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Discrimination as a Convention: A Re-Assessment of the Impact of Social Intervention

Ariane Ghirardello *

Abstract: »Diskriminierung als eine Konvention: Eine Neubewertung des Effekts sozialer Intervention«. This article argues that the "standard approach" of the analysis of discrimination cannot easily explain the durability of discriminatory practices, which should "normally" disappear thanks to market forces. We propose an analysis of labor market discrimination using the concept of convention. First, our convention-based explanation tries to characterize discrimination as an arbitrary, automatic, conformist, and self-enforcing behavior. Second, using the French institutional approach of economics of convention, we can define discrimination as an illegitimate practice. This implies that, because discrimination is stable in the long run and unfair, legislation and policy, as well as affirmative action, are useful. This new approach to the economic analysis of discrimination also changes the interrelation(s) of markets, firms, and law.

Keywords: Discrimination, convention, bad convention, economics of convention, labor markets.

1. Introduction

Various economic theories try to explain the "puzzle" of job discrimination. Their aim is to understand why two individuals with equal productivity may be treated unequally, according to their observable characteristics such as race, ethnicity, or gender. For example, they may receive different wages or face different demands for their labor services at a given wage (Altonji and Blank 1999). Discrimination, then, is an obvious enigma for standard economics, since free markets suppose, on the contrary, that people are valued according to their actual productivity.

This paper proposes to show that most of the economic analyses of discrimination fail to offer a satisfactory explanation of this practice. We will consider, like Arrow (1998, 97), that "[...] the market-based theories give an inadequate account of the effects of racial discrimination." In particular, discrimination is viewed as a transitory behavior, which is contradicted by historical facts. It

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should tend to disappear in the long run thanks to market adjustments. But the market cannot provide an adequate sanction for discriminatory practices.

The use of the concept of convention will support our assumption. Indeed, we will show that some discriminatory practices take the form of arbitrary, automatic, conformist, and self-enforcing behaviors. Discrimination practices can then be viewed as a convention. They provide a stable solution to individuals having a “preference for conformity.” Discrimination can then be analyzed as a stable equilibrium which is, Pareto sub-optimal, but risk dominant.

Moreover, using another concept of convention provided by the economics of convention (in short EC), we can show that discrimination can persist in the long run even if people disapprove it. According to the EC, individuals could be driven by collective preferences and they also have a capacity for justification and a sense of justice (Boltanski and Thévenot 2006). This helps to understand what could be a paradox: the models of representations can produce discriminations even though these behaviors are unfair and most people disapprove it.

Because discrimination seems to be a rational solution for the agents, markets will be unable to eradicate it. But, if discrimination is viewed as a bad or an unfair behavior disapproved of by most people, this justifies the use of anti-discrimination laws and/or affirmative actions. History shows us that the evolution of institutions is based on fighting against the most questionable and unjust situations.

However, one is forced to acknowledge the fact that the multitudes of legislative constraints that have been adopted and the governmental policies that have been used so far have not achieved their goals. Nevertheless, law and case law can be seen as a “dispute” – even if they do not completely succeed in modifying the behavior – that contribute to confirming the illegitimacy of these practices. They are supports for criticism and resources to change models of representation by leading to new compromises.

The ineffectiveness of traditional tools of repression can then be analyzed as the result of the difficulty to enforce a new convention, even if it is both more efficient and fairer. This is why we believe that affirmative actions can be useful in combating discrimination and leading to more just situations for individuals.

2. Discrimination: What Will Happen in the Long Run?

While according to neoclassical theory, in the labor market everyone must be evaluated according to his or her productivity, discrimination contradicts such a result. This is why it fails to explain the permanence of the discrimination that has been historically proven (Arrow 1998; Ghirardello 2003). Using the concept of convention, we will try to understand why discrimination can be seen as

stable behavior. Moreover, by mobilizing the approach of EC, we will show that this behavior, which relies on shared representations, can persist even if people disagree.

2.1 The Market-Based Explanation: Discrimination as a Transitory Behavior

Becker's (1957) analysis is considered as one of the main foundations of the economic analysis of discrimination. He assumes that a taste for discrimination against black people exists.¹ Discrimination may be based on individuals' preferences, an understatement for a well-known behavior: racism. He then considers that different persons can have a discriminatory taste.

