermas, *Between Facts and Norms* (Polity Press 1996) 80.

<sup>38</sup> Thornhill (n 36) 166

<sup>39</sup> *ibid* 171.

<sup>40</sup> A constitutional conception of ADL could be grounded in the ‘broader moral culture’ of a certain community, a set of distinctive political values (‘constitutional patriotism’), ‘which the constitution is deemed to reflect but not to create’. A Ferrara, ‘Of Boats and Principles: Reflections on Habermas’s “Constitutional Democracy”’ (2001) 29 *Political Theory* 782, 788. Moreover, if the purpose of every constitution is ‘to realize the system of rights *anew* in changing circumstances, that is to interpret the system

always in tension with itself, to the extent that the operation of anti-discrimination laws on the ground may challenge the boundaries and meanings of political citizenship, which are usually articulated in constitutional discourse.<sup>41</sup> In that sense, the political reasons in support of a constitutional conception acknowledge the contested nature of constitutional law's legitimacy.<sup>42</sup>

Also, discrimination law 'has considerable expressive currency in most societies', and that may be another political reason why prohibitions of discrimination are included along with formal equality clauses.<sup>43</sup> As Khaitan puts it,

an asymmetric antidiscrimination duty that did not, at least formally, protect dominant groups that have expressive salience will be (often wrongly) seen as implying that their interests do not count. This is likely to catalyse retaliation (including expressive retaliation), often targeted at the protected group. Given the impossibility of non-expression, the next best alternative is a default for expressive even-handedness between salient groups, unless there are robust reasons for apparent partisanship which outweigh this preference.<sup>44</sup>

That is, although the general aim of ADL may be targeting relative group disadvantage, the requirements of formal equality or symmetry are considered warranties of the consideration of all interests. That is a compelling reason to consider the prohibitions of discrimination in the same articles or sections where constitutions warrant formal equality and, in that sense, a political reason in support of a constitutional conception of ADL.

Finally, the political reasons point to the symbolic importance of a constitutional grounding of ADL. For Robert Post, a constitutional principle of anti-discrimination is of utmost importance for the legitimacy of the development of a sub-constitutional anti-discrimination regime, 'for that symbol (...) brings us together in a way the statute doesn't'.<sup>45</sup>

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of rights better, to institutionalize it more appropriately, and to draw out its contents more radically', a constitutional conception of ADL entails the possibility of interpreting in a dynamic way the moral culture of a certain community. Habermas (n 37) 384.

<sup>41</sup> Although in different terms, this idea was developed in N Bamforth, 'Sexuality and citizenship in contemporary constitutional argument' (2012) 10 International Journal of Constitutional Law 477.

<sup>42</sup> Feminist scholarship has produced a history of the contested nature of constitutional law's legitimacy, describing different 'sites of constitutional struggle for women's equality'. R Rubio-Marin and W Chang, 'Sites of constitutional struggles for women's equality', in Tushnet and others. (n 13).

<sup>43</sup> Khaitan (n 24) 177

<sup>44</sup> *ibid* 178.

<sup>45</sup> Post (interview) Mercat-Bruns (n 31) 18.

## 2.5 Institutional Reasons

Every constitution says something on the question of how to protect its most important commitments, and this has effects on the powers of different state institutions. The institutional reasons that support a constitutional conception of ADL emphasise the explicit or implicit institutional choices of constitutional arrangements. Here, I use the term ‘institutions’ as decision-making processes: thus, institutional reasons try to answer the question of which process is best suited, according to its competence, within the struggle against discrimination (ideally, a question of ‘institutional choice’, that focuses on ‘the allocation of decision making’, but that also assesses ‘implications across the behavior of the institutional alternatives that are the building blocks of real reform’).<sup>46</sup> The added value of a constitutional conception of ADL is that it permeates the whole legal order with specific institutional implications.<sup>47</sup> As Neil Komesar puts it:

Constitutional law seems straightforwardly about institutional choice—in particular, the choice between judicial and political decision making and, therefore, it should be directly accessible via comparative institutional analysis. Constitutions are primarily about institutional design and institutional choice.<sup>48</sup>

Without downplaying other functions of constitutions, like the ones presented in the first part of this chapter, I want to stress here the institutional reasons to support a constitutional conception of ADL. The incorporation of anti-discrimination protections in the UK is symptomatic, because even in the absence of a written constitution, the regional integration with Europe allows us to highlight the institutional reasons to support a constitutional conception of ADL.<sup>49</sup> with the incorporation of EU Equality Law through

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<sup>46</sup> N Komesar, ‘The Logic of the Law and the essence of Economics: Reflections on Forty Years in the wilderness’ (2013) *Wisconsin Law Review* 265, 325. Although he claims that this methodology is mainly descriptive, it has an obvious normative stance, as Johanna Croon states: ‘All institutions must make decisions, in which they reconcile multiple, often contradictory, interests and deal with complex themes. The least imperfect institution is the one that may ensure the most adequate representation of interests under such straining circumstances.’ In other words, ‘the focus on representation shows that the theory itself is motivated by egalitarian concerns’. ‘Comparative Institutional Analysis, the European Court of Justice and the General Principle of Non-Discrimination—or—Alternative Tales on Equality Reasoning’ (2013) 19 *European Law Journal* 153, 164.

<sup>47</sup> For Komesar, ‘[i]f you want to understand the meaning of a legal term, ask what function it plays. In U.S. constitutional law, the term “fundamental rights” determines an important institutional choice. If legislation impinges on a fundamental right, then, under U.S. constitutional law, serious judicial review under equal protection or substantive due process follows and, therefore, decision making about the subject largely shifts from the political process to the courts.’ (n 46) 271.

<sup>48</sup> *ibid* 270.

<sup>49</sup> Some have argued that anti-discrimination constitutes a principle of common law in the UK, even if its status, exact content and scope still remain unclear. J Jowell, ‘Is Equality a Constitutional Principle?’ (1994) 47 *Current Legal Problems* 1; C O’Cinneide, ‘Equality: A Constitutional Principle?’ (UKCLA Blog, 14 September 2011) <<https://ukconstitutionallaw.org/2011/09/14/colm-ocinneide-equality-a-constitutional-principle/>> accessed 13 September 2015.

the European Communities Act (1972), or the anti-discrimination rights protected in the European Convention of Human Rights through the Human Rights Act (1998), national authorities have to read statutes in the light of these incorporated norms. Thus, the constitutional dimension is obvious: if statutes cannot be read in the latter way, courts should disapply them in cases involving EU Equality law (direct effect);<sup>50</sup> where conventional rights are applicable, the Supreme Court of the UK could issue a declaration of incompatibility that may or may not be followed by the government.<sup>51</sup> For Bamforth, this legal scenario has a constitutional nature to the extent that,

it deals with the powers and spheres of action of vital state institutions: for in determining which rules of statutory interpretation to apply, we are concerned with the proper approach of the courts when dealing with and applying the products of the legislative process.<sup>52</sup>

Furthermore, although we are dealing with statutory law, both the European Communities Act and the Human Rights Act are viewed as ‘central features of the UK’s current constitutional architecture’.<sup>53</sup>

Nevertheless, the institutional reasons to support a constitutional conception of ADL go beyond the power of courts, because they address the powers of other public entities (especially if we endorse some form of comparative institutional analysis).<sup>54</sup> For Nicholas Bamforth, we should avoid endorsing an ‘exclusively constitutional conception’, that is, one that explains every social context in which discrimination should be tackled as an interpretation of the anti-discrimination clause of a certain constitution, like some readings of the Equal Protection clause of the fourteenth amendment of the US Constitution.<sup>55</sup> Although a constitutional conception of ADL is concerned with all of the contexts in which discrimination may arise (not only employment), it should also be

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<sup>50</sup> European Communities Act 1972 (UK), s 2(4).

<sup>51</sup> Human Rights Act 1998 (UK), ss 4, 10, schedule 2.

<sup>52</sup> Bamforth (n 1) 699. He advances this argument to find a place for employment anti-discrimination law ‘within a broader constitutional framework’: ‘if it is right to characterize the rules dealing with interpretation, “disapplication” and declarations of incompatibility as imposing requirements of a constitutional nature, then each time a court deals with a case involving discrimination within the employment relationship, it must –in so far as either EC law or the European Convention is relevant to that case- deal with the subject-matter in the light of those constitutional requirements’. 698-9.

<sup>53</sup> *ibid* 699.

<sup>54</sup> For Komesar, the nature and scope of judicial powers to review legislation should be an institutional choice based on ‘the relative strengths and weaknesses of the reviewer (the adjudicative process) and of the reviewed (the political process)’. *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (University of Chicago Press 1994) 254.

<sup>55</sup> Bamforth (n 1) 696.

concerned with the development of infra-constitutional regulation that may give meaning and effect to the pertinent constitutional clauses. According to the organisational function presented before, constitutions distribute different roles according to differing degrees of democratic legitimacy and expertise. When conferring courts the power to strike down legislation that may be deemed discriminatory, we tend to forget the previous roles that other public entities could play when placed on the frontline against discrimination. For example, legislatures and administrations are better placed to design structural frameworks to prevent and tackle discrimination, and a constitutional mandate to develop anti-discrimination programmes of regulation may place them at the frontline of this serious commitment. Moreover, they may have more democratic legitimacy than courts (that is, pay due respect to the principle of equal respect and concern when addressing cases where a range of diverse and complex interests are at stake), and in that way contribute to fostering the public culture required by ADL to pervade in social and private life. However, if we consider that anti-discrimination law is mainly crafted as a device for groups that generally suffer from social and political exclusion, the power of courts will always have a central place.<sup>56</sup> The representation-reinforcing theory of judicial review may give us an idea of how to accommodate and organise these different powers, taking into account the existence of disadvantaged, marginalised or politically powerless groups.<sup>57</sup>

A constitutional conception of ADL should acknowledge that ‘what is important is not just that there should be some form of conscious and explicit reflection on constitutional arrangements, but that this should be the work of the people whose society is to be governed by these arrangements’.<sup>58</sup> That could provide a space for the approach of political constitutionalists, who argue that the debate about rights ‘forms part of the circumstances of politics’.<sup>59</sup> Within this context, we can understand the interplay between a constitutional conception of ADL and its different expressions in statutory law or

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<sup>56</sup> As put by Komesar, ‘Courts are most needed where alternative decision makers like political processes and markets work least well’. (n 46) 268.

<sup>57</sup> J Hart Ely, *Democracy and Distrust* (Harvard University Press 1981). However, he is criticised for not considering comparative institutional analysis: ‘[w]hile Ely detects the imperfections of the legislature in making procedural decisions, he is mistaken in inferring from these imperfections that courts should be assigned powers to make these decisions. Such a conclusion requires comparing the virtues and vices of courts and legislatures, while taking into account the complex interdependencies between these institutions. As Komesar establishes, such a comparison does not necessarily favour courts over legislatures.’ *Why Law Matters?* (OUP 2014) 201.

<sup>58</sup> J Waldron, ‘Constitutionalism: A Skeptical View’, in T Christiano and J Christman (eds), *Contemporary Debates in Political Philosophy* (Wiley-Blackwell 2009) 270.

<sup>59</sup> R Bellamy, *Political Constitutionalism* (CUP 2007) 25.



broader sub-constitutional regulation. For Robert Post, the fact that equality and non-discrimination counts as a constitutional principle in the US has a direct influence on the fact that it requires state action and intervention in private relationships.<sup>60</sup> This, in turn, either through administrative or court action, ‘spreads horizontally into the private sphere’, causing ‘the rest of the society to be much more aware of these issues and to want more directives’.<sup>61</sup> So, the constitutional grounding of ADL leads to an institutional development (‘a causal matter’, for Post): ‘the fact that we looked at the state, which is supposed to be supremely neutral, led people to think about the relationship between race and private action and led to legislation. These are complementary. It is not either-or.’<sup>62</sup> Thus, there must be an adequate division of work between a constitutional anti-discrimination principle and a statutory anti-discrimination regime where they can be seen as complementary: constitutions provide the symbols, the values, while statutes are focused on the details, the impact on the ground.<sup>63</sup> In the European context, the role of general constitutional equality clauses, such as the ones in Germany (article 3) and France (article 1), have been considered crucial to laying a constitutional foundation for equality and anti-discrimination public policies, and provide a ‘degree of institutional coordination’ of these.<sup>64</sup> Within this framework, for example, article 3.2 of the German Constitution, which establishes that ‘[t]he state shall promote the actual implementation of equal rights for women and men’, has been interpreted as a ‘constitutional rights norm’ that entails both a goal of the government and a principle that can limit the exercise of other enforceable rights.<sup>65</sup> However, this article is not to be considered an individual entitlement to the ‘actual implementation of equality through the constitutional complaints procedure’, but instead a ‘constitutional foundation against challenges’ to policies crafted to ‘increase women’s presence in the public and economic sphere, and measures to increase men’s presence in the family and private sphere’.<sup>66</sup> Overall, the constitutional foundation for gender equality policies and its institutional coordination

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<sup>60</sup> Post (interview) Mercat-Bruns (n 31) 18. Also, German constitutional jurisprudence grounded state duties to protect maternity and women’s labour disadvantage, even against private interests, on the general equality clause of the German constitution. A Peters, *Women, Quotas, and Constitutions* (Kluwer Law 1999) ch4.

<sup>61</sup> Post (interview) Mercat-Bruns (n 31) 18.

<sup>62</sup> *ibid.*

<sup>63</sup> *ibid.* (‘There is an inherent tendency to make constitutional law general, and there is more of an opportunity to make statutory law impact-oriented’).

<sup>64</sup> Suk (n 33) 438.

<sup>65</sup> A ‘constitutional rights norm’ (eg, social state of law), embodies an objective order of values. R Alexy, *A Theory of Constitutional Rights* (OUP 2010) ch 2.

<sup>66</sup> Suk (n 33) 415.

places the legislator in the centre, as the ‘primary enforcer’ of the ‘actual implementation’ of equality and anti-discrimination rights.<sup>67</sup>

As stated by Eskridge Jr and Ferejohn, moreover, a constitutional conception that is aware of its institutional reasons may give leeway for the development of anti-discrimination super-statutes. In other words, a constitutional conception of ADL acknowledges the crucial role that statutory law plays in developing and even reshaping the constitutional understanding, penetrating the ‘public normative and institutional culture in a deep way’.<sup>68</sup> Therefore, for these kinds of reasons, a constitutional conception recognises a constitution’s limitations in tackling discrimination and the importance of allocating competences to different institutional actors, according to their particular democratic legitimacy and technical expertise. Nowadays, there are many cases of constitutional equality clauses mandating the enactment of ordinary legislation that develops the constitutional principle of equality and non-discrimination, delineating the constitutional standard of protection and allocating competences between different actors.<sup>69</sup>

## 2.6 Doctrinal Reasons

With respect to the doctrinal reasons to develop a constitutional conception of ADL, we should ask what role this conception plays in the debate on whether ADL could be considered a discrete area of law.<sup>70</sup> With the growing enactment or expansion of anti-discrimination regulation, the nature and scope of the subject have attracted more scholarly attention than ever. The need for consistency, which has been expressed in the creation of comprehensive equality and anti-discrimination bodies of legislation, is now one of the main theoretical questions of ADL.<sup>71</sup>

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<sup>67</sup> Suk supports an equal rights amendment in the US based on what she calls a ‘a constitutional infrastructure of social reproduction’, based on comparative constitutional practice. *ibid* 438.

<sup>68</sup> W Eskridge and J Ferejohn, ‘Super-Statutes’ (2001) 50 *Duke Law Journal* 1214, 1215. For them, the Civil Rights Act (1964) reshaped the constitutional understanding of the anti-discrimination principle (1237-1242). For Habermas, a dynamic interpretation of the constitution places the practice of constitutional creativity in ordinary political legislation, challenging ‘the separation between constitutional creativity as an extraordinary and rare deliberative practice and ordinary political legislation ongoing in everyday life of an historically developing community’. M Vargova, ‘Democratic Deficits of a Dualist Deliberative Constitutionalism: Bruce Ackerman and Jürgen Habermas’ (2005) 18 *Ratio Iuris* 365, 382; J Habermas, ‘Constitutional Democracy: A Paradoxical Union of Contradictory Principles?’ (2001) 29 *Political Theory* 766; Habermas (n 37) 248.

<sup>69</sup> Constitution of South Africa (1996, amended in 2012) s 9.4; Constitution of Kenya (2010) art 27.6.

<sup>70</sup> Hellman and Moreau (n 24) 1. It is, in a way, the other face of an ‘exclusively constitutional conception’, which envisages ADL as a section of constitutional law. Bamforth (n 1) 697.

<sup>71</sup> Khaitan (n 24).

Constitutions usually provide arguments to elaborate on a certain account of the wrongness of discrimination, which affects the doctrinal development of ADL. Moreover, in some cases constitutions declare or express the broader aims of non-discrimination clauses. Some constitutions may emphasise the particular interests of victims that are affected by discrimination,<sup>72</sup> while others may be more concerned with the motives behind discriminatory acts;<sup>73</sup> other documents may address the broader collective effects of discrimination on the basis of certain grounds that are shared by many people,<sup>74</sup> or even a combination of these.<sup>75</sup>

In that sense, a constitutional conception of ADL provides a basis to articulate a principled approach to ADL, which could avoid several disciplinary problems: first, distinguishing between direct and indirect discrimination as different clauses, without any principled continuity; second, treating special accommodation requirements as distinct from discrimination law; and third, the judicial trend of relying on different tests of scrutiny, according to different protected grounds.<sup>76</sup> In general, a principled approach provides anti-discrimination law with a ‘purpose clause’, avoiding fragmentation and inconsistency.<sup>77</sup> Ordinary legislation could express the differences in the moral condemnation of intentional versus non-intentional discrimination in awarding damages, or distinguish between the different defences that may be available to defendants, but the idea of having a constitutional conception of anti-discrimination law allows us to describe them as different forms of the same injustice: discrimination.<sup>78</sup>

The idea of relying on constitutional law to develop a principled consistency of statutory discrimination law is not at odds with what has happened in other disciplines, like labour law. Indeed, the groundings of labour law have been gradually displaced from private to public law and, specifically, to constitutional law, in order to build a coherent normative

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<sup>72</sup> Constitution of Maldives (2008) art 17.2.

<sup>73</sup> Constitution of Bangladesh (1972, reinst. 1986, rev. 2014) art 38.b.

<sup>74</sup> Constitution of Bolivia (2009) art 14.

<sup>75</sup> The Constitution of South Africa (1996, amended in 2012) s 1; 7.1; and 9.

<sup>76</sup> S Moreau, ‘Discrimination as Negligence’ (2010) 40 *Canadian Journal of Philosophy* 123, 124. For Julie Suk, an equal rights amendment in the US would go beyond tiers of scrutiny and provide leeway for a unified constitutional doctrine that can ‘clarify the relationship of gender equality policies with other constitutional values.’ Suk (n 33) 439.

<sup>77</sup> This was debated during the legislative proceedings of the Equality Act UK (2010). In the end, the Equality Act ‘did not confer any particular constitutional status on the right to non-discrimination’, and did not include a ‘purpose clause’, ‘which would “spell out” the principled basis of the legislation and the “vision of equality” to which it aimed to give effect’. C O’Cinneide and K Liu, ‘Defining the limits of discrimination law in the United Kingdom: Principle and pragmatism in tension’ (2015) 15 *International Journal of Discrimination and the Law* 80, 85.

<sup>78</sup> S Moreau, ‘What is Discrimination?’ (2010) 38 *Philosophy & Public Affairs* 143, 176.

unity for the different labour law clauses. According to Hugh Collins, what gives coherence to labour law ‘is a sense of vocation’, which ‘springs from a conviction that urgent social problems need to be addressed, and blossoms into a vision of justice in the sphere of social life in which law plays its appropriate role’.<sup>79</sup> For him, this sense ‘marks out a field of enquiry, establishes criteria of relevance of legal materials, and finally constructs a critical vantage-point from which to assess the substance and techniques of current law’.<sup>80</sup> This sense of vocation is also present in discrimination law, and may be recognised as one of the reasons for enacting constitutional equality and non-discrimination clauses in the most relevant parts of several constitutions.<sup>81</sup> The paradigmatic example is the Constitution of South Africa, which highlights the social problems that need to be addressed by a programme of ADL, and gives certain priority to the anti-discrimination agenda.<sup>82</sup>

A constitutional conception does not contradict the idea that discrimination could also be seen as a personal wrong, ‘akin to a tort’.<sup>83</sup> However, it adds something more, allowing us to see the connection between the wrongfulness of discrimination and the broader social or political goals that these laws may serve. For example, we could refer to the constitutional grounding of ADL to understand the expressive dimension of discrimination harms, and how these broader harmful effects against groups could be connected with the personal wrongs committed against a particular victim.<sup>84</sup> In a sense, a constitutional conception allows us to understand the different but interconnected nature of the doctrinal questions that a certain area of law must answer. Drawing from H.L.A. Hart, Khaitan notes that there is ‘a purposive inquiry into the general justifying aim of discrimination law’, and a different ‘set of distributive sub-questions: what rights and duties does the law distribute, to whom, and when’.<sup>85</sup> A constitutional conception of ADL

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<sup>79</sup> H Collins, ‘Labour Law as Vocation’ (1989) 105 *Quarterly Law Review* 468, 473.

<sup>80</sup> *ibid.*

<sup>81</sup> For Bamforth, ‘[g]iven the contextual nature of anti-discrimination law, as well as its concern with issues of historical and contemporary social justice, it is easy to view both conceptions of the subject in terms of Collins’ “vocational organization”’. (n 1) 700.

<sup>82</sup> Constitution of South Africa, s 9.

<sup>83</sup> Moreau (n 78) 146. For her, the tort of discrimination law is a wrong committed to a set of deliberative freedoms to which we all have an equal independent entitlement.

<sup>84</sup> There is a widespread expressivist scholarship on the theory of the Equal Protection Clause in the US. P Brest, ‘The Supreme Court, 1975 Term - Foreword: In Defense of the Anti-Discrimination Principle’ (1976) 90 *Harvard Law Review* 1; K Karst, *Belonging to America: Equal Citizenship and the Constitution* (Yale University Press 1991). Based on Sophia Moreau’s recent pluralist account, a constitutional conception of ADL would allow us to ‘conjoin’ the individual (a wrong committed to an individual) and collective dimensions (injustices suffered by groups corresponding to the protected grounds) of discrimination (n 78) 178.

<sup>85</sup> Khaitan (n 24) 10.

could concede that these types of questions may be different but are obviously connected. Indeed, the justification for legally prohibiting discrimination can be distinguished from the reasons for using different legal devices in order to enforce that prohibition. However, if we want to develop an accurate doctrinal reconstruction of the current anti-discrimination programmes of regulation, we need to make efforts to connect the answers to these two kinds of questions. In this way, for example, we could understand the way in which judicial reparations, crafted according to the broader aims of ADL, are connected with the forms that wrongful discrimination adopts in a certain case.<sup>86</sup>

Constitutions also provide a normative judgment on which of our traits should not be considered as factors to be weighed in decisions in certain social contexts.<sup>87</sup> Whether they are chosen or not, or relevant to us, or whether they reflect a historical pattern of disadvantage, the crucial thing is that they should not be considered as burdens or imposing social costs in our decisions. However, the question of which are these normatively extraneous traits is a complex doctrinal issue that has a constitutional dimension.<sup>88</sup> When discrimination law decides to enumerate protected grounds it ‘comprises a combination of empirical, political, and expressive judgments’.<sup>89</sup> Constitutions are generally thought to do precisely that, that is, recognise the nature of the struggles of historically excluded groups; signal the political reasons to include certain grounds that may be analogically considered to include others in the future (either by statute, judicial interpretation or through constitutional amendments); and provide an expressive component to discrimination based on certain grounds. Some constitutions open up the path to consider social origin, class or even poverty as grounds of protection, and that is usually a matter of constitutional law, as it depends on a relevant normative question in a certain society.<sup>90</sup> Overall, a constitutional conception of ADL could provide reasons for a dynamic interpretation of the doctrinal question of how to deal with the openness of the list of protected grounds.<sup>91</sup>

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<sup>86</sup> C Troncoso and N Morales, ‘Caso Duque con Colombia: Un caso de discriminación estructural’ (2017) 13 *Anuario de Derechos Humanos* 135.

<sup>87</sup> A constitutional conception is also aware of the social contexts where an anti-discrimination programme of regulation should be applied, considering liberty rights. For example, it does not generally apply to our personal relationships, where we are allowed to ‘discriminate’ regarding who we love or who we are friends with.

<sup>88</sup> S Fredman, *Discrimination Law* (2nd edn, OUP 2011) 110.

<sup>89</sup> P Shin, ‘Is There a Unitary Concept of Discrimination?’, in Hellman and Moreau (n 24) 171.

<sup>90</sup> Moreau (n 78) 158.

<sup>91</sup> Fredman (n 88) 130.

## **2.7 Concluding remarks**

This chapter has given an outline of the different types of reasons that justify the need for a constitutional conception of ADL. These reasons highlight the different functions or roles of modern democratic constitutions. In mapping these different reasons, I have provided the reader with different types of arguments that are used to elaborate on a constitutional conception of ADL that gives an account of the historical connection between equality clauses and the development of ADL, that is, to the fact that ADL derives from the interpretation or expansion of constitutional equality clauses; to the political causes and effects of both the expansion of equality clauses towards ‘equality and non-discrimination’ clauses and the political role these provisions play in legal orders; to the institutional impact of including these clauses in constitutional orders, highlighting the organisational function of constitutions; and, lastly, a constitutional conception of ADL that can engage with several doctrinal problems that are becoming increasingly acute for the emergence of ADL as a single field or discipline of law. The arguments presented in this chapter must now be translated to the discussion surrounding Latin American Constitutionalism, which places equality and anti-discrimination at the centre of its agenda.

## Chapter 3 A History of Anti-Discrimination Law in Latin America

### 3.1 Introduction

After more than 35 years since the beginning of the ‘third wave’ of democracy in the region, Latin America is undergoing deep transformations.<sup>1</sup> Nowadays, elections take place regularly, albeit not without problems, and changes in power can happen without the threat of a military coup or a violent conflict. However, many obstacles still impede the path to deepening democracy. Discrimination, poverty and inequality are probably among the most important problems, as they crowd out the agenda of different policies focused on promoting the rule of law, human rights, social cohesion, or economic development. Every country in the region has created new institutional arrangements and enacted laws that are supposed to tackle these obstacles. However, legal transformations are taking place in the region, where there are particular features that threaten these reforms: according to the GINI index, Latin America is the most unequal continent in the world, and almost one third of its population live in poverty;<sup>2</sup> although its citizens support democracy, they are alarmingly unsatisfied with its performance;<sup>3</sup> moreover, on average, the majority of the population thinks that discrimination has structural causes, and that race, ethnicity, poverty and a lack of education or connections determine their lives and destinies.<sup>4</sup> These features provide the perfect scenario for a boom in the enactment of equality and anti-discrimination provisions. Although there may be different objectives for the enactment of these provisions, they are now part of the different jurisdictions in the region, and are thus used, applied and interpreted by legal actors and affected parties. This reality compels us to give the reader an overview of the legal situation that has developed across Latin America, which is characterised by an evolution from the formal constitutional equality clauses of the early republican era to the establishment of complex anti-discrimination statutes in recent years. Although this history could be a focus of research in itself, this chapter will give a brief historical overview of this passage.

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<sup>1</sup> It started in 1978 with the transitional processes in Ecuador and Dominican Republic, and was consolidated in 1989-1990 with the re-establishment of democracy in Paraguay, Chile and Nicaragua.

<sup>2</sup> Moreover, income inequality is concentrated among the most vulnerable groups, which coincides with the different grounds of protection of ADL. CEPAL, *La Hora de la Igualdad* (2010) <[http://www.cepal.org/publicaciones/xml/0/39710/100604\\_2010-114-ses.33-3\\_la\\_hora\\_de\\_la\\_igualdad\\_doc\\_completo.pdf](http://www.cepal.org/publicaciones/xml/0/39710/100604_2010-114-ses.33-3_la_hora_de_la_igualdad_doc_completo.pdf)>, accessed 4 January 2015.

<sup>3</sup> International Institute for Democracy and Electoral Assistance, *La calidad de las democracias en América Latina* (2014) <<http://www.idea.int/es/publications/sod-in-latin-america/index.cfm>> accessed 6 march 2015.

<sup>4</sup> A Chong and H Ñopo, ‘The Mystery of Discrimination in Latin America’ (2008) 8 *Economía* 79.

The objective of this chapter is to describe the history of Latin American ADL, tracing back its origins and presenting its current articulations. From the materials we have at hand, we can start thinking about further reforms or future developments, through a normative reconstruction of a transformative *ethos* of ADL, considering the particular circumstances and challenges of Latin American countries. The nature and scope of the empirical claims included in this chapter constitute the first part of the ‘normative reconstruction’ of Latin American ADL, which entails a fair description of the legal doctrines and practices that will be put to work for a transformative approach in future chapters. However, the main problem with a historical overview is that ADL does not exist as a distinctive field of law in Latin America. Scholars tend to ascribe the development of anti-discrimination legal provisions to the general evolution of constitutional law, or to advances in regional human rights law. To date, there is no comprehensive handbook or textbook on this subject from either a national or a regional perspective.<sup>5</sup> In stark contrast with the development of this field of law in the so-called Global North, there are almost no examples of comprehensive accounts of its main conceptual groundings, doctrinal underpinnings, or institutional implications.<sup>6</sup> Moreover, courts and legal operators do not understand its provisions as part of a larger doctrinal body with more or less clear boundaries. The idea of ADL does not make sense outside the reading of the general constitutional equality clauses that have been present in Latin American constitutions since the first half of the nineteenth century.<sup>7</sup> Although traditionally understood as mere formal equality clauses, things have started to change. Some countries have expanded the wording or understanding of their constitutional equality clauses, including general prohibitions of direct/indirect discrimination, a list of different protected grounds, or intersectionality clauses. Moreover, some countries have recently enacted specific anti-discrimination provisions and comprehensive bodies of legislation after lengthy legislative debates. Throughout the region, legal reforms are taking place without critical doctrinal scrutiny. The following brief historical overview is a first step to bridging this problem.

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<sup>5</sup> However, there are studies that focus on a specific ground of protection. T Hernández, *Racial Subordination in Latin America: The role of the State, Customary Law, and the New Civil Rights Response* (CUP 2013).

<sup>6</sup> E Ellis and P Watson, *EU Anti-Discrimination Law* (OUP 2014); S Fredman, *Discrimination Law* (2nd edn, OUP 2011); N Reiss, S Rice, and D Allen, *Australian Anti-Discrimination Law* (Federation Press 2014).

<sup>7</sup> see the essays included in C De la Torre, *El Derecho a la No Discriminación en México* (Porrua 2006).



## 3.2 The origins of anti-discrimination law in Latin America: constitutional equality clauses

### 3.2.1 Constitutional Equality in the nineteenth century

The roots of ADL can be traced back to the early enactment of constitutional equality clauses. Although these clauses were meant to grant the universal authority of law during the founding era of the Latin American republics, anti-discrimination legal norms have been gradually integrated into the former during the recent decades. A brief overview of the origins and development of these constitutional clauses during the nineteenth century will allow us to understand this connection.

Influenced by the French Revolution and US' independence process, the newly independent countries of Latin America embraced the republican principles of popular sovereignty, equality and freedom.<sup>8</sup> Moreover, the need to fight the wars for independence compelled local Creole elites to promise citizenship rights to previously excluded castes like indigenous and African slaves.<sup>9</sup> At least on paper, the new republics granted equality before the law to all their citizens. From the Constitution of Haiti (1805), the first Latin American constitution to be enacted, there was widespread recognition of a right to equality before the law in almost every constitutional text.<sup>10</sup> The recognition of this right and, more generally, the idea of citizenship itself, were particular features of Latin American republicanism: '[a]t a time when most of the Western world, with the conspicuous exception of the United States, endorsed monarchy, Spanish America opted for the republic.'<sup>11</sup>

Political citizenship, materialised through the right to vote, was extended early on to all free, non-dependent and adult males, including, in some cases, members of the indigenous population.<sup>12</sup> This ideal, imported in the early years of independence, attempted to replace the notion of 'the *pueblos*, the *comunidades*, the subject, the *vecino* (neighbour or

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<sup>8</sup> M Mirow, *Latin American Law: a History of Private Law and Institutions in Spanish America* (University of Texas Press 2004) 103.

<sup>9</sup> P Blanchard, *Under the Flags of Freedom: slave soldiers and the wars of independence in Spanish South America* (University of Pittsburgh Press 2008).

<sup>10</sup> Other examples are as follows: Constitution of Venezuela (1830) art 188; Constitution of Argentina (1819) art 110; Constitution of Ecuador (1830) art 11; Constitution of Uruguay (1830), art 132; Constitution of Bolivia (1826) art 149; Constitution of Brazil (1824) art XIII; Constitution of Chile (1833) art 12; Constitution of Colombia (1830) art 12; Constitution of Paraguay (1844) title X, art 2.

<sup>11</sup> H Sábato, 'On Political Citizenship in Nineteenth-Century Latin America' (2001) 106 *The American Historical Review* 1290, 1291.

<sup>12</sup> *ibid* 1297.

resident)’ with the idea of equal citizens of a single nation.<sup>13</sup> From the beginning, it was considered too abstract for the contexts of the region, but ‘gained increasing favour among the ascending revolutionary elites and found its way into the first constitutions.’<sup>14</sup> This initial extension of franchise was restricted by the elites some decades later, whom ‘increasingly attributed the difficulties in founding a stable political order to the extended suffrage’.<sup>15</sup>

From the start, the general right to equality before the law had no effective implications for the concession of political citizenship. The republican language, used to mark the rejection of the colonial past, did not ‘translate into equal rights for all the population, most of whom remained as excluded from citizenship as before’.<sup>16</sup> The liberal-conservative alliance, which emerged in the mid-nineteenth century as a reaction to the political instability of the recently created polities and dominated the constitutional scene for almost two centuries, had a very particular understanding of equality. Liberals and conservatives allied against radicals (or the so-called republican tradition in the nineteenth century) in rejecting the ‘social question’ and argued for a restrictive conception of democracy.<sup>17</sup> They advocated a narrow understanding of the right to equality, which implied, at most, the concession of political equality (franchise) to the few, subject to property, income and literacy qualifications.<sup>18</sup> During the founding period of Latin American constitutionalism, ‘liberals and conservatives defended (...) the *independence thesis*, that is to say, the thesis according to which it was necessary to have economic independence in order to have political independence.’<sup>19</sup> An early example was the Constitution of Colombia in 1830: in the section on ‘Political Rights’, it granted the right to equality before the law to all Colombians, ‘whatever their wealth or destinies’; subsequently, however, it described the property and education

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<sup>13</sup> *ibid* 1292.

<sup>14</sup> *ibid*.

<sup>15</sup> *ibid*.

<sup>16</sup> J Couso, ‘The Changing Role of Law and Courts in Latin America: From an Obstacle to Social Change to a Tool of Social Equity’, in R Gargarella, P Domingo, and T Roux (eds), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor* (Ashgate 2006) 62. Nevertheless, there were some minor improvements regarding the admission of mulatos to universities, and to the legal status of Indians in some specific areas, such as land distribution.

<sup>17</sup> J Morris, ‘La Cuestión Social’, in H Godoy (ed), *Estructura Social de Chile* (Editorial Universitaria 1971).

<sup>18</sup> see, for example, the thoughts of some Latin American intellectuals in the nineteenth century regarding franchise (Samper, Mora, Bello and Alberdi) R Gargarella, *Latin American Constitutionalism 1810-2010: The Engine Room of the Constitution* (OUP 2013) chs 2-3.

<sup>19</sup> *ibid* 47.

requirements that preconditioned citizenship and thus the right to vote.<sup>20</sup> Therefore, the independence thesis restricted the right to equality before the law to those who were able to vote, and in turn the right to vote was severely restricted. The right to equality was not considered a general clause on social equality, or as recognising the equal status of citizens in the social sphere, or as giving rise to general or special prohibitions on non-discrimination. There was no mention of sex, race or ethnicity, or any reference to discrimination as a social evil that should be tackled. No wording of the right to equality before the law during the nineteenth century included grounds of protection other than citizenship, which was narrowly constrained according to the liberal-conservative mindset described earlier, granting ‘limited political liberties and ample civic (economic) liberties.’<sup>21</sup> By the end of the nineteenth century, almost every constitutional text had introduced ‘property, income, or literacy qualifications to the franchise’.<sup>22</sup>

### 3.2.2 Codification (Private Law) and Status

As happened with new constitutions, codification was considered crucial for nation-building processes, and brought the possibility of repealing the entire colonial order.<sup>23</sup> Early republics saw a new private law as essential to restructure society and break with the colonial past.<sup>24</sup> The ‘revolutionary’ ideals of individual liberty and equality before the law acted through the codification processes, which required that legislation should be directed ‘in unified fashion for the “citizen” rather than for the “noble”, the “bourgeois”, and the “peasant”’.<sup>25</sup> In a sense, the apparent rights revolution brought by constitutional equality clauses was tamed through codification processes that were focused mainly on ‘rules related to property and inheritance, [that] controlled the structure of society and, in turn, channelled significant political power to the authority creating those rules’.<sup>26</sup> Furthermore, civil codes were supposed to be the concrete embodiment of the newly

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<sup>20</sup> D Bushnell, ‘The Independence of Spanish South America’, in L Bethell (ed) *The Cambridge History of Latin America III* (CUP 1994) 109.

<sup>21</sup> Gargarella (n 18) 199. Although this trend was also applicable to the developed world of that time, it is important to state this against the background of the Latin American emphasis on republican values.

<sup>22</sup> Sábato (n 11) 1297.

<sup>23</sup> I Jaksic, *Andrés Bello: Scholarship and Nation-Building in Nineteenth-Century Latin America* (CUP 2006) 176.

<sup>24</sup> Unlike a mere compilation of older bodies of laws, codification was focused on ‘planning a better society by means of new systematic and creative law’. M Murillo, ‘The evolution of codification in the civil law legal systems: towards decodification and recodification’ (2001) 11 *Journal of Transnational Law and Policy* 1, 4.

<sup>25</sup> Mirow (n 8) 98.

<sup>26</sup> Indeed, ‘several early attempts at codification began not with the provisions dealing with the legal status of persons, as the French Civil Code of 1804 would indicate as the logical starting place, but with the provisions dealing with the inheritance and succession of property’ *ibid*.

created constitutional values, so the whole project of the ‘liberal state trusted the legal framework of the civil society to civil codes’.<sup>27</sup> The majority of the constitutional texts that were created after independence included a state duty to legislate through codes in the civil and criminal spheres.<sup>28</sup> Thus, the relation between codes and constitutions leaned towards private law, which attempted to regulate the behaviour of private spheres that were considered important for bourgeois liberal society.<sup>29</sup> For Merryman, these ‘old individual rights’ (rights of personality, private property, and freedom of contract), which were the principal target of the Revolution, ‘received their “constitutional protection” in the civil codes.’<sup>30</sup> In other words, these codes ‘were thought of as serving something like a constitutional function’.<sup>31</sup>

Although the codification of new private rules was directed to the citizen in a unified way, access to civil rights was formally constrained by different regulations regarding property, marriage status and legal capacity. The articulation of these regulations allowed only certain citizens to be full members of the social and political community. For example, the private law definition of legal capacity impeded a broader expansion of civil citizenship to indigenous, afro-descendants, women, and the poor.<sup>32</sup> Debt peonage, tenant farming, the legal status of married woman or a simple lack of resources made it very difficult for these individuals to represent themselves in private or commercial relations or even before state institutions. Also, one could point to the notion of the private sphere in the early Family Law provisions, which rested on the presence of a patriarch: ‘when hereditary distinctions were abolished, domestic patriarchy and dependency came to the fore in regulating access to the privileges of citizenship’.<sup>33</sup> Indeed, ‘on a practical level, patriarchal authority became a precondition of republican citizenship’.<sup>34</sup> The early Constitution of Cundinamarca (Colombia) of 1811 declared that, ‘no one can be a good citizen who is not a good father, good son, good brother, good friend, and good

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<sup>27</sup> A López y López, ‘Constitución, Código y Leyes Especiales, Reflexiones sobre la llamada Descodificación’, in *II Centenario del Código Civil* (Editorial Centro de Estudios Ramón Areces 1990) 1165.

<sup>28</sup> A Guzmán Brito, ‘La Codificación como programa constitucional en Francia, España e Iberoamérica durante el siglo XIX’ (2012) 39 *Revista Chilena de Derecho* 3.

<sup>29</sup> Murillo (n 24) 4.

<sup>30</sup> J Merryman and others, *The Civil Law Tradition: Europe, Latin America and East Asia* (Michie Company 1999) 1170.

<sup>31</sup> J Merryman and R Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (Stanford University Press 2007) 93.

<sup>32</sup> Mirow (n 8) 103.

<sup>33</sup> S Caulfield, S Chambers, and L Putnam, *Honor, Status, and Law in Modern Latin America* (Duke University Press 2005) 7.

<sup>34</sup> N Milanich, ‘Women, Gender, and Family in Latin America, 1820-2000’, in T Holloway (ed), *A Companion to Latin American History* (Blackwell Publishing 2011) 462.

husband'.<sup>35</sup> Moreover, many countries allowed their younger male populations to obtain citizenship if they got married.<sup>36</sup> Therefore, property was not the only important precondition for civil and political citizenship, family status and legal capacity were also significant factors. Within this scenario, equality before the law meant the guarantee of equal treatment of two or more members of the male elite.<sup>37</sup>

Beyond formal exclusion in regard to access to civil and political citizenship, the historical continuity of the colonial concepts of honour and social status during the post-independence period is also crucial to understanding the coexistence of a theoretical commitment to liberal equality and widespread practices of discrimination.<sup>38</sup> Like in colonial times, honour and reputation affected one's capacity to get access to civil and political rights, as the constitutional and legislative commitments to equality 'did not erase social hierarchies based on perceived biological differences, nor did they end social or legal practices of discrimination'.<sup>39</sup> Indeed,

those who were not able to display the markings of honor -for men, economic independence and patriarchal authority -found it exceedingly difficult to defend their rights before the police or courts. The state also played a newly enhanced role in distributing honor as it sought to check private authority in various forms. Officials stopped short, however, of stripping honorable men of their authority over their wives, children, servants, or other dependents.<sup>40</sup>

Either from formal legislative sources, or through the concepts of honour and status in the private and social spheres, the republican values that lay behind the constitutional commitments to equality were eroded, and meant almost nothing to disadvantaged groups.

### 3.2.3 The irrelevance of legal equality

The interplay between constitutional equality clauses, codification, specific legislation, and the concepts of social status and honour, created an integrated framework through which to apply the second strand of the Aristotelian formula: unlikes should be treated

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<sup>35</sup> Constitution of Cundinamarca (Colombia) 1811, art 4 <<http://www.ensayistas.org/identidad/contenido/politica/const/co/cundinamarca.htm>>, accessed 5 May 2015.

<sup>36</sup> Milanich (n 34) 462.

<sup>37</sup> Improvements were seen in commercial/private relations between peninsulars and Creoles, and with the abolition of nobility titles and other legally sanctioned social privileges. Mirow (n 8) 145-6.

<sup>38</sup> R Barragán, 'The "spirit" of Bolivian law: citizenship, patriarchy, and infamy', in S Caulfield and others (n 33) 78.

<sup>39</sup> Caulfield and others (n 33) 2.

<sup>40</sup> *ibid.*

differently, according to their unlikeness. Rather than equalise the status of members of the political community, equality clauses allowed a broad range of hierarchies, segregation and discrimination. A good way to understand the lack of emancipatory power of the legal equality clauses is through the different historical articulations of law and race in a region that supposedly escaped from racism already during the independence era.<sup>41</sup> The first decades of independent history saw an almost complete legal banning of slavery, and few instances of citizenship concessions to ethno-racial communities.<sup>42</sup> Likewise, and in contrast to the status of Blacks in the US, there was no legally sanctioned segregation, and anti-miscegenation laws were not usual. However, as Góngora-Mera puts it, ‘this *constitutional and legal idealism* masked the deals that the political elites made to keep their privileges and manage social hierarchies’, which ‘ultimately resulted in structural discrimination’.<sup>43</sup> Even progressive political projects during the twentieth century that endorsed ideals of racial and ethnic inclusion, or concepts like *mestizaje* (mixture) or *democracia racial* (racial democracy), managed to maintain racial stratification with whites and *mestizos* at the top, and indigenous and afrodescendants at the bottom.<sup>44</sup> The ideas of racial equality and ethnic specificity have been advanced only during the recent decades, after lengthy debates and polemics about the allegedly ethno-racial character of regional democracies.<sup>45</sup> For more than one and a half centuries, equality clauses did almost nothing to improve the status and wellbeing of disadvantaged ethno-racial groups.

The example of the relationship between law and race could well be extended to other vulnerable or marginalised groups that gained attention with the gradual expansion of political rights around the middle of the twentieth century.<sup>46</sup> Women were granted the vote between the 1930s and 1950s, and indigenous movements and rural peasants were

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<sup>41</sup> In a way, the early history of legal/political equality in Latin America is not even enough to attract the moderate enthusiasm for revolutionary charts of Marx, for whom legal emancipation was ‘a stage’ of emancipation: ‘[b]eing regarded by the state as if we were free and equal is an improvement over being treated as if we were naturally subjected and unequal vis-a-vis stratifying social powers.’ W Brown, *States of Injury* (Princeton University Press 1995) 114.

<sup>42</sup> Sábato (n 11) 1310.

<sup>43</sup> M Góngora-Mera, ‘Transnational Articulation of Law and Race in Latin America: A Legal Genealogy of Inequality’ (2012) Desigualdes.net 18 <[http://www.desigualdades.net/Resources/Working\\_Paper/18\\_WP\\_Gongora-Mera\\_online.pdf](http://www.desigualdades.net/Resources/Working_Paper/18_WP_Gongora-Mera_online.pdf)>, accessed 20 December 2014 (emphasis added).

<sup>44</sup> CEPAL, *Afrodescendientes en América Latina y el Caribe: del reconocimiento estadístico a la realización de derechos* (2014).

<sup>45</sup> E Telles and S Bailey, ‘Understanding Latin American Beliefs about Racial Inequality’ (2013) 118 *American Journal of Sociology* 1559, 1565.

<sup>46</sup> E Posada Carbó, ‘Democracia, Liberalismo y Procesos Electorales en América Latina desde 1930’, in M Palacios, and G Weinberg (eds), *Historia General de América Latina: América Latina desde 1930* (Trotta-Unesco 2008) 395.

gradually included in ‘mass democracy’ through traditional political parties or the ascent of populism.<sup>47</sup> However, even after being incorporated into their political communities through citizenship rights (specifically, franchise), there was no sense of equal status with those who were part of the civil and political elites. That is, there was no substantial change in the social sphere that could be translated into real political equality. For O’Donnell, this may be explained by the formal expansion of political rights without the proper recognition and protection of civil and social rights.<sup>48</sup> In other words, the expansion of the right to political participation (voting, running for election and political party affiliation) was not joined by the promotion of diverse and educated public opinion through social and civil rights.<sup>49</sup> New constituencies exercised their citizenship only during elections, while in between, only the members of a privileged minority were allowed full citizenship, giving form to ‘delegative democracies’.<sup>50</sup> From this explanation, many scholars have challenged TH Marshall’s ideas on citizenship to elucidate the problem of the gradual expansion of citizenship rights when applied to the Latin American context. How would an expansion of political rights work within an environment of restricted ‘social rights granted to particular groups in society (eg, the working class) in the absence of universal political and civil rights’?<sup>51</sup> A critical account of the history of citizenship in Latin America shows the irrelevance of traditional equality clauses.

Furthermore, the legal veil of formal equality coexisted with two structural features of Latin American Law that expressed old legacies of colonial rule. First, formal equality clauses coexisted with widespread non-compliance with the scarce protective legislation that was sometimes enacted due to ideological, economic or religious concerns.<sup>52</sup> This is considered a longstanding feature, through which social status determines the ‘unequal

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<sup>47</sup> For Carlos De la Torre, populism entailed a re-emergence of equality in the public discourse. ‘El Populismo en Latinoamérica: entre la Democratización y el Autoritarismo’ (2013) 247 Nueva Sociedad 120, 122.

<sup>48</sup> G O’Donnell, ‘Why the rule of law matters’ (2004) 15 Journal of Democracy 32, 42. For example, as late as the 1970s, although political rights were universally granted to men and women, the legal status of being married prevented the exercise of some basic civil rights for women in most Latin American countries. A Lavrín, ‘Women in twentieth-century Latin American society’, in Bethell (n 20) 529.

<sup>49</sup> An interesting exception to this trend was the Peronist era in Argentina, ‘because so much emphasis was placed on the extension of social rights’. L Whitehead, ‘State Organization in Latin America since 1930’, in Bethell (n 20) 87.

<sup>50</sup> G O’Donnell, ‘Estado, democratización y ciudadanía’ (1993) 128 Nueva Sociedad 62.

<sup>51</sup> P Oxhorn, ‘Social Inequality, Civil Society and the Limits of Citizenship in Latin America’, in S Eckstein and T Vickham-Crowley (eds), *What Justice? Whose Justice? Fighting for Fairness in Latin America* (University of California Press 2003) 47; L Noretto, ‘Variaciones en torno al concepto de ciudadanía’ (2009) 6 Factótum 77.

<sup>52</sup> The delayed implementation of anti-slavery measures is an illustration of this feature. Mirow (n 11) 146.

application of the law according to the addressees of the norms'.<sup>53</sup> Secondly, constitutional equality clauses coexisted with a whole range of legislative and administrative measures that continued to structure the traditional social stratification. In general, the post-independence institutional arrangements allowed the mutual reinforcement of a diversity of policy measures that upheld different legal treatments for those in differing social circumstances. A range of policies maintained the cultural, social and racial structuring of society, like criminal law, prison reform and police ordinances to prosecute disadvantaged and marginalised groups,<sup>54</sup> health and hygiene laws surreptitiously designed to maintain the notion of white supremacy,<sup>55</sup> family laws structured around patriarchy-dependency and status,<sup>56</sup> and selective immigration policies to favour the incorporation of 'good races' from Europe and the United States.<sup>57</sup>

In exceptional cases, the development of constitutional equality provisions incorporated sex or race among the legal grounds of protection, or made reference to disadvantage in the understanding of this general clause. A notable example is the Constitution of Argentina of 1819, which established that '[m]en are so equal before the law, that this should be one and the same for all, be this criminal, prescriptive or protective, and it should favour equally the powerful and the miserable''<sup>58</sup> This wording was quite progressive for the time, especially if one takes note of another provision that makes reference to indigenous peoples, although with a paternalistic and assimilationist perspective.<sup>59</sup> Another interesting exception is the famous Mexican Constitution of 1917, which protected the first social rights in the modern era, including an explicit reference to sex in a clause regarding equal pay for men and women (art 123).<sup>60</sup> These were unique exceptions, as virtually none of the constitutional texts of the region recognised a general prohibition of discrimination or included references to particular vulnerable groups until the middle of the twentieth century.

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<sup>53</sup> Góngora-Mera (n 43).

<sup>54</sup> R Salvatore, and C Aguirre (eds), *The Birth of the Penitentiary in Latin America* (University of Texas Press 1996).

<sup>55</sup> A Zullawski, 'Hygiene and "The Indian Problem"' (2000) 35 *Latin American Research Review* 107.

<sup>56</sup> I Jaramillo, 'The Social Approach to Family Law: Canonical Family Law Treatises of Latin America' (2008) 58 *American Journal of Comparative Law* 843, 865.

<sup>57</sup> D Cook-Martín and D Fitzgerald, 'Liberalism and the Limits of Inclusion: Race and Immigration Law in the Americas (1850-2000)' (2010) 41 *Journal of Interdisciplinary History* 7.

<sup>58</sup> Constitution of Argentina (1819) art 110.

<sup>59</sup> *ibid* art 128: 'Being the Indians equal in dignity and rights to the rest of the citizens, they will have the same privileges and will be subject to the same laws.' The Constitution of Paraguay (1844) used the same wording.

<sup>60</sup> E de la Torre and J García, *Desarrollo histórico del constitucionalismo hispanoamericano* (IIJ-UNAM 1976) 225.



The emergence of the ‘social question’ at the beginning of the twentieth century triggered the enactment of the first social policies, acknowledging that some groups could be more vulnerable than the rest of the population.<sup>61</sup> Most of the time, Latin American social policies were focused only on ‘social insurance’ for the workers in the formal sector (usually, the male breadwinners).<sup>62</sup> In contrast, social assistance was merely a residual bunch of measures designed to provide some help to those other groups that were not in the formal sector, or under the family protection of an urban worker. Although the first social assistance policies made explicit references to vulnerable groups like women, the disabled, or indigenous people, there was no reference to the evils of unfair discrimination or the idea of disadvantage. Moreover, they were intended to benefit all those who needed help, so they could not be recognised as part of the minimum doctrinal body of ADL presented in the introductory chapter.<sup>63</sup> With the expansion of the electorate to women and other previously excluded groups from the 1930s, political parties tried to gain support from these new constituencies, and the ascent of populism in countries like Argentina or Brazil further reinforced this pattern of inclusion.<sup>64</sup> For Phillip Oxhorn, even when populism or other progressive forces expanded the boundaries of citizenship, especially regarding social and political rights,

the dominant model of citizenship during the 20th century was *citizenship as cooptation*. Rights were anything but universal. Social rights of citizenship were segmented, partial and unequal. Entitlement to them was predicated on political loyalty and/or a de facto acceptance of the limits of social change through social mobilization. In this way, the social construction of citizenship was severely constrained in a hierarchical fashion that reinforced rather than mitigated social inequality.<sup>65</sup>

Summarising this section, the most important fact is that for more than 150 years, formal/constitutional equality clauses were not seen and applied as emancipatory provisions that grounded strong prohibitions of discrimination against vulnerable or marginalised groups, provided foundations for the development of social equality

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<sup>61</sup> C Abel, ‘La Política Social en América Latina desde 1930 hasta el presente’, in Palacios and Weinberg (n 46) 213.

<sup>62</sup> A Barrientos and C Santibañez, ‘New Forms of Social Assistance and the Evolution of Social Protection in Latin America’ (2009) 41 *Journal of Latin American Studies* 1.

<sup>63</sup> see 1.4.

<sup>64</sup> Posada Carbó (n 46) 395.

<sup>65</sup> P Oxhorn, ‘When everything seems to change, why do we still call it citizenship?’, in M M Sznajder and others (eds), *Shifting Frontiers of Citizenship: The Latin American Experience* (Brill 2012) 485.

provisions, or resulted in corrective devices to challenge a long history of social and political exclusion.

### 3.3 The re-emergence of equality in Latin America

During the second half of the twentieth century, new political constituencies started to place a strain on the social order. Longstanding practices of discrimination and social exclusion became visible in the political arena. However, the institutional reaction to address these practices took some decades to materialise.

Initially, and prompted by the image of ‘racial innocence’,<sup>66</sup> many Latin American countries started to react to discrimination (and, specifically, to racism) through the use of criminal sanctions.<sup>67</sup> Even before any explicit reference in favour of ethno-racial groups in constitutional provisions, countries like Brazil enacted criminal sanctions against racial discrimination already in the 1950s (the first in Latin America). The *Alfonso Arinos Act* criminalised racial discrimination in the workplace, commerce, public premises, the public sector and education.<sup>68</sup> The aim of this strategy was to show the seriousness of the official anti-racism commitment and to isolate these aberrant acts from other cultural practices, which were allegedly grounded in republican values: ‘racists are criminals rather than representatives of long-standing racist cultural norms’.<sup>69</sup> The claim of republican virtuousness in Latin America was generally raised as a way to distance itself from slavery, racism or other xenophobic acts generally present in the US.<sup>70</sup> In the words of the presidents and heads of state of South America at the beginning of this millennium:

The Presidents view with concern the resurgence of racism and of discriminatory manifestation and expressions in *other* parts of the

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<sup>66</sup> A Dulitzky, ‘A Region in Denial: Racial Discrimination and Racism in Latin America’, in A Harris (ed), *Race and Equality Law* (Ashgate 2013) 93.

<sup>67</sup> Although only a few countries have comprehensive anti-discrimination laws, most of the countries in the region have included hate crimes in their criminal legislation either as crimes in themselves or as aggravations. Hernández (n 5) 199.

<sup>68</sup> Law 1.390 (1951).

<sup>69</sup> Hernández (n 5) 104. For her, ‘even though the criminalization of racial discrimination suggests a strong normative commitment to the eradication of discrimination, it may, as a practical matter, have had the ironic effect of making the legal system less capable of dealing with the problems of inequality and discrimination’ (ibid 105).

<sup>70</sup> P Wade, ‘Race in Latin America’, in D Poole (ed), *A Companion to Latin American Anthropology* (Blackwell 2008) 182.

world and state their common commitment to preserve South America from the propagation of said phenomenon.<sup>71</sup>

In this scenario, criminal sanctions highlighted Latin America's alleged commitment to racial equality. Nevertheless, historically, the effectiveness of tackling discrimination through the use of criminal law has been undermined by the selective and unequal application of law, and constraints to victims' access to justice. The example of the *Alfonso Irinos Act* of 1951 is illustrative: only 9 defendants were convicted during its 46 years of operation.<sup>72</sup> The same could be said of subsequent Brazilian statutes criminalising discrimination, which were affected by the same problems.<sup>73</sup>

After this initial criminal reaction, the region had to wait until the last decades of the twentieth century to see real advances in social and legal equality.<sup>74</sup> One of the most important effects of the 'third wave' of democratisation in the region was the emergence of a diversity of social issues that came to occupy the public agenda. The fragmentation of social movements that were previously united in the struggle against dictatorships or authoritarian regimes allowed the diversification of social demands, and the emergence of indigenous, feminist and environmental struggles, among others.<sup>75</sup> With this, the demands for a broader understanding of the general right to equality fostered constitutional amendments and new laws to protect specific vulnerable groups.<sup>76</sup> In that sense, the re-emergence of equality in the transitional era occurred mainly through the re-appropriation of the meaning of the constitutional right to equality before the law by social activists and movements.<sup>77</sup> We could say that it was a movement towards filling the so-called 'empty' clause of formal equality, or the awakening of a longstanding 'dormant clause'.<sup>78</sup>

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<sup>71</sup> Quoted in Dulitzky (n 66) 93.

<sup>72</sup> Hernández (n 5) 118-9.

<sup>73</sup> J Rodrigo and M Rodríguez, 'Law and Public Sphere: Spaces for Interaction and Flow Direction', in S Kron, S Costa, and M Braig (eds), *Democracia y reconfiguraciones contemporáneas del Derecho en América Latina* (Vervuert Verlag 2012) 171.

<sup>74</sup> Mirow (n 8) 200.

<sup>75</sup> S Álvarez and A Escobar (eds), *The Making of Social Movements in Latin America* (Westview 1992).

<sup>76</sup> S Kron, S Costa, and M Braig, 'Democracia y reconfiguraciones contemporáneas del derecho en América Latina: una introducción', in Kron and others (n 73) 9. Clearly, this was a case of a black and indigenous mobilisation, which pushed for concrete legal and constitutional reforms. Wade (n 70) 187.

<sup>77</sup> For Elizabeth Jelin, these movements generated a dialectic between the new cultural rights of identity and the previously dominant conceptions of equal citizenship. 'Ciudadanía(s)' (2003) UDISHAL, Serie Mayor, Documento de Trabajo 3.

<sup>78</sup> P Westen, 'The Empty Idea of Equality' (1982) 95 Harvard Law Review 537. For the re-appropriation of dormant clauses, see Gargarella (n 18) ch7.

We should also take into account the influence of international human rights law and an emergent regional human rights regime.<sup>79</sup> The IAHRS, as we will see in the next section, has been crucial in expanding the scope and meaning of the right to equality and non-discrimination. These two factors –the emergence of newer demands and the influence of international and regional human rights law- acted as catalysts for reform, and prompted a diversity of anti-discrimination measures that were not co-ordinated. Indeed, the legal empowerment of social movements created avenues for social change that revisited the dormant clauses of different constitutions. For example, in the 1990s, the claims to enforce the right to HIV treatment from public health systems were in part articulated through the use of the right to equality before the law within litigation battles. In these legal procedures, a frequent invocation of international human rights law was considered essential to the re-appropriation of a right that was formerly considered a veil to hide social exclusion and marginalisation.<sup>80</sup> Moreover, the re-emergence of equality discourses through the re-interpretation of traditional rights, like the right to equality before the law, gradually developed and reinforced a sense of identity or belonging within certain groups, creating a special relation between equality, cultural differences, and personal/collective identities, as illustrated by the LGBT movement(s) in Latin America. Mobilisation against discrimination led to the re-appropriation of constitutional rights in a vernacular way, and was thus also performative for the development of personal/collective identities.<sup>81</sup>

With the return of democracy in the 1990s, inequality and discrimination were brought to the forefront of the public agenda. In this transitional era, the newly elected governments, with almost no human rights institutional structure, had to react to equality and non-discrimination claims made by domestic social movements or international organs through the monitoring procedures of international human rights treaties. For many years, it seemed that it was enough for governments to claim that the constitutional equality clauses were binding law and that international obligations were being properly incorporated into national law.<sup>82</sup> General constitutional equality clauses were the explicit

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<sup>79</sup> The impact of international human rights law at the domestic level in Latin America was clearly seen in the changes to the national institutional arrangements regarding discrimination after the UN World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban (2001). M Htun, 'From "Racial Democracy" to Affirmative Action: Changing State Policy on Race in Brazil' (2004) 39 *Latin American Research Review* 60.

<sup>80</sup> J Contesse and D Lovera, 'Acceso a tratamiento médico para personas viviendo con VIH/Sida: Éxitos sin Victoria' (2008) 8 *Sur* 149.

<sup>81</sup> IM Young, *Justice and the Politics of Difference* (OUP 2011) 160-1.

<sup>82</sup> Hernández (n 5) 102-3.

or implicit grounding of general prohibitions of non-discrimination, and the law on paper was deemed to be enough evidence of a government's compliance before the international community.<sup>83</sup> The claim of social movements for a broader understanding of the right to equality did not generate an immediate institutional response.

The current scenario is somewhat different: at least at the level of discourse, the race for substantive or material equality has now arrived in Latin America. Whether in courts, administrations or parliaments, or in the broader public opinion, equality discourse has entered daily debates.<sup>84</sup> Political campaigns, awareness raising strategies, legislative agendas and broader media language have deployed substantive equality as an overarching concept: *Matrimonio Igualitario* (Equal Marriage), *Muevete por la Igualdad* (Move for Equality), or *Fundacion Iguales* (Equality Foundation) are common examples of the different uses of equality, grounded in an overarching notion of equal status.<sup>85</sup> Equality has been deployed in its different dimensions both by groups reaffirming cultural specificity and by those struggling for material benefits within a broader understanding of social citizenship. In other words, there has been a strong connection between equality discourses and struggles for both the right to equality and non-discrimination, and within struggles for social rights grounded in egalitarian values. The language of Latin American activism easily accommodated a place for both dimensions of equality, contradicting the assumed incompatibility between them, that is, the contradictions between class and other grounds of protection from discrimination like race, sex or ethnicity.<sup>86</sup>

At both the domestic and regional levels, judicial forums have been keen to receive arguments to develop the previously dominant formal equality clauses and expand their scope. In a way, courts are gradually starting to abandon the jargon of equality as a mere negative liberty (or as a warranty of neutral treatment), and embrace an anti-subordination

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<sup>83</sup> D Lovera, 'El Informe de Chile ante el Comité de Derechos Económicos, Sociales y Culturales: el Papel del Derecho' (2005) *Anuario de Derechos Humanos* 167.

<sup>84</sup> For some scholars, the re-emergence of equality is the re-emergence of the 'social question'. C Barba-Solano and N Cohen, 'Hacia una visión crítica de la Cohesión Social en América Latina', in *Perspectivas Críticas sobre la Cohesión Social* (CLACSO 2009) 12.

<sup>85</sup> These names refer, respectively, to the umbrella slogan of the Argentinian social movement for same-sex marriage; a state-sponsored campaign against discrimination in Colombia; and a LGBT NGO in Chile.

<sup>86</sup> A Escobar, 'Culture, Economics, and Politics in Latin American Social Movements Theory and Research', in A Escobar and S Alvarez (eds), *The Making of Social Movements in Latin America*: (Westview Press 1992) 62–85; S Warren, 'Latin American Identity Politics: Redefining Citizenship' (2012) 6/10 *Sociology Compass* 833.

approach,<sup>87</sup> a social reading of the equality mandate,<sup>88</sup> a reading of equality as a principle of non-domination,<sup>89</sup> or a conception of substantive equality.<sup>90</sup> In the words of Clérico, Ronconi, and Aldao:

Supreme Courts, Constitutional Courts and tribunals from many countries in Latin America have been applying the equality mandate since they were born as institutions. However, probably only in the last decade of the twentieth century they started to apply the equality clause both as a material legal principle and in its non-discrimination version.<sup>91</sup>

This process has been accompanied by different changes at the normative level: new regional treaties, new and amended constitutions, and special statutory and administrative regulations against discrimination. However, this copious legal development has not achieved the emancipatory promise made by the rapid advancement of democracy and human rights discourse during the last two decades.<sup>92</sup> The emergent ADL in the region, promoted in part by the role of the IAHRs and domestic courts, has not given rise to effective forms of legal protection for people who suffer from the evils of inequality and discrimination. In a way, the race for equality has not yet resulted in the institutional development of effective protections against discrimination. Comparatively, Latin American countries have been very generous in ratifying special human rights treaties and including new rights in their domestic catalogues.<sup>93</sup> However, ‘such legal provisions do not translate into effective human rights protection on the ground’.<sup>94</sup>

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<sup>87</sup> R Saba, ‘Igualdad de Trato entre Particulares’ (2011) 89 *Lecciones y Ensayos* 217.

<sup>88</sup> V Abramovich, ‘From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American Human Rights System’ (2011) 6 *Sur* 7.

<sup>89</sup> L Clérico and others, ‘Towards a Reconstruction of Equality Case-Law Trends in Latin America and the Caribbean: On Non-Discrimination, Anti-Subordination, Redistribution and Recognition’ (2013) 9 *Revista Direito GV* 115.

<sup>90</sup> IACHR, *The Road to substantive democracy: Women’s political participation in the Americas* (OAS 2011) ch 5.

<sup>91</sup> Clérico and others (n 89) 121.

<sup>92</sup> Although there are no empirical works that measure the effectiveness of anti-discrimination legal provisions, indicators show that poverty and social exclusion are disproportionately high among groups protected by ADL. Because of that, some authors speak of the ‘Latin American Paradox’, characterised by the permanent convergence between democracy, human rights and social inequality. HJ Burchardt, ‘The Latin American Paradox: Convergence of Political Participation and Social Exclusion’ (2010) 3 *Internationale Politik und Gesellschaft* 40.

<sup>93</sup> J Melton and others, ‘To codify or not to codify? Lessons from consolidating the United Kingdom’s constitutional statutes’ (2015, *The Constitution Unit UCL*) 27-8.

<sup>94</sup> J Cavallaro and S Erin Brewer, ‘Revaluating Regional Human Rights Litigation in the Twenty-First Century: the case of the Inter-American Court’ (2008) 102 *The American Journal of International Law* 768, 784.

### **3.3.1 The national re-emergence of equality and anti-discrimination**

In what follows, I will describe the recent domestic re-emergence of equality and anti-discrimination discourse through a new understanding of constitutional equality clauses or the reform or enactment of new constitutional, statutory or administrative provisions.

#### **3.3.1.1 Latin American Constitutions**

Recent constitutional changes in the region have major differences between them and are applicable to different contexts, but we can draw some common features related to the topic of this project.<sup>95</sup> Following Rodrigo Uprimny, one could say that one of the most important common features is that ‘the constitutional reforms give special protection to groups that have been traditional targets of discrimination, including indigenous and African-descended communities’.<sup>96</sup> Another common feature, strongly related to the former, is that ‘many constitutions express a strong commitment to equality, not only prohibiting discrimination on grounds of race, gender, and other factors, but also ordering special affirmative action policies to make equality real and effective’.<sup>97</sup> In some cases, these developments have resulted from amendments to the formal constitutional equality clauses, or the incorporation of new provisions that should be read in conjunction with the former. One can notice the explicit inclusion of a general prohibition from discrimination in the core parts of constitutions (Constitution of Mexico, art 1; Bolivia; art 9.1; Peru, article 2.2), and the generous wording of some constitutional equality clauses that include not only the negative dimension of the right to be free from discrimination, but the positive side, by offering constitutional grounding to special measures and affirmative action policies (Constitution of Colombia, art 13).<sup>98</sup> Others have included a different provision, explicitly establishing that positive action or special measures in favour of protected groups are not incompatible with equality clauses, and should be interpreted as measures promoting real equality (Constitution of Argentina, art 75.23). Moreover, some constitutional texts offer explicit grounding for special policies that favour specific groups, like gender quotas in political representation (Constitution of

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<sup>95</sup> A chronology and summary of major constitutional changes can be found in R Uprimny, ‘The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges’ (2011) 89 Texas Law Review 1587, 1587-1589. Several countries in the region adopted new constitutions, among others, Brazil (1988), Colombia (1991), Paraguay (1992), Ecuador (1998 and 2008), Peru (1993), Venezuela (1999), and Bolivia (2009). Others made major reforms, like Argentina (1994), Mexico (1992 and 2011), Costa Rica (1989), and Chile (2005).

<sup>96</sup> *ibid* 1589-90.

<sup>97</sup> *ibid* 1592.

<sup>98</sup> see appendix (table 1).

Argentina, art 37; Constitution of Colombia, art 40), the private and public participation of people with a disability or special needs (Constitution of Bolivia, art 71.II), and specific policies that may foster equal opportunities for indigenous people (Constitution of Mexico, art 2.B). Overall, we could claim, with the exception of Chile (Constitution of Chile, art 19.2), that Latin American constitutions are not neutral with regard to the phenomenon of discrimination.<sup>99</sup>

The development of lengthy and detailed constitutions in the recent decades has favoured the advent of anti-discrimination constitutional provisions in Latin America.<sup>100</sup> Also, the legacy of codification processes has influenced the way in which constitutional texts are becoming a major source for adjudication in contemporary legal landscapes.<sup>101</sup> Considered as superior codes, constitutional texts have started to incorporate more detailed provisions that are able to regulate not only the relationship between the state and individuals, but also private relationships.<sup>102</sup> Furthermore, the idea that rights are granted by the state, rather than being old liberties that existed before the creation of the state and are only then recognised by judge-made law, has triggered detailed regulation of the scope of constitutional rights.<sup>103</sup> This legal mindset has created the false expectation that the scope of rights is fixed by the constitutional wording, suffocating broader efforts to develop more substantive readings through sub-constitutional regulation. The progressive language of several constitutional texts in Latin America has provided incentives for legal mobilisation processes that can both advance the interests of disadvantaged groups and challenge legal arrangements that could be considered discriminatory when compared to constitutional standards.<sup>104</sup> However, the danger is that

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<sup>99</sup> 'Neutral' constitutions are those that merely grant a right to equality before the law, excluding the equal 'protection of the law', or any other provision that commits the state in the struggle against discrimination. P Lambert and D Scribner, 'A Politics of Difference vs. a Politics of Equality: Do Constitutions Matter?' (2009) 41 *Comparative Politics* 337.

<sup>100</sup> The paradigmatic case in this regard is the Bolivian Constitution, which articulates non-discrimination, among other dimensions, as a principle, value and purpose of the State (art 9.2), a fundamental right (art 14.2), and a principle for international relations (art 255.3).

<sup>101</sup> S Montt, 'Codificación y futuro de la educación jurídica en Chile: el caso irremediable, pero liberalizador del derecho administrativo', in M Tapia and M Martinic (eds), *Sesquicentenario del Código Civil de Andrés Bello* (Lexis Nexis 2005).

<sup>102</sup> In the Latin American jurisdictions selected here, constitutional writs can be directed against private actors, but the most important effect, with variations, is the direct application of the constitution and international human rights treaties for the adjudication of private conflicts. A Huneeus, 'Introduction to Symposium on the constitutionalization of International Law in Latin America' (2015) *AJIL Unbound* 90.

<sup>103</sup> R Barker, 'Latin American Constitutionalism: an overview' (2012) 20 *Williamette Journal of International Law and Dispute Resolution* 1, 5.

<sup>104</sup> P Lambert and D Scribner, 'The Constitutional Recognition of Gender Equality in Chile and Argentina' (Western Political Science Association Annual Meeting, Vancouver, April 2017).



social movements may prefer to fix their demands through constitutional discourses rather than mingling with the details of technical regulation.

### **3.3.1.2 Statutory (and administrative) provisions**

Although the establishment of anti-discrimination provisions at the legislative and administrative levels has been increasing, it is still fragmented and scarce.<sup>105</sup> The need to explore the development of sub-constitutional regulation starts from the growing scepticism about the promises of constitutional changes.<sup>106</sup> In a sense, it is a challenge against the reform fetishism present in the region, especially regarding the transformative potential of constitutional reform: ‘the naïve belief that constitutional reform on its own can rise to far-reaching political transformation.’<sup>107</sup>

Recent years have witnessed a growing enactment of specific anti-discrimination provisions. Beginning with the enactment of the Argentinian Anti-Discrimination Law (1988) and the Mexican Federal Law to Prevent Discrimination (1992), many countries in the region started to establish sectorial laws to address the needs and demands of different groups affected by discrimination. In this sense, anti-discrimination provisions are now part of a piecemeal evolution, without clear theoretical groundings other than the general modern understanding of constitutional equality clauses. Either because of international influence, social pressure or technical concerns, different statutes and administrative decrees granting special measures to prevent discrimination and protect vulnerable groups are part of a plethora of rules that go from disability laws and racial equality statutes, to special laws against gender identity discrimination.

Nevertheless, this wave of fragmented anti-discrimination provisions has not developed the appropriate infrastructure to protect these rights. As stated by Brinks and Botero, democracies in our region ‘have witnessed a proliferation of formal rights for traditionally marginalized populations –the indigenous, the women, the poor- but without

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<sup>105</sup> see appendix (tables 1-2).

<sup>106</sup> There is growing scepticism about the development of forms of ‘constitutional populism’, characterised by the merely symbolic effect of constitutional commitments and their use for electoral interests. JP Sarmiento, ‘El populismo constitucional en Colombia, hacia la instrumentalización simbólica de la Constitución por medio de proyectos de actos legislativos fallidos’ (2013) 15 *Estudios Socio-Jurídicos* 75.

<sup>107</sup> D Nolte and A Schilling-Vacaflor, ‘Introduction: “The Times they are a changing”’: Constitutional Transformation in Latin America since the 1990s’, in Detlef Nolte and Almut Schilling-Vacaflor (eds), *New Constitutionalism in Latin America: Promises and Practices* (Ashgate 2012) 25.

corresponding growth of the infrastructure required to generate compliance’’<sup>108</sup> The efforts to build the ‘corresponding infrastructure’ at the legislative or administrative level, through the establishment of special anti-discrimination legislation or the creation of equality bodies, or an adequate degree of institutional coordination, have been weak. Maybe this is because the case for legal reform ‘often focus[es] on the substantive rule to the exclusion of all else.’<sup>109</sup> In a sense, the effectiveness of substantive anti-discrimination provisions, which are generously present in every country in the region, ‘rests on the development of a dense structure of lateral support composed of ancillary rules, and third party facilitators and controllers, often but not only within the state.’<sup>110</sup>

There is no comprehensive legislation other than that in Mexico, which has recently been amended to give more powers to the anti-discrimination agency in charge of its implementation.<sup>111</sup> Recent years have seen a boom in anti-discrimination legislation around the region. Bolivia, Chile and Colombia have enacted so-called general anti-discrimination laws with different scopes. While Bolivia has enacted comprehensive legislation giving soft powers to an administrative agency, Chile and Colombia have restricted the scope of their legislation to the creation of a judicial remedy to tackle discrimination or to the creation or aggravation of hate crimes. In the cases of Argentina, Bolivia, and Chile, the legal definition of discrimination is tied to the enjoyment of other fundamental, constitutional or international human rights, and has attracted criticism for not including an autonomous right to equality and non-discrimination.<sup>112</sup> However, in all of the selected countries, the legislative or administrative expansion of the protected grounds of discrimination, or the expansion of the scope of protection, is expected to impact on the constitutional definition of discrimination.<sup>113</sup> In this regard, we can understand these recent regulations as part of what scholars call small-c constitutions,

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<sup>108</sup> D Brinks and S Botero, ‘Inequality and the Rule of Law: Ineffective Rights in Latin American Democracies’, in D Brinks, M Leiras, and S Mainwaring (eds), *Reflections on uneven democracies: the legacy of Guillermo O'Donnell* (Johns Hopkins University Press 2014) 215.

<sup>109</sup> *ibid.*

<sup>110</sup> Brinks and Botero (n 108) 222.

<sup>111</sup> see appendix (table 2); CONAPRED, *Fundamentos de la Armonización Legislativa con Enfoque Antidiscriminatorio* (2013).

<sup>112</sup> I Díaz García, ‘Ley chilena contra la discriminación: una evaluación desde los derechos internacional y constitucional’ (2013) 40 *Revista Chilena de Derecho* 635.

