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1 Preliminary remarks

A historical inquiry into diversity as a form of ordering tensions between equality and inequality in law should probably start by establishing some preliminary definitions. Laying the groundwork here is important because equality – and, as a result, diversity in dealing with it from the normative point of view of the legal system – is a highly controversial concept. Given the significant variety of legal, social, political, moral and economic usages of the word over time and in different places, it is helpful, if not essential, to begin with a clear analytical framework in mind. Moreover, to enable productive comparisons between legal systems in Europe and the Americas, it is important to devise this framework with relative openness regarding the distinctive forms that references to equality might assume under different historical circumstances. It would be simply misleading to assume that coincidence in the use of a given term in France and, say, Brazil or Argentina during the same period implies coincidence also of the social mentality or, for that matter, of the institutional consequences of a given conception of equality. This might sound trivial in theory but is not always easy to observe in scholarly practice on either side of the Atlantic. Difficulties arise not only as far as historical differences between Europe and the Americas are concerned, but also concerning the factors driving historical change and the diffusion of intellectual trends. When investigating major legal history topics of global repercussion such as codification and equality/inequality, provincializing Europe is as much a methodological challenge as it is an important tool for neutralizing cultural bias.

Understood in terms of arguments about the design and implementation of a social ideal, discussions about equality tend to revolve around basically four types of issues: (i) the notion of equality, or *equality as what*?; (ii) the principles of equality, or *equality for what purpose*?; (iii) the measure of equality, or *equality of what*?; (iv) the extension of equality, or *equality among*

whom?[1] At the risk of oversimplifying a very complex problem into an abstract scheme, I would argue that any historical conception of equality has addressed these four questions in one way or another. To be sure, answers have varied extensively in both theory and practice of law since antiquity. One needs only to review the literature on the subject to trace the basic categories and positions back to ancient Greece or Rome. However, as Meccarelli points out, there is a decisive shift in the history of equality that separates the ancient, medieval and early modern usages of the word from the specifically modern or contemporary reference to equality as a social ideal with consequences for different normative, methodological and institutional aspects of the legal system. This shift goes back to the late 18th century.

Understood as a "programmatic value" (Meccarelli) for ordering and differentiating within society through law, equality emerged as a central demand of the revolutionary period in France and the United States, before adapting later to the transformations introduced by industrialization and mass culture in the 19th and 20th centuries. Equality as a normative claim is, therefore, a specifically modern proposition. Its terms might well relate to reflection on natural law and natural rights in the 16th and 17th centuries. However, its normative and institutional implications such as, for example, constitutionalism and private law codification belong to the world of post-revolutionary Europe and the newly independent Americas.

But even if we confine our discussion to the last 250 years, questions arise as to how to account for historical change. Meccarelli has chosen to focus on the "dialectical relation" between diversity and legal protection, an approach for which he offers two reasons. First, from a sociological perspective, there is a tension between law and society, between the society presupposed by the civil code and the actual, living society whose diversity exceeds the rigidity of codified law. As a result, social change brought about by the technical transformations of industrialization, as seen for example in labour law, has to be dealt with outside the scope of the civil code by means of special legislation. Second, from the perspective of legal methodology, tensions also arise due to the fact that 19th-century legal thought deliberately suppressed diversity as part of a strategy to unify the law through state-sponsored codification and adjudication based on abstract concepts and formal syllogism. Here, tensions

1 For discussion of the issues involved, see Sen (1992) 12 ff.

between formal equality and *de facto* inequality were solved by fundamental changes in early 20th-century legal thought concerning legal principles and methods applied to the social question. Finally, Meccarelli exemplifies his approach by explaining three different functions taken up by special legislation to deal with diversity without resulting in the breakup of the system's logic: integration (labour law), exclusion (criminal law applied to political dissidents) and non-assimilation (colonial law).

In what follows, I discuss briefly the merits of this approach as well as the analytical gains it offers to the study of Brazilian legal history. The paper begins by drawing attention to the methodological challenges involved in thinking about diversity as a form of dealing with equality / inequality in law, focusing especially on the fact that much of today's diversity thinking – including, if I read him correctly, that of Meccarelli – has been influenced by the sociological critique of legal formalism diffused around the globe in the early 20th century. The paper then moves on to a brief discussion of the Brazilian case. Here, it first attempts to show how the relation between codification and special legislation has been complicated from the start by the troubled history of the Brazilian civil code. It then focuses on the relation between special law and political representation in the 1930s and 40s, pointing to the institutional implications of sectoral legislation in a corporatist regime.