First, consider that discrimination is based on employers' preferences. These preferences will entail that they will be ready to pay a higher wage to individuals not belonging to an ethnic minority in order to avoid any "contact" with the latter category. Discrimination therefore appears to be an inefficient phenomenon because it biases labor demand towards a more expensive type of workers: the whites. Any employer considering any characteristic other than the productivity of a worker will not be profit-maximizing and thus will not survive under perfect competition. The theory then yields a surprising result: discrimination *must* disappear in the long run; it is therefore assimilated to a transitory practice.

Second, discrimination is based on workers' behavior. In this case, they prefer to work with individuals belonging to the same group. They are ready to give up a part of their wages in order to match their preferences. In this case, a employer who maximizes would never hire a mixed workforce. So, in the long run, total segregation may exist but there will be no discrimination because blacks and whites receive the same wages.

Third, suppose that discrimination is based on consumer's tastes. Here, discrimination can be viewed as a phenomenon persisting in the long run, but only if consumers are ready to pay a higher cost for the goods produced by individuals not belonging to a minority. Nevertheless, this assumption is not very realistic in particular for the activities which do not imply a face-to-face relationship between consumers and workers (Arrow 1973).

To put it briefly, if discrimination is explained by agents' tastes, the durability of the phenomenon can be understood only at the expense of strong restrictive assumptions. That is why economic theory has been trying to explain, in a more plausible way, the fact that discrimination persists in the long run. Arrow (1973) and Phelps (1972) propose an alternative interpretation of discriminatory behavior by assuming an imperfect information framework in which employers believe that minority workers have, on average, a lower productivity. This

¹ Becker analyses racial discrimination but his theory can be used to explain other forms of discriminations, in particular discrimination against women.

results in a statistical discrimination, which does not rely on the tastes of the individuals any more but on their beliefs.

Employers will then discriminate against ethnic minorities because they believe that they are, on average, less productive. This appears to be effective in the short term because it allows employers to make a quick selection of the applications instead of seeking to make a precise evaluation of individual skills. The same crucial question then arises: what happens in the long run? On the one hand, if the beliefs are true, it is no more a discriminatory behavior: blacks receive a lower wage only because they are less productive. On the other hand, if discriminatory beliefs are disproved by reality, they are bound to disappear. Hence discrimination will be, once again, assimilated to a transitory behavior. To consider discrimination as a durable phenomenon, the economic literature based on beliefs suggests two possibilities.²

First, discriminatory beliefs can have durable effects if they dissuade discriminated people from looking for certain types of jobs. Because of the loss they have to bear, minorities can decide to withdraw from a labor market sector. This is a special case where individuals, knowing that they have slim chances to be hired for a given job, rationally decide not to apply for it. Thus, employers will not have the possibility of acquiring new information about the supposed (low) productivity of the minority individuals, which will reinforce their initial beliefs, even if they are wrong.

Second, discriminatory beliefs can have durable effects if they prevent discriminated people from accumulating knowledge and skills. For example, discrimination durability stems from the impacts of employers' beliefs on employees' decisions relative to their human capital investment. If the individuals belonging to the minority group know that they will probably be discriminated against, they can rationally decide to under-invest in human capital because of the relatively weak expected returns on this investment. This will also tend to confirm the employers' initial prejudice against these workers. Discriminatory beliefs then have properties identical to those of self-fulfilling prophecies.

From these two analyses, the possibility emerges that statistical discrimination may have persistent effects in the long run, either by self-discrimination or by self-fulfillment of *a priori* beliefs. Hence, the analysis of statistical discrimination faces two alternative outcomes. First, discrimination disappears thanks to market adjustment. Second, discrimination disappears because it is no more discrimination: blacks under-invest in human capital, so they are less productive; that is the only reason why they finally receive a lower wage.³

² The analysis of the persistence of the discriminatory beliefs over a long period of time will only be outlined here. To understand such stability, it is particularly appropriate to see on this subject Arrow (1973), Farmer and Terell (1996), or Altonji and Blank (1999).

³ We want to mention however the atypical work of Spence (1973) who, in a model with multiple equilibriums, considers the possibility that discrimination can have durable effects.

But, these results, based on tastes or on beliefs, are not consistent with the empirical evidence, which proves that discrimination is *not* a transitory phenomenon (Altonji and Blank 1999). That is why Arrow (1998) considers that we should only recognize the “ordinary economic analysis” relevance in the short run and should abandon the market-based analyses to understand discrimination. It is this interpretation we want to follow now and propose another analysis of discrimination based on conventions.