<sup>113</sup> see, for example, Corte Suprema de Justicia de la Nación (Argentina), *Maximiliano Alvarez y otros s/n c. Cencosud S.A.* (2010) (considering the ADLARG as a ‘constitutional projection’ of the protection from discrimination to individual employment relationships); Corte Suprema (Chile), rol 11521-2014 (*habeas corpus*) (including nationality, considered as a protected ground in the ADLCHI, to the constitutional right to equality before the law).

which expand the scope and meaning of constitutional rights, or as statutory changes that modify the public understanding of discrimination as a constitutional evil.<sup>114</sup>

Moreover, several countries have created administrative agencies, equality bodies or commissions with the explicit task of tackling discrimination, like Peru (National Committee against discrimination, CONACOD) and Bolivia (Committee against all forms of racism and discrimination), following the examples of the *Instituto Nacional contra la Discriminación, la Xenofobia y el Racismo* (INADI) created by the Argentinian Government in 1995, and the National Committee to Prevent Discrimination in Mexico (CONAPRED).<sup>115</sup> Although each of these countries has autonomous ombudsmen (*defensorias del pueblo* or NHRIs) with both consultative and quasi-judicial powers, they have realised the need to create special anti-discrimination entities.<sup>116</sup> In these cases, there is an important administrative implementation of anti-discrimination regulations that develops in detail the constitutional and legislative clauses. However, the incentives for reaching friendly settlements and the lack of accessible information constitute an important obstacle to the development of administrative jurisprudence on discrimination.<sup>117</sup>

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<sup>114</sup> D Law, 'Constitutions', in P Cane, and H Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010); W Eskridge and J Ferejohn, 'Super-Statutes' (2001) 50 *Duke Law Journal* 1214, 1215.

<sup>115</sup> According to the 'Paris Principles', these four administrative agencies are not autonomous. Even if some of them include participation of civil society, they depend administratively on the government, without any guarantee of constitutional or legislative autonomy.

<sup>116</sup> Five of the six selected jurisdictions have autonomous ombudsmen or *defensorias* (Argentina, Bolivia, Colombia, and Peru) or NHRI (Mexico) that have quasi-judicial powers and, in some cases, the power to litigate before national courts. Again, Chile stands as an exception: although its National Human Rights Institute is accredited with an A status within the Sub-Committee on Accreditation of NHRIs, it has no power to handle complaints and limited power to litigate before courts. CONACOD is a multi-ministerial platform with a general consultative power that depends on the Vice-Ministry of Access to Justice and Human Rights of Peru. Although it does not receive complaints directly, it has the power to supervise the multiple sectorial instances (education, consumption, work and the media) that have the power to receive and adjudicate individual anti-discrimination complaints. Decreto Supremo 015-2013, art 8. The Bolivian Committee against all forms of racism and discrimination is a public entity that includes civil society organisations, which has both consultative and quasi-judicial powers. It depends on the Vice-Ministry of Decolonization. ADLBOL (Law 045-2010). Nowadays, there is an Ibero-American Network of Anti-Discrimination Organisms and Organizations, which serves as an annual platform for sharing the best institutional and social practices against discrimination. RedRIOOD <<http://redriood.org/>> accessed 20 November 2016.

<sup>117</sup> S Fredman, *Discrimination Law* (2nd edn, OUP 2011) 281-2. None of the above-mentioned anti-discrimination bodies contemplates a database to access their administrative jurisprudence. Only INADI provides a fragmented access to some of its resolutions of individual complaints, but there is no systematic or coherent practice. In their annual reports, every organism shares the number of complaints received and solved, and the issues or grounds of protection involved. However, there is almost no impact for the overall understanding of the concept of discrimination in each legal order. An important part of the work of these entities is highlighted by media appearances and anti-discrimination campaigns that have great symbolic power.

### 3.3.2 The Inter-American Human Rights System and the emergence of substantive equality

Despite the lack of resources and political support from the regional and national constitutive institutions, the IAHRs has developed strong and effective protection of some basic human rights.<sup>118</sup> Since its creation in the 1960s and its subsequent development, most of its activity and resources have been focused on the most egregious human rights violations, like torture, enforced disappearances and extrajudicial killings. Those problems have strongly influenced the institutional path adopted by the system. During the height of the dictatorships in the region, the IACHR was very relevant in reporting violations and applying international pressure to authoritarian regimes. However, with the ‘third wave’ of democracies in the region in the 1990s, the Commission started to refer contentious cases to the IACtHR (or the ‘Court’), the adjudicative body that was created by the ACHR, which entered into force in 1978. From then on, the Court became very important in the development of common human rights standards in the region, especially regarding the way in which democracies were to deal with past (recent) human rights violations.<sup>119</sup> Transitional justice became the main scope of action for both the Commission and the Court, in contrast with its European counterpart. Nevertheless, ‘[a]s the countries of Latin America have moved through the phase of transition to (...) the phase of democratic consolidation the concerns regarding the nature of the region’s democracies change.’<sup>120</sup> Social movements, who deploy their scarce resources to put different claims on the public agenda, have triggered a major shift in the issues with which both organs of the system have to deal, and discrimination is certainly one of these newer issues.

As the ACHR does not provide a definition of discrimination, the IACtHR has followed other organs and treaties.<sup>121</sup> In its first article, the ACHR protects the right to equality and non-discrimination regarding conventional rights, through the so-called subordinate

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<sup>118</sup> For a critical overview, see R Goldman, ‘History and Action: the Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights’ (2009) 31 Human Rights Quarterly 856. Despite these problems, the IAHRs has gained a lot of attention in scholarly debates, social movements, and prestige on national judicial cultures. D García Sayán, ‘Inter-American Human Rights System and Constitutionalism’ (2011) 89 Texas Law Review 1835, 1836.

<sup>119</sup> A Dultizky, ‘The Inter-American Human Rights System Fifty Years Later: Time for Changes’ (2011) Sp ed Quebec Journal of International Law 127.

<sup>120</sup> P Engstrom and A Hurrell, ‘Why the Human Rights Regime in the Americas Matter?’, in M Serrano and V Popovski (eds), *The Human Rights Regime in the Americas: Theory and Reality* (UNUP 2010) 44.

<sup>121</sup> On several occasions, the Court has followed the definition provided by CEDAW. IACtHR, *Norín Catrimán et al v. Chile* (2014) para 198.

clause of article 1.1, including an open list of protected grounds.<sup>122</sup> Moreover, in article 24, and under the heading ‘right to equal protection’, the ACHR protects the right to equality before the law, and, as a ‘consequence’, the right to the ‘equal protection of the law’.<sup>123</sup> According to Antkowiak and Gonza, ‘the right to equal protection of the law focuses upon the content of the law, and directs legislators to avoid all discrimination when drafting and enacting statutes’.<sup>124</sup> In other words, article 24 establishes that the right to equality and non-discrimination is protected before the enactment and enforcement of national legislation.<sup>125</sup> In general, the IAHRs has concluded that both clauses are expressions of the general principle of equality and non-discrimination, so the jurisprudence of article 1.1 is pertinent to determining the meaning and scope of article 24.<sup>126</sup>

From these two textual sources (articles 1.1. and 24), the IAHRs has developed one of the most important innovations. The explicit agenda of the Commission has embraced the role of tackling structural inequalities that lie beyond formal institutional arrangements.<sup>127</sup> The Court, for its part, has started to ‘confront cases of structural human rights violations the causes of which do not lie in the exercise of arbitrary state power but are rather the consequences of state weakness and failure to act’.<sup>128</sup> In the words of Abramovich:

In recent years, the [IAHRs] has increasingly confronted an agenda tied to the problems stemming from inequality and social exclusion. After enduring complicated periods of transition, Latin American democracies find themselves threatened by the sustained increase in social inequality and the exclusion of vast portions of the population from the political system and the benefits of development, which

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<sup>122</sup> Art 1.1: ‘The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition’. Following a *pro homine* interpretation, the Court has ‘added sexual orientation, ethnic origin, disability, and HIV status to the list of prohibited categories.’ T Antkowiak and A Gonza, *The American Convention on Human Rights* (OUP 2017) 41.

<sup>123</sup> Art 24: ‘All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.’ The Court has not clarified the ‘logical’ interpretation suggested by the text of the ACHR. Moreover, there is no clear history of the conference where the draft of this treaty was negotiated that could clarify this difference. *ibid* 35-6.

<sup>124</sup> *ibid* 33. In contrast, art 26 of the ICCPR protects these as separate dimensions of the right to equality.

<sup>125</sup> For the relationship between the two articles, see IACtHR, *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica* (Advisory Opinion 1984) para 83.

<sup>126</sup> R Uprimny and LM Sánchez Duque, ‘Artículo 24. Igualdad ante la ley’, in C Steiner and P Uribe (eds), *Convención Americana de Derechos Humanos: Comentario* (Fundación Konrad Adenauer 2014) 585.

<sup>127</sup> Goldman (n 118) 875.

<sup>128</sup> Engstrom and Hurrell (n 120) 42.

imposes structural limitations on the exercise of social, political, cultural and civil rights.<sup>129</sup>

Moreover, the ratification of regional human rights treaties directed at the protection of specific vulnerable groups is a sign of this trend.<sup>130</sup> Two recently approved treaties, the Inter-American Convention against all forms of Discrimination and Intolerance (the Anti-Discrimination Convention), and the Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance (the Anti-Racism Convention), represent the latest advances on the issue by international human rights experts. Although they still need to get more signings to enter into force, preparatory works are very important to understand the IAHRs's scholarship on ADL.<sup>131</sup> For example, beyond providing a definition of discrimination, the Anti-Discrimination Convention makes explicit references to the concepts of intersectionality, indirect, structural or institutional discrimination, and general groundings for strong positive measures or affirmative actions. Moreover, it allows collective complaints mechanisms that can overcome the problem of identifying all of the claimants, as sometimes happens with the formal mechanisms of the ACHR.<sup>132</sup>

The equality jurisprudence of the Court has had both 'clarifying and confusing results', but has made a great effort to provide a coherent framework for understanding the implications of the right to equality and non-discrimination in the Americas.<sup>133</sup> Although the Court follows both the ECtHR and the US Supreme Court approaches to assess whether discrimination has occurred, it has recently developed, albeit imperfectly, its own ways to adjudicate cases in contexts of structural discrimination. Sometimes, the Court

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<sup>129</sup> Abramovich (n 88) 16.

<sup>130</sup> Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (1994); Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (1999).

<sup>131</sup> see the report 'Activities of the Working Group during the 2012-2013 Term' (CAJP/GT/RDI-229/13 rev. 1), presented to the Committee on Juridical and Political Affairs of the Permanent Council of OAS. According to Maria Beatriz Nogueira, '[n]o other treaty in international law has a more inclusive notion of the meaning and reach of the non-discrimination principle than the one presented by this Convention. Whereas other human rights treaties have had to rely on interpretations of the principle that have incrementally come to encompass the protection of certain groups, this OAS Convention has incorporated doctrinal and jurisprudential advances into its own definition.' 'New OAS Conventions protecting IDPs against racism and discrimination' (Forced Migration Review 2014) <<http://www.fmreview.org/crisis/nogueira.html>> accessed 20 September 2017.

<sup>132</sup> Inter-American Convention against all forms of Discrimination and Intolerance (A-69) art 15.i; A Depper, 'Collective Claims and the Draft Inter-American Convention against all forms of Discrimination and Intolerance', (2008) Programa Justicia Global Universidad Los Andes- Human Rights Clinics, University of Texas at Austin.

<sup>133</sup> Antkowiak and Gonza (n 122) 35.

adjudicates on the basis of ‘suspect clauses’, shifting the burden of proof from the petitioner to the state whenever a state measure uses a prohibited ground; however, it also uses the approach of the ECtHR, by applying a traditional proportionality analysis to discrimination cases.<sup>134</sup> For some scholars, this jurisprudence is not very sophisticated, in part because the states’ defence strategies are not easily admissible in cases of blatant discrimination, so the tests cannot advance to future stages.<sup>135</sup> If the defendant states cannot provide a *prima facie* justification for a discrimination complaint, the methodologies used to assess whether discrimination has taken place do not receive much feedback. In *Atala*, one of the few cases in which the Court set the stage for a conflict to be addressed through the use of tiers of scrutiny or proportionality analysis, the Court had the opportunity to clarify the issue, but the equality jurisprudence still remained somewhat puzzling.<sup>136</sup> Overall, the Court has been reluctant to find a violation of article 24 when it can establish that other rights have been violated in a discriminatory way, entailing a violation of article 1.1. Indeed, when a claim is based on a situation of structural discrimination, the Court has required that evidence produced, for example by UN or IACHR reports, which has an influence on the issue under discussion, must be directly concerned with the claims raised by the petitioner.<sup>137</sup> In a way, the situation of structural discrimination serves only as secondary evidence or as a background context when other rights are found to have been violated, or as a way to confirm an individual violation of other rights in cases of structural discrimination. The danger of the Court finding situations of structural discrimination only in the most egregious cases (eg, the massive numbers of killings of women in northern Mexico; and the situation of persons internally displaced by the guerrilla conflict in Colombia) is that it may thwart more sophisticated accounts of disparate impacts or indirect discrimination in the near future, when more complex issues will be brought to the system. In general, we can claim that an expansion of the concept of discrimination towards more sophisticated accounts of indirect discrimination or disparate impacts is not a plausible way forward for the development of the equality jurisprudence of the IAHRs in the near future. The fact that petitions reach the Court stage only through a decision of the Commission, and only after domestic remedies have been exhausted, narrows down the kind of discrimination claims that can be of interest for the development of the equality jurisprudence. If the wrongness of discrimination is not easily visible, or if there is a *prima facie* defensible stance to

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<sup>134</sup> *ibid* 49.

<sup>135</sup> *ibid* 51.

<sup>136</sup> IACtHR, *Atala Riffo and others v Chile* (2012) para 125.

<sup>137</sup> IACtHR, *Vélez Loor v. Panama* (2010) para 251.

justify the challenged measure, for example, the IAHRs may prove reluctant to make a doctrinal contribution in the face of the many other issues that the region must address.

Notwithstanding the abovementioned problems, and sometimes only as *obiter dicta*, the jurisprudence of the IACtHR has developed a social and substantive reading of the right to equality.<sup>138</sup> In this way, for example, the IACtHR has said that the right to equality imposes a duty to accommodate cultural differences, especially in the context of indigenous peoples or ethnic minorities' cases.<sup>139</sup> Moreover, the general principle-right to equality and non-discrimination has been regarded as having the status of *jus cogens*, considered as one of the main exportations of the IAHRs to international human rights law.<sup>140</sup> In a famous advisory opinion on the status of undocumented migrant workers, the Court stated that,

the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws.<sup>141</sup>

Thus, among the newer issues expected by Abramovich, probably the most important has been the development of a conception of substantive and effective equality derived from the textual basis of the ACHR, reaching up to the status of *jus cogens*, according to recent jurisprudence.<sup>142</sup> As the Court said in 2005, regarding a group of victims of a right-wing paramilitary movement in Colombia that were in a situation of structural vulnerability,

With regard to this situation of inequality, it is pertinent to recall that there is an unbreakable tie between the erga omnes obligations to respect and guarantee human rights and the principle of equality and non-discrimination, which has the nature of *jus cogens* and is crucial to safeguard human rights both under international law and under domestic venue, and which impregnates all actions by State power, in all its expressions. To comply with said obligations, States must abstain from carrying out actions that in any way, directly or indirectly, create situations of de jure or de facto discrimination, and

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<sup>138</sup> L Clérico and M Aldao, 'La Igualdad como Redistribución y como Reconocimiento: Derechos de Los Pueblos Indígenas y la Corte Interamericana de Derechos Humanos' (2011) 9 *Estudios Constitucionales* 157.

<sup>139</sup> IACtHR, *Yakye Axa Indigenous Community v. Paraguay* (2005) para 51.

<sup>140</sup> For a critical approach to this issue, see G Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights' (2008) 19 *European Journal of International Law* 101, 118.

<sup>141</sup> IACtHR, *The Juridical Condition and Rights of the Undocumented Migrants* (Advisory Opinion 2003) para 101.

<sup>142</sup> IACtHR, *YATAMA v. Nicaragua* (2005) paras 184-5; *Servellón-García et al. v. Honduras* (2006) paras 95, 112; *Mapiripán Massacre v. Colombia* (2005) para 178; *Apitz Barbera and others v. Venezuela* (2008) para 209; and *Atala* (n 136) para 79.



they must also take positive steps to revert or change existing discriminatory situations in their societies, to the detriment of a given group of persons. This entails the special duty of protection that the State must provide in connection with actions and practices of third parties who, under its tolerance or acquiescence, create, maintain or foster discriminatory situations.<sup>143</sup>

This paragraph summarises the Court's general understanding of the principle-right to equality and non-discrimination: a right that includes both a negative warranty of neutral treatment and a positive duty of the state and third parties to create the conditions for the realisation of the principle of equality. Furthermore, through its remedial regime, the Court has approached these issues from a pragmatic stance, considering the institutional capacities of the countries and the coalitions and networks needed to overcome structural patterns of discrimination and disadvantage.<sup>144</sup> Considering the problems of the equality jurisprudence mentioned before, this general stance must be approached with some nuances. However, the institutional role of the IACtHR is different from its European counterpart, as it has to deal with problems charged with policentricity that prevent it from being a mere fourth instance of appeal. In the words of a former judge of the IACtHR,

Unlike other international tribunals and supervisory mechanisms, the IACourt has known how to assume (...) its institutional role as a human rights tribunal in the region where it operates: an agency for generating renewed Inter-American human rights law, which establishes, by means of addressing large themes in especially transcendent cases, the criteria which will guide the national courts in a broad process of their reception of Inter-American Law (...) Nowadays, the IACourt is an organ which emits general – but mandatory – guidelines for the formation of an American *ius commune* in its subject matter; in contrast, it is not – and never was – a jurisdictional organ of third or fourth instance; nor is it a tribunal designed to intervene repeatedly in innumerable cases of the same nature in order to affirm, through hundreds or thousands of resolutions, a consistent thesis.<sup>145</sup>

Within this peculiar 'institutional role', we can assess the equality jurisprudence in a more integral way, by acknowledging the possible contributions of Inter-American Human Rights Law to the development of a Latin American ADL. Indeed, it has already provided reasons for developing a common understanding on the general tenets of the principle of

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<sup>143</sup> 'Mapiripán Massacre' (n 142) para 178.

<sup>144</sup> A Huneeus, 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights' (2011) 44 Cornell International Law Journal 493.

<sup>145</sup> S García Ramírez, 'The relationship between Inter-American Jurisdiction and States (National Systems): some pertinent questions' (2015) 5 Notre Dame Journal of International & Comparative Law 115, 124-5.

equality and non-discrimination among national courts and legal operators, and for the activity of social movements.<sup>146</sup> In the second part of this thesis, the case law and the broader developments on equality and non-discrimination within the IAHRs will be crucial for understanding the main features of the transformative approach to ADL that I attempt to elaborate here.

### 3.4 Conclusions

Although a legal history of equality clauses in the region would require a separate research project, a historical insight is necessary to understand the recent boom in anti-discrimination provisions within a trajectory that started in the independence era. This chapter has focused on giving a brief overview of the history of ADL in Latin America, influenced by the development of broader constitutional equality clauses, sub-constitutional regulation, Inter-American human rights law, and the role of social mobilisation. The re-emergence of equality discourse has triggered the need to think about the groundings and boundaries of the current anti-discrimination programmes of regulation. In sum, this chapter has presented the raw legal materials and the ways in which they have emerged to constitute an anti-discrimination legal capital that should form the starting point for a normative reconstruction of Latin American ADL.

Overall, we can say that the roots of an emergent ADL are somehow consolidated at both the level of substantive constitutional law and within the IAHRs; however, as mentioned before, that is not the case with statutory and administrative regulations, which should provide the lateral support or the corresponding infrastructure to protect anti-discrimination rights. The need for further legal reforms in ADL compels us to think critically about the boundaries of this distinctive field of law and the need to bridge the divide between normative commitments and the proper institutional arrangements. The region may look to Europe or elsewhere to seek models of reform, especially in order to develop effective institutional arrangements for the protection of already recognised anti-discrimination rights. However, it should not forget what it already has and the context in which it operates.

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<sup>146</sup> see, for example, the influence of the case law of the IACtHR on the legislative proceedings of the ADLCHI. BCN, '*Historia de la ley Anti-Discriminación n20.659*' (2013).

## **Chapter 4 Contemporary Latin American Constitutionalism: Egalitarian-Dialogic Constitutionalism as a constitutional conception of Anti-Discrimination law**

### **4.1 Introduction**

One of the most salient patterns in the recent constitutional transformations in Latin America is the commitment to overcome the social and political exclusion accumulated by a history of discrimination. Moreover, a great majority of Latin Americans consider themselves victims of discrimination, either directly or indirectly. Discrimination, then, is a constitutional problem. If discrimination is directly or indirectly attributed to the constitution, we may gradually lose fidelity to our recently launched constitutional projects. To understand the place of anti-discrimination commitments in Latin American constitutions, we need to give an overview of current constitutional debates, focused on the way in which domestic constitutional projects are addressing the main challenges in the region. This chapter starts by providing an overview of Latin American constitutionalism, focusing on the defining features of contemporary constitutional projects. It ends by establishing one of these projects as the main basis for developing a constitutional conception for ADL in Latin America. Although the chapter is based on a description of the current constitutional scholarship, it adopts a normative stance towards one of the schools or trends of Latin American constitutionalism that I claim accommodates better the challenges posed by discrimination. In other words, although this chapter relies on empirical claims regarding the features of different schools of constitutional thought, there is a normative shift from where I develop my preferred constitutional conception of ADL.

I will focus on the ‘fifth period’ of Latin American constitutionalism, which goes from the end of the twentieth century to the present day, a period with historical records of stability and democratic transitions,<sup>1</sup> and been characterised by intense constitutional experimentation, where ‘countries have increasingly sought their own solutions to their own challenges’, generating a diversity of constitutional arrangements.<sup>2</sup> Moreover, this experimentation has led to internal or external tensions, expressed in different ways: a simultaneous expansion of forms of political participation and the centralisation or

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<sup>1</sup> R Gargarella, *Latin American Constitutionalism 1810-2010: The Engine Room of the Constitution* (OUP 2014) ix.

<sup>2</sup> M Mirow, *Latin American Constitutions: The Constitution of Cádiz and its Legacy in Spanish America* (CUP 2016) 240.

concentration of power in the hands of the Executive;<sup>3</sup> greater democratic or institutional stability combined with electoral volatility, fragile party systems, and low public trust in representative institutions;<sup>4</sup> and tensions between generous agendas of social rights, with a special emphasis on vulnerable minorities, and strong protection of property or investment rights, favourable to neoliberal developments.<sup>5</sup>

These constitutional experiments do not preclude us from outlining common strands of constitutional ideas and setting the debate around three main schools of Latin American constitutionalism: Latin American Neo-constitutionalism (hereafter, 'LANC'); New Latin American Constitutionalism (hereafter, 'NLAC'); and Egalitarian-Dialogic Constitutionalism (hereafter, 'EDC'). These schools of thought, I claim, have in common a transformative ethos that emerges as an organising principle for their main features, although in different forms. The different forms of doing constitutional scholarship entail developing concepts and constructs that can have an impact on reality, abandoning an idea of legal scholarship as implying scientific neutrality.<sup>6</sup> In the description of each current, I will highlight their normative commitments, and the different ways in which they understand the role of law in producing social change. In particular, their differences will be of utmost importance when arguing for a Latin American constitutional conception of ADL, because the right to equality entails particular 'challenges for comparative constitutional analysis as each jurisdiction's response to equality is in significant ways dependent on the constitutional text in question (and the legislative framework) as well as each jurisdiction's social and political history'.<sup>7</sup> If, as argued before, Latin American ADL is grounded in constitutional equality clauses, then it is crucial to delve into contemporary constitutional debates. Furthermore, and although there are processes of institutional convergence in the region, the common legal discourse around Latin American ADL does not address the impact of different forms of constitutional scholarship on the protection of rights on the ground.<sup>8</sup> In this way, this

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<sup>3</sup> Gargarella (n 1) 155-65.

<sup>4</sup> K Roberts, 'Parties, Party Systems, and Political Representation', in P Kingstone and D Yashar (eds), *Routledge Handbook of Latin American Politics* (Routledge 2012) 48.

<sup>5</sup> M P Saffón, 'Can Constitutional Courts be Counterhegemonic Powers vis-à-vis Neoliberalism? The Case of the Colombian Constitutional Court' (2007) 5 *Seattle Journal for Social Justice* 533.

<sup>6</sup> A von Bogdandy, 'The past and promise of doctrinal constructivism' (2009) 7 *International Journal of Constitutional Law* 364, 367.

<sup>7</sup> K O'Regan and N Friedman, 'Equality', in T Ginsburg and R Dixon (eds) *Comparative Constitutional Law* (Edward Elgar 2013) 473.

<sup>8</sup> A Huneeus, 'Constitutional Lawyers and the Inter-American Court's Varied Authority' (2016) 79 *Law and Contemporary Problems* 179.

chapter also attempts to make a contribution to our ‘intellectual maps of constitutionalism’, which ‘tend to marginalize the experience of the developing world’.<sup>9</sup>

## 4.2 The Latin American constitutional debate

For Armin von Bogdandy, ‘Latin America is the region where the debate on the future of constitutionalism is debated with more intensity and urgency’.<sup>10</sup> The importance of Latin America for constitutional academia may seem at odds with this region’s poor record on respect for basic standards of rule of law. Maybe, ‘the law of the Global South, or rather its inefficiency and lack of originality, can be of interest to sociologists, anthropologists and law professors interested in issues of social justice and the reforms needed to achieve it’.<sup>11</sup> However, as stated in one of the volumes of *The Cambridge History of Latin America*, ‘[a]lthough constitutions have often been violated, most countries in the region are highly legalistic and take seriously constitutional precepts, even when they do not adhere to them’.<sup>12</sup> Nowadays, even though the gap between constitutional commitments and political realities seems to be narrowing, the scope of constitutional challenges is expanding.<sup>13</sup>

Constitutional projects of the ‘third wave’ have endorsed different forms of ‘aspirational constitutionalism’, that is, ‘the idea that the destiny of our societies depends in large part on having good constitutions’.<sup>14</sup> In contrast with the traditional debate of the nineteenth century, focused on the legacies of the past (colonial era), nation-building processes, and material or economic interests, the contemporary debate is based on a productive and instrumental relationship between law and social change, on how law could become the cornerstone of social progress. It highlights the constitutive and instrumental dimensions of law: rather than the mere institutionalisation of expectations and interactions in the

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<sup>9</sup> M Schor, ‘An Essay on the Emergence of Constitutional Courts: The cases of Mexico and Colombia’ (2009) 16 *Indiana Journal of Global Legal Studies* 173, 174.

<sup>10</sup> A von Bogdandy, ‘Ius Constitutionale Commune en América Latina: una mirada a un constitucionalismo transformador’ (2015) 34 *Revista Derecho del Estado* 1, 6.

<sup>11</sup> D Bonilla, ‘Introduction: toward a constitutionalism of the Global South’, in D Bonilla (ed), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (CUP 2014) 6.

<sup>12</sup> J Hartlyn and A Valenzuela, ‘Democracy in Latin America since 1930s’, in L Bethell (ed), *The Cambridge History of Latin America VI* (CUP 1994) 158. My project asks what it means for Latin American constitutions to take seriously their anti-discrimination commitments rather than strict compliance with legal frameworks. In that sense, my project constitutes an exception to the idea ‘that constitutional scholarship only flourishes when the law in question binds the authorities’. von Bogdandy (n 6) 370.

<sup>13</sup> D Law and M Versteeg, ‘Sham Constitutions’ (2013) 101 *California Law Review* 863, 911.

<sup>14</sup> M García Villegas, ‘Law as Hope’ (Eurozine, 24 February 2004) <<http://www.eurozine.com/law-as-hope/>> accessed 2 May 2015.

social sphere, law also ‘shapes our very imagination about social possibilities’ and ‘provides strategic resources for the conduct of social struggle’.<sup>15</sup> However, ‘how law matters depends on the complex, often changing dynamics of context in which struggles occur’.<sup>16</sup> The following sections constitute an attempt to go beyond assessments of the efficiency of law as an instrument of social change, in an effort to provide an account of the place that constitutional law occupies in progressive political projects in Latin America.<sup>17</sup>

During transitional stages, countries look to constitutional law as an instrument to navigate future challenges rather than as a mirror of past or current social, cultural or economic arrangements.<sup>18</sup> One may plausibly claim that the main constitutional dispute is now concentrated on how to solve the challenges and persistent problems that still pervade the region, with a view to a more promising future. Moreover, even if the material basis of constitutions has been somehow displaced from constitutional discourse, the emphasis of the modern debate is on how to break the cycle of material inequality ‘bequeathed’ by a history of segregation and political exclusion; the material basis has, rather, shifted to aspirations, isolating the constitutional debate from political economy.<sup>19</sup> All in all, constitutional law is considered as the darling of progressive thinking in the region and it has been coupled with several adjectives: ‘inclusive’, ‘transformative’, ‘egalitarian’, ‘new’, and ‘aspirational’.<sup>20</sup> It has become the favourite idiom of emancipatory projects, and almost every progressive social reform has endorsed different versions of constitutional thinking. Nevertheless, despite the differences, some scholars argue that there is a common identity that allows us to speak of a ‘Ius Constitutionale Commune’, focused ‘on overcoming social exclusion through the triad of human rights, democracy and the Rule of Law’.<sup>21</sup> The three most popular ‘schools’ of the contemporary

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<sup>15</sup> M McCann (ed), *Law and Social Movements* (Ashgate 2006) xii.

<sup>16</sup> M McCann, ‘Law and Social Movements’, in A Sarat (ed), *The Blackwell Companion to Law and Society* (Blackwell 2008) 519.

<sup>17</sup> For Helena Alviar, the belief in the instrumental uses of law persists despite its frequent frustrations, signalling the importance of expanding the analysis of law and societal change, addressing also what law leaves untouched, unsaid or out of reach. ‘The redistribution of property in Latin America: Should we lose our faith in law?’ (2010) 5 *Revista Internacional de Pensamiento Político* 91.

<sup>18</sup> R Teitel, ‘Transitional Jurisprudence: The Role of Law in Political Transformation’ (1997) 106 *Yale Law Journal* 2009, 2014.

<sup>19</sup> García Villegas (n 14).

<sup>20</sup> *ibid*; von Bogdandy (n 10); M Alegre and R Gargarella (eds) *El Derecho a la Igualdad: Aportes para un constitucionalismo igualitario* (Abeledo Perrot 2007). Within the emergence of ‘adjectival constitutionalism’, that is, ‘the study of constitutionalisms with some modifier’, the Latin American constitutional debate is fundamental. M Tushnet, ‘Varieties of Constitutionalism’ (2016) 14 *International Journal of Constitutional Law* 1.

<sup>21</sup> von Bogdandy (n 10) 6.

constitutional scene are concerned with the evils that the political regimes of the region are trying to address.<sup>22</sup> They navigate around the central idea that constitutions should be directly and explicitly concerned with the main social and economic challenges of Latin America. If these challenges are not addressed, then responsibility could be attributed directly or indirectly to the constitutional content or structure itself.

In the following sections I will provide a description of the contemporary constitutional trends in Latin America, explaining their origins, aims and institutional implications. This description will not attempt to look for the ‘best practice’ or the ‘most effective’ solution to a legal problem across the different jurisdictions, or to causally explain the current constitutional arrangements.<sup>23</sup> By contrast, and assuming that ‘there are other forms of deep knowledge beyond description and classification, and alongside causal explanations’, I will attempt to implement an ‘hermeneutic procedure of comparative law that is not oriented towards isolatable relations of cause and effect, but rather towards an understanding that arises from a synthesis of a multiplicity of elements in their manifold relationships’.<sup>24</sup> With this method in mind, I will provide reasons to conclude that EDC could overcome the failures and frustrations associated with LANC and NLAC in regard to bringing social change and democratic consolidation, becoming a synthesis of a multiplicity of elements in their manifold relationships.

The three constitutional currents have some common features that should be highlighted before outlining their differences. Apart from their common origin, during the ‘third wave’ of democracies, they share a diagnosis: dissatisfaction with the performance of democratic regimes in achieving socio-economic equality, social inclusion and democratic consolidation.<sup>25</sup> Another relevant point is their transformative ethos, as each current reserves a special place for constitutional law in the project of social transformation, a promise to perform better than alternative projects in bringing change. Furthermore, we should recall the basic idea that constitutionalism has always emerged from a certain trauma, an obsession with tackling certain problems that seem to require

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<sup>22</sup> I speak of schools or currents to express the idea that the contemporary debate takes place around a scholarly debate.

<sup>23</sup> For an overview of different types of constitutional comparison, see R Hirschl, *Comparative Matters* (OUP 2014) ch6.

<sup>24</sup> A von Bogdandy, ‘Comparative constitutional law as social science? A Hegelian reaction to Ran Hirschl’s *Comparative Matters*’ (2016) MPIL Research Paper Series

<sup>25</sup> R Uprimny, ‘Recent Transformations in Constitutional Law in Latin America’ (2011) 89 *Texas Law Review* 1587; L Whitehead, *Latin America: A New Interpretation* (Palgrave 2006) ch6.

an urgent resolution.<sup>26</sup> In the case of Latin America, each current promises to end social exclusion and marginalisation, and bring about better performances in socio-economic terms. In this regard, the description of each school's defining features does not prevent us from highlighting their common normative stances. Finally, although each has different stances on the neo-liberal impacts on the region, they have all critically assessed the impacts of the economic system on fundamental rights.

### 4.3 Latin American Neo-Constitutionalism

Neo-constitutionalism has its origins in the post-war period, when human rights became the language of justice and social progress, and courts its best allies. It has been dominant in parts of Europe and Latin America,<sup>27</sup> and is now considered both a constitutional model and a theory of legal analysis and interpretation.<sup>28</sup> Originally, it was considered as a reaction against the failure of positivism in protecting rights, but later it adapted itself to 'inclusive positivism', once it realised that most of the values, principles and fundamental rights were incorporated formally in the constitutional rule of recognition.<sup>29</sup> However, the methodological commitments of neo-constitutionalism are closer to a clear rejection of positivist approaches to the study of law.<sup>30</sup> From its different sources, we can draw its normative and institutional prescriptions, which are somehow straightforward: constitutional texts should be rigid (difficult to amend), have the force of law, and be interpreted and applied by independent judges that should remain isolated from external or internal pressures. Judges have to approach the constitutional text with specific rules of interpretation tuned to the moral content of the object under interpretation, and (generally) have the last word on what that constitution means.<sup>31</sup> Within a strict division between law and politics, the neo-constitutional literature emphasises the incorporation of (international) human rights standards into the constitutional catalogue of rights, which should then be used as the standards of political legitimacy for every infra-constitutional provision. Then, the technique of balancing allows legal reasoning to apply constitutional

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<sup>26</sup> Gargarella (n 1) ch4.

<sup>27</sup> The term makes sense only within Italo-Ibero-Latin American academic circles. J Fabra, 'Una nota sobre el neoconstitucionalismo', in J Fabra and L García Jaramillo (eds), *Filosofía del Derecho Constitucional: Cuestiones Fundamentales* (UNAM, 2015) 522.

<sup>28</sup> P Commanducci, 'Modelos e Interpretación de la Constitución', in M Carbonell (ed), *Teoría del Neoconstitucionalismo* (Trotta 2007) 52-3.

<sup>29</sup> J Etcheberry, 'El ocaso del positivismo jurídico incluyente' (2015) 67 *Persona y Derecho* 411, 413-4.

<sup>30</sup> P Commanducci, 'Formas de Neoconstitucionalismo: un análisis metateórico', in M Carbonell, *Neoconstitucionalismo(s)* (Trotta 2009) 87.

<sup>31</sup> L Prieto Sanchis, 'Notas sobre la Interpretación Constitucional' (1991) 9 *Revista del Centro de Estudios Constitucionales* 175, 176.



rights and principles to every legal conflict, as they are considered ‘optimization requirements’ that, through the weigh formula, have an answer for every set of circumstances.<sup>32</sup> That explains the progressive constitutionalisation of all areas of law, and the direct or indirect application of the constitution in all public or private relationships. Despite maintaining the basic liberal arrangements for the organisation and separation of powers, it imbued both law-making and application processes with standards and principles of substantive constitutional law, opening the channels for moral interpretation.<sup>33</sup>

The importation of neo-constitutionalism to Latin America has shaped new understandings of its main premises, so we should ask here about the distinctiveness of LANC. In Latin America, neo-constitutionalism has been associated with long and detailed constitutions, which could be explained by the legacy of processes of codification, and currently there is an inflationary trend of incorporating more fundamental rights and detailed regulations in constitutions’ catalogues.<sup>34</sup> It has also been associated with new adjudicative practices, which were supported by a ‘growth industry’ of judicial reforms that has gradually changed constitutional practices.<sup>35</sup> For LANC, the combination of more constitutional rights and stronger courts would increase the chances for social progress, specifically in the hands of ‘new more consequentialist, socially conscious and self-consciously progressive judges’.<sup>36</sup>

In less than 20 years, the transnational scholarly debate turned very fast from discussions around sovereignty and non-intervention to a more cosmopolitan, integrated, and rights-oriented legal realm.<sup>37</sup> Indeed, there was a rediscovery of the open texture of legal texts, in which an active role of legal subjects was determinant in the production of legitimate aims. Moreover, such new legal readings shifted the focus from the previously dominant

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<sup>32</sup> Constitutions irradiate their normative force to every part of the legal system, so there is no need to wait for the legal production of the legislature or the administration, and there is no space for ‘political question doctrines’. If constitutional rights are ‘optimization requirements’ that have a precise answer to a legal conflict (a rule, applicable to the case), then only judges have the final word. R Alexy, *A Theory of Constitutional Rights* (OUP 2002) 47.

<sup>33</sup> A Alterio, ‘Corrientes del Constitucionalismo Contemporáneo a Debate’ (2014) 8 Problema, *Anuario de Filosofía y Teoría del Derecho* 227, 234.

<sup>34</sup> J Melton and others, ‘To codify or not to codify? Lessons from consolidating the United Kingdom’s constitutional statutes’ (2015, The Constitution Unit UCL) 27-8.

<sup>35</sup> L Hammergren, *Envisioning Reform: Improving Judicial Performance in Latin America* (Penn State University Press 2007).

<sup>36</sup> D Brinks, ‘“A Tale of Two Cities”: The Judiciary and the Rule of Law in Latin America’, in Kingstone and Yashar (n 4) 66.

<sup>37</sup> A Huneeus, ‘Constitutional Lawyers and the Authority of the Inter-American Court’ (2016) 79 *Law and Contemporary Problems* 179.

statutory (textual) interpretation that was bequeathed by codification. This ‘turn to legal interpretation’ entailed the endorsement of ‘new interpretive theories’ that ‘are marshalled against the conventional practices of national courts and traditional commentators, which are in turn dismissed as pure legal formalism’.<sup>38</sup> The new conception of legal interpretation was seen ‘as a key to open the closed gates of legal formalism’, which were partially responsible for the conservatism of legal practice.<sup>39</sup>

The predominance of this new conception of legal interpretation came along with extended access to justice mechanisms, where individuals sought in courts what was not available through the ordinary means of policy reform.<sup>40</sup> In a continent with frequent representativeness crises, and manifold administrative shortcomings or weaknesses, courts applying open-textured constitutions with broad catalogues of human rights were seen as the main avenue for social progress.<sup>41</sup> Throughout the continent, constitutional principles were to be applied under the pro-personae criteria in order to offer the best available protection for fundamental rights. These principles took the job of fitting a whole codified legislation –in many countries, a legacy from the nineteenth century- that was seen as detached from the social reality and as an unjust structure. Furthermore, if principles are ethical-political products of moral argumentation rather than legal rules with deontic structures, then nothing prevented judges from creating new constitutional principles not included in texts, if it was a requirement of justice or dignity in certain circumstances.<sup>42</sup> This new practice of adjudication promoted the exercise of strong powers of judicial review, including both the constitution and international human rights treaties as standards of review. During recent years, this practice has reached its peak with the doctrines of the ‘bloc of constitutionality’ (the idea of extended constitutions, which incorporate international human rights as standards of review)<sup>43</sup> and ‘conventionality

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<sup>38</sup> J Esquirol, ‘The Turn to Legal Interpretation’ (2011) 26 American University International Law Review 1031, 1033.

<sup>39</sup> D López Medina, ‘¿Por qué hablar de una teoría impura del derecho para América Latina?, en D Bonilla (ed), *Teorías del Derecho y Transplantes Jurídicos* (Siglo del Hombre 2009) 46.

<sup>40</sup> This has been the case even when public trust in courts is still very low, and may be better explained by changes in constitutional opportunity and support structures. C Smulovitz, ‘Judicialization in Argentina: Legal Culture or Opportunities and Support Structures?’, in J Couso, A Huneeus and R Sieder (eds) *Cultures of Legality: Judicialization and Political Activism in Latin America* (CUP 2010).

<sup>41</sup> D Brinks and W Forbath, ‘The Role of Courts and Constitutions in the New Politics of Welfare in Latin America’, R Peerenboom and T Ginsburg (eds), *Law and Development of Middle-Income Countries* (CUP 2014).

<sup>42</sup> L Streck, *Verdade o Consenso* (Saraiva 2014) 470-96.

<sup>43</sup> R Uprimny, *Bloque de Constitucionalidad, Derechos Humanos, y Proceso Penal* (Consejo Superior de la Judicatura 2006) 29-33.

control’ (the idea that judges, as state officials, are bound to apply the ACHR and its jurisprudence in the exercise of their adjudicatory powers).<sup>44</sup>

The idea that there is a big gap between the ‘laws on the books and laws on the ground’ raises challenges that must be overcome by any legally driven project of social change. However, by placing the moral language of constitutions at the heart of social progress, LANC endorsed the image of ‘failed law’ in Latin America, suggesting that technical regulations and institutional coordination are somehow too far-fetched.<sup>45</sup> The legitimacy crisis of legislatures and bureaucracies has resulted in judges becoming the main social actors in the project of changing reality through a flexible managerial approach, which allows judges to consult the best available technical expertise to find ad-hoc solutions.<sup>46</sup> The idea of a top-down, elite-based project that could highlight the failure of legislative politics and administrative activity in delivering public goods has turned into a common picture in many constitutional jurisdictions in the region. Therefore, the change that neo-constitutional trends brought to Latin America was not only about entrusting judges with powers to enforce fundamental rights, but also about assuming a distrust of legislatures and its institutionalisation in different legal devices.<sup>47</sup>

In Latin America, the idea of courts rather than executive or legislative powers addressing pressing social issues has become a common currency of constitutional law. The Colombian Constitutional Court has been seen as the model agent for social change.<sup>48</sup> For their part, the Supreme Court of Brazil, the Supreme Court of the Nation in Mexico, the Constitutional Chamber of the Supreme Court of Costa Rica, and the Argentinian Supreme Court are sometimes seen as the main followers of this new practice of progressive neo-constitutional adjudication.<sup>49</sup> Moreover, because of the legitimacy crisis of legislatures, and the critiques of the hyper-presidentialist regimes that dominate across

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<sup>44</sup> For a critical account of conventionality control, see J Contesse, ‘Inter-American constitutionalism: the interaction between human rights and progressive constitutional law in Latin America’, in C Rodríguez Garavito (ed), *Law and Society in Latin America* (Routledge 2014).

<sup>45</sup> J Esquirol, ‘The failed law of Latin America’ (2008) 56 *The American Journal of Comparative Law* 75.

<sup>46</sup> For Fernando Atria, neo-constitutional scholarship has ended up undermining the normativity of law and its ability to guide human behaviour, triggering a retreat to a pre-modern law, where the moral adjudication of judges have the power to decide what law means after the facts are considered. *La Forma del Derecho* (Marcial Pons 2016) 56.

<sup>47</sup> Alterio (n 33) 262-3.

<sup>48</sup> K Merhof, ‘Building a bridge between reality and the constitution: The establishment and development of the Colombian Constitutional Court’ (2015) 13 *International Journal of Constitutional Law* 714, 721.

<sup>49</sup> Although neo-constitutional adjudication has not always been progressive. Brinks, “‘A Tale of Two Cities’: The Judiciary and the Rule of Law in Latin America”, in Kingston and Yashar (n 4) 68; J Gonzalez-Bertomeu and R Gargarella (eds), *The Latin American Casebook: Courts, constitutions, and rights* (Routledge 2016).

the region, judges are seen as the last hope for those that are excluded from access to political or social channels to make their demands.<sup>50</sup> Overall, despite their impact on the ground, these courts see themselves as contributors to the consolidation of democracy over time, fosterers of a constitutional culture, and developers of stronger civil societies.<sup>51</sup>

As discussed above, LANC is a radical interpretation of the basic neo-constitutional idea that constitutions should emphasise their substantive (moral) over their procedural (political) dimension. In this scenario, a constitutional jurisdiction becomes the main actor in delineating the powers allocated to the legislative, the executive, and to ordinary judges, with an overarching view of protecting fundamental rights; to sum up, we could say, far from the state arrangements, closer to the citizen.<sup>52</sup> The perspective of rights as ‘trumps’ or as ‘the sphere of the undecidable’ was advanced in the region to the detriment of the majoritarian understanding of democracy.<sup>53</sup> The institutional architecture of courts and the principle of procedural fairness, then, are considered a better warranty for the egalitarian protection of fundamental rights.

#### 4.4 ‘New’ Latin American Constitutionalism

This term describes recent processes of constitution-making in Bolivia (2009), Ecuador (2008), and Venezuela (1999), and the interest it has aroused in their study in the Ibero-American academic world. Although some authors include the Constitution of Colombia (1991) and other constitutional processes, there are structural differences with the latter processes.<sup>54</sup> Thus, we should start by asking, what does ‘new’ mean when applied to Latin American Constitutionalism? According to its more prominent scholars, the newness lies in the radical democratic origins of constitutions, and the idea that for the first time Latin

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<sup>50</sup> R Gargarella, P Domingo and T Roux, *Courts and Social Transformation in New Democracies: An institutional voice for the poor?* (Ashgate 2006).

<sup>51</sup> Brinks (n 49) 69.

<sup>52</sup> R Arango, ‘Fundamentos del Ius Constitutionale Commune en América Latina: Derechos Fundamentales, Democracia y Justicia Constitucional’, in A Bogdandy and M Morales (eds) *Ius Constitutionale Commune en América Latina. Rasgos, Potencialidades y Desafíos* (UNAM 2015) 27; Alterio (n 33) 241-6.

<sup>53</sup> Alterio above (n 33) 240. In a continent plagued by imperfect democracies, it is suggested, LANC does not even require a democratic theory of its own. P Salazar, ‘Garantismo y Neo-constitucionalismo frente a frente: algunas claves para su distinción’ (2011) 34 *Doxa* 289, 294.

<sup>54</sup> I agree with Pedro Salazar, for whom the ‘family resemblance’ should be thick enough to make the common patterns relevant. ‘El nuevo constitucionalismo latinoamericano (una perspectiva crítica)’, in L Gonzalez D and Valades (coords), *El constitucionalismo contemporáneo. Homenaje a Jorge Carpizo* (UNAM 2013) 349.

America can elaborate a constitutional project of its own.<sup>55</sup> Moreover, some claim it is the first transformative project, because the liberal constitutional projects have always been designed and operated to protect the *status quo* (thus, the adjective postliberal).<sup>56</sup> Its novelty also relies on the fact that it is the only current that explicitly stands against capitalism, articulating in constitutional terms the explicit endorsement of a certain political economy.<sup>57</sup> Finally, its origins may lie outside of academia and closer to the processes of social mobilisation against the impacts of the Washington Consensus.<sup>58</sup>

The most striking feature of NLAC is the priority of the ‘popular’, relocating the people at the forefront of constitutional law.<sup>59</sup> NLAC, then, is the constitutional consolidation of new forms of populism; for its critics, a doctrine where a single source of power (the populist leader) appeals directly to the masses, through referenda or other participatory means, in order to maintain its legitimacy.<sup>60</sup> Although it shares with LANC the pervasiveness of constitutional law even at the margins of legal regimes, the priority is placed on the democratic rather than the legal dimension of constitutions.<sup>61</sup> It claims a specific extra-constitutional origin in constituent assemblies that have a ground-breaking character in the history of Latin American constitutionalism.<sup>62</sup> That leads NLAC to define the constitution as the expression of the will of the constituent power rather than a framework to limit and correct politics. Nevertheless, the ‘people’ do not only appear at certain special moments, challenging dualism and representative democracy.<sup>63</sup> Moreover, NLAC reclaims a role for the people in constitutional interpretation. However, it is quite

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<sup>55</sup> R Viciano and R Martínez, ‘La Constitución democrática, entre el neoconstitucionalismo y el nuevo constitucionalismo’ (2013) 48 *El Otro Derecho* 63. The symbolic dimension is also crucial for breaking with the old order, as illustrated by the new official names of countries (eg Plurinational State of Bolivia).

<sup>56</sup> J Wolff, ‘Towards Post-Liberal Democracy in Latin America? A Conceptual Framework Applied to Bolivia’ (2008) 45 *Journal of Latin American Studies* 31, 33.

<sup>57</sup> G Pisarello, ‘El nuevo constitucionalismo latinoamericano y la constitución venezolana de 1999: balance de una década’ (2009) <<http://www.sinpermiso.info/textos/el-nuevo-constitucionalismo-latinoamericano-y-la-constitucion-venezolana-de-1999-balance-de-una-dcada>> accessed 27 July 2015.

<sup>58</sup> R Martínez and R Viciano, ‘Fundamentos Teóricos y Prácticos del Nuevo Constitucionalismo Latinoamericano’, in R Viciano (ed), *Estudios sobre el nuevo constitucionalismo latinoamericano* (Tirant Lo Blanch 2012) 332.

<sup>59</sup> A Medici, ‘Nuevo constitucionalismo latinoamericano y giro decolonial: Seis proposiciones para comprenderlo desde un pensamiento situado y crítico’ (2013) 48 *El Otro Derecho* 15, 21.

<sup>60</sup> S Edwards, *Populismo o Mercados* (Norma 2009).

<sup>61</sup> R Viciano and R Martínez, ‘¿Se puede hablar del nuevo constitucionalismo latinoamericano como corriente doctrinal sistematizada?’ (2011) <<http://www.juridicas.unam.mx/wcccl/ponencias/13/245.pdf>> accessed 20 May 2016.

<sup>62</sup> Martínez and Viciano (n 58) 310.

<sup>63</sup> NLAC avoids being associated with the kind of ideas proposed by Bruce Ackerman, which have been popular in Latin America to justify systems of constitutional control. B Ackerman and C Rosenkrantz, ‘Tres Modelos de Democracia Constitucional’ (1991) 29 *Cuadernos y Debates* 15.

different from several strands of popular constitutionalism, as it is known in the US constitutional debate.<sup>64</sup>

Regarding constitutional arrangements, it distances itself from the classical separation of powers, not only because it gives predominance to the executive power in dealing with the most important daily issues of politics, but because it creates a fourth power (‘citizens’ power’, ‘social control and transparency power’, or a ‘participation and social control function’), which is in charge of supervising the way in which constituted authorities carry out the constituent power’s will.<sup>65</sup> Mechanisms of direct democracy, then, are crafted in order to prevent the constituted authorities from deviating from the constituent power’s will.<sup>66</sup> The constituent power has a permanent presence, and always retains the power to make the constitution anew. In this way, the rules of constitutional change are crafted in order to prevent<sup>67</sup> or, even more so, exclude the participation of constituted powers.<sup>68</sup> Along with LANC, it supports a ‘rigid’ constitution, with super-majoritarian rules of change and strong powers of judicial review. This architecture suggests that the intention of these constitutions is to freeze the constituent power over time, and keep alive the revolutionary spirit that originally animated it, as a threat against the potential abuses of constituted authorities.<sup>69</sup> In that sense, at least regarding the power to interpret the constitutional text, it is committed to a kind of ‘originalism’.<sup>70</sup> For some scholars, NLAC should recognise the openly political character of post-liberal methods of constitutional interpretation and leave behind the artificial boundaries between law and politics.<sup>71</sup> In that regard, NLAC has taken seriously the counter-majoritarian objection to judicial review, and promoted the direct election of the members of constitutional courts, the

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<sup>64</sup> For the connections between popular constitutionalism and constitutional practices in Latin America, see R Niembro and M Alterio (eds), *Constitucionalismo Popular en América Latina* (Porrúa 2013).

<sup>65</sup> Constitution of Venezuela, Title V, chV; Constitution of Ecuador, chV, title IV; Constitution of Bolivia, arts 241-242.

<sup>66</sup> Martínez and Viciano (n 58) 323.

<sup>67</sup> Constitution of Ecuador, art 441.

<sup>68</sup> Constitution of Bolivia, art 411; Constitution of Venezuela, arts 342-346.

<sup>69</sup> Martínez and Viciano (n 58) 332. The role of concentrated constitutional review in updating the political will of the constituent power has been a constant since the early case law of the Supreme Tribunal of Justice of Venezuela. See judgements of the chamber N3.167 (2002); N-160343 (2016).

<sup>70</sup> No scholar has used the term ‘originalism’ to defend the constitutional methods of interpretation used by the mixed systems of constitutional controls of NLAC. In some cases, originalism has implied using the proceedings of the constituent assembly to defend a certain point. In Bolivia, it is the main rule of constitutional interpretation, according to the Law of the Plurinational Constitutional Court (art 6). In Venezuela, following the constitutional endorsement of the Bolivarian doctrine (Constitution of Venezuela, art 1), the Supreme Tribunal of Justice refers to the writings of Bolívar to shed light on constitutional clauses, adding uncertainty to the outcome of the interpretive process. Judgment of the chamber N-160343 (2016) s I.2.

<sup>71</sup> A Oquendo, ‘The politicization of human rights’ (2016) 50 NYU Journal of International Law and Politics 1.

possibility of rejecting nominations for these courts, and the opening up of the indictment of justices to the general public.<sup>72</sup>

The constitutions of NLAC are filled with principles, and rules are required mainly when they are needed to articulate the will of the constituent power.<sup>73</sup> Moreover, these constitutions are comparatively more extended than the average: between 350 and 444 articles.<sup>74</sup> The extension may be explained as a product of the will of the constituent power, composed by the many, who needed to express their different aims, and in that sense restrain the powers of constituted authorities (specially, the legislative) while favouring greater powers of constitutional review.<sup>75</sup> NLAC's constitutions include lengthy and detailed catalogues of rights, compared to other constitutions in the region, in some cases articulating the institutional protection that will be afforded to each right, considering its individual or collective dimension.<sup>76</sup>

Although the constitutional structure of NLAC sounded radical to progressive legal scholars, the operation of democratic mechanisms of control has not been used in order to democratise the 'engine room' of constitutions.<sup>77</sup> Indeed, processes of concentration and centralisation of power have eroded the declared commitment to public participation.<sup>78</sup> Moreover, the hyper-presidentialist arrangements of NLAC have blurred 'the legal and political dividing line between the presidency as an institution and the persona of its holder'.<sup>79</sup> Furthermore, the incorporation of fundamental rights and mechanisms of direct democracy have not implied a radical redistribution of economic

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<sup>72</sup> A Noguera, 'El neoconstitucionalismo andino: ¿una superación de la contradicción entre democracia y justicia constitucional?' (2011) 90 *Revista Vasca de Administración Pública* 167, 191-4.

<sup>73</sup> eg, the highly specific rules for a referendum included in ch XI, on constitutional reforms, in the Constitution of Venezuela.

<sup>74</sup> Along with the Constitution of Colombia (380 articles), these are the most extended constitutions in the region.

<sup>75</sup> Martínez and Viciano (n 58) 323.

<sup>76</sup> An overview of the rights protection system in NLAC in C Storini, 'Derechos y Garantías en el Nuevo Constitucionalismo Latinoamericano' (XV Encuentro de Latinoamericanistas Españoles, Madrid, Nov 2012).

<sup>77</sup> Gargarella (n 1) 156, 172-177, 192-195.

<sup>78</sup> R Huber and C Schimpf, 'Friend or Foe? Testing the Influence of Populism on Democratic Quality in Latin America' (2016) 64 *Political Studies* 872.

<sup>79</sup> F Panizza, *Contemporary Latin America: Development and Democracy Beyond the Washington Consensus* (Zed Books 2009) 223.

power,<sup>80</sup> or the improvement of environmental standards.<sup>81</sup> Indeed, other centre-of-left political projects in the region have achieved better and more sustainable socio-economic outcomes under liberal constitutional frameworks.<sup>82</sup> However, the assessment of social policies and their effectiveness in tackling socio-economic problems is still an object of debate. It is still not clear whether constitutional forms of neo-populism are necessary to achieve more egalitarian outcomes. In practical terms, the concentration of power in the hands of the executive power, infringements of judicial independence, and the restriction of civil liberties have been at the forefront of the agenda of NLAC, attracting criticism even from the radical left.<sup>83</sup>

#### 4.5. Egalitarian-Dialogic Constitutionalism

As a current that is increasingly taking root in Latin American constitutionalism, its main sources can be found in the work of a progressive scholarship that is sceptical about both the premises of LANC and the operation of NLAC on the ground. The term draws from the writings of Roberto Gargarella, a combination of his active support for egalitarian constitutionalism and his works on the dialogical model of constitutional justice.<sup>84</sup> Since the beginning of his career, he has advocated strengthening deliberative democracy, and gradually developed a theory of judicial review suited to the challenges of Latin American democracies.<sup>85</sup> During the last decade, he has attempted to reconstruct the Latin American constitutional tradition in order to understand what we could learn from 200 years of constitutional history.<sup>86</sup>

Like Gargarella, several scholars are somewhat frustrated by the performance of self-declared progressive constitutional democracies in bringing about social change.<sup>87</sup>

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<sup>80</sup> The ‘boom of commodities’ has explained, in greater part, the increasing power of social policies in tackling poverty and inequality. N Birdsall, N Lustig and D McLeod, ‘Declining Inequality in Latin America’, Kingstone and Yashar (n 4) 163-171.

<sup>81</sup> R Lallander, ‘Entre el ecocentrismo y el pragmatismo ambiental: consideraciones inductivas sobre desarrollo, extractivismo y los derechos de la naturaleza en Bolivia y Ecuador’ (2015) 6 *Revista Chilena de Derecho y Ciencia Política* 109.

<sup>82</sup> McLeod and N Lustig (n 80).

<sup>83</sup> eg, International Commission of Jurists, *Strengthening the Rule of Law in Venezuela* (2014).

<sup>84</sup> Gargarella (n 1) ch 10; ‘We the People’ Outside of the Constitution: The Dialogic Model of Constitutionalism and the System of Checks and Balances’ (2014) 67 *Current Legal Problems* 1.

<sup>85</sup> R Gargarella, ‘Democracia Deliberativa y Judicialización de los Derechos Sociales’, in Alegre and Gargarella (n 20).

<sup>86</sup> Gargarella (n 1).

<sup>87</sup> see, for example, critical accounts of the impact of the ‘social constitutionalism’ advocated by the Colombian constitution. H Alviar, ‘Distribution of resources led by courts: A few words of caution’, in H Alviar, K Klare and L Williams (eds), *Social and Economic Rights in Theory and Practice* (Routledge 2015).



Originally, these scholars thought that judicial review and activist courts could trigger democratic deliberation and promote social justice, considering the difficult conditions in which electoral democracies have been working since the beginning of the 1990s.<sup>88</sup> They supported novel forms of legal mobilisation, and developed their ideas on judicial review based on the practice of social movements, human rights clinics, or non-governmental organizations.<sup>89</sup> In that sense, they first elaborated on sophisticated versions of neo-constitutionalism and the potential contribution of courts to democratic consolidation.<sup>90</sup> However, they gradually realised how the perils of judicial elitism and conservatism may downplay the ultimate aims of progressive legal thinking in Latin America.<sup>91</sup> As domestic and regional courts have been judicially assertive, going beyond (and against) the ‘neoliberal’ original framework under which they were fostered in the beginning, they have ‘become a politically prized booty and now enjoy less degrees of freedom than their younger selves’.<sup>92</sup> Furthermore, judicial activism has also become a tool for conservative interests, who have used courts to prevent changes achieved through majoritarian politics.<sup>93</sup> Reacting to that, and to novel mobilisation strategies beyond courts, scholars from EDC started to reclaim the priority of the people in creating, crafting and interpreting constitutional arrangements. That is why they looked for support in popular constitutionalism, and began to welcome the democratic innovations of NLAC.<sup>94</sup> After some years of witnessing the operation of these novel legal institutions on the ground, they realised, once again, how progressive social projects may be curtailed by the concentration of power, corruption and the restraint of individual liberties.<sup>95</sup> Nowadays, and considering the repeated frustrations of progressive political projects, they still endorse the importation of some form of transformative constitutionalism into Latin

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<sup>88</sup> For example, see D Lovera, ‘¿A quién pertenece la Constitución en Chile? Cortes, Democracia y Participación’ (2010) 11 *Revista Jurídica de la Universidad de Palermo* 119.

<sup>89</sup> C Rodríguez-Garavito and D Rodríguez-Franco, *Radical Deprivation on Trial* (CUP 2015); N Espejo and A Carillo, ‘Re-imagining The Human Rights Law Clinic’ (2011) 26 *Maryland Journal of International Law* 80.

<sup>90</sup> For the role of Latin American courts in consolidating democracy, see D Landau, ‘Political Institutions and Judicial Role in Comparative Constitutional Law’ (2010) 51 *Harvard Journal of International Law* 319.

<sup>91</sup> For critical approaches to ‘judicial elitism’, see Alterio and Niembro (n 64).

<sup>92</sup> S Botero, ‘Agents of neoliberalism? High courts and rights in Latin America’, in T Falleti and others (eds), *Latin America Since the Left Turn* (University of Pennsylvania Press, Forthcoming).

<sup>93</sup> MA Peñas, and JM Morán, ‘Conservative litigation against sexual and reproductive health policies in Argentina’ (2014) 22 *Reproductive Health Matters* 82.

<sup>94</sup> J González-Jacomé, ‘From abusive constitutionalism to a multilayered understanding of constitutionalism: Lessons from Latin America’ (2017) 15 *International Journal of Constitutional Law* 447, 457.

<sup>95</sup> J Couso, ‘Radical Democracy and the “New Latin American Constitutionalism” (SELA conference, July 2014).

America, although within a critical reassessment of the liberal framework bequeathed by 200 years of constitutional history.<sup>96</sup>

Within the current debate, EDC stands for an update of the double commitment of foundational Latin American constitutionalism to the principles of collective self-determination and individual autonomy. However, it remains sceptical about the current achievements:

On the one hand, Latin American constitutions maintain a concentrated organization of power, pay little attention to the deliberative bodies, and seem to still be too hostile to popular political participation. On the other hand, these Constitutions have extended their statements of rights, over the years, in an unprecedented way, although without providing those rights with a proper institutional support.<sup>97</sup>

The abovementioned ideals could hardly generate an abstract objection, but EDC is concerned with the question of what constitutional arrangements are best equipped to realise these goals in practice. Gargarella, at the end of his *Latin American Constitutionalism*, gives us some clues to understand the implications of his conception of constitutional law, but he lacks ‘a more concrete agenda to put forward’.<sup>98</sup> EDC’s scholars are aware of the gap that exists between the double normative commitment and the constitutional practice of Latin America. However, they are also conscious of the need to reinforce, in an innovative way, the normative commitments that constitutes the ‘trinitarian formula of the constitutionalist faith: a commitment to human rights, democracy, and the rule of law’.<sup>99</sup> In that regard, the main challenge for the research programme of EDC is the translation of this double commitment in institutions able to address the current problems of Latin American societies. In what follows I will attempt to answer two questions that I think constitute the research agenda of EDC: What are the main features of EDC? And, more importantly, how can the institutional implications of EDC be materialised?

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<sup>96</sup> R Uprimny, ‘The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges’ (2011) 89 Texas Law Review 1587, 1599-1604.

<sup>97</sup> Gargarella (n 1) 206.

<sup>98</sup> see the critique of D Wei and P Privatto in their book review of *Latin American Constitutionalism* (2014) 12 International Journal of Constitutional Law 256, 260.

<sup>99</sup> M Kumm, ‘The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law’ (2013) 20 Indiana Journal of Global Legal Studies 605, 609.

The central feature of EDC is defined by an attempt to provide a ‘third way’ that can overcome the deficiencies of both LANC and NLAC. Although it shares with them a positive view of the relationship between law and social change, it puts forward a theory of law and legal reasoning that is inscribed in a broader theory of democracy attuned to Latin American problems.<sup>100</sup> Political equality is the main driver of social transformation for EDC, avoiding the defence of a constitutional arrangement just because it brings moral and social progress. EDC acknowledges the difficulty in promoting ‘an egalitarian reform in an unequalitarian society, whose members lack the moral disposition necessary for making the reform their own’, and endorses constitutional reforms that go beyond mere institutional engineering, towards symbolic and ethical commitments with social goals.<sup>101</sup> The transformative ethos of EDC is explicit in the sense that discrimination, poverty and socio-economic inequalities are the main constitutional evils to be addressed (structural problems that commit all state action), and political equality is the best remedy against those evils.<sup>102</sup>

Nevertheless, the most important innovation of EDC is a particular placing of law at the centre of social progress. It is characterised by a republican conception of law as a medium of social integration, as it is based in lifeworld discourses, but also as an effective mechanism of social coordination in complex and functionally differentiated societies, where the grounds of social integration do not rely on mere authority or divine sources.<sup>103</sup> In other words, law cannot just be posited, but, as a social system, needs to contribute its own conditions of legitimacy. This Habermasian idea, as applied to Latin America, becomes crucial to understand the relationship between constitutional law, legitimacy and the rule of law.<sup>104</sup> EDC is then concerned with the political and institutional conditions under which law is created, and with the institutional conditions under which law is applied: a concern with deliberative politics, a theory of legislation that in Latin America must address the particular problems of presidential forms of government; and a theory of adjudication and judicial review, where the distinction between law and morals, and

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<sup>100</sup> Compared to EDC’s literature on judicial review, theories of administration and legislation do not attract the same amount of scholarly debate in Latin America.

<sup>101</sup> Gargarella (n 1) 205.

<sup>102</sup> E Nino, ‘La discriminación menos comentada’, in R Gargarella (ed), *La Constitución en 2020: 48 propuestas para una sociedad igualitaria* (Siglo XXI 2011) 49.

<sup>103</sup> J Habermas, *Between Facts and Norms* (Polity Press 1996) 38-41.

<sup>104</sup> Habermas’s theory of democracy has been applied in Latin America to discussions around transitional justice and freedom of expression, among other issues. R Gargarella, ‘La democracia frente a los crímenes masivos: una reflexión a la luz del caso Gelman’ (2015) 2 *Revista Latinoamericana de Derecho Internacional* 1; C Mauersberger, *Advocacy Coalitions and Democratizing Media Reforms in Latin America* (Springer 2016).

law and politics, is maintained to the service of democracy.<sup>105</sup> If laws are created under democratic conditions that pay due respect to the principle of political equality, with a fluid communication between political public spheres and institutional sites of legal production, then there is an increased commitment to the positive character of law that shapes the way in which legal conflicts will be adjudicated.<sup>106</sup> This Habermasian influence was strongly visible in the late writings of Carlos Santiago Nino, who turned to political theory in order to argue that legal norms produced by inclusive democratic procedures have a presumption of validity, procedures capable of generating impartial decisions on issues that affect everyone.<sup>107</sup> If those conditions are not met, adjudicatory processes must assume a dynamic role in the protection of deliberative politics.<sup>108</sup> The relationship between a theory of deliberative democracy and methodological positivism is understood in a dynamic way, where the division of legal labour (the creation and application of law) does not imply complete isolation between law and morals, on the one hand, and law and politics, on the other. In that way, it acknowledges that law has internal resources, both in the stages of creation and application, although with different degrees and articulations, to put forward justice concerns; and also the radical indeterminacy of law, which generates the need to refer to legal procedures of adjudication to give a final word on a particular issue.

Lastly, EDC's research programme needs to highlight its commitment to institutional reform. Indeed, the main argument of Gargarella's historical account points to the way in which the incorporation of progressive and substantive clauses in Latin American constitutions has not altered the liberal-conservative arrangement regarding the distribution of powers, which has remained highly centralised on the executive.<sup>109</sup> The idea of entering into the 'engine room' is aware of the dangers of ambitious projects of social engineering that may suffer from hyperrationality, that is, the belief that reason has

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<sup>105</sup> D López Medina, 'La "Cultura de la Legalidad" como discurso académico y práctica política: un reporte desde América Latina', in I Wences and others (eds), *Cultura de la Legalidad en Iberoamérica: Desafíos y Experiencias* (FLACSO 2014) 72-5.

<sup>106</sup> EDC's conception of law accommodates a revitalised version of (ethical or ideological) positivism, as has been argued by Fernando Atria (n 50).

<sup>107</sup> Although the Habermasian influence in Nino was never fully articulated by him, there is a clear connection between his moral constructivism and the discourse principle as the foundation of legitimate law. CS Nino, *La validez del Derecho* (Astrea 1985). For the relationship between Habermas and Nino, see R Gargarella, 'El punto de encuentro entre la teoría penal y la teoría democrática de Carlos Nino' (2015) 35 *Análisis Filosófico* 189.

<sup>108</sup> Through dialogical engagement we reduce the influence of other kinds of power asymmetries in the determination of the outcomes of social co-operation. R Gargarella (ed), *Por una Justicia Dialógica* (Siglo XXI 2014).

<sup>109</sup> Arguably, EDC's commitment to radical democracy suggests the development of some form of parliamentarism. M Alegre, 'Democracia sin Presidentes', in Alegre and Gargarella (n 18).

sufficient ability to foresee all the consequences of legal reforms, without any concern for the processes required to achieve the aims of those reforms.<sup>110</sup> While recognising the limits of legally-driven projects of social change, EDC stresses the institutional choices that are inscribed in constitutional decisions, which ascribe to different institutions the role of pursuing certain goals in particular social contexts.<sup>111</sup> In a way, it revives the interest for the doctrine of a separation of powers, updating it as a concern for the ability of law in co-ordinating institutional efforts towards democratically chosen collective goals.

EDC assumes that different state entities have a certain institutional role in addressing constitutional problems or duties that should be accountable before affected constituencies. The overarching ideal is to promote the virtues of deliberation and protect the value of collecting information from different sources, correcting initial preferences, addressing expert opinion, and incorporating previously excluded voices in the public debate.<sup>112</sup> Then, the dialogical dimension of EDC is articulated as a methodological commitment to a kind of comparative institutional analysis that has a strong normative stance: the protection of political equality.<sup>113</sup> Indeed, even if abstract considerations favour institutional choices for deliberation and dialogue in democratically elected bodies, EDC is concerned with addressing alternative institutional capacities that may assume a dynamic role in the long-term project of consolidating democracy and political equality. Moreover, EDC is concerned with extra-institutional spaces that may also play their part in fostering these ideals, like the emergent literature on social protest and popular constitutionalism in Latin America.<sup>114</sup>

Overall, EDC is concerned with the role of law in developing the foundations of what O'Donnell called a 'democratic rule of law'.<sup>115</sup> In this way, EDC articulates a particular

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<sup>110</sup> J Elster, *Reason and Rationality* (Princeton University Press 2009).

<sup>111</sup> Comparative institutional analyses are starting to be a topic of interest for Latin American legal academia. See, for example, D Wei, 'Courts as healthcare policy-makers: the problem, the responses to the problem and problems in the responses' (2013) Fundação Getulio Vargas – DIREITO GV Research Paper Series 75.

<sup>112</sup> Unlike LANC and NLAC, EDC rejects dualism, which unduly splits the exercise of ordinary political citizenship with certain extraordinary moments where the people emerge, and supports constitutional structures that grant every act of ordinary law-making with the highest democratic deliberative pedigree. Lovera (n 88).

<sup>113</sup> J Croon, 'Comparative Institutional Analysis, the European Court of Justice and the General Principle of Non-Discrimination—or—Alternative Tales on Equality Reasoning' (2013) 19 *European Law Journal* 153.

<sup>114</sup> D Lovera, '¿Tres son Multitud? Constitucionalismo Popular, Cortes y Protesta', in Alterio and Niembro (n 64).

<sup>115</sup> G O'Donnell, 'Why the Rule of Law Matters' (2004) 15 *Journal of Democracy* 32.

relationship between law and social change, and between law and democratic consolidation. As a full and working democracy is yet to be consolidated in the region, the role of law becomes central to foster the quality of democracy. Accordingly, law and legal institutions may contribute ‘to the endogenous formation of preferences conducive to social change’ and to the generation of the political practices that are required for the entrenchment of the rule of law and constitutionalism in the region.<sup>116</sup> EDC is looking for a middle path between an instrumental conception of constitutional law (the idea that law can directly transform social reality) and an extreme realist or sociological account (the idea that what really matters for democracy is not law, but societal attitudes). Therefore, the relationship between law and democracy is mutually reinforcing, and the historical problem of ineffective constitutions will not be solved only by a naked devolution of power from elites to rules.<sup>117</sup> It is not only more regulation, but laws that could promote their own legitimacy and effectiveness. EDC, then, supports a constitutional conception of ADL that could itself be the driver of transformation, democratisation, and therefore legitimisation.

#### **4.5 EDC as the best constitutional conception of ADL in Latin America**

In this last section, I argue that EDC provides different reasons to develop a particular constitutional conception of ADL in Latin America that both highlights its substantive commitments and its concern with an effective scheme of co-operation and dialogue for its enforcement. Although both LANC and NLAC consider anti-discrimination commitments crucial, I claim that they remain insufficiently focused on the institutional problems for the effective enforcement of ADL. On the one hand, and in the face of political crises and institutional blockades, LANC suggests that judges are the best ‘institutional voices’ for those that suffer from discrimination in the region. In this line of analysis, and in the light of situations of structural discrimination, LANC has recently advanced different judicial mechanisms for the protection of the right to equality and non-discrimination, such as the conventionality control or a structural approach to reparations.<sup>118</sup> However, this default reliance on judges, as a counter-majoritarian guarantee for politically powerless groups that suffer from discrimination, is done without any comparative institutional analysis, that is, any attempt to create the institutional

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<sup>116</sup> Gargarella (n 1) 202.

<sup>117</sup> M Schor, ‘Constitutionalism Through the Looking Glass of Latin America’ (2005) 41 *Texas International Law Journal* 1, 7.

<sup>118</sup> T Antkowiak, ‘Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond’ (2008) 46 *Columbia Journal of Transnational Law* 351.

conditions for potentially more effective enforcement under alternative institutional arrangements. On the other, NLAC assumes that the principle of majoritarian rule and the permanent presence of the people (in the form of the subject of the constituent power) are the best guarantees for rights protection, advancing a certain ‘politicization of human rights’.<sup>119</sup> In this case, it is suggested, the right to equality and non-discrimination is better served by the action of political organs. In other words, if LANC pushes towards some form of ‘depoliticization’ of anti-discrimination struggles, NLAC pushes for their ‘politicization’. Although EDC is a current of Latin American constitutionalism that is yet to be developed, it provides a way out of this confrontation, where the emphasis is placed on the substantive commitments rather than on the particular legal ways of realising those commitments, or where alternative institutional processes for the enforcement of ADL are sidelined.

EDC is explicit in its commitment to equality and non-discrimination, naming (structural) discrimination as one of the main constitutional evils to be addressed. It acknowledges the important symbolic and expressive character of this commitment, and its political role in defining the membership of the political community. Nevertheless, what distinguishes EDC is that, within the traditional constitutional structure, it supports the connection of the dogmatic with the organic parts of constitutions (that is, the catalogues of rights with the section on the distribution of powers), through the establishment of the foundations of institutional systems for the protection of rights.<sup>120</sup> Although constitutions do not need to regulate each and every aspect of the institutional system for the protection from discrimination, they can provide a framework for its development.

Recalling the institutional reasons that support a constitutional conception of ADL, EDC highlights the way in which constitutions matter for the development of an effective institutional scheme for the enforcement of the generous anti-discrimination commitments included in contemporary Latin American constitutionalism. As explained by Komesar, constitutions always entail explicit or implicit institutional choices, allocating tasks to different decision-making processes, usually either courts or political organs.<sup>121</sup> EDC follows this approach and attempts to take it further: it aims to craft constitutional schemes that can foster the development of effective and comprehensive

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<sup>119</sup> Oquendo (n 71) 31-42.

<sup>120</sup> Gargarella (n 1) 201.

<sup>121</sup> N Komesar, ‘The logic of the law and the essence of economics: reflections on forty years in the wilderness’ (2013) *Wisconsin Law Review* 265, 270.

enforcement mechanisms. Constitutions can enable state organs in regard to the development of an infrastructure for the protection of the right to equality and non-discrimination, provide a degree of institutional coordination between different entities (multi-actor schemes), mainstream anti-discrimination commitments across all state activities, avoid fragmentation in the reading of non-discrimination commitments according to the different schemes for the protection of discriminated groups, and give a purposive and principled reading to the different articulations of non-discrimination commitments at the sub-constitutional level. Although statutory or administrative law can perform all of these functions, the role of constitutional law should not be underestimated. As I explained in chapter 2, the different kinds of reasons that support a constitutional conception of ADL are defined by the different tasks or functions that constitutions play, emphasising the need to approach the study of constitutional law from multifarious perspectives. EDC pays particular attention to the institutional and doctrinal reasons to develop such a conception.

Doctrinally, the constitutional pledge to equality and non-discrimination, which is usually also the object of detailed legislative regulation, provides greater leeway for those in charge of the implementation of ADL at the sub-constitutional level. According to Fombad, the presence of constitutional support matters for the effective protection of the right to be free from discrimination.<sup>122</sup> The incorporation of a general anti-discrimination clause at the constitutional level already provides incentives for a unified approach to the sub-constitutional reading of ADL.<sup>123</sup> Moreover, the constitutional foundations of an institutional scheme for the protection of the right to equality and non-discrimination, such as the creation of an administrative entity in charge of the protection and promotion of such a right, have the potential to avoid the fragmentation of anti-discrimination protections, which may gain contingent victories at the legislative or administrative level, or the problem we know as the ‘hierarchy of grounds’.<sup>124</sup>

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<sup>122</sup> C Fombad, ‘The Constitutional Protection against Discrimination in Botswana’ (2004) 53 *International and Comparative Law Quarterly* 139.