2 Regarding method

Regarding method, apart from the introductory comments made above, the main topic worth discussing has to do with the difficulties of separating the analytical framework used for studying diversity and the actual historical responses to tensions between equality and inequality in law. Specifically, when looking into the history of codification and special legislation as forms of dealing with diversity in law and legal thought, one risks being intellectually hamstrung by the sociological critique of codification and legal formalism that circulated the world in the early 20th century and still informs much legal theory discussion today. In my opinion, the risk here is to mistake considerations and value judgments offered by authors directly involved in the transformations of private and public law around 1900 and later in the 1920s and 30s for a general framework of thinking about diversity that is still acceptable today. If this is the case, the study of the strategies dealing with tensions between equality and inequality in law ceases to be oriented by

overarching questions that can be answered through historical research and is instead identified with the very developments it attempts to explain. In other words, the analytical framework for discussing diversity is directly derived from the object it attempts to understand. Accordingly, instead of producing new and innovative insights into modern and contemporary legal history, the study of different historical forms of dealing with diversity in law risks simply updating a well-known, historically situated critique arisen in 19th-century legal thought.

One possible way to avoid this risk would be to work on preliminary definitions of the three central concepts: diversity, equality and inequality from the point of view of legal history. Much like equality, and probably merely the other side of the same coin, diversity is a relational concept whose core meaning must be rendered more precise to be useful for historical research. Diversity of what? In relation to what or to whom? And to what extent? The answers to these questions are not trivial. They depend on historical context, especially if the analysis focuses, as Meccarelli's does, on the relationship between diversity and legal protection.

As far as this conceptual aspect of the discussion is concerned, Meccarelli has chosen not to offer an exact definition of diversity, preferring instead to elucidate different historical conceptions by contrasting medieval, early modern and contemporary views. Central to this approach is the construction of monist legal thought in the 19th century, followed by its crisis in the early 20th century. According to this view, 19th-century jurisprudence was state-centred, abstract, founded on an exclusive view of the system that reduced the law to positive legislation and judicial interpretation to formal syllogism. To overcome the limitations of this type of legal thought in the light of the technical and social transformations that came about at the turn of the century, open-minded lawyers had to adapt the legal system to a changing reality by referring to the "reality that exceeds the civil code", most notably in matters of labour and union law.

One possible objection to this approach is that it is formulated in the same terms as the sociological critique of 19th-century legal thought that it describes as a turning point in the history of thinking about diversity in law. The critique of legal formalism, of logical syllogism in adjudication theory, of state-centrism and positivism concerning the sources of law are all well-known topoi of late nineteenth and early 20th-century sociological jurisprudence. They are central features of historically situated legal theories arguing

for a society that exceeds the internal structure of codification. However, as recent studies have shown, e. g. concerning the Historical School in Germany[2] or the École de l'Exégèse in France,[3] there are several problems with this well-established narrative, problems that cannot be examined here but that have mostly to do with the biased interpretation it offers of 19th-century legal thought. The point is not only one of historical accuracy but also, and mainly, of method, in the sense that the framework used to think about diversity seems to be directly derived from the historical experience it is supposed to analyse and explain.

3 Codification and social law in republican Brazil

Turning now to diversity as a form of dealing with tensions between equality and inequality in Brazil, the first thing to notice about the analytical gains of the approach advanced by Meccarelli is the specific context in which civil law codification was here discussed and implemented. Unlike many of its neighbours, Brazil is a latecomer to the reality of ordering social life through a single normative structure such as the civil code. Whereas other countries in the region were able to codify the relevant legal aspects of civil life in the 19th century, beginning with Peru in 1852, Chile in 1855, Argentina in 1869 and Colombia in 1887, Brazilian political institutions seemed incapable of producing a civil code until 1916. To be sure, just as in other parts of the world influenced by European legal thought, codification had been an issue in Brazilian legal culture and politics since the 1850s, when the then monarchic government took first steps towards drafting a civil code that would cement the country's independence from Portugal in civil law too.[4] Yet successive attempts failed to deliver the code even after the fall of the monarchy in 1889, suggesting that slavery was a crucial, but not the only, obstacle to civil law reform in the Brazilian empire. It was only in 1899, after roughly ten years of republican anarchy and civil war, that the political system was stabilized sufficiently for the civil code to become a viable political project. After 18 years of political struggle, exhausting discussions and substantial

2 Haferkamp (2018).
3 Halpérin (2014).
4 For the codification efforts in the 1850s, see Reis (2015).

modifications to the original text in both houses of Congress, the civil code finally came into force in the midst of World War I in January 1917.