2.2 A Convention-Based Explanation: Discrimination as a Stable Equilibrium

In this section, we propose an alternative analysis of discrimination based on the concept of convention, which allows to understand its stability.

Conventions solve a coordination problem involving individuals with common interests. Lewis (1969) defines a convention as a “regularity” in behavior, each agent following conventions that he/she expects others to adopt. Everyone maintains his/her action if the others do the same. Conventions settle and develop because of this presupposed preference for conformity. “This is why it is redundant to speak of an ‘arbitrary’ convention. Any convention is arbitrary because there is an alternative regularity that could have been our convention instead” (Lewis 1969, 70). Within this framework, the puzzle of the stability of discrimination can be solved, since the latter is contemplated as a conventional solution to a coordination problem, in the same way as in Schelling’s well-known “meeting game,” used by Lewis.

It is interesting to note that Schelling himself (1969, 1978) explains segregation using the concept of convention. Suppose that white people do accept to be with black people only if there is a local majority of white people. In this case, Schelling shows that even if people prefer a mixed distribution, segregation is the only outcome: “if each insists on being a local majority, there is only one mixture that will satisfy them – complete segregation” (1978, 141). This approach explains why discrimination can be a stable equilibrium. Schelling then compares discrimination against blacks or women to a self-enforcing convention.⁴ Here inequalities are only supported by conventions.

The main interest to viewing discriminatory behaviors as a conventional solution to a coordination game is that they can emerge in spite of their Pareto sub-optimality. In other words, to use the “conventionalist” analysis implies to emphasize the existence of coordination at the expense of optimality. This stresses a fundamental characteristic of conventions, which allow to coordinate individuals on an arbitrary basis without guaranteed collective efficiency. Although it may perform badly with respect to collective efficiency, the conven-

⁴ An interesting development of this analysis has been suggested by Kaneko and Kimura (1992).

tional solution, nonetheless, plays the role of a “natural” authority. This is why everyone wants to respect it. So, the players will discriminate, although choosing not to discriminate would be, collectively, less damaging. Discrimination can then be assimilated to a low equilibrium of a game and defined as a coordination failure. As the solutions of the game are Nash equilibrium, discrimination is stable. Discrimination is thus a self-enforcing, and therefore stable, behavior.

More recently, evolutionary theorists have argued that irrelevant factors, like the color of the skin, which are common knowledge, can imply a conventional solution which benefits one type of players relatively to another. For example, Young (1993, 1996, 1998) uses the evolutionary game behavior and the concept of convention to analyze segregation. He assumes that there are two types of players: blacks and whites. Each player has two persons in his/her neighborhood (one on his/her left, one on his/her right), and accepts his/her position only if at least one of her neighbors is like him. The result is segregation. Young introduces another assumption: he assumes that, because of limited rationality, sometimes people do not act like they supposed to do, and then, with a very small probability, they do not change their place even if they should (on the basis of their preferences).⁵ In this case there is only one stable equilibrium, which is stochastically stable: total segregation.

Other evolutionary theorists have developed Shelling’s concept. On the one hand, Zhang (2004) constructs dynamic model to prove that segregation may emerge and persist, even if everybody prefers integrated neighborhoods, because of its stability. On the other hand, Hargreaves-Heap and Varoufakis (2002) have developed the discriminatory convention’s concept in the sense that it arbitrarily assigns each person, on the basis of the color of his/her skin, to a specific strategy and then to different payoffs. More generally, the most important message these analyses convey is that a phenomenon may prevail in a society despite what people want or feel is “good.” We can call it a “bad” convention, i.e., a coordination failure, which implies a sub-optimal solution (Larquier and Batifoulier 2005).

2.3 An EC-Based Explanation: Discrimination as an Illegitimate Representation

We now want to analyze discrimination using another concept of convention, the one that is used by the approach of EC, which has developed a transdisciplinary approach. This approach can be useful to understand both economic

⁵ The hypothesis is usual in the evolutionary game behaviour that consider agent with limited rationality. “This assumption expresses the simple fact that we do not know all the reasons why people act the way they do. Our behavioral model is incomplete, and actions need to be modeled as random variables” (Young 1998, 10).

institutions and the coordination of behaviors. It will help us to understand why discrimination can be both a stable and illegitimate practice.