<sup>123</sup> P Lambert and D Scribner, ‘The Constitutional Recognition of Gender Equality in Chile and Argentina’ (Western Political Science Association Annual Meeting, Vancouver, April 2017).

<sup>124</sup> A Coddou and T Vial, ‘Estándares y criterios para la creación de un órgano anti-discriminación en Chile’ (2013) *Anuario de Derecho Público* 216.



Institutionally, constitutions can provide the foundations for ‘webs of accountability’,<sup>125</sup> a multi-task scheme that mainstreams anti-discrimination commitments,<sup>126</sup> a multi-stage process for the protection of equality and non-discrimination,<sup>127</sup> or the ‘infrastructure’ for a sophisticated equality regime.<sup>128</sup> Constitutions can grant autonomy and a reserve a special role for NHRIs in the struggles against discrimination. Furthermore, they can allocate different anti-discrimination tasks, such as complaint-handling powers for autonomous agencies, and consultative powers to non-autonomous ones; enable associational rights that can articulate themselves in power channels against discrimination, or third parties that can bridge the enforcement dilemma (eg, collective associations, unions); expand the rules of standing for certain constitutional writs or actions against discrimination; or, at least, clarify the role of courts in cases of structural discrimination.

Enabling third party-controllers (eg, governmental agencies, or even NGOs that may serve in the public interest) is an example of how constitutions may strengthen an institutional system for the protection of anti-discrimination rights. Indeed, as proposed by Brinks and Botero, third-parties not only have some control in the realisation of the relationship between the first and second parties (the duty and the right-bearers), but ‘might also (...) be facilitators, who provide support for first and second party actors in their interactions with controllers (for example, lawyers, NGOs, victim support groups, even neighbors)’.<sup>129</sup> This is even more important ‘when the second parties are disadvantaged relative to the first parties’, so ‘third party facilitators might be as or more important than controllers’.<sup>130</sup>

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<sup>125</sup> M Taylor and V Buranelli, ‘Ending up in Pizza: Accountability as a problem of Institutional Arrangement in Brazil’ (2007) 49 *Latin American Politics and Society* 59.

<sup>126</sup> J Shaw, ‘Mainstreaming Equality and Diversity in European Union Law and Policy’ (2005) 58 *Current Legal Problems* 255.

<sup>127</sup> Lambert and Scribner (n 123).

<sup>128</sup> J Suk, ‘An Equal Rights Amendment for the Twenty-First Century: Bringing Global Constitutionalism Home’ (2017) 28 *Yale Journal of Law & Feminism* 381.

<sup>129</sup> Brinks and Botero, ‘Inequality and the Rule of Law: Ineffective Rights in Latin American Democracies’, in D Brinks and others (eds), *Reflections on Uneven Democracies: The Legacy of Guillermo O'Donnell* (Johns Hopkins University Press 2014) 220.

<sup>130</sup> *ibid* 221. In a recent comparative study, scholars showed how organisational rights do matter for the protection of rights on the ground. These rights ‘aid the establishment of organizations (...) that have the incentives to safeguard the right as well as the means to act strategically to protect it from government repression (...), a built-in mechanism that addresses the collective-action problem inherent in individual rights protection’. A Chilton and M Versteeg, ‘Do Constitutional Rights Make a Difference?’ (2016) 60 *American Journal of Political Science* 575.

An interesting example, in this regard, is provided by the still underdeveloped equality regime that emerged after the enactment of the Equality Act in the UK (2010), which has clear constitutional dimensions.<sup>131</sup> In this regime, the harmonisation of previously created public sector equality duties, and the unification of powers in the hands of the Equality and Human Rights Commission, constitutes an interesting approach to understand the relationships between EDC and ADL. The self-determination of concrete and measurable equality and non-discrimination objectives by public/private bodies, which are at the same time subject to regulatory monitoring by the Equality and Human Rights Commission, and to a potential judicial review process, constitutes an important implementation of reflexive/responsive approaches to the enforcement of ADL.<sup>132</sup> Indeed, by relying on equality objectives declared by organisations themselves, objectives that include a certain pattern of distribution (eg, to have a certain distribution of gender positions at the end of a certain period), these practices invite third-party controllers to collaborate on the enforcement of measurable commitments, and provide a background role for courts in this web of accountability.<sup>133</sup>

In Latin America, there are several examples of constitutional mandates for the enactment of special anti-discrimination statutes,<sup>134</sup> the creation of national anti-discrimination programmes or plans, or even the creation of NHRIs with the role of protecting human rights in general, and equality and non-discrimination in particular.<sup>135</sup> Once created, this constitutionally mandated governmental activity is subject to judicial review that may be triggered by NHRIs, other public entities, or even the wider public. Acknowledging the underdeveloped institutional capacities in Latin America, EDC assumes that courts will always be crucial actors of last resort for particular cases of discrimination, especially considering that discriminated groups are usually politically powerless, and have restrained access to the institutional schemes for the enforcement of ADL. In some ways, these emerging trends suggest that ADL in Latin America may be moving towards some form of reflexive/responsive approach towards the realisation of anti-discrimination

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<sup>131</sup> J Sigafoos, 'Using Equality as a Sword' (2016) 16 *International Journal of Discrimination and the Law* 66.

<sup>132</sup> MA Stephenson, 'Mainstreaming equality in an age of austerity: What impact has the Public Sector Equality Duty had on work to promote gender equality by English local authorities?' (DPhil Thesis, Warwick University, 2016) 44-8.

<sup>133</sup> In this way, the enforcement of ADL can address Alexander Somek's critique; he argued that the normative deficiency of ADL, that is, the absence of a measurable pattern of distribution in the anti-discrimination norm, ends up falling prey to moralism. *Engineering Equality: An essay on European Anti-Discrimination Law* (OUP 2011) 142-5.

<sup>134</sup> Constitution of Argentina, art 75.23.

<sup>135</sup> Constitution of Mexico, art 102; Constitution of Bolivia, art 222.

commitments.<sup>136</sup> The frequent emergence of dialogical practices in Latin America constitutes a novel object of research that is increasingly gaining attention, although mostly focused on the role of higher courts in triggering forms of institutional dialogue or participation of affected individuals or communities. In what follows, I will show some examples at regional and domestic levels.<sup>137</sup>

Regarding the IAHRs, the practices of ad-hoc supervisory mechanisms of compliance crafted by the IACtHR are an interesting example of enabling third party controllers that can bridge the distance with the standards according to which judgments are assessed in domestic contexts with varying institutional capacities.<sup>138</sup> Moreover, and for the same reasons, EDC has critically addressed the doctrine of ‘conventionality control’, according to which domestic judges should refrain from the application of any law that may contravene the object and aim of the ACHR. The critique has been grounded on the idea that democracies are allowed to seek and decide on the best institutional arrangements to give effective protection to their international obligations. Conventionality control, it is said, should not preclude the institutional possibilities that countries may explore for complying with international obligations, that is, democratic deliberation on the domestic distribution of powers.<sup>139</sup> Under EDC, the relationship between national and supra-national legal regimes is characterised by regional/transnational dialogues that must respect both democracy and human rights, that is, dialogues that could synergically reinforce the institutional capacities that domestic democracies have, and that develop clear criteria for triggering sound supra-national judicial interventions.<sup>140</sup> These examples suggest that EDC is continually seeking the best potential institutional arrangement that can support sustainable compliance with the substantive equality commitments that derive from the IAHRs.

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<sup>136</sup> If reflexive regulation acknowledges the different logics and dynamics of communication between subsystems of a system of regulation (eg, the discourse of courts, or the logic of unipersonal agencies), responsive regulation attempts to be transparent regarding the substantive aims and open to instances of participation and deliberation that may improve regulatory outcomes. While reflexive regulation places law as one system of communication among others, responsive approaches have created more space for the particular role that legal processes may play in the achievement of the declared aim and its capacities to enhance co-operation and dialogue towards that enterprise. Stephenson (n 132) 48.

<sup>137</sup> R Gargarella, ‘El Nuevo constitucionalismo dialógico frente al sistema de frenos y contrapesos’, in R Gargarella (ed), *Por una Justicia Dialógica: el Poder Judicial como promotor de la deliberación democrática* (Siglo XXI 2014).

<sup>138</sup> A Huneeus, ‘Courts Resisting Courts: Lessons from the Inter-American Court’s Struggle to Enforce Human Rights’ (2011) 44 Cornell International Law Journal 493, 529-30.

<sup>139</sup> J Contesse, ‘¿Última Palabra? Control de Convencionalidad y Posibilidades de diálogo con la Corte Interamericana de derechos humanos’, in *Derechos humanos: posibilidades teóricas y desafíos prácticos* (Librería 2014).

<sup>140</sup> J Contesse, ‘Resisting Inter-American Human Rights Law’ (2018) 44 Yale Journal of International Law forthcoming).

On a domestic level, let us explore the example of Mexican ADL as an early attempt of EDC. In 2001, a constitutional amendment incorporated a general prohibition of discrimination with an open list of protected grounds,<sup>141</sup> which fostered the creation, in 2003, of CONAPRED (an administrative agency with investigative, educative, consultative, and complaint-handling powers, created by a law that declared that discrimination entailed a social interest and a public order issue).<sup>142</sup> Subsequently, in 2011, a new constitutional amendment established that international human rights treaties have constitutional hierarchy, and included other modifications regarding constitutional remedies.<sup>143</sup> In this scenario, the Mexican NHRI (the National Commission of Human Rights), created in 1992, had to accommodate this new scheme for the protection of equality and non-discrimination. While the Commission constitutes an NHRI that complies with international human rights standards (Paris Principles), CONAPRED is a decentralised body of the federal government (it depends on the *Secretaria de la Gobernación*). Although both entities participate in the creation of the four-year Human Rights Plan, CONAPRED has a special duty to create an anti-discrimination programme.<sup>144</sup> In these plans or programmes, all public entities are invited to participate in the construction of their own human rights or anti-discrimination objectives, which should be translatable to measurable indicators that are subject to monitoring by either the Commission or CONAPRED.<sup>145</sup> Currently, both the Commission and CONAPRED have powers to receive discrimination complaints: if the former has the power to issue non-binding individual or general recommendations, the latter has the power to impose administrative sanctions and issue reparation orders for complaints against ‘actions,

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<sup>141</sup> Constitution of Mexico, art 1.5.

<sup>142</sup> Consejo Nacional de Derechos Humanos, *La discriminación y el derecho a la no discriminación* (CNDH 2016) 20. ADLMEX, art 1.

<sup>143</sup> Constitution of Mexico, art 1.2.

<sup>144</sup> CONAPRED, *Programa Nacional para la Igualdad y No Discriminación 2014-2018* (Diario Oficial 30 April 2014).

<sup>145</sup> The Mechanism for Follow-Up and Evaluation of the Human Rights Programme in Mexico City (Federal District) includes special anti-discrimination duties. Although this mechanism is an instrument of soft law, supervised by the Human Rights Commission of Mexico City, among other organs, the relevance of creating real, plausible and measurable objectives that can prevent discrimination can be said to be the foundations of public sector equality duties (PSED) in the region. Evidence Lessons from Latin America, ‘Making Human Rights Real: Two Latin American experiences in the rights-based approach to policymaking’ (2012, *Ella Network*) 2-3. The rights-based approaches in Mexico and Argentina are the most sophisticated mechanisms for transforming human rights standards into concrete indicators. In both cases, what we see is an explicit reliance of these programmes in the constitutional duties of mainstreaming equality and anti-discrimination (Constitution of Argentina, art 75.23; Constitution of Mexico, art 1.3). However, we still need to see what the role of the courts could be in the enforcement of these programmes, crafted and implemented after vertical (with civil society) and horizontal (between state institutions) dialogues organised by public authorities.

omissions, or social practices' considered discriminatory;<sup>146</sup> while the former deals with complaints against public authorities, the latter can also deal with complaints against private actors.<sup>147</sup> The anti-discrimination powers of these entities are supposedly well coordinated, and if one individual or group has triggered a complaint against a public authority before the Commission, CONAPRED is prevented from beginning a new case.<sup>148</sup> Furthermore, if the Council believes that its institutional capacities are overloaded or if it anticipates a political conflict, it can raise a case or an issue before the Commission, which has greater autonomy, financial support and legal powers to address a particular problem, despite the lack of sanctioning powers.<sup>149</sup> For example, at the request of CONAPRED,<sup>150</sup> the Commission has the power to address a case and make general recommendations or trigger an action of unconstitutionality before the Supreme Court of Justice of the Nation, which entails a process of abstract constitutional review of certain legislation at either the national or state level.<sup>151</sup> In several cases, the combined activity of both organs, triggered by individual or collective anti-discrimination complaints, or even by their own initiative, has ended up in a policy reform that protects the rights of discriminated groups, such as people with disabilities, LGBT minorities, or people living with HIV. For example, in one landmark case, and after a TV chronicle that showed the structural discrimination suffered by people with disabilities in the airport of Mexico City, the Human Rights Commission of the Federal District, created by the constitutional mandate included in article 102.B, and CONAPRED, decided that the latter would initiate a complaints (*queja*) procedure to determine public responsibilities. In an expedient procedure, CONAPRED opened public hearings, consulted expert opinions, and required several documents to issue its judgment.<sup>152</sup> A few months later, the Secretary of Transport and the National Directorate for Civil Aviation issued an administrative regulation to warrant the accessibility for people with disabilities to aviation facilities. In most of these cases, authorities have complied with the judgments of CONAPRED or the

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<sup>146</sup> In the case of CONAPRED, the binding administrative sanctions include different reparation measures (among others, restitution, compensation, public sanction, public pardon, and a general warranty of non-repetition). If these measures are not complied with, CONAPRED can start judicial proceedings. ADLMEX, arts 83, 83bis.

<sup>147</sup> Previously, the complaints procedure before CONAPRED was voluntary and distinguished between complaints against private and public actors. Amendment of 2014, ADLMEX, Diario Oficial, April 30<sup>th</sup> 2014.

<sup>148</sup> ADLMEX, art 63Octavus.

<sup>149</sup> CNDHMEX-CONAPRED, 'Convenio General de Colaboración' (8 April 2015) s C.

<sup>150</sup> Internal Regulation of the National Commission of Human Rights, art 11.

<sup>151</sup> Constitution of Mexico, art 105.g.

<sup>152</sup> *Resolucion por Disposicion 2/12; 03/12 and 02/11*. Not all of these rulings are available on the website of CONAPRED. I had access to these documents thanks to an email exchange with their communications officer.

recommendations issued by the Commission(s), but the judicial stage is always open: CONAPRED can resort to a judge in the case of lack of compliance with its resolutions, or the Commission can ‘file accusations and complaints with the appropriate authorities’, including litigation in some specific cases.<sup>153</sup> Up to this point, however, the administrative equality regime, combining both autonomous and non-autonomous state entities, has preferred a collaborative and non-litigious approach to address situations of structural discrimination.

In Chile, the lack of a constitutional anti-discrimination clause, and a statutory duty included in the recently enacted ADL that is highly abstract and not subject to supervision by any administrative entity, have ended up reducing the protection from discrimination to the availability of judicial remedies. The statutory duty, included in article 1.2 of the Chilean ADL, which forces every state entity to enact measures against discrimination, has been considered too abstract, and is by-passed by several organs, especially considering the lack of supervisory mechanisms.<sup>154</sup> This statutory duty includes no deadlines, no specific way of complying with it, and no measurable objectives that public entities should address.<sup>155</sup>

In Argentina, for its part, the combination of a constitutional mandate for positive equality duties, which favoured the creation of INADI,<sup>156</sup> the autonomy of the *defensoría del pueblo*,<sup>157</sup> and the commitment to the protection and promotion of fundamental rights,<sup>158</sup> provide support for a multi-actor scheme for the protection of the right to equality and non-discrimination.<sup>159</sup> There are several examples where complaints raised before the INADI have subsequently been transferred to provincial or local *defensorías*, and, as a last resort, the issue may be assigned to the federal Defender of the People, who can activate formal judicial remedies.<sup>160</sup> In other cases, reports elaborated by INADI have been considered crucial for the adjudication of anti-discrimination claims raised by the

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<sup>153</sup> Constitution of Mexico, art 102.b.2.

<sup>154</sup> Espacio Público, *Chile Diverso: Institucionalidad para la Igualdad* (2016) 28-9.

<sup>155</sup> A Coddou and others, ‘La ley antidiscriminación: avances e insuficiencias en la protección de la igualdad y la no discriminación en Chile’, in *Informe Annual sobre Derechos Humanos en Chile* (UDP 2013) 297-8.

<sup>156</sup> Constitution of Argentina, art 75.23; INADI, *Hacia una Argentina sin Discriminación* (2008-2009) 30-2.

<sup>157</sup> Constitution of Argentina, art 86.

<sup>158</sup> *ibid* art 75.22.

<sup>159</sup> For an overview of the Argentinian ADL regime, see U Baset and others, ‘The Enforcement and Effectiveness of Anti-Discrimination Law’, in M Mercat-Bruns and D Oppenheimer (eds), *The Enforcement and Effectiveness of Anti-Discrimination Law* (Springer, forthcoming).

<sup>160</sup> In chapter 8, I describe one of these cases. See appendix (table 2).

Defender of the People or by other collective associations through the constitutional remedy of *amparo*.<sup>161</sup> Moreover, the intense policy experiments with anti-discrimination plans at both the national and local levels, entailing different public and private actors, constitute a pioneering example for the enforcement of ADL in Latin America.<sup>162</sup> In a way, the emergence of reflexive-responsive schemes for the creation and enforcement of human rights programmes or plans opens up the path for the development of native forms of public sector equality duties in Latin America.<sup>163</sup>

EDC considers that constitutions are fundamental for the development of responsive approaches to the enforcement of constitutional commitments. Indeed, constitutions are considered not only the repository of shared values that cannot be ignored, but also the enablers of schemes of communication and co-operation between different actors that should be engaged in the enforcement of its clauses. In this way, constitutions may favour responsive approaches for the legislative and administrative enforcement of ADL, by establishing mainstreaming duties for including the concerns of the right to equality and non-discrimination in every state activity, while leaving the details of concrete regulations to institutional implementation and public-private interaction. However, constitutions are at the same time fundamental due to their role in avoiding the dangers of reflexive/regulatory approaches that question the normative force of law. Indeed, by guaranteeing a special role for courts in the protection of human and fundamental rights, EDC acknowledges that power asymmetries are crucial for the enforcement of constitutional commitments. Although there is space for regulated bodies to develop their own solutions, or craft their own anti-discrimination objectives, a ‘clearly defined pyramid of enforcement’ must be put in place ‘if those solutions do not meet the objectives that regulation is designed to achieve’; indeed, ‘there is no space for deliberation about whether to take any action at all.’<sup>164</sup> In other words, by providing a space for legislatures, administration, and the judiciary in the enforcement of ADL,

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<sup>161</sup> see, for example, Corte Suprema de Justicia de la Nación (Argentina), *Sisnero, Mirtha Graciela y otros cl Taldelva SRL y otros s/amparo* (2014). Here, INADI presented an *amicus curiae* describing the general context of structural discrimination suffered by women in regard to access to jobs in the transport systems.

<sup>162</sup> Despite the lack of participation of diverse stakeholders and the vagueness of its objectives, the Anti-Discrimination Plan for Argentina (Administrative Decree 1086-2007) started a novel approach to the enforcement of ADL in Latin America. ACNUDH, *Hacia un plan nacional contra la discriminación en Argentina* (INADI 2005).

<sup>163</sup> PSEDs have been subject to intense public scrutiny and evaluation by different actors. In the UK, there is no consensus on their impacts and effectiveness, largely due to the lack of political support. A McColgan, ‘Litigating the Public Sector Equality Duty: The Story So Far’ (2015) 35 *Oxford Journal of Legal Studies* 453.

<sup>164</sup> Stephenson (n 132) 48.

constitutions have the opportunity to create institutional architectures or infrastructures that can help in the realisation of its commitments.

## 4.6 Conclusions

This chapter explained the features of three schools of constitutional thought currently present in Latin America, which have emerged from the desires embedded in allegedly aspirational constitutions. LANC and NLAC have been presented as different modes of articulating the relationship between law and social change, but have also been criticised for their insufficient democratic premises or for the real impact of their constitutional innovations.

In this scenario, EDC presents itself as a ‘third way’, which is increasingly taking root in Latin American constitutionalism, to overcome the deficiencies exhibited by LANC and NLAC. As I said before, it is a kind of ‘synthesis of a multiplicity of elements in their manifold relationships’.<sup>165</sup> In this regard, EDC is based on a combination of empirical claims regarding the frustrations or the real impact of the other schools of constitutional thought, and a set of normative commitments that need to be reinforced and articulated in innovative ways. Surely, the realisation of these commitments is a working project, because we can not say that Latin American legal regimes are defined by their robust channels of dialogue, deliberation, institutional coordination, or democratic participation. Indeed, we may think the opposite. However, as a constitutional scholarship that is expanding, EDC needs to keep developing concepts and ideas with a view to impact and transform reality. The following features of EDC can be highlighted: first, it considers that the constitution is mainly a configuration of power, although with a radical commitment to the realisation of democracy and the protection of human rights; along with NLAC, it relies on external legitimacy, assuming that constituent assemblies are a regulative ideal of utmost importance; regarding the organic distribution of powers and functions, it is committed to institutional choices oriented towards the protection of political equality, and to different forms of public dialogue (either in the structure of judicial review, the implementation of a deliberative bureaucracy, or a renewed theory of legislation); its endorsement of the priority of the political process, and the constitutional institutionalisation of the conditions of legitimacy of the former; its defence of forms of dialogue and interaction with international orders that could protect both the values of

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<sup>165</sup> see 4.2.



democracy and human rights ('weak conventionality control'); and, finally, its commitment to a republican conception of law that accommodates a revitalised version of positivism as a legal theory. As a current that is increasingly taking root in constitutional scholarship, it has yet to attract more attention, especially regarding a democratic theory of administration, and a renewal of the debate around executive-legislative relations within a normative commitment to political egalitarianism. Nevertheless, it is the latest answer to the challenges of a region that, even more than before, is plagued by a dynamic constitutional scholarship.

As I explained in the last section, and considering the first two chapters, where I mapped the different kind of arguments that support a constitutional conception of ADL, and described the history of Latin American ADL, EDC stands as the ideal project to embed a transformative approach to ADL in the region. Specifically, it supports constitutions that can create the conditions for effective enforcement of the already generous anti-discrimination commitments of recent constitutional transformations. EDC attempts to carve out constitutional 'engine rooms' in order to fulfil the promises of anti-discrimination provisions and develop forms of comparative institutional analysis to seek the best guarantees of political equality. The first part of this thesis, then, concludes by advancing a particular constitutional conception of ADL that acknowledges the synergic relation between law and social change, on the one hand, and law and democratic consolidation, on the other. The need to improve regional records on the respect for the rule of law must be addressed through more democracy and human rights, by strengthening EDC's double commitment to collective self-determination and individual autonomy. As it currently stands, EDC constitutes an interesting though underdeveloped school of constitutional thought, with many challenges ahead. With all its normative and institutional commitments, EDC seems to be the most interesting answer to the challenges posed by widespread practices of discriminations. It is an innovative attempt to enforce the already generous commitments to anti-discrimination of recent constitutional transformations. However, to understand the place of ADL within this project, we need to critically address the problems discrimination poses for legal regulation and institutional arrangements, and the many different dimensions that discrimination entails.



## **SECOND PART: A CRITICAL SOCIAL THEORY OF ANTI-DISCRIMINATION LAW IN LATIN AMERICA<sup>1</sup>**

The two dimensions of EDC highlighted in the last chapter should prompt further studies on ADL in Latin America. In particular, its explicit commitment to tackling discrimination and its concern with adequate infrastructures for the effective enforcement of ADL provide support for studies on the role that constitutions play in developing particular anti-discrimination regimes. In general, aspirational constitutions of the recent era, which are committed to equality and non-discrimination, need to be understood as serious attempts to end the traumas or evils that shape their clauses, despite the imperfect institutional arrangements that attempt to make those commitments effective. A recent history of dictatorships and political turmoil, and a longstanding colonial legacy of economic inequality and racial and social hierarchies are definitely crucial to understanding recent constitutional (trans)formations. However, it is also important to address the institutional capacities that different constitutional arrangements contemplate in regard to tackling discrimination. In this context, rather than a purely normative analysis of the principles or values embedded in these transformations around ADL, the research programme of EDC entails ‘a sociologically informed approach’ towards the study of ADL, addressing the sociopolitical realities around legal institutions.<sup>2</sup>

However, even before EDC’s becoming of age as a (legal) research programme, one needs to critically understand the phenomenon under study, in this case, discrimination in Latin America, and the role of law in addressing it.<sup>3</sup> In other words, a constitutional conception of ADL grounded in EDC needs to move the project forward by developing an analysis of the problems it needs to address. The idea of a normative reconstruction I advanced in the introduction suggests that the legal standards of justice we apply when we deploy the provisions of ADL are not the outcome of independent procedures that are detached from the analysis of society. In other words, the task of normatively

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<sup>1</sup> I use the terms critical theory or critical social theory as synonyms.

<sup>2</sup> M Garcia Villegas, ‘A Comparison of Sociopolitical Legal Studies’ (2016) 12 *The Annual Review of Law and Social Science* 25. A sociopolitical vision of law understands that ‘law cannot be understood outside of its social and political dimensions’. In contrast to legal formalism, it supports the idea of relative legal autonomy (from society) and relative legal neutrality (from political power). (27-8).

<sup>3</sup> In this way, it warns against the unintended effects of theoretical discussions around the question of whether ‘critical legal studies’ were a consolidated legal theory or tradition in the US. These discussions ended up occluding or impeding critical socio-legal research in regard to what was happening with (neo)conservative backlashes to civil rights that started to dominate the political debate in the 1970s-1980s.

reconstructing Latin American ADL entails not only the application of binding legal provisions to an independent social reality, but an analysis of the social structures and behaviors that explain discrimination, and the ability of law in tackling that problem. However, the idea of normative reconstruction does not ‘leave the business of social analysis to the empirical studies of social sciences’, but attempts to combine empirical and normative claims in the analysis of social phenomena such as discrimination.<sup>4</sup> Indeed, the task of ‘processing and sorting out the empirical material’ is carried out according to their internal efficacy and normative achievements, to their ‘significance for the social embodiment and realization of socially legitimated values.’<sup>5</sup> In general, we may say, a normative reconstruction entails abandoning the traditional division of labor between normative theory and social sciences. In this work, I have already explained the way in which I understand the normative starting points, the recent constitutional transformations that have derived in a set of provisions that form the bulk of Latin American ADL, which constitutes positive law, with all their expressive, constitutive and instrumental dimensions. As one may guess, these provisions are also open-textured, inviting discriminated individuals and groups to give meaning and substance to ADL, to infuse the law with their struggles, and reshaping their contents and structure in that same process.

The need to understand the target of ADL, the evil to be redressed, emerges from the dangers of using the wrong remedy: addressing discrimination with inadequate means; creating new dangers or harms, or reproducing old ones, such as forgoing or occluding traditional issues of redistribution; or creating negative competition between groups for scarce shares of recognition, issues that explain the current salience of ADL in the Western World.<sup>6</sup> By forging a better understanding of discrimination, we will be able to craft adequate legal remedies.<sup>7</sup> Furthermore, by studying the role that law and legal orders play in addressing discrimination, we can bridge the gap between the normative expectations of a constitutional narrative of equality and anti-discrimination and the concrete objectives that a consolidated equality regime can plausibly achieve. For

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<sup>4</sup> A Honneth, *Freedom’s Right: The Social Foundations of Democratic Life* (Polity 2014) 6.

<sup>5</sup> *ibid.*

<sup>6</sup> see, for example, the political debate prompted by Obama’s presidential directive that allowed students to use bathrooms corresponding with their gender identity. For Wolfgang Streeck, this was a paradigmatic example of how the growth of identity politics was partially to blame for Trump’s victory, who rearticulated white identities and class concerns in his groundbreaking campaign. ‘Trump and Trumpists’ (2017) 3(1) *Inference* < <http://inference-review.com/article/trump-and-the-trumpists> > accessed 28 August 2017.

<sup>7</sup> B Smith and D Allen, ‘Whose fault is it? Asking the right question to address discrimination’ (2012) 37 *Alternative law journal* 31.

example, it is precisely the frustration with the impact of anti-discrimination reforms on black communities in the US that lies at the origins of critical race theory.<sup>8</sup> In this regard, socio-legal studies are fundamental to unmasking the radical inefficacy of progressive legal reforms, or to highlight the selective application of law in Latin America. Socio-legal studies, then, are fundamental for critical approaches to law. Nevertheless, in the case of Latin America, we have relatively young regimes of law crafted to tackle discrimination that have still to display their normative potential and their internal (eg, operating according to their premises) or external (eg, effecting social and cultural changes more broadly) efficacy. A critical social theory of ADL in Latin America could anticipate the potential strengths and limits of this area of law, without the need to wait for concrete socio-legal studies denouncing its inefficacy, or relying by default on the image of the ‘failed law in Latin America’, which serves as a project of constant legal reforms imported from abroad.<sup>9</sup>

Rather than providing a complete sociological explanation of discrimination in Latin America, a comprehensive sociological method for studying ADL, or a sociological analysis of the impact of recent reforms,<sup>10</sup> in the second part of this thesis I will develop a critical social theory of ADL that builds upon legal practices that are currently taking place in the region (a critical legal approach to the study of ADL in this part of the world). EDC, as a committed constitutional project of reform, needs to be complemented by a critical legal theory capable of giving a general account of the strengths and limits, the remedies and harms, the possibilities and dangers, or the benefits and costs of consolidating equality regimes or programmes of ADL in Latin America.<sup>11</sup> In other words, as a sociologically informed approach to the study of constitutionalism in Latin America, EDC needs to be complemented by critical legal theory,

that portion of normative legal theory which is specifically concerned to dig beneath the surface of legal doctrines and practices: to go beyond a project of explanation and rationalization and to interrogate

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<sup>8</sup> C Douzinas and A Gearey, *Critical Jurisprudence: The Political Philosophy of Justice* (Hart 2005) 259.

<sup>9</sup> J Esquirol, ‘The Failed Law of Latin America’ (2008) 56 *The American Journal of Comparative Law* 75.

<sup>10</sup> R Banakar, ‘Studying Cases Empirically: A Sociological Method for Studying Discrimination Cases in Sweden’, in R Banakar and M Travers (eds), *Theory and Method in Socio-Legal Research* (Hart 2005).

<sup>11</sup> Although it will become clear later in this work, critical legal approaches not only develop conceptual or discursive critiques of law, but also provide pragmatic assessments that derive from its practical vocation towards the legal activity of social movements. D Kennedy, ‘The International Human Rights Movement: Part of the Problem?’ (2002) 15 *Harvard Human Rights Journal* 101.

the deeper political, historical and philosophical logics which underpin the power of law.<sup>12</sup>

This definition of what critical legal theories entail suggests that we need to go beyond the traditional boundaries of constitutional scholarship. It is in this terrain where I situate the second part of this thesis. In this scenario, two questions become fundamental: why is it worthwhile developing critical legal theories of ADL without the need for comprehensive socio-legal studies that can have a say on the effectiveness or the impact of recent legal reforms? Why is it worthwhile developing critical legal approaches to ADL on its own terms, disregarding the need for a complete doctrinal reconstruction of this area of law?<sup>13</sup>

In Latin America, it seems that any expansion towards sociologically informed approaches to law entail abandoning the internal perspective, and leave socio-legal studies as mere sociological explanations of how law operates on the ground, irrespective of its normative commitments, or as mere (political) admonitions of law, where legal venues are considered simply as battlefields through which to continue political struggles through slightly different means.<sup>14</sup> Indeed, socio-legal studies seem to adopt an entirely external position to law, without reflecting on the ethical and political questions raised by the nature and significance of legal practices in several parts of Latin America.<sup>15</sup> The case for advancing a critical social theory of ADL in Latin America stems from the need to complement socio-legal studies with a fundamental task, that is, the ethical or political orientations of research, or the impossibility of a value-free inquiry into the operation of recent ADLs on the ground.<sup>16</sup> In this way, a critical legal theory of ADL in Latin America entails a sociologically informed approach that eschews external perspectives to the study of law as just one object of research among others. Furthermore, critical legal theories add something that traditional legal analyses are unable to provide. The latter work with raw legal materials and seek ‘the elements that may plausibly be represented as social or moral ideals’ (ideals that ‘are believed to be in some sense already present in the law’),<sup>17</sup>

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<sup>12</sup> N Lacey, ‘Normative Reconstruction in Socio-Legal Theory’ (1996) 5 *Social & Legal Studies* 131.

<sup>13</sup> Although a ‘complete doctrinal reconstruction’ of ADL is not necessary to develop a critical social theory, ‘some’ doctrinal work is crucial to understand the stage of development of anti-discrimination legal regimes in Latin America, as I explained in chapter 3.

<sup>14</sup> Garcia Villegas (n 3) 34-5.

<sup>15</sup> D Bonilla, ‘Introduction: toward a constitutionalism of the Global South’, in D Bonilla (ed), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (CUP 2014) 6-7.

<sup>16</sup> Lacey (n 13) 133.

<sup>17</sup> R Mangabeira Unger, ‘Legal Analysis as Institutional Imagination’ (1996) 59 *The Modern Law Review* 1, 9.

or develop constructive interpretations that ‘impose purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong’;<sup>18</sup> after that, however, traditional legal analysts understand that their role must be carried out with caution and modest institutional ambition, respecting institutional competences, and providing ‘merely a difference in the interpretation or an elaboration of existing legal materials – a new gloss on the 14<sup>th</sup> amendment or something of the sort.’<sup>19</sup> In contrast, critical legal theories of ADL can work with legal materials and start their political or ethical reflections without the need to rationally reconstruct this relatively young field of law, either to find implicit moral or social ideals, or to impose a purpose on them and construct the law’s integrity. In this regard, the raw materials of Latin American ADL, as presented in the first part of this thesis, can accommodate a critical social theory of ADL that can provide a better understanding of the strengths and limits of this area of law.

A common theme around critical analyses of law is the idea of exclusion or oppression, which unifies different strands of critical legal feminism, critical race theory, and critical disability theory that endorse a critique of law’s power and its harmful effects but without abandoning the commitment of the internal perspective to law.<sup>20</sup> As Balkin puts it, what unifies critical legal theories is their ambiguity regarding the law’s legitimating role: even if law legitimates political institutions by providing checks and balances or by embedding moral principles that serve as grounds of critique, it also legitimates domination or oppression, masquerading harms that can be widespread, such as institutionalising structural disadvantage.<sup>21</sup> Moreover, critical legal theories challenge the law’s absolute autonomy, suggesting the need to consider socio-political realities or the context of the creation and application of the law, and the special impact of the law on disadvantaged groups.<sup>22</sup> These approaches have decided not to renounce the law’s distinctive capacities and leave them to their oppressors or to the free flow of societal interests; instead, they have committed themselves to the law and legal reasoning, adopting an internal perspective while keeping their critical stance. In that regard, critical legal theories have

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<sup>18</sup> J Waldron, ‘Dirty Little Secret’ (1998) 98 Columbia Law Review 510, 516.

<sup>19</sup> Mangabeira (n 18) 9.

<sup>20</sup> K Crenshaw, ‘Race, Reform, and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law’ (1988) 101 Harvard Law Review 1331; P Williams, ‘Alchemical Notes: Reconstructing Ideals from Deconstructed Rights’ (1987) 22 Harvard Civil Rights-Civil Liberties Law Review 401; H Samuels, ‘Feminist Legal Theory’, in R Banakar and M Travers (eds), *Law and Social Theory* (2nd edn, Hart 2013).

<sup>21</sup> J Balkin, ‘Critical Legal Theory Today’, in F Mootz (ed), *On Philosophy in American Law* (CUP 2008).

<sup>22</sup> K Bartlett, ‘Feminist Legal Methods’ (1990) 103 Harvard Law Review 829.

been particularly attentive to ADL, being rigorous to scrutinise its broken promises and unmask its real legitimising motives, while also being ready to exploit the contradictions of dominant legal paradigms, enhance the power of disadvantaged groups and individuals through legal means, or elaborate alternative meanings of legal concepts. Overall, critical legal approaches to ADL invite us to imagine how a different regime of ADL would look after posing ethical or political questions that arise from looking at the practice with a power/value/interest-laden perspective. It is in that spirit that a critical theory of ADL becomes a fundamental task, which is worthwhile in itself, for anyone interested in the role of law in advancing human emancipation.

In the first chapter of this second part (chapter 5), I provide reasons to develop a critical social theory of ADL, and outline a definition of ADL as an anti-misrecognition device, though thoroughly interimbricated with economic and political spheres. In the following chapters (6, 7, 8, and 9), I work around the interplay between my social theory of ADL and the legal practices in Latin America, in an attempt to show instances of anticipatory illumination that ground the principles of a transformative approach to ADL that serve as a roadmap of its unfinished project.



## Chapter 5 Towards a critical social theory of anti-discrimination law

### 5.1 Introduction

As political philosophy is turning towards a relational conception of equality, with concepts of oppression, domination or subordination coming to the fore, theories of ADL have become more attractive for both philosophy and legal theory.<sup>1</sup> Against a purely distributive paradigm, relational equality has highlighted the need to give a more accurate philosophical account of legal fields like ADL, which aim to redress the evils of social relations rather than generate a fairer distribution of shares of self-respect. However, even if ‘relational equality sounds very much like a description of anti-discrimination law’, the aims of the current anti-discrimination regimes are very much about access to employment, services, goods and resources that are valuable to people, especially those who are most vulnerable.<sup>2</sup> In other words, ADL ‘also aims to rectify distributive injustices’,<sup>3</sup> or constitutes ‘an indispensable component of a basic structure that justly distributes the benefits and burdens of social cooperation’.<sup>4</sup>

In the midst of distributive and relational theories of equality, ADL may seem to provide a solution to many of the problems that contemporary societies are facing. Different governments have created equality laws on the assumption that they are part of progressive political projects tackling key social and economic evils: discrimination undermines the social basis for economic systems, unjustly restricts access to valuable social goods, constrains valuable options for individual freedom, generates harms for individual and social identities, and endangers social cohesion. For conservatives however, ADL goes too far in attempting to intervene in social relations and promote cultural and social changes according to an egalitarian ideal;<sup>5</sup> for some liberals, ADL should be narrowly crafted (or, worse still, dispensed with altogether) in order to avoid

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<sup>1</sup> D Hellman and S Moreau, *Philosophical Foundations of Discrimination Law* (OUP 2013); C Fourie and others (eds), *Social Equality: On What It Means to Be Equals* (OUP 2015). Although there are many debates around whether the value or principle of equality constitutes the normative underpinning of ADL, the concepts of equality and non-discrimination seem to be inevitably connected in both legal and non-legal discourses. One is discriminated against when one is not treated equally, as the popular jargon claims. Moreover, as I explained in the introduction and in chapter 2, the connection between equality and ADL derives from different types of reasons that sustain a constitutional conception of ADL.

<sup>2</sup> S Moreau, ‘Equality and Discrimination’, in *Cambridge Companion to the Philosophy of Law* (CUP forthcoming).

<sup>3</sup> *ibid.*

<sup>4</sup> S Choudhry, ‘Distribution vs. Recognition: the case of anti-discrimination laws’ (2000) 9 *George Mason Law Review* 145, 149.

<sup>5</sup> E Pricker, ‘Anti-Discrimination as a program of private law’ (2003) 4 *German LJ* 771; J Cornides, ‘Three case studies on “Anti-Discrimination” law’ (2012) 23 *EJIL* 517.

curtailing other important freedoms, like freedom of association or freedom of contract;<sup>6</sup> for the sceptical left, ADL may be deemed as the ‘darling’ of neo-liberal projects, endorsing a politics of identity that forgoes issues of redistribution.<sup>7</sup> This puzzling scenario invites us to think better about the nature and purpose of ADL, not only because it touches upon deeper moral issues, and has an unavoidably expressive character, but because it promises to achieve a society free of oppression, subordination and domination with a fairer distribution of rights and duties. To be part of progressive political projects, ADL needs to be critical of its role in contemporary societies, where it is faced with processes of modernisation that push towards social/political disintegration and systemic/market integration.<sup>8</sup> Neither a panacea nor a purely human face for neoliberal arrangements, ADL could be a truly revolutionary project that aims to transform the current state of affairs. Philosophical debates around ADL have attempted to give an account of its promises. By placing the wrongness of discrimination in certain aspects of our current practices, different theories of ADL have tried to give an account of this emergent field of law by explaining when and why discrimination is wrong, and the need for legal regulation. However, as I will argue, we need more than philosophical theories attached to our legal practices to understand what is at stake here.

In this chapter, I start by arguing that debates around the philosophical foundations of ADL seem to be ill-equipped to provide an account of the emancipatory potential of this emergent field of law. Although these debates wander between the look for univocal and pluralist theories that can provide a normative foundation for ADL, and which have an impact on how the law works and affects people’s lives, these theories bypass the fact that ADL contains radical promises that need to be reassessed in the current state of post-socialist conditions. The debates around the philosophical foundations of ADL are important for doctrinal issues that continually arise in the case law, which include the distinction between direct and indirect discrimination, the availability of defences against discrimination claims, and the connection between particular distributive questions (the distribution of rights and duties to different actors) and the general justifying aim of ADL, among others. Nevertheless, they do not have the tools to understand how the evolution of the praxis of ADL in certain contexts is the outcome of social, political and legal mobilisation within bounded institutional ‘battlefields’. As I explained in the first part of

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<sup>6</sup> R Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Harvard University Press 1995).

<sup>7</sup> A Somek, *Engineering Equality: An Essay on European Anti-Discrimination Law* (OUP 2011).

<sup>8</sup> W Streeck, ‘The Crisis of Democratic Capitalism’ (2011) 71 *New Left Review* 5, 25

the thesis, the normative reconstruction should start with the radical anti-discrimination commitments that are part of binding (positive) law, with all its expressive, constitutive, and instrumental dimensions. However, the need to move this project forward will not be enhanced by reinforcing a normative theory that is detached from the practices it attempts to address. It is here that critical social theories enter the picture, clarifying the strengths and limits of anti-discrimination projects, that is, the place of ADL within a theory of social/political emancipation.<sup>9</sup> Overall, I start from the basic assumption that even if ADL is not a solution to every social problem, it is more revolutionary than what some of its critics sustain.

What are the limits of the transformative potential of ADL? If ADL is not a solution to every problem, how should we understand the role of ADL in different spheres, such as the economy, culture and politics? What kind of economic or political harms can ADL properly address? In sum, what is the truly revolutionary aspect of ADL that triggers reactions from different constituencies? In an attempt to answer these questions, I will supplement the debates around the philosophical foundations of ADL with insights from critical social theories, more specifically, the theory of social justice developed by Nancy Fraser. Within her theory, we can read ADL as an anti-misrecognition device and display its transformative potential (ADL as a paradigmatic case of ‘non-reformist reform’).<sup>10</sup>

## 5.2 Philosophical Foundations of ADL

In this section, I argue that the debates around the philosophical foundations of ADL have not addressed the emancipatory potential of this emergent field of law, that is, its strengths and limits as a legally-driven project of cultural and social change. In particular, I will explain the path from mental-state theories to current pluralist theories of ADL and the spaces it opens up for a critical social theory of ADL.

It has been a while since theories of ADL abandoned the idea that what is required to eliminate discrimination is a demand for consistent treatment, that is, to ensure the

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<sup>9</sup> In Marxists terms, political emancipation was achieved with the principle of equality before the law and the abolition of feudal entitlements; social/human emancipation, for its part, is the full realisation of the promise of equality, and is understood as societies being free of subordination, domination or oppression. K. Marx, ‘On the Jewish Question’, in R. Tucker (ed.), *The Marx-Engels Reader* (2nd edn, Norton & Company 1978). I claim that ADL has a say in both dimensions of emancipation.

<sup>10</sup> N. Fraser, ‘Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation’, in Fraser and Honneth, *Redistribution or Recognition?: A political-philosophical exchange* (Verso 2003) 79.

impartial application of the law to all regulated subjects. If consistent treatment were all that ADL demands, then the formal equality clauses that have been present in our legal systems for more than two centuries would be sufficient. The incorporation of prohibitions of discrimination according to different protected grounds, usually after social/political mobilisation, demanded theoretical debates about the value that stands in the background of a comparative exercise.<sup>11</sup> Thus, the expansion of ADL required a theoretical exercise beyond formal equality. For anti-discrimination scholarship, this movement towards the philosophical foundations of ADL required us to focus on the wrongness of discrimination and the reasons that ultimately justify having a whole set of legal regulations to tackle it. Furthermore, the emergence of the doctrine of implicit bias, the incorporation of indirect discrimination clauses, and the need for ADL to structurally address the stigma, stereotype or prejudice against certain social groups, have expanded our understanding of discrimination and made it much more difficult to theorise it.<sup>12</sup> With the current shift towards relational equality, theories of ADL are required to deal with both distributive and relational dimensions, complicating the answer to the question, ‘which of the many morally troubling features of discriminatory acts and policies render them wrongful or unfair’?<sup>13</sup>

Having abandoned mental state theories of ADL, several theories have proposed alternative accounts of the wrongness of discrimination. Recognition-based theories of ADL, usually based upon a broader conception of relational equality, argue that the wrongness of discrimination lies in the lack or failure of recognition of the victim.<sup>14</sup> For their part, prioritarian theories argue that there are several reasons to justify ADL as a way to redress disadvantage and alleviate the well-being of those who are worst off.<sup>15</sup> Indeed, these theories focus on the effects of discrimination on its victims, who are usually denied important means to support their well-being, and start from a ‘general moral theory according to which the right action is the action that maximizes moral value’.<sup>16</sup> Liberty or freedom-based theories argue that discrimination is a violation of an

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<sup>11</sup> D Reaume, ‘Dignity, Equality, and Comparison’, in Hellman and Moreau (n 1) 9.

<sup>12</sup> Moreau (n 2).

<sup>13</sup> *ibid.*

<sup>14</sup> E Anderson and R Pildes, ‘Expressive Theories: A General Restatement’ (2000) 148 *University of Pennsylvania Law Review* 1503; D Hellman, *When is Discrimination Wrong?* (Harvard University Press 2008); A McColgan, *Discrimination, Equality and the Law* (Hart 2014); P Shin, ‘The Substantive Principle of Equal Treatment’ (2009) 15 *Ratio Juris* 149.

<sup>15</sup> In general, prioritarian theories move away from grounding ADL in the value or principle of equality.

<sup>16</sup> Moreau (n 2); K Lippert-Rasmussen, *Born free and equal: A philosophical inquiry into the nature of discrimination* (OUP 2014); R Arneson, ‘Discrimination, Disparate Impact, and Theories of Justice’, in Hellman and Moreau (n 1). For these theories, ADL is an instrument of distributive justice.

individual liberty, independent of what others possess.<sup>17</sup> For Sophia Moreau, discrimination entails a violation of our interest in ‘freedoms to have our decisions about how to live insulated from the effects of normatively extraneous features of us, such as our skin color or gender’.<sup>18</sup> In this way, discrimination works like a tort: a personal wrong committed against an individual by another, ‘wrongs which consist in unfairly disadvantaging someone because of a trait whose costs she really should not have had to bear’.<sup>19</sup>

Recently, opposed to the idea of attempting to capture the wrongness of discrimination in a single value, several scholars have supported pluralist theories of ADL. They argue that the wrongness of discrimination, when considering the practice of our anti-discrimination laws, is not reduced to a single value, and thus it is a theory of discrimination law ‘which gives some role to the absence of social subordination, some role to the protection of freedoms, and some role to the effects of discrimination on people’s well-being’.<sup>20</sup> Khaitan’s theory of ADL combines a prioritarian-sufficientarian view of its purpose (the elimination of systemic disadvantage that endangers the possibility of human autonomy), with a freedom-based view that also considers discrimination as a personal wrong that imposes ‘costs on membership of groups whose membership is morally irrelevant’.<sup>21</sup> Sophia Moreau, abandoning her original claim to give an account of ADL uniquely based on the violation of an individual right to deliberative freedoms, now endorses a pluralist account that promises to capture the different strands of discrimination: ‘we do care very much about giving people deliberative freedoms in certain contexts; but we also care just as deeply about eliminating subordination and eliminating relative disadvantages between social groups’.<sup>22</sup>

Maybe pluralist theories have achieved the best we can hope for from theory: ‘apparently incompatible theoretical explanations (...) all have captured some essential truth about discrimination law (although none can explain everything on its own)’.<sup>23</sup> However, we

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<sup>17</sup> J Raz, *The Morality of Freedom* (OUP 1986) ch9. For Benjamin Eidelson, discrimination entails a violation of a right to be treated as individuals. *Discrimination and Disrespect* (OUP 2015); Choudhry (n 4) 154.

<sup>18</sup> S Moreau, ‘What is Discrimination?’ (2010) 38 *Philosophy and Public Affairs* 143, 147.

<sup>19</sup> Moreau (n 2).

<sup>20</sup> *ibid.*

<sup>21</sup> T Khaitan, *A Theory of Discrimination Law* (OUP 2015) 168.

<sup>22</sup> Moreau (n 2). In ‘What is Discrimination?’, she acknowledged the possible deficiencies of a purely liberty-based account of ADL (n 18) 178.

<sup>23</sup> Khaitan (n 21) 10.

are not entirely clear about how we can institutionally articulate these theoretical accounts to capture the different strands of current anti-discrimination laws. One possibility is to distinguish several facets or dimensions of current anti-discrimination laws within pluralist theories, and provide a compartmentalised explanation of the operation of sophisticated institutional programmes of regulation. For example, we may explain direct and indirect discrimination as addressing the same personal wrong, because we understand that we are unjustly imposing costs on group membership for the victims; however, at the same time, we can distinguish between the different defences that may be available for defendants in both cases, as direct discrimination usually involves an explicit lack of recognition or egregious expressive harms, while indirect discrimination may be understood as the legislative imposition of duties on those who control valuable goods that determine our socio-economic position. Also, we may distinguish between the judgment of the wrong of discrimination, which answers the legal question of who should be held responsible for a discrimination claim, and the desirability of using ADL to eliminate systemic disadvantage against certain social groups, which is expressed in the remedial parts of judgments that frequently attempt to extend the impact beyond the directly affected parties.

The above-mentioned theories have been looking - each in its own way - for 'a coherent normative foundation upon which discrimination law can securely rest'.<sup>24</sup> They have been criticised because there are several aspects of the surface structure of anti-discrimination laws that are not explained by the preferred normative foundation, even when we consider those aspects as morally desirable.<sup>25</sup> For example, how can we explain the fact that we consider indirect discrimination as something to be redressed even when the discriminatory act shows no demeaning expressive message to the victim? And, how can we explain the fact that ADL also protects individuals who are not among disadvantaged groups if the discriminatory act cannot be considered a serious threat against their individual freedoms? In a way, the whole theoretical enterprise is about dealing with aspects of our current anti-discrimination laws that we consider important. Therefore, looking for the right balance between what the practice shows us and what we think ADL should be doing is a plausible theoretical enterprise. An acknowledgment that the relationship between law (as it is) and morality is mutually constitutive has been one of the main contributions of the current state of the philosophical debate around ADL: it

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<sup>24</sup> *ibid* 6.

<sup>25</sup> P Shin, 'Is there a unitary concept of discrimination?', in Hellman and Moreau (n 1).

is not only that our practice should match our previous moral agreements, but that our practice can inform, both practically and theoretically, our moral reasoning.<sup>26</sup> It is precisely by exploiting this relationship that pluralist theories have been developing the most interesting accounts of ADL.

On the whole, debates around the philosophical foundations of ADL have not addressed the question of whether ADL could be considered an emancipatory project of social change. Initially, this question may fall towards the purposive inquiry, which ‘engages with overall systemic concerns: why do we have a system of discrimination law at all? What, indeed, is the point of this area of law?’<sup>27</sup> To answer these questions, it is useful to resort to the practice of ADL, which in several jurisdictions has proved quite challenging for the status quo and has been dubbed a ‘dangerous’ instrument in the hands of subordinated social groups. Different lawmakers attempt to craft anti-discrimination institutions and devices than can keep expectations low: for example, broader economic or social issues are usually left out of legal regulation, creating a clear distinction between socio-economic issues and ADL,<sup>28</sup> or excluding class, socio-economic status, or poverty as protected grounds;<sup>29</sup> statutory duties to modify institutional arrangements according to the commitments of equality and non-discrimination are considered too demanding for the *status quo*, and there is a strong preference for strictly judicial models of ADL;<sup>30</sup> in general, positive actions are considered compatible with ADL, but policy-makers are mindful of not making these measures the main remedy against discrimination; regardless of their constitutional grounding, anti-discrimination regulations sometimes aspire to be merely technical, leaving ADL with no grounding principles or purpose-based reasoning;<sup>31</sup> in some cases, lawmakers are conscious of the possible chain of events that may follow the enactment of an ADL, including clauses that prevent anti-discrimination claims from becoming the first step in a slippery slope towards broader legal reforms.<sup>32</sup>

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<sup>26</sup> Khaitan (n 21) 5-6; C O’Cinneide, ‘Justifying Discrimination Law’ (2016) 36 OJLS 909, 914.

<sup>27</sup> Khaitan (n 21) 10.

<sup>28</sup> eg Equality Act UK (2010) s 149.

<sup>29</sup> eg EU Equality Directives: Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, art 2; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, art 1.

<sup>30</sup> eg ADLARG.

<sup>31</sup> C O’Cinneide and K Liu, ‘Defining the limits of discrimination law in the United Kingdom: Principle and pragmatism in tension’ (2015) 15 International Journal of Discrimination and the Law 80, 85.

<sup>32</sup> ADLCHI, art 18 (‘Interpretation of this Law. The provisions of this law will not be interpreted as amending or derogating other currently binding legal rules’). According to the history of the legislative proceedings, this provision was incorporated with the support of right-wing parties, which were fearful that the newly created judicial remedy would be used to challenge institutions such as marriage. BCN, ‘Historia

As was highlighted at the beginning of the chapter, although ADL is not a solution to every social problem, either in relation to social or material inequality, it could prove quite emancipatory in the hands of those who have been disadvantaged or considered second-class citizens.

By looking into the practice with a pluralist lens, we may acknowledge that the theoretical question around ADL requires elements that go beyond a relationship between law and morality. For example, we may need to theorise capitalism in order to look for the ways in which some groups are subordinated, or why, even with perfect starting conditions in terms of access to a good, some groups end up worse off than before. Maybe a whole picture of the practice would tell us that social movements see ADL as a truly encompassing project that addresses several problems faced by disadvantaged groups and reserve a place for it within a broader movement towards social emancipation. And maybe that is what people expect or what governments promise when particular anti-discrimination laws are enacted.

Indeed, even if these theories seem to have reached a stage at which only pluralist approaches can provide comprehensive accounts of the many aspects that anti-discrimination laws seem to cover, they seem insufficiently equipped to understand the place of ADL in broader progressive political projects. In other words, they seem to be blind to the potential emancipatory power of ADL, which has been crafted not only to redress the violation of individual freedoms, challenge the demeaning messages that acts or social practices send to discriminated groups, and alleviate the well-being of those who are worst off, but also to tackle social subordination, that is, where social groups are unfairly subordinated to others. Even if tackling social subordination has been both a moral insight into understanding the wrong of discrimination and a reading of positive law (eg, the principle of anti-subordination in US law), the implications of incorporating this broader social aim seem to puzzle philosophical theories of ADL. Sophia Moreau has recently provided a pluralist theory of ADL that reserves a special place for subordination in the determination of why and when discrimination is unjust. This move should trigger new understandings of how some social groups end up with a lower social status, or ‘to explore the many ways in which acts, policies, and physical structures in the world

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*de la ley Anti-Discriminación n20.659* (2013) <<http://www.bcn.cl/historiadelaley/nc/historia-de-la-ley/4516/>> accessed 3 November 2016.



perpetuate these differences in status'.<sup>33</sup> This move requires us to go beyond purely philosophical enquiries, in order to explore the ways in which social structures and individual or collective behaviours and attitudes have a causal relationship with situations of social subordination (combining prejudices or stereotypes, and sustaining 'policies, practices and physical structures that tacitly accommodate the dominant group's needs at the expense of less privileged groups'), or mark a group as inferior on the basis of a prohibited ground of discrimination.<sup>34</sup> Surely, this demands a broader perspective in the study of discrimination: if social subordination is a social phenomenon that is hardly understood without engaging with social theories, theories of ADL need to expand their scope not only to understand when and why discrimination is unjust, but also to reveal possible paths of emancipation.

It is precisely here that my project meets and delves into the interstices of critical (social) theory, using ideology critique as the preferred tool of inquiry. As McNay puts it, this method entails two dimensions, disclosure and reflexivity. The first (disclosing critique) 'tries to penetrate forms of ideological domination, the ways in which symbolic forms (words, images, ideas) are used to naturalise and legitimate exploitative and unequal social relations and, above all, to manufacture political quiescence'.<sup>35</sup> In a way, this first moment attempts to answer the old Marxist question of how subordinates consent to their subordination, that is, on how discrimination becomes normalised or embedded in social structures. According to the second moment (reflexivity), which 'is inwardly directed towards the scrutiny of ideology critique's own presuppositions', we need to ensure that the path to emancipation 'does not become yet another ideological mode of thinking, that is, that it reproduces prejudicial beliefs that themselves reinforce or mystify unjust social hierarchies'.<sup>36</sup> Here, I engage with the work of Nancy Fraser, because I think she provides us with an illuminating account of the potential emancipatory possibilities of an emerging field of law like ADL, highlighting both its benefits and strengths, as well as its limits and dangers. Her theory allows us to apply these two moments of ideology critique to the social phenomena we associate with discrimination, and provides us with the tools to elaborate practical roadmaps. In this way, by using a term she has explicitly endorsed as a 'political compass' for current times, I propose to understand ADL in Latin America as

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<sup>33</sup> S Moreau, 'Discrimination and Subordination' (draft, quoted with permission from the author).

<sup>34</sup> *ibid.*

<sup>35</sup> L McNay, 'Contemporary Critical Theory', in M Freeden and M Stears (eds.), *The Oxford Handbook of Political Ideologies* (OUP 2013) 140.

<sup>36</sup> *ibid.*

an anti-misrecognition device that acknowledging its limits, can act as a case of ‘non-reformist reform’. In this way, the second part of this thesis, which this chapter opens, is not an inquiry into the correct theory of discrimination law or a moral account of the wrongness of discrimination, but an attempt to engage with critical social theory in order to provide an account of the emancipatory potential of ADL. The following section asks the question, what can critical social theories contribute to the analysis of current forms of discrimination and the potential transformative role of ADL in addressing/redressing it?

### 5.3 The critical social theory of Nancy Fraser

#### 5.3.1 Introduction: non-reformist reforms

In general, critical social theories distinguish themselves from traditional theories in regard to their practical aim towards human emancipation, that is, challenging domination or oppression and improving human freedom in all its forms. In order to do that, every critical theory is ‘necessarily interdisciplinary in nature’,<sup>37</sup> and ‘must explain what is wrong with current social reality, identify the actors to change it, and provide both clear norms for criticism and achievable practical goals for social transformation’.<sup>38</sup>

Nancy Fraser is a critical theory scholar who has developed a ‘comprehensive critical theory of justice’ in the midst of current post-socialist conditions.<sup>39</sup> Her theory’s ultimate aim is to provide a comprehensive framework through which to understand and clarify the different struggles of our times. In several works, she uses the famous statement of Karl Marx on what should be the object of philosophy, which counts as a general definition of critical theory: ‘the self-clarification of the struggles and wishes of the age.’<sup>40</sup> In contrast with the Rawlsian approach, which bypasses an analysis of the concrete injustices that afflict contemporary societies, she starts from an empirically grounded

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<sup>37</sup> *ibid* (‘when intellectual enquiry (...) is contained within a single discipline unified by received assumptions about how to proceed, there is no imperative for (...) critical self-reflection and it runs the risks of becoming reified.’)

<sup>38</sup> J Bonham, ‘Critical Theory’ (Stanford Encyclopaedia of Philosophy, 8 March 2005) <<https://plato.stanford.edu/entries/critical-theory/>> accessed 12 February 2015.

<sup>39</sup> Rainer Forst, ‘First things First’, in N Fraser and K Olson (eds), *Adding Insult to Injury* (Verso 2008) 310. These conditions represent the current state of social justice struggles that decouple redistributive politics from politics of recognition and that lack any overarching socialist project of transformation. Moreover, these conditions observe ‘a decentering of claims for equality in the face of aggressive marketization and sharply rising material inequality.’ *Justice Interruptus: Critical Reflections on the Post-Socialist Condition* (Routledge 1997) 3.

<sup>40</sup> N Fraser, ‘What’s Critical About Critical Theory?’, in *Fortunes of Feminism* (Verso 2013) 19.

social theory to develop her normative standard of participatory parity. She explicitly starts her analyses from what she calls ‘folk paradigms of social justice’, which ‘constitute a moral grammar that social actors can (and do) draw on in *any* sphere to evaluate social arrangements’.<sup>41</sup> In contrast to Axl Honneth, who claims that critical theory should avoid deriving its concepts from the activity and struggles of social movements, Fraser supports the general idea that social theory should start from concrete political experiences, as everything happens in discursively mediated contexts.<sup>42</sup> Indeed, her theory draws mostly from the struggles of feminist movements, and assesses the extent to which our critical theories ‘serve the self-clarification of the struggles and wishes of contemporary woman’.<sup>43</sup> In this context, ‘the folk paradigms of justice that constitute a society’s hegemonic grammars of contestation and deliberation’ are the starting point for Nancy Fraser’s theory, although ‘they do not enjoy any absolute privilege.’<sup>44</sup> In her famous debate with Axl Honneth, who endorses a subject-centred philosophy, in which moral psychology grounds, and constrains, social theory and moral philosophy, the method of the critical theorist becomes clearer, because it should assess ‘folk paradigms of justice’ with two independent questions: ‘first, from, the perspective of social theory, whether a society’s hegemonic grammars of contestation are adequate to its social structure, and, second, from the perspective of moral philosophy, whether the norms to which they appeal are morally valid’.<sup>45</sup>

Within the first perspective, Fraser advocates a social theory capable of analysing the mutual imbrication of economy, culture and politics in contemporary societies, and avoids approaches such as substantive triadism (where there is a dissociation between each dimension), or economism/culturalism/politicism (where the different dimensions are reduced to one). Instead, she adopts a ‘perspectival triadism’, where redistribution, recognition and representation are the three analytical perspectives applied to social phenomena, ‘which cut across institutional divisions’.<sup>46</sup> It is important to highlight that

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<sup>41</sup> These paradigms ‘are transpersonal normative discourses that are widely diffused throughout democratic societies, permeating not only political public spheres, but also workplaces, households, and civil society associations’. N Fraser, ‘Distorted beyond all recognition: A Rejoinder to Axl Honneth’, in Fraser and Honneth (n 10) 207-8. Today, the principal ‘folk’ paradigms of justice are recognition, redistribution and representation.

<sup>42</sup> *ibid* 204-205.

<sup>43</sup> Fraser (n 40) 19-20.

<sup>44</sup> Fraser (n 41) 207, 208.

<sup>45</sup> *ibid* 208.

<sup>46</sup> *ibid* 217. The incorporation of ‘politics’ as a third domain, or the analysis of misrepresentation as a separate form of injustice, stemmed from the analysis of how the grammar of contestation and deliberation has been altered with globalisation (what she calls a ‘*Post-Westphalian* frame’): above and beyond first order questions of substance, like those addressed by redistribution and recognition, ‘arguments about

these are analytical distinctions within a theory that has been elaborated with a single purpose: to provide an evaluative framework to the struggles of our time.<sup>47</sup> In other words, these are not distinctions that pretend to mirror social dynamics or describe states of facts; instead, it is an approach for the social theorist who is working to offer guidance on the struggles of social movements.<sup>48</sup> However, in several parts of her work, Fraser acknowledges the need to theorise capitalism, which develops institutional differentiations between the different spheres:

the economic dimension becomes relatively decoupled from the cultural dimension, as marketized arenas, in which strategic action predominates, are differentiated from non-marketized arenas, in which value-regulated interaction predominates. The result is a partial uncoupling of economic distribution from structures of prestige.<sup>49</sup>

This has triggered the critique that if Fraser's distinction between redistribution, recognition and representation has an institutional basis, then it is not merely analytical; this is something I will come back to in future chapters.<sup>50</sup>

In the realm of moral philosophy, she offers a 'clear articulation of a normative framework' to distinguish between worthwhile desires and aims for the struggles of our age.<sup>51</sup> Specifically, grounded within a liberal/universalist 'norm of the equal moral worth', she proposes the standard of 'participatory parity', where 'justice requires social arrangements that permit all members of society to interact with one another *as peers*.'<sup>52</sup>

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justice today also concern second-order, meta-level questions. What is the proper frame within which to consider first-order questions of justice? Who are the relevant subjects entitled to a just distribution or reciprocal recognition in the given case? Thus, it is not only the substance of justice, but also the frame, which is in dispute'. N Fraser, 'Reframing Justice in a Globalized World' (2005) 36 *New Left Review* 69, 72.

<sup>47</sup> Several authors have wrongly interpreted Nancy Fraser's approach without considering that recognition and redistribution are different 'analytical' perspectives. For example, Choudhry criticised Fraser for adopting a group-based status recognition that 'sets to one side the notions of recognition that underlie egalitarian politics of redistribution, even if only as a simplifying device' (n 4) 159. He does not take into account how she conceives of the relations of intertwinement between the two, how in real life we usually experience both harms and, finally, how we can start thinking about a strategy to redress those harms.

<sup>48</sup> Fraser (n 41) 198.

<sup>49</sup> N Fraser, 'Rethinking Recognition' (2000) 3 *New Left Review* 107, 118.

<sup>50</sup> In the words of Axel Honneth: 'Contrary to her assurances that she is restricting herself to a "perspectival dualism," at times Fraser succumbs to the temptation of talking about "social integration" and "system integration" in an essentialist sense.' 'The Point of Recognition: A Rejoinder to the Rejoinder', in Fraser and Honneth (n 10) 253.

<sup>51</sup> C Zurn, 'Arguing over Participatory Parity', in Fraser and Olson (n 39) 148.

<sup>52</sup> Fraser, 'Why Overcoming Prejudice is Not Enough', in Fraser and Olson (n 39) 84, 87. Apparently, her normative standard endorses a thick (substantive) conception of justice, suggesting a deontological conception of liberalism. Although different from procedural liberalism, which centres on the institutional arrangements that grant democratic procedures, Fraser's approach acknowledges that participatory parity results from the accumulation of substantive standards that have been incorporated to the realisation of equality. Fraser (n 41) 230.

Within post-socialist conditions, and in the current context of complex societies facing modernisation processes that pull towards systemic integration, which in its turn endangers communicative practices of social integration, the question that emerges is how a theory of social justice like that of Nancy Fraser can foster human emancipation.<sup>53</sup> A first remark is that Fraser attempts to develop a critical theory that defends the ‘continued importance and the continued validity of “grand theorizing”’, which provides us with ‘a big picture that allows us to situate ourselves historically and to orient ourselves politically’.<sup>54</sup> Although we may be dealing with gender subordination in ordinary family relations, we should never lose sight of the big picture, of what is at stake structurally and politically in those relations. Nevertheless, one of the most important premises that unifies different critical theories is starting ‘with agents’ own pretheoretical knowledge and self-understandings’ and employing different approaches according to the differing circumstances.<sup>55</sup> Moreover, contemporary critical theories need to show some ‘perspicacity’: ‘if, at the end of the day (...) critical social theory doesn’t tell us something insightful and practically useful about the actual struggles and wishes of our age, then it has missed the target’.<sup>56</sup>

Without abandoning the need for grand-theorising, Nancy Fraser borrowed from André Gorz the term ‘non-reformist reform’, in order to assess whether a policy or action could be framed as emancipatory in the current post-socialist conditions.<sup>57</sup> In the words of Fraser, as stated already, these are reforms (or, better, struggles) that ‘set in motion a trajectory of change in which more radical reforms become practicable over time.’<sup>58</sup>

In this way, Nancy Fraser is on the look out for a ‘*via media* between an affirmative strategy that is politically feasible but substantively flawed, and a transformative one that is programmatically sound but politically impracticable’.<sup>59</sup> Moreover, in connection with

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<sup>53</sup> Fraser (n 40).

<sup>54</sup> H Dahl and others, ‘Recognition, Redistribution and Representation in Capitalist Global Society: An Interview with Nancy Fraser’ (2004) 46 *Acta Sociologica* 374, 381.

<sup>55</sup> Bonham (n 38).

<sup>56</sup> Zurn (n 51) 143.

<sup>57</sup> For Gorz, ‘[a] reformist reform is one which subordinates its objectives to the criteria of rationality and practicability of a given system and policy. Reformism rejects those objectives and demands—however deep the need for them—which are incompatible with the preservation of the system. On the other hand, a not necessarily reformist reform is one which is conceived not in terms of what is possible within the framework of a given system and administration, but in view of what should be made possible in terms of human needs and demands.’ André Gorz, *Strategy for Labour* (Beacon Press 1967) 7; Fraser (n 10) fn91.

<sup>58</sup> Fraser (n 10) 79-80.

<sup>59</sup> *ibid* 79.

Fraser's understanding of Foucauldian genealogies of power, we could understand that emancipation, in her theory, 'refers specifically to transforming a state of domination into a mobile, reversible, and unstable field of power relations within which freedom may be practiced'.<sup>60</sup> In other words, emancipation does not mean freedom from power relations (with Foucault, we would say, there is no way out of power relations, we are subjectively constituted by them), the traditional utopian image of freedom for the Enlightenment tradition; however, as Fraser states, 'what Foucault needs, and needs desperately, are normative criteria for distinguishing acceptable from unacceptable forms of power'.<sup>61</sup> The standard of participatory parity, in connection with her political critique of the force of law, which will be explained later, will allow us to frame ADL as a non-reformist reform,

that opens up lines of fragility and fracture within the present that are also spaces of anticipatory illumination, spaces that enable us to transform states of domination into mobile and reversible fields of power relations, and to practice freedom within those fields.<sup>62</sup>

In a way, non-reformist reforms are 'policies with a double face': they call upon people's identities and articulate their claims within existing frameworks/grammars of recognition, redistribution and representation, while they also 'set in motion a trajectory of change in which more radical reforms become practicable over time'.<sup>63</sup> Thus, for example, feminist movements are challenging hard-wired norms that rank 'masculine' qualities above 'feminine' ones, but they must also gain concrete advances in order to broaden their support. In other words, contrary to former social movements that have sacrificed immediate achievements for an ultimate aim, Nancy Fraser calls for reforms that could reinforce current power struggles. The strategy, then, lies in

conceiving and pursuing reforms that deliver real, present-day results while also opening paths for more radical struggles for deeper, more structural change in the future. Feminists can embrace this approach in an agnostic spirit. We don't need to decide now whether the end

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<sup>60</sup> A Allen, 'Emancipation Without Utopia: Subjection, Modernity, and the Normative Claims of Feminist Critical Theory' (2015) 30 *Hypatia* 513, 517.

<sup>61</sup> N Fraser, 'Foucault on Modern Power: Empirical Insights and Normative Confusions' (1981) 3 *Praxis* 272, 286.

<sup>62</sup> Allen (n 60) 524.

<sup>63</sup> Fraser (n 10) 79.

result must be a postcapitalist society (...) So I say, let's pursue nonreformist reforms and see where they lead.<sup>64</sup>

### 5.3.2 Does she have a particular theory of law?

Now we need to focus on one of the most pressing questions regarding Nancy Fraser's theory of justice, a question that has been raised frequently in exchanges with Jacques Derrida, Axel Honneth, Leonard Feldman, Christopher Zurn, William Scheuerman and Thomas McCarthy, among others. In general, these critics have claimed that Fraser has neglected the analysis of law as a separate sphere (the *neglect critique*). Even though she locates her normative principle of participatory parity within the liberal values of equality, freedom/autonomy and dignity, for her critics 'she does not elaborate it in legal-and political-theoretical terms; thus, she largely bypasses the complicated contestation of the meanings of equality, autonomy, and the like within the liberal tradition'.<sup>65</sup>

Moreover, as put by one of her critics, 'Fraser tends to treat law as purely instrumental, as a guarantor of redistribution and recognition claims, rather than as a mode of social ordering and a dimension of social justice in its own rights' (the *instrumentalist critique*).<sup>66</sup> For Axel Honneth, within Fraser's approach to law,

state-sanctioned rights are to have only the purely instrumental function of equipping already achieved entitlements to cultural recognition or economic redistribution with certain enforcement powers after the fact. This instrumentalism (...) forgets that rights govern relations among actors in fundamental ways, and their significance to social interaction is thus not only functional. Rather, the subjective rights we grant one another by virtue of the legitimation of the constitutional state reflect which claims we together hold to require state guarantees in order to protect the autonomy of every individual. This interactive character of rights also allows us to explain why they should be understood as independent, originary sources of social recognition in modern societies.<sup>67</sup>

In several works, Honneth has stressed that legal recognition or legal freedom is indispensable for personal integrity and thus a positive achievement of modernity,

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<sup>64</sup> G Gutting and N Fraser, 'A Feminism Where "Lean In" Means Leaning On Others' (*New York Times*, 15 October 2015) <<https://opinionator.blogs.nytimes.com/2015/10/15/a-feminism-where-leaning-in-means-leaning-on-others/?mcubz=1>> accessed 15 November 2016.

<sup>65</sup> T McCarthy, 'Book review: Nancy Fraser and Axel Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange*' (2005) 115 *Ethics* 397, 400.

<sup>66</sup> *ibid*; Honneth (n 50) 251-2.

<sup>67</sup> *ibid*.

because law is needed to enable structures of recognition outside the legal sphere of rights.<sup>68</sup> This is what Fraser supposedly ignores or bypasses, the centrality of law and rights for political and social struggles in modernity. Although Fraser expresses ‘fidelity to critical theory as an interdisciplinary endeavor, law’s status within that project ultimately remains unclear’, opening the door to critiques of endorsing a neo-marxist approach to law that is merely functional or instrumental.<sup>69</sup> Despite her self-declared neo-Kantian commitment, she does not address law, the rule of law or rights, and does not engage with the legal scholarship inspired by Frankfurt’s Critical school, especially that since the publication of Habermas’ *Between Facts and Norms*.<sup>70</sup>

Although her general comments on law are very brief, we can say that her empirical reference points always deal with social struggles around legal institutions (eg, marriage) or waged within legal discourses (eg, domestic violence). In this regard, law becomes a crucial object of analysis, as social movements use legal discourse as one of the main avenues to advance their ‘folk paradigms of justice’, either to challenge legally sponsored subordinations or to ‘redress nonjuridified status subordination’.<sup>71</sup> The question, then, could be reformulated from the point of view of the relationship between law and social change, or between law and the demands of social movements.

Even if her main works do not directly address the central place that law occupies in social and political struggles, her exchanges with several scholars allow us to reconstruct her legal thoughts in a more fruitful way. Her thoughts on law are rooted in her comments to Jacques Derrida’s legal ideas, a brief work that has not been quoted by most of her critics, and that could help us in defending her critical theory approach to law.<sup>72</sup> In contrast to Derrida, who endorsed a metaphysical idea about the force of law as constitutively and inescapably violent, she supported a political understanding of the force of law that locates ‘law’s force in contingent social relations and

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<sup>68</sup> A Honneth, *Struggles for Recognition* (MIT Press 1995); *Freedom’s Right: The Social Foundations of Democratic Life* (Polity Press 2014) ch4

<sup>69</sup> W Scheuerman, ‘Recent Frankfurt Critical Theory: Down on Law?’ (2017) 24 *Constellations* 113, 114, 123.

<sup>70</sup> J Habermas, *Between Facts and Norms* (Polity Press 1996).

<sup>71</sup> N Fraser (n 41) 221.

<sup>72</sup> J Derrida, ‘Force of Law’ in D Cornell and others (eds) *Deconstruction and the Possibility of Justice* (Routledge, 1992). For Fraser’s response, see her ‘The Force of Law: Metaphysical or Political?’ (1991-1992) 13 *Cardozo Law Review* 1325. Not even William Scheuerman, who has probably made the most informed critique of Nancy Fraser from a Frankfurt-inspired theory of law, made a reference to this work. (n 69).



institutionalizations of power'.<sup>73</sup> Moreover, her political approach to the force of law specifies the object of critical theory in 'forms of masked, structural violence', because we tend to overlook 'a range of deadly systemic social processes' that generate massive harms, and 'which cannot be easily attributed to identifiable individual agents'.<sup>74</sup> For example, she pays special attention to the expressive harms or symbolic injustices rooted in legal institutions that operate to exclude certain groups, who then become unable to participate as peers in certain social interactions.<sup>75</sup>

Specifically, in her critique of Derrida's *The Force of Law*, she supports a critique of law that can highlight the structural limitations of current legal systems in addressing 'claims for harms one has suffered by virtue of belonging to a social group'.<sup>76</sup> Thus, she has always been aware of the limits of an individualistic justice that 'presents obstacles to anyone who seeks judicial standing to claim that a systemic injustice has occurred'.<sup>77</sup> Furthermore, a political approach to the force of law, she argues, should not preclude a critical analysis of the cultural backgrounds of legal systems, which determine the functions and outcomes of legal decision-making processes that 'work to the disadvantage of subordinated social groups'.<sup>78</sup> Summarising her 'political critique of the force of law', we could say that its object consists in rendering visible 'forms of masked, structural violence that permeate, and infect' specific legal judgments, an 'institutionalized regime of justice reasoning situated in a specific, structured, sociocultural context'.<sup>79</sup>

At the end, she leaves open the door for considering law as a vehicle of social emancipation, because her theory of social justice has the normative tools to distinguish and identify forms of legal violence that are not necessary.<sup>80</sup> We should remember that Fraser's 'perspectival trialism' conceives of law as pertaining to the three above-mentioned domains of justice (redistribution, recognition, representation), 'where it is

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<sup>73</sup> Fraser (n 72) 1328.

