

## JUSTIFIED DISCRIMINATION IN A LIBERAL SOCIETY /

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**Abstract:** *The act of discrimination is a decision that affects the rights of third parties. Undoubtedly, its exercise and materialisation are disastrous. However, would it be possible to discriminate against a person without facing legal consequences? This work opens a space to explain that there are situations in which discrimination is carried out and validated, in which it is justified its usefulness to preserve a titled property considered as a fundamental right or safeguarding public order as a fundamental structure of the teleology of the state.*

**Key words:** *Democracy; Fundamental Rights; Inequality; Discrimination; Autonomy; Justice; Legal Theory*

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## 1. INTRODUCTION

*„Learning to doubt is learning to think.“*

Octavio Paz

How many times has a child been reprimanded for playing with another, for the colour of his skin; the family's refusal to marry between people with different religions; the displeasure of some to see a homosexual couple, walking hand in hand; overselling a person with Arab features, at an international airport; almost automatic disapproval of an older person, asking for a job; refusal to work to a person with motor disability, without valuing his intellectual potential; the qualification of personal appearance prejudiced to enter a restaurant; and thus, there are so many situations that make discrimination subsist.

These (pre)social judgments cause an injury, a grievance and, logically, a victim(s). The perpetrator performs an action to demonstrate his displeasure or dissatisfaction, self-justifying the act in his right of freedom while at the same time making invisible the rights of others, to then produce and issue an apology of inculpability (Rousseau, 1992).

Discrimination is synonymous with aggression, in which a person is excluded from a social group, either because of his or her physical characteristics, because he or she has some kind of disease, religion, sexuality, or because he or she does not comply with the norm of the dominant ethics.<sup>1</sup> Undoubtedly, such acts affect society in a significant way, contract people and weaken their self-esteem, forming resistance and creating barriers in society.

Deconstructing discrimination is a daring way to know, observe and interpret the motives for imposing and applying an ignominious discourse (Garzón, 1998, p. 152). Misogyny, racism, segregation or confinement are examples that show the lack of understanding, tolerance, empathy and respect that merit the characteristics, preferences or actions of other people.

Prejudice becomes the primary element for the exercise of discrimination, which is exploited in an exercise of verticality, domination, subordination and manipulation that produces privileges and selfish satisfaction, which generates hatred, bitterness and resentment (see Galindo and Ríos, 2015).

In this order of ideas, this chapter starts from the hypothesis that there are spaces in which discrimination is inoculated as a fact. However, this can be exercised to create favourable conditions towards a group (positive discrimination), such as exclusive government calls for women or the hiring of people with a physical disability, as well as confined spaces in shopping centres for persons with disabilities.

Reflecting on justified discrimination, it is necessary to analyse its limitations in order not to misrepresent its public utility, since it may happen that this differentiated treatment, duly justified, is operationalised or erroneously invoked. For example, a job advertisement required a hostess, and presented a person with physical features that were not in line with the company's requirements; might it not be seen as discrimination? Let's think of another sample, an ex-defendant applies for a job as a vehicle operator in a securities company, and we assume that this person has already served his sentence and therefore, is readapted, not hiring him would be discrimination? Or is such refusal justified? The answers are not given, but must be constructed.

Judicial independence is enshrined and guaranteed in the Constitution as a principle for its hierarchy and must permeate in the creation, implementation and resolution of the various situations that arise, in the conflicts of individuals and in the activities of the State.

The methodology of this research is deductive and analytical, so to begin with a map will be presented on the nouns difference and inequality, with the objective of visualizing that discrimination is a social construct articulated and interrelated with the unjustified differential treatment derived from the unequal. The following section outlines the origins of discrimination, and how it has been part of history. This already allows us to explain how it has been socially established and how it has been used by governments to justify its existence and validity. This work will study the types of discrimination that exist, and thus observe the species, depending on the space and time context. Finally, an argument is made about possible discrimination, a space in which its exercise should not be objectionable.

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<sup>1</sup> The Mexican Supreme Court of Justice has called these notions "suspect categories".

The aim is to expose when discrimination can be socially accepted and there are no legal effects, on the understanding that such action is validated and/or tolerated by certain circumstances and that it is limited to a closed space, creating exceptions in the area of discrimination. Such an act could be seen as an aporia in the legal system, but the rule should be regarded as relative, when applied, and as general, in its spatial scope.

## 2. DIFFERENCE AND INEQUALITY

In this section, two topics will be presented that have a primary objective, the distinction. The difference is the result of comparing similar things and noticing what are the similar and distinctive characteristics of those objects, things or goods. Inequality is realised from a knowledge or prejudice learned or constructed by a person(s) with the aim of disapproving something or someone who dislikes it, that does not seem correct, bothers or dislikes that being, acting, preference or make of another(s) individual(s) (cf. Perry, 2009).

With regard to inequality, when a confrontation takes place and one wonders if they are equal, in what way they are similar or different, one must take into account the reference system observed and discussed. For instance, to compare a pair of books precisely it is necessary to know what aspect is being compared and for what purpose, this is called a reference system. Physically, one is green cover and the other blue; one has a hundred pages and the other eighty; one is made with bond paper and the other with recycled paper; one has handwritten letter and the other of mold; one contains annotations and the other is in perfect condition; one book is recent and the other is from the last century. Another form of comparison could be functional or thematic: one book speaks of algebra and the other of politics; one was useful, the other was not understood. Thus, the reference system closely relates the intentions of the comparator and the objects of the comparison in order to have precision in the conclusions and/or specific intentions of the comparison.

Utilitarianism produces a link between the object and the subject, creating a benefit to the person from his subjective judgment. Subjectively, the person recognises the quality or function of the object to qualify if it is useful or convenient and in what way it is or can be. Thus, the difference can be in two ways, the physical comparison between two objects, which may be of the same genus, but different in the species. For example, you could note the differences between a dog's stomach and that of a bear, and compare the size, function, capacity, location, among several characteristics. But it is not productive to compare objects without a common genus, so they must be objects that can be compared or mentioned why they could be compared.