According to the approach of EC, qualities of persons – as goods – are not given. They depend on conventions. As Luc Boltanski and Laurent Thévenot (2006) show, modern societies are not a single social order but an interweaving of multiple orders. They identify six “orders of worth” (*ordres de grandeur*), which are systematic and coherent principles of evaluation. Then the incentives that govern behavior, whatever they are, are embedded in and derive from a much broader belief structure, which includes a system of worth (*grandeur*) (Eymard-Duverney et al. 2005). The consequence from the viewpoint of the approach of EC is that there is a plurality of possible solutions for coordination and for justification (Diaz-Bone and Salais 2011). Depending on the situation, each person is able to justify different ways of acting.

Following Favereau (1986), we can say that convention is not only a specific kind of rules; it also designates a social and collective representation. We can have a particular example in the chapter 12 of Keynes’s famous book (“The General Theory of Employment, Interest and Money” and more specifically) with the beauty contest. Keynes described the action of rational agents in a market using an analogy based on a fictional newspaper contest, in which entrants are asked to choose the prettiest faces from a hundred photographs. Those who picked the most popular faces are then eligible for a prize. A naive strategy would be to choose the face that, in the opinion of the entrant, is the most beautiful. A more sophisticated contest entrant, wishing to maximize the chances of winning a prize, would think about what the majority perception of beauty is, and then select based on some inference from his knowledge of public perceptions. Sometimes, because people have to coordinate themselves with others, they can act not like they want to but like they think others want them to act. It then becomes possible that everybody chooses a situation even if everybody prefers another one.

But is there a real difference between Keynes’s example and the question of discrimination? Probably not from an opening point of view. We can indeed imagine that if there is discrimination it is because employers believe that the majority prefer hiring whites, males... or beautiful people. This does not imply that racism, sexism, or homophobias do not exist, but only that even if you do not want to discriminate against someone you may prefer to discriminate anyway. So, discrimination can persist in the long run.

Nevertheless, in the example of the beauty contest, there is no normative judgment – although for the person who was not chosen even if she was considered as the most beautiful, we may consider the judgment unfair. It is different when Keynes completes his explanation of the conventional rate of interest. In this case, the situation is clear: a high rate of interest is bad because it does not allow enough effective demand to reach employment.

But who says that the convention is “bad”? The economists in many cases, when they show that a convention is inefficient. It is both the case for Keynes or for Young. In other cases, it is the philosophers by saying what is fair and unfair. It is both the case for Rawls or for Sen. But in the case on discrimination, not only economists and philosophers, but also individuals themselves are able to say that it is bad.

Of course, if you are racist or sexist, your preference is clear. But in a lot of cases, it is possible that people prefer discrimination and, at the same time, regret this choice not only because discrimination is legally forbidden (even if it could play a big role, as we will see in the last part of the article) but because they disapprove of doing so. We can have in mind parents, defenders of the public school and opposed to any form of segregation, who nevertheless choose to put their own children in a private school (because the standards are better, there is less violence or simply because there is fewer colored children) knowing that their choice reinforces the segregation they disapprove of? Who does not know a recruitment office that chooses not to present a colored candidate, even if he/she is performant, only because they think that the firms that pay them prefer a more “standard” candidate?

To clarify, we can draw on the dichotomy between individual preferences and collective behaviors. This is, again, a connection to Shelling’s work (1978): “good” micromotives can produce “bad” macrobehaviors (like drivers unhappy with being stuck in a traffic jam on the highway because drivers in front of them slow down to look at the accident in the opposite direction and who will also slow down when they pass the accident themselves).

Moreover, we can make a link with the theories of social identity that include the person’s sense of self. Akerlof and Kranton (2000) explicitly use the theory of social identity to analyze discrimination (especially between men and women). Being assigned to an identity (and, symmetrically, assigning others to an identity) acts as a social norm (e.g., women are more “careful” while men have a “taste for power”). Even though everyone would disapprove of this norm, he/she may tend to reproduce it: social identity becomes an element of the utility function.

But social identity can also be a way of rethinking individual rationality as proposed by Bessis, Chaserant, Favereau and Thevenon (2006). It would make it possible to pass from a homo oeconomicus to a homo conventionalis. In fact, the individual does not only seek to be a perfect calculator (which he/she cannot be), but to be a social individual, belonging to a group and, *a fortiori*, to a “common humanity” (Boltanski and Thévenot 2006). Individuals, to integrate into the group or society, will tend to follow the norm. However, they are also able of judging this norm since they are able to say what is right and wrong according to the axiomatic of Boltanski and Thévenot that assume that each “world” (*cit *) respects principles of justification. In everyday life, when people have to justify themselves they used conceptions of fairness, even if they are

not necessarily aware of doing so.⁶ So philosophical theory joins secular knowledge. Criticism is not only an external criticism, formulated by economists or philosophers, it becomes endogenous.