<sup>74</sup> *ibid.*

<sup>75</sup> Fraser (n 49) 115.

<sup>76</sup> Fraser (n 72) 1329.

<sup>77</sup> *ibid.*

<sup>78</sup> Fraser illustrates this with the 'congeries of androcentric assumptions that has led many judges and juries to reject self-defense as a legal defense in cases where women are accused of attacking or killing men who have battered them over a period of years. It has been argued that any legitimate act of 'self-defense' must occur in the heat of an assault and cannot involve use of a deadly weapon against an assailant who has used 'only' his fists.' *ibid* 1330.

<sup>79</sup> *ibid.*

<sup>80</sup> *ibid.*

liable to serve at once as a vehicle of, and a remedy for, subordination'.<sup>81</sup> Again, in contrast with Honneth, who reserves a special place for legal recognition in one institutionalised social sphere (rights), Fraser highlights the pivotal role that law plays in many social spheres, giving form to what Scheuerman called the *compartmentalization* thesis against Honneth.<sup>82</sup>

For Honneth, family and marriage fall under the sphere of love, esteem or solidarity in our social relations (eg, work), while legal recognition deals with the respect we need in public spheres, as citizens with equal rights. In the words of Scheuerman, for Fraser, '[t]he law decisively shapes intimate relationships in ways that Honneth's attempt to parcel it off into a separate sphere of recognition obscures'.<sup>83</sup> However, in other parts of his work, Honneth gets closer to Fraser, and stipulates a broader role for law in modern conditions, where it can serve as a 'legitimate and even necessary means to make sure that recognition in the sphere of intimacy takes a normatively acceptable form. Law does not disable but instead enables "structures of recognition" even outside the (legal) sphere of rights'.<sup>84</sup> This is an issue that has been present since the early works of Fraser, especially in her critique of the Habermasian view on juridification, which romanticises the family as a sphere of communicative interaction that should be kept apart from the density of legal regulation, according to his distinction between system and lifeworld.<sup>85</sup> In contrast with Scheuerman, who suggests that Fraser is an enemy of legalism, we can read Fraser's critical approach to juridification as part of her political approach to the force of law: we should not be afraid to use the weapons of law, or fight within legal arenas, especially against certain epistemologies that start from substantive boundaries that put the family, educational institutions or other romanticised spheres outside the scope of legal regulation. By treating law perspectively, Fraser assumes that we can call for its force whenever we face a parity-impending challenge.

Although she has not spent too much energy on developing a thoughtful approach to legal issues, her political critique of the force of law acknowledges that law is not just an instrument but constitutes an important insight into the analysis of 'folk paradigms of justice'; for example, it has allowed feminist movements to display their struggles in legal

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<sup>81</sup> Fraser (n 41) 220.

<sup>82</sup> Scheuerman (n 69) 116.

<sup>83</sup> *ibid.*

<sup>84</sup> *ibid.*

<sup>85</sup> Fraser (n 40) 30.

arenas, recognising their own despised identities in legal discourses (eg, human rights) and transforming the meaning of legal terms that were previously understood according to dominant positions. In this way, Fraser can respond to the instrumentalisation critique, and advance the possibility of addressing law and legal discourse as sources of social justice in itself. Legal discourses (that is, an officially recognised idiom, which includes concrete vocabularies, paradigms of argumentation, narrative conventions and modes of subjectification) are readily available means of interpretation and communication (MIC) that constitute ‘the historically and culturally specific ensemble of discursive resources available to members of a given social collectivity in pressing claims against one another’.<sup>86</sup> Even if ‘a society’s authorized [MICs] are often better suited to expressing the perspectives of its advantaged strata than those of the oppressed and subordinated’, social struggles deploying legal strategies or making their claim in legal avenues have made linguistic innovations to articulate injustices that previously lacked names.<sup>87</sup> I think that this idea of law as being both constitutive and instrumental is closer to what Nancy Fraser recognises as the proper picture of law in her theory. In some way, this places Fraser closer to the emerging literature on law and social movements, which has abandoned a purely instrumental notion of law for a more complex picture.<sup>88</sup>

### 5.3.3 ADL as an anti-misrecognition device

From the work of Nancy Fraser, there are good reasons to understand ADL as an anti-misrecognition device and inscribe it within her critical social theory. Although she has not made any detailed analysis of ADL, her theory allows us to place this field of law within broader reforms or policies for emancipatory social change. At first glance, Fraser’s theory of social justice could favour a reading of ADL as a device against every form of injustice. Indeed, ADL has been used in every social sphere, from tackling everyday discrimination in the media (culture), to highlighting the absence of women from political positions of power (politics), and addressing poverty in countries that do

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<sup>86</sup> Fraser, ‘Struggle Over Needs’ (n 40) 57. One may add that the constitutive function of law is connected to its expressive dimension. To the extent that the law is a social construct, it attempts to give meaning to social structures and behaviors with the purpose of impacting reality and the way we deal with it. In this process, however, the law also highlights its expressive dimension. Anderson and Pildes (n 14).

<sup>87</sup> N Fraser ‘Prioritizing Justice as Participatory Parity’, in Fraser and Olson (n 39) 334; see also the analysis of ‘the politics of needs surrounding wife-battering’, where feminist activists ‘renamed the practice with a term drawn from criminal law and created a new kind of public discourse’, highlighting the political character of the issue under discussion. Fraser (n 40) 72; ‘Toward a Discourse Ethic of Solidarity’ (1986) 5 Praxis International 425.

<sup>88</sup> M McCann, ‘Law and Social Movements’, in M McCann and A Sarat (eds), *The Blackwell Companion to Law and Society* (Blackwell 2004).

not have a welfare state (economy). In general, then, ADL cuts across the three domains of justice. However, according to Fraser's theory, I will argue that ADL could be considered an anti-misrecognition device for the following reasons: first, we need an account of ADL that acknowledges its limits, because it is not a solution to every form of injustice; second, we require an articulation with the remedies against forms of injustice that are mainly rooted in the economy or in the political sphere; and third, instead of drawing upon an ontological distinction between what pertains to the state and what pertains to culture, we need to combat the formal/cultural institutionalisation of value patterns that impedes participation as peers in social life.

Fraser's analysis of contemporary recognition struggles starts from the need to develop a comprehensive theory of justice that can articulate different struggles addressing different harms. In her early works, she started from the fact of our current postsocialist conditions in order to analyse two different paradigms of social justice, redistribution and recognition, and integrate them into a single framework (a 'bivalent conception of justice').<sup>89</sup> Her initial worries were rooted in the dilemmas between recognition and redistribution struggles, specifically in the problem of 'displacement':

The demise of communism, the surge of free-market ideology, the rise of 'identity politics' in both its fundamentalist and progressive forms – all these developments have conspired to decenter, if not to extinguish, claims for egalitarian redistribution.<sup>90</sup>

To address this problem, she provided an account of two different conceptions of injustice, maldistribution and misrecognition, which could be addressed in every societal domain ('perspectival dualism').<sup>91</sup> She stated that applying these two analytical perspectives to contemporary struggles required a socio-theoretical framework where 'neither of these injustices is an indirect effect of the other', but where both could be understood as 'primary and co-original'.<sup>92</sup> She later recognised the need to incorporate politics as a separate domain, where a distinct form of injustice (misrepresentation) takes place ('perspectival trialism').<sup>93</sup> In this sphere, the struggles are about participation itself, that is, about who has a voice, and about membership in a participatory community.

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<sup>89</sup> N Fraser, 'Social Justice in the Age of Identity Politics' (1996) The Tanner Lectures on Human Values, Stanford University.

<sup>90</sup> *ibid* 4.

<sup>91</sup> Fraser (n 10) 63.

<sup>92</sup> Fraser (n 90).

<sup>93</sup> T Burns and S Thompson, *Global Justice and the Politics of Recognition* (Springer 2013) 172. Leonard Feldman speaks of a 'trivalent theory of justice'. 'Redistribution, Recognition and the State: The Irreducibly Political Dimension of Injustice' (2002) 30 *Political Theory* 402, 420.

Fraser's status model of recognition is influenced by a Weberian approach to Marx.<sup>94</sup> Indeed, within this folk paradigm of justice, victims 'are more like Weberian status groups than Marxian classes'.<sup>95</sup> In other words, they are '[d]efined not by the relations of production, but rather by the relations of recognition, [and] they are distinguished by the lesser respect, esteem, and prestige they enjoy relative to other groups in society'.<sup>96</sup> When evaluated from the standard of participatory parity, misrecognition is a specific form of injustice where 'institutionalized patterns of cultural value constitute some actors as inferior, excluded, wholly other, or simply invisible, hence as less than full partners in social interaction'.<sup>97</sup>

In contrast with 'identity models of recognition', such as those of Axel Honneth and Charles Taylor, which 'start from psychological premises about the intersubjective conditions for the development of a sense of personal identity', the status model of recognition endorses a sociological approach that 'treats recognition from the external perspective of a sociological observer rather than the internal perspective of individuals engaged in intersubjective relations of recognition and identity-formation'.<sup>98</sup> Hence, misrecognition should not be understood mainly as a cognitive/psychological issue, but as 'an institutionalized social relation'.<sup>99</sup> Although Fraser does not ignore the possibility that misrecognition may have profound effects on individual identities, she considers that from the perspective of a critical theory of justice, we should not start the analysis of our current struggles from subjective, unmediated, pre-political experiences of injustice.<sup>100</sup> In

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<sup>94</sup> In contrast, her approach to the politics of redistribution is influenced by the Marxist paradigm of the exploited working class. Overall, her theory could be labelled a Neo-Marxist approach, an example of 'the articulation of Weberian concepts in the recent development of Marxist theory (...) a Neo-Marxist theory of class.' V Burris, 'The Neo-Marxist Synthesis of Marx and Weber on Class', in N Willey (ed), *The Marx-Weber Debate* (Sage Publications 1971) 68. Neo-Marxists grant 'considerable autonomy to nonclass form of oppression. Disagreements remain as to the most appropriate way of conceptualising these forms of oppression, their degree of autonomy, and the precise manner in which they are articulated with capitalist class relations'. (ibid) As I will address later, the precise manner in which non-class forms of oppression are articulated with class in contemporary capitalism is one of the most important contributions of Nancy Fraser's critical social theory.

<sup>95</sup> Fraser (n 10) 14. She quotes the influential work of Max Weber, called 'Class, Status and Party'.

<sup>96</sup> ibid.

<sup>97</sup> ibid 29.

<sup>98</sup> Zurn (n 51) 147-8.

<sup>99</sup> N Fraser, 'Capitalism, Heterosexism and Misrecognition' (1997) 52/53 *Social Text* 279, 280.

<sup>100</sup> C Zurn, 'Balkanization or Homogenization: Is There a Dilemma between Recognition and Distribution Struggles' (2004) 18 *Public Affairs Quarterly* 159, 167 (arguing that identity models of recognition have something to say about crafting remedies of differentiation or dedifferentiation). Also, for Lois McNay, 'Fraser's critique of the subjectivism inherent in the identity model of recognition is so emphatic that it leads to an objectivist style of analysis that forecloses any understanding of the subjective dimensions of oppression and agency'. She develops on Bourdieu's idea of habitus, which could allow Fraser to 'understand subjectivity as an effect of power relations', but without relinquishing 'the central importance

other words, ‘the status model does not so much exclude other meanings of recognition as set constraints on how they may be legitimately achieved’.<sup>101</sup> Her account, then, is broader than identity models, which start their analysis of misrecognition from a phenomenological account of subjective experiences of injustice:

critical theory must prioritize the critique of institutionalized injustice in order to open a space for legitimate forms of self-realization. Treating justice as the first virtue, it must seek to equalize the conditions under which various interpretations of human flourishing are formulated, debated and pursued.<sup>102</sup>

Furthermore, the need to look at status rather than identities does not imply endorsing a fixed ontological lens that assumes that groups are an unavoidable fact of modernity. Although Fraser’s model

does not deny the multiplicity of kinds of social affinity groups, collectivities, associations, coalitions, and so on found in complex societies, it focuses only on those groups that owe their existence as a group to being placed in a subordinate social position because of entrenched patterns of cultural value. According to the status model, then, misrecognition arises not merely from cultural and symbolic slights, but only from those that are anchored in social institutions and that systematically deny the members of denigrated groups equal opportunities for participation in social life.<sup>103</sup>

In her early works, Fraser acknowledged the tensions between ascertaining the existence of group-based misrecognition and the reifying potential of group identities, which in turn excludes dissenters and breeds separatism.<sup>104</sup> Her liberal commitment to the principle of equal moral worth and the standard of participatory parity made her radically aware of the potentially oppressive role of group identities for individual autonomy.<sup>105</sup> Moreover, her critical stance towards social struggles and social movements does not commit her to

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of a hermeneutic orientation in understanding aspects of oppression and agency’. ‘The Trouble with Recognition: Subjectivity, suffering and agency’ (2008) 26 *Sociological Theory* 271, 283-284. In ch 9, I develop the principle of the political axis of ADL, and ask whether incorporating a focus on agency within Fraser’s work helps us in understanding how some individuals or groups are willing to challenge their oppression while others remain passive and consent to their subjection.

<sup>101</sup> Fraser (n 87) 333.

<sup>102</sup> *ibid* 334.

<sup>103</sup> Zurn (n 51) 148.

<sup>104</sup> Fraser (n 39); in contrast, Iris Marion Young, who also acknowledged the importance of group-based oppression, was initially uncritical towards the possible reifying effects of group identities, and understood ‘group differentiation’ as ‘both an inevitable and a desirable aspect of modern social processes’. *Justice and the Politics of Difference* (2nd edn, OUP 2011) 47.

<sup>105</sup> Choudhry wrongly includes Fraser in his account of the ‘paradigm of recognition’, which he claims does not address the potential oppressive effects of group identities. (n 4) 163.

a full partisan endorsement of those causes: ‘once we couch misrecognition in terms of status subordination, it becomes clear that misrecognition can occur not only across groups, but within groups as well’.<sup>106</sup> In this way, we can understand her critical stance on how the achievements of second-wave socialist feminists have been co-opted by mainstream neoliberal thought, reproducing the social conditions for gender subordination.<sup>107</sup>

To overcome misrecognition, she initially advocated a deconstructive recognition politics (as she advocated socialism for redistribution struggles), aimed at the deconstruction of binary oppositions that reproduce practices of cultural misrecognition.<sup>108</sup> The initial versions of her account were against an ‘affirmative politics of recognition, as interfering with transformative economic justice and generating perverse feedback loops of resentment when combined with liberal welfare state programs targeting disadvantaged groups’.<sup>109</sup> However, in the *Tanner Lectures* (1996), she elaborated a more diversified account of recognition remedies, arguing that ‘judgments about the appropriateness of a deconstructive approach to cultural injustice or a multiculturalist approach cannot be made theoretically, and a priori’.<sup>110</sup> Later, in *Recognition Without Ethics* (2001), Fraser acknowledged that recognition struggles should choose their strategies and remedies carefully, according to the particular kind of cultural injustice that they purport to tackle, while also assuming a connection with the other two dimensions of justice.<sup>111</sup> Some injustices may require misrecognised groups

to be unburdened of excessive ascribed or constructive distinctiveness. In other cases, they may need to have hitherto underacknowledged distinctiveness taken into account. In still other cases, they may need to shift the focus onto dominant or advantaged groups, outing the latter’s distinctiveness, which has been falsely parading as universality. Alternatively, they may need to deconstruct the very terms in which attributed differences are currently elaborated. Finally, they may need all of the above, or several of the

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<sup>106</sup> Zurn (n 51) 153.

<sup>107</sup> N Fraser, ‘Feminism, Capitalism and the Cunning of History’ (2009) 56 *New Left Review* 97.

<sup>108</sup> Fraser (n 39) ch1. For some critics, this early account looked like ‘an assimilationist project that ultimately expects all barriers and divisions to dissolve. The weight attached to transformation inevitably suggests a process of convergence between what are currently distinct values or identities, a cultural “melting pot” out of which new-but then no longer “cultural”- identities will be forged.’ A Phillips, ‘From Inequality to Difference’, Fraser and Olson (n 39) 124.

<sup>109</sup> L Feldman, ‘Status Injustice: The Role of the State’, in Fraser and Olson (n 39) 223. The same critique could be made of liberal versions of multiculturalism that celebrate diversity without challenging the dominant horizons of value.

<sup>110</sup> *ibid.*

<sup>111</sup> N Fraser, ‘Recognition Without Ethics’ (2001) 18 *Theory, Culture & Society* 21, 31.

above, in combination with one another and in combination with redistribution.<sup>112</sup>

In other words, a range of different recognition remedies, whether affirmative or transformative, may be available, across the different domains of justice. The target of these different remedies is not the culture, the economy or ‘the political’ as separate entities (substantive trialism), but rather different harms whose origins lie primarily in these different spheres. Any attempt to tackle a phenomenon like discrimination, without being aware of the interimbrications, may end up reproducing the conditions that generate a certain harm in any sphere of interaction.<sup>113</sup> In some exceptional cases, Fraser acknowledges the possibility of cross-redressing, that is, redistribution remedies that tackle misrecognition, or recognition remedies that tackle maldistribution.<sup>114</sup> In a way, Fraser’s initial dilemma between redistribution and recognition struggles has gradually shifted from a tragic to a practical dilemma: ‘[t]here are real and persistent practical differentiation tensions between the numerous remedies and strategies that might be adopted to achieve social justice’.<sup>115</sup>

Although ‘standard forms of formal legal equality’ are necessary but not sufficient for participatory parity to be possible, the strategy of groups pushing for differentiation today may be the consolidation of formal equality tomorrow.<sup>116</sup> A more detailed analysis of the history of legal equality clauses would teach us that recognition remedies are not always pushing for the consolidation of difference, opening up the possibility for an approach to ADL that accommodates a range of different recognition remedies in its struggle against misrecognition, considering the interimbrication of the different spheres.<sup>117</sup>

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<sup>112</sup> Fraser (n 89) 35.

<sup>113</sup> This could address Zurn’s critique (n 51); Fraser (n 89) 46-7.

<sup>114</sup> Fraser (n 10) 83.

<sup>115</sup> C Zurn, ‘Balkanization or Homogenization: Is There a Dilemma between Recognition and Distribution Struggles’ (2004) 18 *Public Affairs Quarterly* 159, 179.

<sup>116</sup> Fraser (n 89) 30.

<sup>117</sup> Questions regarding LGBTI struggles could help us in building this approach: what should its advocates pursue through the usage of ADL? Egalitarian Marriage (considering sexual orientation as a barrier to the right to marriage) or decoupling benefits from heterosexual marriage and allocating them to individuals? Should they concentrate their struggles on achieving formal equality or in attempting to overcome cultural forms of misrecognition that are better confronted by intervening in the social and private spheres of action? Should their main target be the cultural domain, attempting to challenge dominant horizons of value, or the legal sphere and institutions, which grant the social basis for an egalitarian distribution of self-respect? Fraser, ‘Rethinking Recognition: Overcoming Displacement and Reification in Cultural Politics’ (n 39) 136. For her, the answers of social movements to these questions would need to pass the test of ‘non-reformist reforms’.



Rescuing the contribution of ‘identity models of recognition’, like the one articulated by Axel Honneth, where recognition implies securing the conditions of social interactions for individuals to develop self-confidence (love), self-respect (law), and self-esteem (achievement), may lead us towards this flexibility.<sup>118</sup> In the words of Zurn: ‘different types of recognition struggles-*contra* Fraser- may or may not be fundamentally aimed at dominant cultural patterns of value, and furthermore, may or may not involve strategies for remedy that tend towards group differentiation’.<sup>119</sup> However, nothing in the ‘status model of recognition’ prevents us from incorporating this flexible approach to recognition remedies, especially if we include representation remedies. Indeed, we could say that she endorses the idea that

a theory of social justice must attend to the multiple causal axes of injustice and the different forms of political struggles appropriate to them. It must be sensitive to their distinct sets of focal issues, types of injustice, normative claims, candidate remedies, strategic choices, practical tensions between desirability and feasibility, and so on.<sup>120</sup>

This practical approach towards recognition remedies should be coupled with her analytical distinctions/socio-theoretical articulations of non-class forms of oppression with class and citizenship in contemporary capitalism. Fraser’s analytical distinction between misrecognition, maldistribution and misrepresentation is appropriate to understand the limits of an emancipatory tool like ADL. Indeed, when we are able to understand in which sphere certain harm is mainly rooted, we are able to tailor particular remedies, allowing us a more efficient use of our limited capacities for social struggles. Within Fraser’s account, ADL attempts to tackle a social phenomenon that has its origins in the institutionalisation of cultural value patterns, which may have effects in different spheres or dimensions, as illustrated by the economic or political effects of discrimination. As an anti-misrecognition device that tackles harms that are mainly rooted in culture, this does not mean that it does not operate in the economy or in the political sphere.

The idea that harms are rooted primarily in the cultural sphere, at the same time, does not mean that ADL tackles merely symbolic harms. Contrary to the idea of coupling symbolic

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<sup>118</sup> Zurn (n 115) 180.

<sup>119</sup> *ibid* 171. For Zurn, Nancy Fraser’s status model of recognition does not fit with basic struggles for political and legal equality that are not primarily directed at institutionalised patterns of representation, interpretation and communication (*ibid* 173).

<sup>120</sup> *ibid* 180.

harms with culture and material harms with the economy, Fraser explains that ‘injustices of misrecognition are just as material as injustices of maldistribution.’<sup>121</sup> Thus, ‘norms, significations, and constructions of personhood that impede women, racialized peoples, and/or gays and lesbians from parity of participation in social life are materially instantiated’.<sup>122</sup> Her theoretical framework, then, ‘eschews orthodox distinctions’ and endorses a socio-theoretical distinction between the different spheres in order to propose a theory of social emancipation that can deal with the gaps, with those instances where misrecognition is not the superstructure of an economic base, or address those economic complexities that move fluidly across different cultural spheres in order to achieve its self-declared aims of enhancing competitiveness or maximising profits.<sup>123</sup>

Futhermore, labelling ADL an anti-misrecognition device does not preclude the mutual influence of the different spheres, the mutual imbrication between the economy, culture and politics. On the contrary, these ‘three dimensions stand in relations of mutual entwinement and reciprocal influence’, as Fraser state in *Reframing Justice in a Globalizing World*.<sup>124</sup> Although the different articulations of the political dimension of justice have never been fully explained by Fraser, a footnote of the latter essay is the clearest articulation of this mutual ‘interimbrication’:

the capacity to influence public debate and authoritative decision-making depends not only on formal decision rules but also on power relations rooted in the economic structure and the status order (...). Thus, maldistribution and misrecognition conspire to subvert the principle of equal political voice for every citizen, even in polities that claim to be democratic. But of course the converse is also true. Those who suffer from misrepresentation are vulnerable to injustices of status and class. Lacking political voice, they are unable to articulate and defend their interests with respect to distribution and recognition, which in turn exacerbates their misrepresentation. In such cases, the result is a vicious circle in which the three orders of injustice reinforce one another, denying some people the chance to participate on a par with others in social life. As these three dimensions are intertwined, efforts to overcome injustice cannot, except in rare cases, address themselves to just one of them. Rather, struggles against maldistribution and misrecognition cannot succeed unless they are joined with struggles against misrepresentation—and vice versa.

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<sup>121</sup> Fraser (n 99) 286.

<sup>122</sup> *ibid.*

<sup>123</sup> Fraser (n 107); W Brown, *Undoing the Demos* (Verso 2015).

<sup>124</sup> Fraser (n 46) 79.

Where one puts the emphasis, of course, is both a tactical and a strategic decision.<sup>125</sup>

The interimbrication of the different spheres does not mean that ADL can address every possible injustice, whatever the origin; rather, it starts from the idea that the political and economical systems tend to work according to their own logics, which can be better understood through other socio-theoretical devices. Within a broader theory of social emancipation, we should conjoin these different struggles against maldistribution, misrecognition and misrepresentation. However, at a more concrete level, we should tailor particular remedies addressed at different kind of harms after ‘a tactical and a strategic decision’.<sup>126</sup> It is within this pragmatic approach to remedies that I frame ADL as an anti-misrecognition device.

The following table illustrates the potential roles ADL can play within the interimbrication of the different spheres, suggesting it is neither an all-encompassing remedy nor strictly circumscribed within one of the spheres. In that regard, the table shows examples of harms mainly rooted in one of the three spheres, but with effects or influences in the others, and their possible remedies:<sup>127</sup>

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<sup>125</sup> *ibid* fn11.

<sup>126</sup> For some critics, this practical or even strategic turn in Fraser’s work is counterproductive if not complemented by a ‘relational phenomenology of social suffering’. Indeed, for McNay, Fraser’s theory ‘overlooks types of suffering that fall below the perceptual threshold of the recognition and redistribution’, such as the constraining effects of class upon action, which ‘operate not so much in terms of objective access to resources but as a set of class-specific dimension’. Moreover, ‘a construal of agency from the perspective of a relational phenomenology that connects identities to deeper social structures is one way exploring the interpenetrations of cultural and economic forces’, the interimbrication that is so central in Fraser’s method. McNay (n 100) 293, 288, 287; C Zürn, ‘Identity or Status? Struggles over “recognition” in Fraser, Honneth, and Taylor’ (2003) 10 *Constellations* 519, 534.

<sup>127</sup> In each box, I describe the particular kinds of harms and, after the semicolon, suggest potential remedies tailored specifically to them.

Harms/Remedies	Culture	Economy	Politics
Culture	Status inequality (Recognition); ADL; redressing everyday discrimination in the media.	Gendered nature of Poverty, childcare and unpaid work, gender pay gap (sexual division of labour); ADL, formal equality, intersectionality	Underrepresentation of women in politics; ADL, Quotas
Economy	Stigmatisation of poverty; include poverty as a protected ground (ADL?)	Economic inequality (Redistribution); Unions, collective bargaining, taxation, financial regulation.	Buying votes; campaign financing laws.
Politics	Centralisation of politics and underestimation/stereotyping of the capacity of rural areas to develop themselves; political means	Exclusion of Global South from international arrangements and underdevelopment; new UN venues (eg, global parliament)	Political inequality (Representation); new electoral systems, federal/parliamentary arrangements

**Table 1**

Thus, for example, the first row shows different harms mainly rooted in the cultural sphere, but with effects in all of the other spheres. ADL attempts to redress everyday discrimination in the media, where harms can be deemed to be merely cultural, that is, they impede parity of participation but without a clear impact in the other spheres.<sup>128</sup> For example, the stigmatisation of disadvantaged groups at comedy festivals could be addressed by using ADL in conjunction with media regulations in order to tackle the reproduction of the social conditions of disadvantage, even if its effects or impacts on the economic well-being or citizenship status of the victims are not clearly proved. The table also shows us that the gendered nature of poverty, the economic costs of childcare activities and unpaid work, and, more clearly, the gender pay gap, are mainstream cultural harms with profound economic effects. The remedies, here, may range from applying formal equality clauses to bridge gender pay gaps to an active use of intersectionality approaches to tackle the gendered nature of poverty. The remedies, in general, should bring forth or highlight the sexual division of labour, either by using comparators or by challenging the male-dominated horizons of value and its expressions in the job market.<sup>129</sup> Lastly, ADL has been used to challenge the lack of disadvantaged groups in positions of decision-making power by revealing the obstacles that a male-dominated arrangement of representative democracy creates for women: from the toughness and bargaining skills that are unjustifiably attributed to men, to the timetable of party meetings

<sup>128</sup> K Pérez Portilla, *Redressing Everyday Discrimination* (Routledge 2016).

<sup>129</sup> S Fredman, 'Women and Poverty: Human Rights Approach' (2016) 24 *African Journal of International and Comparative Law* 494.

that make it difficult for women with ‘double shifts’ to attend.<sup>130</sup> However, even regarding harms that are rooted mainly in other spheres, ADL can be used as an ancillary device. The most obvious case has been to address the cultural effects of a structural economic harm, like the stigmatisation of people living in poverty.<sup>131</sup>

In general, regarding harms mainly rooted in the other two spheres, Fraser’s theory of social emancipation would recommend tailoring remedies apart from ADL. This has to do with her account of the interimbrication of the different spheres. On the one hand, she has continually stressed the idea that late capitalism has developed into a ‘social formation that differentiates specialized economic arenas and institutions, including some that are designated as cultural’.<sup>132</sup> What this means is that there is a ‘relative uncoupling’ of economic and cultural issues in the current state of late capitalist societies: ‘far from claiming that cultural harms are superstructural reflections of economic harms’, or that economic harms or injustices are always rooted in cultural hierarchies, like the sexual division of labour, she historicises the current capitalist formations in order to understand the gaps that could help us in tailoring the adequate remedies.<sup>133</sup> I will address this interimbrication more deeply in chapter 8.

On the other hand, although she has not deeply developed her account of misrepresentation, she acknowledges that the political sphere can create certain harms that could be better addressed by devices targeted at the boundaries of constitutional membership, like rights of citizenship, or by devices crafted to respect the idea that every member should have an equal political voice. As she explains in *Reframing Justice*, ‘[m]isrepresentation occurs when political boundaries and/or decision rules function to deny some people, wrongly, the possibility of participating on a par with others in social interaction—including, but not only, in political arenas’.<sup>134</sup> At a first level, there is ordinary-political misrepresentation, and here we enter into the terrain of political science and its debate on the relative merits of alternative political/electoral systems, or on the drawing of different constituencies (eg, gerrymandering) and their compliance with the principle of political equality and balance with other principles like stability or

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<sup>130</sup> T Thomas, ‘Remedying Systemic Sex Discrimination by Gender Quotas: Just Because’ (2017) Forthcoming, *Harvard Journal of Law & Gender*.

<sup>131</sup> A Coddou, ‘Addressing Poverty through a Transformative Approach to Anti-Discrimination Law in Latin America’, in L Boratti and others (eds), *Law and Policy in Latin America* (Palgrave 2017).

<sup>132</sup> N Fraser, ‘A Rejoinder to Iris Marion Young’ (1997) 223 *New Left Review* 126, 127-8.

<sup>133</sup> *ibid*; Fraser (n 10) 56.

<sup>134</sup> Fraser (n 46) 76.

governability. At most, ADL could be used to highlight issues of political misrepresentation that disproportionately affect certain protected groups. In general, however, the constitutional guarantee of political equality, in its different articulations, should suffice to tackle these problems. At a different level, she introduces the idea of misframing, ‘which concerns the boundary-setting aspect of the political. Here the injustice arises when the community’s boundaries are drawn in such a way as to wrongly exclude some people from the chance to participate at all in its authorised contests over justice.’<sup>135</sup> In contrast with ordinary-political misrepresentation, which can be addressed by traditional political means, misframing involves very serious injustices that have been highlighted by globalisation. Frequently, we suffer directly due to the impact of decisions in which we do not even have the opportunity to have a say, decisions that usually lie outside the boundaries of the national state in which we live. Here, the remedies should be crafted in order to foster the Habermasian discourse principle beyond the traditional Westphalian model.

#### **5.4 Conclusions**

This chapter started by providing an overview of the most important debate around the philosophical foundations of ADL and argued that pluralist theories have explained the wrongness of discrimination through several different aspects of the practice of ADL. These theories point towards a purposive inquiry into the practice of ADL as committed to transformative aims, such as the need to reduce and, hopefully, eliminate social subordination. In that regard, the philosophical foundations of ADL need to be complemented by a critical theory that is capable of placing ADL within a broader theory of social emancipation. As I argued here, ADL is an anti-misrecognition device that operates within an interimbrication of different spheres, through strategic and practical decisions of social agents. As I will illustrate in the following chapters, individuals and groups use ADL, highlighting its expressive commitments, and their sense of entitlement due to the recognition of identities in legal discourse, but also as a means for achieving recognition or access to valuable goods.

The theoretical toolkit provided by Nancy Fraser allows us to locate ADL within a theory of social emancipation, to understand both its strengths and limits. In societies facing pressures for precarious systemic market-integration processes, ADL constitutes an

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<sup>135</sup> *ibid.*

interesting case of non-reformist reform. Indeed, ADL can be a first step, with the materials we have at hand, towards elaborating progressive political projects that could reinforce the current struggles for human emancipation and alter the terrain upon which later struggles will be mounted. Hence, it is not only its expressive currency, but also the way in which ADL has been used, that constitutes the basis of the theoretical framework for a transformative approach to ADL. ADL appears to be a dangerous weapon in the hands of social movements that can exploit the legal and political opportunity structures, at least when viewed from the perspective of those who want to defend the dominant horizons of value of what is considered as the 'norm'.





## Chapter 6 The principles of a transformative approach to ADL

### 6.1 Introduction

Considering my definition of ADL as an anti-misrecognition device, although deeply interimbricated with the different spheres of social interaction, and with both constitutive and instrumental dimensions regarding the relationship between law and social change, what do we find in the practice of Latin American ADL? If my aim is to elaborate on a transformative approach to ADL, that is, to place it as a case of ‘non-reformist reform’, does the practice of Latin American ADL show certain illuminating patterns or trends? An answer to these questions motivates the following chapters, in which I develop the principles that I claim constitute the transformative approach to ADL in Latin America.

Anti-discrimination scholarship has provided different accounts of the transformative potential of ADL, namely, in regard to expanding its scope of action to private actors,<sup>1</sup> or incorporating clauses of indirect discrimination, intersectionality or reasonable accommodation,<sup>2</sup> or the endorsement of a structural turn.<sup>3</sup> The debates around the philosophical foundations of ADL have attempted to incorporate these transformative aims. However, as I explained in the previous chapter, these debates seem ill-equipped to understand the place of ADL within progressive political projects. In contrast, when viewed from a particular critical social theory, such as the one developed by Nancy Fraser, Latin American ADL offers a promising avenue through which to perform this task.

Indeed, in terms of comparative exercises, Latin American ADL is not characterised by the development of sophisticated doctrinal accounts, such as the ones advanced in the common law jurisdictions, or in the EU equality regime. For example, there is hardly a judgment in the region that clarifies the meaning of indirect discrimination, or the procedural implications of intersectionality clauses.<sup>4</sup> There are no handbooks or textbooks that rationally reconstruct the nascent equality regimes, either from a regional or a domestic perspective. Moreover, as I explained in the first part of this thesis, the

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<sup>1</sup> E Muir, ‘The Transformative Function of EU Equality Regime’ (2013) 5&6 European Review of Private Law 1231, 1234.

<sup>2</sup> S Fredman, *Intersectional discrimination in EU gender equality and non-discrimination law* (European network of legal experts in gender equality and non-discrimination 2016).

<sup>3</sup> S Bagenstos, ‘The Structural Turn and the Limits of Antidiscrimination Law’ (2006) 94 California Law Review 1.

<sup>4</sup> E Caamaño, ‘La discriminación laboral indirecta’ (2001) 12 Revista de Derecho 67, 81.

institutional arrangements crafted by Latin American jurisdictions seem to be at an early stage of development, and even if egalitarian-dialogic constitutionalism seems to be pushing in the right direction, there is a long way to go in terms of the effective enforcement of recent legal reforms. However, as I will show in this second part - and viewed through the lens of Fraser's theory - Latin American ADL can make an important contribution to the critical social theory of ADL, that is, to the emancipatory role it can play in 'disclosing critique' (unmasking domination, oppression and unfair disadvantage) and to the awareness of its limits and dangers ('reflexivity'), the two 'moments' of ideology critique of 'contemporary critical theory'.<sup>5</sup> In other words, the second part of this thesis is focused on providing a critical theory for ADL in Latin America that can be used as an approach to existing anti-discrimination regimes.

A few words on the rationale of this and the following chapters need to be said. In the first section of this chapter, I will explain the character, sources and functions of the principles; then, I will present three principles (state intervention, group dimension, and legal empowerment/mobilisation). In the following chapters (7, 8, and 9), I will present the principles of the challenging stance, the socio-economic lens, and the political axis of ADL separately, for two reasons: first, due to their prominence within the transformative approach to ADL and the importance they claim in understanding ADL as anti-misrecognition device; secondly, and more important, these principles coincide with the folk paradigms of justice and the three analytical spheres or perspectives Fraser uses to address the social struggles of our era. For these reasons, the presentation of these principles requires a longer extension.

### **6.1.1 Character, sources, and functions**

ADL occupies a peculiar place in debates around the meaning of law and how it is experienced in contemporary societies. For Mangabeira Unger,

[b]ecause so much conflict over the content of law takes the form of a struggle over the distinction in the treatment of people, equal-protection doctrine occupies a special place in the system of legal ideas. It is not merely another topic within the law; it is also, by

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<sup>5</sup> L McNay, 'Contemporary Critical Theory', in M Freeden and M Stears (eds), *The Oxford Handbook of Political Ideologies* (OUP 2013) 140.

synecdoche, the problem of law itself, just as property is not simply another right but the exemplary instance of rights.<sup>6</sup>

This peculiar place, I suggest, can be approached from the standpoint of those who suffer discrimination and from the role that ADL plays in envisioning emancipatory alternatives.<sup>7</sup> In contrast to mainstream forms of legal and normative analysis ('rationalising legal analysis'), where the raw materials of law are presented as the embodiment of more abstract moral or social ideals, ADL seems to be wary of coherence or an integral plan that is implicit in law.<sup>8</sup> In particular, ADL seems prone to notice how certain aspects of the current practice or 'corners of the law' can show the 'bad face' of the practice, where 'any given body of law or legal doctrine is bound up to be messy, rich in compromises, exceptions and contradictions'.<sup>9</sup> Even if ADL, like 'any given body of law', is subject to these same problems, I argue that it provides us with 'spaces of anticipatory illumination' in regard to what a progressive anti-discrimination regime might look like in Latin America.<sup>10</sup> In a way, the inner logic of ADL is that of critical theory itself.

For responsive models of law, a legal order provides 'its own built-in criticisms, and through those its own sources of elaboration and change'.<sup>11</sup> Within this framework, ADL can be seen as a mechanism that not only affirms the authority of law, but 'exposes [its] authority to challenge and open policies to change'.<sup>12</sup> For Axel Honneth, the right to equality is affected by what he calls 'structural openness': an indeterminacy as to what counts as a legal person in order to have access to 'equal rights', opening up instituted forms of recognition to challenge, and thus, to the inclusion of previously excluded or discriminated groups.<sup>13</sup> For Raimundo Unger, anti-discrimination rights may constitute basic 'destabilization rights', which 'protect the citizen's interest in breaking open the large scale organizations or the extended areas of social practice' that usually 'remain

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<sup>6</sup> Raimundo Unger, *What Should Legal Analysis Become?* (Verso 1996) 84.

<sup>7</sup> Of course, this peculiar place may also be explained by the role that equality plays in constructing our fidelity to law, to the added moral value of governing our common affairs through law. For this idea, see J. Waldron, 'Why Law – Efficacy, Freedom, or Fidelity?' (1994) 13 *Law & Philosophy* 259.

<sup>8</sup> Raimundo Unger, 'Legal Analysis as Institutional Imagination' (1996) 59 *The Modern Law Review* 1.

<sup>9</sup> J. Waldron, 'Dirty Little Secret' (1998) 98 *Columbia Law Review* 510, 514.

<sup>10</sup> A. Allen, 'Emancipation Without Utopia: Subjection, Modernity, and the Normative Claims of Feminist Critical Theory' (2015) 30 *Hypatia* 513, 524.

<sup>11</sup> P. Nonet, *Administrative Justice: Advocacy and change in government agency* (Russell Sage Foundation 1969) 251.

<sup>12</sup> *ibid.*

<sup>13</sup> A. Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (MIT Press 1995) 110.

closed to the destabilizing effects of ordinary conflicts and thereby sustain insulated hierarchies of power and advantage'.<sup>14</sup> In different ways, ADL seems inherently dangerous for the authority of law, and as such provides an interesting case of immanent critique, an avenue for critical legal theory to explore law's internal contradictions and unmask forms of domination, oppression or subordination. Immanent critique can be presented as nothing but a method to bridge the gap between the ideals that the law purports to embody and what actually occurs – between 'wish and fulfilment'.<sup>15</sup> Nevertheless, a more precise account of immanent critique within critical legal scholarship should distinguish it from mere internal critique. For Emilios Christodoulidis, drawing from a Marxist perspective,

[i]mmanent critique is tied to the logic of contradiction where contradiction, as 'practical' rather than logical, informs a crisis that is experienced by social agents in the materiality of their life. Social reality is experienced by actors in terms of normative expectations that are constitutive (rather than 'epiphenomena') of that reality. Normative expectations are part of institutional frameworks that inform actors' perception of social reality. Immanent critique aims to generate within these institutional frameworks contradictions that are inevitable (they can neither be displaced nor ignored), compelling (they necessitate action) and transformative in that (unlike internal critique) the overcoming of the contradiction does not restore, but transcends, the 'disturbed' framework within which it arose.<sup>16</sup>

In this account, immanent critique, when applied by legal scholars, does more than merely honour the rule of law as an 'unqualifiable human good', or the 'internal morality of law'.<sup>17</sup> Actually, the distinction between internal and immanent critique can be associated with the distinction between reformism and non-reformism, and in this way is related to the portrait of ADL I defend here. Rather than merely affirming the authority of law, or stabilising expectations, a progressive account of ADL needs to be attentive to those instances in which law destabilises or challenges its own authority, or exploits its 'structural openness'.<sup>18</sup> Sometimes, the victories of ADL represent the shames of law, where the contradictions highlighted by the former become inevitable, compelling and

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<sup>14</sup> R Mangabeira Unger, *False Necessity: Anti-necessitarian social theory in the service of radical democracy* (Verso 2004) 530.

<sup>15</sup> G Pearson and M Salter, 'Getting Public Law Back into a Critical Condition: The Rule of Law as a Source for Immanent Critique' (1999) 8 *Social & Legal Studies* 483, 488.

<sup>16</sup> E Christodoulidis, 'Strategies of Rupture' (2006) 20 *Law and Critique* 3, 6

<sup>17</sup> EP Thompson, *Whigs and Hunters: The Origin of the Black Act* (Pantheon 1975) 266; L Fuller, *The Morality of Law* (revised edn, 1969 Yale University Press).

<sup>18</sup> Christodoulidis (n 16) 17.

transformative.<sup>19</sup> ADL, described as an anti-misrecognition device that is thoroughly interimbricated with other spheres, which addresses cultural harms that are materially instantiated in institutional value patterns (as material as economic harms), and has both instrumental and constitutive dimensions, provides a privileged illustration of immanent critique. The principles presented here describe the conditions under which ADL can be considered a paradigmatic case of immanent legal critique, an inevitable, compelling and transformative form of critique or, alternatively, a case of ‘non-reformist reform’.

The sources for these principles depend on an enlarged account of law and legal systems that we may call a ‘relational theory of law’, which understands the object of the critique by exploring the ‘interaction between legal relations and other forms of social relations rather than treating law as an autonomous field of inquiry linked only by external relations to the rest of society’.<sup>20</sup> Specifically, the sources for these principles are located in the current practice of Latin American ADL, and not only in the case law of the IAHRS and domestic courts, in recent anti-discrimination legal reforms, or more broadly within transnational constitutional debates; in particular, these principles are to be found within the practice of social movements that deploy legal devices in their mobilisation strategies. Indeed, they are precisely the ones who exploit those ‘built-in criticisms’ of law, or the ‘structural openness’ of forms of legal recognition.

The principles presented here have only partial explanatory power, that is, they do not provide a comprehensive theoretical account of Latin American ADL. This is due not only to the methodological challenge of considering the different anti-discrimination regimes in the region under a single object of study, but primarily to the critical approach presented before: indeed, even if they derive from the practice of ADL, they attempt to provide spaces of anticipatory illumination in terms of what a transformative approach to ADL might look like.<sup>21</sup> In other words, even if they can be claimed to be immanent legal

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<sup>19</sup> See the speech given by the Spanish PM during the enactment of the Same-Sex Marriage Act, which highlighted how the case for this form of legal recognition, based on the principle of equality and non-discrimination, became ‘inevitable’ (after years of institutional and social humiliation), ‘compelling’ (necessary to restore dignity, through the means of law) and ‘transformative’ (not only sexual minorities, but all the Spanish society would be transformed according to principles of decency and equal dignity). < [http://cadenaser.com/ser/2005/07/01/espana/1120175411\\_850215.html](http://cadenaser.com/ser/2005/07/01/espana/1120175411_850215.html) > accessed 20 September 2017.

<sup>20</sup> Pearson and Salter (n 15) 488. For example, ‘the social institution of marriage involves a numbers of different forms of social relations (legal, economic, gender, sexual relations, etc.); such a conceptualization makes it possible to explore questions about the role which law plays in the development and change of this and other social institutions and practices.’ (ibid 489); A Hunt, ‘The Critique of Law: What’s “Critical” About Critical Theory?’ (1987) 14 *Journal of Law and Society* 5, 16.

<sup>21</sup> The methodology that attempts to elaborate these principles could be associated with what Boaventura De Sousa Santos calls a ‘sociology of emergences’, which searches for the signs, latencies or possibilities

principles, which are already explicit or implicit in law, they have no explanatory power if we understand this task as a (complete) ‘rational reconstruction’ of ADL. Thus, these are principles that even without any grounding in positive law, can be read out of it, or derived especially from the practice of those deploying legal strategies to advance anti-discrimination rights in Latin America (immanent principles).<sup>22</sup> Furthermore, these principles are not primarily premises of political morality that can fit with the history and current accounts of Latin American ADL, as a Dworkinian analyst might attempt. To put it differently, I am not attempting to impose ‘a purpose on an object or practice to make of it the best possible example of the form or genre to which it is taken to belong’.<sup>23</sup> My aim here is not to give a complete ‘theoretical account of the legal model regulating discrimination’ based on a certain Latin American dataset, but to advance the possibility of a transformative approach to ADL according to certain legal and social practices currently taking place in the region.<sup>24</sup> The principles, thus, are built on certain examples, which expand the knowledge we have of the powers of ADL, representing what is absent from our current ‘perceptions’ of the role of law for producing social change.<sup>25</sup>

These criteria provide a somewhat partial account of what we have, the current state of the art of parts of Latin American ADL, and a roadmap that can highlight the strengths and limits of an anti-discrimination programme, and thus its place within broader ‘progressive political projects’. In general, these principles could be better characterised as normative standards that are immanent in legal practices and that illustrate the character of ADL as a case of ‘non-reformist reform’. These principles have two concrete functions. First, they are separate normative standards through which to evaluate different aspects of ADL, specially crafted to evaluate current reforms that are being discussed in Latin America and provide a roadmap for the much needed consolidation of these regimes of law. Although considered as separate normative standards, the principles together constitute a normative framework to which we can resort for discussing the ability of

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that are frequently discredited because they do not exist or because they are not easily translatable to measures or indicators. *Toward a New Legal Common Sense* (Butterworths 2004) ch9.

<sup>22</sup> For the concept of immanent values, see P Cane, ‘Theory and Values in Public Law’, in P Craig and R Rawlings (eds), *Law and Administration in Europe: Essays in Honour of Carol Harlow* (OUP 2003).

<sup>23</sup> R Dworkin, *Law’s Empire* (Harvard University Press 1986) 52.

<sup>24</sup> T Khaitan, *A Theory of Discrimination Law* (OUP 2015) 4.

<sup>25</sup> For the role of examples in expanding our knowledge and improving our judgments in legal reasoning, see O Angelí, ‘Global constitutionalism and constitutional imagination’ (2017) 6 *Global Constitutionalism* 359, 361-6.

ADL to address structural issues or widespread practices of discrimination.<sup>26</sup> Moreover, these principles could be considered as ‘the backdrop against which to consider the application of doctrinal issues that require resolution’.<sup>27</sup> In that sense, although immanent, they are available to orientate or serve as a source of arguments for strategic litigation or judicial resolution, and thus have a practical impact even in the absence of concrete reforms in positive law. In a way, these principles are legal principles that constitute the backdrop against which many of the most progressive landmark cases are built.

In explaining each principle, I will consider the elements that constitute ADL as an anti-misrecognition device and further developments in Nancy Fraser’s critical theory. With the help of her critical framework, the legal practice of the jurisdictions considered in the database will appear in a new light, providing us examples to imagine how a transformative approach to ADL would look like, that is, to represent what is absent from a doctrinal reconstruction of the law ‘as it is’.

## **6.2 The principle of state intervention**

The idea that ADL entails some positive state action seems undisputed. However, the idea that the state, as a collective human association with peculiar legal features, should take a stance on divisive moral issues such as the ones involved in many discrimination cases, lacks unanimous support. This principle starts from the base that the State must intervene in societal spheres to tackle discrimination. In contrast to the classical liberal idea of the State as the main antagonist of society, one that should remain neutral in the face of moral disagreements, this principle forces the State to take a stance concerning discrimination. Thus, an initial question is how this principle can be reconciled with the liberal idea of state neutrality, that is, with the idea that the State should not promote or enforce any particular version of the good.

Despite Nancy Fraser’s commitment to (some form of) liberalism and practical vocation towards the struggles of progressive social movements, reflections on theories of the state are scarcely present in her work. She has been criticised for not considering ‘the particular

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<sup>26</sup> I have used this normative framework to analyse a recent judgment of the IACtHR in *A Coddou*, ‘Atala: a landmark in transformative approaches to anti-discrimination law in Latin America’, in K Fernandez and others (eds), *Chile and the Inter-American Human Rights System* (School of Advanced Studies 2017).

<sup>27</sup> P Craig, ‘Theory and Values in Public Law: A Response’, in Craig and Rawlings (n 22) 28.

role of the state and “the political” in struggles over distribution and recognition’, or its role as ‘a crucial source of oppression and hardship in itself’.<sup>28</sup> Moreover, she seems to bypass the particular role the state can play in achieving emancipation. In her ‘Tanner Lectures’, when addressing the problems of liberal feminism and state neutrality, she stated the following:

[i]n order to achieve just distribution and reciprocal recognition, it is necessary to devise policies that challenge conservative views of family and gender relations. (...) The view that justice requires social arrangements that permit all (adult) members of society to interact with one another as peers is itself not neutral between feminist and fundamental views of gender relations.<sup>29</sup>

However, there is no much more in her writings. According to Fredman, Fraser’s principle of participatory parity, ‘a moral principle which does not intrude on individual ethics’, could give us a basis to distinguish those areas in which the ‘state is entitled to take positive action to further specific values or prevent the pursuance of what it regards as morally bad goals’.<sup>30</sup>

A recurrent theme in feminist political theory, the idea of state intervention, has recently been highlighted by theories of constitutional democracy, which understand the idea of state neutrality in a different way.<sup>31</sup> Derived either from the liberal principle of plurality, or from the need to protect public morality, state intervention is justified to promote or secure the conditions required for equal valuable autonomy or reasonable deliberation.<sup>32</sup> Instead of avoiding mingling with social or moral conflicts, the modern constitutional state is required to intervene and enhance rational discussions among citizens that see themselves as equally entitled to participate in finding the solutions to potentially divisive moral issues.<sup>33</sup>

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<sup>28</sup> L Feldman, ‘Redistribution, Recognition and the State: The Irreducibly Political Dimension of Injustice’ (2002) 30 *Political Theory* 402, 410-11.

<sup>29</sup> N Fraser, ‘Social Justice in the Age of Identity Politics’ (1996) *The Tanner Lectures on Human Values*, Stanford University, fn62.

<sup>30</sup> S Fredman, *Human Rights Transformed* (OUP 2008) 21. For a critique of Fraser’s distinction between morality and ethics, see C Zurn, ‘Arguing over participatory parity: On Nancy Fraser’s conception of social justice’, in N Fraser and K Olson (eds), *Adding Insult to Injury: Nancy Fraser debates her Critics* (Verso 2008) 153-4.

<sup>31</sup> J Kantola, ‘Feminism’, in C Hay and others (eds), *The State: Theories and Issues* (Palgrave 2006) 119-20.

<sup>32</sup> J Raz, *The Morality of Freedom* (OUP 1986) 426.

<sup>33</sup> J Habermas, *Between Facts and Norms* (Polity Press 1996) 176.



While classical liberalism placed civil society against the state, and thus created an artificial division between the private and public spheres, ‘critical liberal theories’ have internalised the republican idea that these spheres are inherently connected.<sup>34</sup> Within the latter frameworks, ADL can be understood, not as dealing with private harms that can merely be redressed through individual initiatives, but as engaging the state as the guarantor of public interest. Moreover, seen from the perspective of structural accommodations -where society bears the costs imposed by the way of life of dominant groups, as expressed, for example, in conventions, dress codes, working times, work-life balances, or architectural design- the need for intervention in the name of public interest seems justified from the liberal principle of equal concern and respect. As Sandra Fredman puts it, ‘[t]he status quo, without legal intervention, requires the out-group to bear the full cost’, so ‘disabled people bear the cost of disability’: ‘[w]hatever cost is not borne by employers or the state is left on the shoulders of those who are least able to bear it’.<sup>35</sup> Accordingly, equal concern and respect for members of out-groups or, alternatively, the liberal idea of a basic structure that allocates the benefits and burdens of a collective scheme of co-operation provides strong groundings for the state to intervene through ADL.

### 6.2.1 State theories

If one moves beyond the liberal debates, and looks towards different state theories, we arrive at a much more nuanced approach of the idea of state intervention. Here, I will first present the traditional Kelsenian definition of the state and argue that relational theories are better equipped to understand the legal complexities that are involved in the principle of state intervention. Kelsen’s definition of the state as ‘a relatively centralized legal order’, although purely theoretical, has many impacts on legal practice.<sup>36</sup> It provides accurate answers to questions about the three elements of traditional state theories (population, territory and power).<sup>37</sup> To ascertain whether someone has compromised state responsibility, a pure legal theory of the state has obvious advantages, as illustrated by the rules of attribution for the international responsibility of States.<sup>38</sup> For example, to

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<sup>34</sup> N Fraser, ‘Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy’, in C Calhoun (ed), *Habermas and the Public Sphere* (MIT Press 1992) 118-21.

<sup>35</sup> S Fredman, ‘Substantive Equality Revisited’ (2016) 14 *International Journal of Constitutional Law* 712, 734.

<sup>36</sup> H Kelsen, *Pure Theory of Law* (2nd edition, University of California Press 1967) 286.

<sup>37</sup> Kelsen used law and state as synonyms. *ibid* 285.

<sup>38</sup> ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*.

determine state responsibility and award damages in foreign investment disputes, arbitrators have relied on the idea that the legal personality of the state implies conceiving of it as a ‘monolithic entity’.<sup>39</sup> Along Kelsenian lines, the state is then characterised by the approach of corporate law, as a hierarchical entity that in the upper part of the scale has allegedly one person/entity liable.<sup>40</sup> This approach has been criticised for not acknowledging the administrative complexities of states, which must deal with contradictory interests and diverse goals.<sup>41</sup>

If we want to understand how the state, even as a legal order, intervenes in socially or morally divisive issues, we should broaden our perspective towards relational theories of the state. Nicos Poulantzas argued in the late 1960s for the expansion of traditional Marxist state theory, and conceived of the (capitalist) state as a social relation: neither an entity in its own right, nor an instrument nor a rational subject, but a relationship of forces, or the material condensation of those relations.<sup>42</sup> For relational theories, the problems of state theory are located in the articulation between state and society. As Jessop puts it, while the State

is just one institutional ensemble among others within a social formation (...) it is peculiarly charged with overall responsibility for maintaining the cohesion of the social formation of which it is merely a part. Its paradoxical position as both part and whole of society means that it is continually called upon by diverse social forces to resolve society’s problems and is equally continually doomed to generate ‘state failure’ since so many of society’s problems lie well beyond its control and may even be aggravated by attempted intervention.<sup>43</sup>

Relational theories of the state, by relying on this paradox, are better equipped to understand the complexities of the principle of state intervention.

The idea that the state is something more than the accumulation or aggregation of private interests and something less than a monolithic legal entity has been pervasive in Latin American political and legal practice. The articulation of different practices within and

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<sup>39</sup> ICSID, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (2004) para 166.

<sup>40</sup> Kelsen (n 36) 290-99.

<sup>41</sup> X Fuentes, ‘El impacto de las normas internacionales sobre protección de la inversión extranjera en el derecho nacional’, in CEPAL & GTZ, *Acuerdos internacionales de inversión, sustentabilidad de inversiones de infraestructura y medidas regulatorias y contractuales* (2010) 39.

<sup>42</sup> N Poulantzas, ‘The Capitalist State: A Reply to Milliband and Laclau’, in J Martin (ed) *Poulantzas Reader* (Verso 2008).

<sup>43</sup> B Jessop, *State Power: A Relational-Strategic Approach* (Polity Press 2008) 7.

around the state makes the approach of the state as a monolithic legal entity untenable. The study of the state in contemporary Latin America could be approached as ‘a differentiated structure which allows the various interests of civil society political expression’, where ‘these interests, and the individuals whose economic relationships produce these interests, are not simply submerged in the state’.<sup>44</sup> This relational definition may explain the ambiguous relationship of Latin American citizens with their states: although a majority of them consider that the state should intervene in the economy and resolve social conflicts, they distrust its institutional capacities to solve problems like crime, corruption or inequality.<sup>45</sup> Furthermore, although the majority of Latin Americans feel that powerful elites capture state institutions, they still consider that the State is the main agent that can improve their living conditions.<sup>46</sup>

Relational theories of the State in Latin America have important legal implications that have been highlighted by recent approaches that consider the state a fragmented legal entity, with several interstices that allow some interests to prevail among/against others.<sup>47</sup> For Molyneux, for example, the history of the state in Latin America shows that states ‘are far from constituting the all-powerful monoliths they are sometimes assumed to be’, and could be better characterised as arenas of social struggles with contingent and unpredictable outcomes, and limited transformative power, which makes the image of the state as standing above society a mere illusion.<sup>48</sup> Analysing recent feminist struggles in the region, and challenging the illusory image of states as ‘neutral arbiters’, Molyneux posits that the state is the main reproducer of gender status inequalities:

[w]hether through intention, through the effects of policies, or through indifference and inaction that maintains the power relations enshrined by the status quo, states are implicated in the ordering of gender relations over the societies over which they preside.<sup>49</sup>

In recent years, there has been a growing body of literature on the gendered nature of social policies, which have reproduced gender inequalities through diverse social

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<sup>44</sup> A Callinicos, *Social Theory: An Introduction* (Wiley 2015) 47.

<sup>45</sup> Latinobarometro, *Informe 2013* (Latinobarometro 2013) 67-70.

<sup>46</sup> Latinobarometro, *Informe 2016* (Latinobarometro 2016) 36.

<sup>47</sup> For Alvaro Garcia Linera, current vice-president of Bolivia, relational theories of the state, such as the one developed by Poulantzas, are important to understand the ‘reality’ of the (neoliberal) state in Latin America, its compartmentalisations and, thus, its possibilities for emancipation. ‘El Estado y la Vía Democrática al Socialismo’ (2015) 259 *Nueva Sociedad* 143, 152.

<sup>48</sup> M Molyneux, ‘Twentieth Century State Formation in Latin America’, in E Dore and M Molyneux (eds), *Hidden histories of gender and the state in Latin America* (Duke University Press 2000) 38.

<sup>49</sup> *ibid* 39.

programmes that, for example, place ‘mothers at the service of the state’.<sup>50</sup> However, even in this scenario, ‘the power states have to affect social relations is neither absolute nor monolithic, nor is the exercise of power a zero-sum game’.<sup>51</sup>

Furthermore, Latin America’s legal ‘brown areas’ or ‘lawless spaces’ openly challenge the ideal theory of the state as a centralised legal order.<sup>52</sup> In a way, they challenge the element of effectiveness, considered fundamental to Kelsen’s definition of law.<sup>53</sup> In turn, theories of legal pluralism dealing with indigenous peoples’ claims in Latin America ‘have long challenged the state’s version of itself as a unitary, hegemonic legal order’.<sup>54</sup> Also, the upsurge of a ‘new developmental state’ in Latin America has changed the legal conception of the state in terms of its social roles, especially when considering the variance in state capacities and the different networks with which it interacts.<sup>55</sup> In contrast with the image of the state favoured by dominant legal theories, which relied on a state issuing legal commands, the ‘new developmental state’ accommodates ambiguous legal roles:

to be flexible and at the same time provide stability for investors; to be open to citizen involvement in the regulatory process of those affected by the rules and at the same time protect the institutions from being captured by interest groups; and finally, to be able to incorporate new forms of participation and transparency that go beyond the classical model of law (...) and at the same time provide avenues for responsive regulation that is accountable to the public.<sup>56</sup>

Finally, neoliberal legalities in the region have favoured fragmented approaches to the state, or the emergence of different legal personalities.<sup>57</sup> A ‘fragmented’ neoliberal state,

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<sup>50</sup> M Molyneux, *Change and Continuity in Social Protection in Latin America: Mothers at the Service of the State?* (UNRISD 2007); V Schild, ‘Securing Citizens and Entrenching Inequalities: The Gendered, Neoliberalized Latin American State’ (2015) Research Network on Interdependent Inequalities in Latin America, Working Paper Series 83.

<sup>51</sup> Molyneux (n 48) 38.

<sup>52</sup> G O’Donnell, ‘On the State, Democratization and Some Conceptual Problems: A Latin American View with Glances at Some Postcommunist Countries’ (1993) 21 *World Development* 1355; J Lemaitre, ‘Constitutionalism or barbarism: how to rethink law in “lawless” spaces’, in C Rodriguez-Garavito (ed), *Law and Society in Latin America: A New Map* (Routledge 2015).

<sup>53</sup> For Wolfgang Friedman, ‘[h]ow this minimum of effectiveness is to be measured Kelsen does not say, nor could he do so without going deep into questions of political and sociological reality’ *Legal Theory* (5th edn, Columbia University Press 1967) 278.

<sup>54</sup> R Sieder, ‘Subaltern Cosmopolitan Legalities and the Challenges of Engaged Ethnography’ (2013) 75 *Universitas Humanistica* 222, 233.

<sup>55</sup> D Trubek and others (eds), *Law and the New Developmental State* (CUP 2013).

<sup>56</sup> H Alviar, ‘Social Policy and the New Development State’, in *ibid* 347.

<sup>57</sup> Sieder speaks of ‘fragmented neoliberal sovereignties’ in Latin America. (n 54) 233. In contrast, liberal legality conceives of law ‘as a system of generalized rules that are interpreted through reason and applied equally to all following rational procedural formalities in manner void of political concerns and outcomes’.

with different state legalities (hard/soft law), nobilities (valued/undervalued), and intensities (intervene/retreat), challenges the image of a monolithical entity.<sup>58</sup> Moreover, the neoliberal state, instead of defending state neutrality, justifies permanent intervention in both economic and non-economic areas.<sup>59</sup> If we define neoliberalism as an ‘order of normative reason’ that extends to ‘every dimension of social life’, producing particular subjectivities and social relations, we can understand the neoliberal state in contrast to the classical liberal distinction between state and civil society.<sup>60</sup> In Latin America, the neo-liberal State has endorsed the idea of intervention in both economic and non-economic areas since its early emergence in the Chilean dictatorship and its subsequent developments in the era of ‘structural adjustments’.<sup>61</sup> The question, however, is how the state intervenes in these areas.

### 6.2.2 State Intervention and Latin American ADL

Legal mobilisation processes and legal practices in the region show a more nuanced approach to the character of the state as a legal order and highlight three main ways to address the principle of state intervention concerning ADL. First, we need to address the emergence of international and constitutional duties of the state to protect victims of discrimination, which derive from general obligations to respect, protect and promote human or fundamental rights.<sup>62</sup> In several regional human rights treaties and domestic constitutions in Latin America, there is an explicit acknowledgment of the need for the state to tackle discrimination and craft its institutional arrangements to that end.<sup>63</sup> In a recent case, related to discrimination on the grounds of sexual orientation, the IACtHR acknowledged,

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H Brabazon, ‘Understanding Neoliberal legality’, in H Brabazon (ed), *Neoliberal Legality: Understanding the role of law in the neoliberal project* (Routledge 2017) 2.

<sup>58</sup> That is, for example, the way in which neoliberal legality exploits the public/private distinction, which ‘appears to be deployed when convenient’: intervening with intensity in some areas, and retreating softly in others. Brabazon (n 57) 11.

<sup>59</sup> For William Davies, ‘[a]n increase in state power has always been the inner logic of neoliberalism, because, in order to inject markets into every corner of social life, a government needs to be highly invasive.’ ‘The Neoliberal State: Power against “politics”’, in D Cahill and others (eds), *Sage Handbook on Neoliberalism* (Sage 2017).

<sup>60</sup> W Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (Verso 2015) 30.

<sup>61</sup> A Thomas, *How Left a Turn? Legacies of the Neoliberal State in Latin America* (Doctoral Dissertation, The University of Tennessee, Knoxville 2013) 107-111.

<sup>62</sup> A Coddou, ‘Deberes generales de respetar, proteger y promover derechos fundamentales’, in P Contreras and C Salgado (eds), *Derechos Fundamentales. Temas de Teoría General* (Lom 2017).

<sup>63</sup> ACHR, arts 1.1 and 2; Inter-American Convention Against All Forms of Discrimination and Intolerance (A-69) (see the preamble and chapter IV, including a detailed list of measures and policies the state should put in place to combat discrimination in all its forms, even in social spheres); Constitution of Bolivia, art 9.1; Constitution of Colombia, art 13.2.

that social, cultural, and institutional *changes are taking place* in the framework of contemporary societies, which are aimed at being more inclusive of their citizens' different lifestyles. This is evident in the social acceptance of interracial couples, single mothers or fathers and divorced couples, which at one time were not accepted by society. In this regard, *the law and the State must help to promote social progress; otherwise there is a grave risk of legitimizing and consolidating different forms of discrimination* that violate human rights.<sup>64</sup>

Frequently quoted by subsequent judgments, this line of reasoning has been criticised as promoting an unjustified expansion of judicial activism, creating obstacles to the gradual advances made recently by processes of democratisation.<sup>65</sup> Nevertheless, comparatively speaking, social consensus does not play a crucial role in the adjudication of human rights affairs in Latin America. The right to equality and non-discrimination is considered as including the need for positive state action, intervening in favour of victims of discrimination, disregarding the idea of a regional or national consensus. This idea has been followed by several national courts, which have generally declared that they are competent to decide on potentially divisive moral issues and avoid adopting 'political question doctrines' that would prevent them from adjudicating a discrimination case.<sup>66</sup>

The second way in which the legal practice of the region illustrates the principle of state intervention derives from the rising tensions between different state branches or agencies regarding compliance with the right to equality. There are different motivations, interests, and institutional capacities that reside in the State in regard to compliance with judgments of the IACtHR, especially those mandating the end of structural discrimination.<sup>67</sup> Within the ad-hoc procedures for monitoring compliance with the IACtHR, some agencies of the state have been deeply engaged in the enforcement of a certain judgment despite the obstacles created by, or the reluctance of others.<sup>68</sup> In the face of a poor compliance record with the IACtHR's rulings, the building of coalitions or alliances with one or more of the

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<sup>64</sup> IACtHR, *Atala Riffo and daughters v. Chile* (2012) para 120 (the emphasis is mine).

<sup>65</sup> G Neumann, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights' (2008) 19 *European Journal of International Law* 101.

<sup>66</sup> Administrative Tribunal of the Autonomous City of Buenos Aires (Argentina), *Freyre, Alejandro y otro c/GCBA s/amparo* (2009) (the state has a duty to protect the right to equality and non-discrimination regarding access to (same-sex) marriage even against dominant public opinion); Suprema Corte de Justicia de la Nación (México), 45-2015 (*tesis de jurisprudencia 10a.*) (the power of Mexican states to define civil status according to their conceptions of the good cannot violate the fundamental right to equality and non-discrimination).

<sup>67</sup> A Huneeus, 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights' (2011) 44 *Cornell Journal of International Law* 493.

<sup>68</sup> Cladem-Red Mesa, *Proposals for analysis and monitoring of the "Cotton Field" case sentence* (CLADEM 2016) 66-82.

state branches constitutes an important tool for rights protection in Latin America.<sup>69</sup> Thus, the way in which the state intervenes in issues associated with discrimination reveals a broader conception of its legal capacities and personalities than the ones derived from a strictly legal conception. At a domestic level, these tensions are illustrated by the action of NHRIs or anti-discrimination entities that use their (constitutional, legislative or merely administrative) autonomy in order to challenge social practices of discrimination even against the will of important state powers.<sup>70</sup> For example, in the case of Mexico, the National Human Rights Commission and CONAPRED formed a coalition to litigate before the Supreme Court, in order to defend the constitutionality of the same-sex marriage act in Mexico City, challenging the position adopted up to that point by Mexico's Attorney General.<sup>71</sup>

Lastly, a third way to represent the principle of state intervention, connected with the previous one, is illuminated by the usage of state institutions for anti-discrimination mobilisation. Although litigation has always been the preferred strategy for anti-discrimination struggles, scarce resources have triggered the expansion of the repertoire of legal mobilisation. Within processes of state modernisation and democratic consolidation, anti-discrimination struggles have been forging coalitions with more diverse legislatures and developed novel forms of 'institutional activism'.<sup>72</sup> Indeed, with an increase in electoral quotas for vulnerable groups and the expansion of political participation, anti-discrimination struggles have found allies in Congress in order to push for favourable legislative agendas. Moreover, the coming to power of several (centre-of-)left governments in the region has allowed former social activists to reach positions of power and the emergence of agencies dealing with discrimination.<sup>73</sup> This has prompted novel forms of mobilisation, where social movements find allies in the chains of bureaucracies, thereby exploiting contradictions against other agencies of the state that

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<sup>69</sup> T Pegram and N Herrera, 'From Compliance to Implementation: National Human Rights Institutions and the Interamerican Human Rights System', in P Engstrom (ed), *Assessing the Impact of the Inter-American Human Rights System* (Pennsylvania Studies in Human Rights 2017).

<sup>70</sup> For the role of Latin American NHRIs and *defensorias* in horizontal forms of accountability, see T Pegram, 'National Human Rights Institutions in Latin America', in R Goodman and T Pegram (eds), *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (CUP 2012) 222-5.

<sup>71</sup> J Díez, *The Politics of Gay Marriage in Latin America: Argentina, Chile, and Mexico* (CUP 2015) 192.

<sup>72</sup> R Neaera and L Tatagiba, 'Institutional Activism: Mobilizing for Women's Health from Inside Brazilian Bureaucracy', in F Rossi and M von Bulow (eds), *Social Movement Dynamics: New Perspectives on Theory and Research from Latin America* (Routledge 2016).

<sup>73</sup> E Dagnino, A Olvera, and A Panfichi, *La Disputa por la Construcción Democrática en América Latina* (CIESAS 2006) 74.

are less keen to handle anti-discrimination claims, and favouring the slow and gradual features of institutional change.

### 6.3 The Group Dimension

In her ‘political critique of the force of law’, Fraser criticises the ‘deep grammar’ of mainstream legal reasoning, arguing that ‘in our legal system it is exceedingly difficult, or indeed often impossible, to press claims for harms one has suffered by virtue of belonging to a social group.’<sup>74</sup> That is, ‘even before legal judging officially begins, there has already been an operation of prejudgment’, which favours addressing individual harms that are ‘the result of a breach of contract or other definite assignable obligation’.<sup>75</sup> Despite Fraser’s comments, the idea of groups has always played an important role in ADL. In contrast with liberal theories of ADL, which neglect the group dimension, several theories claim that groups are decisive for the evaluation of the wrongness of discrimination.<sup>76</sup> In her latest work, Sophia Moreau has incorporated the idea of groups as fundamental for the theoretical account of discrimination as subordination.<sup>77</sup> For Khaitan, the need to reduce relative group disadvantage constitutes the main ultimate objective of ADL.<sup>78</sup> Theories that consider indirect discrimination as the paradigmatic case of discrimination reserve a special place for the group dimension.<sup>79</sup> Moreover, in the legal practice of comparative ADL, groups have always played an important role, whether in the determination of which grounds merits protection, in allowing collective standing, or for ordering collective reparations in situations of structural discrimination. Both theories of ADL and practical accounts, however, seem uncritical of the emancipatory potential or, alternatively, the dangers of the presence of ‘social’ groups in equality regimes. In this scenario, what contribution can critical theory make to the group dimension of ADL? What is the place of groups within a transformative approach to ADL? This section argues that the group dimension is crucial for understanding the transformative role of ADL.

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<sup>74</sup> N Fraser, ‘The Force of Law: Metaphysical or Political’ (1991-1992) 13 *Cardozo Law Review* 1325, 1329.

<sup>75</sup> *ibid.*

<sup>76</sup> A famous liberal theory of ADL in L Alexander, ‘What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies’ (1998) 18 *OJLS* 167.

<sup>77</sup> S Moreau, ‘Discrimination and Subordination’, in *The Many Faces of Equality* (Forthcoming).

<sup>78</sup> Khaitan (n 24) 121.

<sup>79</sup> N Bamforth and others, *Discrimination Law: Theory and Context* (Sweet & Maxwell 2008) 292.



### 6.3.1 The group dimension in theories of ADL

Within Khaitan's pluralist account, the concept of discrimination implies being the victim of a certain harm because of one's membership of a group that suffers relative and persistent disadvantage within a particular society.<sup>80</sup> For some liberty-based accounts of discrimination, the grounds of protection determine the injustice of discrimination by assessing unjustified restrictions on individual deliberative freedoms due to certain normatively extraneous traits that classify persons into 'social groups'.<sup>81</sup> For Khaitan, the group element is one of the necessary and sufficient conditions that distinguish norms of discrimination law from other legal norms: what we call protected grounds (eg, sex) must be capable of classifying persons into more than one classes of persons, loosely called groups (eg, men and women), and members of at least one group must be significantly more likely to suffer abiding and substantial disadvantage than the members of at least one other group defined by the same ground.<sup>82</sup> Moreover, the duty-imposing anti-discrimination norm must be designed such that it is likely to distribute the substantive benefits or burdens in question to some, but not all, members of a protected group ('eccentric-distribution condition').<sup>83</sup> In that way, as I explained in the introductory chapter, 'unlike a universal welfare benefit or a socio-economic right, even positive norms in discrimination law (...) are not designed to benefit every member of the target group'.<sup>84</sup>

For prioritarian theories of ADL, if a person's membership of a relatively disadvantaged group has an impact on their access to fundamental or primary goods, ADL plays a crucial systemic role: it sees the corresponding society through the lens of certain traits that classify persons into groups, according to patterns of disadvantage.<sup>85</sup> However, even if, according to Khaitan, this systemic purpose must be considered when designing the precise rules and duties of anti-discrimination regimes, in the end, 'the law on discrimination is ultimately about the protection of persons'.<sup>86</sup> In a way, this signals the

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<sup>80</sup> Khaitan (n 24) 168.

<sup>81</sup> S Moreau, 'What is Discrimination?' (2010) 38 *Philosophy & Public Affairs* 143.

<sup>82</sup> He talks of loose groups because their members do not need to show 'any solidarity, coherence, essence of identity, shared history, language, or culture. Certain groups which are protected in practice, such as older people (...) may not possess some or all of these features. Under this loose formulation, groups 'members' do not even have to be consciously aware that they belong to this group.' Khaitan (n 24) 30.

<sup>83</sup> *ibid* 38-41.

<sup>84</sup> *ibid* 39.

<sup>85</sup> K Lippert-Rasmussen, *Born Free and Equal? A philosophical inquiry into the nature of discrimination* (OUP 2014) 165-170.

<sup>86</sup> Khaitan (n 24) 139.

place that the idea of groups has in theoretical accounts of ADL, articulated in the following questions: if someone is a member of a protected or a cognate group; if she suffered unjustly because of her group membership; or if certain traits of the victim place her at a persistent and relative disadvantage in terms of access to primary goods.

### 6.3.2 The Group Dimension and Comparative ADL

The group dimension has a fundamental place in comparative ADL, and the discussion around the principles of anti-discrimination and anti-subordination in US ADL offers an interesting way of approaching this issue.<sup>87</sup> The latter was offered as a grounding principle to account for the progressive jurisprudence of the Equal Protection Clause, that is, the constitutional entrenchment of the duty to protect groups that have historically suffered mistreatment, or that lack political power, and considered unconstitutional any government action or inaction that subordinates African-Americans or similar social groups, regardless of the intentions or motives.<sup>88</sup> Despite its soundness and the scholarly attention it attracted, the jurisprudence of the US Supreme Court has persistently embraced the anti-discrimination principle over the anti-subordination principle, ‘defining the Clause as targeted primarily at discrimination against individuals on a small number of forbidden grounds’, as a mandate of formal equality over substantive equality.<sup>89</sup> Thus, the US constitution considers certain grounds as suspect categories subject to different types of scrutiny, even if it concerns ameliorative policies like affirmative action.<sup>90</sup> Nevertheless, the anti-subordination or group-disadvantaging principle has left its mark on the jurisprudence of the court, which has claimed some role for the status of groups in constitutional review processes: ‘racially neutral laws that have a disparate impact would be valid absent an illicit subjective purpose, but so too would most forms of affirmative action’.<sup>91</sup> For Patrick Shin, moreover, ‘the fact that antidiscrimination law dictates irrelevance for only a select set of enumerated group classifications [Civil Rights Act, title VII] strongly suggests that group-based concerns

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<sup>87</sup> The anti-discrimination principle has also been called the anti-classification or colour/race/gender-blindness principle; the anti-subordination principle has also been called the anti-caste or group-disadvantaging principle. J Balkin and R Siegel, ‘The American Civil Rights Tradition: Anticlassification or Antisubordination’ (2004) 58 *University of Miami Law Review* 9.

<sup>88</sup> O Fiss, ‘Groups and the Equal Protection Clause’ (1976) 5 *Philosophy & Public Affairs* 107. For him, social groups where characterised by a collective identity and the interdependence of their members.