The constituent elements that contain the goods or properties allow for differentiation (Delfino, 1997, pp. 189–214). These judgments are made according to the characteristics of the objects and the knowledge of the person who makes the comparison. But they can also be realised from their usefulness. Differentiation is a fact that relates to the subject, its intentionality and the object, resulting in a decision or judgment. Subjectivity and utility will indicate how the thing will be observed, enjoyed or used by the person. For example, he who acquires a painting of Titian by taste or as an investment; he who travels by bus instead of driving his own vehicle to go to work; he who has more fun in a bar than in a museum.

So, it can be concluded that the differences are made from the comparison of the elements contained in an object, considering the gender in which they agree. From these elements, the differentiation is made between them. In another scenario, the difference is based on the function that the object must operate. There is no mandate for

this decision, but on the contrary, in every comparison and selection of elements and functions, volitional subjectivism is reflected.

With regard to inequality, characteristics, preferences and uses are the distinctive elements that allow differences between people. These peculiarities or traits are basic to personality development. They are clothed with dignity, so they must be respected to live together in peace. So inequality can be seen as an incorrect distribution of freedoms, rights, resources or opportunities.

However, it is easier to qualify and subdue another person than to attend to the motive of subjective judgment toward another individual. Knowledge is created or assimilated to criticise for reasons such as race, sexuality, gender, creed, economic condition, among other ways to impose one thought on another. It recreates a truth constructed in conceptions or opinions of its own and/or of third parties, that try to distance, to prevent an act, to continue a conduct or to subjugate another subject.

Inequality is designed by a set of premises that originate in personal or social preference, or in certain socio-cultural, political and/or economic conditions. Someone does not like their neighbour to be an individual with indigenous traits, because they are not equal and considers that they should live outside their neighbourhood. In this matter, one has a prejudice towards people because of their personal characteristics (it does not qualify their behaviour or contribution to society), but it is not their pleasure to see them around and even has a discourse that justifies it. But where and why he issued that request to despise him and drive him out of his community. It should be noted that this person had prior knowledge, which was used as soon as he saw or knew of someone with certain characteristics. This prejudice becomes annoying when the circumstance confronted him with this visual situation so he demanded his eviction. His personal preferences activated his displeasure and activated a defence mechanism against the other individual. In this discussion, a distinction is created from the person who does not want to see, and another who does not share or please his thinking and attitude, and at the same time generates harm.<sup>2</sup>

The concepts that originate from discrimination can come from discourses and facts of inequality; which aim to establish privileges, impositions, benefits, subordinations, to impose a thought and action against the unequal, through the perpetuation of a certain status quo.

In the case of discrimination, it is validated and materialised by a narrative devoid of reflections and criticism. There is no inner judgment, and their sentences, actions, conditions and stipulations are obeyed as dogma, taking into account only those opinions that serve them to continue demonstrating their discourse and acting.

As a system of ideas, discrimination is an endogenous tendency. It does not need an external opinion or value, it is simply because it is and must be, without the possibility of making a comment or observation against; it is spurious, contains fallacies or is designed with prejudices, lies, manipulations or disqualifications about the features, acts and circumstances of inequality of people, to build a taste, benefit, privilege or reward for the unequal (see Altschuler, 2016).

Discrimination does not contain contrasts within, it requires opacity to continue operating and stationing people in darkness; to continue exercising their perversions and harms. This inequality is designed, manufactured and elaborated through prejudices or ideas without scientific deliberation or empathy. It originates from elaborate judgments about myths, subjective conclusions, manipulation of facts, false communication,

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<sup>2</sup> The doctrine considers damage to be the violation of the interests of the person; injury to something in which it has a real interest.

permeable ignorance, among other components (Bickel, 1986, p. 38). These acts of control cause injury or grievance, causing the victim to suffer physical, psychological and/or financial loss.

This inequality (which is manifested in its discriminatory form) results in a bias in the exercise of rights and freedoms, which benefit the controlling person or ideological group, and, on the other hand, generates an affront to the(s) person(s) in his personal sphere, space, material and temporal.

### 3. ORIGINS AND FOUNDATIONS OF DISCRIMINATION

The proposed topic will be analysed from the theory of the spheres of justice of Michael Walzer (1984). The exploration of discrimination will unravel its nature, its components, its instrumentation, its objectives and the arguments for its validity.

Discovering the origin of discrimination will make it possible to know its nature and etiology. This anthropological discovery exposes the establishment and the instruments that were used to turn inequality into an imperative doctrine and condition of the possibility of discrimination. What is required for discrimination to be established as habitual conduct and for power to be exercised against the unequal?

The recognition and extraction of the foundations of inequality will reveal the foundations of judgments and actions to abuse, order and separate the various, through acts of exclusion and discriminatory segregation. For example, in Europe, pilgrims did not have the same rights as a citizen; slaves manumitted in Rome would never be senators. African-Americans in the United States of America were (and continue to be) frowned upon in multiple communities predominantly of European (white) descent; even those who are not of European descent are still prevented from buying and selling a property, and sometimes are not treated respectfully in shops and public services.

Discrimination as a product of subjectivity emanates from individual conceptions, in which it justifies why the other person should not and cannot be seen as peer and therefore does not deserve to be considered as an equal. Discrimination has been used as a tool to highlight differences between people.

These mechanisms become the materialisation of their conceptions, to highlight certain characteristics, behaviours or preferences of some that are supposedly subject to the will of others, so they cannot develop freely, nor exist with dignity. Contempt is one of the material instruments of discrimination, which originates from the characteristics or activities of another person or group (Delfino, 1997, p. 215). This action serves to make known that the subject is not a common element, is not pleasant, nor enjoys acceptance (or is of little value), and that explains and justifies the demerit or disqualification.

Discrimination provokes animosity and therefore requires or requests the cessation or prohibition of the action, the expulsion from the site and the appropriate punishment for altering and violating their welfare. It creates a sanction to the individual for not leading to what is imposed, because the pseudo-norm is on the one hand an act of empire and on the other, an exercise of a certain ideology. Dominant conditions will impose a resolution mechanism on that kind of mess.