The plurality of conventional qualifications of people and things offers a more balanced and complex view on the composition of markets, firms, and other organizational devices (Thévenot 2006). It helps us to understand why discriminatory practices can exist and persist in our societies. Discrimination is then a “bad convention” but the concept changes meaning (Larquier 2016). It is not only a sub-optimal solution. It is a persistent convention even if people consider it legitimately bad.

3. Is Social Intervention against Discrimination Useful?

If discrimination is not persistent in the long term, it implies that the free operation of the market is sufficient to combat it. On the contrary, if discrimination is a convention, it is a stable and illegitimate behavior. It is then necessary to find public mechanisms to eliminate it. Indeed, “nothing is more difficult to move than convention” (Favereau 2012). Thus the anti-discrimination legislation and legislation on minority rights are necessary to condemn the practices but also to change the models of representation. However, they can be complemented by positive actions that will reinforce the effects of the law and that can be considered fair.

3.1 The Effects of Market Forces

As we mentioned before, the standard economics of discrimination is based on individual tastes or on beliefs. A simple employer who maximizes will not discriminate in the long run because discrimination is expensive for him. Discrimination therefore appears to be an inefficient phenomenon and, on that account, should be penalized by the market. In this sense, this result actually condemns all political and legal interventions because they do not reduce the inequalities and have negative effects on growth (Lundberg and Startz 1983). Even in the case where discrimination has durable effects because it dissuades ethnic minorities from looking for some jobs (self-discrimination) or because it

⁶ In fact, Boltanski and Thévenot (2006) propose six axioms that individuals can mobilize if they have to justify actions: common humanity (which poses a fundamental equivalence between all individuals of the same humanity), the principle of dissimilarity (which assumes a difference of state for each in the city), the common principle of dignity (which gives to each the same power to access to different states), the order of magnitude (which associates with each state a scale of values), an investment formula (which highlights the cost of moving to a higher state) and the common good (which provides that well-being, which rises when one reaches a higher state, must benefit to everyone).

frustrates their accumulation of knowledge and skills (self-fulfillment of beliefs), government action will have an ambiguous effect. On the one hand, the optimistic view is that a policy fighting discrimination may reduce inequalities and increase economic efficiency by allowing employees and jobs to be better matched. On the other hand, the pessimistic view, which is also the most widespread, anticipates a “condescending” attitude on the part of employers, involving the maintenance of prejudices despite mechanisms to fight discrimination (Coate and Loury 1993). The latter will thus prove ineffective from the point of view of inequality and growth. Economic analysis therefore does not yield any consensus on the effectiveness of policies to fight discrimination.

Supposing that discrimination is based on convention changes this result. Because discrimination is then a stable and a sub-optimal equilibrium, market forces will be useless. This theoretical result justifies social intervention against discrimination.

Formally, we can use the “stag hunt game”⁷ to specify this point. This game always admits two Nash equilibriums but, whereas one is Pareto-optimal, the other is risk-dominant. By selecting this second solution, the players give up the objective of profit-maximization but choose the “reasonable” solution: the one that will minimize the risks incurred in case of coordination failure.

We will now consider that the discriminatory equilibrium is risk-dominant; which also implies that it is *a priori* more stable. Thus, discrimination remains undoubtedly a prejudicial solution for all with respect to the Pareto criterion. But, it can appear as an efficient means of coordination if people are rationally risk-averse and, consequently, they ensure the stability of the outcome. Expressed explicitly, one adopts the discrimination strategy because it is the most-followed one.

A risk-dominant convention is more difficult to destabilize than a Pareto optimal equilibrium, because it adapts more easily (Sugden 1989; Young 1993). This would speak for the uniqueness of a convention, here the risk-dominant one: discrimination. Fighting discrimination can be seen as a mean to go to the Pareto optimal solution. That is why legislation against discrimination or affirmative action can be viewed as a good solution if you want to fight discrimination and to reinforce efficiency. Moreover, if discrimination is an illegitimate practice, it will tend to show that policy against discrimination is fair (Ghirardello and Van Der Plancke 2006).