<sup>89</sup> M Dorf, ‘A Partial Defense of Anti-Discrimination Principle’ (2002) 2 *Issues in Legal Scholarship: The Origins and Fate of Antisubordination Theory*, 3.

<sup>90</sup> Supreme Court of the US, *Fisher v. University of Texas* 579 US 14-981 (2015).

<sup>91</sup> Dorf (n 89) 5.

are relevant to the purposes of the law itself.<sup>92</sup> Overall, the principle that explains the dominant view in the US – that ADL protects ‘persons, not groups’ – rests mainly on a non-comparative view of freedom and autonomy, where individuals are protected against adverse or preferential treatment based on inferences about their membership of a protected group; and stands against certain forms of treatment that are ‘justified solely on the expected consequences for welfare or group equality’.<sup>93</sup>

In EU Equality law, the prohibition of indirect discrimination entails the assessment of disproportionate impacts of neutral rules, criteria or practices on certain groups, recognising the role that social groups play in the legal procedures of ADL.<sup>94</sup> Furthermore, the concept of vulnerability has been useful when arguing that some groups are in desperate need of state action, and has derived in some interest jurisprudential innovations in the case law of the ECtHR.<sup>95</sup> In exceptional cases, this court has accepted the existence of collective subjects for the purpose of standing.<sup>96</sup> Ultimately, despite the emergence of several enforcement mechanisms that have made serious attempts to incorporate the idea of groups,<sup>97</sup> systemic concerns about reducing disadvantages between social groups seem to be an arena for regimes other than ADL.<sup>98</sup>

### 6.3.3 The Group Dimension and critical theory

For a critical theory of ADL, there are several problems with the group dimension that should trigger caution, something that Nancy Fraser addressed largely in her critical account of malrecognition and in her theory of the public sphere. From the work of Alexander Somek, one of the most passionate critics of the project of ADL, we can derive several criticisms of the group dimension that are important for the critical legal scholar.<sup>99</sup>

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<sup>92</sup> P Shin, ‘Treatment as an individual and the priority of persons over groups in antidiscrimination law’ (2016) 12 *Duke Journal of Constitutional Law & Public Policy* 107, 111.

<sup>93</sup> *ibid* 115. Supreme Court of the US, *Grutter v. Bollinger* 539 US 306 (2003).

<sup>94</sup> S Besson, ‘Evolutions in Non-Discrimination Law within the ECHR and the ESC Systems: It Takes Two to Tango in the Council of Europe’ (2012) 60 *The American Journal of Comparative Law* 147, 164.

<sup>95</sup> L Peroni and A Timmer, ‘Vulnerable Groups: The promise of an emerging concept in European Human Rights Convention Law’ (2013) 11 *The International Journal of Constitutional Law* 1056.

<sup>96</sup> *DH and Others v. Czech Republic* App no 57325/00 (ECtHR, 13 November 2007). Following this case, Besson has ‘identified the development of a right to collective equality held not only by individuals, but also by groups’ (n 94) 160.

<sup>97</sup> see, for example, the collective complaints procedure of the European Committee of Social Rights.

<sup>98</sup> Even if the comparative disadvantage of social groups constitutes an important concern for EU equality law, it needs to be complemented by other value or criteria, such as human dignity or vulnerability, leaving equality as a ‘fluid, ambiguous concept within EU law’. C O’Cinneide, ‘The Constitutionalization of Equality Within the EU Legal Order’ (2015) 22 *Maastricht Journal of European and Comparative Law* 370, 382.

<sup>99</sup> A Somek, *Engineering Equality: An Essay on European Anti-Discrimination Law* (OUP 2011).

The first is whether the recognition of certain traits or categories of persons who usually suffer the effects of social spheres (or markets), allowing people to act out of their whims, ends up creating and reifying collective entities, leading to balkanisation and intra-group resentment.<sup>100</sup> The second is whether the extension of the grounds of protection creates incentives ‘to be admitted to the victim’s club’, leading to a *reduction ad absurdum*, especially if we consider that ‘whether or not a category becomes protected is a matter of political conflict and not of logic’.<sup>101</sup> Thirdly, he claims that members of disadvantaged groups contend for primary goods and ‘do not act together or support each other’, even if ‘the protection of the right to equal treatment of one group member incidentally creates a public good for others’.<sup>102</sup> Hence, he proceeds, ‘the realization of any of the group member’s goals does in no manner depend on the cooperation with others’.<sup>103</sup> Moreover, even across disadvantaged groups, he claims that the recognition of commonalities seems very difficult, because ‘they *do not* perceive to have in common the quality that they really share and which *in fact* accounts for the fact that they endure discrimination in the first place, namely, a lack of political and economic power’.<sup>104</sup> In other words, for Somek, the idea of groups derived from ADL is concomitant with ‘sets’ of individuals that ‘reflect the commodified categories of consumption’:

Groupism and the ‘diversity’ of so-called ‘cultures’ are the epitome of a society drained of solidarity. The celebration of ‘difference’ is the effect of a society where solidarity is unknown to the powerless. It is the consequence of individualism.<sup>105</sup>

I think that these critiques are somewhat far-fetched. The problem with Somek’s account, which is arguably made from a sceptical left position, is that his arguments are based on the jurisprudence of EU ADL, which is focused very much on employment discrimination law, and does not take into account how anti-discrimination norms may act as catalysts for social mobilisation in manifold domains.<sup>106</sup> Indeed, his sceptical view on the

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<sup>100</sup> *ibid* 153.

<sup>101</sup> *ibid* 154. This could lead to the so-called ‘visibility paradox’: the salience of traits that are representative of discriminated social groups invites more scrutiny towards the group and expands the possibility of resentment.

<sup>102</sup> *ibid* 155.

<sup>103</sup> *ibid*. This is more clearly illustrated in cases where individual anti-discrimination judicial claims entails the access to primary goods or benefits to the detriment of members of the same discriminated group.

<sup>104</sup> *ibid* 155.

<sup>105</sup> *ibid.*; Mangabeira Unger (n 6) 94.

<sup>106</sup> To be fair, Somek’s main critique is that (European) ADL is normatively twisted: due to its lack of any distributive pattern, anti-discrimination norms allow for pre-normative intent to colour the attribution of discrimination to agents that happen to control access to distributive resources. *ibid* ch5. For a nuanced approach to Somek’s critique, see C O’Cinneide, ‘Completing the picture: the complex relationship between EU anti-discrimination law and “Social Europe”’, in N Countouris and M Freedland (eds), *Resocialising Europe in a Time of Crisis* (OUP 2013) 123-30.

transformative capacities of ADL is shaped by images of individual interests resorting to litigation in the 'absence of vision for political action'.<sup>107</sup>

#### 6.3.4 The Group Dimension and Nancy Fraser

In Fraser's work, theories of discourse help us to understand the formation of people's social identities and, more importantly, how social groups can acquire collective agency to challenge the cultural hegemony of dominant groups in society.<sup>108</sup> For her, 'the formation of social groups proceeds through struggles over social discourse'.<sup>109</sup> Through these struggles, which use different means of interpretation and communication, feminist social movements have been able to challenge their exclusion from public spheres, the topics to be discussed, or reappropriated official discourses.<sup>110</sup>

Within this framework, law and legal discourse play a crucial role in defining the contours of social groups, especially of those that are formed under conditions of inequality, and provide disadvantaged minorities 'with forums where they could object to exclusion and discrimination'.<sup>111</sup> This process, as Fraser acknowledges, is not unidirectional: just as law influences the struggles, strategies and norms of social groups and movements, it is influenced, and in part shaped, by the activities of these collective subjects.<sup>112</sup> Consistent with Fraser's Gramscian influence, law is a way of world meaning-making, constitutive of social ontology, but also an avenue for official means of interpretation and communication, which are to be reshaped by different practices.<sup>113</sup> In this way, law's role in defining the contours of discriminated social groups and providing avenues for grievances should consider the emancipatory potential and dangers of the legal articulation of the group dimension.

Through their recognition in law, several groups have realised their collective worth, and acknowledged their capability to challenge an order that, under the guise of neutrally addressing individual responsibilities, ends up disadvantaging social groups, something I

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<sup>107</sup> Somek (n 99) 158

<sup>108</sup> N Fraser, 'Against Symbolicism: The Uses and Abuses of Lacanianism for Feminist Politics', in *Fortunes of Feminism: From State-Managed Capitalism to Neoliberal Crisis* (Verso 2013) 140-1.

<sup>109</sup> *ibid* 141-2.

<sup>110</sup> N Fraser, 'Struggle over Needs: Outline of a Socialist-Feminist Critical Theory of Late Capitalist Political Culture', in Fraser (n 108) 72-9.

<sup>111</sup> W Eskridge Jr, 'Channeling: Identity-Based Social Movements and Public Law' (2001) 150 *University of Pennsylvania Law Review* 419, 425-6.

<sup>112</sup> Fraser (n 110) 72.

<sup>113</sup> Fraser (n 108).

will address further with the principle of the challenging stance.<sup>114</sup> Moreover, the legal recognition of certain grounds of protection has influenced the development of ‘subaltern counterpublics’, which are discursive arenas that allow ‘members of subordinated social groups [to] invent and circulate counter discourses to formulate oppositional interpretations of their identities, interests, and needs’.<sup>115</sup> The ability of groups to speak in their own voice, without fear of being minimised, with their own conventions of discourse, constitutes an important insight into the current struggles of minority groups. Within Fraser’s framework, struggles for recognition are

not so much [about] the recognition of the group as of equal worth, but the recognition of the group specificity *in order* to challenge a gender order that has established masculinity as its norm, challenge a racial hierarchy that has marked out Roma or blacks as deviants or criminals, achieve a more just distribution between privileged and disadvantaged groups.<sup>116</sup>

The group dimension, as I argue here, does not involve a mere claim to cultural recognition: assessed through the filter of participatory parity, the assertion of a kind of collective agency entails the ability to speak within its specificity rather than a way to essentialise identities.<sup>117</sup> Rather than depoliticise, as many critics of identity politics argue, the group dimension of anti-discrimination rights has the ability to reinscribe, through discursive means, the political nature of social disadvantage ascribed to group status or group membership.<sup>118</sup> In this way, the group dimension challenges the idea that ADL, ultimately, protects persons and not groups. In other words, ADL protects not only the right of individuals to be free from (group) stereotyping or prejudices, but also their social identities as constitutive of their personal identities, and the group’s collective agency to participate in the public sphere.<sup>119</sup> In Fraser’s work, furthermore, there is also

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<sup>114</sup> P Richards and J Gardner, ‘Still Seeking Recognition: Mapuche Demands, State Violence, and Discrimination in Democratic Chile’ (2013) 8 *Latin American and Caribbean Ethnic Studies* 255.

<sup>115</sup> Fraser (n 34) 123.

<sup>116</sup> A Phillips, ‘Recognition and the Struggles for Political Voice’, in B Hobson (ed), *Recognition Struggles and Social Movements* (CUP 2003) 266. In contrast to Habermas, who argued that ‘individuals and not groups’ were the ultimate protectorate of constitutional democracies, both Phillips and Fraser consider the group dimension as crucial for the democratic public sphere, although they remain agnostic on the value attached to groups (273)

<sup>117</sup> Recall that the standard of participatory parity also challenges social groups that curtail internal dissidence based on an assumed ideal group identity.

<sup>118</sup> see the debate between Wendy Brown and Patricia Williams on the emancipatory potential of rights for identity politics struggles. *La Crítica de los Derechos* (UAndes-Instituto Pensar 2007).

<sup>119</sup> In that way, it can challenge a ‘new’ way of understanding ADL as protecting minority persons but not minority cultures. As Kenji Yoshino puts it, ‘[i]n the old generation, discrimination targeted entire social groups –no racial minorities, no women, no gays (...). In the new generation, discrimination directs itself

an important insight into the possibility of using legal remedies to make grievances as collective groups, something I will address later in this chapter.

Although some recent pluralist accounts have called for theories of discrimination law to be complemented by theories of social subordination, which require a theoretical account of the reality of social groups or their place within broader social contexts, they do not provide an account of how this complementation may bring about real change for those who are in most need of protection from discrimination.<sup>120</sup> The latter triggers a rethinking of the group dimension. A possibility is to look at the legal discourse and practice of jurisdictions to open up new lines of thought, highlighting what the legal practice can teach in terms of our philosophical accounts of discrimination. It is here that Latin American legal practice enters into the critical approach, one that not only highlights the importance of groups for legally addressing the wrongness of discrimination, but that allows the grievance of collective claims and the recognition of collective agency, and thus acknowledges the capacity of law to reduce significant disadvantages between social groups.

### **6.3.5 The group dimension in Latin America**

Although there is plenty of evidence that relative group disadvantage in Latin America is widespread, discrimination law in the region is notorious for its lack of use of statistical comparison between different groups in order to prove discrimination. Also, the regular duties to disclose information on the part of defendants are not usually seen in schemes designed to tackle workplace discrimination in the region. The correlation between social indicators and disaggregated data on group membership could be an interesting way to operationalise the group dimension in Latin America.<sup>121</sup> An overarching search in the jurisprudential database of six different jurisdictions shows that statistical studies or comparative evidence regarding groups' relative disadvantage are rarely an issue in discrimination cases.<sup>122</sup> Most cases end up evaluating whether the discriminator provided enough good reasons for the challenged behaviour, whether there was a discriminatory

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not against the entire group, but against the subset of the group that fails to assimilate to mainstream norms.' *Covering: The Hidden Assault On Our Civil Rights* (Random House 2006) 21-2.

<sup>120</sup> Moreau (n 77).

<sup>121</sup> Inter-American Convention against all forms of discrimination and intolerance (State's duty to provide disaggregated data, art 15.v)

<sup>122</sup> The Colombian Constitutional Court constitutes an exception. In several *tutela* judgements, this court has emphasised, with statistical support, the relative group disadvantage suffered by groups that are discriminated against. See, for example, T-025 (2004) and T-60 (2008).

intention or motive, whether the victim allegedly suffered harms to her dignity, or whether the case involves a vulnerable social group. Although clauses of indirect discrimination and intersectionality have been incorporated into legal schemes, there has been almost no doctrinal development on this issue; furthermore, in many instances, there is no need to present evidence of a ‘group’ comparator to adjudicate a discrimination case.<sup>123</sup> It seems as though Latin American jurisdictions operate on the assumed widespread existence of social groups’ relative disadvantage without the need for any special justification. This particular feature may be explained by the deficient arguments of the plaintiffs, a lack of expertise in discrimination legal issues, or simply scarce institutional resources. Whatever the cause, there is a general tendency in Latin American courts to adjudicate cases without the need for a comparator, or the need to prove relative group disadvantage.<sup>124</sup>

When viewed through the lens of critical theory, the practice of Latin American ADL exhibits three main features of an emerging group dimension that challenges the merely ‘technical’ position that groups seem to occupy in comparative ADL.

First, recent constitutional transformations in Latin America have included the legal recognition of ethnic and indigenous groups and expanded the grounds of protection from discrimination, acknowledging the claims raised by ‘new’ social movements in the region.<sup>125</sup> This recognition has happened simultaneously with processes of state retrenchment, privatisation, and neoliberalisation, allowing scholars to speak of a ‘neoliberal multiculturalism’, where governance arrangements are crafted to distinguish citizens and groups that are welcome from those that are threatening to the market-shaped society.<sup>126</sup> However, for others, the legal recognition of rights for minority cultures, or of the existence of collective identities, has prompted mobilisations that have ended up challenging the neo-liberal governance that may have shaped those reforms at the

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<sup>123</sup> F Muñoz, ‘Estándares conceptuales y cargas procesales en el litigio antidiscriminación. Análisis crítico de la jurisprudencia sobre Ley Zamudio entre 2012 y 2015’ (2015) 28 *Revista de Derecho* 145; in Mexico, there have been jurisprudential thesis regarding indirect discrimination. Suprema Corte de Justicia de la Nación (México), 2007798-2014 (tesis jurisprudencial). However, this has not triggered a doctrinal analysis or a broader development of the concept of indirect discrimination.

<sup>124</sup> The recent emergence of anti-discrimination regimes in Latin America fits closer with the reasoning behind (sexual) harassment protections, ‘which are explicable only in deontological terms’. Somek (n 99) 108.

<sup>125</sup> R Uprimny, ‘The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges’ (2011) 89 *Texas Law Review* 1587, 1589.

<sup>126</sup> C Hale, ‘Neoliberal multiculturalism: the remaking of cultural rights and racial dominance in Central America’ (2005) 28 *PoLAR* 10.



beginning.<sup>127</sup> Likewise, the expansion of the protected grounds of discrimination has entailed a repoliticisation of disadvantaged groups' social markers. Notwithstanding the individualistic emphasis of general anti-discrimination clauses, the incorporation of several markers that define the boundaries of groups' salience has been an acute doctrinal problem in several jurisdictions.<sup>128</sup> At both the domestic and regional levels, these clauses have allowed a collective reading of civil and political rights, and an integrated approach to the adjudication of cases involving social and economic rights, which has unavoidably entailed a group dimension.<sup>129</sup> Furthermore, the recently approved Inter-American Convention against all forms of Discrimination and Intolerance includes an explicit reference to collective rights that is at odds with liberal constitutionalism:

Every human being has the right to the equal recognition, enjoyment, exercise, and protection, *at both the individual and collective levels*, of all human rights and fundamental freedoms enshrined in their domestic law and in the international instruments applicable to the States Parties.<sup>130</sup>

The recognition that social groups can be victims of discrimination implies the need to protect their ability to speak in their own voice and to make their grievances in the specific discursive contexts in which they arise, that is, to allow them spaces of 'withdrawal and realignment'.<sup>131</sup>

A second important feature of Latin American ADL is the ease with which adjudicators endorse a structural approach to remedies against discrimination. Following a trend adopted by the IACtHR and some of the most influential courts in the region, several cases illustrate the need to address structural problems with limited institutional

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<sup>127</sup> O Kaltemeier and others, 'Multiculturalism and Beyond: The New Dynamics of Identity Politics in the Americas' (2012) 7 *Latin American and Caribbean Ethnic Studies* 103, 107.

<sup>128</sup> see for, example, the dilemmas faced by afro-descendant movements: whether they present themselves as an ethnic group or demand, as individuals, equal treatment with other citizens. A Dultizky, 'Cuando los Afrodescendientes se transformaron en "Pueblos Tribales": el Sistema Interamericano de Derechos Humanos y las comunidades rurales negras' (2010) 41 *El Otro Derecho* 13.

<sup>129</sup> O Parra Vera, *Justiciabilidad de los derechos económicos, sociales y culturales ante el sistema interamericano* (Comisión Nacional de Derechos Humanos-México 2011) 47-57; see also V Abramovich, 'From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American Human Rights System' (2009) 6 *Sur* 7, 17.

<sup>130</sup> Art 3 (emphasis is mine).

<sup>131</sup> See the judgment of the Administrative Tribunal of Cundinamarca (Colombia) regarding the justification of woman-only passenger cars in Bogotá: this measure not only protects woman from daily sexual violence, but allows them a 'safe space' to share their grievances and enhance their dignity. *El Espectador*, 'Espaldarazo Jurídico a vagones para mujeres en Transmilenio', October 7th, 2014 <<http://www.elespectador.com/noticias/bogota/espaldarazo-juridico-vagones-mujeres-transmilenio-articulo-520904>> accessed 20 September 2017.

resources.<sup>132</sup> The IACtHR has considered that the ‘guarantee of non-repetition’ forms part of the principle of integral reparation, generating duties for structural reforms that tackle the conditions that prompted human rights violations.<sup>133</sup> In most of these cases, the issue of structural discrimination and its interimbrication with poverty or other situations of social exclusion have been at the forefront of innovative reparation schemes, based mainly on non-monetary compensation. Through a broad reading of article 63 of the ACHR, the IACtHR has developed an extensive system of reparations, and has set up supervisory committees that include the victims, different branches of the state, court staff, and even ‘fourth’ parties that can contribute to the solution.<sup>134</sup> Within these ad-hoc procedures for compliance, the group dimension has contributed to a structural approach to discrimination, highlighting potential victims beyond the directly affected parties, and with special concern for the most vulnerable within affected communities.

#### **6.4 Legal Mobilisation/Empowerment**

Discriminated groups and individuals have reasons to distrust courts or administrative agencies, and to be sceptical about engaging in legal discourse or resorting to legal commitments in order to advance their claims. In general, they have not meaningfully participated in creating the legal norms under which they live, or taken part in the system that applies those norms to them. Moreover, legal orders usually protect those with the ability to navigate in their corners, constrain potentially more radical alternatives, and operate within the social backgrounds provided by dominant groups. The ideological underpinnings of legal systems are not friendly to those attempting to seek a radical restructuring of the social or institutional arrangements, and the undemocratic nature of judicial systems makes them difficult venues in which to challenge the *status quo*. Despite this initial scepticism, anti-discrimination claims are mainly deployed through the means of law. The logic of consistency and equality that accompanies legal orders is prone to accommodating the demands of discriminated groups, who move between claims for consistent equal treatment (formal equality), and claims that attempt to challenge substantive standards that inform the formalities of law (substantive equality).

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<sup>132</sup> Abramovich (n 129) 17.

<sup>133</sup> IACHR, ‘Principal Guidelines for a Comprehensive Reparations Policy’. See also IACtHR, *Myrna Mack Chang v Guatemala* (2003) paras 236-7; *Case of the Caracazo v. Venezuela* (Reparations 2002) paras 77-8.

<sup>134</sup> A Huneeus, ‘Reforming the State from Afar: Structural Reform Litigation at the Human Rights Courts’ (2015) 40 *The Yale Journal of International Law* 1, 25-31.

This principle's starting point is the fact that ADL has profoundly empowering effects. When approached through the lens of participatory parity, ADL becomes an important site for empowering people's ability to demand legal, social and political accountability. As stated in a recent report on the advancement of legal empowerment among rule of law promoters: 'it is about power more than law'.<sup>135</sup> In that sense, this principle connects with the principle of the political axis of ADL, which will be addressed later, but is distinguished in several ways from it: first, it is especially focused on processes of legal mobilisation related to anti-discrimination claims, the reasons why groups and individuals have to resort to law and justice mechanisms to overcome discrimination; second, while the political axis of ADL attempts to address the interimbrications of the political and cultural spheres, contribute to the protection of the special character of 'the political', and enhance political agency, the principle of legal mobilisation/empowerment emerges from the simple fact that ADL is used to advance progressive claims and has indirect consequences for broader social or political struggles.

People are empowered because of many factors, which derive from the interaction between legal, social and political orders. The legal recognition of protected grounds of discrimination, which usually coincide with salient social groups, constitutes a factor of legal empowerment in itself, triggering people to use law and justice mechanisms to advance their interests or fundamental values, or broader processes of political empowerment.<sup>136</sup> Here, I am concerned with legal/political empowerment that emerges from processes of anti-discrimination legal mobilisation, where the 'focus is on articulating a demand or grievance that can be taken up into the formal court system'.<sup>137</sup> The fact that people who are misrecognised use law and justice mechanisms to overcome their situation of disadvantage can result in processes of legal or political empowerment whereby they 'gain new resources (psychological, social, material, or political) and, through these, the ability to make and enact strategic life choices'.<sup>138</sup> For example, legal mobilisation can empower people by leading to

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<sup>135</sup> S Golub, 'The Commission on Legal Empowerment of the Poor: One Big Step Forward and a Few Steps Back for Development Policy and Practice' (2009) 1 Hague Journal on the Rule of Law 101, 108.

<sup>136</sup> see 6.3.4

<sup>137</sup> P Domingo and T O'Neill, 'The Politics of Legal Empowerment' (2014) UK Department for International Development, 22.

<sup>138</sup> *ibid.* As I use it here, persons are legally empowered when they have legal agency, that is, when they incorporate law's normativity in their daily lives, without the need to actually resort to courts or other legal procedures. It is precisely this feature that explains why legal empowerment constitutes a crucial element to define ADL as a non-reformist reform. D Brinks and S Botero, 'The Social and Institutional Bases of the Rule of Law', in Brinks and others (eds), *Reflections on Uneven Democracies: The Legacy of Guillermo O'Donnell* (Johns Hopkins University Press 2014) 218.

a change in capabilities and an awareness of self, even in the absence of more tangible outcomes – for instance, the process of using the law can change a person’s consciousness of their situation (...) and their interactions with their family, their community and wider society. It can also, under some social and political conditions, result in a different perception of the role of, and relationships with, public authority.<sup>139</sup>

In general, then, this principle starts from the fact that law’s content and procedures have been always considered as sites of contestation that are continually reshaped by the actions of individuals and groups. ADL constitutes a special fracture point or site of contestation, which can be viewed from Fraser’s account of the political critique of the force of law. Furthermore, this principle claims to be a central part of non-reformist reforms, as legal mobilisation processes with an impact on legal/political empowerment are part of ‘incremental and piecemeal processes of change in social and political conditions and relations’, even beyond the affected parties in a certain case.<sup>140</sup>

#### **6.4.1 The Political Critique of the Force of Law**

In the previous chapter, the reconstruction of Fraser’s legal thought allowed me to present her political critique of the force of law in a new light, as a framework to ‘render visible forms of masked, structural violence that permeate, and infect’ law and legal judgment: the point is ‘not to identify forms of “violence” that are “necessary for any possible justice”, but to identify forms of violence that are precisely not necessary.’<sup>141</sup> This critique assumes that legal orders have their own channels through which to resist precisely those forms of legal violence that are not necessary, are generally ‘masked and structural’, and frequently generate massive harms.<sup>142</sup> In this way, Fraser’s work can dialogue with certain theories of law and social mobilisation, or with current approaches to responsive law as a model of relation between legal and social/political orders.

One of the main concerns of Fraser’s political critique of the force of law is the centrality of certain constitutional principles, such as the right to private property, and its impact in

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<sup>139</sup> Domingo and O’Neill (n 137) 13-4.

<sup>140</sup> *ibid* 16.

<sup>141</sup> Fraser (n 74) 1328.

<sup>142</sup> Remember that Fraser does not commit her framework to a state free of power relations, but free of subordination, domination or oppression. See 5.3.

constraining legal interpretation upon the overall legal system.<sup>143</sup> In that way, as soon as we attempt to constitutionalise our struggles, we are bound to take into account certain constitutional principles that may not favour our position. Moreover, the ‘bounded nature of constitutional rights claims exclude more creative and normatively ambitious forms of social activism’.<sup>144</sup> Although legal channels represent an opportunity to focus and situate certain issues that compels the state to give an answer through principled reasoning, the bounded character of legal discourse has been criticised as constraining the viability and utility of resorting to law for emancipation.<sup>145</sup> To complement the political critique of the force of law in this dimension, we could stress the bounded/unbounded nature of anti-discrimination claims, which operate either to enforce the formalities of law (formal equality), or to open up lines of fracture in the *status quo* by putting into question the background standards and criteria upon which a certain treatment is challenged as discriminatory.<sup>146</sup> In this way, a transformative approach to ADL relies on the potential destabilisation effects that are prompted by anti-discrimination claims, which take place not only in public law litigation.<sup>147</sup>

In this scenario, contemporary anti-discrimination regimes can also be approached from the model of responsive law. According to this model, the integrity of law (its independent, autonomous and distinctive character) needs to be balanced with the broader purposes or legal ends, and thus pushes towards openness, which makes law more prone to challenge and disarray. As Nonet and Selznick put it, ‘[t]o be responsive, the system should be open to challenge at many points, should encourage participation, and should expect new social interests to make themselves known in troublesome ways’.<sup>148</sup> Instead of portraying law as a closed system that acquires legitimacy only through procedural fairness, the model of responsive law is concerned with substantive justice, where legal and political aspirations are blended to the point at which legal knowledge needs to open up its boundaries, and where legitimacy is obtained to the extent that the legal system is able to be ‘more responsive to social needs’.<sup>149</sup> In this regard, models of responsive law accommodate processes of legal mobilisation that seek a certain legal or policy reform, and also broader political mobilisations that attempt to create alternative interpretive

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<sup>143</sup> Fraser (n 74) 1328.

<sup>144</sup> J King, *Judging Social Rights* (CUP 2012) 64.

<sup>145</sup> *ibid* 60-3.

<sup>146</sup> *see* 5.3.3.

<sup>147</sup> C Sabel and W Simon, ‘Destabilization Rights: How Public Law Litigation Succeeds’ (2004) 117 *Harvard Law Review* 1015, 107; *see also* Mangabeira Unger (n 13) 530.

<sup>148</sup> P Nonet and P Selznick, *Law and Society in Transition* (Transaction 2001) 6.

<sup>149</sup> *ibid* 73.

communities that ‘change the wind’ under which the law flows, and understand them as opportunities for legal evolution.<sup>150</sup> In the words of Phillippe Nonet:

One of the peculiar characteristics of the legal order is that it provides its own built-in criticisms, and through those its own sources of elaboration and change. It is for this reason that law is competent at the same time to affirm the authority of policies, and yet to expose this authority to challenge and open policies to change. Policies become more binding, but also less settled; concepts are sharpened, but their contours become more ambiguous.<sup>151</sup>

Furthermore, within Fraser’s framework, and in contrast to ‘cases where the parties are identifiable individuals and the alleged harm is the result of a breach of contract or other definite assignable obligation’, anti-discrimination claims have the capacity to address harms that ‘are rather a result of more impersonal systemic processes and of structural relations among differentially advantaged social groups’, which are at odds with the ‘legal grammar of individualism’.<sup>152</sup> For Sandra Fredman, the recent expansion of standing rules entails a ‘recognition that discrimination is not just a question of individual justice.’<sup>153</sup> Fraser’s concerns have been at the forefront of reform processes that attempt to change the legal opportunity structure of anti-discrimination legal regimes, by expanding rules of standing, creating special equality bodies that can intervene even in the absence of identified victims, or asserting the power of courts to open up spaces of participation through hearings or monitoring implementation mechanisms. As I will explain below, this is precisely the case of the emergent practice of Latin American ADL.

#### **6.4.2 Legal empowerment/mobilisation in Latin America**

In a previous chapter, I described the ways in which the re-emergence of substantive equality and non-discrimination in Latin America was in part the consequence of processes of legal and political mobilisation.<sup>154</sup> The ‘third wave’ of democracy in the region entailed a profound reform of the political and legal opportunity structures that had impacts on the ability of ‘new social movements’ to resort to law and justice mechanisms to advance their claims.

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<sup>150</sup> L Guinier and G Torres, ‘Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements’ (2014) 123 *The Yale Law Journal* 2740.

<sup>151</sup> Nonet (n 11) 251.

<sup>152</sup> Fraser (n 74) 1329.

<sup>153</sup> S Fredman, *Discrimination Law* (2nd edn, OUP 2011) 284-5.

<sup>154</sup> see 3.3.

One of the central features of transformative constitutionalism, as has been vernacularised in Latin America, is the capacity of disadvantaged individuals and groups to achieve through legal means what they have not been able to through political means.<sup>155</sup> Indeed, for von Bogdandy, a shared transformative dimension of legal mobilisation is one of the central characteristics of what he calls the *Ius Constitutionale Commune* of Latin America, which is evidenced in several judicial victories of discriminated groups.<sup>156</sup> A recent report on legal empowerment in the Global South states that ‘there is evidence to suggest that disadvantaged people invoking the law and mobilising through different justice mechanisms to advance their interests and entitlements has increasingly become a more relevant feature of social action’.<sup>157</sup> The new political and legal opportunity structure in Latin America has activated an intense legal mobilisation around ADL, shaping the articulation of manifold social and political movements, even before the consolidation of bigger political projects, which entail broader compromises and collective action problems.<sup>158</sup> The incremental character of the attempts to achieve social and cultural change through the means of law constitutes another core feature of *Ius Constitutionale Commune*, and a reason to see the inclusion of legal mobilisation/empowerment as crucial to label ADL as a case of non-reformist reform.

There are several conditions that explain processes of legal mobilisation around ADL in Latin America, which can be approached through some of the main theoretical explanations of the ‘law and social movement scholarship’: ‘legal/political opportunity structure’, ‘framing and discourse analysis’, and ‘resource theory’.<sup>159</sup> Within the postulates of resource theory, legal mobilisation in Latin America has been enhanced by several factors, the most important of which is the networks and co-operative schemes between different actors. Human rights or public interest clinics have been at the forefront in the fight against discrimination, especially by developing strategies of impact

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<sup>155</sup> Nevertheless, as has been repeatedly argued, law is not only an instrument at the service of social causes; it is better considered as both a source of normativity and a complex/fragmented scheme that is pragmatically and strategically assessed by claimants striving for social change.

<sup>156</sup> A von Bogdandy, ‘*Ius Constitutionale Commune*: una mirada a un constitucionalismo transformador’ (2015) 34 *Revista de Derecho del Estado* 3, 17.

<sup>157</sup> Domingo and O’Neil (n 137) 12.

<sup>158</sup> Von Bogdandy (n 156) 23.

<sup>159</sup> For an overview of this scholarship in Latin America, see A Ruibal, ‘Movilización y Contramovilización Legal: Propuestas para su análisis en América Latina’ (2015) 22 *Política y Gobierno* 175.

litigation.<sup>160</sup> National and international NGOs with expertise in legal advocacy have also proved essential for legal mobilisation around ADL, by providing support to social movements or small communities when they lack legal expertise.<sup>161</sup> In several cases, NGOs from developed countries have provided technical support in complex cases involving structural discrimination, through either reporting, building statistical evidence, or endorsing impact litigation in domestic higher courts or before the IAHRs.<sup>162</sup> Both law schools' clinics and NGOs have created regional networks of co-operation to share best practices and make regional/transnational activism more efficient, before the IAHRs, the UN Human Rights Monitoring Systems, or domestic jurisdictions.<sup>163</sup> Finally, it is important to stress the role of public institutions in redressing discrimination, both those with a constitutional or legal guarantee of autonomy (NHRIs and ombudsmen), and those that form part of the executive power (such as special anti-discrimination committees). Although some of them have the power to deal with and adjudicate complaints, they also provide important resources of support for legal mobilisation in judicial venues.<sup>164</sup>

Newly available resources and a different political opportunity structure have allowed some social movements to achieve important victories. For several observers, the rights revolution for sexual minorities in Latin America has been the outcome of social, political and legal processes from below rather than gratuitous concession from political elites.<sup>165</sup> Apart from arguments related to the development of LGBT-friendly policies in high-income countries, or to broader changes in the political opportunity structure, concrete instances of legal mobilisation have been crucial to explain the 'Gay Rights Revolution' in Latin America.<sup>166</sup> Building broad coalitions among 'L', 'G', 'B' and 'T' groups, and even outside those groups, including expert communities, these movements have

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<sup>160</sup> Unlike human rights clinics in law schools in the US, Latin American clinics place an emphasis on litigation. A Carrillo, N Espejo, 'Re-Imagining Human Rights Law Clinics' (2011) 26 Maryland Journal of International Law 80.

<sup>161</sup> Coddou (n 26) 55.

<sup>162</sup> eg, the different modes of support of American Civil Liberties Union (ACLU) to legal mobilisation before the IAHRs.

<sup>163</sup> Red Latinoamericana de Clínicas Jurídicas; Red Iberoamericana de Organismos y Organizaciones contra la Discriminación.

<sup>164</sup> D Procopio and C Rodríguez, 'Institutional Responses to Discrimination at the National Level in Latin America: An Overview' (2008) Center for Human Rights and Justice at the UTexas School of Law. See appendix (table 2).

<sup>165</sup> J Corrales, 'LGBT Rights and Representation in Latin America and the Caribbean: The Influence of Structure, Movements, Institutions, and Culture' (August 2015) <[https://lgbtqrightsrep.files.wordpress.com/2015/08/lgbt\\_report\\_latam\\_v8-copy.pdf](https://lgbtqrightsrep.files.wordpress.com/2015/08/lgbt_report_latam_v8-copy.pdf)> accessed 17 August 2017.

<sup>166</sup> O Encarnación, *Out in the Periphery: Latin America's Gay Rights Revolution* (OUP 2017).



achieved concrete judicial and administrative victories that have facilitated further legal reforms, with indirect consequences for movement building and political agency.<sup>167</sup>

Regarding justice mechanisms, which constitute the core of legal opportunity structures, the ‘third wave’ of Latin American democracies radically improved the possibility of taking grievances through legal channels, before national or regional court systems, quasi-judicial venues, or other instances that derive from processes of legal pluralism, like dispute-resolution mechanisms from indigenous law.<sup>168</sup> Newly created or amended constitutions reinforced judicial independence, creating the conditions for more assertive courts, willing to play a role as veto players, to act as guarantors of checks and balances, or as protectors of constitutional rights. Although judicial reforms were initially modelled to provide legal stability and protection for commercial transactions and private property, from the beginning of this period disadvantaged individuals and social movements started using courts as venues for rights discourse.<sup>169</sup> Also, (newly created or amended) courts in search of legitimacy were willing to advance progressive causes that contradicted the elite consensus around issues such as sexual minority rights or social rights.<sup>170</sup>

Along with the creation or reinforcement of more independent and assertive courts, longstanding legal remedies were given new strength, expanding the possibility of direct access to constitutional justice, and creating new and concrete anti-discrimination actions. As a result of judicial powers to accumulate several individual petitions that entail structural discriminatory harms (eg, the case of the Colombian *tutela*), constitutional or legislative provisions that created new mechanisms (eg, Bolivian action of unconstitutionality; Chilean action of non-arbitrary discrimination), or the re-interpretation of old judicial writs (eg, the case of the Mexican *amparo* after the constitutional amendments of 2011), victims of discrimination now have a wide range of formal justice mechanisms. In the six chosen jurisdictions, access to justice for victims of discrimination has been dramatically enlarged. Easy, fast, cheap and informal judicial

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<sup>167</sup> Díez (n 71) 9; Coddou (n 26) 52; coalitions of groups supported the strategy for egalitarian marriage in Argentina, which subsequently led to the enactment of the Gender Identity law. See PNUD, ‘Sistematización del Proceso para la aprobación de la Ley de Identidad de Género en Argentina’ (PNUD 2014).

<sup>168</sup> Uprimny (n 125) 1590.

<sup>169</sup> S Botero, ‘Agents of neoliberalism? High courts and rights in Latin America’ (DCC Conference Citizens, Constitutions and Democracy in Post-Neoliberal Latin America, University of Pennsylvania, May 2015).

<sup>170</sup> JS Elias, ‘Judges and Democracy in Argentina: An Elite in Search of Legitimacy’, in S Turenne (ed), *Fair Reflection of Society in Judicial Systems – A Comparative Study* (Springer 2015).

actions have allowed victims of discrimination to resort directly or indirectly to high courts or constitutional courts in order to seek redress for discriminatory acts against public or private defendants.<sup>171</sup> Furthermore, in several cases, collective (the power to resort to constitutional justice in the name of a collective or a group), public (the power of public entities to trigger judicial actions against discrimination) or popular actions (action taken by any individual, in the name of the protection of rights of the citizenry) have been created to tackle situations where discrimination compromised the public interest.<sup>172</sup> In this way, an emergent and uniform practice of a ‘Latin American Law of *amparo*’ has started to attract attention from comparative lawyers.<sup>173</sup> However, these actions usually have several limitations: ‘*amparo* judgments are of purely injunctive nature [and] *amparo* injunctions are limited to order the defendant to do, or to refrain from doing, certain acts and expressly foreclose the possibility of awarding monetary damages for the petitioner’.<sup>174</sup> Moreover, judgments of *amparo* have no *erga omnes* effects, constraining the use of these writs as channels of impact litigation.<sup>175</sup> Overall, and considering the power asymmetries that constrain legal agency, the availability of constitutional writs has not implied a structural rights revolution.<sup>176</sup> However, this has

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<sup>171</sup> Although we can label them *amparos*, the judicial action has a different name in each country, with some procedural differences: *Amparo* (Argentina, Mexico and Peru); Action for Constitutional Protection (Bolivia); Writ of Protection (Chile); *Tutela* (Colombia). The case of Chile is notably exceptional: in contrast with the rest of the jurisdictions, the writ of protection does not protect rights included in international human rights treaties and covers only traditional negative rights (Constitution of Chile, art 20). In 2005, Chile created the writ of inapplicability for unconstitutionality, which can be raised before the Constitutional Court, pending a case in any judicial venue (art 93 n6). In general, *amparos* are widely popular, especially for victims of discrimination, because ‘the perceived judicial congestion and the backlog of civil courts throughout the region made the filling of *amparo* suits very attractive’. M Gomez, ‘Will the Birds Stay South? The Rise of Class Actions and Other Forms of Group Litigation Across Latin America’ (2011-12) 43 University of Miami Inter-American Law Review 481, 488.

<sup>172</sup> Constitution of Argentina, art. 43.2; Constitution of Bolivia, art. 129.I; Constitution of Colombia, art. 88.2; Constitution of Peru, art. 200.5; Constitution of Mexico, art. 107.I.

<sup>173</sup> J Esquirol, ‘The Failed Law of Latin America’ (2008) 56 The American Journal of Comparative Law 75, 123.

<sup>174</sup> Gomez (n 171) 491. Recently, however, the Argentinian Supreme Court has decided that when collective actions entail ‘socially salient rights’ or ‘traditionally disadvantaged or weakly protected groups’, the procedural requirements for these actions should be waived and compensations allowed, creating an exception that allows judges discretion to deal with structural discrimination cases. *PADEC c/ Swiss Medical s/ Nulidad de cláusulas contractuales* (2013).

<sup>175</sup> In Mexico, since the constitutional amendments of 2011, there is a procedure through which a binding precedent of the Supreme Court can have *erga omnes* effect, including cases of *amparo* where a norm has been declared incompatible with the constitution. Constitution of Mexico, art 107.II. In the case of Argentina, *amparo* judgments have *inter partes* effect (Constitution of Argentina, art 43.1). However, the Argentinian Supreme Court has decided that in some cases, considering the possible infringements of the right to equality before the law or the integrity of the Argentinian legal system, *amparo* judgments have *erga omnes* effect. *Halabi Ernesto c/ Poder Ejecutivo Nacional* (2009).

<sup>176</sup> Brinks and Botero (n 138).

been an important route for the most egregious cases of discrimination, such as those of migrants in Argentina or people living with HIV in Chile.<sup>177</sup>

Several anti-discrimination statutes have created special judicial remedies to redress discrimination (Argentina and Chile). In the case of Argentina, the judicial action created by law 23.592 (1992) has more than two decades of case law, having been applied in first-tier courts all around the country.<sup>178</sup> The creation of the INADI in 1995 provided an impulse for the administrative implementation of this law, including alternative dispute resolution mechanisms, so the effective judicial implementation of this law is still an on-going challenge.<sup>179</sup> Regarding the CHIADL (2012), statistics and qualitative assessments show that claimants are faced with several obstacles in trying to achieve successful judicial outcomes.<sup>180</sup> Indeed, they still prefer constitutional remedies, because they tend to be cheaper, informal and faster, or judicial actions before employment tribunals, which observe weaker standards of proof.<sup>181</sup> However, there have been some important victories for Chilean victims of discrimination, and some cases show the possibility of using the non-arbitrary discrimination action as a case of impact litigation.<sup>182</sup> In both countries, judicial actions have been affected by the usual obstacles that in Latin America constrain wider and better access to justice, such as the prohibition of contingency-fee arrangements, the lack of legal aid and representation, and the prevalence of the loser-pays-all rule regarding lawyers' fees.<sup>183</sup>

What is remarkable here is the innovative action taken by some tribunals, with the help of legal activists and other organisations, which have created ad-hoc collective complaints mechanisms even in the absence of any specific legislation, allowing 'judicial

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<sup>177</sup> see the current collective *amparo* against a new decree issued by the Argentinian government for regulating the expulsion of migrants (*Centro de Estudios Legales y Sociales y otros c/ EN – DNM s/ Amparo Ley 16.986*, Expte. N° 3061/2017); J Contesse, D Lovera, 'Acceso a tratamiento médico para personas viviendo con VIH/SIDA: éxitos sin victoria en Chile' (2008) 5 Sur 150.

<sup>178</sup> U Basset and others, 'The Enforcement and Effectiveness of Anti-Discrimination Law in Argentina', in M Mercat-Bruns and D Oppenheimer (eds), *The Enforcement and Effectiveness of Anti-Discrimination Law* (Springer, forthcoming).

<sup>179</sup> Email from INADI to author (12 September 2017). The doctrinal evolution of Argentinian ADL is developed by the constitutional case law on *amparos* rather than through the administrative or judicial implementation of the ADLARG.

<sup>180</sup> F Muñoz, 'La Ley Zamudio en acción: sentencias de primera instancia sobre acción antidiscriminación emitidas entre diciembre de 2012 y marzo de 2015' (2015) 6 Anuario de Derecho Público 172.

<sup>181</sup> Muñoz (n 123).

<sup>182</sup> A Coddou, 'Sobre la recepción del Derecho Antidiscriminación en Chile y su potencial emancipatorio', RedSeca <<http://www.redseca.cl/un-dialogo-con-fernando-munoz-sobre-la-recepcion-del-derecho-antidiscriminacion-en-chile-y-su-potencial-emancipatorio/>> accessed 20 August 2017.

<sup>183</sup> Centro de Estudios de Justicia para las Américas, *Derecho de Acceso a la justicia: Aportes para la construcción de un acervo latinoamericano* (CEJA-GTZ 2017).

protection against collective harms through mechanisms not originally intended for dealing with mass claims'.<sup>184</sup> In most of the cases were the Colombian Constitutional Court has decided to aggregate individual *tutelas* under a single process, ADL has been a crucial tool to highlight the structural discrimination suffered by individual petitioners.<sup>185</sup> Furthermore, four of the six selected countries have adopted legislation enabling class actions and other forms of aggregate legislation, opening up judicial possibilities for victims of collective harms of discrimination (Argentina, Chile, Colombia and Mexico).<sup>186</sup> However, only in Argentina has there been intense activity among the so-called collective *amparos* (*amparo de intereses colectivos*), which receive constitutional support, in regard to the protection of the right to equality and non-discrimination.<sup>187</sup> Taking into account the possibility of diffuse constitutionality control, which allows claimants to raise a constitutional issue before any judge of the country, the collective *amparos* in Argentina have been prone to receiving complaints of structural discrimination, for example, regarding access to public or private services.<sup>188</sup> Indeed, in these cases, the collective *amparo* does not need to name or identify every individual affected by discrimination, and the action can be raised, beyond those directly affected, by the Public Defender or officially registered NGOs.<sup>189</sup>

For some observers, there is 'a familiarity with collective claims' in Latin America that allows the IAHRs to attempt to consolidate these practices by creating a new collective complaints mechanism before the IACHR for the violation of the rights included in the ACHR or in the recently created Inter-American Convention against all forms of Discrimination and Intolerance.<sup>190</sup> Although the IACtHR still requires that individual petitioners be at least identifiable, there are trends pushing towards the recognition of public and popular actions that can protect the public interest when it is affected by cases of structural or institutional discrimination.<sup>191</sup> In this way, the IAHRs can follow an emergent practice both within the ECtHR, where there is no need to identify each and

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<sup>184</sup> Gomez (n 171) 483.

<sup>185</sup> D Landau, 'The promise of a minimum core approach: the Colombian model for judicial review of austerity measures', in A Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (CUP 2014) 285-6.

<sup>186</sup> Gómez (n 171) 493.

<sup>187</sup> Constitution of Argentina, art 43.1.

<sup>188</sup> see 8.4.3.

<sup>189</sup> Constitution of Argentina, art 43.2.

<sup>190</sup> A Depper, 'Collective Complaints and the Draft Inter-American Convention Against Racism and All Forms of Discrimination and Intolerance' (2008) Programa Justicia Global UAndes- Human Rights Clinics, UTexas at Austin. See also Inter-American Convention against all forms of Discrimination and Intolerance (A-69) art 15.i.

<sup>191</sup> *ibid.*

every individual of a certain group that is the victim of a systematic, structural or institutional form of discrimination, and the European Committee of Social and Economic Rights, where the collective complaints mechanism allows actions representing unidentified individuals or in favour of a certain group.<sup>192</sup>

Beyond that, the creation or bolstering of administrative agencies in charge of tackling discrimination offers new possibilities, such as quasi-judicial mechanisms to receive complaints of discrimination, and in some cases with specific litigation powers to act strategically with individual cases. In five of the six selected countries, special administrative agencies with the power to receive, deal with and solve discrimination complaints have been created or reinforced during the last two decades (Argentina, Bolivia, Colombia, Peru, Mexico).<sup>193</sup> Some of them qualify as Equality Bodies, according to EU Law, and all of these countries have an A status accredited NHRI.<sup>194</sup> In these countries, an administrative implementation of ADL allows victims to contribute in the design of sustainable transformative reparations.

In accordance with the model of responsive law, which conceives of the legal process ‘as an alternative mode of political participation’, several courts in the region have opened up instances of participation either during a certain procedure, or within the monitoring process of compliance with structural remedies for discrimination.<sup>195</sup> In cases of public interest, several courts have opened up public hearings to allow individuals and civil society organisations to present their arguments about a case, including *amicus curiae*.<sup>196</sup> In cases where courts have created structural remedies that affect parties not directly involved with the case, disadvantaged groups and individuals have taken part in the monitoring process set up under the supervision of judicial venues.<sup>197</sup> When dealing with structural discrimination, the IACtHR has issued a list of orders that demands a complex scheme of compliance, taking into account the lack of police authority, resources, and political support from the OAS. Moreover, and considering that this court operates in

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<sup>192</sup> Besson (n 94) 147-180.

<sup>193</sup> see appendix (table 2).

<sup>194</sup> Global Alliance of National Human Rights Institutions, Sub-committee on Accreditation < <http://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Pages/default.aspx> > accessed 4 September 2017.

<sup>195</sup> Nonet and Selznick (n 148) 96.

<sup>196</sup> The leading court in this practice is the Corte Suprema de Justicia de la Nación (Argentina). JS Elias, ‘Supreme Court of Argentina’, *Max Planck Encyclopedia of Comparative Constitutional Law* (2017) < <http://oxcon.oup.com.libproxy.ucl.ac.uk/view/10.1093/law-mpeccol/law-mpeccol-e519?rkey=jtDHS7&result=1&prd=MPECCOL> > accessed 22 September 2017.

<sup>197</sup> C Rodríguez-Garavito and D Rodríguez Franco, *Radical Deprivation on Trial* (CUP 2015).

countries with a poor record in regard to the rule of law, opening up monitoring processes to different stakeholders increases the viability of structural compliance.<sup>198</sup>

## 6.5 Conclusions

In this chapter, I have presented the character, sources, and functions of the principles that I claim constitute the transformative approach to ADL I defend here. These immanent legal principles are built on the practice of the jurisdictions considered in the database, when viewed through the lens of a critical framework. According to the critical theory of Nancy Fraser, in the previous chapter, I defined ADL as an anti-misrecognition device, considering the need to place ADL within broader progressive political projects. In that regard, these principles provide examples that expand the knowledge of what a transformative approach to ADL would look like. In other words, the principles provide a privileged illustration of immanent critique and, moreover, provide a normative standard of critique that orientates current debates and reforms within Latin American ADL.

In the last sections, I explained three different principles that required a brief explanation (state intervention, group dimensions, legal empowerment/mobilisation). In the following chapters, I will deal separately with three other principles that have a prominent place within the transformative approach I defend here. The challenging stance, a socio-economic lens, and the political axis of ADL coincide with the folk paradigms of justice and with the analytical perspectives that Nancy Fraser considers fundamental to clarify the struggles of our era.

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<sup>198</sup> Huneeus (n 67).







## Chapter 7 The Challenging Stance

### 7.1 Introduction

This principle starts from the basic premise that ADL is inevitably linked to an ‘ordinary’ conception of culture, but further states that ADL would not be transformative if it did not provide opportunities to challenge dominant or hegemonic cultural ideas that constitute the background for the allocation of legal entitlements.<sup>1</sup> As I claim here, ADL inevitably ends up addressing these ideas, especially in an era that Fraser has characterised as ‘denormalization’, where ‘justice claims immediately run up against counterclaims whose underlying assumptions they do not share’.<sup>2</sup> Moreover, in multicultural societies, as Terry Lovell states, ‘there no longer exists any single all-powerful and legitimate value system’, because ‘cultural capital in modern society is held in diverse currencies’.<sup>3</sup> With the resurgence of populist right-wing movements in the Western world, cultural values that mark boundaries of ‘otherness’ are seen as decisive political issues to be addressed, to the detriment of economic factors, and thus the principle of the challenging stance becomes an important issue to analyse.<sup>4</sup>

In this chapter, I will first draw on some ideas developed by Nancy Fraser that constitute the groundings of this principle and describe the latter main problems or limits. Finally, I will explain how this principle is articulated in the practice of Latin American ADL.

### 7.2 Fraser’s insights

#### 7.2.1 Status model of recognition

If ADL is considered an anti-misrecognition device, which provides remedies against injustices grounded mainly in the cultural sphere, we need to understand the complex relationship between ADL and different conceptions of culture. The identity model of recognition, according to Fraser, considers culture as either a ‘free-floating’ sphere, from which cultural harms are derived, which is isolated from the economy; or, on the other hand, as the exclusive source of injustices, from which side effects are derived, like

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<sup>1</sup> An ordinary conception of culture assumes that it is something we all have or carry, whether consciously or not, an attribute of all societies. A Phillips, *Gender & Culture* (Polity Press 2010) 57.

<sup>2</sup> N Fraser, ‘Abnormal Justice’ (2008) 34 *Critical Inquiry* 393, 396.

<sup>3</sup> T Lovell, ‘Nancy Fraser’s Integrated Theory of Justice’ (2007) 1 *Law Social Justice and Global Development Journal*.

<sup>4</sup> R Inglehart and P Norris, ‘Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash’ (2016) Kennedy School of Government, Harvard University RWP16-026.

maldistribution.<sup>5</sup> In both cases, these ‘culturalist proponents of identity politics simply reverse the claims of an earlier form of vulgar economicism’.<sup>6</sup> In contrast, Fraser’s ‘status model of recognition’ considers culture as an (analytically) independent sphere, which is interimbricated with the sphere of the economy and ‘the political’. Within this model, culture is addressed as a justice issue insofar as it institutionalises value patterns that impede participatory parity. To combat cultural harms, Fraser originally proposed transformative remedies, aimed at deconstructing binary oppositions (eg, black/white), ‘acknowledging the complexity and multiplicity of identifications’.<sup>7</sup> For Anne Phillips, this proposal looked like any other ‘assimilationist project’, but in this case one ‘that ultimately expects all barriers and divisions to dissolve’.<sup>8</sup> Transformative remedies bear the responsibility of being constantly challenging cultural categories, and might end up creating ‘a cultural “melting-pot” out of which new- but then no longer cultural- identities will be forged’.<sup>9</sup> The danger or risks associated with the creation of a new (queer?) norm, and her later endorsement of a more pragmatic approach towards remedies, led Fraser to reconsider the contribution of affirmative recognition remedies.<sup>10</sup>

Of the three most common forms of misrecognition described by Fraser, cultural domination, constitutes the most important challenge for contemporary politics of recognition and, thus, for the legal regulation of discrimination, beyond instances of pure disrespect or total non-recognition (invisibility).<sup>11</sup> Cultural domination implies ‘being subjected to patterns of interpretation and communication that are associated with another culture and are alien and/or hostile to one’s own’.<sup>12</sup> The critique of assimilation has shown both the strengths and limits of ADL in tackling cultural domination. According to Kenji Yoshino, the critique of assimilation and the aim of human (not cultural) authenticity should be the main purpose of ADL.<sup>13</sup> Indeed, it could be considered the

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<sup>5</sup> N Fraser, ‘Rethinking Recognition’, in K Olson and N Fraser (eds), *Adding Insult to Injury: Nancy Fraser Debates her Critics* (Verso 2008) 132.

<sup>6</sup> *ibid.*

<sup>7</sup> N Fraser, ‘Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation’, in N Fraser and A Honneth, *Redistribution or Recognition?: A political-philosophical exchange* (Verso 2003) 77.

<sup>8</sup> A Phillips, ‘From Inequality to Difference’, in Olson and Fraser (n 5) 124.

<sup>9</sup> *ibid.*

<sup>10</sup> For the possibility of queerness becoming a new conventional normativity, see N Giffney, ‘Denormatizing queer theory’ (2004) 5 *Feminist Theory* 73.

<sup>11</sup> N Fraser, ‘Social Justice in the Age of Identity Politics’ (1996) *The Tanner Lectures on Human Values*, Stanford University, 7. One could think that pure instances of disrespect could be addressed through individual torts or hate crimes, and that non-recognition constitutes the paradigmatic case of misrepresentation, a broader political injustice.

<sup>12</sup> *ibid.*

<sup>13</sup> K Yoshino, *Covering: The Hidden Assault on Our Civil Rights* (Random House 2006).

biggest contribution of LGBT movements, because of their expertise in the art of ‘covering’, which consists in toning down ‘a disfavored identity to fit in the mainstream’.<sup>14</sup> Blacks and women do not face conversion and passing, because it is difficult to hide their salient traits, but they face covering, as all civil rights groups do: blacks are forced to dress and ‘comb white’ or to abandon street talk; and women are forced to display manly management skills to be promoted, or to show their masculine strength to fight on the frontline of their national armies. For Yoshino, the current doctrine of US ADL does not protect against the pressure to cover:

Courts have often interpreted these laws to protect statuses but not behaviors, *being* but not *doing*. For this reason, courts will often not protect individuals against covering demands, which target the behavioral aspects of identity- speaking a language, having a child, holding a same-sex commitment ceremony, wearing a religious garb.<sup>15</sup>

In other words, courts tend to judge in favour of members of protected groups insofar as they keep their behaviours assimilated to dominant cultural paradigms, because they adjudicate on the basis of personal choice: if you are gay, be discrete, or keep it private, and you will be protected; be notorious or flagrant, and the court will probably say that insofar as you choose to act like that, you will not have the protection of the law.<sup>16</sup> In this way, we can understand the claim that US ADL protects members of minority groups, insofar as they assimilate, but not minority cultures themselves.

Finally, the status model of recognition provides a way to address some of the main philosophical questions around multi-culturalism, for example, whether we can presume that all cultures are of equal value or (in)commensurable, or the problems associated with culture as a justification for certain practices.<sup>17</sup> Fraser’s commitment to liberalism leads her to question multi-cultural scholars who find something particular in cultural issues that has significance for the moral evaluation of human behaviours.<sup>18</sup> Her social justice approach to recognition allows processes of identity formation to happen within cultural spheres but without pre-judging a claim around the presumptively equal value of cultural practices or world-visions, and without the need for esteem or evaluations of the worth

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<sup>14</sup> *ibid* ix.

<sup>15</sup> *ibid* 24.

<sup>16</sup> *ibid* 93-101.

<sup>17</sup> B Barry, *Culture & Equality* (Harvard University Press 2002) ch7.

<sup>18</sup> N Fraser, ‘Multiculturalism, Antiessentialism, and Radical Democracy: A Genealogy of the Current Impasse in Feminist Theory’, in *Justice Interruptus: Critical Reflections on the ‘Post-Socialist’ Condition* (Routledge 1997) 187.

of cultural practices.<sup>19</sup> In that sense, Brian Barry's critique of Fraser is misguided when he claims that the remedy for misrecognition requires meddling with cultural valuations *tout court*.<sup>20</sup> What concerns liberals such as Barry, like the problems associated with state-sponsored campaigns for cultural valuations, has an answer within Fraser's work, which meddles with cultural value patterns only insofar as they infringe on participatory parity.

### 7.2.2 Hegemony

For Fraser, injustices associated with culture are not mainly about the lack of access to cultural goods, or the ability of individuals to participate in cultural practices, but constitute unequal access to the practices and goods that establish norms across diverse cultural spheres, that is, access to the 'socio-cultural means of interpretation and communication' (hereafter, 'MICs').<sup>21</sup> Her commitment to discourse theory and its contribution to the analysis of social struggles led her, like many others, to the study of the Gramscian idea of hegemony. Discourse theory, then, is not only important for the formation of individual/social identities, but also to understand 'how the cultural hegemony of dominant groups in society is secured and contested', and finally to 'shed light on the prospects for emancipatory social change and political practice'.<sup>22</sup> Hegemony, for Fraser, is the 'discursive face of power', the ability to establish the 'common sense' (*doxa*), and 'includes the power to establish authoritative definitions of social situations and social needs, the power to define the universe of legitimate disagreement, and the power to shape the political agenda'.<sup>23</sup> Gramsci's concept of hegemony, originally focused on class domination, was later re-interpreted by post-modern and post-structural versions as discursive mechanisms that marginalised

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<sup>19</sup> A Phillips, 'Recognition and the Struggles for Political Voice', in B Hobson (ed), *Recognition Struggles and Social Movements* (CUP 2003). Fraser's approach stands in contrast to that of IM Young, for whom '[g]roups cannot be socially equal unless their specific experience, culture, and social contributions are publicly affirmed and recognized' *Justice and the Politics of Difference* (2nd edn, OUP 2001) 174.

<sup>20</sup> Barry (n 17) 274-9. Moreover, he claims that Fraser puts into parentheses the demands for legal equality of culturally disvalued groups. This is far from what Fraser recognises in several parts of her work. See 5.3.3.

<sup>21</sup> Considered as 'historically and culturally specific ensemble of discursive resources', these include 'officially recognized idioms', 'concrete vocabularies available for making claims in these recognized idioms', 'paradigms of argumentation accepted as authoritative in adjudicating conflicting claims', 'narrative conventions available for constructing the individual and collective stories', and finally 'the modes of subjectification', that is, 'the ways in which discourses positions interlocutors as specific sorts of subjects endowed with specific sorts of capacities for action'. N Fraser, 'What's Critical About Critical Theory?', in *Fortunes of Feminism* (Verso 2013) 57.

<sup>22</sup> N Fraser, 'Against Symbolicism: The Uses and Abuses of Lacanianism for Feminist Politics', in Fraser (n 21) 140.

<sup>23</sup> *ibid* 142.

subordinated groups along several different traits.<sup>24</sup> In a post-modern condition, we are left ‘without any large-scale (meta-narrative) solution to the various types of marginalisation to which we are subject’, so we ‘should therefore simply try to be aware of the omnipresent possibility of exclusion and marginalization and should work at the limits of the institutions and practices’ in which we find ourselves.<sup>25</sup> With no necessary connection between different forms of oppression, the possibility of building a single revolutionary coalition also becomes more difficult.

Law, in this scenario, has no power other than to work at these margins, within dominant and abstract rationalities, in an attempt to subvert or challenge ‘hegemonies’ rather than a single and discrete dominant idea of hegemony held by a ruling or dominant class.<sup>26</sup> With the increasing decentralisation of the radical enterprise (from a focus on class to a focus on gender or race), law has gained attention as a tool of critique ‘at the margins’. Thus, the legal lesson one can learn from Laclau and Mouffe’s pluralist approach to domination is that legal mobilisation by subaltern groups will be necessarily fragmented (waged in different battlefields);<sup>27</sup> committed to a radical critique of power within liberal arrangements; and against consensus, providing ‘radical moments of conflictual disruption where those previously outside the remit of the “human” speak’.<sup>28</sup> In the words of Sally Engle Merry,

Instead of an overarching hegemony, there are hegemonies: parts of law that are more fundamental and unquestioned, parts which are becoming challenged, parts which authorize the dominant culture, parts which offer liberation to the subordinate. Law cannot be viewed as hegemonic or not as a whole, but instead as incorporating contradictory discourses about equality, justice, and persons.<sup>29</sup>

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<sup>24</sup> C Mouffe and E Laclau, *Hegemony and Socialist Strategy* (Verso 1985).

<sup>25</sup> D Litowitz, ‘Gramsci, Hegemony, and the law’ (2000) 2 Brigham Young University Law Review 515, 535.

<sup>26</sup> For Gramsci, law is located at the intersection of state and civil society, where the concept of hegemony plays its most important role, to generate ‘the “spontaneous consent” given by the great mass of population’ to dominant groups’ ideas. Therefore, law is not only about force or repression, but also about legitimising domination, either through persuasion or pedagogy, but more importantly through a constitutive process of social ontology. Q Hoare and G Nowell (eds), *Selection from the Prison Notebooks of Antonio Gramsci* (Lawrence & Wishart 1971) 12, 246-7.

<sup>27</sup> Mouffe and Laclau (n 24) 159.

<sup>28</sup> K McNeilly, ‘After the Critique of Rights: For a Radical Democratic Theory and Practice of Human Rights’ (2016) 27 Law Critique 269, 277.

<sup>29</sup> S Engle Merry, ‘Courts as Performances: Domestic Violence Hearings in Hawai’i Family Court’, in M Lazarus-Black and S Hirsch (eds), *Contested States: Law, Hegemony and Resistance* (Routledge 1994) 54.

Although Fraser's endorsement of the idea of non-reformist reforms suggests that it would be better to start from micro-level instances of resistance to 'hegemonies' and see where they can lead us, she never neglects the importance of 'Hegemony' as a structural idea. In other words, law plays an important part in reinforcing an overarching idea of hegemony,<sup>30</sup> but legal counter-hegemonies, as described by Gramsci and others, can be important for opening up avenues of emancipation.<sup>31</sup> For Fraser, we can approach this problem with the help of Foucault: law is constitutive of social ontologies and, at the same time, is inherently immersed within relations and structures of power.<sup>32</sup> Law is there, already playing its part, selecting behaviours, expressing moral condemnation for certain activities and not others, or simply being applied in the hands of individuals that cannot be easily detached from their socio-cultural contexts. However, what we need, as Fraser states, is a normative framework to distinguish those sites that can accommodate critique from those that seem to be closed or that do not open up any form of contestation or counter-hegemony.<sup>33</sup>

On this account, the challenging stance stands in a paradoxical relation to legal mobilisation: although the latter risks being disadvantaged and co-opted by the logic of dominant MICs, it is at times a fundamental strategy to challenge cultural presuppositions that constitute legal discourse and determine the outcomes of legal systems. Hegemony as a cultural code is considered as the closure, the self-referring nature of legal systems;<sup>34</sup> however, hegemonies, and, specifically, counter-hegemonies, can be considered as sites of contestation, which open up lines of fracture, reveal silences, or heighten contradictions.<sup>35</sup> Not all the cultural assumptions behind legal discourses are directly at issue in a given dispute, but, as Bordieu would say, a trial is a 'symbolic struggle' where different worldviews are at issue, each attempting to become legitimised in the language of law.<sup>36</sup> The degree of reproduction and reinforcement of legal hegemonic codes, which

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<sup>30</sup> Kimberlé Crenshaw summarises this sceptical view of law: 'If law functions to reinforce a world view that things should be the way they are, then law cannot provide an effective means to challenge the present order'. 'Race, Reform and Retrenchment' (1988) 101 Harvard Law Review 1331, 1352.

<sup>31</sup> A Hunt, 'Rights and Social Movements: Counter-Hegemonic Strategies' (1990) 17 Journal of Law and Society 309.

<sup>32</sup> A Allen, 'Emancipation Without Utopia: Subjection, Modernity, and the Normative Claims of Feminist Critical Theory' (2015) 30 Hypathia 513.

<sup>33</sup> N Fraser, 'Foucault on Modern Power: Empirical Insights and Normative Confusions' (1981) 3 PRAXIS International 272.

<sup>34</sup> Litowitz (n 25) 540.

<sup>35</sup> The double nature of legal orders as both affirming the authority of law and exposing it to challenge is also one of the central concerns of the model of responsive law. P Nonet and P Selznick, *Law and Society in Transition* (Transaction 2001).

<sup>36</sup> P Bordieu, 'The Force of Law' (1977) 38 Hastings Law Journal 805.

serves in itself to reproduce dominant ideologies, is something to debate. For many, like Bordieu and Derrida, an overarching concept of hegemony, violence or domination will be unavoidably present in any legal instance;<sup>37</sup> for Fraser, in contrast, it is possible to enact a political critique of the force of law where not every contact with legal discourse implies a negation of emancipatory alternatives.<sup>38</sup>

From Fraser's work, the main issue is the quest for a normative framework to wage these battles along different strands of domination and challenge dominant or hegemonic culture(s) without blaming a single class or attempting to build or constitute a single revolutionary actor that will end with domination once and for all.<sup>39</sup> The idea of counter-hegemony, conceived of not as an oppositional project that is just an alternative totality to the dominant hegemony, but instead as a more practical disposition of critique, reworking or refashioning the elements of hegemony, can be associated with 'non-reformist reforms' (a Gramscian 'war of position'). For Gramsci, counter-hegemonic movements must start from 'where people are at', from the materials at hand, in order to supplement what is already there, a process that can open up hegemony's silences.<sup>40</sup> In the words of Hunt, these movements imply 'the putting into place of discourses, which, whilst still building on the elements of the hegemonic discourses, introduce elements which transcend that discourse'.<sup>41</sup>

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<sup>37</sup> J Derrida, 'Force of law: the metaphysical foundation of authority', in D Cornell and others (eds), *Deconstruction and the Possibility of Justice* (Routledge 1992).

<sup>38</sup> N Fraser, 'The Force of Law: Metaphysical or Political' (1991-1992) 13 *Cardozo Law Review* 1325.

<sup>39</sup> G Gutting and N Fraser, 'A Feminism Where "Lean In" Means Leaning On Others' (*New York Times*, 15 October 2015) <<https://opinionator.blogs.nytimes.com/2015/10/15/a-feminism-where-leaning-in-means-leaning-on-others/?mcubz=1>> accessed 15 November 2016.

<sup>40</sup> Hunt (n 31) 314.

<sup>41</sup> *ibid.* See also Crenshaw above (n 30) 1367. These counter-movements have the potential to go beyond merely internal critiques. See 6.1.1. For Laclau, the struggles different groups wage in contemporary societies stem in part from the battle for a universal empty signifier (the battle for hegemony): 'politically speaking, the right of particular groups of agents—ethnic, national or sexual minorities, for instance— can be formulated only as universal rights. The appeal to *universal* is unavoidably once, on the one hand, no agent can claim to speak *directly* for the "totality" while, on the other, reference to the latter remains an essential component of the hegemonico-discursive operation. *The universal is an empty place, a void which can be filled only by the particular, but which, through its very emptiness, produces a series of crucial effects in the structuration/destructuration of social relations.*' As is clear from the last part of the quote, for Laclau, these struggles are also crucial for social identities, as it is precisely this emptiness (or the attempt to fill that emptiness) that is constitutive, for example, of group identities. 'Identity and Hegemony: The Role of Universality in the Constitution of Political Logics', in J Butler and others, *Contingency, Hegemony, and Universality: Contemporary Dialogues on the Left* (Verso 2000) 58.

### 7.2.3 Feminism

Fraser's insights into the principle of the challenging stance also derive from her feminist positions, such as the critique of the male norm, which has been thoroughly developed by legal scholars such as Catharine Mackinnon. In terms of the latter, the two dominant pathways of sex discrimination law (sameness and difference), which roughly coincide with first and second wave feminisms, conceal 'the substantive way in which man has become the measure of all things':

Under the sameness standard, women are measured according to our correspondence with man, our equality judged by our proximity to his measure. Under the difference standard, we are measured according to our lack of correspondence from him, our womanhood judged by our distance from his measure. Gender-neutrality is thus simply the male standard, and the special protection rule is simply the female standard, but do not be deceived: manhood is the referent for both.<sup>42</sup>

Foundational (and dominant) ideas of culture, as many feminists have tirelessly argued, 'precondition the allocation of basic legal entitlements'.<sup>43</sup> Not only when ADL requires evidence of similarly situated comparators, but also when it relies on distinctions in order to establish positive duties of accommodation, foundational ideas of culture, like the male norm, are operating behind.<sup>44</sup> If ADL is nothing more than the guarantee of equal treatment, with the addition of certain suspect grounds of classification, which at times can be used as a basis for ameliorative policies, then nothing prevents regulations from being designed, interpreted and applied according to dominant cultural paradigms, which frequently go unchallenged.<sup>45</sup> If we approach the study of ADL merely through a focus on distributive paradigms, some of which extend to the distribution of non-material goods (eg, rights or opportunities), we also 'fail to bring social structures and institutional contexts under evaluation'.<sup>46</sup> The principle I am explaining here, in contrast, derives from accounts of ADL that are closer to social or relational egalitarianism.<sup>47</sup> In a way, through its challenging stance, ADL brings social processes that constitute difference as disadvantage into question, rather than focusing on end-state processes. That is why ADL

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<sup>42</sup> C Mackinnon, 'Difference and Dominance: On Sex Discrimination', in *Feminism Unmodified* (Harvard University Press 1987) 34.

<sup>43</sup> J Butler, 'Sexual politics, torture, and secular time' (2008) 59 *British Journal of Sociology* 1, 8.

<sup>44</sup> D Reaume, 'Dignity, Equality and Comparison', in D Hellman and S Moreau (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013) 7.

<sup>45</sup> In the US context, even if anti-discrimination case law has allowed for the emergence of 'multiple femininities', it has continued to reinforce the dominant paradigm of masculinity. T Smith and M Kimmel, 'The Hidden Discourse of Masculinity in Gender Discrimination Law' (2005) 30 *Signs* 1827, 1830.

<sup>46</sup> Young (n 19) 20.

<sup>47</sup> E Anderson, 'What Is the Point of Equality?' (1999) 109 *Ethics* 287.



achieves something, most of the time, even without the help of precise distributive patterns, and evaluates the way in which social processes ‘enable or constrain individuals in relevant situations’.<sup>48</sup> In other words, even when reduced to the anti-classification principle, where the equal protection or anti-discrimination clauses force claimants to invoke a comparator, there is an opportunity to challenge the dominant norm that allegedly imposes a pre-determined comparator.<sup>49</sup> Hence, the ideological tension of ADL (whether or not it challenges dominant cultural paradigms) is present even when reduced to the anti-classification principle, which can expose the limits of ADL in challenging the dominant or hegemonic norms.

ADL sceptics, such as Alexander Somek, tend to underestimate the ability of ADL to bring foundational ideas of culture into question. Even if equality and non-discrimination clauses seem to provide no explanatory norm, that is, no substantive standard in itself to assess statutory purposes or determine distributions of rights and benefits, in the hands of social movements they have been used to bring cultural paradigms into question. The conception of equality and non-discrimination and its evolution within a certain society, as argued by Sandra Fredman, is not an issue of logic, ‘but of values or policy’.<sup>50</sup> We could say that ADL evolves through challenges to the ‘norm’ that serves as the standard for comparison or as the criteria of likeness/unlikeness in discrimination law.<sup>51</sup> That is, even without changing the content of laws, ADL’s challenging stance provides an avenue for (constitutional) redemption, for challenging paradigms that seem to prevent equal treatment clauses from displaying their normative power.<sup>52</sup>

Finally, another significant aspect of Fraser’s feminism, which is also central for feminist jurisprudence, allows us to conceive of ADL as a way to challenge the alleged sanctity of

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<sup>48</sup> Young (n 19) 26.

<sup>49</sup> Unless adjudicators are not willing to even start the analysis of whether discrimination has occurred in the absence of real (not hypothetical) comparators. This tendency is now in retreat in several jurisdictions. S Goldberg, ‘Discrimination by Comparison’ (2011) 120 *The Yale Law Journal* 728, 803-811.

<sup>50</sup> S Fredman, *Discrimination Law* (2nd ed, OUP 2011) 2.

<sup>51</sup> Habermas claims that ideas contributed by radical feminism have been crucial for updating the system of rights, within a dialectic tension between de jure and de facto equality, which has brought into the political public sphere the ‘fundamental level of a society’s cultural self-understanding’, like the sexual division of labour or ‘gender-dependent differences’. Acknowledging feminist contributions to discourse theory, and tacitly evoking Fraser’s critiques, he recognises that ‘[f]eminism (...) is directed against a dominant culture that interprets the relationship of the sexes in an asymmetrical manner that excludes equal rights’. Hence, ‘[t]he scale of values of the society as a whole is up for discussion: the consequences of this problematization extend into core private areas and affect the established boundaries between the private and public spheres as well’. J Habermas, ‘Struggles for Recognition in the Democratic State’, *Inclusion of the Other* (MIT Press 1998) 209-211.

<sup>52</sup> J Balkin, *Constitutional Redemption* (OUP 2011) 6; See 2.3 fn19 (Honneth’s ‘structural openness’).

spheres like the family or education, where interactions allegedly depend on idealised processes of communicative action. In a way, ADL may be an example of ‘proper juridification’, where the law intervenes in communicative spheres only to restore equality of communicative power.<sup>53</sup> Indeed, sexual harassment law has been used by feminist movements as a way to challenge the purported ‘sanctity of the bedroom’, questioning the authority to draw a moral line between what constitutes ‘socially integrated action contexts’ and ‘system-integrated action contexts’.<sup>54</sup> In *What’s Critical about Critical Theory*, Nancy Fraser argued for the need to restore participatory parity at all levels, equalising communicative powers within spheres that are crucial for processes of identity formation.<sup>55</sup>

#### 7.2.4 The political critique of the force of law and the public sphere(s)

As I explained previously, despite her critics, Fraser considers law as a ‘central locus of transformative recognition struggles’.<sup>56</sup> However, those who are misrecognised start with a structural disadvantage:

Background assumptions (...) constitute the inescapable horizon of any judgment. Yet, in a society that is stratified by gender, color, and class, many of the most culturally authoritative and widely held assumptions about such things work to the disadvantage of subordinated social groups (...) When they serve as elements of the tacit backdrop against which foreground legal judgments are made, they, too, become part of ‘the force of law.’<sup>57</sup>

Her political critique of the force of law allows for conceiving of ADL as an instance of discursive contestation between different ethical positions that function as pre-conditions for the allocation of legal entitlements, and for improving access to the MICs to subjects who are structurally disadvantaged within dominant forms of discourse. Although legal discourses do imply processes of discursive assimilation, they may be less dominant and structurally disadvantaging than other sites of the formal/informal political public sphere.