Antipathy produces inequality. The discriminator expects or orders that people be of a certain aspect or that people act according to their ideas, demands and personal tastes (Kojève, 2005, p. 36). In which the victims are at the mercy of the character and decision of the one who wants the imposition, to ensure their good, desire and tranquility.

Discrimination is a product of irrationality. The rationalisation exercise produces knowledge and tools that design personality and behaviour. However, if a critical, intelligent and robust cognitive process is not developed, biased information and

behaviour will be obtained. Irrational judgments also result in differential treatment of certain people, but without a solid explanation of their positions.

Ignorance is a source of discrimination. To express an opinion, make or question without proper information sometimes causes injuries. In Chile, it is said that communists eat babies. An illiterate comment that disqualifies the political adversary, which is made without any evidence (Constable and Valenzuela, 1991, p. 272). Discrimination and treatment for political preference continues to produce a deep division in Chilean society. Thus, ignorance can produce ill-conceived ideas and thus unequal treatment.

Discrimination as a lack of empathy. Placing yourself in the situation of the other person is essential to discover your thoughts and emotions and thus achieve social conformism. In cases of unequal treatment, the perpetrator is not interested in reflecting on the consequences of his acts, his selfishness does not allow him to think of the other. Your position does not allow you to place yourself in the role or emotions of others. Its goal is that its selfishness should prevail in its relations with the outside world.

Discrimination generates bias. Before a decision that deals with selection, distribution or another, if the person operates with an unequal-discriminatory epistemic system, he or she will prefer the subject who is closest to him or her. Your decision can be adjusted to set standards, or as an opportunity to show your judgment and power. Partiality does not recognise or grant the same rights, freedoms and opportunities, it is the benefit to another person in a private interest (see Trujillo, 2007).

Intolerance is implicit in discrimination. Respect for difference is at the heart of tolerance. This value allows coexistence between different people, regardless of their characteristics or behaviours. Tolerance is the essence of a republican regime, so that it exists and allows peaceful coexistence. Intolerance becomes discrimination, a lack of respect for diversity and pluralism (Williams and Waldron, 2008, p. 56).

Most discrimination is acquired empirically, through the senses and/or deductions, without a scientific method. Its conceptualisation is subjective and casuistic: its argumentation is a type of abstraction, which is made effective by its alliteration. Discrimination is validated as self-justification of what is right, what should be right, based on the biased trial.

There is no scientific support for discrimination. This means that it lacks the methodological structure to be able to produce a contribution to society, and improve the quality of life. Discrimination impedes the development of science and humanity, so the arguments or discourses in which it is fostered by inequality are a socio-political setback.

The type of discrimination is born and depends on a historical, economic, political and social context. This is understood to be a cultural product. It involves a space and time in which it takes place, for example: the persecution of the Girondins in the French Revolution, the final solution of the Nazi regime, apartheid in South Africa or segregation in the sixties in the United States. These discriminations were perpetrated through personal or social thought at a local or national level, in an environment in which a group tried to impose its position through harmful actions, in a given time and space (Nohlen, 2003, p. 191 and 196).

Discrimination is often accepted without consideration or reflection. The assimilation of their conceptions is made through the family, school, religion or social custom, which declare and justify why there should be inequality and the obligation to continue with this closed set of judgments, performing various behaviours that will cause the continuity of inequality (Dworkin, 2003, p. 419 et seq.).

Inequality as a social concept can be equated with the process of osmosis, that is, passing from a liquid to a solid membrane. In other words, the assimilation of

discriminatory knowledge happens from outside to inside the individual, as a means to be or belong to the main group or not to be discriminated against by them (see Caicedo Tapia and Porras Velasco, 2010). This adoption allows its continuity in time and space, through its reproduction and repetition to establish it as a custom. Its general observation provokes acceptance and validation in the community, which legitimises it by its acts in favour or disqualifying it for the outrages it excites.

Discrimination may be established as a social custom, as a product of the subjectivity of the individual or of the social psyche which invites and encourages its establishment or permanence through the observation of the repetition of these conventionalisms that erect a behaviour of the social group, some as unequal and others, as victims of their uses and abuses.

The family is another source that can preach and propagate discrimination, and make it adopted by its members. The family environment generates and fosters a form of behaviour inside and outside through the rules that are taught, invoked and protected from the same home. This communication of knowledge is taught by the holders of the family to the rest of their members, these thoughts are absorbed by the holders of the family to the rest of their members, who set out what values and practices they should exercise.

Another source of discrimination is through religious justification, which warns or makes an ordinance to parishioners to establish a set of beliefs that allow for the ends of inequality, abuse and injustice. Believers and worshippers of worship will not doubt the message by the authority that issues it, and will take their words literally and practice what is dictated by their spiritual leaders.

The ideological apparatuses of the State can also generate and spread discrimination, through certain messages that are communicated through propaganda, the media, norms and sentences that encourage the amalgamation between politics and society (see Althusser, 1974). For example, the caste system that existed in Mexico during the colonial period (Peninsular, Creole, Black, Mulatto, Zambo, Saltimbanqui, Salta pa' tras), determined the social position, and therefore specified their rights, freedoms, and even the places to attend, profession and to live (e.g., Castro, 1983).

It is necessary to remember that people who disobey discriminatory conceptions become enemies by not accepting or doing what they are supposed to do or invalidating because discrimination is part. As has already been said, the reproduction of hegemonic-oligarchic discourses instrumentalised from privilege.

This does not mean that any differential treatment is discriminatory, since, as long as such differentiation is objective, justified and rational, it cannot be characterised as discriminatory. If a football coach chooses certain players to play and not others because they do not have as much physical skill, the choice is not discriminatory, because there is a supporting threshold in the decision. Otherwise, the coach would standardise his decision not on physical dexterity in the religious inclination of the players.

Another key to its establishment is to favour a person or a group, so that the most capable, the most intelligent, the most beautiful predominates, etc. To benefit a person by his characteristics or abilities is a type of inequality, justified by that partial selection, with certain concepts of the right, the aesthetic, the useful, the valuable, etc. (cf. Dworkin, 1996).