On Meccarelli's account, the main consequence of this particular path to civil law codification is the fact that, in Brazil, legal doctrine and judicial practice had to come to terms with the civil code at a time when the code's power to order society through a single systematic normative structure had fallen into disrepute. Whereas in most of Europe and many South American countries codification is largely a product of 19th-century legal thought, in Brazil the enactment of the code coincides with root and branch transformations in state power, society itself and legal thought. The exception here is, of course, Germany's BGB from 1900. However, unlike Germany, the Brazilian civil code was not supported by a century-old tradition of modernizing law through legal science that could both substantiate its implementation and lay the grounds for its critique from a sociological point of view. In Brazil, until the 1930s there was no clear distinction between the scholars, lawyers, and judges acting in support of the code and the rise of sociological jurisprudence.

A good example of this can be found in Clóvis Beviláqua, the author of the draft civil code of 1899 which, after substantial changes in congress, came into force in 1917. A prominent advocate of evolutionist theories of law, Beviláqua was among the first in Brazil to discuss the work of Enrico Cimbali and Pietro Cogliolo, two of the prominent Italian jurists that Meccarelli associates with the growing attention among legal scholars for *de facto* inequality and other socially relevant aspects of private law. In his introduction to the Brazilian translation of Cimbali's *The New Phase of Civil Law* published in 1900, Beviláqua, who was also a feminist, emphasized the author's "genuinely naturalist" conception of law, asserting that, "in the future, jurisprudence will recognise in it one of its most powerful driving forces".[5] A similar mindset can be found in Eduardo Espínola, the translator of Cogliolo's *Philosophy of Private Law*.[6] One of the most prominent lawyers of the time, Espínola served at the Brazilian Supreme Court from 1931 to 1945, where, as chief justice, he was responsible for deciding on important, socially and economically sensitive issues of the time such as the admission of the *clausula rebus sic stantibus* in Brazilian private law.

5 Cimbali (1900) 12.
6 Cogliolo (1898).

At the level of legal doctrine and in some cases also of judicial practice, there is no incompatibility between the Brazilian civil code and the growing awareness of the social pre-conditions and functions of law. As far as diversity is concerned, the reaction against some of what we would today call the progressive dispositions of the draft civil code came from reactionary members of the Brazilian congress, some of them supporters of the monarchy, who opposed, for instance, the more egalitarian treatment of women and even the separation of church and state. Issues relating to the rights of women, to the substance of marriage or the legal status of the Catholic Church are some of the most intensely debated subjects in the eight-volume collection of congressional debates on the civil code. In contrast, little or almost no attention was given to economically sensitive issues such as the social function of property or contracts, the main focus of Cimbali's new civil law, for example. This is because, again unlike Germany or other European countries, the Brazilian civil code was debated in extremely adverse economic circumstances, during a period of severe economic recession and social unrest. Diversity was, therefore, reduced here to its moral implications.[7]

4 Special legislation and political representation in Brazil under Vargas

Developments in countries on both sides of the Atlantic suggest that the relation between codification and special legislation acquired a new nuance from the 1920s and 30s onwards. This is largely because subject matters of special legislation came to attain constitutional relevance, thus making socially sensitive issues, such as the regulation of labour and capital, politically significant in the sense that they provide an alternative form of political representation. Change in this regard relates first to the changing nature of state power during the first half of the 20th century. As Meccarelli points out in connection with the work of Filippo Vassalli and other Italian jurists whose books also circulated in Brazil, this process began with wartime legislation during the First World War and was destined to have an enduring impact on the functions later attributed to special law.