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<sup>53</sup> J Habermas, *Between Facts and Norms* (Polity Press 1996) s 9.2.

<sup>54</sup> N Fraser, ‘Sex, Lies, and the Public Sphere: Reflections on the Confirmation of Clarence Thomas’, in J Landes (ed), *Feminism, the Public and the Private* (OUP 1998).

<sup>55</sup> Fraser (n 21).

<sup>56</sup> C McBride, ‘Demanding Recognition: Equality, Respect, and Esteem’ (2009) 8 *European Journal of Political Theory* 96, 102.

<sup>57</sup> Fraser (n 38) 1329-30.

In a way, Fraser's political critique of the force of law attempts to challenge the dominant cultural background of legal grammars and supplement them with what they occlude or cannot see. It is a critique both against liberal grammars, which assume that legal categories protect fixed or endogenous individual preferences or interests, and republican grammars, which rely on the ability of law to 'contain the politics of civil society and exhaust what these politics are about'.<sup>58</sup> The challenging stance, through the lens of Fraser's critical account of republican progressive narratives of the public sphere, favours the creation of subaltern counterpublics that challenge not only the content of public discussions, but also second-order issues that shape what those discussions are about, who can participate, and how they are carried out. Along with the group dimension, which favours the creation of collective 'spaces of withdrawal and realignment', where members of subordinated groups can discuss their 'needs, objective and strategies' without the 'supervision of dominant groups', subaltern counterpublics expand the discursive scope of an allegedly neutral public sphere, which creates the image of subjects discussing issues of public concern, bracketing their unequal economic and social status, 'as if' they were equal peers; challenges 'discursive assimilation' as a 'condition for participation in public debate'; and questions dominant cultural paradigms that draw a line between what is public and thus a matter of debate, and what is private and thus a matter not for discussion.<sup>59</sup> Culture itself is a subject of common concern through discursive contestation, so even questions about who counts as a member of a subaltern group is put into question, decreasing the dangers of balkanisation.<sup>60</sup>

Considering Fraser's political critique of the force of law and her critical account of the public sphere, we can return to her distinction between affirmative and transformative remedies against misrecognition. According to the former, those who are misrecognised may opt for revaluing their 'unjustly devalued group identities, while leaving intact both the content of those identities and the group differentiations that underlie them'.<sup>61</sup> Even if these remedies are vulnerable to the reification of collective identities and 'tend to pressure individuals to conform to a group type, discouraging dissidence and

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<sup>58</sup> E Christodoulidis, *Law and Reflexive Politics* (Kluwer 1998) xiv.

<sup>59</sup> N Fraser, 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracies', in C Calhoun (ed), *Habermas and the Public Sphere* (MIT Press 1992) 126. See 6.3.

<sup>60</sup> *ibid* 123-4.

<sup>61</sup> Fraser (n 7) 75.

experimentation', they are sometimes an important catalyst for the challenging stance of ADL.<sup>62</sup> In the words of Cillian McBride,

Where marginalized groups internalize the dominant group's view of themselves as worthless or at least of little value, the first step in the process of igniting a struggle for justice is that members of the group concerned re-evaluate *themselves*. This is an internal process of revaluation and recognition which addresses the problem that internalizing dominant judgements gives rise to the formation of adaptive preferences, which must first be revised if a struggle for equal rights is to be commenced.<sup>63</sup>

The danger with demanding esteem within marginalised or oppressed social groups lies at the point where it is transformed into another kind of hierarchy, when a 'reasonable concern with *amor propre*' turns 'into an unreasonable compulsion to hierarchically distinguish ourselves from others'.<sup>64</sup>

Transformative remedies against misrecognition, for their part, 'destabilize invidious status distinctions'<sup>65</sup> or, more frequently, challenge the underlying social structures, articulated in 'structural accommodations', that is, the 'policies, practices and physical structures that tacitly accommodate the dominant group's needs at the expense of less privileged groups'.<sup>66</sup> A good example comes from the way in which public buildings and places have been designed to 'accommodate the needs of people who are able-bodied and who fit into conventional gender categories' and the possible role that ADL may play in challenging these structural accommodations.<sup>67</sup> For Sophia Moreau,

We have only recently begun to understand the many ways in which these spaces and institutions privilege some people's needs at the expense of others. There has, then, been a constant series of accommodations given to many of us, accommodations that give us deliberative freedoms. Most of the time, these accommodations remain invisible.<sup>68</sup>

Structural accommodation, then, only comes to our attention through anti-discrimination claims, through a failure to include or accommodate the victims because of their possession of some (normatively) extraneous trait.

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<sup>62</sup> *ibid* 76-7.

<sup>63</sup> McBride (n 56) 105; A Sayer, 'Class, Moral Worth and Recognition' (2005) 39 *Sociology* 947, 955.

<sup>64</sup> McBride (n 56) 107.

<sup>65</sup> Fraser (n 7) 77.

<sup>66</sup> S Moreau, 'Discrimination and Subordination', in *The Many Faces of Equality* (forthcoming).

<sup>67</sup> S Moreau, 'What is Discrimination?' (2010) 38 *Philosophy & Public Affairs* 143, 151.

<sup>68</sup> *ibid* 149. See also S Fredman, 'Substantive Equality Revisited' (2016) 14 *International Journal of Constitutional Law* 712, 734.

### 7.2.5 The limits of the challenging stance

First, the challenging stance of ADL encounters problems as with any project of legal reform that places culture as its main target. As put by Young, '[o]ur society enacts the oppression of cultural imperialism to a large degree through feelings and reactions, and in that respect oppression is beyond the reach of law and policy to remedy'.<sup>69</sup> The challenge for ADL is, thus, addressing discrimination through traditional models of legal accountability, like the attribution of responsibility. The problem is that the usual victims of discrimination

are oppressed by structures of cultural imperialism that mark them as the Others, as different, [and] thus not only suffer humiliation of aversive, avoiding or condescending behaviour, but must usually experience that behaviour in silence, unable to check their perceptions against those of others.<sup>70</sup>

At the point that ADL has come to help individuals that attempt to challenge these oppressive structures, they are usually already willing to break their silence, and check their perception against dominant valuations. So, if ADL is to be understood as directed towards a 'cultural revolution', as a 'transformative project of culture', it seems that it needs to expand towards other areas, or explore alternative legal tools to redress 'everyday discrimination'.<sup>71</sup> These features explain the structural turn in ADL, where legal devices have been shaped in order to address cognitive biases, distinguished between legal processes of blaming and attributing responsibility, or definitively turned to reflexive regulation or soft legal remedies.<sup>72</sup> For Yoshino, this project may seem too ambitious for law, and calls for anti-discrimination projects 'to look outside the law': '[m]any covering demands occur at such an intimate and daily level that they are not susceptible to legal correction', and 'are better redressed through appeals to our individual faculties of conscience and compassion'.<sup>73</sup>

Secondly, an obvious structural limit of the challenging stance of ADL derives from broader limits that affect law as an institutional practice. Allegedly, the challenging stance

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<sup>69</sup> Young (n 19) 124.

<sup>70</sup> *ibid* 134

<sup>71</sup> A Koppelman, *Anti-Discrimination and Social Equality* (Yale University Press 1996) 2.

<sup>72</sup> S Bagenstos, 'The Structural Turn and the Limits of Antidiscrimination Law' (2006) 94 California Law Review 1.

<sup>73</sup> Yoshino (n 13) 24.

cannot transform law into an unstable institution, so expanding the limits of law to what it cannot see or address seems overdemanding.<sup>74</sup> Indeed, this is a particular challenge for equality law, which at points seems to be a valve to challenge the alleged closure of the legal system. However, its structural limitations seem obvious: '[b]oth law and the theories of equality that law articulates are Janus-faced. They are liminal. They define guarantees of equality while defining what is not even a question of equality.'<sup>75</sup> Hence, in order to understand the structural limits of the challenging stance of ADL, we need to understand what law does not do, 'what law leaves unoccupied, unrecognized, and untouched' for the preservation of its institutional character.<sup>76</sup>

Finally, once we attempt to challenge dominant or hegemonic oppressive cultural harms through law, we may end up replacing 'the diffuseness of cultural debate' with 'the concreteness and definitiveness of legal proceedings'.<sup>77</sup> That may pose serious problems for group identities, something I explained earlier in this work.<sup>78</sup> However, as has been recognised by Nancy Fraser, the breaking point is where legal institutions, with all of their categorical reasoning (eg, you either belong or do not belong to an indigenous people), may end up promoting 'participatory parity' and democratising access to the means of interpretation and communication, thus keeping alive that cultural diffuseness, without elevating that diffuseness into a new melting-pot 'norm'; in other words, keeping alive the individual quest for cultural authenticity without denying the existence of social groups or identities that provide the materials, values and practices for individual identities.

### 7.3 The Challenging Stance of ADL in Latin America

The case for the challenging stance in Latin America starts from those instances in which ADL has been used to address some of the most visible and dominant cultural paradigms

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<sup>74</sup> Robert Post, interviewed in M Mercat-Bruns, *Discrimination at Work: Comparing European, French, and America Law* (UC Press 2016) 86.

<sup>75</sup> Balkin (n 52) 172.

<sup>76</sup> *ibid.* We could refer to the ways in which the lack of racial or ethnic recognition in France helps to reproduce social inequalities that ADL is prevented from addressing, for the sake of the republican character of law. J Gilbert and D Keane, 'Equality versus fraternity? Rethinking France and its minorities' (2016) 14 *International Journal of Constitutional Law* 883; E Bruce-Jones, 'Race, Space, and the Nation State: Racial Recognition and the Prospects for Substantive Equality under Anti-Discrimination Law in France and Germany' (2008) 39 *Columbia Human Rights Law Review* 423, 437-9.

<sup>77</sup> S Choudhry, 'Distribution vs. Recognition: the case of anti-discrimination laws' (2000) 9 *George Mason Law Review* 145, 175.

<sup>78</sup> see 6.3.3.

in the region.<sup>79</sup> For several decades, these cultural paradigms have allowed scholars to speak, in a rather loose way, about a regional scope for the study of phenomena like law or political systems.<sup>80</sup> However, the challenge against these paradigms also confers us the possibility of studying transnational regional networks of social/legal mobilisation. The use of ADL has been crucial to render this area of law a dangerous weapon from the point of view of those who benefit from the dominant cultural paradigms.<sup>81</sup> As put by the IACtHR in *Atala*, ‘the law and the State must help to promote social progress; otherwise there is a grave risk of legitimizing and consolidating different forms of discrimination that violate human rights’.<sup>82</sup> In a way, it is a call for the states and their anti-discrimination regulations to tackle dominant cultural paradigms that violate human rights, instead of waiting for social change to emerge from the ‘spontaneous orders’ of Latin American societies. In this section, I will describe different articulations of the challenging stance of ADL in Latin America.

The first group of examples derive from feminist struggles at both the regional and domestic levels. In general, and despite their different social origins (indigenous, religious or liberal), feminist movements are bound together by their opposition to patriarchal relations of power and the so-called macho culture, which is claimed to be entrenched in Latin American societies. As stated recently in *The Economist*: ‘Raw statistics tell a story of female advancement; machista culture has yet to catch up’.<sup>83</sup> The recent advancement of women in decision-making positions has been associated with cultural ideas of strong and caring matriarchs, the perfect mixture of decision-making convictions and ‘altruism, affectivity and moral virtuousness’, which also shapes some of the most successful social policies in the region that operate through female households heads.<sup>84</sup> Tackling macho cultures and the advancement of multiple femininities constitutes the most important challenge for Latin American sex discrimination law.

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<sup>79</sup> In the next chapter, I will address law’s relationship with a dominant paradigm of neoliberal ‘cultures’.

<sup>80</sup> For Gongora-Mera, for example, historical racial hierarchies have shaped the ‘consequent tradition of unequal application of law according to the addressees of the norm’. ‘Transnational Articulations of Law and Race in Latin America: A Legal Genealogy of Inequality’ (2012) Working Paper 18 Desigualdades.net.

<sup>81</sup> For conservative positions, ADL in Latin America serves as the channel of ‘gender ideologues’, destabilising settled natural distinctions, ‘attempting to provoke the transformation of societies according to plans of engineers of the new “sex”’. J Alvear, ‘La sentencia de la CIDH en el caso Atala: Una iniciativa para el adoctrinamiento en ideologías radicales’ (2012) 26 *Actualidad Jurídica* 577, 582.

<sup>82</sup> IACtHR, *Atala Riffo and daughters v. Chile* (2012) para 120

<sup>83</sup> *The Economist*, ‘Wonder women and macho men’ (London, 22 August 2015) 17.

<sup>84</sup> M Molyneux, ‘Mothers at the Service of the New Poverty Agenda: Progres/Oportunidades, Mexico’s Conditional Transfer Programme’ (2006) 40 *Social Policy and Administration* 425.

In abortion cases, equality and non-discrimination rights have been used to illustrate that regulations end up affecting women in particular, due to stereotypes about their social roles, and most clearly to address widespread cultures of sexism and patriarchy.<sup>85</sup> In a landmark ruling, the Constitutional Tribunal of Bolivia assessed the constitutionality of several statutory regulations regarding women's rights, and declared that there is a constitutional duty of the state, through all its agencies, to implement the principle of gender equality (article 8), to tackle exploitation, colonisation and patriarchal cultures.<sup>86</sup> In blunt terms, it stated the need to rebuild the state, but now under the principles of gender equality and de-patriarchalisation, naming the specific social evil to be tackled:

Gender inequality has been a characteristic problem affecting Bolivian society, mainly because of the endorsement of sexist behavioural schemes bequeathed from the past, systematic discourses and practices that reduced women's rights and that contributed to a precarious and colonial logic of distinction based on the dichotomy between masculine and feminine. (...) [T]here is a long road ahead towards a truly and effective realization of the principle of equality and non-discrimination.<sup>87</sup>

This judgment echoed a regional landmark case adjudicated by the IACtHR, the so-called *Cotton Field* case, which addressed the structural situation of subordination suffered by women in Ciudad Juarez (Mexico), where the criminal patterns against them revealed a broader 'culture of gender-based discrimination' by both private and public actors.<sup>88</sup> In another famous case, the Colombian Constitutional Court addressed the structural (institutional and social) subordination of women caused by the human rights violations of internally displaced people by the guerrilla.<sup>89</sup> In a special enforcement ruling (*auto de cumplimiento*), the court acknowledged the limits of judicial tools in challenging the cultural paradigms of gender inferiority that amplified the broader human rights violations generated by the conflict, and stressed the need for structural political tools to come up with permanent solutions.<sup>90</sup>

In cases of employment discrimination, feminist movements have been able to use ADL in certain areas of the labour market that are disproportionately occupied by men. The Argentinian higher courts can be labelled the champions in this area, due to their attempts

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<sup>85</sup> P Bergallo and A Ramón, 'Constitutional Developments in Latin American Abortion Law' (2016) 135 *International Journal of Gynecology and Obstetrics* 226.

<sup>86</sup> Plurinational Constitutional Tribunal of Bolivia, 0206 (2014).

<sup>87</sup> *ibid* s III.3.

<sup>88</sup> IACtHR, *González et al ("Cotton Field")*, v. Mexico (2009) paras 132, 399.

<sup>89</sup> Corte Constitucional de Colombia, T-025/2004.

<sup>90</sup> Corte Constitucional de Colombia, *Auto de Cumplimiento* 092/2008.



to develop structural remedies against gender discrimination. Two cases are remarkable here: *Freddo* and *Sisnero*. In *Freddo*, a feminist NGO triggered a class action procedure for gender discrimination against a popular ice-cream company that employed almost no women in its different job positions, especially in the stores themselves. This was one of the first instances in which the collective and diffuse interests standings clause of the Argentinian Constitution (article 43) had been applied in a discrimination case. Here, the Appellate Chamber on Federal and Civil Law issues ruled against the company, declaring a structural situation of discrimination against women, based on the idea that ‘suspect clauses’ like sex should be treated with extreme caution, because those criteria are precisely the ones that perpetuate discrimination. In that vein, it denied the defendant’s justifications that ‘women’ were not strong enough to ‘carry the boxes filled with ice-cream’ or perform other important physical tasks. Moreover, it argued that the whole point of anti-discrimination legislation is directed at challenging the traditional ‘practices and customs’ that have a discriminatory effect on women.<sup>91</sup> In *Sisnero*, the Argentinian Supreme Court ruled against a public transportation company in the province of Salta, for its infringement of the right to non-discrimination on the basis of gender. The claimants (a woman who had tried to apply several times to be a driver of public buses and a local feminist NGO) argued that a pervasive culture of gender subordination prevented women from applying for these kinds of jobs. The provincial court initially denied the individual claims, but granted the judicial action because it attempted to challenge a ‘widespread presence of discriminatory symptoms in society that is illustrated by the total absence of women in the position of bus drivers’.<sup>92</sup> This is interesting because even in the absence of a similarly situated comparator raised by the claimant (another female driver), and faced with problems of evidence regarding the intention of the discriminator, it addressed broader questions around the pervasive culture of discrimination. Later, the Supreme Court remanded the case, arguing that a widespread cultural practice that affected the rights of women was sufficient evidence of a *prima facie* case of discrimination.<sup>93</sup> Finally, in the remanded judgment, the provincial court of Salta elaborated several distributive patterns for the companies that run the local public transportation service, requiring that

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<sup>91</sup> Cámara de Apelaciones en lo Civil Federal, “*Fundación Mujeres en Igualdad y otro c/ Freddo S.A. s/amparo* (2009).

<sup>92</sup> Corte de Justicia de Salta, *Sisnero, Mirtha Graciela; Caliva, Lía Verónica Vs. Ahynarca S.A. – Tadelva S.A. y otros – Amparo – Recurso de apelación* (2010).

<sup>93</sup> Corte Suprema de Justicia de la Nación (Argentina), *Sisneros, Mirtha Graciela y otros c/ Tadelva SERL y otros s/amparo, Recurso de hecho* (2014).

30% all positions be filled by women, forcing the hiring of two women for every man hired after the ruling.<sup>94</sup>

What is interesting about these two cases is that the courts, instead of requiring proof of statistical discrimination on the broader situation of women in these work sectors, relied mainly on the ‘notorious fact’ of widespread cultural practices that prevented women from having access to these kinds of jobs. On the other hand, they did not require the claimant’s proof of intention or proof of bad faith on the side of the discriminators, but instead focused on institutional (not necessarily formal) patterns of cultural domination that impinged on women’s participatory parity. This reasoning seems closer to the law of sexual harassment than that of indirect discrimination, where the tort of discrimination is attributable to a ‘hostile working environment’.<sup>95</sup> Despite the fact that indirect discrimination is virtually prohibited in every Latin American anti-discrimination regime, what these judgments articulate is a concern with structures of discrimination that reproduce dominant cultural paradigms that end up affecting members of particular vulnerable groups.<sup>96</sup>

ADL has also been actively deployed in pregnancy discrimination cases against students, challenging educational projects based on religious ideas around motherhood and sexual autonomy prevalent in the region. For the Colombian Constitutional Court, the autonomy of educational centres must not be used to ‘stigmatize, separate, or discriminate against a pregnant student with respect to the benefits derived from the right to education’.<sup>97</sup> This has also been the line of judgements in Chile, through the writ of protection and quasi-judicial administrative organs;<sup>98</sup> and in Peru, especially through the cases decided by the INDECOPI tribunals.<sup>99</sup>

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<sup>94</sup> Corte de Justicia de Salta, *Sisnero, Mirtha Graciela; Caliva, Lía Verónica Vs. Ahynarca S.A. – Tadelva S.A. y otros – Amparo – Recurso de apelación* (2015).

<sup>95</sup> For a general overview on the law of sexual harassment in Latin America see N Gherardi, *Otras formas de violencia contra las mujeres que reconocer, nombrar y visibilizar* (CEPAL 2016) 36-ff.

<sup>96</sup> In a way, this signals that despite its formal recognition, the doctrine of indirect discrimination has not yet received judicial and scholarly attention.

<sup>97</sup> Corte Constitucional de Colombia, T-656/1998.

<sup>98</sup> G Gomez, *Derechos Fundamentales y Recurso de Protección* (UDP 2005) 409-411.

<sup>99</sup> The jurisprudence of INDECOPI tribunals in Peru is illustrative, because it challenges ways of denying access to goods or services that rely on dominant cultural paradigms that stigmatise or marginalise members of protected groups. Although this institution has been criticised for not relaxing the standard of proof for discrimination claimants, and for its lack of expertise in constitutional and human rights issues, it has been a privileged avenue for the development of Peruvian ADL.

Regarding sexual orientation, several instances have shown the need for the state to put human rights regulation before the prevalent social morality. LGBT movements are probably the most frequent legal activists in the region, using different mobilisation strategies depending on the social and political opportunity structures.<sup>100</sup> Indeed, they have built alliances and networks across the entire social/political spectrum with different state branches and agencies. In the case of Chile, LGBT groups triggered the first judgment of the recently enacted ADL, regarding a lesbian couple that was denied admission to a short-term rental motel based on customers' prejudices.<sup>101</sup> In this case, the judge recognised that the whole point of having anti-discrimination legislation is to tackle prejudices and stereotypes held by 'common sense' reasoning.<sup>102</sup> In Argentina, in a landmark case regarding same-sex couples' adoption and maternity benefits, a district court followed the reasoning of *Atala* and considered that ADL is at the service of those who want to tackle dominant cultural paradigms.<sup>103</sup> In all of the jurisdictions studied here, sexual orientation is considered as an explicit ground of protection by recently enacted legislation.<sup>104</sup> Moreover, before the recognition of sexual orientation as a protected ground, processes of legal mobilisation used the avenue of sex discrimination or the principle of free development of personality to challenge dominant ways of being men (exhibiting manly behaviour, strength, and heterosexuality) or women (being feminine, weak, domestic, and supportive of the male partner).<sup>105</sup> There is no evidence of a sophisticated treatment of stereotypes by Latin American ADL case law (eg, the distinction between ascriptive and prescriptive stereotypes), but the doctrinal developments of the law of sexual/labour harassment are pioneering due to their challenge to unique and dominant ways of *being* a male or a female worker.<sup>106</sup> Only during recent years, within the so-called 'Gay Rights Revolution' in Latin America, has the challenging stance of ADL addressed issues that deal particularly with the problems suffered by the LGBT community.<sup>107</sup> The rapid development of same-sex marriage and the current waves of gender identity bills place the LGBT community at the forefront of the challenging stance.

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<sup>100</sup> C Gianella and B Wilson, 'LGBTI Rights', in J Gonzalez-Bertomeu and R Gargarella (eds), *The Latin American Casebook: Courts, constitutions, and rights* (Routledge 2016).

<sup>101</sup> Tercer Juzgado Civil de Santiago (Chile), *Zapata con Sociedad Comercial Marín Limitada* (2012).

<sup>102</sup> *ibid* s 19.

<sup>103</sup> Juzgado de Familia 5° Mar del Plata (Argentina), MP-11313 (2015).

<sup>104</sup> see appendix (table 1).

<sup>105</sup> J Lemaitre, 'El Amor en Tiempos de Cólera: Derechos LGBT en Colombia' (2009) 6 SUR 79, 81-83.

<sup>106</sup> Gianella and Wilson (n 100).

<sup>107</sup> O Encarnacion, *Out in the Periphery: Latin America's Gay Rights Revolution* (OUP 2016).

Indigenous peoples in Latin America have increasingly been recognised as crucial political actors, through both organising parties and creating strong social movements.<sup>108</sup> They have used international human rights law and domestic laws to advance their claims, which are mainly based around the rights to land/natural resources, and political autonomy (specifically, the right to previous consultation).<sup>109</sup> In this scenario, they have used ADL as an indirect tool to advance their demands, or as part of a broader strategy of legal mobilisation.<sup>110</sup> The domestic application of the ILO Convention 169, considered as a quasi-Latin American international treaty, is a clear example of this broader strategy that includes both economic and political claims.<sup>111</sup> ADL, within this broader project of legal reform, may play a small, although not irrelevant, part. Nevertheless, as one might expect, almost every case regarding indigenous peoples implies addressing issues of structural discrimination in Latin America.<sup>112</sup> Indeed, when considering the broader social context of a case, courts are compelled to address the dominant cultural paradigms that end up burdening the rights of indigenous peoples, even if anti-discrimination rights are not the main cause of action before judicial arenas.<sup>113</sup>

In general, indigenous peoples' claims end up challenging the idea of a single nation, the dominant narrative since early republican times.<sup>114</sup> The 'third wave' of democracy brought with it the constitutional recognition of indigenous peoples and a commitment to

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<sup>108</sup> D Lee Van Cott, *From Movements to Parties in Latin America: The Evolution of Ethnic Politics* (CUP 2005).

<sup>109</sup> C Rodríguez-Garavito, 'Ethnicity.gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields' (2010) 18 *Indiana Journal of Global Legal Studies* 263; A Skjævestad, 'The Mapuche People's Battle for Indigenous Land: Litigation as a Strategy to Defend Indigenous Land Rights', in J Couso et. al (eds), *Cultures of Legality: judicialization and political activism in Latin America* (CUP 2010).

<sup>110</sup> The individual emphasis of ADL does not seem at first hand a good tool for the special collective character of indigenous people's claims, which are mobilised mainly through other political rights. That may be one reason why LGBT and feminist movements in Argentina and Chile, and Afro-descendants in Peru and Colombia, respectively, have been the main lobbyists for the recent creation of anti-discrimination legislation. A Coddou and others, 'La ley antidiscriminación: avances e insuficiencias en la protección de la igualdad y la no discriminación en Chile', in *Informe Anual Sobre Derechos Humanos en Chile* (UDP 2013); C Parra, 'Estatutos Antidiscriminación y su Desarrollo en Colombia' (2007) 27 *Revista de Derecho* 134, 147-8.

<sup>111</sup> International Labour Organization, *Application of Convention No. 169 by domestic and international courts in Latin America* (2009).

<sup>112</sup> This may be explained by the fact that for every social indicator, indigenous people are disproportionately represented as the most disadvantaged population. See the latest report of the World Bank, *Indigenous Latin America in the Twenty-First Century* (2015).

<sup>113</sup> The IACtHR has considered the principle of equality and non-discrimination as both a structural and interpretive principle of cases where indigenous populations suffer from extreme deprivation, generating strong state duties. The social and cultural context of deprivation played an important part in the reasoning of these cases. IACtHR, *Yakye Axa Indigenous Community v. Paraguay* (2005) paras 161-169, 172, 175; *Sawhoyamaya Indian Community v. Paraguay* (2006) paras 152-178.

<sup>114</sup> R Stavenhagen, 'Indigenous Peoples and the State in Latin America: An Ongoing Debate', in R Sieder (ed), *Multiculturalism in Latin America* (Palgrave 2002) 25.

the rapid development of international human rights law in this area. However, as stated previously, the incorporation of multi-cultural provisions in several Latin American constitutions at the beginning of the 1990s, and the implementation of the ILO Convention 169 were eroded by simultaneous processes of liberalisation and privatisation, which granted private property rights and clauses of 'legitimate expectations' for private (and, specially, foreign) investors. This first stage was characterised by a version of multiculturalism as a case of recognition without either redistribution or representation, illustrated by the Colombian Constitution of 1991 (merely symbolic).<sup>115</sup> For some sceptics, this version of multi-culturalism, coupled with the fact that cultural relativism has found a fertile soil in Latin America, deprived the region of normative guidelines to address its complex cultural realities, and called into question 'the historically unfulfilled objective of achieving equality before the law and to subject all citizens, including the most powerful of them, to a single body of norms'.<sup>116</sup> However, instances where the right to cultural identity has been considered as a justification for the infringement of the equality and anti-discrimination rights of other vulnerable groups (eg, women or children), which feed the latter scepticism, have been quite exceptional in the region.<sup>117</sup>

More problematic in recent times has been the quest of other vulnerable minorities, like Afro-descendants, who were forced to indigenise their claims, to be seen as culturally distinct in order to have access to the special rights and benefits of indigenous peoples.<sup>118</sup>

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<sup>115</sup> J Lucero, 'Ambivalent Multiculturalisms', in T Eisendstadt and others (eds), *Latin America's Multicultural Movements* (OUP 2013).

<sup>116</sup> J Aguilar, 'Multiculturalism and Constitutionalism in Latin America' (2014) 4 Notre Dame Journal of International & Comparative Law 19, 33.

<sup>117</sup> These cases are on the public agenda thanks to the leadership of women, who mobilise not only to demand their women rights, but also attempt to redefine 'indigenous law from their own cultural frames of reference', addressing 'the impunity, gender violence and discrimination they experience as indigenous women, within their communities and in society as a whole'. MT Sierra, 'Indigenous Women Fight for Justice', in Sieder and McNeish (eds), *Gender Justice and Legal Pluralities* (Routledge 2013) 56. In a way, we now know these cases because they have prompted conflicts within traditional institutional venues, where women have adopted a universal discourse of human rights with their own critical/cultural identities, where human rights have become 'vernacularised'. S Engle Merry, *Human Rights and Gender Violence: Translating international Law into Local Justice* (Chicago University Press 2006). Although articles 8-10 of the ILO Convention 169, regarding the consideration of indigenous peoples' cultures in the implementation of legal orders, raise interesting doctrinal debates on legal pluralism, the conflict between indigenous law and feminism or other vulnerable minorities tends to be exaggerated by some commentators. Cultural defences have not been significantly considered as a justification for accommodations of cultural practices that violate the rights of other vulnerable groups. C Carmona, 'Hacia una comprensión "trágica" de los conflictos multiculturales: acuerdos reparatorios, violencia intrafamiliar y derecho propio indígena' (2015) 42 Revista Chilena de Derecho 975.

<sup>118</sup> J Hooker, 'Indigenous Inclusion/ Black Exclusion: Race, Ethnicity and Multicultural Citizenship in Latin America' (2005) 37 Journal of Latin American Studies 285. However, these conflicts have not prevented their claims from being treated along the lines of indigenous peoples' claims, as both 'share a past of European domination, as the European colonizers were the ones forcibly who brought [the Afro-

The latter problem points towards the analysis of the relationship between law and culture, which the challenging stance attempts to address. The problem seems obvious: ethnical belonging, which is slippery, articulated in socially fragmentary markers, context-dependent and relative, must be used by institutions as an objective criterion, just like age or income.<sup>119</sup> The choice for self-description as the definitive institutional marker of ethnical belonging has prompted agitated debates because of the (mis)use of indigenous identities for the purpose of obtaining benefits. It is precisely here that the challenging stance of ADL shows its normative strength, triggering critical dialogues about law's relationship with culture.

Indeed, anti-discrimination rights in Latin America have been used as a way to demand a different or, at least, more plural ontological justification for the principles of constitutional government. Several cases regarding discrimination against indigenous peoples have challenged the liberal or natural law justifications behind the project of ADL as a project of equal and impartial treatment with certain recognition of ethnic/indigenous identities.<sup>120</sup> Examples of racism and sexism from Bolivia and Peru have illustrated the importance of alternative justifications of the project of ADL. These examples may prove crucial to avoid a common premise of human rights activism, that is, the existence of a single and objective moral order of rights, which creates a fertile ground for a Catholic constitutional backlash against the advancement of indigenous or women rights.<sup>121</sup> Furthermore, they have played an important role in advancing the idea of multiple indigenities, challenging the fixed conception of the 'indio' as someone who is (entirely) determined by his or her culture.<sup>122</sup> In other words, ADL has prompted debates about the problems of cultural essentialism, even within groups that have raised their ethnic/cultural

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descendants] to the continent'. Hence, indigenous legislation has been amended to accommodate those claims. L Lixinski, 'Constitutionalism and the Other: Multiculturalism and Indigeneity in Selected Latin American Countries' (2010) 14 *Anuario Iberoamericano de Justicia Constitucional* 235, 242-3.

<sup>119</sup> D Lehman, 'Identity, Social Justice and Corporatism: The Resilience of Republican Citizenship', in M Sznajder and others (eds), *Shifting Frontiers of Citizenship: The Latin American Experience* (Brill 2012) 103-4.

<sup>120</sup> In the reasoning of the Bolivian Constitutional Court, article 8 of the Constitution entails a duty upon every Bolivian authority to apply both republican and indigenous principles, endorsing a plural moral justification for the newly created institutional arrangements. 0112 (Amparo, 2012); see also the separate votes of judge Ligia Velázquez, where she states that projects of decolonialism and anti-patriarchalism are intimately connected with the justification of the right to equality and non-discrimination. 0206 (2014).

<sup>121</sup> J Lemaitre, 'Catholic Constitutionalism on Sex, Women, and the Beginning of Life', R Cook and others (eds), *Abortion Law in Transnational Perspective* (University of Pennsylvania Press 2014). (highlighting the importance of addressing Catholic constitutionalism on its own terms, as attempts to justify the existence of an objective morality that could be accepted by those who do not share the Christian faith).

<sup>122</sup> J Stöbele-Gregor, 'Movimientos Indígenas- ¿motor de la democratización de sociedades indígenas', in S Kron and others (eds), *Democracia y Reconfiguraciones Contemporáneas del Derecho en América Latina* (Iberoamericana-Vervuert 2012) 278.

identities as markers of mobilisation.<sup>123</sup> In cases of racism in the workplace or the media in Peru and Bolivia, public opinion has been challenged, not only in regard to obvious instances of disrespect, but to consider the *indigena* or the ‘afro-descendent’ as someone who displays multiple identities.<sup>124</sup>

Furthermore, the challenging stance has been used even against Latin American progressive narratives of inclusion such as *mestizaje*, which develops the idea of single nations that grew out of the mixture of races. Despite its progressive strand, the challenging stance of ADL has opened up avenues through which to defy this narrative by unmasking ‘much physical or skin colour variation and thus distinct racialized experiences’, questioning the absolute and all encompassing character of *mestizaje*.<sup>125</sup> In contrast with the challenges to the prevalent models of assimilation of indigenous peoples into national projects of development (dominant until the end of military dictatorships in the region), in this case, ADL has been used to highlight multiple identities within the oppressed groups. The use of ADL by afro-descendants against indigenous communities, or by indigenous populations against other vulnerable classes has highlighted the determinant character of skin colour or bodily appearance, sometimes described as ‘a better predictor of ethno-racial inequality than the traditional ethno-racial categories’.<sup>126</sup> The cases of Peru and Bolivia are somehow symptomatic of these trends. In Bolivia, an initial evaluation of the administrative complaints mechanism established in 2014 concluded that appearance was the most important ground of discrimination, including cases where skin colour was the determinant factor.<sup>127</sup> The cases dealt with by the CONACOD and INDECOPI, in Peru, show a similar pattern. In many of these cases, what we see is ‘brown-coloured’ people stigmatising or directly disrespecting members

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<sup>123</sup> In a way, ADL has served to question the dominant narratives that were brought with the constitutional recognition of ethnic identities, which created the image of indigenous people as having a more intense cultural identity than the rest of the population. This was considered as the main cultural background behind the efforts to create the ILO Convention 169 at the end of the 1980s, and it is illustrated in the reports of the then Special Commissioner Martínez del Cobo.

<sup>124</sup> see, for example, the multiple complaints triggered by the popular Peruvian TV program *La Paisana Jacinta*, which depicted an indigenous woman who worked as a domestic worker, and who continually discriminated against other vulnerable minorities, like Afro-Peruvians or homosexuals. One of the arguments of these complaints was the exclusion or occlusion of the different positive roles that indigenous women play in Peruvian society. S de Los Heros, ‘Humor étnico y discriminación en La paisana Jacinta’ (2016) 4 *Pragmática Sociocultural* 74. In the case of Bolivia, the Law against Racism and Discrimination has obliged the media to implement several legal provisions in order to tackle discrimination and show the diversity of Bolivian society, especially of groups that are discriminated against (see the provisions in art 6.III).

<sup>125</sup> E Telles, *Pigmentocracies: Ethnicity, Race, and Color in Latin America* (UNC Press 2014) 11.

<sup>126</sup> *ibid* 12.

<sup>127</sup> Comité Nacional contra el Racismo y la Discriminación (Bolivia), *Cuatro años de la aplicación de la ley Contra el Racismo y Toda Forma de Discriminación* (2014).

of indigenous peoples or from the Afro-Bolivian community.<sup>128</sup> Indeed, as these examples show, we could explain discrimination socially through the range of different skin colours within a common palette.

These trends risk balkanisation, but the ‘corporatist tradition of the Latin American state’ prevents this kind of recognition politics from creating instances of ‘cultural isolation’, which are prevalent in European models of multi-culturalism.<sup>129</sup> For David Lehman, in Latin American societies ‘republican citizenship is so deeply rooted that even policies which deploy large-scale racial or ethnic preferences end up being included within a universality architecture of citizenship’.<sup>130</sup> A compromise between a renovated version of *mestizaje* and the recognition of indigenous and black identities constrains the possibility of the challenging stance developing into a real right to opt-out of the state’s institutional arrangements.

#### 7.4 Conclusions

The challenging stance constitutes an unavoidable character of anti-discrimination regimes in Latin America. However, the degree to which these regimes open up opportunities for challenging the dominant or hegemonic ideas that disadvantage members of certain groups depends on the development of a political critique of the force of law. In this scenario, Nancy Fraser’s ideas illuminate the analysis of several struggles that are taking place in Latin America. Although in a different form, this part of the world is witnessing its own ‘culture wars’, and Latin American ADL observes particular features that favour a transformative approach to studying its recent developments.

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<sup>128</sup> M Benavides and others, ‘Pobreza, Discriminación Social E Identidad: El Caso De La Población Afrodescendiente En El Perú’, in J Stubbs and H Reyes (eds), *Más allá de los promedios: Afrodescendientes en América Latina* (World Bank 2006) 56-7.

<sup>129</sup> That is, the idea that multi-culturalism entails the possibility of opting-out of state/institutional arrangements. In contrast, Latin American societies prefer to use the term inter-culturalism to give an account of political practices based on dialogues between cultures. Inter-culturalism, indeed, is the term used by several recently created constitutions, and constitutes the favourite term for indigenous groups themselves. D Lehman, *The Crisis of Multiculturalism in Latin America* (Palgrave 2016); see also A Solano-Campos, ‘Bringing Latin America’s ‘Interculturalidad’ into the Conversation’ (2013) 34 *Journal of Intercultural Studies* 620.

<sup>130</sup> Lehman (n 119) 102.



## Chapter 8 The Socio-Economic Lens

### 8.1 Introduction

For Bob Hepple, ‘a truly comprehensive and transformative approach to equality obviously does not mean that all aspects of socio-economic disadvantage have to be dealt by a single duty or in a single statute’.<sup>1</sup> Moreover, he remained sceptical about the possibility of directly addressing distributive issues through equality laws.<sup>2</sup> The principle of the socio-economic lens accepts the challenge of describing which ‘aspects of socio-economic disadvantage’ can be addressed by ADL, even if this is not in the form of ‘a single duty or in a single statute’.<sup>3</sup> The metaphor of a lens, for its part, is particularly important for accounts of ADL that, among other things, challenge the ‘itemization of grounds’ and propose a more integrated approach to discrimination.<sup>4</sup> The basic premise, borrowed from Nancy Fraser’s work, is that ADL, characterised as an anti-misrecognition device, is nevertheless deeply interimbricated with the economy. Recent attempts to include ‘social condition’ as a protected ground in the Canadian Human Rights Act illustrate well the potential contribution of adding a socio-economic lens to ADL: in order to render visible the ‘heretofore invisible dynamic of real people’s experiences of discrimination’, we need to understand how culture and economy are interimbricated.<sup>5</sup>

Although anti-discrimination legislation has undeniable distributive implications, the principle of the socio-economic lens places an additional burden upon this field of law. ADL is not only about fair treatment, affecting distributive outcomes of the basic structure of societies, but challenges the way in which these structures are linked to discrimination.<sup>6</sup> Nancy Fraser’s work allows us to develop a framework to address the ways in which the different spheres (economy, culture, politics) are interimbricated, and hence propose specific remedies once these interimbrications are articulated. Within this framework, ADL could play a relevant part in the struggles for redistribution that are taking place within neoliberal/capitalist arrangements. In particular, this principle argues that ADL could play a humble but not unimportant role in addressing poverty and economic

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<sup>1</sup> B Hepple, *Equality: The Legal Framework* (Hart 2014) 227.

<sup>2</sup> *ibid* 228.

<sup>3</sup> I use the term ‘socio-economic’ to go beyond economic inequalities, which creates problems in itself, but is closer to accounts of the social conception of class, where different kinds of capital (social, cultural, economic and symbolic) interact to create advantages and disadvantages for individuals and groups.

<sup>4</sup> D Reaume, ‘Of pigeonholes and principles: A Reconsideration of Discrimination Law’ (2002) 40 *Osgoode Hall Law Journal* 114, 132.

<sup>5</sup> W MacKay and N Kim, ‘Adding Social Condition to the Canadian Human Rights Act’ (Canadian Human Rights Commission 2009) 81.

<sup>6</sup> *see* 5.1.

inequality; also, connected with the principle of the challenging stance, the socio-economic lens questions neoliberal cultures of work or social behaviour.

In this chapter, I will explain the basic tenets of Fraser's ideas around the interimbrication between culture and the economy, which I claim have utmost importance in exploring the transformative potential of ADL. Finally, I will provide the reader with an overview of the ways in which ADL could be interimbricated with the struggles for redistribution and challenges to neo-liberalism in Latin America.

## **8.2 Interimbrication with the economic sphere**

To address the problem of 'displacement', that is, the rapid advancement of 'identity politics' to the detriment of traditional struggles for redistribution, Nancy Fraser analyses the precise manner in which non-class forms of oppression are articulated with class in contemporary capitalism. Although I defined ADL as an anti-misrecognition device, it has an ability to address the 'thorough interimbrication' between the economic and cultural spheres. The socio-economic lens attempts to bring the analytical perspective (the lens) of redistribution into the societal domains that we associate with discrimination. Hence the target of the socio-economic lens of ADL is not culture as a separate entity, but the way in which harms grounded in one sphere may generate injustices associated with other spheres; thus, the centrality of the concept of interimbrication.

To understand this concept, it is important to characterise Fraser's distinction between economy and culture, which constitutes a response to the on-going debate between neo-Marxists currents around the material/cultural division.<sup>7</sup> For Butler and other 'cultural feminists', who raise deconstructive arguments against upholding this distinction, those who attempt to separate the material from the cultural are relying on an unjustifiable ontological distinction; in particular, Fraser's perspectival dualism is accused of reducing this distinction to a 'theoretical anachronism'.<sup>8</sup> In contrast, for Fraser, the real divide is between economy and culture (not the material/cultural distinction), which has no ontological grounding and relies better on an approach to social theory she calls 'historicization'. She clearly states that misrecognition harms 'are just as material as injustices of maldistribution', because 'norms, significations, and constructions of

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<sup>7</sup> R Williams, *Culture and Society* (Random House 2015).

<sup>8</sup> J Butler, 'Merely Cultural' (1998) 227 *New Left Review* 33, 36; see also A Sayer, *The Moral Significance of Class* (CUP 2005) 88.

personhood that impede women, racialized peoples, and gays and lesbians from parity of participation in social life are materially instantiated' in concrete and historical forms.<sup>9</sup> In her later works, she stresses the need to distinguish between different historical versions of capitalist social formations to help in understanding the interimbrication of the different spheres.<sup>10</sup> Responding to Judith Butler's critique, she claims that:

With a historically specific, differentiated view of contemporary capitalist society, we can locate the gaps, the nonisomorphisms of status and class, the multiple contradictory interpellations of social subjects, and the multiple complex *moral imperatives* that motivate struggles for social justice.<sup>11</sup>

In current capitalist social formations, a pragmatic approach to social struggles would initially suggest affirmative or transformative remedies of redistribution: if injustices are grounded in the economic sphere, we should craft specific remedies against maldistribution.<sup>12</sup> However, if we ignore the misrecognition harms generated by capitalism, we may not be able to understand what is at stake in current social struggles; furthermore, Fraser's approach invites us to 'locate the gaps', where misrecognitions are not a mere epiphenomenon of economic injustices. In this way, for example, a fight against heterosexism is not necessarily a fight against capitalism.<sup>13</sup>

Fraser's (analytical) distinction between the different spheres, which is also the product of the historicisation of current capitalist social formations, provides a space for addressing the ways in which an economy that is now isolated from society can be articulated through economic discourses that move fluidly within cultural backgrounds, producing 'new' types of harms. How, for example, can gay identity politics be put to work at the service of capitalist accumulation (eg, pinkwashing)? How can feminism foster the commodification of care and precarious jobs? Fraser's recent critique of what she labels 'progressive neo-liberalism' could be integrated with broader studies of 'cultural economy', a perspective that 'can illuminate the ways in which markets,

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<sup>9</sup> N Fraser, 'Heterosexism, Capitalism and Misrecognition: A response to Judith Butler' (1997) 52/53 *Social Text* 279, 287.

<sup>10</sup> N Fraser, 'Contradictions of Capital and Care' (2016) 100 *New Left Review* 99.

<sup>11</sup> Fraser (n 9) 287.

<sup>12</sup> This position is endorsed by Wolfgang Streeck, for whom feminist complaints against unpaid domestic work and in favour of paid work are merely a cultural instrument with a powerful economic motivation behind: 'to enlist women as allies in a fight for deregulation of employment (...) to push for "flexible" labor markets allowing "outsiders," typically female, to compete with typically male "insiders"'. 'How to study contemporary capitalism' (2012) 53 *European Journal of Sociology* 1, 18. Therefore, equal pay clauses or other anti-discrimination devices are just instruments of newly crafted 'cultural political economies'.

<sup>13</sup> This is in contrast with the arguments of Butler (n 8); A Smith, 'Missing Poststructuralism, Missing Foucault: Butler and Fraser on Capitalism and the Regulation of Sexuality' (2001) 19 *Social Text* 103, 112.

property rights, work and consumption produce distinctive identities and affects, not as side-effects or as false consciousness, but as integral components of how they operate.<sup>14</sup> To analyse this, Fraser's account of different struggles and their possible remedies looks particularly valuable, especially because redistribution struggles seem flawed if not raised 'in combination with' recognition struggles.<sup>15</sup> Pushing my characterisation of ADL even further, we could say that it is an anti-misrecognition device that in contemporary social formations of capitalism attempts not only to impact on the misrecognition effects of maldistribution (or vice versa), but also on the 'cultural political economy' we associate with neo-liberalism. This context invites us to be reflexive, to be aware that the remedies or strategies we might pursue might produce new harms or reproduce old ones across all spheres of social interaction.<sup>16</sup>

Overall, the idea of 'interimbrication' suggests that we need to understand the way in which culture and economy interact and produce particular types of harm that seem to fit in uneasy ways with legal categories.<sup>17</sup> As said before, for the case of discrimination, Fraser's pragmatic approach to remedies may suggest either affirmative or transformative remedies against misrecognition that could be combined with the struggles for redistribution.<sup>18</sup> In some contexts, however, we may resort to what Fraser calls 'cross-redressing', that is, 'using measures associated with one dimension of justice to remedy inequities associated with the other' ('using distributive measures to redress misrecognition and recognition measures to redress maldistribution').<sup>19</sup> She suggests that we should not use cross-redressing across the board, but on a limited scale, and that we should be aware of how can we best address the imbrication of class and status.<sup>20</sup>

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<sup>14</sup> W Davies, *The Limits of Neo-liberalism* (revised edn, Sage 2016); N Fraser, 'The End of Progressive Neoliberalism' (2017) 64 Dissent 130.

<sup>15</sup> N Fraser, 'Social Justice in the Age of Identity Politics' (1996) The Tanner Lectures on Human Values, Stanford University, 35.

<sup>16</sup> N Fraser, 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation', in N Fraser and A Honneth, *Redistribution or Recognition?: A political-philosophical exchange* (Verso 2003) 64-7.

<sup>17</sup> To fully understand the transformative potential of ADL in its relationship with current capitalist social formations, we need to first explore a sociological account of the cultural processes that produce and reproduce social inequality. Michele Lamont, among others, has built on Fraser's theory in order to understand how culture and economy produce and reproduce harms associated with phenomena like the feminisation of poverty or the racialisation of structures of status and worth. M Lamont and others, 'What is Missing? Cultural Process and Causal Pathways to Inequality' (2014) 12 Socio-Economic Review 573, 574. A complete sociological account, however, requires a separate research project.

<sup>18</sup> see 5.3.3.

<sup>19</sup> Fraser (n 16) 83. Increasing female market participation enhances their bargaining position in households, the usual sites for the reproduction of misrecognition harms.

<sup>20</sup> *ibid.* The challenging question is whether, in certain contexts, ADL can work as a 'cross-redressing' posture.

The most obvious interimbrication between the economic and cultural perspectives within a single societal domain is revealed when ‘cultural harms that originated as by-products of economic structure may have developed a life of their own’, such as depictions of welfare-recipients as ‘scroungers’.<sup>21</sup> To mobilise against these forms of class misrecognition, we may want to promote recognition remedies that can help those who lack the material resources to overcome their situation. Discourses of empowerment of the ‘poor’, micro-credit’s portrait of ‘poor entrepreneurs’, and other development strategies work as affirmative recognition remedies that do not challenge “‘culture-of-poverty” ideologies that suggest that the poor deserve what they get.’<sup>22</sup> Indeed, these remedies may work as mere attempts at ‘social inclusion’ of the poor within economic arrangements based on the direct association of merit and reward, arrangements that do not challenge stereotypes or prejudices around the laziness of people that lack enough income to support themselves. Moreover, these cultural remedies are at the same time affirmative remedies for redistribution that do not challenge the way in which economic arrangements distribute outcomes. However, even in this scenario, as Fraser states,

poor and working people may need a counter- ‘identity politics’ to support their struggles for economic justice; they may need (...) to build class communities and cultures in order to neutralize the hidden injuries of class and forge the confidence to stand up for themselves. Thus, a politics of class recognition may be needed both in itself and to get a politics of redistribution off the ground.<sup>23</sup>

Within Fraser’s work, affirmative remedies (revaluing despised identities, and reclaiming self-worth) against forms of class misrecognition may constitute strategies of ‘withdrawal and realignment’, where members of disadvantaged groups have a ‘safe space’ to articulate their goals.<sup>24</sup> Furthermore, these remedies may work as a catalyst for broader and more robust struggles for redistribution. One may think of adding ‘poverty’ or ‘class’ as grounds of discrimination to either reject negative stereotypical judgments or, alternatively, create spaces of institutional recognition of this condition that facilitate the articulation of their claims as a ‘social group’. Thus, we may want to underscore how ‘class, too, functions at the level of identity politics’, or, alternatively, how the interimbrication can be addressed through intersectionality, highlighting the idea that

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<sup>21</sup> Fraser (n 15) 19.

<sup>22</sup> *ibid* 20.

<sup>23</sup> *ibid*.

<sup>24</sup> see 6.3.4.

contemporary ‘class struggles’ do not take part in ‘some sort of race and gender neutral terrain’.<sup>25</sup>

Transformative remedies against misrecognition, that is, those that attempt to challenge the cultural processes and distinctions that produce certain value patterns that impede parity of participation, can also be combined with struggles for redistribution. The clearest examples involve phenomena such as the racialisation of structures of status and worth, which (in)directly affect distributive outcomes that harm people on the grounds of their race, colour or ethnicity. For example, how can we make sense of the fact that despite the increasing protection from race discrimination, blacks still face major obstacles to accessing high-level jobs? One way to redress these harms is to target the cultural processes, such as stereotypes of blacks’ indiscipline, which produce and reproduce ideas that impede some people from having access to these jobs on the grounds of normatively extraneous traits, such as race or skin colour. In many cases, black professionals prefer colour-blind schemes, demand to be ‘unburdened of excessive ascribed or constructive distinctiveness’, and eschew any claims to special treatment.<sup>26</sup> However, without any concern for transformative redistributive solutions, these remedies seem to be available only to those members of discriminated groups that claim a right to be treated as individuals, according to their merit or their ‘net marginal productivity’, or that can easily set aside the mark of their despised identities.<sup>27</sup>

Nevertheless, in the form of transformative remedies against misrecognition, anti-discrimination claims may work, indirectly, as transformative remedies for redistribution. For example, as it currently operates in disability law, the law of accommodation challenges the abled norm and, furthermore, throws ‘unresolved distributive questions’ into scrutiny, with the potential to become a decommodifying device, making ‘people’s lives more independent from market forces’.<sup>28</sup> In these cases, beyond the legal question

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<sup>25</sup> R Kelley, ‘Identity Politics & Class Struggle’ (1997) 6 *New Politics* 84. This locates Fraser’s work against ‘those who decry “identity” politics, and insist on the unifying and universalizing qualities of *class*.’ P Frase, ‘Stay Classy’ (Jacobin 26 June 2016) <<https://www.jacobinmag.com/2014/06/stay-classy>> accessed 8 December 2016.

<sup>26</sup> Fraser (n 15) 35.

<sup>27</sup> Fraser (n 14).

<sup>28</sup> A Somek, *Engineering Equality: An Essay on European Anti-Discrimination Law* (OUP 2011) 183. The law of accommodation includes those instances where the right to be free from discrimination entails ‘accommodating’ the particular needs or interests of the victim, sometimes rearranging the standards or paradigms that were used as models for the policy or practice in question. In that sense, it challenges structural accommodations, which for Sophia Moreau are ‘policies, practices and physical structures that tacitly accommodate the dominant’s group needs at the expense of less privileged groups’, in this case, the able-bodied. ‘Discrimination and Subordination’, in *The Many Faces of Equality* (forthcoming).

itself, decision-makers have to address broader questions of ‘why employers –and not taxpayers at large- need to bear the costs for reversing the general ill of excluding people with disability from participation in society at large’.<sup>29</sup> In a way, this illustrates the way in which ADL has created instances to challenge market rationality, forcing employers to bear the costs of changing their recruitment or promotion practices, adapt the architecture of workplaces, or even promote a new assessment of productivity.<sup>30</sup> Instead of solely adopting affirmative remedies that rely on the value of individuals (eg, that people with disabilities can contribute to productive activities), the law of accommodation extends to transformative remedies that challenge workplace cultural norms that constitute the standards of productivity and merit.<sup>31</sup> Indeed, in these cases the law of accommodation attempts to grant ‘access to processes with which a society can shape the structures giving rise to patterns of distribution’, and thus goes against social inclusion approaches to ADL.<sup>32</sup>

Although these instances may not be close to altering the broader economic arrangements, even for sceptical accounts of ADL, like Somek’s, the only hope for ADL in terms of it not becoming an ancillary policy of neoliberalism lies in the law of accommodation.<sup>33</sup> We can even attempt to extend the ‘emancipatory model’ of the law of accommodation to ADL at large: if all the work accommodation duties do is to raise distributive questions, challenging the adaptive gravitational force of market rationality, then why can ADL not play a similar role? As I pointed out in a previous chapter, if we locate the wrongness of discrimination in the violation of an individual interest, namely, the interest that our deliberative freedoms remain protected, ‘insulated from the pressures or burdens caused by certain extraneous traits of ours’, we might provide ADL with the kind of hope that

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<sup>29</sup> Somek (n 28) 183.

<sup>30</sup> see, for example, American with Disabilities Act (US) s 12111(9). From this decommodifying perspective, Mladenov has attempted to challenge different expressions of neoliberalisation in disability employment policies. T Mladenov, ‘Postsocialist Disability Matrix’ (2017) 19 *Scandinavian Journal of Disability Research* 104, 110.

<sup>31</sup> This is the standard interpretation of the ‘social model’ of disability. However, the obsession with creating a barrier-free world with full equal access to participation could even be dangerous for people with disabilities themselves, through neglecting their different experiences of impairment. T Shakespeare, *Disability Rights and Wrongs* (Routledge 2009) ch4.

<sup>32</sup> H Collins, ‘Discrimination, Equality and Social Inclusion’ (2003) 66 *Modern Law Review* 16. As put by Somek, ‘[i]nclusion represents an application of the equality principle that does not extend to the self-reflexive political concern with the basic structure. Rather, it takes existing distributive structures for granted.’ A Somek, ‘The preoccupation with rights and the embrace of inclusion: A critique’, (2013) University of Iowa (Legal Studies Research Paper 13-11) <<https://ssrn.com/abstract=2205299>> accessed 10 June 2015; C O’Cinneide, ‘Fumbling Towards Coherence: The Slow Evolution of Equality and Anti-Discrimination Law in Britain’ (2005) 57 *Northern Ireland Legal Quarterly* 57, 62-3; A McColgan, *Discrimination, Equality and the Law* (Hart 2014) 36-7.

<sup>33</sup> Somek (n 28) ch8.

Somek expects from the work of accommodation.<sup>34</sup> Indeed, even when ADL is grounded on liberal values (the protection of deliberative freedoms), it can challenge adaptive pressures, functioning like decommodification counterforces, and asking ‘what businesses may legitimately expect from people given whatever else is important to their life’.<sup>35</sup> When crafted to protect deliberative freedoms, ADL can challenge structural accommodations that disadvantage those who deviate from the usual, normal or dominant patterns.<sup>36</sup>

To summarise, according to Fraser’s account, remedies against misrecognition should be combined with struggles for redistribution in a pragmatic way, to either (re)affirm despised or devalued identities ‘to get a politics of redistribution off the ground’, or challenge the cultural processes that impact on redistribution. Through Fraser’s framework, we can also give an account of ADL that is aware of reproducing old harms or creating new ones, and of its limits as a device for redistribution. In this way, we can avoid an uncritical approach to ADL as an all-encompassing device for both redistribution and recognition, even if in some cases it can work as a ‘cross-redressing strategy’. Indeed, those who defend substantive equality as the foundational value of ADL, relating protections from unequal treatment to broader aims of tackling disadvantage, do not explain how maldistribution and misrecognition can be articulated to create adequate remedies.<sup>37</sup> For example, and drawing partly on Fraser’s ideas, Sandra Fredman’s approach to ADL as grounded in a multi-dimensional conception of substantive equality does not explain how the different elements of her theory should be articulated.<sup>38</sup> She rests too much on a ‘holistic human rights framework’, calling for legal intervention to be effective, capable of addressing the interaction between the different factors that, for example, weigh on the feminisation of poverty.<sup>39</sup> General calls for ADL to be grounded on a broader notion of substantive equality, able to redress social disadvantage, should

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<sup>34</sup> S Moreau, ‘What is Discrimination?’ (2010) 38 *Philosophy & Public Affairs* 143, 149.

<sup>35</sup> Somek (n 28) 182.

<sup>36</sup> For Moreau, ‘[t]hese freedoms are so much a part of the fabric of most of our everyday lives that we rarely reflect on how fundamental they are. (...) We enjoy these freedoms and can afford to take them for granted, however, only because businesses and associations tend to arrange their affairs and their physical premises in a way that tacitly accommodates the needs and abilities of their usual employees or clients.’ Moreau (n 34) 150-151.

<sup>37</sup> S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 176; MJ Añón, ‘Principio Antidiscriminación y Determinación de la Desventaja’ (2013) 39 *Isonomía* 127.

<sup>38</sup> S Fredman, *Discrimination Law* (2nd edn, OUP 2011) 25-33.

<sup>39</sup> S Fredman, ‘Woman and Poverty: Human Rights Approach’ (2016) 24 *African Journal of International and Comparative Law* 494, 504.



not bypass the need to understand the way in which the different factors that explain disadvantage may help us in crafting adequate remedies.

### 8.3 The Socio-Economic Lens in comparative ADL

How does the operation of concrete equality and anti-discrimination regimes understand this interimbrication? On the one hand, ADL can be considered fundamental for the operation of market economies, so the alleged interimbrication between the economic and cultural spheres is put to work for the correction of ‘market failures’. Misrecognition is particularly harmful to the effective operative conditions of market economies, which attempt to measure the economic value of an individual’s engagement with productive activities, either as a worker or as a consumer. In other words, market economies can use ADL to tackle misrecognition as a particular harm that prevents proper cost-benefits analysis, as distortions of ‘economic value’ that prevent economic actors from creating the public goods that derive from market arrangements. However, as the reader might guess, the existing market systems have produced and reproduced some of the most discriminatory practices (eg, relying on customer prejudices to hire only attractive blonde women for restaurants), and some employment or commercial decisions usually rely on a ‘generalization or stereotypes that, although quite overboard and from one point of view invidious, provide an economically rational basis’ for the latter practices.<sup>40</sup> In these cases, discrimination does not constitute a ‘market failure’, and any attempt to correct or legally intervene may be seen as an efficiency loss.

On the other hand, however, ADL can work at times to prevent the economisation of certain human activities or interests, tackling pressure from market forces. ADL is sometimes put at the service of the protection of the dignity of workers against market practices that threaten the former or, in some cases, allocates distributive duties to certain actors even when they have not contributed directly to the wrong of discrimination. Moreover, in recent times, ADL has put into question the colonisation of the lifeworld, the economisation of human activities which are necessary for productive activities, such as care, education or human socialization.<sup>41</sup> Overall, we can claim, there is no one-way

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<sup>40</sup> C Sunstein, ‘Why Markets Don’t Stop Discrimination’ (1989) 8 Social Philosophy & Policy 22, 26.

<sup>41</sup> In developed regimes of ADL, the prohibition of discrimination on the grounds of ‘family status’ and ‘family responsibilities’ is increasingly putting into question the impact of employment practices on the conditions that are necessary for productive activities. M Mercat-Bruns, *Discrimination at Work: Comparing European, French, and American Law* (UC Press 2016) 180. In Fraser’s view, these kinds of conflicts highlight the social contradictions of financialised capitalism, articulated in ‘boundary struggles’:

relation between ADL and current capitalist social formations: sometimes, it is put at the service of market economies, creating effective markets where previously there were only hierarchical relations of status or correcting ‘price distortions’, ‘market failures’ or ‘unfair competitive advantages’ created by discrimination; or, alternatively, ADL serves to tame market forces, or even forces distributive outcomes at odds with market premises.

A good way to understand these tensions is to analyse the different readings of EU Equality Law. The first anti-discrimination provision to be enacted within the European Economic Community, an equal pay gender clause, was born to prevent unfair competitive advantages in the development of a common market, which still influences doctrinal developments.<sup>42</sup> For several scholars, the only collective goal that renders European social policies successful is the need to create a single market through the protection of the four fundamental freedoms (the free movement of goods, capital, services, and labour), constraining the radical potential of policies such as ADL.<sup>43</sup> For Somek, ADL

is not primarily directed at decommodification (...) it is different from a type of social legislation that aims at backing up the provision of goods with some market-defying or market-bypassing distributive mechanism. Indeed, the very point of anti-discrimination law is to facilitate market access and not to exempt a certain sphere from the operation of the market.<sup>44</sup>

Moreover, by prohibiting the use of immutable characteristics outside of the control of the person, ADL ‘indirectly endorses mutability, adaptability, flexibility as the core virtues of market participants’.<sup>45</sup>

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‘capitalism’s institutional divisions often become foci of conflict, as actors mobilize to challenge or defend the established boundaries separating economy from polity, production from reproduction, human from non-human nature’. N Fraser, ‘Behind Marx’s Hidden Abode’ (2014) 86 *New Left Review* 55, 68.

<sup>42</sup> see the opinion of Advocate General Gand in the Case 15/69, *Württembergische Milchverwertung-Südmilch-AG v. Salvatore Ugliola* [1969] ECR 363, 371; J Suk, ‘Disparate Impact Abroad’, in E Katz and S Bagenstos (eds) *A Nation of Widening Opportunities: The Civil Rights Act at 50* (University of Michigan 2015) 301-2.

<sup>43</sup> W Streeck, ‘Competitive Solidarity: Rethinking the “European Social Model”’ (MPIfG Working Paper 8, 1999). However, even the protection of the principle of free movement of workers (discrimination on the grounds of nationality) is suffering serious legal and judicial setbacks that compromise European integration. C O’Brian, ‘Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights’ (2016) 53 *Common Market Law Review* 937, 937-9.

<sup>44</sup> Somek (n 28) 83.

<sup>45</sup> A Somek, ‘Anti-Discrimination and Decommodification’ (2005) University of Iowa (Legal Studies Research Paper 13-11) < <https://ssrn.com/abstract=651441> > accessed 27 June 2015.

Even progressive developments like the prohibition of indirect discrimination, which pursue distributive justice ‘at the cost of insinuating that a distributive agent [eg employer] has engaged in some kind of reprehensible conduct, even if that has evidently not been the case’, suffer from a normative deficiency that ends up falling prey to moralism, which leaves ADL in an indeterminate state.<sup>46</sup> With its obsession with finding a central or auxiliary discriminatory premise in the decision-making process of the distributive agent, EU ADL ends up being trumped by cost-benefit analysis, without undermining market-rationality (eg, how to address the case of a work sector that, without the intention of the employer, ends up being filled only by men, without the help of a distributive pattern that commands how many women that sector should observe).<sup>47</sup> That’s why Somek considers that ‘Anti-discrimination law is the darling of the neoliberal left’.<sup>48</sup>

Nevertheless, this ‘brute’ economic aim has been somehow eroded by a broader social or human rights aim, and both the CJEU and several scholars consider that EU Equality Law ‘has also become a method to deliver social policies’,<sup>49</sup> or an expression of the fundamental principle of equal treatment, which goes beyond a narrow protection of the single market freedoms.<sup>50</sup> For example, the case of EU gender equality law arguably constitutes the single most significant achievement of the Union in the field of social policy: it has played a key role in transforming European society and breaking down the barriers that previously reduced women to second-class citizens in both economic and social terms.<sup>51</sup> Therefore, despite the widespread critiques of the emancipatory potential of EU Equality Law, centred on ‘how it can reinforce the dominant market orientation of contemporary European economic and social policy’ (the so called leftist critique of ADL), there are numerous reasons to be optimistic.<sup>52</sup>

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<sup>46</sup> *ibid.*

<sup>47</sup> *ibid.* In his words, ‘[t]he pursuit of distributive objectives is relegated to the application of the deontological idiom of the law’ (n 28) 131. He criticizes John Gardner’s account of the wrongfulness of discrimination (his concern to look for tainted motives in operative premises of the discriminators), specially in cases of indirect discrimination, where the analysis of the case law of the CJEU leads him to observe ‘how quickly moral zeal evaporates into thin air with a cost-benefit analysis’. The work, in the end, is done by the principle of proportionality.

<sup>48</sup> Somek (n 28) 97.

<sup>49</sup> C McCrudden and S Prechal, *The Concepts of Equality and Non-Discrimination in Europe: A practical approach* (European Network of Legal Experts in the field of Gender Equality 2009) 6.

<sup>50</sup> Case C-303/06, *Coleman v Attridge Law* [2008] ECR I-5603, paras 47-48.

<sup>51</sup> C O’ Cinneide, ‘Completing the Picture – The Complex Relationship between EU Antidiscrimination Law and “Social Europe”’, in N Countouris and M Freedland (eds), *Resocialising Europe* (OUP 2013) 123.

<sup>52</sup> *ibid* 125; R Xenidis, ‘Shaking the normative foundations of EU equality law’ (2017) European University Institute (Working Paper 04).

## 8.4 The Socio-Economic Lens in Latin America

How do the economic and cultural spheres get interimbricated in the practice of ADL in Latin America? In what way can ADL, understood as an anti-misrecognition device, end up addressing issues of redistribution? How can we make sense of the context in which the most recent anti-discrimination reforms operate and how this affects their potential and limits in addressing redistribution? Almost one in three Latin American individuals are currently living in poverty or indigence and, according to the GINI index, this region is the most unequal in the world.<sup>53</sup> Throughout the continent, this reality inevitably has an effect on the legitimacy and authority of law.<sup>54</sup> Legal institutions not directly crafted to address socio-economic issues end up being affected by the above-mentioned realities. Addressing socio-economic issues in the design or the practice of ADL seems unavoidable: on the one hand, traditional protected grounds are overrepresented among the poor; on the other hand, the poor ‘experience many of the elements of discrimination experienced by status groups, including lack of recognition, social exclusion and reduced political participation.’<sup>55</sup> Furthermore, these recent reforms are in harmony with Latin American public opinion: on average, the majority view discrimination as having structural causes, and think that poverty or a lack of money are the main grounds of discrimination, ranking higher than race, ethnicity or gender.<sup>56</sup>

There is a consensus in international human rights law that ADL should be inextricably linked with ‘economic and social situation’, and both the IAHRs and different Latin American jurisdictions have taken this challenge seriously.<sup>57</sup> Anti-discrimination provisions in Latin America have included, as protected grounds, ‘economic condition’,<sup>58</sup>

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<sup>53</sup> CEPAL, *Panorama Social* (2014).

<sup>54</sup> O Vilhena Vieira, ‘Inequality and the Subversion of the Rule of Law’, in C Rodríguez-Garavito (ed), *Law and Society in Latin America: A New Map* (Routledge 2014).

<sup>55</sup> S Fredman, ‘The potential and limits of an equal rights paradigm in addressing poverty’ (2011) 22 *Stellenbosch Law Review* 566, 567.

<sup>56</sup> Latinobarómetro, *Informe Anual* (2001) <<http://www.latinobarometro.org/latContents.jsp>> accessed 12 August 2015; this trend has been confirmed by domestic surveys in Chile, Argentina and Mexico. INDH (Chile), *Encuesta Nacional de Derechos Humanos*, 2015; INADI (Argentina), *Mapa Nacional de la Discriminación*, 2013; CONAPRED (Mexico), *Encuesta Nacional sobre la discriminación en Mexico*, 2010.

<sup>57</sup> CESCR, *General Comment no.20* (UN 2009).

<sup>58</sup> ADLARG, art 1.2; Constitution of Peru art 37.

‘social condition’,<sup>59</sup> ‘socioeconomic situation’,<sup>60</sup> or ‘social origin’.<sup>61</sup> Moreover, although the prohibition of indirect discrimination and duties of accommodation are not of heightened concern, socio-economic issues pop up in every instance where legal regimes attempt to deal with them.<sup>62</sup> The most recent anti-discrimination provision is based on the idea that ADL should do something more to address these issues.<sup>63</sup> Those who draft anti-discrimination legislation in Latin America should presuppose that socio-economic issues are a necessary consequence of recognising social condition, poverty or class as protected grounds, or of enacting prohibitions of indirect discrimination or accommodation duties.<sup>64</sup> In what follows, I will explore the possibility of developing the socio-economic lens through an alternative account of ADL, which appears to be the dominant discourse on the foundations of social policies in Latin America.

#### 8.4.1 An alternative narrative of ADL: Neostructuralism

In the context of Latin America, the socio-economic lens of a transformative approach to ADL stands against the alternative of placing recent legal reforms under the developmental narrative of neostructuralism, which presents itself as a *via media* between structuralism and neoliberalism.<sup>65</sup> To begin with, it was understood as a reaction to the failure of neoliberal policies of structural adjustment during the 1980s and 1990s.<sup>66</sup> Nowadays, it influences policy discourses that shape the region’s approach to

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<sup>59</sup> ADLBOL art 5.a; Criminal Code (Peru) art 323.

<sup>60</sup> ADLCHI Chile art 2; Inter-American Convention against all forms of discrimination and intolerance (A-69) art 1.

<sup>61</sup> ADLMEX (Mexico) art 1.III; ACHR, art 1.1.

<sup>62</sup> Corte Suprema de Justicia de la Nación (Argentina), *Sisnero, Mirtha Graeiel y FEM c. el Taldelva SRL y otros, s/ amparo* (2014); Corte Suprema (Chile), rol 1637-2014 (recurso de protección) (accommodation duties to improve prison conditions of inmates with disabilities); Suprema Corte de Justicia de la Nación (México), *19/2014* (amparo) (the different regulation for marriage and co-habitation agreements regarding duties of support once these contracts have ended indirectly discriminates against sexual minorities).

<sup>63</sup> see the different reports of the Secretary of Legal Affairs of the OAS, in preparation for the Inter-American Convention against racism and all forms of discrimination and intolerance (A-69).

<sup>64</sup> In the legislative proceedings of the Chilean (Historia de la ley 20.609), Argentinian (Historia de la ley 23.592), and Bolivian (Memoria de la ley Boliviana contra el Racismo y Toda Forma de Discriminacion) ADLs, there was no debate around these issues. However, in a recent Argentinian anti-discrimination bill (Expediente 9064-15), there is an explicit acknowledgment of the ‘socio-economic perspective’, defined as the ‘acknowledgment of poverty and social exclusion as multipliers of vulnerabilities and common to all protected grounds, and that fosters the creation of the the adequate conditions for equal opportunities’.

<sup>65</sup> Parts of this section were developed in A Coddou, ‘Addressing Poverty through a Transformative Approach to Anti-Discrimination Law in Latin America’, in L Boratti and others (eds), *Law and Policy in Latin America* (Palgrave 2017).

<sup>66</sup> O Sunkel and E Zulueta, ‘Neo-structuralism versus Neo-liberalism in the 1990s’ (1990) 42 *CEPAL Review* 35.

development, and is considered ‘the most influential paradigm of political economy that lies behind the social-democratic current within the region’.<sup>67</sup>

Neostructuralism has been the development narrative of the ECLAC since the beginning of the 1990s, and it has fostered anti-discrimination reforms as a way to trigger the required social integration to enhance international competitiveness.<sup>68</sup> Indeed, neostructuralism could consider ADL as a crucial policy to balance the change in production patterns with social equity and, probably, as the main social policy within the path to development.<sup>69</sup> Alongside economic policies (fiscal reform and a structure of incentives), ADL is considered crucial for the way in which excluded groups are incorporated into an economic system of cooperation: vulnerable groups are now available for the job market, which should be blind to considerations other than job skills, or have the potential to be entrepreneurs themselves.<sup>70</sup> Furthermore, neostructuralism does not represent a challenge to the free operation of market forces, but a reinforcement of its premises: if the market is to function effectively, non-market based forms of coordination, beyond those offered by market forces alone, should complement it.<sup>71</sup> Considering the globalisation of local economies and processes of production, the basic neostructural premise is that global competition is shaped not only by the transaction of commodities but through a value or credit enhancing race that balances different factors, like foreign investment regimes, research and educational institutions, infrastructure, and, in some cases, the respect of equality and non-discrimination.<sup>72</sup>

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<sup>67</sup> J Webber, ‘Neostructuralism, Neoliberalism, and Latin America’s Resurgent Left’ (2010) 18 *Historical Materialism* 208, 210.

<sup>68</sup> see the conclusions of the report *Changing production patterns with social equity* (1992) and the parallel developments in gender or racial equality that made reference to that developmental narrative (ECLAC/CDCC 1995).

<sup>69</sup> For David Trubek, an active social policy focused on social cohesion, combined with a flexible ‘new industrial policy’ is crucial for what he terms ‘new developmentalism’, a variant of neostructuralism. *Law, State, and the New Developmentalism: An Introduction*, in D Trubek and others (eds), *Law and the New Developmental State* (CUP 2013) 10.

<sup>70</sup> For Hernando De Soto, the informal economy in Latin America offers a wide range of ‘free and spontaneous’ market interactions, yet without institutional protections for property rights or a structure to legally enforce transactions. *The Mystery of Capital* (Basic Books 2003). De Soto and his supporters advocated the mere extension of economic freedoms to the poor (to incorporate them, without discrimination, into the formal market), but were harshly criticised for having a narrow approach to anti-poverty strategies of legal empowerment. D Banik, ‘Legal Empowerment as a Conceptual and Operational Tool in Fighting Poverty’ (2009) 1 *Hague Journal on the Rule of Law* 117, 119.

<sup>71</sup> F Leiva, ‘Towards a Critique of Latin American Neostructuralism’ (2008) 50 *Latin American Politics and Society* 1, 6. However, in recent years ECLAC ‘has developed the social and labour market dimensions of its neo-structuralist discourse, moving from a limited concern with ‘equity’ to embrace a rights-based, universalist conception of social protection’. R Mahon, ‘Integrating the Social into CEPAL’s Neo-structuralist Discourse’ (2015) 15 *Global Social Policy* 3, 13.

<sup>72</sup> Webber (n 67) 216.

Hence, economic policies remain untouched under this new developmental framework, as it ‘displaces the center of gravity in policy intervention from economics to the realm of subjectivity, symbolic politics, and the cultural dimension’.<sup>73</sup> The role of the state and the regulatory apparatus should be redirected at the symbolic dimension, through which historically excluded sectors are incorporated with new types of expectations or new ideas of understanding citizenship.<sup>74</sup> For Webber, under neostructural narratives, the state’s role ‘is to build civil society-state relationships, public-private partnerships, and an overall social, political, and ideological consensus across social classes behind the drive for export-led capitalist growth’.<sup>75</sup> In other words, neostructuralism is mainly a change in the working environment rather than a radical transformation of the economic institutional arrangements, a new cultural and social mindset under which market forces should lead us towards development. In this project, one would think, ADL becomes a crucial tool of economic development, both in practical and symbolic terms.

#### **8.4.2 A Grounding Narrative for the Socio-Economic Lens in Latin America**

Instead of appealing to a neostructural narrative, a transformative approach to ADL starts by acknowledging its role in a region with structural problems like socio-economic inequality and poverty. Moreover, in contrast with the European approach, Latin American ADL has emerged in an era of profound changes that have shaped its particular socio-economic lens.

In general, we may start the development of the principle of the socio-economic lens from the following fact: Latin American ADL was not borne out of concerns about unfair advantages in the regulation of a common market or the efficiency or productivity rates of the workforce, but out of a constitutional narrative that gives coherence to recognition and redistribution, both of which are understood to be dimensions of the right to equality and non-discrimination. Under every current of Latin American constitutionalism, poverty and socio-economic inequalities become fundamental constitutional problems.<sup>76</sup> Although not all the constitutional texts considered here explicitly name the problems to be tackled, poverty and economic inequality are part of the constitutional challenges that

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<sup>73</sup> Leiva (n 71) 8.

<sup>74</sup> *ibid*

<sup>75</sup> Webber (n 67) 216.