Within discrimination, there is a situation of order-subordination, between the unequal and the subject who is the object of their claims and decisions. Which reveals an advantage for the one who exercises and a loss for the person who suffers the effects of their subjectivities. Partiality is one of the foundations for establishing a system of

favouritism, in which a person or a group realises its taste and need, by means of imposition and coercion to protect a decision and to be able to grant a preference.

Although it is true, in the society, and less in the social complexity of the contemporaneity, not all have the same position, no less true is that this differentiated positioning does not justify either ontological, factual, social, politically and economically any arbitrary differential treatment. The objectives of discrimination are born from the individual conception by means of reflections, conceptions and assimilations at the subjective level, which will produce a prejudice that characterises the individual and his interaction with others.

One of the effects of discrimination is to constitute two social groups: the unequal and the unequal (victimizers and victims). In which the unequal will be those who make or cause an affectation or detriment by the exercise of their doctrine. The decisions and actions of the perpetrators take the form of economic, physical, mental, emotional or general damage or damage to their legal property or rights against the personality and property of the victims (Waller, 2013, p. 63 et seq.).

For example, consider the legality of the conduct of the operators of the Third Reich, with respect to their national legal system. The Nazis made the systematic extermination of a people a legal norm (García, 1991). The Nuremberg Laws of 1935, and any action taken to give effect to such a mandate, were protected by the Law of the Reich. Indeed, all their actions were backed up by-laws, decrees and regulations. The Nazis were aware that what they were doing or were not doing was criminal in nature; simply what they were doing was right, according to their legal system, and failure to do so would rather have made them liable for violating their law (Barrios, 2013). In this specific case, it can be elucidated how this relation and interaction between the two was legally institutionalised, translating discrimination as legal.

As mentioned, the discriminator wishes to repress, manipulate, deter or extinguish in order to gain advantages over what is not to his liking. In his environment, he tries to make his ideas prevail, under a means of domination and controlled circumstances. This for two reasons, the first, to have an ideal environment for your philosophy; and the second, to make permanent that ideal environment.

Controlling the way people live is another objective of discrimination. By stipulating how people should behave, an inventory is created of what can be done and what is prohibited, derived from what is permitted or directly, is prohibited.

The effect of disobedience to discrimination is the sanction that can be in various ways: corporal punishment, display, separation, censorship, limitation, marginalisation, even ostracism or confinement. Through punishment, the unequal system is reinforced; people know what they can do or how they should behave, the effect of the norm is to deter the behaviour.

The exhibition shows not only the offender, but will produce a marginalisation because it is contrary to unequal beliefs, and as a result, it will be separated from the rest because it did not respect the recognised norms. In an extreme way, the discriminated against can be expelled from the community so that they no longer see them, nor cohabit in the same space (Kerbo, 2004, p. 250 et seq.). The topic of expulsion on racial grounds, or how ghettos have been created to locate them, is well known.

An indirect objective of discrimination is to build subordination. There are two ways; the first is the unconditional submission of the unequal to their philosophy. The second is that which produces in the unequal as victims, having to obey the guidelines and conditions that this doctrine generates (Fallon, 2004, p. 7).

Discrimination as a trans-generational figure leads to the continuity of its principles, forms, actions and the circumstances that underpin it. Their continuation will



depend on their apparatus of persecution and punishment, education and other factors. What must be visualised is that an objective of inequality that seeks to impose itself permanently, to generate a single discourse, creating and establishing a single reason.

#### 4. INTRODUCTION OF DISCRIMINATION AND ITS TAXONOMY

In the former section the concept of discrimination was presented, its origins, its foundations and a classification to see the different ways in which it can be exercised. In the next part of the study, it will be analysed which devices are used by the dominant person or group to impose their will through discrimination, that is, the instrumental sense of discrimination (Cornejo Certtucha, 1982, pp. 239–240).

Therefore, it must be borne in mind that obedience to inequality can be through coercion. For the imperative act to be considered not only legitimate, but also legal, this legal order is placed as just and valid, and as unjust and immoral, for the abused.

##### 4.1 *Forms and Types of Discrimination*

Here will be the direct and indirect application of subjective, social or professional criteria that, based on inequality, have caused an imbalance in the relations, rights, freedoms and opportunities of some person(s).

In the act of discrimination, it is important to note that the difference can produce disadvantage, and vice versa, the disadvantage generates a discriminatory difference (Sørensen, 1996). Exemplifying: if someone possesses a certain personal characteristic by his skin tone, the unequal reacts, using his unconscious, which warns him and signals the behaviour he must execute.

On the other hand, social difference is a construct of a community, which has established a series of conceptions about the good, the just, the wrong, the normal, the accepted, the valuable, the due, the recognised, the bad, the harmful, the repudiable, the sanctioned, etc. The acts of the person are based on recognised standards that the majority approves (moral standards), which serve for the functional development on a personal and social level, which allow the performance of continuous tract conduct, and which are evaluated and strengthened in a reward or penalty system.

A religious community, for example, rejects homosexual people, because, to their sieve, they are perverse, because that is not natural, because their preferences, behaviours or ways of being are not acceptable, because they spoil the rest of society, because they are sick, among so many prejudices and ideas that drive the psyche and behaviour of the collective (Sojo, 2010, pp. 45–63). The person who adopts these preconceived ideas can accept them fully or with a certain degree of gradualness, or reject them, designing and constructing their own judgments, based on their own ideas and assessments.

The types of discrimination should be studied from the social, political and economic context. Each scenario is different, but there are certain patterns in its conception, diffusion and application. What is important to consider is that discrimination is created from subjective conceptions and that it tries to form people according to the plans of the unequal. In this way, discrimination is installed in the person and its rejection, adoption, continuity, disinterest or censorship depends on it.

Personal differentiation is the most common form of discrimination. This is generated from anthropology, the attire, the way of speaking, some physical or mental disability. In these cases, the subject distinguishes the difference from the others, generating and reproducing their inequality schemes.