7 I have tried to examine the arguments and offer an overview of the debates on the civil code in Reis (2017).

It should be stressed, however, that this transformation was not limited to countries which would later witness the emergence of dictatorial regimes, such as Italy in 1925 and Brazil in 1930. Unlikely though it may seem, in 1918 Léon Blum, for instance, drew from his wartime experience the conclusion that in every democracy,

> "il faut un chef de gouvernement comme il faut un chef d'industrie. La mission, la tâche nécessaire de ce chef est d'ordonner l'ensemble de l'activité gouvernementale, ou, en termes plus précis, d'adapter l'administration à une politique, ce qui implique la direction effective du travail politique comme du travail administratif."[8]

In both Europe and the Americas during the First and the Second World Wars and throughout the 20th century, this "administrative work" would largely be executed through special legislation, thereby paving the way for the debates on "decodification" in the late 1970s.[9]

From the Brazilian perspective, however, the central shift in the relation between codification and special legislation has to do with the connection between economic regulation (labour and capital) and the emergence of new forms of political representation. Even though state concern for labour and union law, for example, can be traced back to the beginnings of the Brazilian Republic around 1900, it was only after the revolution that brought Vargas to power in 1930 that the state began to regulate labor as a way to create corporatist forms of political representation. Regarded as the modern alternative in comparison to the old-fashioned liberal 1891 constitution, this shift towards corporatism was directly connected to the institutional crisis that arose after the operational model established *de facto* in 1900 by an informal agreement between regional oligarchs collapsed in the 1920s. During the 1930s and 40s, a majority of intellectuals and politicians came to a consensus according to which Brazilian society was deemed incompatible with representative liberal democracy. Instead of trying artificially to replicate Anglo-Saxon patterns of representation founded on individual liberty and party politics, intellectuals such as Oliveira Vianna argued that representation should be organized according to corporatist criteria. Defending the labour union reform of 1939, Vianna stated that:

> "we should not react against institutions of professional or corporatist solidarity, but rather take them into our hands, face them with courage and change them, deform

8 Blum (1936) 15.

9 See, most notably, Irti (1999).

them, Brazilianise them to adjust them to our body, our conformation, the dimensions of our possibilities".[10]

From the 1930s onwards, what used to be the field of special law became the source for alternative modes of political representation. This marked a watershed not only in constitutional law but also in the relation between the civil code and special legislation. As Meccarelli has shown, this relation might still be described in legal scholarship in terms of the centuries-old differentiation between *ius commune* and *ius singulare*. In practice, however, the decisive factor, in my opinion, lay in the creation of a distinct institutional framework, informed by a separate set of rules affecting both substantive and procedural aspects of the respective legal field – an institutional framework whose existence was justified by the fact that it represented directly, i. e. without parliamentary mediation, a group of professional, economic or social interests.

Again, labour law offers one of the clearest examples. Defending the constitutional competence of labour appeal courts to rule over collective bargaining agreements, Oliveira Vianna argued that

> "there is no correlation between [the courts'] normative competence and the corporatist regime. The foundation of the normative competence of labour courts is not the political regime of a given country, but rather the nature of the decision itself, the peculiarity of the conflict to be judged, the structure of contemporary economic organizations. The foundation of normativity is organic – not political."[11]

In a society marked by its natural incapacity to exercise self-government, the purpose of the labour courts, according to Vianna, was to produce solidarity through the institutional framework of the state. Diversity, in this case, ceased to be a strategy of dealing with equality / inequality within society to become part of a state project that incorporated social conflicts and, at the same time, wanted to transform them productively to explore its political potential.

5 Final remarks

As long as it remains attached to value judgments and historical assessments forged during the social, political and economic turmoil of the early 20th century, comparative historical research on diversity as a means of dealing with equality and inequality in law is likely to produce little to no analytical gains.

10 Vianna (1943) XII.
11 Vianna (1938) 94.

In this respect, legal history and legal science in general still have much to learn from concurrent accounts of inequality in political science and economics.[12]

Bearing this in mind, and from the perspective of Brazilian legal history, this brief commentary stresses two basic points concerning Meccarelli's account. First, if the emphasis falls on diversity in private law in general and in the civil code in particular, attention must be paid also to contemporary developments in the modes of political representation. In Brazil, and presumably also in Italy, this means analysing private law transformations in the broader context of the crisis of parliamentary democracy and the rise of corporatism. Second, a comparative legal history of diversity should consider, as Meccarelli partly does, the specific local context in which diversity emerges as a challenge to law and legal science in the early 20th century.

As indicated in the comments above, at least in the case of Brazil there is hardly a clear-cut division between a formalist, civil code-centred jurisprudence on one side and social, progressive legal thinking on the other. Here as elsewhere, ideas and concepts are mobilized in response both to international trends and to specific local challenges, which is why research on diversity in law should not only consider, as stated above, the range of questions that the concept implies, but also the diversity of answers revealed by comparative work.

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12 For an influential economic account that relies heavily on legal documentation, see Piketty (2014).

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