<sup>76</sup> see 4.1.

should be addressed by governments: eradicating poverty and addressing inequalities are not only desirable policy orientations; they are constitutional imperatives.<sup>77</sup>

Moreover, we must consider the political context: democratisation and social provisions emerged in the early 1990s, simultaneously with economic liberalisation and privatisation.<sup>78</sup> Despite having a century-old tradition of social constitutionalism, dating back to the Mexican Constitution (1917) and other populist constitutional reforms (1940s-50s), ‘social constitutionalism truly became the dominant pattern in Latin America as the region began to return to democracy in the 1980s’.<sup>79</sup> However, at this stage, social constitutionalism had to deal with development pressures, negotiating with powerful economic actors that pushed towards privatisation and de-regulation of the activities involved in the realisation of social rights. This tension has influenced the development of constitutional provisions: indeed, many progressive provisions, like those recognising substantive equality, stand against the protection of private property or constraints against state involvement in the economy.<sup>80</sup> The latter ended up compromising the normative strength of social rights provisions, and its advocates had to find ways to make social rights justiciable. A paradigmatic example is the Constitution of Colombia (1991), which considered social rights in a different chapter to ‘fundamental rights’, which were the only rights covered by ordinary constitutional writs.<sup>81</sup> The Constitution of Peru (1994), despite having a weaker commitment to social rights, also shows this ambiguity between the need to foster social protection and pressures towards neoliberal reforms.<sup>82</sup> The Argentinian constitutional amendment of 1994 is also an acute expression of these contradictions, recognising the full list of social rights included in the International Covenant Economic, Social, and Cultural Rights, while establishing the basis for the neoliberal reforms that resulted in the crisis of early 2000s.<sup>83</sup> In general, these

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<sup>77</sup> When describing development plans, the Colombian Constitution uses the term ‘fight against poverty’ (article 339); the Constitution of Bolivia, for its part, speaks of the need to reduce inequalities and eradicate poverty (arts 312 and 313).

<sup>78</sup> J Grugel and P Riggirozzi, ‘Post-neoliberalism in Latin America: Rebuilding and Reclaiming the State after Crisis’ (2012) 43 *Development and Change* 1, 6.

<sup>79</sup> D Brinks and W Forbath, ‘The Role of Courts and Constitutions in the New Politics of Welfare’, in Randall Peerenboom and Tom Ginsburgs (eds), *Law and Development of Middle-Income Countries* (CUP 2014), 224-5.

<sup>80</sup> C Rodríguez-Garavito, ‘Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America’ (2011) 89 *Texas Law Review* 7.

<sup>81</sup> Brinks and Forbath (n 79) 224-5.

<sup>82</sup> C Landa Arroyo, ‘Del Tribunal de Garantías al Tribunal Constitucional: el caso peruano’ (1995) 2 *Pensamiento Constitucional* 73.

<sup>83</sup> L Clérico and M Aldao, ‘La igualdad “des-enmarcada”: a veinte años de la reforma Constitucional argentina de 1994’ (2014) 13 *Revista Electrónica del Instituto de Investigaciones Jurídicas y Sociales “Ambrosio Lucas, Gioja”* 7, 12.



contradictions placed social rights under a somewhat lower legal pedigree, forcing social movements to find strategies to circumvent institutional obstacles or to make them justiciable through procedural claims and/or teleological or systematic interpretations.<sup>84</sup> Within these contradictions, and in the hands of social movements, constitutional and legal equality clauses have been used to reframe the place and meaning of equality in public discourse.<sup>85</sup>

The political context has also influenced the emergence of ‘new social movements’, which replaced, but never broke, with the traditional leftist groups that early in the century forged socialism and later fought dictatorships. At the beginning of the 1990s, ‘new social movements’ conjoined previous demands, and forged coalitions that accommodated both demands for recognition and redistribution.<sup>86</sup> This reality challenges the assumed incompatibility between class and other grounds of protection as tools of emancipation.<sup>87</sup> Once democracy was re-established, for example, feminist movements that had fought against dictatorships started to address newer issues like the feminisation of indigenous or ethnic discrimination and poverty, and serious socio-economic problems concerning reproductive rights.<sup>88</sup> In a nutshell, the particular dynamics of recent Latin American history suggest that problems such as ‘displacement’ (the hollowing out of ‘class struggles’ by ‘identity politics’) or ‘reification’ (the fixation of collective identities that ‘encourage separatism, intolerance and chauvinism, patriarchalism and authoritarianism’)<sup>89</sup> need to be articulated in ‘actually existing—historicized and culturally distinct—forms of capitalism’.<sup>90</sup>

Regarding a third common feature of Latin American ADL, legal operators have to work in societies with structural inequalities and social segregation, with important parts of the population living under poverty or indigence. If we add the fact that legal operators have to do their work with scarce resources and weak political support, we can understand the way in which they conceive of their role in implementing anti-discrimination

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<sup>84</sup> O Parra-Vera, ‘The Protection of Social Rights’, in J Gonzalez Bertomeu and R Gargarella (eds), *The Latin American Casebook: Courts, constitutions, and rights* (Routledge 2016).

<sup>85</sup> L Clérico and others, ‘Towards a Reconstruction of Equality Case-Law Trends in Latin America and the Caribbean: On Non-Discrimination, Anti-Subordination, Redistribution and Recognition’ (2013) 9 *Revista Direito GV* 115.

<sup>86</sup> S Warren, ‘Latin American Identity Politics: Redefining Citizenship’ (2012) 6 *Sociology Compass* 833.

<sup>87</sup> V Schild, ‘Feminism and Neoliberalism in Latin America’ (2015) 96 *New Left Review* 59.

<sup>88</sup> *ibid.*

<sup>89</sup> N Fraser, ‘Rethinking Recognition’, in N Fraser and K Olson (eds), *Adding Insult to Injury: Nancy Fraser Debates Her Critics* (Verso 2008) 130.

<sup>90</sup> Schild (n 86) 59.

provisions.<sup>91</sup> In this context, it seems ingenuous to narrow equality to the protection of regulatory consistency, or to prevent legal operators from expand the understanding of equality clauses to issues of redistribution or structural discrimination. For example, the IACtHR understands that the scope of its institutional role is very broad and complex, and is aware that the right to equality refers both to claims of recognition and redistribution, and that its judgments provide guidelines for the development of more detailed protections for rights.<sup>92</sup> Moreover, at the level of reparations, legal operators understand that the role of human rights courts is to effectively apply the guarantee of non-repetition, promoting structural changes in order to tackle causes that lie under the surface, which requires addressing complex issues of both recognition and redistribution.<sup>93</sup>

### **8.4.3 Articulations of the socio-economic lens**

In what follows, I will explain the way in which ADL, characterised as an anti-misrecognition device, addresses issues of poverty or economic inequality, and challenges the dominant cultural paradigms associated with neo-liberalism in Latin America. Several legal practices and broader processes of legal mobilisation within Latin American ADL show how the above-mentioned interimbrication is taking place in this part of the world.

#### **8.4.3.1 ADL and Social Rights**

A good way to start exploring these connections is to study the relationship between ADL and social rights, which is articulated mainly through the legal mobilisation strategies of economic and social rights advocates.<sup>94</sup> First, in its most basic version, formal equality, the basic guarantee from which ADL derives, entails regulatory consistency. In this regard, equality laws have been useful in claiming a ‘ratchet effect’ upon economic and social rights, especially for groups that cling to modest advances in social protection to

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<sup>91</sup> see 6.4.3.

<sup>92</sup> R Uprimny and L Sánchez, ‘Artículo 24. Igualdad ante la ley’ in C Steiner and P Uribe (eds), *Convención Americana de Derechos Humanos: Comentario* (Fundación Konrad Adenauer 2014) 586-7.

<sup>93</sup> S García, ‘The Relationship between Inter-American Jurisdiction and States (National Systems): Some Pertinent Questions’ (2014) <<https://humanrights.nd.edu/assets/134035/garciaramireziaeng.pdf>> accessed 20 March 2015.

<sup>94</sup> Different articulations between social rights and ADL have been explored by the Equal Rights Trust, *A litigator’s Guide to Using Equality and Non-discrimination Strategies to Advance Economic and Social Rights* (ERT 2014).

extend the scope of its beneficiaries. Every time the state has made available the objects of social rights to some of its citizens, equality clauses have been used to argue that the state must extend the same benefits to others. In these cases, the formal equality dimension of anti-discrimination clauses is used as the direct cause of action, as a proper affirmative remedy for redistribution. This is the way in which gay couples have obtained access to social security benefits from which they were excluded;<sup>95</sup> it is also the way in which afro-descendants have claimed state protection in Colombia and Peru, arguing before legal and political venues that they are in an equivalent position to indigenous peoples.<sup>96</sup> The logic behind equal pay clauses also presupposes this kind of strategy, an issue that is under or poorly litigated in Latin America.<sup>97</sup> As these examples show, formal equality claims do not entail placing the schemes for redistribution under scrutiny, but subject its outcomes to consistency tests.

Second, economic and social rights advocates have used ADL to support or strengthen their demands, or even to advance their claims in the absence of justiciable social rights. Beyond appealing to social rights, these advocates tend to use the right to equality and non-discrimination as a way to universalise their demands, placing the material conditions of (social) citizenship on the agenda of political powers.<sup>98</sup> Through the lens of constitutional equality clauses, social movements have used judicial venues to ‘compensate, in some measure, for deficits in responsiveness and accountability toward the mass of poor and vulnerable citizens on the part of bureaucrats, elected officials, and party elites’.<sup>99</sup> Even in the absence of justiciable social rights, equality and anti-discrimination clauses have supported social rights’ advocates before courts, in order to demand ‘equal concern and respect’, or the bigger implications of what (social) citizenship entails for poor and vulnerable citizens.<sup>100</sup> If unequal access to social rights (or its objects) affects equality and non-discrimination commitments, then it is obviously

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<sup>95</sup> IACtHR, *Duque v Colombia* (2016) para 103. Some gay movements have pushed forward the strategy of decoupling social benefits from heterosexual marriage, instead of pushing for a more demanding mobilisation for same-sex marriage. Fraser (n 89) 136.

<sup>96</sup> T Paschel, ‘The Right to Difference: Explaining Colombia’s Shift from Color Blindness to the Law of Black Communities’ (2010) 116 *American Journal of Sociology* 729.

<sup>97</sup> The enforcement of these clauses faces several obstacles, like the lack of statistical analyses, an under-developed doctrine of indirect discrimination, pay secrecy, unequal access to justice and poor legal aid. P Bergallo and N Gherardi, ‘Trabajo’, in C Motta and M Saez (eds), *Género en la Jurisprudencia latinoamericana: la mirada de los jueces* (Siglo del Hombre editores 2008) 148-62.

<sup>98</sup> Parra-Vera (n 84) 154.

<sup>99</sup> Brinks and Forbath (n 79) 221.

<sup>100</sup> Corte Constitucional de Colombia, T-406/92 (the lack of attention to sewage in the poorest zones of Cartagena, Colombia, constituted a violation of the duty of the state to protect those citizens less able to protect themselves, derived from article 13.2 of the Constitution).

a constitutional problem that should be addressed by courts. Furthermore, although many jurisdictions recognise the binding character of social rights, they do not include a judicial remedy to redress their violation. Thus, litigants have no alternative but to claim the right to equality in connection with other social clauses, or on its own, under a broad understanding of what equality entails. In the case of Chile, where the writ of protection does not cover social rights, the right to equality and non-discrimination has worked as a way to make social rights justiciable, especially when access to the social provision depends on a segregated system of public and private provision.<sup>101</sup> In addition, when coupled with social rights, the principle of equality and non-discrimination emphasises the former's collective dimension, which is manifest in the assessment of the infringement in question or in the proposal of structural remedies.<sup>102</sup> In this way, it warns of the dangers of using litigation as an individual and fragmented way of enforcing social rights commitments.<sup>103</sup> Moreover, equality clauses may be used to emphasise the lack of coverage of social provisions, the unequal or discriminatory access to the object of the rights in question,<sup>104</sup> or the extension of benefits to groups or individuals beyond the plaintiff.<sup>105</sup>

ADL has also been coupled with the 'minimum core' approach to social rights, constituting one of the elements that ground the –somehow urgent- state duty to act. In these cases, faced with scarce resources, the right to equality and non-discrimination has proved useful in arguing for the need to prioritise the needs of the most vulnerable populations, and the urgency to intervene effectively to change their condition.<sup>106</sup> In these

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<sup>101</sup> J Contesse and D Lovera, 'Acceso a tratamiento médico para personas viviendo con VIH/Sida: Éxitos sin Victoria' (2008) 8 Sur 149.

<sup>102</sup> Parra-Vera (n 84) 157, 158-165; IACtHR, *Yean and Bosico v. Dominican Republic* (2005) para 240 (there is a need to understand the social structures that place certain social group at disadvantage); Latin American courts have been using equality clauses to understand that 'discrimination does not arise in relation to a single feature', or out of a discrete act of discrimination, 'but rather from a plurality of factors', or a social context that needs to be addressed integrally. L Clericó, L Ronconi, and M Aldao, 'Equal Protection', in Gargarella and González-Bertomeu (n 84) 3.

<sup>103</sup> O Motta Ferraz, 'Harming the poor through social rights litigation: lessons from Brazil' (2010) 89 Texas Law Review 1643.

<sup>104</sup> Tribunal Constitucional (Chile), 976-07 (Inapplicability for Inconstitutionality) (distinguishing on the basis of sex to determine that the premium of private health insurance is incompatible with the right to equality).

<sup>105</sup> This has been the usual reasoning behind the reparations of different judgments dealing with structural discrimination in Latin America, such as prison conditions in Colombia. J González Bertomeu, 'Prisons and prisoners' rights', in Gargarella and González-Bertomeu (n 84). See also the reparations in other judgments of the Colombian Constitutional Court, which created structural remedies out of individual complaints: T-447/2005 (discrimination against children living in rural areas); T-595/2002 (discrimination against disabled persons in regard to access to the public transportation system).

<sup>106</sup> IACtHR, *Yakye Axa Indigenous Community v. Paraguay* (2005) para 162 (State duties towards indigenous communities need to prioritise the rights and interests of those who are most in need within those communities); *Ximenes Lopes v Brazil* (2006) para 103.

contexts, ADL can work even when poverty is not considered as a protected ground, or, again, even in the absence of justiciable social rights.

A good way to summarise the different articulations between ADL and social rights is to analyse cases of structural discrimination against certain groups of the population, due to longstanding institutional failures. The massive accumulation of *tutelas* raised by internally displaced people (hereafter, ‘IDP’) before the Colombian Constitutional Court, due to the conflict between the Colombian State and different *guerillas*, is considered one of the landmark cases of Latin American social constitutionalism.<sup>107</sup> In it, the Court interpreted civil and social rights within a general interpretive framework created by the rights to a vital minimum, to equality and non-discrimination, and the principle of the social state of law.<sup>108</sup> Anti-discrimination clauses, specifically article 13.2 of the Colombian Constitution, addressed the lack of attention to these people’s urgent demands as a violation of the right to equal concern and consideration by state institutions; moreover, the Court insisted that the right to equality and non-discrimination should be considered as an ancillary principle that articulates the different manifestations of the principle of the social state of law; it acknowledged that IDP had been discriminated against not only because of the fact of being displaced, which is not a prohibited ground of discrimination in itself, but specifically because of political opinions not always consciously held;<sup>109</sup> it considered that the fact of being displaced was the main cause of their defencelessness and inability to change their social condition; finally, these clauses were used to assess the disproportionately negative impact that internal displacement had had on some of the most vulnerable members of IDP (namely, women, the elderly and children), and to impose special protection measures in favour of them.<sup>110</sup> Hence, the right to equality and non-discrimination was considered crucial to providing an overall assessment of the situation.

Additionally, the Colombian Constitutional Court declared that the way in which the Colombian State had dealt with the situation of IDP constituted an ‘unconstitutional state

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<sup>107</sup> Corte Constitucional de Colombia, T-25/2004; C Rodríguez-Garavito and D Rodríguez-Franco, *Radical Deprivation on Trial* (CUP 2015).

<sup>108</sup> D Landau, ‘The promise of a minimum core approach: the Colombian model for judicial review of austerity measures’, in A Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (CUP 2014) 285-7.

<sup>109</sup> Internally displaced persons were discriminated against on the basis of political opinions not necessarily held by them, but due to their association with the political ideologies that guerrillas claim to sustain (ascribed stereotypes).

<sup>110</sup> Corte Constitucional de Colombia (n 106) s 5.2.

of affairs', whose resolution required a combination of transformative remedies against both misrecognition and maldistribution.<sup>111</sup> In the first place, IDP was not a homogenous social group, and the impact had been felt disproportionately among the most vulnerable people within that group; moreover, there was no single despised identity to reaffirm before public opinion at large, but a need to challenge the hegemonic cultural patterns that crafted harms of disrespect and marginalisation through a long 'cultural process' by which urban populations saw IDP as associated with the evils of *guerrillas*. Regarding transformative redistributive remedies, the Colombian Constitutional Court highlighted the need to change the social policy approach to the issue, which was clearly not working. Instead of demanding more resources from the social programme already set up by the state, the judgment insisted on the need to revise the ways in which discrimination patterns were associated with the specific arrangements of the programme created by the Colombian government up until that point.<sup>112</sup>

In another landmark case, the Colombian Constitutional Court attempted to provide a structural solution to an explosion of *tutelas* demanding compliance with the social right to health.<sup>113</sup> The claimants were mainly from a contributory system that covers workers of the formal sector, although they represent a small minority of the Colombians, who are instead overwhelmingly protected by a subsidized system. Although both groups of people should receive the same package of benefits (called POS) according to Colombian health law, in practice that has never happened, and the subsidised POS for the poor are inferior to those in the contributory system. Acknowledging that the current separate schemes of provision of POS disadvantages people with lower incomes, the Colombian Constitutional Court declared that income should not be a discriminatory factor in regard to access to a good so fundamental to the exercise of citizenship as health.<sup>114</sup> Moreover, it established that

[t]he progressive nature of a right does not justify standing still nor much less forgetting the mandate to unify beneficiary plans in order to avoid subjecting persons with low incomes to inferior constitutional protection, which is openly inadmissible in a social state of law.<sup>115</sup>

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<sup>111</sup> In the section regarding structural reparations, however, the use of equality clauses to extend the scope of beneficiaries of the judgment was not explicit.

<sup>112</sup> *ibid* s 5.2.

<sup>113</sup> Corte Constitucional de Colombia, T-60/2008).

<sup>114</sup> *ibid* s 4.4.3.

<sup>115</sup> *ibid* s 6.1.2.1.1.

Some scholars have claimed that social rights, especially when viewed from a minimum core approach, are compatible with radical forms of inequality, because their realisation does not entail a redistribution of resources from those that are well-off to those that are worst-off.<sup>116</sup> Nevertheless, as we have seen in this judgment, the right to equality and non-discrimination can be used to extend the protection of social rights beyond a ‘minimum core’, entailing a transformation or re-arrangement of the ways in which the objects of social rights are provided, or a demand for equal treatment with ‘those within the state’s jurisdiction who enjoy the highest standards of economic and social rights’.<sup>117</sup>

In recent times, ADL has increasingly been used as a legal tool to analyse the discriminatory impacts of social spending cuts, and austerity or emergency measures adopted after economic crises. Here, anti-discrimination clauses act as a reactive defence, working akin to egalitarian guarantees of creditors during processes of bankruptcy: there is a public interest in protecting the way in which spending cuts are to be carried out, according to the principle of equality and non-discrimination.<sup>118</sup> For the former UN Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda, even in the absence of justiciable social rights, and

[b]efore implementing a budget cut or any other policy measure, States must comprehensively assess its social impact, including from an equality and gender perspective, and should only adopt policies that are compatible with their international human rights obligations, including their non-discrimination obligations.<sup>119</sup>

In the European context, social constitutionalism, in association with the principle of equality and non-discrimination, has been the basis of broader defences of the pillars of the welfare state.<sup>120</sup>

In Latin America, the scenario is markedly different, mainly because there are no robust universal social protections that need to be defended in times of crisis.<sup>121</sup> Nevertheless,

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<sup>116</sup> S Moyn, ‘Human Rights and the Age of Inequality’, in D Lettinga and L van Troost (eds) *Can Human Rights Bring Social Justice?* (Amnesty International 2015).

<sup>117</sup> Equal Rights Trust (n 94) IV.

<sup>118</sup> F Atria, *Derechos Sociales y Educación: un nuevo paradigma de lo público* (LOM 2014) 56-61 (explaining social rights as an alternative way to deal with scarcity).

<sup>119</sup> M Sepúlveda Carmona, ‘Alternatives to austerity: a human rights framework for economic recovery’, in Nolan (n 108).

<sup>120</sup> C O’Cinneide, ‘European Social Constitutionalism’ (2017) <<https://ssrn.com/abstract=2921173>> accessed 20 May 2017.

<sup>121</sup> L Lavinas, ‘Latin America: Anti-Poverty Schemes Instead of Social Protection’ (2015) 7 *Contemporary Readings in Law and Social Justice* 112.

periodic economic crises and the present ending phase of the ‘golden decade’, characterised by high prices of commodities, endanger the precarious social benefits that allow countries to keep people out of the crudest poverty. The Argentinian economic crisis of 2001-2002 represents a good case study to inquire into the relationship between courts, social rights and social protection.<sup>122</sup> After several millions were pushed below the poverty line, Argentinian courts around the country had to deal with legal claims from numerous middle class individuals that were under economic distress regarding their health provisions or social security, or some of the most acute forms of poverty or deprivation, related to basic guarantees of adequate nutrition and housing/shelter. Although Argentinian constitutional law has protected social rights for a long time, ADL has played an important supporting role. In several cases regarding the widespread social consequences of the economic crisis, equality and non-discrimination clauses were used by the courts in order to bring a socio-economic dimension to individual claims requesting that the state provide adequate resources for the provision of social benefits. In an individual case on the right to housing raised by a homeless mother and her disabled son against the City of Buenos Aires, equality and non-discrimination was brought to the fore in order to challenge the lack of adequate institutional arrangements and rules for priorities in the administrative decrees that dealt with emergency housing subsidies.<sup>123</sup>

The Colombian Constitutional Court offers another interesting way of addressing budgetary restrictions that could impact disproportionately on lower-income earners. According to this Court, the principle of the social state of law should be read in the light of the right to equality (art 13), with a special consideration of those who are in most need. In that regard, it upheld a budget law (2002) that included a measure that capped only the increase in salaries of middle and higher income public officers, and did not affect lower income officers.<sup>124</sup> The social state of law, considered as ‘a complex principle of institutional design’, allows the government, when faced with budgetary restrictions, to articulate different salary increases without affecting those who are in danger of falling below the ‘minimum core’.<sup>125</sup>

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<sup>122</sup> E Nino and G Maurino, ‘Economic and Social Rights and the Supreme Court of Argentina’, in A Nolan (n 108).

<sup>123</sup> Corte Suprema de Justicia de la Nación (Argentina), *Q. C., S. Y. c/ Gobierno de la Ciudad de Buenos Aires s/ amparo* (2014).

<sup>124</sup> Corte Constitucional de Colombia, C-1064/2001.

<sup>125</sup> Landau (n 108) 272.



Overall, in all of these cases where ADL has addressed complex budgetary restrictions or situations of economic crisis, the recognition that harms grounded in the economic sphere may have detrimental effects on those who may have less power to redress their situation, or that may result in vicious circles such as the ‘poverty trap’, becomes crucial. The interimbrication between the spheres of the economy and culture does not seem to be explicit in the reasoning of these examples, which are grounded mainly on the principles of human dignity, solidarity or the social state of law. However, the fact that the human consequences of economic harms constitute an important part of the decision-making processes suggests that the interimbrication between the economy and culture plays an important role in the motivation of adjudicators. They all start from the basic fact that in difficult economic times, countries need basic social solidarity schemes to prevent the emergence of cultural discourses that segregate citizens according to their income, threaten social cohesion, or blame the victims for their lack of adaptability to these new harsh conditions.

#### **8.4.3.2 ADL and Poverty**

Finally, specifically on the issue of poverty, the anti-discrimination laws of the region have been relevant to highlight aspects related to social exclusion, marginalisation and vulnerability, which let us dig more deeply into the legal articulation of the concept of interimbrication.<sup>126</sup> Challenging the dominant idea that equality laws are of use mainly for those who are part of the ‘traditional working class’, Latin American ADL has been keen to address pressing social issues affecting a ‘disorganized underclass’ that is generally ‘unstably employed in unskilled, dead-end, and temporary jobs’, and more importantly ‘least able to enlist the legal and rhetorical strategies of antidiscrimination in its own defense’.<sup>127</sup> In general, ADL addresses poverty in four fundamental ways: first, by incorporating ‘poverty’ (or other related indicator or proxy) as a ground of protection;<sup>128</sup> second, by bridging the gap between universal and means-tested policies, incorporating the latter into comprehensive social protection frameworks;<sup>129</sup> third, by drawing links between poverty and other protected grounds through indirect

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<sup>126</sup> For Sandra Fredman, the interconnection between equality laws and poverty allows us not only to make a ‘valuable contribution to aspects of poverty based on mis-recognition and social and political exclusion’, but also to ‘address distributive inequalities in its own right’. (n 55) 588.

<sup>127</sup> R Mangabeira Unger, *What Should Legal Analysis Become?* (Verso 1996) 91; in Latin America, we could add, not even the ‘traditional working class’ has a proper access to justice.

<sup>128</sup> Fredman (n 55).

<sup>129</sup> M Sepulveda Carmona, ‘The rights-based approach to social protection in Latin America’ (ECLAC 2014) 20-2.

discrimination or intersectionality;<sup>130</sup> and, finally, by crafting positive duties that pay due regard to socio-economic disadvantages, with a special concern for those who are most in need.<sup>131</sup> Here, I will address what are probably the clearest instances of the socio-economic lens of ADL in Latin America, where ‘poverty’, ‘social condition’, ‘income’ or ‘social origin’ are considered protected grounds by legal decision-makers, acknowledging the misrecognition effects of harms derived mainly from the economic sphere. The role of legal decision-makers connecting poverty with ADL does not consist in enforcing a target of income included in statutory law, such as the Child Poverty Act of the UK (2015).<sup>132</sup> In contrast, it entails addressing poverty from an integral perspective, including both an objective element, comprising ‘economic rank, or social standing based on factors such as income, occupation or level of education’, and a subjective one, which involves ‘the value attributed to an individual based on social perceptions or stereotypes associated with [objective] factors’.<sup>133</sup>

In Latin America, ADL has been used to challenge the lack of access to ‘basic’ services on the grounds of ‘poverty’, ‘social condition’ or ‘economic situation’. Specifically, it has been raised to enforce compliance with state duties to warrant equality of access to these services, and address structural problems in the functioning of markets in Latin America (market access). However, equality laws have also been used to challenge the stereotyping effects of anti-poverty policies, in an attempt to break the continuities between distributive problems (a lack of sufficient material resources) and status inequalities (class misrecognition). Additionally, they have been used to extend the scope of social policies that were originally crafted as means-tested (eg, conditional cash transfers) or emergency measures. Within this second dimension, ADL has been related to concerns that go beyond the mere expansion of market access, and are closer to transformative redistributive remedies that challenge the way in which market arrangements address poverty. Let us take a look at the practice of Latin American ADL.

The first group of cases concerns situations in which deprived urban areas were lacking access to basic services. The reason behind these anti-discrimination claims was to

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<sup>130</sup> Clericó and others (n 85).

<sup>131</sup> eg, Equality Act 2010 s 149

<sup>132</sup> D Barrett, ‘The importance of equality law and human rights in addressing socio-economic inequality’, in D Cuypers and J Vrielink (eds), *Equal is not Enough* (Intersentia 2016) 11.

<sup>133</sup> MacKay and Kim (n 5) 22. This definition of poverty has been endorsed by the IACHR. O Parra-Vera, ‘Derechos humanos y pobreza en el Sistema Interamericano’ (2012) 56 Revista IIDH 272, 281-8.

enforce compliance with market commitments, especially regarding services that were previously provided by state-owned enterprises, like water or telecommunications. A remarkable case was initiated by the INADI, and later decided by the quasi-adjudicatory powers of the Ombudsman of the City of Buenos Aires.<sup>134</sup> In this case, an old lady living in an economically deprived area of the city of Mar del Plata made a complaint against a telephone service provider because they had refused to install an Internet service, claiming that the area was considered a ‘risk zone’. The procedure was initiated before the INADI, and later a new complaint was triggered before the local ombudsman, which referred the case to the ombudsman of Buenos Aires. The resolution issued by the *Defensoría de Buenos Aires* integrated the reading of the prohibition of discrimination within the administrative regime of public services and the rights of users and consumers: even when dealing with ‘improper services’ (that is, those not directly provided by the state), the public regime is entrusted to guarantee the permanent, general and egalitarian provision of services that were once the exclusive domain of the state. Moreover, the resolution related the ground of ‘social position’ included in the ARGADL with the concept of ‘social category’, and then concluded that the company had arbitrarily distinguished and imposed a disadvantage upon the claimant.<sup>135</sup> Similar cases concern consumers and users’ associations using collective actions to address these problems from a structural point of view, specifically considering poverty and deprivation within an urban context.<sup>136</sup> Based on Article 75.23 of the Constitution of Argentina, which speaks of ‘positive action’ and ‘real equality of opportunity’, and gives examples of ‘vulnerable groups’, one of the Federal Courts concluded that ‘the role of the judiciary is to make a careful balance in the exercise of rights and protect the weakest’.<sup>137</sup> This line of reasoning was partially based on the harmful effects of a lack of access to telephone or Internet services, which diminishes the ‘market competitiveness’ of people living in areas considered as ‘risk zones’ and reproduces the conditions of poverty.<sup>138</sup>

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<sup>134</sup> Decision 26 (2013).

<sup>135</sup> A similar reasoning was reproduced in a case triggered by the *Defensor Nacional* and decided by the National Chamber for Civil and Commercial Appeals, *Rodriguez, Olga Liliana y otros con Telefónica De Argentina SA, S/Incidente De Medida Cautelar* (2015). This higher court remanded the case and ordered INADI to provide an overall assessment of the issue, which affected many people living in *Rivadavia*, one of the poorest neighbourhoods in Buenos Aires.

<sup>136</sup> A landmark collective action against *Transportes de Buenos Aires* constitutes an interesting example regarding the unequal conditions of train lanes depending on socioeconomic backgrounds: for middle-upper classes areas, the *Mitre* line provided amenities suitable for a trip like air conditioners, TV screens, and reasonable density during peak hours; for lower classes, the *Sarmiento* line did not have minimum safety conditions, had no windows, and was persistently overcrowded. Corte Suprema de Justicia de la Nación (Argentina), *Unión de Usuarios y Consumidores v Sec. Transporte*, 104/01 (2014).

<sup>137</sup> Federal Civil and Commercial Court (Argentina), n10 101 (2012) 2.b.

<sup>138</sup> *ibid.* 5.a.3; for other similar cases, see dossier 13787 (2006) of the same court.

In a Chilean case, a group of families living in slums (*pobladores*) in the metropolitan area applied for government subsidies to buy a piece of land where they could find a definitive solution to their housing problems. The last stage of this process required an authorisation from the local government (municipality), in charge of zoning plans, when a land transaction exceeds a certain amount of money. The administrative decision of the mayor and the local council was tainted by several press statements and opinions: pressured by people living in a newly developed private housing condo nearby, they claimed that they did not want to bring ‘drug-dealers or criminals’ close to their neighbourhoods. With the help of an NGO, the *pobladores* challenged the administrative decision on the basis that it was tainted with discriminatory motives on the grounds of their ‘socioeconomic situation’, a trait included in the recently created CHIADL (art 1.2). Although formally issued within the legal requirements of the Organic Law of Municipalities, the administrative decision was claimed to be discriminatory against the *pobladores* because of their socio-economic condition, and, in order to assess the way in which these decisions end up disadvantaging poor people, the judicial procedure has been forced to address broader problems of poverty in Santiago’s slums.<sup>139</sup> The remarkable feature of this case is that the right to housing is not recognised in the Chilean Constitution, and social rights are not justiciable under ordinary constitutional writs (writ of protection).<sup>140</sup> The final outcome of this case will shape the legal opportunity structure and potentially enhance the ability of the CHIADL to address the interimbrication between maldistribution and misrecognition.

Sociological studies on cultural processes of stigmatisation have been useful in understanding the interimbrication between economy and culture when applied to social movements emerging from people living in precarious social housing or slums.<sup>141</sup> Without an understanding of how socio-economic inequality is produced and reproduced at all levels of interaction, we will not be able to develop concrete remedies to address the problems of urban segregation. In the case of people living in slums, who are generally not incorporated into the formal economy (who have a minimum coverage for health and mostly live on social assistance), and who lack ‘traditional’ class consciousness (an

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<sup>139</sup> 2° Juzgado Civil Santiago (Chile), *Comité de Allegados La Isla / Ilustre Municipalidad de Maipu* (2016).

<sup>140</sup> J Couso and others, *Constitutional Law: Chile* (Kluwer 2011) 126-30.

<sup>141</sup> The literature on social mobilisation has struggled to give an account of housing movements. A Cortes, ‘El movimiento de pobladores chilenos y la población La Victoria: ejemplaridad, movimientos sociales y el derecho a la ciudad’ (2014) 40 EURE 239, 251-5.

understanding of themselves as a different class, as they are outside formal relations of production), how do we understand the interimbrication between economy and culture? At first, one may expect their situation to be addressed mainly through remedies of redistribution: as their lack of material resources derives from economic processes, affirmative and transformative remedies for redistribution could tackle the direct source of injustice. However, understanding cultural processes that impact on poverty suggests different alternatives, closer to transformative or affirmative remedies against misrecognition, or even transformative remedies of representation.<sup>142</sup> In the context of weak welfare regimes, with no universal social protection, these people may first opt to revalue their despised identities, the typical affirmative remedy against misrecognition. Beyond socio-psychological insights, which reveal individual or social strategies of resistance against discrimination by resorting to in-group reference, cultural sociology also ‘considers cultural repertoires (...), as well as the conditions that make it more likely that members of groups will draw on some rather than other strategies available in their cultural toolkits in formulating their responses’.<sup>143</sup> In Argentina, during the economic crisis of the early 2000s, social movements that included the most socio-economically deprived groups began to emerge as a resistance to the austerity measures.<sup>144</sup> Either called *piqueteros*, because of their distinctive method of social protest, or *villeros*, because of the informal settlements that emerged in urban areas, these movements started to identify themselves around socio-economic conditions like the lack of housing or access to basic income. Beyond that, these people found an identity in the shared experience of poverty, and the Argentinian Congress recognised this by establishing October 7th as the Day of the *Villero* Identity.<sup>145</sup> How are cultural processes that devalue certain individual or social identities (people living in slums) produced and reproduced at all levels of interaction (formal/informal)? How can we design legal strategies to redress the injustices they suffer? If we approach this phenomenon through the cultural processes that have a direct/indirect impact on their situation, we may provide a space for ADL to tackle the causal pathways that are operating in these situations.<sup>146</sup>

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<sup>142</sup> E Nino, ‘Some reflections on the election of representatives in the ghettos of Buenos Aires’ (SELA 2015, Yale University, Brazil, June 2015) (enhancing local political participation as a remedy for urban ghettos).

<sup>143</sup> M Lamont and N Mizrachi, ‘Ordinary People Doing Extraordinary Things: Responses to Stigmatization in Comparative Perspective’ (2012) 35 *Ethnic and Racial Studies* 365, 368.

<sup>144</sup> M Svampa, ‘Movimientos Sociales y Nuevo Escenario Regional. Las Inflexiones del Paradigma Liberal en América Latina’ in *Cambio de época. Movimientos Sociales y Poder Político* (Siglo XXI 2008).

<sup>145</sup> Law 27.095 (2014).

<sup>146</sup> Lamont and others (n 17).

Anti-discrimination legal provisions have also been used to challenge anti-poverty policies that are considered discriminatory either because of their stereotyping premises or effects, or because they do not function as decommodying devices, that is, they are not able to sustain the exercise of citizenship for people with little or almost no (formal) market participation. In these cases, the main point is to abandon the consideration of poverty as a purely economic issue (measured only with objective factors, such as income, illiteracy, educational qualifications, etc.), and bring forward multi-dimensional accounts that can trigger a structural discrimination approach to the issue.<sup>147</sup> Here, poverty is considered not as the violation of the content of a specific social or economic right (eg, ‘vital minimum’), or as an unlawful objective condition (eg, lack of certain income), but as an integral and complex problem that is difficult to grasp through legal categories.<sup>148</sup> Thus, the emphasis is placed neither on the unequal treatment of economically deprived people compared with other citizens nor on the reasons behind pro-poor policies, but on the social context surrounding a certain extended practice.<sup>149</sup> An illustrative case was decided by a first instance court of the Autonomous City of Buenos Aires, regarding the establishment of emergency measures to deal with the lack of school vacancies for inhabitants of *villas de emergencia* (emergency slums). In 2002, when the effects of the Argentinian economic crisis were at their peak, the Government of Buenos Aires started to set up ‘modular classrooms’ to deal with the lack of vacancies for children living in poverty. Although they were originally established as emergency measures, in 2005 there was still no institutional plan for replacement or reallocation of these children in the educational system. Those classrooms were popularly known as ‘container classrooms’ and associated with children that lived in *villas de emergencia/villas miseria* (slums of misery). The case started with a collective action triggered by an NGO, and was based on anti-discrimination provisions at different levels (both the Federal Constitution and the Constitution of the City of Buenos Aires). The government of Buenos Aires replied that these emergency measures were considered as positive actions in favour of economically deprived people, so they could not be considered as infringing fundamental rights. The final judgment concluded that the process should not be focused on analysing the government’s motives that justify the public policy, or on the administrative measure

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<sup>147</sup> Unlike the common protected grounds of ADL, which work according to a logic of duality (men/women; disabled/not disabled), ‘social condition’ brings into consideration a multi-dimensional approach. MacKay and Kim (n 5) 38.

<sup>148</sup> E Nino, ‘La Discriminación Menos Comentada’ in R Gargarella (ed), *La Constitución en 2020* (Siglo Veintiuno 2011).

<sup>149</sup> Parra-Vera (n 84). This is the reason why some jurisdictions prefer the ground ‘social condition’ over ‘poverty’: the later ‘may not sufficiently protect individuals based on complex socio-economic factors’. MacKay and N Kim (n 5) 38.

under scrutiny, but rather on the systemic discriminatory effects produced by the educational system and the broader context of urban segregation.<sup>150</sup> Furthermore, it ordered the government to provide a permanent solution, and stressed the importance of budget planning and long-term strategies in the ‘war’ against poverty, in order to pay due regard to the principle of equality and non-discrimination.<sup>151</sup>

These cases illustrate the contradictions of neoliberalism in Latin America, considered along Foucauldian lines, as ‘a specific and normative mode of reason’ that produces particular subjectivities in different idioms or instantiations.<sup>152</sup> The instantiations of neoliberalism in Latin America have peculiar dynamics, where harms and remedies for redistribution and recognition do not necessarily follow the patterns in the Global North.<sup>153</sup> Therefore, we need to have a broader picture of the particular interimbrication between culture and economy, the ways in which harms derived mainly from the capitalist system of production generates status misrecognition, and the spaces where neoliberal normativities move fluidly across different spheres, using struggles for recognition as catalysts for their project (the nonisomorphisms of class and status in particular idioms of neoliberalism). On the one hand, these cases illustrate how the promises of neoliberalism, that competition secures moral and social progress, pushing people to make entrepreneurs out of themselves, have failed in particular ways in Latin America:<sup>154</sup> in many of these cases, what was in play was precisely the access to the means that could allow those left behind to compete and thrive in market arrangements. Access to telephone, mobile phones, the Internet, electricity and transport is considered an invaluable asset on which economic production relies. ADL has been used to enforce the promises of market capitalism even in zones considered ‘too risky’ for private companies, expanding the realm of the market through the ‘force of law’, the paradigm of neoliberal legalities, where legal change is used for the project of re-making society and its subjects according

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<sup>150</sup> If equality tests entail a comparison, it is a very special kind of comparison, which entails analysing not only the context of the law or measure under scrutiny, but the place of the disadvantaged group in the broader social, political and legal fabric of our society.

<sup>151</sup> Administrative Court of the City of Buenos Aires, n11 (2006).

<sup>152</sup> W Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (Verso 2015) 48.

<sup>153</sup> Schild (n 87).

<sup>154</sup> Rather than affecting *homo oeconomicus*, who pursue their individual interests in the market realm, neoliberalism has reshaped labour as human capital: ‘every subject is rendered as entrepreneurial, no matter how small, impoverished, or without resources, and every aspect of human existence is produced as an entrepreneurial one’. Brown (n 152) 65. Paraphrasing one of the judgments analysed before: imagine if we deny people living in slums access to mobile phones, how are they going to receive a call for a job that might require them to present themselves immediately for a job interview? (n 137). Currently, the need for mobile phones is an important tool for our own capital appreciation, where (individual) human capital is better understood as ‘a portfolio of investments’ through social media, leisure time, consumption, etc.

to the principle of competition.<sup>155</sup> In this way, ADL could be used to enforce the promise of capitalist development, which, to put it in De Soto's terms, is to incorporate everyone, especially those living in slums in the big metropolis of Latin America, under the scope of formal markets.<sup>156</sup> However, and more importantly, these cases also suggest something deeper about neoliberal governmentality. Indeed, in several instances we witness ADL and its implicit promise to achieve a society of equals challenging a neoliberal way of addressing public problems. Increasingly, as subaltern counterpublics proliferate and provide spaces for reflecting on status misrecognition, we will see how ADL could become a potential avenue for beneficiaries themselves to challenge anti-poverty social policies. The combination of these struggles for recognition with broader coalitions based on struggles for redistribution have indeed been crucial in the development of innovative transformative remedies that challenge the way in which production is arranged. To see the role that ADL could have in these coalitions, we will have to wait for more interesting developments, for more case law bringing 'social condition' forward, deploying its ability to grasp people's real suffering due to discrimination.

## 8.5 Conclusions

This chapter has developed the way in which the socio-economic lens of ADL is unfolding in Latin America. Fraser's concept of interimbrication allows us to understand the ways in which the culture and the economy couple/uncouple to generate distinct types of harms. Fraser's insights seem to promise interesting avenues for ADL, previously characterised as an anti-misrecognition device, to act in combination with redistributive struggles, whether affirmative or transformative. Moreover, they seem to provide the basis for articulating an emancipatory role for ADL in an era where neoliberalism could easily collide with identity politics. However, when Fraser's framework is translated to Latin American particularities, it becomes somehow puzzled. In the most unequal region in the world, and with almost one in three Latin Americans living below the poverty threshold, the socio-economic lens will inevitably taint the practice of ADL in Latin America. Within this scenario, as we have seen, ADL constitutes a usual support in processes of legal mobilisation for social rights and plays a complex role within the 'war' against poverty. More importantly, part of the emergent practice of Latin American ADL

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<sup>155</sup> As Honor Brabazon puts it, 'neoliberalism should be understood as a particularly "juridical" phase of capitalism, in which it is understood (consciously or not) that capitalism should be structured by, and expanded through, the juridical relations of the legal form'. 'Introduction', in H Brabazon (ed), *Neoliberal Legality: Understanding the Role of Law in the neoliberal project* (Routledge 2017) 16.

<sup>156</sup> De Soto (n 70).



highlights the peculiar ways in which harms and remedies are linked to the above-mentioned interimbrication. All in all, a transformative approach to ADL is not ‘merely cultural’ but, rather, seeks to address how cultural processes are materially instantiated in the basic structures of societies, generating injustices linked to both maldistribution and malrecognition. Certainly, as stated by Bob Hepple, ADL will not be the main tool within the struggles of redistribution, but Latin America shows that its role will be more important than what sceptics claim.



## Chapter 9 The Political Axis of ADL

### 9.1 Introduction

Several theories have attempted to model the surface structure of anti-discrimination laws on the basis of tort law: a tort, attributed to another person or institution through a judicial procedure launched by an individual cause of action. Within this framework, ADL can be portrayed as entailing merely private conflicts. Even if there is a public interest in preventing harm, the broader political or social goals of ADL are not essential to give an account of this field of law, and constitute ancillary goals that we can decide to include within ADL through democratic means. For other theories, though, ADL should be restricted to the public realm, to the protection of political equality, a guarantee for the constitution of the political community, where we stand as equals. From this strict separation between the ‘private/social’ and the ‘political’, theories of ADL have emerged that narrow its scope to the political realm.

Between these theories, I draw on Nancy Fraser’s work to develop the political axis of ADL. This principle argues that ADL stands on a political axis, even if at times it appears to be concerned with non-fundamental choices (eg, different routes to my workplace), access to trivial goods (eg, a birthday cake), or with dealings that could be deemed private or merely social (eg, who I want to hire as an assistant). Moreover, as I have explained in a previous chapter, a broader constitutional conception of ADL has hollowed out accounts restricted to the relationship between citizens and the state or employment-based conceptions, posing questions that lie at the core of what constitutes us as a community.<sup>1</sup> In this chapter I argue that ADL, defined as an anti-misrecognition device, is connected with struggles for political voice or with the activation of political agency and, moreover, constitutes a crucial element for the protection of the special character of political communities.

In what way does ADL stand on a political axis? How can we claim this precisely in an era of ‘post-democracy’ or ‘de-democratisation’? First, I attempt to answer these questions by resorting to Fraser’s critique of the bourgeois conception of the public sphere and to her critical stance on the search for the political. Second, I will highlight the ways in which Latin American ADL has endorsed a political axis of ADL, even when dealing with issues not directly concerned with the political domain.

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<sup>1</sup> see 2.2.

## 9.2 Fraser's insights

### 9.2.1 A critical account of the bourgeois public sphere

Nancy Fraser is one of the most important critics of the conception of the public sphere developed by Jurgen Habermas.<sup>2</sup> Articulated first as a 'feminist and radical critique of the late welfare-state capitalist democracies', it has now been expanded to a critique of the political domain of justice in a Post-Westphalian world, something I will pursue briefly below.<sup>3</sup> Let us focus on the importance of the 'feminist and radical critique' of the public sphere for the development of the principle addressed in this chapter.

When the seminal work of Habermas was translated to English, Fraser was one of the first scholars to critically address the emancipatory potential of the theory of the public sphere. I have already noted the importance of this critical account for the principle of the group dimension, where ADL provides spaces of 'withdrawal and regroupment' for 'subaltern counterpublics', which are considered fundamental for the recognition struggles of social groups, claims that are nonetheless political in a sense I will clarify later. Here, I want to focus on the most fundamental critique of the 'bourgeois public sphere', which stresses that social equality is a necessary condition for political democracy, that private issues and concerns are sometimes political matters to be debated within the public sphere, and, more broadly, that '[t]he meaning and boundaries of publicity depend at every point on who has the power to draw the line between public and private'.<sup>4</sup> These critiques do not break with one of Habermas' main contributions to the theory of democracy, the so-called co-originality of private and public autonomy of citizens in a political community, but strengthen its ability to theorise the 'limits of actually existing democracies'.<sup>5</sup> When Habermas later developed his theory of law, he recognised that a critical account of the public sphere contributes to solving 'the paradoxical emergence of legitimacy out of legality', which must be 'explained by means

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<sup>2</sup> J Habermas, *The Structural Transformation of the Public Sphere* (Polity 1989). N Fraser, 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy', in C Calhoun (ed), *Habermas and the Public Sphere* (MIT Press 1992).

<sup>3</sup> S Benhabib, 'Feminist Theory and Hannah Arendt's concept of Public Space' (1993) 6 *History of the Human Sciences* 97, 109; N Fraser, 'Transnationalizing the Public Sphere: On the Legitimacy and Efficacy of Public Opinion in a Post-Westphalian World' (2007) 24 *Theory, Culture and Society* 7.

<sup>4</sup> N Fraser, 'Sex, Lies, and the Public Sphere: Reflections on the Confirmation of Clarence Thomas', in J Landes (ed), *Feminism, the Public and the Private* (OUP 1998) 314.

<sup>5</sup> Fraser (n 2) 111.

of the rights that secure for citizens the exercise of their political autonomy.’<sup>6</sup> The Habermasian reconciliation between liberalism and republicanism, between private and public autonomy, or between human rights and popular sovereignty, depends on a system of rights that ‘states precisely the conditions under which the forms of communication necessary for the genesis of legitimate law can be legally institutionalized’.<sup>7</sup> Among these rights, we reserve a special place (‘a privileged position’ for Habermas) for the right to equality and non-discrimination, which could be considered a ‘communicative and participatory right’ that is ‘constitutive for democratic opinion and will-formation’.<sup>8</sup> In what follows, I will explain Fraser’s critiques, and articulate the potential insight for the political axis of a transformative approach to ADL.

The bourgeois conception of the public sphere demanded bracketing our inequalities in terms of status, so the ‘theatre for debating and deliberating’ required us to act as if we were ‘social and economic peers’.<sup>9</sup> Moreover, this sphere of interaction dealt with matters of common concern, so private interests were left behind a theatre that was not for ‘buying and selling’, but for us as private persons for discussing and deliberating on what matters to everyone.<sup>10</sup> To this conception of the public sphere, which is supposed to contribute a normative and critical stance to the theory of contemporary democracies, Fraser applies a revisionist historiography that shakes its main assumptions.<sup>11</sup> Her principle of participatory parity, when applied to the classical examples of the bourgeois conception of the public sphere in the nineteenth century, highlights the impossibility of bracketing economic or status inequalities.<sup>12</sup> Thus, informal impediments to participatory parity, like dominant modes of discourse, usually disadvantage those who are socially deviant, those who are not used to training themselves in these (discursive) skills, or that simply lack the time to rehearse their script for the theatre of the public sphere.<sup>13</sup> In our times, we still

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<sup>6</sup> J Habermas, *Between Facts and Norms* (Polity Press 1996) 83.

<sup>7</sup> *ibid* 104.

<sup>8</sup> *ibid* 264.

<sup>9</sup> Fraser (n 2) 111, 118.

<sup>10</sup> *ibid* 111.

<sup>11</sup> Fraser has been criticised for not using an ideal theory that could eschew the particular experience of ‘Western modernity in general, and the fate of liberal-capitalist welfare states in the latter part of the 20<sup>th</sup> century in particular’. K Hutchings, ‘Whose History? Whose Justice?’ (2007) 24 *Theory, Culture and Society* 59, 62.

<sup>12</sup> Fraser (n 2) 118-121; J Landes, *Women and the Public Sphere in the Age of the French Revolution* (Cornell University Press 1989).

<sup>13</sup> Even the linguistic turn, which for critical legal studies emphasised the power of discourse as knowledge, ends up disadvantaging women, as Robin West pointed out: ‘So long as silence rather than discourse remains the primary product of modern patriarchy (...), the social theorist’s focus on discourse and speech is an entirely misguided entry into the study of women’s lives’. ‘Feminism, Critical Social Theory and Law’ (1989) 1 *University of Chicago Legal Forum* 59, 66.

face pressures to constitute public spheres as ‘spaces of zero degree culture’, where those who can easily dispose of their ‘culture’, or those who think that culture is something that constitutes the identity of those who are disadvantaged, but not of the privileged, can easily adapt and manage processes of discursive assimilation.<sup>14</sup> Moreover, Fraser’s contribution to the radical potential of the public sphere depends on an issue that I have already addressed, that is, the challenge to the appropriate boundaries of what is private, of what pertains to individual interests, and therefore is not a matter of discussion within public spheres.<sup>15</sup> Even progressive conceptions of the public sphere, like republican accounts of deliberative democracy, tend to assume that private, domestic and sexual issues are at most ‘prepolitical starting points of deliberation, to be transformed and transcended in the course of debate’, for what matters is the public spirit, the single collective subject that we will constitute within deliberation processes.<sup>16</sup> For Fraser, instead, ‘[o]nly participants themselves can decide what is and what is not of common concern to them’, because ‘there are no naturally given, a priori boundaries here’.<sup>17</sup>

For the discourse theory of democracy, where deliberative politics comprises regulated democratic procedures and ‘informal processes of opinion-formation in the public sphere’, the need for an ‘anarchic’ public sphere, which resists organisation as a whole, and provides spaces of ‘unrestricted communication’, constitutes a crucial source of legitimacy in complex societies.<sup>18</sup> However, this ‘anarchic structure’, according to Habermas (in an implicit wink to Fraser’s critique), suggests that the ‘general public sphere is (...) more vulnerable to the repressive and exclusionary effects of unequally distributed social power, structural violence, and systematically distorted communication than are the institutionalized public spheres of parliamentary bodies’.<sup>19</sup> Where and how does ADL enter into this picture, which is drawn by Habermas and Fraser as a sketch of contemporary and complex democracies, where ‘weak publics’ influence and, at times,

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<sup>14</sup> Fraser (n 2) 126. For a critical account of the distinction between those who have ‘moral values’ and those who are allegedly ‘determined by their traditional culture’, see Anne Phillips, *Gender and Culture* (Polity Press 2010) ch4.

<sup>15</sup> see 6.2; ch7.

<sup>16</sup> Fraser (n 2) 129-130. As Habermas, Fraser is critical of republican theories of democracy that ‘view the citizenry as a collective actor that reflects the whole and acts for it’, where ‘the citizens’ practice of self-determination’ is ascribed to ‘a macro-social subject’. Habermas (n 6) 299.

<sup>17</sup> Fraser (n 2) 129. She gives the example of how domestic violence shifted from a purely domestic issue, to being bracketed in public discussions, to a matter of common concern, suitable for political contestation and debate.

<sup>18</sup> Habermas (n 6) 307.

<sup>19</sup> *ibid* 307-8.

constrain ‘strong publics’?<sup>20</sup> Furthermore, if the co-originality between private and public autonomy is to be honoured, how are we to understand ADL? If I characterise ADL as an anti-misrecognition device, how does it get interimbricated with the political domain?

### 9.2.1.1 Misrecognition and political voice

Misrecognition constitutes a pervasive harm with profound political impacts.<sup>21</sup> Indeed, the endorsement of recognitive justice by social movements has almost never meant leaving the political claims aside, but has been fundamentally an attempt to challenge the formal terms and conditions of citizenship. For example, the widespread literature on sexual citizenship breaks with exclusively state-centred conceptions, and directs our attention to ‘the multiple ways in which multiple forms of legal regulation intersect with other non-legal, non-state forms of governance’.<sup>22</sup> This has triggered an interest in substantive conceptions of citizenship, where issues that are traditionally concerned with social and cultural practices are brought into the public sphere, shifting our conception of citizenship towards processes of belonging, of membership and inclusion in a certain polity.<sup>23</sup>

Therefore, recognition not only requires us to grant access to the means of interpretation and communication that constitute cultural value patterns across several domains (eg, the house, the neighbourhood, the market), but indirectly allows us to challenge the arrangements that taint political institutions with social inequality. Struggles for recognition, when strained through the standard of participatory parity, are not only about revaluing despised identities, enhancing cultural diversity, or the wholesale transformation of societal patterns that shape our current identities, but also about ‘political voice’ or ‘political agency’.<sup>24</sup> For Anne Phillips, Fraser’s emphasis on

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<sup>20</sup> Strong publics have the power to discuss public issues and take binding decisions; weak publics discuss these issues, but have no power to directly influence the final decision. As explained by Bonham, ‘in a complex society, as Habermas asserts, “public opinion does not rule” but rather points administrative power in particular directions; (...) members of the public do not control social processes; qua members of a public, they may exercise influence through particular institutionalized mechanisms and channels of communication’. J Bonham, ‘Critical Theory’, *The Stanford Encyclopedia of Philosophy* (2005) <<https://plato.stanford.edu/entries/critical-theory/>> accessed 8 March 2015.

<sup>21</sup> A Phillips, *Which Equalities Matter?* (Polity Press 1999) 79-80 (‘Whether each has equal access to political influence (...) [is] just the tip of the iceberg. What really threatens the Titanic of liberal democracy is the profound lack of social recognition.’).

<sup>22</sup> B Cossman, *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging* (Stanford University Press 2007) 17; M Kaplan, *Sexual Justice: Democratic Citizenship and the Politics of Desire* (Routledge 1997).

<sup>23</sup> N Bamforth, ‘Sexuality and citizenship in contemporary constitutional argument’ (2012) 10 *International Journal of Constitutional Law* 477.

<sup>24</sup> A Phillips, ‘Recognition and the Struggle for Political Voice’, in B Hobson (ed), *Recognition Struggles and Social Movements* (CUP 2017).

individuals' participatory parity, in order to avoid the dangers of reification or separatism that infuse identity models of recognition, ended up diminishing the need for current political struggles to recognise a strong assertion of group agency.<sup>25</sup> Nevertheless, nothing in Fraser's work suggests that processes of identity formation have no connection with political voice or agency (either of individuals or of groups, as I explained previously), or that recognition struggles entail a demand for equal moral worth in cultural spheres with no impact on political domains.

As Fraser points out, '[o]f course, distribution and recognition are themselves political in the sense of being contested and power-laden; and they have usually been seen as requiring adjudication by the state'.<sup>26</sup> However, both recognition and redistribution are interimbricated with a third dimension of justice (representation), which establishes criteria of social belonging, and thus determines 'who counts as a member', specifying the reach of the other dimensions: 'it tells us who is included in, and who excluded, from the circle of those entitled to a just distribution and reciprocal recognition', and 'sets the procedures for staging and resolving contests in both the economic and the cultural dimensions: it tells us not only who can make claims for redistribution and recognition, but also how such claims are to be mooted and adjudicated'.<sup>27</sup> If both recognition and redistribution assume a Keynesian-Westphalian frame, current globalisation processes have prompted us to look at this third dimension of justice, where issues of membership and procedure are at the centre of the debate.<sup>28</sup> However, if representation is, in one way, 'a matter of social belonging', recognition and redistribution have been always interimbricated with political issues at the national/territorial level: '[j]ust as the ability to make claims for distribution and recognition depends on relations of representation, so the ability to exercise one's political voice depends on the relations of class and status'.<sup>29</sup>

#### **9.2.1.2 Social Equality in an era of 'de-democratisation'**

The right to equality and non-discrimination, both in the private and public spheres, then, is a necessary condition to achieve political equality. In the current state of declining democratic participation, however, we can imagine a society that lives without serious

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<sup>25</sup> *ibid* 272.

<sup>26</sup> Fraser, 'Reframing Justice in a Globalized World' (2005) 36 *New Left Review* 69, 74-5.

<sup>27</sup> *ibid* 75.

<sup>28</sup> If processes taking place in a borderless world are increasingly shaping our destinies, how can we draw the boundaries between the communities affected by phenomena such as climate change?

<sup>29</sup> Fraser (n 26) 75, 79.



problems of discrimination, where everyone relates to one another as social equals but with almost no common or shared interests other than maintaining basic respect in terms of access to recognition.<sup>30</sup> Hence, the question is whether ADL can do something to revive the culture, the spirit, the necessary desire to make democracy thrive, or whether it is concomitant to current de-democratisation waves. Several anti-discrimination projects have been criticised for their market-expanding thrust, highlighting the ‘politicisation’ of consumption or the workplace. However, this kind of politicisation promoted by ADL, according to its critics, is doing nothing but interfering with consumer sovereignty or freedom of contract, where ‘the costs of prejudice are shifted from the victim to whomever anti-discrimination law designates to be the distributive agent’.<sup>31</sup> In a perfect state of social equality, where everyone can present in the market as a ‘social equal’, we can imagine ADL being non-alienating, where ‘consumers are no longer in the position to avoid having to deal with persons whom they would have shunned otherwise’.<sup>32</sup>

Discrimination may be functional in certain capitalist systems – because it caters to the discriminatory ‘tastes’ of third parties, because it may be statistically efficient to discriminate, or simply because ‘preferences are endogenous to current laws and practices’, so ‘[o]nce those laws and practices are entrenched, there are special obstacles to bringing about change through market ordering’.<sup>33</sup> But it is not functional for ‘neoliberalism’, considered as a governing rationality that attempts to instil competition and (economic) inequality as virtues that should prevail in every social domain (education, health, environment, and even democracy itself), not only in economics. Hence, ideally, discrimination constitutes a wrong, as long as it prevents real cost-benefit analyses, growth or competitiveness.<sup>34</sup>

Moreover, this normative order of reason is ‘always mediated through law’: by adjudicating disputes about ‘the nature of the personal liberty and equality that basic constitutional protections enshrine’, the politicisation of market encounters is put at the

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<sup>30</sup> I am thinking about a thin conception of democracy, such as one grounded in Ian Carter’s empirical range property of ‘opacity respect’. ‘Respect and the Basis of Equality’ (2011) 121 *Ethics* 538, 559-60.

<sup>31</sup> A Somek, *Engineering Equality: An Essay on European Anti-Discrimination Law* (OUP 2011) 137.

<sup>32</sup> *ibid.*

<sup>33</sup> C Sunstein, ‘Why Markets Don’t Stop Discrimination’ (1989) 8 *Social Philosophy & Policy* 22, 31.

<sup>34</sup> W Brown, *Undoing the Demos: Neoliberalism’s Stealth Revolution* (Verso 2015) 25.

service of capitalist accumulation.<sup>35</sup> In this way, ADL steers the not-so-taken-for-granted spontaneity of the social order, to put it in Hayekian terms. Thus, instead of leaving the market to reign freely and waiting for market agents to realise that discrimination is not economically efficient, at least when one wants to participate, survive and increase market share, ADL is placed at the service not merely of market-correction, but of market expansion.<sup>36</sup> In this sense, it runs against Richard Epstein's dream of no regulation of the prohibition of discrimination whatsoever: governments are required to eliminate discrimination to enhance market virtues.<sup>37</sup>

At this point, we can start to imagine 'progressive' workplaces, without any cultural hierarchies, full of Muslims, Christians and Atheists, straights, lesbians, and queers, with no dress-codes at all, and where the different slangs or ways of speaking English are considered as assets for companies, but with no unions, and no spaces for political contestation.<sup>38</sup> The question is, then, can we imagine a society where no-one is discriminated against, in the sense of being culturally misrecognised, but where there is little interest in political democracy? How can we understand the simultaneous rise of anti-discrimination protections and the decline of political participation? Is ADL merely the progressive face of neoliberalism, delaying the emergence of the 'political contradictions of financialized capitalism', which would reveal how neoliberalism is undoing the demos?<sup>39</sup> The challenge, at this point, is to pose a normative limit to ADL, capable of protecting the special character of the political community and, thus, preventing the impoverishment of public life.<sup>40</sup> Nancy Fraser's project of radical democracy would be incomplete if it were restricted to a critique of liberal legality and did not attempt to protect the special character of the political.

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<sup>35</sup> D Singh and J Purdy, 'Introduction: Law and Neoliberalism' (2014) 77 *Law and Contemporary Problems* 1, 9; H Brabazon, 'Introduction', in *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge 2017).

<sup>36</sup> That is why discrimination cases usually target small businesses, like bed and breakfasts, bakeries or photography companies, who are most likely to ignore the efficiency costs of their discriminatory practices.

<sup>37</sup> R Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Harvard University Press 1995).

<sup>38</sup> People would not need to 'enclose in their own hearts', or stay at home waiting for the government to provide the basics, but could go outside (to the market!) and give a free reign to what their hearts command. The threats posed by the kind of individualism and prevalence of instrumental reason posed by Charles Taylor at the beginning of the 1990s are no longer the same. *The Ethics of Authenticity* (Harvard University Press 1991) 9.

<sup>39</sup> While 'legitimate, efficacious public power is a condition of possibility of sustained capital accumulation', 'capitalism's drive to endless accumulation tends to destabilize the very public power on which it relies'. N Fraser, 'Legitimation Crisis? On the Political Contradictions of Financialized Capitalism' (2015) 2 *Critical Historical Studies* 157, 159; Brown (n 34) 17.

<sup>40</sup> The normative limit entails being critically aware of the potential dangers of expanding the scope of ADL without considering redistribution and representation.

### 9.2.2 ADL and Political Communities

In this section, I draw on some of Fraser's works to challenge the dystopian possibility of full social equality in an era of 'de-democratization'.<sup>41</sup> Specifically, I develop an insight into the somehow inevitable political axis of ADL and its role in triggering political agency, while preserving the special character of the political community, or what Arendt deems as the special character of the 'public space', where 'men act together in concert', and where 'freedom can appear'.<sup>42</sup> What is this 'special character of the political' that ADL might contribute to enhancing and protecting?

#### 9.2.2.1 The search for the political

For Fernando Atria, the search for the political implies the recognition of the other as an equal, an enquiry that commits us to the relationship between truth and politics in a way that is usually avoided by dominant political theories.<sup>43</sup> For the latter, either we locate the standard of justice outside any political possibility, so that what we decide politically might be unjust, or we locate it within our political procedures, so that what is morally just is what we decide politically.<sup>44</sup> Nevertheless, if the political reserves a 'constitutive' function for truth, considered as a basic assumption of our political practices, a kind of truth that is different from 'appellative' instances of truth in politics (eg, when faith is used as a way to end political dialogues), then it is possible to understand the special character of the political as the sphere where we can resort to the reasons for our beliefs, reasons that could be common to all of the interlocutors. The constitutive function of truth, objectivity or validity seems to play a special role in defining the political, because our way of approaching these issues shapes our political practices in a particular way. As truth is never revealed directly, but only through the propositions of other interlocutors, it plays a particular role in political practices that rely on the basic assumption that everyone has an equal claim to truth, correction or validity. Therefore, 'what is said to be truth or objective are linguistic propositions, and language assumes community', so the political is the space that emerges when we reciprocally recognise each other as agents in

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<sup>41</sup> W Brown, 'American Nightmare: Neo-liberalism, Neoconservatism, and De-Democratization' (2006) 34 Political Theory 690.

<sup>42</sup> Benhabib (n 3) 102.

<sup>43</sup> F Atria, *La Forma del Derecho* (Marcial Pons 2017) ch17.

<sup>44</sup> *ibid* 364-6.

regard to what is correct, valid or true.<sup>45</sup> To honour this reciprocal recognition, which is the basic assumption of the search for the political being, an ethics of authenticity appears on the horizon of social interactions of all kinds.<sup>46</sup> Indeed, to acknowledge the possibility that everyone is an equal agent in the search for validity, we would want to enhance an ethics of authenticity that eschews pressures for conversion, passing or covering, a commitment to human flourishing that grounds radically political lives.<sup>47</sup> According to this portrait of the quest for the political, is there any role that ADL can play? To start to address this question, let us focus on Hannah Arendt's popular critiques of the role of ADL.

For Arendt, the 'rise of the social' meant bringing 'bodily functions' (like those of women) and 'material concerns' (like the needs of the poor) into the public sphere, which ended up occluding the 'political' with the 'social'.<sup>48</sup> She was explicitly against understanding ADL as a programme for challenging fundamentally private decisions, where discrimination is the norm, in contrast to political decisions, where equality should prevail.<sup>49</sup> Within this Arendtian framework, we can understand current accusations of ADL as bringing private and social concerns into the public space, as matters open for political contestation. Understanding ADL as a programme of private law, that is, to be applied horizontally between citizens, 'threatens the variety of individual shapes, styles and forms of life', disposing with

pluralism in which the most diverse human preferences or reservations, and sympathies or antipathies, especially their desire for closeness or distance, for sociability or solitude, can develop peacefully and to the fullest extent, because precisely such a pluralism balances these opposites as in a market.<sup>50</sup>

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<sup>45</sup> *ibid* 377.

<sup>46</sup> However, this 'ethics of authenticity' should not be based on the notion of self-fulfilment advanced by post-modernism or relativism, which defended impartiality, state neutrality and the equal treatment of all citizens' preferences. Taylor (n 38) 13-23. On the contrary, the moral force of the idea of being true to oneself seems to play a renovated role in the account of the political argued by authors such as Fernando Atria.

<sup>47</sup> K Yoshino, *Covering: The Hidden Assault On Our Civil Rights* (Random House 2006) 21-2. For gay men, conversion meant changing their sexual orientation (therapy); passing - ignoring their true sexual orientation and acting as if nothing had happened ('don't ask, don't tell'); covering entails a more complex form of assimilation, and consists of toning down 'a disfavored identity to fit in the mainstream', such as acting straight (ix).

<sup>48</sup> Arendt, *The Human Condition* (University of Chicago Press 1958) pt II.

<sup>49</sup> In the private realm, 'uniqueness' is the norm. H Arendt, 'Reflections on Little Rock' (1959) 6 *Dissent* 45.

<sup>50</sup> E Picker, 'Anti-discrimination as a Program of Private Law?' (2003) 4 *German Law Journal* 771, 774.

This quote, included in a critique against the implementation of the EU Equality Directives in Germany, resembles Arendt's critique of civil rights litigation that sought to enforce desegregation in schools, and thus to eliminate plurality, for her, the condition of all political life: 'without discrimination of some sort, society would simply cease to exist and very important possibilities of free association and group formation would disappear'.<sup>51</sup> In contemporary politics, there is an allegedly 'inviolable premise of functional differentiation' that reinterprets Arendt in order to argue in favour of spontaneous orders (both in the market and in social spheres), which thwarts any intervention in an extraneous sphere, each with its own 'logic', preventing 'injustices that appear in one sphere from spilling over into another'.<sup>52</sup> For Fraser, instead, a multi-dimensional theory of justice, which in the current conditions is turning increasingly towards 'boundary struggles' - struggles 'over the boundaries delimiting "economy" from "society", "production from reproduction", and "work" from family'-,<sup>53</sup> promotes 'the kinds of links and overlaps that make public life and social justice meaningful', for example, 'in allowing the *political* pursuit of *economic* objectives possible in the name of *social* goals'.<sup>54</sup>

#### 9.2.2.2 'The personal is political'

A good way to explore the issues presented before is to explore what Nancy Fraser's conception of this second wave feminist motto would be.<sup>55</sup> Actually, the concept of participatory parity, which is extended to the access to the means of interpretation and communication even in domestic spheres, has obvious political subtexts, as exemplified by the slogan of 'democracy in the country, in the household, and in bed'.<sup>56</sup> The struggle 'to redistribute and democratize the access to and control over the means of interpretation

<sup>51</sup> Arendt (n 49) 51.

<sup>52</sup> On the Right, the paradigmatic example is the inner logic of the market's spontaneity; on the Left, the example is articulated by the idea of 'spheres of justice'. E Christodoulidis, 'De-Politicising Poverty: Arendt in South Africa' (2011) 22 Stellenbosch Law Review 501, 518.

<sup>53</sup> N Fraser, 'Contradictions of Capital and Care' (2016) 100 New Left Review 99, 103.

<sup>54</sup> Christodoulidis (n 52) 518. He erroneously considers Fraser's work as aligning with the Right, understanding it as an ontological or functional differentiation of spheres. On the contrary, Sandra Liebenberg has correctly applied Fraser's 'perspectival pluralism' to social rights struggles: although judicialisation exhibits 'depoliticizing tendencies', it can 'also serve to enhance participatory politics'. 'Needs, rights and transformation: The adjudication of social rights in South Africa', in T Lovell (ed), *(Mis)Recognition, Social Inequality and Social Justice: Nancy Fraser and Pierre Bourdieu* (Routledge 2007) 187.

<sup>55</sup> C Hanisch, 'The Personal Is Political' (January 2006) <<http://www.carolhanisch.org/CHwritings/PIP.html>> accessed 15 March 2016. 'Political', here, not as electoral politics, but referring broadly to power relationships.

<sup>56</sup> Attributed to Julieta Kirkwood and Margarita Pisano.

and communication', is, indeed, a struggle 'for women's autonomy: a measure of collective control over the means of interpretation and communication sufficient to permit us to participate on a par with men in all types of social interaction, including deliberation and decision-making'.<sup>57</sup> To be able to speak in one's voice, or even bring silences, to bring bodies to face-to-face discussions, or to lodge/dislodge from cultural relative standing in order to appear in the public realm, are all matters that Fraser attempted to address with the standard of participatory parity.

Nevertheless, the standard of participatory parity, as derived from a radical democratic interpretation of the liberal principle of equal moral worth, does not mean that everything is political, that everything is already a matter of common concern. Here, Fraser coincides with Habermas's position on the grounding of the constitutional right to privacy (private autonomy), where '[l]egally granted liberties entitle one to *drop out* of communicative action, to refuse illocutionary obligations; they ground a privacy freed from the burden of reciprocally acknowledged and mutually expected communicative freedoms'.<sup>58</sup> It is precisely her respect for the co-originality of private and public autonomy that allows us to understand the character of the political axis of ADL: it is for individuals to decide whether to go public (or, to the public realm) with their mixed/multiple - whether chosen or not - identities, and that is protected by a right to equality and non-discrimination, tackling pressures of assimilation (or, as we have seen, covering). Some feminist theories emphasise the need for women to bring their sexuality into the public sphere, breaking the traditional private/public divide, but they nonetheless argue that the 'sexual citizen' is a 'hybrid being', who has multiple civic identities, and it is for them to decide how to transit from their private to the public sphere.<sup>59</sup> In this sense, the political axis of ADL can be coupled either with the right to privacy, protecting the transition from private to public spheres;<sup>60</sup> or, on the other hand, with the right to fundamental freedoms in the public sphere, such as access to fundamental institutions like marriage.<sup>61</sup> On this account, for example, sexual citizenship 'articulates sexuality in the public sphere through claims for rights and participation, while also cultivating (and claiming a right to) separate spaces for subcultural life.'<sup>62</sup> From this Fraserian approach, we get close to freedom-based

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<sup>57</sup> N Fraser, 'What's Critical About Critical Theory?', in *Fortunes of Feminism* (Verso 2015) 48.

<sup>58</sup> Habermas (n 6) 120.

<sup>59</sup> J Weeks, 'The Sexual Citizen' (1998) 15 *Theory, Culture & Society* 35.

<sup>60</sup> Morris Kaplan's account of sexual citizenship argues for the importance of intimacy for social and political equality (n 22).

<sup>61</sup> J Díez, *The Politics of Gay Marriage in Latin America* (CUP 2015) 43-7.

<sup>62</sup> C Stychin, *Governing Sexuality: the changing politics of citizenship and law reform* (Hart 2003) 17; quoted in Bamforth (n 23) 489.

accounts of ADL, where individuals are entitled to an equal set of deliberative freedoms, which insulates them from considering normatively extraneous traits as costs in their decisions, whether fundamental (like considering one's sexual orientation in regard to getting married) or trivial (like considering one's mobility impairments in regard to choosing public transportation).<sup>63</sup> In the end, it is for individuals to exercise and act upon their deliberative freedoms.

In this scenario, Fraser's approach protects the special character of the political community by providing a safe transition from private to public spheres in a particular way. As I said before, ADL politicises social relations, such as market transactions, but how do we understand ADL's broader objective of 'politicisation'? Even if anti-discrimination claims are frequently not overtly political, they stand on a political axis as soon as they emphasise that questions of relative cultural standing are different from mere market choices, challenging liberal theories of democracy.<sup>64</sup> In this way, ADL provides a safe transition from the private to the public realm, where individuals have deliberative freedoms to decide for themselves, and consequently act upon them, but at the same time posits an important challenge to projects pursuing social equality in an era of de-democratisation. Indeed, by stressing that market choices are fundamentally different from the freedoms associated with the development of our own identities, even if the latter could result in trivial decisions in the market realm, ADL accommodates the roots of resistance against de-democratisation pressures.<sup>65</sup> Even if ADL seems at times to be concerned with trivial domestic or market decisions, it hosts the seeds of democratisation processes that emphasise the need for citizens to consider their identities not just as pre-political starting points of deliberation or negotiation (or, worst, mere aggregation), but as potential issues for political debate, as issues of common concern to be discussed in

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<sup>63</sup> S Moreau, 'What is Discrimination?' (2010) 38 *Philosophy & Public Affairs* 143.

<sup>64</sup> This is another point of contact between Fraser and Habermas. By emphasising that ADL does not protect mere preferences or pre-political liberties, where 'human rights all but impose themselves on our moral insight as something given, anchored in a fictive state of nature', but rather protects privately reflected and socially instantiated identities, the political axis honours the co-originality of private and public autonomy, or the mutual dependence between rights and popular sovereignty. Habermas (n 6) 301. In sum, issues of relative cultural standing are neither just limits on what politics can do, nor starting points or individual interests that should be aggregated within a collective decision-making process.

<sup>65</sup> My argument contrasts with the potential role that ADL could play in societies that observe advanced patterns of consumption, where 'sociation by consumption', the preferred mode of social integration, can accommodate the choices and identities we could associate with progressive readings of ADL (a queer theory of consumption?). Indeed, compared to more traditional modes of social integration (eg kinship), 'consumer choice appears more voluntary, resulting in social bonds that are less restrictive', and 'provides a mechanism that allows people to conceive an act of purchase (...) as an act of self-determination and self-presentation, one that sets the individual apart from social groups while uniting him or her with others'. For Wolfgang Streeck, these loose ties threaten the strong ties required for political communities to flourish. 'Citizens as Customers' (2012) 76 *New left Review* 27, 35.

the public sphere even if they are not directly associated with our discursive or justificatory capacities. If I have to consider my skin colour as a cost when deciding which shop to enter, what is the implication of that curtailed freedom for my standing as a political equal, as a citizen?<sup>66</sup> As has been repeatedly argued in the field of consumption discrimination, where the most frequent instances of discrimination are related with skin colour, bodily appearance, or visual traits, these cases are never only about discrimination against our status as consumers.<sup>67</sup> Understood as standing on a political axis, ADL also helps us to protect the special character of the political by preventing negative competition between groups. If what matters is justice as participatory parity, struggles for recognition are not about a certain amount of positive recognition for a despised group; they are mainly about addressing the lack of political agency or enhancing political voice.<sup>68</sup> In this way, the political axis of a transformative approach to ADL avoids the distinction between first- and second-class protected groups, challenging a ‘hierarchy of grounds’ that may depend on who the market considers as non-threatening, who mobilises more or the sympathies some groups could generate in decision-makers.<sup>69</sup>

At this point, then, we can ask where can we draw the boundaries between the political axis of ADL and the political sphere that Fraser considers as an analytically different dimension of justice? How can we understand that everything is somehow political without reducing ADL to the political order? In opposition to Rainer Forst, who argues that the political is the master dimension of social justice, and that power is the ‘hyper-good whose distribution determines that of all other goods’, Fraser claims that we should not fall prey to ‘politicism’, ‘the view that the social relations of representation determine

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<sup>66</sup> For Elizabeth Cohen, this connection was explicit in civil rights movements. *A Consumer's Republic: The Politics of Mass Consumption in Postwar America* (Knopf 2003).