Many discriminations that are made are based on social conceptions, in which the individual validates his acting by communal impositions (Tilly, 1998, p. 22 et seq.). In this case, the difference is no longer based properly on the taste or preference of the person, but their judgments come from assimilated ideas, and therefore continues to reproduce and renew that belief. In the United States of America, several of its citizens think that Latinos only serve to provide services. In this case, immigrants consider that they are not able to lead a life and achieve the American dream; that they are not at their level and that their characteristics and beliefs do not allow them to achieve other goals.

As for discrimination as a factor of disadvantage, several possibilities can be noted. The first is the origin of the person (which can be racial, economic, among others), which leads to the judgment of acceptance by the community (Raz, 1988, pp. 23–99). The origin of where it comes from generates a label in certain groups, which qualify their acceptance according to it. Physical appearance is one of the main causes that excite and encourage discrimination. An attempt is made to impose a stereotype, standard or model of what is a pattern of beauty or of the aesthetic characteristics that people must possess, in order not to be disqualified by their image (in the Latin American case, the aesthetic standard is often the Eurocentric). By looking at the external elements, an image or symbol is formed in the person, which knows or identifies its physical peculiarities and for what purpose, housing in the mind its contents and functions of the object. But it not only assimilates identification, but also a personal judgment towards the object, an opinion based on subjectivity and/or in accordance with social materiality. The core of the identity of the object must be the basis for its identification, use and judgment.

On the other hand, all people have tastes, which come most often from the subjective selection of knowledge contained in the psyche (e.g. Dubet, 2015). They give guidelines to an act, to have or to do, as it is the dress, the sexual preference, among so many.

It is said that for tastes there are colours, and each human being has his preference, based on the purification of his knowledge, which provoke taste and attraction to various elements. In the case of personal tastes about the appearance of another person, it operates by prior knowledge either by personal taste or by an external conception, which directs its pleasures and thoughts.

The idea of superiority from one person to another can be given in several ways. One of the most obvious examples is that we observe that all individuals have certain morphological characteristics such as: skin colour, height, size, odour, among others, that allow identification and, in the background, the qualification of certain personal characteristics. In the first scenario, an identification and recognition is made. In the second moment, the attitude that will be taken towards the other individual takes place: an indifferent treatment, such as a pair or displeasure (which can generate an action against the other person).

The pre-judgment for physical differences becomes discrimination, when the same social treatment is not granted or recognised to those who are dissimilar in appearance or who they consider are not part of their standards, which gives them a differential treatment that attacks and violates their rights and freedoms.

Continuing with the subject of physical characteristics, one can see that discrimination occurs when there is a judgment that someone is more valuable than another because of their race or ancestry, that is, they are not peers and therefore their rights and freedoms should not be equal. Xenophobia is a social problem that results from the stigma of physical difference and leads to unequal treatment in society. Racial problems are as old as humanity, let us recover the African Americans in the USA, the Aryan supremacy, the indigenous of the ancient civilisations (Bolivia, Brazil, Chile, Peru,

Mexico, among others), the people was segregated by apartheid in South Africa, among many (Bix, 2009, p. 22).

It is observed that the image is what identifies us, but it is also the primary sample with which people are judged. This superficial judgment, which contains no depth, is only a perception based on emotional subjectivity. The attire of a person who comes from an original village, a punk, a trendy blonde, a dirty person, someone in an old suit, among so many images, instantly qualify the person by his image. This evaluation generates a reaction towards the other individual, which can be of indifference, taste or displeasure and with it, could generate an inequality in the treatment, for not complying with certain labels or not being in accordance with fashion consumption. One could also discriminate against a person because of the image he possesses by denying him a good or service. The unevenness that is exercised with these judgments creates a damage that the victim suffers in his sphere (Fiss, 2004, p. 59).

Gender, on the other hand, is a social product, recognizing the stereotyping of men and women, their roles in society, rights and freedoms. This construct is linked to a power relationship, in which women are unequal because of their sex and dominant beliefs (Izquierdo, 1999, pp. 25–49). Objectification has made women an object, at the service not only of men but also of society and the market. Differentiation has served to scorn and ignore their feelings and emotions, diminish their rights and freedoms, resulting in inequality by unravelling the gender issue. This has facticity in terms of jobs (secretaries, nurses, waitresses), careers (educators), jobs (it is believed that they cannot run a mechanical workshop), places (public and in good time), attire (label to look your own), to make it look good. This inequality is intrinsic in the acts that impose modes, forms, rules and behaviours of the roles that men and women must perform, if they want to be approved and seen well by the social conglomerate (Nino, 1989, pp. 199–236).

In another sense, sexuality is a private matter that concerns and belongs to every being. In this area, there are freedoms and rights that society has safeguarded and defined, in which preference must be respected, as well as the protection of the sexuality of minors and disabled persons. Sexual preference is a subjective decision, involving its exercise (optional), a decision, and a realisation involving the sexual rights of each person. The exercise of freedom of sexual preference is built on the basis of the personal, social and religious conceptions and beliefs of each subject, but which are determined in a space and time. This creates a parameter of admitted sexuality, in which the issue of right, normal and good are the measures to know if that person is acting in the right way, if there could be any tolerance, how to treat a disease or a crime to be punished. Discrimination comes in dealing with people who do not follow the social sexual canons; for example, homosexuals are not well seen by everyone, they cannot demonstrate their affection publicly, they go to exclusive places to entertain themselves without being qualified, clothing for their sexual preference, the application for a job if their homosexuality is recognised, etc.<sup>3</sup>

Mental condition can also generate differentiation, and lead to inequality and discrimination. For example, people with different capacities like Down, Asperger's, Tourette's, mental retardation, (among other mental or motor diseases) show at first sight a person with a disability, which sometimes produces a kind of injustice, for they do not enjoy the same physical or mental conditions as mental-physical-motor hegemonism. Without understanding, we are equal, but different.