3.2 Change Convention and Representation Model

We have seen that discriminatory convention, following the EC approach, can be stable even if a majority of people disapprove of this kind of behaviors.

⁷ This game is adapted from the famous parable of Jean-Jacques Rousseau in his “discours sur l’origine de l’inégalité parmi les hommes,” which is also used by Lewis (1969, 47).

Indeed, it is probable that most people disapprove of racial or gender discrimination on the labor market. This point has been stressed by Schelling:

The command – or suggestion – is self-enforcing. A feature of many rules is that, good rules or bad, they are better than no rules at all; and these conventions that coerce via expectations can be exceedingly helpful. But people can be trapped into self-enforcing rules that misdirect behavior. A tradition that separate women from the men or the whites from the blacks, the students from the faculty or the officers from the enlisted men, may be strongly self-enforcing even though one or both or the two groups deplore the tradition, and it may continue as long as conspicuous exceptions are an embarrassment. (Schelling 1978, 120)

In other words, discrimination may survive in the long run despite the fact that it is an inefficient practice and despite the fact that people can disapprove of it. By the way, market forces and even collective disapprobation become unable to eradicate discrimination practices. Legal constraints are then necessary to change this convention.

In their model of justification, Boltanski and Thévenot (2006) move on the idea that evaluation involves “justification.” Then people are able to say what is good and just in a certain “world” (“*cité*” in French). From this point of view, the notion of “convention” refers to the definition (shared representation) of the common good, being given a plurality of fair principles allowing to judge (and rank) people and things. It leads to consider more explicitly both the cognitive and deontic (if not political) aspects of conventions, although certain conventions have the pure practical aspect of reducing the costs of coordination (Bessy 2015).

Conventions depend on a normative judgement about the right functioning, implying a conception of justice and vision of the common good. Finally, given these conditions – no failure of efficiency and of legitimacy – recruiters in firms have the power of valuation (Eymard-Duvernay 2016): in the labor markets, actors accept that employers can decide who is valuable and who is not.

Boltanski and Thévenot (2006) consider interaction as ongoing coordination threatened by critiques. The continuity of coordination then suggests the reference of the actors to a “superior common principle” enabling coordination to resist the critique. It means that interaction oscillates between continuity regimes – close to routines, but where actions remain aligned with the world into which actors situate them – and disputes in justice implying justifications and evolution of the common principle grounding the coordination. Thus, disputes appear as fortunate moments to analyze the principles in opposition. The juridical dimension is one of the multiple possibilities to open a “dispute” through the mobilization of courts so that jurisdictions are a good place to see the confrontation of argumentations expressing the several principles in balance (Diaz-Bone, Didry and Salais 2015). Then fairness is not only depending on a philosophical point of view. If we observe people we can see that they are able to

say what is fair because they are able to say what is unfair. Once again, there is no opposition between scholarly and secular knowledge.

3.3 What Should We Do: Legal Actions versus Affirmative Actions?

Social intervention against discrimination first takes the form of a legal system prohibiting discrimination behavior.⁸ The fight against collectively harmful and sub-optimal discrimination implies a necessary intervention of law.

However, we are forced to conclude that the multitude of legislative constraints that have been adopted have failed to achieve their objective of securing employment especially because discrimination is, most of the time, difficult to prove (Epstein 1992; De Schutter 2002). This result can be easily understood if we consider as Weber (1971) that the conventional order can be more restrictive than the law.

Any convention that is sufficiently pervasive can come to seem like a law of nature. [...] Most conventions, if they are sufficiently entrenched, acquire the appearance of natural norms, their conventionality becomes invisible. That is part of what gives them their strength they would lack if they were not internalised in that way. (Murphy and Nagel 2002, 8-9)

Changing the current convention may then be very hard even if people agree with the fact that they dislike discrimination practices. A convention may persist and exercise a normative force that is able to influence social practices over time (Latsis 2005).

Nevertheless, legal rules provide incentives but more than that, they affect the formation of preferences and norms (Bar-Gill 2004). Indeed, if some economists, using the concept of convention, follow Hume (1740) and argue that the idea of fairness must not be used to analyze the emergence and the stability of conventions,⁹ others consider that fairness can affect behaviors and then the issues of the game (Sugden 1989; Hargreaves-Heap and Varoufakis 2002). Individuals' preferences and social norms are not exogenously given. They may be the outcome of imitation, learning, cultural transmission mechanisms, and legal rules. Anti-discrimination laws influence conventions by enforcing individual preferences for fairness. Law as an institution, therefore, is understood as endogenous to collective action and coordination (Diaz-Bone 2015). It is support for criticism and resource to change models of representation by leading to new compromises. That is why, contrary to what is often postulated by standard economic analyses, the legislation must be associated with the use of active political intervention, which is commonly called: affirmative action.