<sup>67</sup> D Kennedy, ‘Consumer Discrimination: The Limitations of Federal Civil Rights Protection’ (2001) 66 *Missouri Law Journal* 275, 281.

<sup>68</sup> If the remedy is merely a certain amount of recognition for despised or marginalised identities, nothing prevents ADL from being co-opted by discourses of neoliberalism. If neoliberalism considers both corporations and citizens as human capital, -which ‘like all other capitals, are constrained by markets in both inputs and outputs to comport themselves in ways that will outperform the competition and to align themselves with good assessments about where those markets may be going’- then nothing prevents the co-optation of social struggles such as LGBT mobilisation (‘pinkwashing’). Brown (n 34) 177. If being homophobic threatens our market appreciation, markets could be seen as causes of progress. However, if market shares do indeed depreciate with commitments to the protection of other identities (eg indigenous), nothing prevents markets from instilling competition among groups, in order to cater for marketable preferences, and create a different ‘hierarchy of grounds’.

<sup>69</sup> P Neuvonen, “‘Inequality in equality’ in the European Union equality directives: A friend or foe of more systematized relationship between the protected grounds?’ (2015) 14 *International Journal of Discrimination and the Law* 222, 234.



those of distribution and recognition'.<sup>70</sup> As power asymmetries are everywhere, in every order, we should not restrict ourselves to struggles for representation, because it will not always be sufficient to overcome maldistribution or misrecognition. Moreover, instead of depicting 'persons as givers and receivers of justifications', Fraser's account of the political conception of the person portrays them 'as co-participants in an indeterminate multiplicity of social practices, which emerge and disappear in a historically open-ended process, [which] cannot be specified once and for all'.<sup>71</sup> In her view, 'persons are socially situated but potentially autonomous fellow actors, whose (equal) autonomy depends on their ability to interact with one another as peers-not only in political reasoning, but in all the major arenas and practices that constitute their form of life'.<sup>72</sup> In that sense, Fraser's conception of the political stands against radical democratic theories that rely on a philosophy of politics or a political ontology 'whose fundamental task is, in the first instance, to isolate and capture the very essence of political being'.<sup>73</sup> A critique is also targeted at liberal political theories, which assume 'that it is possible to organize a democratic form of political life on the basis of socio-economic and socio-sexual structures that generate systemic inequalities'.<sup>74</sup> Overall, Fraser's account of the political realm is not detached from its social conditions of possibility and from the everyday practices that sustain and renew those conditions, and so broadens her approach to issues of empowerment and participation that prevent individuals from being the agents of their own interests. Indeed, in contrast to theories of democracy that rely 'on abstract notions of political community and the nature of public reason, where individuals are assumed to be more or less equal and political participation is assured', Fraser embraces the challenge of what Olson calls the 'paradox of participation', that is, the problem of how to trigger participatory parity as the driver for social change when those most in need of it are not willing or interested in participating.<sup>75</sup> It is precisely here that ADL can again play a humble but not unimportant role: it may not be the cornerstone of resistance against de-democratisation pressures, but, as put by O'Cinneide, it helps 'to break down the barriers

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<sup>70</sup> N Fraser, 'Prioritizing Justice as Participatory Parity', in N Fraser and K Olson (eds), *Adding Insult to Injury: Nancy Fraser Debates her Critics* (Verso 2008) 342, 343; see also, in the same book, R Forst, 'First Things First Redistribution, Recognition and Justification'.

<sup>71</sup> Fraser (n 70) 344.

<sup>72</sup> *ibid.*

<sup>73</sup> L McNay, *The Misguided Search for the Political* (Polity Press 2014) 2.

<sup>74</sup> N Fraser, *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition* (Routledge 1997) 79.

<sup>75</sup> McNay (n 73) 38; 'The participatory ideal is thus circular. It depends on exactly the same processes it is designed to safeguard': 'equal political and cultural agency' K Olson, *Reflexive Democracy* (MIT Press 2006) 112.

to participation that prevent many marginalised social groups (...) from playing an active role in the shaping of their society'.<sup>76</sup>

ADL, then, is not mainly about the syntax of propositions raised in political domains, but is crafted to address power differentials in social relations. In this way, Fraser's approach enriches Fernando Atria's conception of the political, which assumes equal/reciprocal recognition of 'linguistic' agents.<sup>77</sup> In other words, ADL is not restricted to practices of justification, but applies to wider social practices/arenas of social interaction. Although ADL prepares individuals for political practices, it is not directed at the many different justificatory issues that usually arise in the context of political debates, such as the rules of justification, evidence or the need to discuss fundamental issues before deciding with binding authority. In that way, the multi-dimensional theory of social justice developed by Fraser is able to distinguish the political order, which creates problems of its own, from the socio-cultural order, but without ignoring the 'relations of mutual entwinement and reciprocal influence' between these dimensions.<sup>78</sup> These different orders are scrutinised by the principle of participatory parity, which is not a purely procedural standard, but also a substantive test to be applied against procedurally fair processes, which asks whether the outcomes of decisions 'will really enhance the fairness of future encounters by reducing disparities of participation'.<sup>79</sup> In that way, Fraser's stance against politicism considers justification as a principle requiring a threshold of acceptability for claims of justice that frequently ignores 'entrenched asymmetries of power between democratic interlocutors', which usually reside outside political arenas.<sup>80</sup> Even if the right and duty of justification, as advocated by Rainer Forst, represents an opportunity for marginalised groups (their 'day in Parliament'), we need to complement this approach by allowing 'oppressed subjects to explain their experiences in their own terms and thereby hopefully generate enhanced understanding of their normative stance as well as shedding light on connections and commonalities with the position of others'.<sup>81</sup> Within this

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<sup>76</sup> C O'Cinneide, 'Completing the picture: the complex relationship between EU anti-discrimination law and "Social Europe"', in N Contouris and M Freedland (eds), *Resocialising Europe in a Time of Crisis* (CUP 2013) 119.

<sup>77</sup> see 9.2.2.1.

<sup>78</sup> Fraser (n 26) 79.

<sup>79</sup> Fraser (n 70) 340. We can apply this perspective to argue against practices such as the 'burkini ban': by creating obstacles to Muslim women's access to public accommodation, we are preventing them from 'participating' in daily 'arenas' of social life, and thus curtailing their development as social equals, even if there is no justificatory skill at conflict.

<sup>80</sup> L McNay, 'The limits of justification: Critique, disclosure, and reflexivity' (2016) *European Journal of Political Theory* (forthcoming).

<sup>81</sup> *ibid.*

account, ADL should not demand that its victims transform their ‘experiences of disrespect and exclusion’ into ‘generally and reciprocally justifiable claims to legal, political or social inclusion’,<sup>82</sup> as claimed by Forst, but ‘demand a recalibration of the burden of the conversation about justice, so that it falls more heavily on privileged than vulnerable interlocutors’.<sup>83</sup> Shifting the burden of proof, or allowing judges to appreciate evidence within qualified approaches in favour of the victims, are devices that can help us to ‘politicize’ the embodied agencies of disadvantaged groups.<sup>84</sup> In this way, we can acknowledge that everyday discrimination, like consumption discrimination, compromises embodied agency, which is focused on the

negative experiences of subordination within hierarchical relations and the repercussions these have on the capacity of individuals to act as autonomous political agents. For many individuals, a consequence of the lived reality of oppression is that they may acquire a deep-seated dispositional reluctance to act as agents of their own interests.<sup>85</sup>

Therefore, everything, even the personal, is political in the sense that it shapes and determines our relative social standing in regard to participating as peers in social life, and not everything is political in the sense that addressing power asymmetries is not restricted to ‘the practice of demanding and receiving political justifications’, as argued by some theories of justice.<sup>86</sup> By politicising social relations, then, ADL not only promotes equal autonomy, but attempts to strike down barriers to participatory parity as impediments to full membership in society, and avoids the ‘*alienation from one one’s society and fellow actors*’.<sup>87</sup> For example, by tackling discrimination on the ground of visible traits, ADL brings into question ‘certain types of structural oppression [that] are rendered politically invisible by being internalized as corporeal dispositions’ and expressed as reluctance to participate as peers in social and political life.<sup>88</sup> In this way,

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<sup>82</sup> R Forst, ‘Justice, reason and critique: basic concepts of critical theory’, in D Rasmussen (ed), *The Handbook of Critical Theory* (Blackwell 1999), 157-8; quoted in McNay (n 80).

<sup>83</sup> McNay (n 80).

<sup>84</sup> Disempowered individuals have a kind of basic agency, because they survive and cope on a daily basis with places or shops they can visit, or public places they should avoid. What ADL helps to promote is a different kind of agency (‘second-order’), which is not restricted to the political order and points to the ‘capacity to autonomously shape or change an individual or collective way of life’. McNay (n 73) 37

<sup>85</sup> *ibid* 16.

<sup>86</sup> Fraser (n 70) 345. For Lois McNay, ‘[a]t best, the syntax of justification is what Nancy Fraser terms a “circuitous route” to dealing with unwarranted disparities of power between individuals that may be more effectively dealt with by a direct focus on the nature of the specific injustice in question’. (n 80).

<sup>87</sup> Fraser (n 70) 344.

<sup>88</sup> L McNay (n 73) 29. Although ADL usually arrives late, once these ‘corporeal dispositions’ have been articulated by a desire to complaint, the indirect or symbolic effects of certain cases have an impact on the disposition of third parties to engage in subsequent mobilisation.

from Fraser's approach, ADL gets immersed with the paradox of participation, and helps to 'envision a transition to more just social arrangements via political processes that occur by definition in unjust circumstances'.<sup>89</sup>

The political axis of ADL suggests that even if its case law seems to be concerned with a non-political dimension of participation, these are precisely the instances where political agency is activated. In the more serious cases, ADL engages with everyday interactions that are sometimes symptomatic of political marginalisation. Let us think of the Roma communities, which are almost politically invisible, the optimal case study for the paradox of enablement. Even in cases where social policies benefit members of the Roma population, they usually lack any voice in the design of those policies. One would think that giving them political presence, or what Olson calls the remedy of inclusion, would be the preferred remedy.<sup>90</sup> However, we could also think of instances of everyday discrimination and exclusion of the Roma population from shops, restaurants or other accommodation as addressed with the familiar devices of ADL: consumption or workplace discrimination, rather than bigger or more ambitious proposals for giving them political presence that are subject to paternalism. The political axis, then, suggests that to trigger political agency, ADL may be used as a tactical and strategic decision to ignite the capacities of the Roma population to be the agents of their own interests.

### **9.2.2.3 The character of political communities**

Overall, Fraser's interpretation of the statement 'the personal is political' provides an interesting opportunity for ADL, understood as compromising communicative rights that mediate between private and public spheres, to play a humble but not unimportant role in political struggles. By emphasising that personal choices are not the same as market choices, and by keeping the boundaries with the political realm, ADL contributes to the protection of the special character of the political community. In that way, it is difficult to keep sustaining the idea that ADL could work as a pure recognition device, an idea that has been accused of being complicit with current neo-liberal discourses that undo the demos. As Streeck puts it:

Political communities are republics that cannot by their very nature be turned into markets, or not without depriving them of some of their central qualities. Unlike the highly flexible communities of choice

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<sup>89</sup> Fraser (n 70) 340-1.

<sup>90</sup> K Olson, 'Participatory Parity and Democratic Justice', in Fraser and Olson (n 70) 251.

that emerge in societies governed by advanced patterns of consumption, political communities are basically communities of fate. (...) [T]hey ask their members not to insist on their separate individuality but to accept a collectively shared identity, integrating the former into the latter.<sup>91</sup>

Even if Streeck's definition of political communities is normatively too demanding and empirically untenable, insofar as it neglects the possibility of multiple and shifting loyalties within a polity, it articulates the fundamental political question for this chapter.<sup>92</sup> The question, then, is how to integrate separate individualities, which are nevertheless socially instantiated, into collectively shared identities, the basis of political communities. The features of political relations described by Streeck point towards the need to foster relations based on identities that are not akin to market preferences, and that constitute a pre-condition of sincere and authentic political dialogues. The political axis of ADL, then, will not make things easier, but will enhance a conception of deliberative democracy where '[d]ifferently situated actors create democratic publicity by acknowledging that they are together and that they must work together to try to solve collective problems'.<sup>93</sup>

Integrating separate individualities into collectively shared identities

may not bring about agreed-on solutions so much as reveal the structural conflicts of interest that would be obscured by discussion which successfully claimed that at bottom we have common interest. If in fact a society is structurally divided in this way, then deliberative processes ought to aim to reveal and confront such division, rather than exhort those who may have morally legitimate grievances to suppress them for the sake of some people's definition of a common good.<sup>94</sup>

By politicising interpersonal relations, ADL should be put at the service not of capitalist accumulation or neoliberal rationalities, but of a particular understanding of the barriers to participation that usually remain hidden in liberal or radical theories of democracy. Furthermore, as proposed by the discourse theory of democracy, ADL constitutes a crucial element of the system of rights included in contemporary constitutions, which 'ensure that collective identities can be formed which are not detached – like national

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<sup>91</sup> Streeck (n 65) 42 (emphasis is mine).

<sup>92</sup> Recently, Streeck's distinction between *Staatsvolk* (people of the state) and *Marktvolk* (the people of the market) has been accused of defending a return to an ethnic character of the state. A Tooze, 'A General Logic of Crisis' (2017) 39 LRB 3. Critical definitions provided by multicultural and cosmopolitan political theories would enrich Streeck's perspective. S Behnabib, *Another Cosmopolitanism* (OUP 2006).

<sup>93</sup> IM Young, *Inclusion and Democracy* (OUP 2000) 112.

<sup>94</sup> *ibid* 119.

identities- from the plural normative basis of the life-world'.<sup>95</sup> Complemented with a critical social theory, such as the one that Fraser develops, which addresses the 'paradox of participation' (or better, 'of enablement'), 'the public sphere can act once again as a radical-progressive force for social change, between economy and the state'.<sup>96</sup>

### 9.3 The political axis of Latin American ADL

The history of democracy is the history of the expansion of the scope of civil, political and social rights. In this way, as has been argued before in this work, the right to equality and non-discrimination is intimately connected with the political order. The overview of the history of ADL in Latin America described the processes by which waves of rights were granted to Latin Americans, a non-linear progress, which emerges from the application of T.H. Marshall's approach to different social realities.<sup>97</sup> Nowadays, with almost universal coverage of rights for all adults, citizenship studies in the region have shifted their focus towards the impact of these rights in the face of poverty, social and economic inequality, criminality and the (un)rule of law.<sup>98</sup> Within this framework, the study of the political axis of ADL should start from the interimbrication between the political and cultural spheres and address the most acute forms of misrepresentation or misrecognition. Regarding representation, we could point to the relationship between ADL and strong publics, or to the impact of discrimination on processes of democratic consolidation, two of the most important issues on the agenda of regional organisations and domestic publics.

For an empirical perspective, the connection between experiences of everyday discrimination in Latin America and the political attitudes held by the victims (eg, support for democracy or party systems, political trust, external political efficacy) is fragmentary and sometimes contradictory.<sup>99</sup> As Levitt puts it, it is not clear '[w]hat causal processes might link the experience of discrimination with changes in one's orientation toward one's political system'.<sup>100</sup> Therefore, it is quite difficult to enquire into whether legally tackling discrimination is positively associated with interpersonal trust between fellow

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<sup>95</sup> C Thornhill, *Political Theory in Modern Germany: an Introduction* (Polity Press 2000) 168.

<sup>96</sup> *ibid* 171.

<sup>97</sup> see 3.3.

<sup>98</sup> L Taylor and F Wilson, 'The Messiness of Everyday Life: Exploring Key Themes in Latin American Citizenship Studies' (2004) 23 *Bulletin of Latin American Research* 154, 156.

<sup>99</sup> B Levitt, 'Discrimination and the distrust of democratic institutions in Latin America' (2015) 3 *Politics, Groups, and Identities* 417, 419.

<sup>100</sup> *ibid*.

citizens, support for the institutions of representative democracy (courts, parties, the executive, congress, etc.), or general support for democracy. For some, redressing everyday discrimination in private or social settings is crucial, as it is what matters for measures of broader interpersonal and, hence, political trust;<sup>101</sup> for others, it is sufficient to prevent discrimination in the relations between citizens and public institutions, which is positively associated with political support for the institutions of representative democracy (eg, experiencing low levels of discrimination in dealings with local courts might enhance support for political institutions).<sup>102</sup> Although multiple dimensions shape political attitudes (economic inequality, level of development, corruption, etc.), what is clear is that discrimination across different domains (private, social or public settings) is negatively correlated with processes of democratisation. In this scenario, how are we to understand the interimbrication between the political and cultural dimensions in the practice of Latin American ADL? Although several legal venues in the region consider discrimination an issue of public interest, the interimbrication between the political and the cultural dimensions of discrimination is not always articulated. Acknowledging the puzzling questions posed by political scientists, in what follows, I will describe instances of Latin American ADL that highlight the political axis of ADL and its transformative potential, that is, the capacity to alter the terrain upon which futures struggles will be waged.

The most basic association between ADL and strong publics (political decision-makers) in Latin America has been triggered by the rapid enactment of gender quotas or indigenous/ethnic reservations for positions of political power. Indeed, almost every country in Latin America has some form of gender quota, and those countries with an important indigenous population have advanced positive actions regarding political representation at the local and national levels.<sup>103</sup> Alternatively, some countries have amended their electoral laws to improve representativeness and include marginalised groups. In Fraserian jargon, these cases represent either remedies for representation, with recognition subtexts ('no representation without recognition'), which attempt to correct the ordinary-political representation of disadvantaged groups in decision-making venues (eg, shifting to proportional systems that tend to improve gender representation), or affirmative remedies within struggles for recognition, with political subtexts ('no

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<sup>101</sup> Ronald Inglehart and others, *Human Beliefs and Values* (Siglo XXI 2004).

<sup>102</sup> K Cook and others, *Cooperation Without Trust?* (Russell Sage Foundation 2007).

<sup>103</sup> M Htun, *Inclusion without Representation in Latin America: Gender Quotas and Ethnic Reservations* (CUP 2016) 39-40.

recognition without representation’), which are represented by the formal enactment and proper implementation of gender quotas or ethnic reservations. Several of the legislative proposals for gender quotas have been scrutinised in judicial review processes and, in general, have been declared compatible with the constitutional right to equality and non-discrimination.<sup>104</sup> However, when ADL is closely connected with an expanded understanding of what political equality entails, we could instead resort to broader constitutional guarantees regarding electoral principles, or to devices crafted to protect the guarantee of political equality.<sup>105</sup> In other words, even if the source of injustice relies in cultural value patterns that infringe upon participatory parity (eg, the fact that political party meetings that decide the list of candidates take place in the evening is based on the assumption that women are not willing to undertake a political candidacy, or do not have the capacity to be available at all times to address party issues), the enactment of gender quotas or ethnic reservation represents a clear political remedy, in Fraser’s terms, an example of cross-redressing.<sup>106</sup> This is exemplified by the introduction of gender quotas in electoral laws, or in the chapters of constitutional texts that deal with legislative or administrative powers rather than in sections that articulate a catalogue of rights.<sup>107</sup>

Nevertheless, as I explained in previous sections, the political axis of ADL has added value as an anti-misrecognition device when focused in the broader social realm. For example, by providing spaces of ‘withdrawal and regroupment’, affirmative remedies of misrecognition, where despised or devalued identities acquire a new status, have an impact on political mobilisation. The increasing presence of indigenous/ethnic movements in political processes was, in part, triggered by previous processes of soft-multiculturalism, which implied the recognition of indigenous/ethnic identities as protected grounds of discrimination.<sup>108</sup> Even if ADL looked innocent at the beginning, as a merely symbolic recognition of previously demeaned identities, in the long-term it was part of the factors that ignited the subsequent ethnic and indigenous mobilisation.<sup>109</sup> Struggles for recognition, as described within the principle of the group dimension, were

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<sup>104</sup> R Figueroa, ‘¿Son constitucionales las cuotas de género para el parlamento?’ (2015) 42 *Revista Chilena de Derecho* 189.

<sup>105</sup> However, the choice of a strictly political remedy over a recognition one, ‘is both a tactical and a strategic decision’. Fraser (n 26) 79.

<sup>106</sup> see 5.3.3.

<sup>107</sup> Observatorio de Igualdad de Género de América Latina y el Caribe, ‘Leyes de cuotas’ (CEPAL, 2017) <<http://oig.cepal.org/es/leyes/leyes-de-cuotas>> accessed 20 June 2017.

<sup>108</sup> D Yashar, ‘Does Race Matter in Latin America?: How Racial and Ethnic Identities Shape the Region’s Politics’ (2015) 94 *Foreign Affairs* 33.

<sup>109</sup> O Kalteneier and others, ‘Multiculturalism and Beyond: The New Dynamics of Identity Politics in the Americas’ (2012) 7 *Latin American and Caribbean Ethnic Studies* 103, 107.



mainly about the political voice or political agency of social or collective agents.<sup>110</sup> In what follows, though, I want to focus on cases of Latin American ADL that highlight Fraser's insights, presented before, that is, the politicisation of private and social encounters, and the protection of the special features of the political.

The most recent regional human rights treaty is focused on discrimination and intolerance, and starts by stating that the principles of equality and non-discrimination are 'dynamic democratic principles' that grant 'equal protection against every form of discrimination and intolerance in any ambit of private or public life'.<sup>111</sup> This is the consolidation of a consensus that has been emerging among experts on the issue, which points to the fact that the groups that are most heavily discriminated against are usually those who do not have access to political participation (or are not interested), and that without political presence, these groups will not be able to overcome their situation.<sup>112</sup> This consensus represents an interesting approach to overcoming obstacles for political participation that do not have their source in a certain political ontology, but, rather, in the depoliticising effects of domination and oppression, or in the lack of subjective political agency. Let us explore some instances of the political axis of ADL in Latin America.

The first group of cases concerns the rights of LGBT individuals, who resort to strategies of legal mobilisation based on their right to equality and non-discrimination, on the grounds of sexual orientation and gender identity. Paradigmatic in this sense is the case of Karen Atala, a Chilean lesbian judge who was discriminated against on the grounds of her sexual orientation within a child custody process; this was the first case regarding this issue to be adjudicated by the IACtHR.<sup>113</sup> The IACtHR's reasoning was based in the *ius cogens* status of the right to equality and non-discrimination, and it followed the ECtHR in confirming that a dynamic interpretation of the ACHR could include other grounds of protection that the original drafters did not explicitly consider.<sup>114</sup> The significance of Atala relies on the duty to consider sexual orientation and gender identity as protected

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<sup>110</sup> see 6.3.4.

<sup>111</sup> Inter-American Convention Against All Forms of Discrimination and Intolerance, art 2.

<sup>112</sup> P Oxhorn, 'Why Democracy Isn't All That Democratic: Social Exclusion and the Limits of the Public Sphere in Latin America' (2001) 44 *The North-South Agenda*.

<sup>113</sup> The comments on this case are based on A Coddou, 'The Atala case: a landmark case for a transformative approach to anti-discrimination law in Latin America', in K Fernández and others (eds), *Chile and the Inter-American Human Rights System* (U of London Press 2017).

<sup>114</sup> IACtHR, *Atala Riffo and Daughters v. Chile* (2012) 83-5.

grounds, an authoritative interpretation that will prove highly influential across all fields of law.

For the political axis of ADL, this innovative jurisprudence is important for breaking down barriers of participation that usually remain hidden in the social and private spheres. Indeed, the Atala case assumes that in order for individuals to participate in the political community, they should be able to present themselves as they are, with the life choices they have made individually and collectively: ‘the right to non-discrimination due to sexual orientation is not limited to the fact of being a homosexual *per se*, but includes its expression and the ensuing consequences in a person’s life project’.<sup>115</sup> In other words, LGBT individuals should be able to have privacy and intimacy, and to act upon decisions and identities developed in the transition from the private/social to social/public realms.<sup>116</sup> Concomitant with other domestic courts that understood homosexuality as an ‘essential and intimate part of an individual’s identity’, which is to be read within a framework that combines the rights to privacy, to full and free development of personality, and to equality and non-discrimination, the Atala case highlights the political significance of LGBT rights.<sup>117</sup> In this way, as Lucy Taylor writes in analysing Latin America’s citizenship studies, ‘a sense of identity as a political being (a politico-cultural) element’ complements and combines with the ‘tools and framework of citizenship (formalised legal rights and responsibilities)’.<sup>118</sup> Being the first case to adjudicate on discrimination on the grounds of sexual orientation, the Atala case ‘went beyond the protection of people facing a situation of psychical and psychological abuse’,<sup>119</sup> and advanced the idea of a public understanding of liberty rights, like privacy, which can shed light on the need to challenge the obstacles to political participation that occur when ‘objective inequalities are taken into the body and naturalized as subjective dispositions’.<sup>120</sup> Atala, thus, makes the case for protecting both identities and agencies, the case for protecting not only normative spaces for the exercise of deliberative

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<sup>115</sup> *ibid* 133.

<sup>116</sup> The IACtHR explicitly rejected the interpretation of the right to equality and non-discrimination adopted by the Chilean Supreme Court, which granted protection of sexual orientation insofar as it does not entail the public display of behaviours that could affect the public trust or ‘the image of the judicial branch’. *ibid* 221.

<sup>117</sup> Corte Constitucional de Colombia, C-481/1998, s VII.22; Suprema Corte de Justicia de la Nación (México), 2-2010 (Writ of Unconstitutionality) 263-4.

<sup>118</sup> L Taylor, ‘Client-ship and Citizenship in Latin America’ (2004) 23 *Bulletin of Latin American Research* 213, 214.

<sup>119</sup> B Wilson and C Gianella, ‘LGBT Rights’, in J Gonzalez-Bertomeu and R Gargarella (eds), *Latin American Casebook: Courts, constitution, and rights* (Routledge 2016).

<sup>120</sup> Mc Nay (n 73) 28.

freedoms, usually related to intimacy, privacy or the household, but the (bodily) behaviours displayed in the social and public realms.

Another obvious kind of struggle to seek the basis of the political axis of ADL is feminist mobilisation in the region. In the first half of the past century, even before achieving the right to vote, women used legal channels to demand their status as full members of the community. In a famous judgment in 1921, the Argentinian Supreme Court acknowledged that citizenship is not restricted to vote, and is based on a broader notion of belonging, granting women access to public positions.<sup>121</sup> A similar reasoning was advanced in Mexico, regarding the citizenship of women and their right to abortion in certain cases (1936), almost two decades before they were able to vote (1953).<sup>122</sup> Although these cases were not representative of the dominant legal thinking of their time, they are considered the precedents of current developments in Latin American ADL, which stress the political consequences of advancing gender equality within the social realm. In Argentina, for example, the Supreme Court declared the constitutional validity of a high-profile public school that changed its male-only admission policy to incorporate women. In the reasoning, the court declared that by denying women the possibility of being educated among men in an excellent school, the state was ‘denying women’s participation and contribution to social development according to their capacities and talents’.<sup>123</sup> The judgment, which moves between an anti-classification and anti-subordination framework, is considered to be a landmark case that underlines a shift from state neutrality regarding the social realm (education, family, household) to the political consideration of enhancing the participation of women across several societal domains.<sup>124</sup> More explicit was the landmark ruling of the Bolivian Plurinational Constitutional Court, in reviewing the constitutionality of several pre-constitutional legal arrangements that were declared incompatible with the new commitments to gender equality, decolonisation and de-patriarchalisation of the Constitution of 2009.<sup>125</sup> In an individual opinion, Judge Ligia Velázquez argued that these guiding principles entailed enhancing the participation of women, in its different forms, in all political, economic and social domains, and thus their status as full members of the political community. According to

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<sup>121</sup> Corte Suprema de Justicia de la Nación (Argentina), *Ángela Camperchioli* (1921).

<sup>122</sup> M Lamas, ‘La despenalización del aborto en México’ (2009) 220 *Nueva Sociedad* 154.

<sup>123</sup> Corte Suprema de Justicia de la Nación (Argentina), *Cristina González de Delgado y otros contra UNC* (2000).

<sup>124</sup> C Motta, ‘Ciudadanía’, in C Motta and M Saez (eds), *La Mirada de los Jueces: Género en la Jurisprudencia latinoamericana: Tomo I* (Siglo del Hombre 2008) 59.

<sup>125</sup> Constitution of Bolivia, arts 3.III (gender equality) and 9.1 (decolonialization).

her, rights such as abortion should be understood under this political axis and not through the right to privacy or the individual interests of the woman.<sup>126</sup>

Another important group of gender equality cases concerns the reasons to include women (sex) as a protected group, stressing that what matters is not only a history of subjugation, social exclusion or marginalisation, but the fact that they are generally politically powerless.<sup>127</sup> Even if women have become presidents of Latin American countries and currently have a historical presence in decision-making venues, there are many barriers to political participation that remain widespread in many different domains. The ‘paradox of political powerlessness’, then, has still not reached the level of some developed countries, and women can still plausibly present themselves as powerless in order to get protection from the law.<sup>128</sup> For the Peruvian Supreme Court, classification on the grounds of sex is considered to be presumptively unconstitutional especially because women are not generally ‘part of the dominant groups that participate, debate and create the legal norms’.<sup>129</sup> Therefore, an anti-classification approach is complemented by the political consideration of the incorporation of women as a protected group of ADL, especially in those jurisdictions that have embraced some form of the ‘suspect clauses/tiers of scrutiny’ approach, such as Argentina, Colombia, Mexico and Peru.<sup>130</sup>

Moving on to the right to abortion or broader reproductive rights, as Bergallo and Michel put it, even

the more progressive courts still find it strikingly difficult to point conclusively to the criminalization of abortion as a form of gender-based discrimination to account for the burden of unwanted pregnancy in its physical and social dimension, and to articulate the idea of equality in difference.<sup>131</sup>

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<sup>126</sup> Tribunal Constitucional Plurinacional (Bolivia), 0206-2014, Individual Opinion Ligia Velazquez.

<sup>127</sup> S Fredman, *Discrimination Law* (2nd edn, OUP 2011) 31-3.

<sup>128</sup> K Yoshino, ‘The Paradox of Political Power: Same-Sex Marriage and the Supreme Court’ (2012) 2012 Utah Law Review 527.

<sup>129</sup> Corte Suprema (Peru), ‘Unconstitutionality of Law 28449’ (2005) ss 144-6 (on the assessment of the different schemes of unemployment benefits for men and women from a substantive equality standard).

<sup>130</sup> Corte Suprema de Justicia de la Nación (Argentina), *Sisneros, M.G. y O c. con Tadelva y otros s/amparo* (2014); Suprema Corte de Justicia de la Nación (México), 2199-2009 (*Amparo*); 988-2004 (*Amparo*) (strict scrutiny on ‘suspect clauses’); Tribunal Constitucional (Peru), 2317-2010, ss 32-4 (‘strict scrutiny’ on ‘suspect clauses’, or ‘specially invidious’ classifications); Corte Constitucional de Colombia, C-481/1998. In contrast with Bruce Ackerman’s recent arguments on the demise of the anti-humiliation principle, these cases show that the more ‘mechanic’ or doctrinal approach of developing ‘tiers of scrutiny’ does not need to be uncoupled with substantive approaches that are open to political considerations. *We the People: The Civil Rights Revolution* (Harvard UP 2014).

<sup>131</sup> P Bergallo and A Michel, ‘Abortion’, in Gonzalez-Bertomeu and Gargarella (n 126) 52.

Thus, appeals to equality, autonomy or the principle of the ‘free development of personality’ have only appeared in individual opinions or dissenting votes, where reproductive rights are explicitly connected to women’s full membership in the political community.<sup>132</sup> In the famous ruling on the right to abortion until the 12<sup>th</sup> week of pregnancy in Mexico City, the individual opinion of Judge Genaro Góngora started from the doubts that the Mexican Supreme Court expressed when addressing the status of the embryo before 12 weeks of gestation. In contrast, he declared his certainty that ‘women are persons, human beings with a name that require real recognition of their status as citizens responsible of decisions that concern directly with their bodies and life projects, without being punished for that’.<sup>133</sup> This statement, which is much celebrated by feminist movements in Mexico, showed an understanding of the struggle for reproductive rights as the consolidation of a longstanding history of struggles for citizenship, dating back to the 1930s.<sup>134</sup>

Lastly, as advanced at the beginning of the chapter, consumer discrimination in Latin America has provided a viable alternative for redressing everyday discrimination, triggering successive processes of political empowerment, as has happened with some Afro-descendant communities, who were not originally covered by the legal recognition of ethnic and indigenous identities or territorial autonomies.<sup>135</sup> In Peru, INDECOPI is one of the leading public institutions in redressing discrimination, endorsing an active stance against discriminatory practices or behaviours that take place in the ‘messiness and fluidity of everyday commercial transactions’.<sup>136</sup> Acknowledging widespread discrimination on the grounds of skin colour and appearance in Peruvian nightclubs, the INDECOPI promoted the incorporation of protection from discrimination in the case of consumption (1998), highlighting that the consumer is nothing but the ‘economic

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<sup>132</sup> Corte Constitucional de Colombia, C-356/2006, s 3.3 (on the importance of the principle of ‘free development of personality’ for the ability of women to exercise their rights of citizenship); Suprema Corte de Justicia de la Nación (México), 1460-2007 (writ of unconstitutionality), individual opinion (Genaro Góngora); Tribunal Constitucional (Chile), 3729(3751)-2017, ss 36-9 (although it avoided directly addressing the issue of abortion from an equality and non-discrimination approach, it mentioned how gender equality needs to frame the solution of the constitutional conflict); Tribunal Constitucional Plurinacional (Bolivia) (n 126).

<sup>133</sup> Suprema Corte de Justicia de la Nación (México) (n 132) s 6.

<sup>134</sup> G Gongora, *¿De quién es la vida?* (Instituto Nacional de Ciencias Penales Mex 2009) 16.

<sup>135</sup> In Peru, where 44% of afro-descendants report discrimination in consumption exchanges, there is an emphasis on struggles against discrimination in the media and in commercial advertising. In contrast to the Colombian case, they constitute a mostly urban population, which triggers types of social mobilisation less focused on territorial or political claims. See the annual reports of the Centro de Estudios y Promoción Afroperuanos-LUNDU.

<sup>136</sup> TDC-INDECOPI, Resolución 1415 (2006).

dimension of citizenship'.<sup>137</sup> Therefore, the public interest in non-discrimination within consumption exchanges relies not only on the protection of market virtues, but on the protection of spaces of citizenship formation.<sup>138</sup> A similar reasoning backed the Chilean incorporation of consumption discrimination, and its later development with the enactment of law 20.609 (CHIADL), where legal intervention was understood as going beyond merely patrimonial protection.<sup>139</sup> The administrative agency for consumer protection (SERNAC) has now launched a campaign, 'Become yourself a SERNAC citizen' and, moreover, has adopted an active stance against sexist advertisements, despite not having special legal powers to tackle this issue.<sup>140</sup>

Current approaches to theories of citizenship in Latin America suggest that 'citizenship as consumption' constitutes a new model that is explained by 'the provision of universal political rights in the absence of universal civil rights and declining social rights.'<sup>141</sup> On this account, citizens can exercise their right to vote but have restricted channels for political/legal accountability and for autonomous spaces of self-organisation (what Guillermo O'Donnell calls 'delegative democracies'), which are further curtailed by poverty and economic inequality.<sup>142</sup> Moreover, identities can have symbolic importance for the status of citizens as consumers, but are immediately repressed when they become politicised and act as catalysts for political mobilisation.<sup>143</sup> Nevertheless, as the cases here show, consumption discrimination provides spaces for political deliberation, for focusing on injustices that predate the quest for the true political being. The political axis, thus, becomes a crucial device to analyse discriminatory practices that take place in consumption transactions and that in the long term become entrenched as corporeal or psychological dispositions, which are expressed as reluctance to become political agents due to a lack of social recognition.<sup>144</sup>

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<sup>137</sup> INDECOPI, 'Documento de Trabajo N° 3' (1998) 11-2.

<sup>138</sup> A Arosteguy, 'Construcción de capital social comunitario y empoderamiento ciudadano' (2007) 26 *Ultima Decada* 123.

<sup>139</sup> E Isler, 'Aproximación al derecho a la no discriminación arbitraria en el régimen de la Ley 19.496' (2016) 84 *Revista de Derecho Público* 99, 102-3.

<sup>140</sup> SERNAC, 'Reporte sobre publicidad sexista' (5 March 2015) <<http://www.sernac.cl/reportesobre-publicidad-sexista/>> accessed 20 May 2017.

<sup>141</sup> P Oxhorn, 'Citizenship as Consumption or Citizenship as Agency: Comparing Democratizing Reforms in Bolivia and Brazil' (2010) 12 *Sociologías* 18.

<sup>142</sup> G O'Donnell, 'Delegative Democracy' (1994) 5 *Journal of Democracy* 55.

<sup>143</sup> Streeck (n 65).

<sup>144</sup> M Hilton, 'Social activism in an age of consumption: the organized consumer movement' (2007) 32 *Social History* 121, 122.

## 9.4 Conclusion

Drawing on Nancy Fraser's theory, I argued that the political axis of ADL helps us in overcoming the problems of the 'misguided search for the political'. To address the 'paradox of participation', ADL attempts to locate specific injustices or barriers to participation that are mainly grounded in the cultural sphere and have serious impacts on individuals and groups' capacities to be the agents of their own interests. In this way, Fraser's approach is directed against some theories of radical democracy that are gaining rapid ground in Latin America, which eschew an analysis of the causes and conditions that prevent marginalised or disadvantaged individuals and groups from acting politically. For Contreras,

the central purpose of a renewed critical theory is to direct our gaze toward the potentials of the rebellion, transformation, and rupture carried out by antisystemic movements and to boost their obstructed capacities in order to establish the conditions of possibility for democratic, socialist, and plural processes of individual and collective self-determination.<sup>145</sup>

Despite his radical commitments, he does not explain how he plans to boost 'their obstructed capacities', and seems to take for granted the agency and moral authority of 'antisystemic movements'. The 'political axis', instead, suggests going one step before, and inquiring into the conditions for political agency that may be encouraged by ADL. Rather than addressing claims against the system as a whole, this principle is attentive to the political agencies inscribed in the daily claims of indigenous and LGBT persons of being treated as equals and without discrimination. While some radical theories of democracy are looking for the conditions of rebellion and revolution, the political axis attempts to 'boost' the agency of those who may not even be in the mood for joining 'antisystemic movements'. As pointed out by Sandra Fredman, instead of being merely a constraint of what politics can do, ADL is fundamental for an adequate functioning of democracy because it creates proper arenas for deliberation.<sup>146</sup> What I have done in this chapter is to explain in which way ADL enriches a critical theory of the public sphere, while enhancing the special character of political communities. Therefore, the political axis of ADL contributes to its consideration as a special case of 'non-reformist reform'.

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<sup>145</sup> M Contreras Natera, 'Insurgent Imaginaries and Postneoliberalism in Latin America', in M Goodale and N Postero, *Neoliberalism, Interrupted: Social Change and Contested Governance in Contemporary Latin America* (Stanford University Press 2013) 251.

<sup>146</sup> S Fredman, *Human Rights Transformed* (OUP 2008) 29.





## **Concluding Remarks**

### **10.1 Overview**

This thesis has developed the basis of what I have called a transformative approach to ADL in Latin America and the place of this emergent field of law in progressive political projects. In the first part, I provided an account of what we have, a vast repertoire of anti-discrimination provisions, which are the outcome of recent constitutional transformations in the region. Although this part relied mainly on a description of recent constitutional transformations regarding the right to equality and non-discrimination, I never abandoned a normative stance about what should guide the commitments to this right, which far from desirable social policies, entail proper constitutional imperatives. According to different reasons that support a constitutional conception of ADL, and current debates in Latin American constitutional scholarship, I argued that EDC offers the best account of these constitutional transformations, and provides an avenue for effectively implementing the constitutional duties to tackle discrimination. Indeed, this current of Latin American constitutionalism honours the double commitment to political self-determination and individual autonomy, characteristic of the republican tradition in Latin America, while developing an approach to constitutions, understood as a set of institutional choices.

In particular, through the lens of EDC, Latin American ADL entails a commitment to legal reforms that can enforce the already generous anti-discrimination provisions, going beyond the mere enforcement of liberal standards of equal, fair or impartial treatment. As explained at the end of the first part, EDC's concern with entering into the 'engine rooms' is an attempt to articulate constitutional duties into concrete decision-making processes, providing a narrative from which to elaborate on a constitutional conception of ADL that acknowledges the synergic relation between law and social change, on the one hand, and law and democratic consolidation, on the other. Through the lens of EDC, we can approach the study of recent institutional innovations in the field of ADL, as the cases of Mexico and Argentina illustrated. Bridging the gap between strong constitutional aspirations, which motivate an intense regional debate, and their realisation on the ground, do not simply depend on a naked devolution of rules from human beings to legal structures (the ideal of a 'government of laws, not of men'); on the contrary, as advocated by EDC, bridging this gap depends on strengthening the foundational double commitment to collective self-determination and individual autonomy, and to institutions that can trigger the behaviours and attitudes necessary to sustain the rule of law. In this project, ADL seems to occupy a central place.

In the second part, this work provided the reader with the grounds of a critical social theory of ADL in Latin America, identifying six principles that constitute the transformative approach I defended here. As I said in the introduction, the two parts are joined by the method that Nicola Lacey calls ‘normative reconstruction’.<sup>1</sup> I argued that without a critical social theory of ADL, with the ability to address the perils and possibilities of this emergent field of law, the constitutional conception of ADL is doomed to fail. Indeed, without a clear understanding of the ways in which ADL can work as a ‘disclosing critique’, that is, in unmasking the different forms of law and legal discourse as ‘ideological domination’, where symbolic forms ‘are used to naturalize and legitimize exploitative and unequal social relations and, above all, to manufacture political quiescence’, the constitutional conception of ADL will remain unable to understand the place of ADL within progressive political projects.<sup>2</sup> With the help of Nancy Fraser’s social theory, I defined ADL mainly as an anti-misrecognition device (culture), though thoroughly interimbricated with the other spheres (the political and the economic), which allows us to imbue our critical theory with some ‘reflexivity’, warning against the dangers of ‘ideology critique’ becoming ‘yet another ideological mode of thinking’, and reproducing ‘prejudicial beliefs that themselves reinforce or mystify unjust social hierarchies’.<sup>3</sup> Consequently, I warned of those instances where ADL risks becoming an all-encompassing device, able to frame social struggles against any possible harm, in every domain of justice, constraining our limited capacities to wage these struggles. In the current state of financialised capitalism, moreover, ADL risks becoming a device for ‘legal neoliberalism’, instilling market rationality in every sphere, in places where it was previously absent, or an instrument that bypasses the special character of the political community. In any case, a critical social theory of ADL urges us to be aware of the dangers of using the wrong remedy, creating new harms, or reviving older ones, or of bypassing the need to address social realities before crafting strategies for social mobilisation. Although critical legal theories are always aware of the importance of reflexivity, especially regarding the perils of rights-talk or the strategies of rights-mobilisation, there is a gap in the literature in terms of the possibility of critically addressing a single field of law in a certain context, and practically reshaping it towards

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<sup>1</sup> N Lacey, ‘Normative Reconstruction in Socio-Legal Theory’ (1996) 5 *Social & Legal Studies* 131.

<sup>2</sup> L McNay, ‘Contemporary Critical Theory’, in M Freeden and M Stears (eds), *The Oxford Handbook of Political Ideologies* (OUP 2013) 140.

<sup>3</sup> *ibid.*

emancipation.<sup>4</sup> In a way, this thesis attempted to develop a critical social theory of ADL that is capable of both disclosure and reflexivity, but also with an interest in practical emancipation, starting from the current unequal social conditions in which individuals are situated, that is, with a minimum of perspicacity: the ability to say something insightful and practical to our current struggles, to the justice claims of our age.

With the help of Nancy Fraser's theory of social justice, again, I was able to look at the practice of Latin American ADL to elaborate on the six principles explained in the second part. In particular, these principles play an important part in the tasks of 'normative reconstruction', through which ADL can be approached and articulated as a critical legal project in itself. Through these principles, we can view ADL in Latin America as entailing a 'critique of existing legal and social arrangements'; moreover, with the help of these principles, we can imagine 'different ethical values, relationships, and institutions', and design 'political strategies which seek to change current legal-institutional arrangements', providing a roadmap for the legal reforms needed for the definitive consolidation and effective enforcement of ADL in the region (in brief, ADL as a paradigmatic example of a 'nonreformist reform').<sup>5</sup>

The practice of Latin American ADL shows this emergent field of law as calling upon people's individual and collective identities within existing legal frameworks/grammars of recognition, while also setting in motion 'a trajectory of change in which more radical reforms become practicable over time'.<sup>6</sup> The different principles developed in the last part show how ADL goes way beyond the mere liberal protection of the principle of equality before the law, 'changing incentive structures and political opportunity structures', while expanding 'the set of feasible options for future reforms'.<sup>7</sup> To put it in different terms, rather than merely affirming the authority of law, its universal character and consistency requirements, the practice of Latin American ADL exposes the contested character of its application, accommodating the roots for a broader movement of progressive social change, without prejudging the ultimate aim of emancipation. In other words, as a 'non-reformist reform', ADL does not articulate the moment when we will

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<sup>4</sup> C Douzinas and C Gearty (eds), *The Meanings of Rights: The Philosophy and Social Theory of Human Rights* (CUP 2014) 7.

<sup>5</sup> Lacey (n 1) 131.

<sup>6</sup> N Fraser, 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation', in Fraser and Honneth, *Redistribution or Recognition?: A political-philosophical exchange* (Verso 2003) 79.

<sup>7</sup> *ibid.*

achieve emancipation, but constitutes a movement for ‘conceiving and pursuing reforms that deliver real, present-day results while also opening paths for more radical struggles, more structural change in the future’.

Considering the arguments summarised above, I can conclude by stating that ‘normative reconstruction’ should start from a well-developed constitutional conception of ADL that makes sense of recent constitutional transformations. Rather than starting from zero, or transplanting/importing foreign equality law regimes, the project of normative reconstruction, as articulated through the principles developed here, must acknowledge that Latin American ADL offers a rich set of provisions and regimes from which to move forward. If EDC is concerned with the translation of constitutional commitments into concrete decision-making processes, a critical social theory of ADL helps us in understanding the way in which this translation can take place. In that way, for example, the principle of state intervention acknowledges that there is no space for the Latin American state to bypass the need to address social and cultural changes and intervene even against a moral or social consensus that affects discriminated groups. In that regard, any process of legal reform in the area of ADL needs to put the state and its institutions at the frontline against discrimination, acknowledging the potential transformative capacities vis-à-vis spontaneous social change. To advance another example, the principle of legal empowerment/mobilisation should prompt wider access to justice, either to traditional judicial venues, or to newer instances of administrative justice. Hence, collective or class actions, public interest litigation, and the development of a relaxed burden of proof, are crucial to recognising the unequal social conditions in which victims of discrimination currently stand, especially in a region where the democratic channels are still difficult for disadvantaged groups. The socio-economic lens, for its part, makes us conscious of the inevitable socio-economic dimension of the principle of equality and non-discrimination on a continent with alarming social indicators. In particular, it prompts ADL to address poverty and socio-economic inequality in connection with the development of social rights, aware of those aspects of socio-economic disadvantage that can be addressed by equality law.

## **10.2 Contributions of the thesis to the existing literature**

There are four main contributions that this dissertation has attempted to achieve. As I noticed in different parts, the literature on ADL in Latin America is scarce, and does not reflect beyond the recent progress in both domestic constitutional schemes and within the

IAHRS. Indeed, there is no textbook or handbook on the issue, either from a national or regional perspective, and this emergent field does not seem to motivate a scholarly analysis on its doctrinal boundaries or guiding principles. At a domestic level, there are studies that focus on one protected ground of discrimination, or that address discrimination within a discrete area of law, such as employment discrimination.<sup>8</sup> However, there are no general accounts of ADL as it emerges in every legal debate in Latin America, occupying a central place of what legal commitments entail for discriminated groups. At the regional level, moreover, despite the lack of institutional integration in Latin America, an emergent doctrine on the status of equality and non-discrimination within Latin American Human Rights law has not moved away from general statements, granting this right the status of *ius cogens*. In this scenario, this dissertation constitutes the first overview of the current status and future possibilities of anti-discrimination legal projects in Latin America. At the same time, however, this general account of Latin American ADL starts from recent constitutional transformations, which generate processes of convergence between different jurisdictions and common discourses around law, such as the place of Latin American ADL within the trinitarian mantra of the constitutionalist faith, that is, within the principles of democracy, the rule of law, and human rights. In that regard, this general contribution to the scarce literature on the issue is not detached from processes of convergence that are currently taking place in the region, and that allows us to develop a common approach to Latin American ADL.

Secondly, the thesis contributes with a critical legal approach that is sidelined by mainstream anti-discrimination legal scholarship. Although many of the scholars I quoted in this work are aware of the transformative potential of ADL, they have neither addressed the particular place that ADL may occupy within broader progressive political projects nor the possibility that ADL may be a critical legal project in itself. Indeed, many anti-discrimination legal scholars rely on Fraser's multi-dimensional theory of social justice to develop the normative underpinnings of ADL, or to explain the the different dimensions or the scope of anti-discrimination legal provisions.<sup>9</sup> However, they seem to underestimate the potential of critical social theories, and of Nancy Fraser's theory in particular, to provide a 'self-clarification of the struggles and wishes of our age', among

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<sup>8</sup> E Vela, *La Discriminación en el Empleo en México* (Instituto Belisario Domínguez 2017).

<sup>9</sup> L Vickers, 'Promoting Equality or Fostering Resentment? The Public Sector Equality Duty and Religion and Belief' (2011) 31 *Legal Studies* 135; A Mc Colgan, *Equality, Discrimination and the Law* (Hart 2014) 37; S Fredman, *Discrimination Law* (2nd edn, OUP 2011) 16-7, 32; S Fredman, 'Redistribution and Recognition: Reconciling Inequalities' (2007) 23 *South African Journal on Human Rights* 214.

them, the struggles we deploy in the name, or through the means of ADL.<sup>10</sup> In the current state of post-socialist conditions, where processes of modernisation push towards social/political disintegration and systemic/market integration, ADL may be presented as nothing more than a balsam against more structural problems and therefore drained from its transformative potential. In this scenario, a critical legal framework to analyse the strengths and limits of anti-discrimination legal projects, which are becoming a common currency in many jurisdictions, becomes urgent. This could be particularly interesting to critically address the alleged success of equality regimes such as the one developed within the EU.

Moreover, as I advanced in some parts of the research, Nancy Fraser's theory of social justice has been criticised for neglecting the analysis of law as a separate sphere, bypassing the centrality of law and rights for current political and social struggles. However, as I explained at the beginning of the second part, her 'comprehensive theory of social justice' offers the materials from which to reconstruct her legal thoughts, elaborating an idea of law as being both constitutive and instrumental for the struggles of our age. In this way, this thesis constitutes an attempt to answer Fraser's critics by deploying her theory of social justice for the concrete struggles of our age, such as those waged within ADL, and in that sense makes a contribution to the multiple ramifications of Fraser's comprehensive/multi-dimensional theory.

Finally, throughout this work, I have avoided the image of the 'Failed Law of Latin America', which places Latin American law as a secondary source for comparative or transnational legal debates. An indirect effect of the image of a 'Failed Law', which is crucial for comparative anti-discrimination law, entails discrediting the possibility that Latin American ADL can have a say in broader debates.<sup>11</sup> Indeed, this is what happened to Latin American labour law in the face of neo-liberal reforms, which considered labour rights as mere rigidities to be displaced by a new labour market facilitating movements of labour assets.<sup>12</sup> The Latin American tradition of labour rights, which dates back to the Mexican struggles of the beginning of the twentieth century, was a common reference for early comparative studies on labour rights, but this is no longer the case. In this thesis, I

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<sup>10</sup> N Fraser, 'What's Critical About Critical Theory?', in *Fortunes of Feminism* (Verso 2013) 19.

<sup>11</sup> J Esquirol, 'Legal Latin Americanism' (2013) 16 *Yale Human Rights & Development Journal* 145, 158-9.

<sup>12</sup> A Santos, 'Trouble with Identity and Progressive Origins in Defending Labour Law', in D Trubek and others (eds), *Critical legal perspectives on global governance: Liber amicorum* (Hart 2014).

have explored the possibility that Latin American ADL can make a contribution to the emancipatory potential of this field of law for comparative legal debates. Although, in itself, that would require a separate research project, my thesis constitutes a basis from which that contribution can draw its support. Indeed, Latin American ADL has a specific constitutional grounding that departs from the origins of ADL in other jurisdictions, where concerns with market expansion or unfair competitive advantages were crucial for the early development of equality clauses, and from those constitutional groundings develop a place for ADL as central for aspirational or transformative constitutionalism. Or, the particular class awareness of Latin American ADL in recent legal practices, as I have described here, may constitute an interesting innovation that needs to be addressed by comparative equality law.

### **10.3 Implications and future research**

At first glance, one of the possible objections against my work is the lack of a theoretical account of anti-discrimination regimes as they currently exist in several jurisdictions in Latin America. Nevertheless, as I advanced in the introductory chapter, the aim of this work did not rely on a complete doctrinal reconstruction or on a theoretical account of ADL as it is, but rather on an enquiry into a transformative approach to this field of law that could start from recent constitutional transformations. In that regard, it endorsed a general account of Latin American ADL that could orient the reader towards the emancipatory potential that ADL exhibits in the chosen dataset. Latin America has still to consolidate anti-discrimination legal regimes that could trigger doctrinal reconstructions that present ADL as a distinct field of law. Therefore, one of the future research questions that emerges from this thesis is whether a more detailed analysis of concrete anti-discrimination regimes could accommodate the transformative approach to ADL defended here. In this way, maybe a complete doctrinal reconstruction of a concrete anti-discrimination regime makes the approach defended here untenable, and better suits traditional liberal interpretations of the right to equality and non-discrimination or other normative accounts.

Another question relates to the particular roles that the principles of a transformative approach can play in the last task of normative reconstruction, that is, the design of ‘political strategies which seek to change current legal-institutional arrangements’ and the imagination of alternative institutional choices for the advancement of human freedom in all its forms. In connection with the institutional concerns of EDC, these

principles could prompt detailed studies on the concrete institutional alternatives that may be available for the design of anti-discrimination regimes. For example, by resorting to the principle of the challenging stance, we may want to loosen rules of evidence, allowing victims of discrimination to resort to the social context in order to understand the expressive meaning of certain discriminatory practices. Or, by studying the different ways in which Latin American ADL observes a socio-economic lens, we may develop a more detailed account of the ways in which class, poverty, or other social conditions could be incorporated as grounds of protection, or to understand better the possibility of implementing public sector equality duties to address socio-economic issues.

A third question that emerges at the end of this theoretical enterprise is whether recent critical theories that engage with ‘legalistic theories of justice or “constitutional theory”’ reduce critical social analysis to a mere scholarly specialisation that ‘has lost the attempt to think about the social totality’.<sup>13</sup> This is one of the questions that I have tried to address, although indirectly, through my discussion of the complementary nature of a critical social theory of ADL and the advancements made by recent Latin American constitutional scholarship, which is very much focused on the power of law and legalism for progressive social change. A deeper theoretical reflection on the recent scepticism about modern law’s legalism, allegedly drawn from leading figures in the Frankfurt School tradition, would require a broader analysis that has been left out of this work. Moreover, future research questions that emerge from this dissertation point to the possibility of using different dimensions of the concept of ‘juridification’ to address both the dangers and strengths of the recent boom in ADL in Latin America.<sup>14</sup> Hence, rather than extending Fraser’s account to the study of legal institutions, we could explore the possibility of directly addressing ADL from the perspective of the vast critical scholarship that derives from the work of first and second generation Frankfurt scholars, such as Franz Neumann, Otto Kirchheimer, and Jürgen Habermas, all of whom addressed law from a multi-dimensional perspective.<sup>15</sup>

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<sup>13</sup> W Scheuerman, ‘Recent Frankfurt Critical Theory: Down on Law?’ (2017) 24 *Constellations* 113.

<sup>14</sup> L Blichner and A Molander, ‘Mapping Juridification’ (2008) 14 *European Law Journal* 36.

<sup>15</sup> Scheuerman (n 13) 11.



## Appendix

Table 1  
Anti-discrimination provisions in six Latin American countries

Country	Constitutional Level	Legislation
Argentina	<p><b>Constitution of 1853 (major amendments in 1994)</b></p> <p><b>Equal pay</b> (art 14bis): “Labor in its diverse forms shall enjoy the protection of the law, which shall ensure to workers (...) equal pay for equal work”.</p> <p><b>Equality before the law</b> (art 16): “The Argentine Nation admits neither blood or birth prerogatives: there are neither privileges [to special rules or courts] nor titles of nobility. All its inhabitants are equal before the law, and admissible to employment without any other requirement their ability. Equality is the basis of taxation and public burdens”.</p> <p><b>Equality between citizens and foreigners</b> (art 20): “Foreigners enjoy within the territory all the civil rights of a citizen”.</p> <p><b>Gender equality quotas</b> for Congress, article 37.</p> <p><b>Amparo (discrimination)</b> (art 43): “Any person may file an expeditious and swift action of <i>amparo</i>, whenever no other more appropriate judicial means exists, against any act or omission by public authorities or by private individuals, that presently or imminently harms, restricts, alters or threatens, in an arbitrary or manifestly illegal manner, the rights and guarantees recognized by this Constitution, by a treaty, or by a law. As appropriate, the judge may declare the norm upon</p>	<p><b>Law 23.592 of 1988, Anti-Discrimination Law:</b> It establishes hate crimes and a special judicial remedy against arbitrarily/discriminatory behaviour that impedes, obstructs or in some way diminishes the full exercise of fundamental rights. It considers especially discriminatory those acts or omissions based on grounds such as race, religion, nationality, ideology, political opinion, union affiliation, sex, economic position, social condition of physical characters.</p> <p><b>Law 25.013 of 1998:</b> it establishes a special clause against discriminatory dismissal.</p> <p><b>Code of Ethics in Public Functions, adopted by decree n41 of 1999:</b> “Public officials shall not carry out discriminatory in their dealings with the public or with other government officials. They must grant every person equal treatment in all comparable situations. Equality of situations is understood to exist where there are no differences which, in accordance with current legislation in force, should be deemed to establish a priority. This principle also applies to the dealings which the public official maintains with their subordinates.”</p>

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which the harmful act or omission is founded unconstitutional.

[When] this action complains of any form of discrimination, or regards the rights that protect the environment, competition, the user, the consumer, or rights of a collective nature in general, it may be brought by the affected party, the Defender of the People, and the associations that support these ends that are registered as required by a law that shall determine the requirements and forms of their organization.”

**Equality as an objective of education** (art 75.19): “the promotion of democratic values and the equality of opportunities and means without any discrimination whatsoever.”

**Constitutional Hierarchy of Human Rights Treaties** (art 75.19): including, among others, the main international human rights treaties with special equality and non-discrimination provisions for disadvantaged groups.

**Positive duties (social policies and affirmative action** (art 75.23): “The Congress shall have power: (...) To legislate and promote proactive measures that guarantee true equality of opportunity and treatment, and the full enjoyment and exercise of the rights recognized by this Constitution and by current international treaties on human rights, in particular with respect to children, women, the elderly and people with disabilities.”

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Bolivia	<b>Constitution of 2009</b>	<b>Law 45 of 2010, Law against Racism and every form of Discrimination.</b>
	<b>Foundational values</b> (art 8.II): " The State is based on the values of unity, equality, inclusion, dignity, liberty, solidarity, reciprocity, respect, interdependence, harmony, transparency, equilibrium, equality of opportunity, social and gender	“Article 1.ii The purpose of this Act is to establish mechanisms and procedures for the prevention and punishment of acts of racism and all forms of discrimination within the scope of the Political Constitution of the State and international human rights treaties; ii. The aims of this Act are to eliminate racist conduct and all forms of discrimination

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equality in participation, common welfare, responsibility, social justice, distribution and redistribution of the social wealth and assets for well being."

**"Essential purposes and functions of the State"** (art 9): (... ) 1) To construct a just and harmonious society, built on decolonization, without discrimination or exploitation, with full social justice, in order to strengthen the Pluri-National identities; 2) To guarantee the welfare, development, security and protection, and equal dignity of individuals, nations, peoples, and communities, and to promote mutual respect and intra-cultural, inter-cultural and plural language dialogue; 5) To guarantee access of all people to education, health and work".

**Prohibition of Discrimination against individual and collectives** (art 14): "ii) The state prohibits and punishes all forms of discrimination based on sex, color, age, sexual orientation, gender identity, origin, culture, nationality, citizenship, language, religious belief, ideology, political affiliation or philosophy, civil status, economic or social condition, type of occupation, disability, pregnancy, and any other discrimination that attempts to or results in the annulment of or harm to the equal recognition, enjoyment or exercise of the rights of all people; iii) the State guarantees everyone and all collectives, without discrimination, the free and effective exercise of the rights established in this Constitution, the laws and international human rights treaties".

**Access to health without discrimination** (art 18.II): "The State guarantees the inclusion and access to health for all persons, without any exclusion or discrimination."

**Right to/of work without discrimination** (art 46.I): "To dignified work, with industrial and occupational health and

and to consolidate public policies in the area of protection and prevention of crimes of racism and all forms of discrimination".

article 5.a) The term 'discrimination' shall be used to signify all forms of distinction, exclusion, restriction or preference based on the grounds of sex, color, age, sexual orientation and gender identity, origin, culture, nationality, citizenship, language, religious belief, ideology, political or philosophical affiliation, marital status, economic, social or health status, profession, occupation or trade, level of training, differing abilities and/or physical, intellectual or sensory disability, pregnancy, origin, physical appearance, attire, surname or other grounds whose purpose or result is the annulment or diminishment of the recognition, enjoyment or exercise, under equal conditions, of the human rights and liberties recognized by the Political Constitution of the State and international law. Affirmative action measures shall not be considered as discrimination".

	<p>safety, without discrimination, and with a fair, equitable and satisfactory remuneration or salary that assures a dignified existence for the worker and his or her family.”</p> <p><b>A new ground of protection</b> (art 59.III): “Every child and adolescent, without regard to origin, has equal rights and duties with respect to his or her parents. Discrimination among offspring on the part of parents shall be punished by law.”</p> <p><b>Protection of discrimination against the elderly</b> (art 68.II): “II. All forms of mistreatment, abandonment, violence and discrimination against elderly persons is prohibited and punished.”</p> <p><b>Protection of Disabled Persons</b> (art 71.I-II): “I. Any kind of discrimination, mistreatment, violence and exploitation of anyone who is disabled shall be prohibited and punished; II. The State shall adopt measures of affirmative action to promote the effective integration of disabled persons into the productive, economic, political, social, and cultural sphere, without any discrimination whatsoever.”</p>	
Chile	<p><b>Constitution of 1980</b></p> <p><b>Bases of Institutionalality</b> (art 1): “Persons are born free and equal in dignity and rights (...) It is the duty of the State (...) to promote the harmonized integration of all the sectors of the Nation and to assure the right of the persons to participate with equal opportunities in the national life.”</p> <p><b>Equality before the law</b> (art 19.2): “Equality before the law. In Chile there are no privilege persons or groups. In Chile there are no slaves, and any that sets foot on its territory will become free. Men and women are equal before the law. Neither the law nor any authority whatsoever may establish arbitrary differences.”</p>	<p><b>Law 20.609 of 2012, that establishes measures against discrimination:</b></p> <p><b>Purpose of this law</b> (art 1): “establish a judicial remedy to restore the rule of law against a discriminatory act.</p> <p>Every organ of the administration, within its powers, should elaborate and implement policies to guarantee every person, without arbitrary discrimination, the entitlement and exercise of its rights and freedoms recognized in the Constitution, laws and international treaties.”</p> <p><b>Definition of discrimination</b> (art 2): “all distinction, exclusion or restriction that lacks reasonable justification, committed by the State or individuals, and that causes privation, perturbation or threat on the legitimate exercise of the fundamental rights (...) in particular when these are grounded in motives such as race or ethnicity,</p>

	<p><b>Prohibition of discrimination in employment (art 19.16):</b> “Any discrimination that is not based on personal skills or capability is forbidden, notwithstanding that the law may require Chilean citizenship or age limits in certain cases.”</p>	<p>nationality, socio-economic condition, language, ideology or political opinion, religion or belief, union membership or participation or non participation in other associations, sex, sexual orientation, gender identity, civil status, age, personal appearance, illness or disability.”</p>
Colombia	<p><b>Constitution of 1991</b></p> <p><b>General clause (art 5):</b> “The State recognizes, without any discrimination whatsoever, the primacy of the inalienable rights of the individual and protects the family as the basic institution of society.”</p> <p><b>General equality clause (art 13):</b> " All individuals are born free and equal before the law, shall receive equal protection and treatment from the authorities, and shall enjoy the same rights, freedoms, and opportunities without any discrimination on account of gender, race, national or family origin, language, religion, political opinion, or philosophy.</p> <p>The State shall promote the conditions so that equality may be real and effective and shall adopt measures in favor of groups that are discriminated against or marginalized.</p> <p>The State shall especially protect those individuals who on account of their economic, physical, or mental condition are in obviously vulnerable circumstances and shall sanction the abuses or ill-treatment perpetrated against them."</p> <p><b>Equality of Family members (art 42):</b> “Family relations are based on the equality of rights and duties of the couple and on the reciprocal respect of all its members.”</p> <p><b>Constitutional grounds of the labor statute (art 53):</b> “Equality of opportunity for workers”.</p>	<p><b>Law 1482 of 2011, Anti-Discrimination Law:</b> it only establishes criminal penalties for discriminatory acts and speeches.</p> <p>The Colombian labour code includes a general right of equality before the law of all employees (2011, article 10).</p> <p>Other laws, such as 823 of 2003, establishes sectorial clauses for the protection and promotion of equality of opportunities for several disadvantaged groups.</p>

	<p><b>Equality and dignity</b> (art 70): “Culture in its diverse manifestations is the basis of nationality. The State recognizes the equality and dignity of all those who live together in the country.”</p> <p><b>Basis of the administrative function</b> (art 209): “The administrative function is at the service of the general interest and is developed on the basis of the principles of equality.”</p> <p><b>Equality as grounding of fiscal oversight</b> (art 267): “Oversight of the fiscal management of the State includes exercising financial control, management, and performance, based on efficiency, economy, equality, and appraising the environmental costs.”</p>	
Mexico	<p><b>Constitution of 1917; major amendment in 2011</b></p> <p><b>Prohibition of discrimination</b> (art 1): “Any form of discrimination, based on ethnic or national origin, gender, age, disabilities, social status, medical conditions, religion, opinions, sexual orientation, marital status, or any other form, which violates the human dignity or seeks to annul or diminish the rights and freedoms of the people, is prohibited.”</p> <p><b>Equality of opportunities for indigenous people</b> (art 2.B): “In order to promote equal opportunities for indigenous people and to eliminate discriminatory practices, the Federation, the Federal District, the States and the local councils shall establish the necessary institutions and policies to guarantee indigenous people’s rights and comprehensive development of indigenous communities. Such institutions and policies shall be designed and operated together with them.”</p> <p><b>Social equality as an ideal in education</b> (art 3.IX.C).</p>	<p><b>Federal Law to Prevent and Eliminate Discrimination of 1992</b> (major amendments in 2011):</p> <p><b>Definition of discrimination</b> (art 4): "every distinction, exclusion or restriction based on ethnic or national origin, sex, age, disability, social or economic status, health, pregnancy, language, religion, opinion, sexual preferences, civil status or any other, impedes recognition or enjoyment or rights and real equality in terms of opportunities for people".</p> <p><b>Different forms of behaviour that are considered discrimination</b> (art 9): "among others (...) impeding access to public or private education (...) prohibiting free choice of employment, restricting access, permanency or promotion in employment (...) deny or restrict information on reproductive rights (...) deny or condition medical services (...) impede participation in civil, political or any other kind of organizations (...) to impede the exercise of property rights (...) to offend, ridicule or promote violence through messages and images displayed in communications media (...) to impede access to social security and its benefits (...) to impede access to any public service or private institution providing services to the public, as well as limiting access and freedom of movement in public spaces (...) to exploit or treat in an abusive or degrading way (...) to restrict participation in sports, recreation or cultural activities (...) incitement to hatred, violence, rejection, ridicule, defamation, slander, persecution or exclusion (...) promote or indulge in physical or psychological abuse based on physical</p>

	<b>Gender Equality as a principle of broadcasting and telecommunication</b> (art 6.B.5)	appearance or dress, talk, mannerisms or for openly acknowledging one's sexual preference or any other ground of discrimination”.
Peru	<b>Constitution of 1993</b>  <b>Human Dignity as the essential objective of the State</b> (art 1).  <b>Equality before the Law</b> (art 2.2): “Every person has the right: (...) to equality before the law. No person shall be discriminated on the basis of origin, race, sex, language, religion, opinion, economic situation or any other reason.”  <b>Equality in labor relationships</b> (art 26): “Equal opportunity without discrimination.”	<b>Hate crimes and aggravating circumstances</b> (arts 46 and 323 of the Criminal Code): (discrimination may constitute a crime).  There are several sectorial regulations that prohibit discrimination, such as the <b>Law of Equality of Opportunities between men and women</b> (Law 28983 of 2007). However, the Peruvian legislation does not include any general prohibition of discrimination on an open list of grounds

Table 2

Anti-discrimination entities or organs in six Latin American countries

Country	Name(s)	Character: NHRIs, Equality Bodies, ombudsmen?	Powers: report and advocacy	Powers: litigation	Powers: receive complaints	Coordination with other mechanisms/institutions
Argentina	<i>Instituto Nacional contra la Discriminación, la Xenofobia, y el Racismo</i> (law 24.515 of 1995)	Equality Body (non-autonomous), which depends on the Ministry of Justice and Human Rights	General advisory and reporting powers; organize campaigns for the promotion of non-discrimination; propose public policies; in charge of implementing the National Plan against discrimination (decree 1086/05)	No standing for litigation	Handles complaints on violations of the Argentinian anti-discrimination law, committed either by the Administration or individuals, but has no powers to sanction. It has also conciliatory and mediation powers	Defer cases to other institutions (eg, to the <i>Defensorias provinciales</i> or to the federal Ombudsmen); also participates in the design of the National Human Rights Plan with the supervising authority of the Ministry of Justice and Human Rights
	<i>Defensoria del Pueblo de la Nación</i> (law 24.284 of 1993,	National Human Rights Institution (Constitution of Argentina, art 86; *A	It has a general reporting powers, with an institutional priority for disadvantaged groups.	General standing for litigation, “the capacity to be a party in a lawsuit” (Constitution, art 86).	It has general fact-finding and investigative powers, but no power to sanction. It can act by request or	Acts in coordination with <i>defensorias provinciales</i> , which are grouped under a common association.

Country	Name(s)	Character: NHRIs, Equality Bodies, ombudsmen?	Powers: report and advocacy	Powers: litigation	Powers: receive complaints	Coordination with other mechanisms/institutions
	and art 86 of the Constitution)	Status: “an independent authority (...) with full autonomy and without receiving instructions from any other authority. The mission (...) is the defense and protection of human rights and other rights, guarantees and interests sheltered under this Constitution and the laws, in the face of deeds, acts or omissions of the Administration; as well as the control of public administrative functions.”		Also, power to trigger <i>amparos</i> (Constitution, art 43), and support individual or group litigants.	thorough self-standing initiative. It has powers to conciliate or mediate between the parties involved in a complaint.	
Bolivia	<b><i>Comité contra el Racismo y la no Discriminación</i></b> (law 045 of 2010).	A non-autonomous Equality body, which depends on the Ministry of Cultures, through the De-Colonization Vice-Ministry. It is made up of two commissions: the Anti-Racism Commission and the	Elaborate and propose public policies; coordinate state action; implements law 045; hold a registry and systematization of judicial and administrative anti-discrimination complaints	No litigation powers. It has an official duty to denunciate discrimination acts that could constitute a crime.	Cannot receive complaints (every complaint should be directed against the authority in question; it follows and supervises the evolution of these complaints). No investigation or sanction powers. However, it has soft powers to make	Elaborates a national Plan to coordinate all state action against discrimination.



Country	Name(s)	Character: NHRIs, Equality Bodies, ombudsmen?	Powers: report and advocacy	Powers: litigation	Powers: receive complaints	Coordination with other mechanisms/institutions
	<b>Defensoría del Pueblo</b> (law 870 of 2016)	Anti-Discrimination Commission. Constitutional autonomy (Constitution of Bolivia, art. 218; *A Status): “operational, financial and administrative autonomy, in accordance with the law”.	General reporting powers (promotion, dissemination of and compliance with human rights, both individual and collective, that are established in the Constitution, laws and international instruments); can also propose bills and amendments.	General standing to litigate and file any kind of actions. This power extends to the administrative activity of the entire public sector and the activity of private institutions that provide public services	recommendation on certain cases. General investigative, but no sanction powers.	Can refer cases to any public institution.
Chile	<b>Instituto Nacional de Derechos Humanos</b> (law 20.405 of 2009)	National Human Rights Institution (Legislative autonomy; *A Class).	General reporting and advisory powers	Public Interest Litigation (crimes against humanity, torture, forced disappearances; constitutional writs of protection and habeas corpus)	No enquiry or complaint-handling powers	Coordinates with the under-secretary of Human Rights
Colombia	<b>Defensoría del Pueblo</b> (Constitution of Colombia, art 118 and 281). Special law of 1992.	Constitutional autonomy (*A Status). Part of the Public Ministry (Constitution of Colombia, art 281), which has the responsibility “to defend and promote human rights, to protect the public interest, and to	Non-binding guidelines for private entities  Constitution of Colombia (art 282): general powers of the ombudsman.	It can initiate Public Interest Litigation before any judicial venue	Mediate collective complaints of organizations of the civil society against public administration	

Country	Name(s)	Character: NHRIs, Equality Bodies, ombudsmen?	Powers: report and advocacy	Powers: litigation	Powers: receive complaints	Coordination with other mechanisms/institutions
		oversee the official conduct of those who perform public functions.”				
Mexico	<b><i>Consejo Nacional para Prevenir la Discriminación</i></b> (CONAPRED), created by the Federal law to prevent and eliminate discrimination, of 2003.	A non-autonomous, decentralized organ that depends on the <i>Secretaria de la Gobernación</i> . It has technical and management autonomy.	General consultative and reporting powers. Active promotion and design of public policies against discrimination.	No power to litigate	Handles complaints triggered by individuals or collective organizations against public or private actors; counselling of complainants; the power to issue binding administrative sanctions, with different reparation measures (restitution, compensation, public sanction, public pardon, and the warranty of non-repetition). In case of non-compliance, it can send the case to judicial authorities.	If a complaint against a public authority is made before the National Commission, the Council is precluded from acting (Federal Law to Prevent and Eliminate Discrimination, art 63). CONAPRED also elaborates National Plan Against Discrimination *4 years.
	<b><i>Comisión Nacional de Derechos Humanos</i></b> (CNDH), created in 1992 by a special law.	Constitutional autonomy (art 102.B; *A Status). It subjects to scrutiny only public authorities	Make autonomous investigations or by petition of the government or other public authorities (Constitution of Mexico, art 102); make general recommendations on issues), and general consultative and promotion powers	Trigger actions of unconstitutionality (Constitution of Mexico, art 105.g) (abstract constitutional review)	Handles complaints but can only issue non-binding recommendations; can also trigger complaints before respective authorities; promotes conciliation between the complainants and public authorities (article 6 law of the Commission).	Can present actions of unconstitutionality and has a priority of jurisdiction before CONAPRED in cases where victims from discrimination chose the National Commission.
Peru	<b><i>Defensoría del Pueblo</i></b> (Office of	It is the National Human Rights	General reporting powers, and a special	It can trigger the constitutional remedies	General investigative and fact-finding powers, but	Special units for vulnerable groups. After the investigation

Country	Name(s)	Character: NHRIs, Equality Bodies, ombudsmen?	Powers: report and advocacy	Powers: litigation	Powers: receive complaints	Coordination with other mechanisms/institutions
	the Ombudsman), created by law 26.520 of 1995	Institution, with constitutional autonomy (arts 161-162; *A Status)	power to initiate legislation and recommend measures (Constitution of Peru, art 162)	before the Constitutional Court and intervene in <i>habeas corpus</i> procedures for the protection of fundamental rights	issues non-binding recommendations	of complaints, in can refer cases to the General Comptroller of the Republic, who can issue binding decisions
	<b>Comisión Nacional contra la Discriminación</b> (CONACOD), created by an Executive Decree 015 of 2003	Non-autonomous body, which depends on the Ministry of Justice and Human Rights; a multi-sectorial entity, in charge of monitoring, supervising and advising the executive power in issues of equality and non-discrimination.	Inter-ministerial body that designs a National Human Rights Plan and presents an annual report. Elaborates and proposes public policies at all state levels.	No litigation role. However, it includes a technical team that supports the citizen in their anti-discrimination claims, including the possibility of strategic litigation before the higher tribunals and the Constitutional Court	It creates a ‘single-window’ system for anti-discrimination complaints. It issues binding decisions for the different sectorial bodies subjected to it.	Coordinates with the <i>Defensoría del Pueblo</i> .

\* Status within the Sub-Committee on Accreditation of National Human Rights Institutions



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