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<sup>3</sup> In Mexico, the right of same-sex marriage is recognised. But some of their rights as a husband or wife are not yet applied. For example, social security, adoption, health insurance, among others.

These diseases already disturb them and cause them discomfort, but there are still people who do not offer their understanding and support, but who still discriminate against them. In the natural lottery they did not enjoy an excellent health, and therefore conditions must be created for them to participate in equity in society (Schneider et al., 2002).

Religious intolerance has generated hundreds of thousands of human misfortunes. To profess or worship any particular religion or creed is a personal decision. Militant religion or hatred directed at a particular person, race or population demonstrates their lack of spiritual pluralism. Disqualification, domination and imposition are the peculiarities of an intolerant religion, which on many occasions is in complicity with a State ideology.

Religion is used as an instrument of fanaticism, as a means for the State to instrumentalise exclusion, persecution, punishment or a campaign of hatred towards a religious group. For example, the Jews in the Nazi regime, the Cristeros in Mexico, the Christians in the Roman Empire, the Aztecs creed in the Spanish empire, the Muslims in the West, among other cases of discrimination for professing some faith (Tortosa Blasco, 2003, pp. 177–195). Do not forget that the Christian church in the Middle Ages censured any other way of understanding the world and that who dared, was punished, the way of prosecuting those who pointed out to be sorceresses, those who degrade those who do not follow the conventions, among others.

Belonging to a political group may also place a person in a situation of discrimination. People who are communists or extreme right-wing are intolerant of political pluralism, where their vision is one of political hegemony. They consider the ideology of the reason of State, and that their philosophy should be established, over others that are contrary or have an interest that does not empathise with them. This discrimination in the treatment of those who are not with me leads to disqualifying the thinking and interests of political pluralism, but, above all, exposes the lack of dialogue and empathy, considering antipodes or enemies to their adversaries.

The education received can also lead to discrimination. This in several ways: first, in some places, private education is a privilege, there are better teachers and peers with similar economic conditions unlike the public education system. Second, you can develop a bias for the school or university of origin. Thirdly, the opportunities presented to them by their place of training. And, finally, for the continuation of their studies in postgraduate, it is considered as variable, the school where they did their professional studies or to get a job. This difference between the types of education generates inequality and discrimination in treatment, opportunities and working conditions (Wesselingh, 1997).

The classism that is produced by belonging to a social stratum can produce discrimination (Cortés, 2016, pp. 23–60). The social treatment received by a person with financial resources in a restaurant or in a competence system, certain people enjoy an advantage because of the education they received and this causes a new case of discrimination (Sen, 2005, p. 16 et seq.). The social and economic conditions in which each person lives and in which he or she lives are sometimes decisive in terms of evidence and discrimination.

Age as a factor of discrimination where the years become a component in the market, in relationships or to define their activities (Gallego and Jiménez, 2010, p. 59). When an older person applies for a job in a factory, his or her application is rejected because of his or her abilities; a young person wishes to acquire a mortgage loan but does not consider it a subject to meet certain obligations; a mature woman trying to get a job in a government office and is rejected for the years she has and could contribute. In these cases, age is a determining factor for not obtaining what they requested or required.

In the first case, the physical condition of the elderly, their skills and abilities. In the second example, a person who does not enjoy a job stability and a certain profile, so it is more difficult for the person to find a real estate loan or to start a business. In the third case, for a woman with a certain age and no work experience it is very difficult to find work in the market, which requires young people and they will be paid less. So the jobs they come up with are minor, with little responsibility and minimal pay. This creates judgments of inequality and consequently discrimination, because those affected are not in accordance with the social, conventional or labour requirements, or worse, of commercial profitability.

Discrimination today is much discussed, since there are social entities and public entities that make laws to control and combat these acts; but, still, in times there are pockets in which part of the citizenry discriminates, which does not accept everyone equally and which bases its actions on unequal ideas (see Esquivel, 2015).

#### *4.2 Validity Criteria for Justified Discrimination*

Discrimination is instinctively rejected, recognised as harmful and a liability in liberal societies. However, it is this same freedom that on certain occasions allows its use to be justified, without a sanction; there is talk, therefore, of exceptions to discrimination, in which the application of criteria of segregation has no legal sanction and, moral, but an apology is sought for that decision, and it produces its validity from the protection of a protected asset.

Therefore, a classification can be created from various cases, which allow an analysis of why it is generated and why the justification is validated to be able to make a rational and objective differential treatment, seeking the primacy of certain principles.

##### *4.2.1 Positive Discrimination*

Positive discrimination was built on the basis of public policies, through so-called affirmative action, in the 1960s. It is essential to locate the context in which women could not be responsible for executive positions in the private sector or be appointed to relevant public functions. A stereotype emerged in which women's work was to preserve care for the home or to perform work in which men had no competence ('Affirmative Action in American Colleges After Fisher v. Texas', n.d.). Thus, society entrenched the custom of the roles, jobs and tasks that a woman had to perform, and on the other hand, a paradigm was consolidated that excluded them from public debate and decisions, without their presence or opinion.

This construction -positive discrimination- aims to seek justice and inclusion of women in the public space in which they request equal opportunities, inclusion in the public space, freedom of social action, equity in the treatment and full realisation of their rights (that are not only a legal representation). As an example, we can note the public calls for employment in the Mexican government, in which it was placed in the bases of the contest, which would only be for women.

This undoubtedly excluded men from the competence for these public positions, generating a series of legal remedies, which accused of discrimination and that there were not the same positions, just because they were of a sex other than the female.

On the matter in question, the High Chamber of the Court, in a different case, arrived at the following considerations when deciding the case SUP-JDC-1080/2013 and cumulated:

*"Affirmative actions in favour of women, for example, they aim to combat the discrimination and exclusion that they have historically faced, and they aim to accelerate their participation in a given area. - Also called temporary special measures, they seek to equalize opportunities and, therefore, grant special benefits or preferential treatment to women, who are destined to disappear as soon as the situation of inequality has been overcome. - They are affirmative action measures: or the issuance of one-off calls for public office and jobs open exclusively to women in response to a history of structural and systematic exclusion. A one-off call for women in competition competitions for posts related to the professional electoral service would be a proportionate response to the huge disparity between women and men holding posts in that service professional."*

Another example of positive discrimination can be found in the Mexican Federal Congress. At the present time, candidates and political representative delegations must be fifty per cent for women, so that there is equitable representation and they are no longer dispensed with electoral matters and political representation. Here, however, there would be room for reflection (IMCO Staff, 2018).