⁸ See for example the EU Directive 2000/43/EC dated June 29, 2000, implementing the principle of equal treatment between persons, O.J. L 180 of July 19, 2000, p.22. The member states had to transpose this directive into national law before July 19, 2003.

⁹ See, for example, Young's analysis (1993, 1996, 1998), which is only based on a Darwinist selection concept.

But social intervention against discrimination does not take only one form and the question of the opportunity of affirmative actions is often debated.¹⁰ Here we want to outline two arguments in favor of this kind of prescription. On the one hand, because both markets and the law seem unable to eradicate discrimination, policy intervention appears to be a necessity. On the other hand, affirmative actions are useful if we want to establish a fairer society both in the sense used by Rawls (1971) and Sen (1989).

Indeed, law and affirmative action can help change individual preference (Hirschman 1986). If individual agents both “prefer” discrimination and would not prefer to have this kind of preferences, then legal constraint and political action can help then change their preferences.¹¹ This point stressed the fact that there is no systematic opposition between fairness and efficiency. By fighting discrimination, firms can then reduce inequalities and be more productive by having a better evaluation of the employees. Affirmative actions could be analyzed in this perspective. First, it could help to eradicate stigmas that affect the population groups being discriminated against, in particular members of ethnic minorities. In addition, they may yield improvements for firms themselves, which, because they would both evaluate candidates more accurately and diversify their workforce, would benefit from better performances by adopting a more efficient and fairer convention.

This point contradicts the idea that there is a tension between the inclination to see merit in fixed and absolute terms and the ultimately instrumental character of merit – its dependence on the concept of “the good” in the relevant society (Ghirardello and Van Der Plancke 2006). The contingent nature of merit indicates that its relationship with economic inequality would depend very much on whether an aversion to economic inequality is included in the representation of the whole society. Some people are seen as being just more meritorious than others, and may indeed have been born more talented. In some versions of personification, the inborn talents are seen not only as being variable between one person and another (for which there may be considerable evidence), but also as distributed according to some other readily distinguishable characteristic, such as skin color or the size of the nose (for which the evidence seems very problematic, to say the least; Sen 2000).

A caste system often derives its rationale from beliefs regarding the distribution of talent. Such beliefs are, of course, a standard part of the “intellectual”

¹⁰ Work carried out mainly in the United States (Holzer and Neumark 2000), shows that some mechanisms can bring about a real improvement in the situation of population groups that have been traditionally discriminated against (measured in terms of employment rate in these groups) but also of the industries taking part in this kind of policy (measured in terms of productivity of the persons employed).

¹¹ Like people who smoke, because he/she prefers smoking but at the same time saying he/she would prefer not preferring smoking, can change of preference because of photos showing the damage of tobacco on cigarette packs.

background of the practice of racism. This stresses the necessity to present the effectiveness of the respective policies in terms of their results as well as in terms of the means necessary to implement them. *A fortiori*, it will be a question of determining the most effective type(s) of policy (policies).

4. Conclusion

Contrary to Becker's optimism (1957), but in accordance with Arrow's intuitions (1998), our analysis shows that the market appears unable to justify correctly a behavior such as discrimination which is sub-optimal but stable. This practice will not disappear due to market automatisms. Indeed, the analysis of discrimination with the concept of convention, shows that discrimination can be stable even if it is unfair and if most people disapprove of it. Criticism is not only an external criticism, it is endogenous too.

Hence, a legal intervention is then useful but nevertheless, insufficient to restore equal treatment on the labor market. In this case, affirmative actions, contrary to what is often postulated by standard economic analyses, become essential, to disrupt discriminatory convention.

This raises the question of the change of convention and models of representation, especially if they are ineffective and unfair. We can distinguish two scales of variation: long variations, in terms of historical duration or cultural gaps, and short variations, which consist of differences between activities within a single economy, or changes in conventions in an organization, during interaction and so on (Eymard-Duvernay 2002). For this, anti-discrimination legislation and legislation on minority rights as affirmative actions, cannot be neglected. This is an issue for those interested in the historical evolutions of institutions and society.

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