Although a quantitative parity had already been created in Congress, it did not mean that they had full freedom to exercise their functions, but that they were subject to the orders of the political party that nominated them and supported their candidacy. So their determinations are directed by the top political party, and, on the other hand, by the legislative agenda. It is a representation that in qualitative terms does not contribute to the gender of women, and that becomes an ornament for a beautiful photograph, but that has in the background an invisible chain and dark manipulation (Expansión Política, 2018).

#### 4.2.2 Functional Discrimination

In a newspaper job section, staff were requested to work as hostess in a privileged restaurant. The restaurant required women of a certain height, good treatment, good looking and presence, but the message printed did not define or mention the physical characteristics that the candidates should possess, so a person with indigenous traits and an outfit of their locality was presented.

The human resources department decided that she did not have the image requirements required by the company's image. Thus, the victim decided to sue for this rejection, since she considered that it did comply with the bases of the advertisement, and that its racial and ethnic traits had been the pretext for not hiring her.

The case went to the Supreme Court of Justice where it found that there was a consensus that there had been discrimination on the basis of differential treatment, but it also gave the company the reason, since it had the freedom to choose its staff, and that knowledge and image considerations are paramount to the product they offer. In this way, an exception was designed in the criteria of recruitment of personnel, safeguarding the employer's right to freedom from hiring.<sup>4</sup>

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<sup>4</sup> Direct amparo under review 4441/2018 of the Mexican judiciary.

#### 4.2.3 *Discrimination for Criminal Record*

As discussed above, the image may be a requirement for employment. In which the aesthetic requirements are paramount for the development of the function that is planned, so the selection becomes fundamental for the proper development of that work. But one could examine a person's background as a criterion for agreeing to a job, in other words, one would be free to hire someone with a bad reputation or criminal record.

In Mexico, an advertisement was published in the employment section of a bank securities transport company requesting personnel. On that occasion, there was a man who had recently been released from prison for theft and drug trafficking. When applying to work, they asked him if he met the requirements that were of height, handling of weapons, consumption of drugs, among others that pointed out the advertisement of the newspaper. But the point that prevented the hiring was the appearance of his criminal record, because they did not provide confidence in the worker, so it was decided not to hire him.

The unsuccessful person established that he had been discriminated against, that he had already been released and that the issue of criminal records was not mentioned in the advertisement as a requirement for being hired and able to work in that company. The case was prosecuted, and was considered by the highest court in the country, which although the summons did not mention or specify any criminal record, no less true is that because of the activities carried out by the corporation, it required a suitable profile, and between them generate a relationship of trust to exercise its functions.

The discrimination on the basis of differential treatment that had occurred was justified by safeguarding the right of the company to recruit the appropriate personnel to carry out its tasks.<sup>5</sup>

#### 4.2.4 *Discrimination based on Mental or Physical Capacity*

In previous cases, it was observed that job openings should be more specific so as not to create problems with recruitment. However, what would happen if the call established a mental condition to be able to own a job. In the hypothetical case of a construction site and there is an outside advertisement, which indicates that someone with experience in the handling of the crane is required to place iron beams, upload material and other acts related to heavy loads and a person with Down syndrome or advanced age is presented to apply for the use of crane handling. The first reaction was a mockery, he was not even asked about his skills, being discriminated against and not hired by the construction company (Suprema Corte de Justicia de la Nación, 2010).

The point to consider, is that the announcement did not contain as a requirement any reason of health, or mental or physical capacity; however, it should be reflected that people who want that employment enjoy a set of knowledge, skills and health to operate these teams. The safety of workers must be safeguarded by the same company, so the hiring of specialised personnel minimises risks, hence the justification for differentiated *treatment*.

#### 4.2.5 *Discrimination in Political Representation*

There are sometimes certain requirements for positions and positions of political representation, which place those who could not fill them in a disadvantaged position, or

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<sup>5</sup> Amparo in revision 272/2019 of the Mexican Judiciary.

that because of its specialty requires personnel with a professional profile or certain requirements for its designation. These legal requirements could be considered discriminatory, but let's look at some examples. The Mexican Constitution states that to be a deputy or senator, one must be 21 and 25 years old, respectively. But really these citizens who already exercise political acts, cannot contend for the fact that they do not have the established age; indeed, age would be a criterion for thinking that the individual can already discern responsibly on public affairs.<sup>6</sup>

In other regulatory systems to apply for representative positions in Congress, it is required to know how to read and write (Brazil), or to have a higher secondary education (Chile), being the fundamental requirements to be a candidate. But are these constitutional conditions discriminatory, or are they the minimum level for carrying out their representative tasks? There are other conditions, for example, in Mexico, ministers of creed must give up their habits, at least six months before the election or have been commissioned to office in the government of the current election. In the case of the civil service, there are some additional requirements to be considered in office, such as having nationality (Taibo case) or to be Secretary of State (have a professional degree) (Muñiz Toledo, 2018).

#### 4.2.6 *Discrimination by Self Guardianship (Security)*

Justified discrimination can also be made when it is for security reasons. In Mexico City, in public transport, cars or exclusive spaces for women are set aside so that they do not suffer from harassment, guaranteeing their safety and being able to travel comfortably, with this separation policy (Vela Barba, 2016).

In times of pandemic, a public service could be denied. For example, the rent of an apartment to a doctor, who is in contact with infectious diseases or attend in a restaurant to nurses who work with people infected with a virus of contact transmission (Lastiri, 2020).

#### 4.2.7 *Legal Discrimination*

Sometimes the rules contain discriminatory criteria on the grounds that a superior asset is protected. In family matters, the Civil Code provides that in cases of guardianship, women shall have custody of minors, leaving the father of the minors defenceless, since a right is imposed by virtue of being the mother, and it is believed that they will take proper care of them. However, each case is a story, and not because it is regulated, all the elements of that issue should not be overlooked (Indigo Staff, 2019).

There are also specialised public policies for mothers who are householders, which provide them with certain support, such as education, health care for them and minors, entrepreneurship, housing, microcredit, working hours, among others. In which sexuality determines that only women will be able to obtain these benefits.

#### 4.2.8 *Competitive Discrimination*

Context determines how people's lives and actions are taken. In which the evolution is the constant one so that the vulnerable groups obtain political triumphs or social demands for their rights. In the case of the women's sports competition, the difference between trans athletes and women has been noted. Because they consider that their physical conditions (volume and muscle mass) produce inequalities with

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<sup>6</sup> Constitutional Articles 55 and 58 of the Mexican Federal Constitution.



women (biologically speaking) (BBC Mundo, 2016), which generates a competition that is not fair for these physical inequalities.

This topic is still being discussed, what can be observed is that the answer would be very casuistic, depending on the type of sport being consigned. It is not the same archery as athletics, routine with hoop and weightlifting, it is not the same synchronised swimming as boxing, among others (Vela, 2017).

#### *4.2.9 Discrimination by Suspicious Appearance*

In the criminal procedure system and in many public security systems, corporal review of persons who appear to be suspected by the police or who act in a manner that could lead to a crime is permitted.<sup>7</sup>

But this harassment is also due to the appearance of people. In the United States, reviews or arrests are greater for Latinos or African Americans, where their racial conditions are related to crimes, and therefore they are subject to greater supervision, which often becomes discrimination in their selection of personal reviews.

Another example where there is discrimination in screening is at airports. In which people with Arab traits are more guarded and personal searches are almost a future fact. Here the good that is protected is security, its criterion is the past acts in which there were terrorist attacks.

#### *4.2.10 Discrimination on the Basis of a Public Record*

Databases on various subjects are currently available. Through electronic means or public consultation ranging from credit histories, criminal records, record of sexual predators against minors, non-payment of alimony, professional malpractice, among others (CNDH México, 2016).

In these databases, various public data on individuals are displayed which can be used to obtain information about their activities. But these data could generate discrimination of the people contained in them, so it could be a factor (depending on the topic and object), to be able to discriminate against a subject who has committed illegal or illicit activities.

#### *4.2.11 Diseases and Discrimination*

At present, everyone is familiar with the issue of the pandemic by COVID 19. This virus has changed the way people develop their personal, professional, and social activities. This has resulted in the imposition of a system of social inactivity and confinement (compulsory or out of self-confidence), in which interaction with other individuals has been attempted to minimise, so as not to spread the spread of this disease.

For the same reason, a vaccine was invented to recover the previous life and be able to continue life as closely as the previous one, in terms of the uses and customs of the people. This immunisation in some states has become binding for subjects (such as Spain), and in other countries (such as Mexico), the issue of the freedom of individuals not to undergo this medical treatment against COVID has been discussed.

But there are certain states (such as Chile) in which a certificate called "Mobility Pass" has been issued, in which, to work, attend the cinema, go up to the subway, be at

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<sup>7</sup> Art. 269 of the National Code of Criminal Procedure (Corporal Research).

school, visit a museum, or any outside activity, it requires the subject to have it, under penalty of criminal or administrative punishment. For example, new discrimination is generated when a person without vaccines or those authorised, cannot enter the United States of America (Janssen / J & J. Pfizer-BioNTech. Modern. AstraZeneca. Sinovac. Sinopharm. Covishield. Covaxin) or Europe (Pfizer, Moderna, Johnson & Johnson, and AstraZeneca).

But should it be a *sine qua non* requirement for any activity (how to apply for a job, visit the family or attend a concert), to possess and present an immunisation card? Should people be forced to vaccinate (for the sake of others)? or should personal autonomy be respected and not excluded from social, personal, and professional activities?

#### 4.2.12 *A Possible Fraud to the Law*

In this legal space, if a man requests a judicial change of his birth certificate, in which he is registered as a man to be now recognised as a woman, accompanies an expert in psychology in which her female personality is declared. The judge must consider or examine whether this person is making a voluntary change, there is no opposition, the law has no objections, and neither can the judge request further review of the case (López Bonilla, 2019).

Because it is an administrative procedure, an order is issued for the change of sex in the birth certificate, and with this, it is possible to exercise their rights as any citizen. Subsequently, it requests that the public policies that were created exclusively for women be recognised and granted, in areas such as entrepreneurship, single mothers, health for herself and her children, housing subsidy, educational scholarships, among others, or requiring work leave to care for their children.

On the electoral issue, there was a relevant case (Coppel, 2018). A group of men requested their registration by gender quota when claiming that they were women (they even dressed and made up for photos), and that not considering their personal decision would violate their sexual determination and discriminate against them, as they claimed to be women. This case was resolved on the assumption that they had not expressed this preference before the elections, nor had they made public or private statements about their sexual orientation, so they dismissed the matter and denied these postulations.<sup>8</sup>

## 5. EPILOGUE

This booklet presented a theme that, although it is repudiated at first instance, no less true is an act that is constantly carried out in various social areas. So the task was to show this clash of rights, in which the circumstance or an individual can operate an argumentative system that justifies discrimination, without having to face a punitive consequence. It is not a question of validating these decisions, but rather of stating that the relativity of a subject that can generate an exceptional space, and that is the same thing which allows to generate exit valves and that the juridical system can face its contradictions inside.

Justified discrimination in liberal society is a topic for discussing another form of protection of a protected good and on the other hand, observe the inexorable and unrestricted respect for the rights of every person, and that the clash of rights and

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<sup>8</sup> SUP-JDC-304/2018 of the Mexican Judiciary.

casuistic circumstances produce spaces for the use of disqualification to certain individuals or groups (even affecting their rights), provided that the usefulness of that personal decision is useful for personal or social well-being.

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