PETER COLLIN
AGUSTÍN CASAGRANDE (EDS.)

Law and Diversity:
European and Latin American
Experiences from a
Legal Historical Perspective

Vol. 1: Fundamental Questions

Leonard Wolckenhaar

Categories and Concepts, Themes, References,
and Outlooks in the ConferenceDiscussions on
"Law and Diversity". A Structured Summary
| 737–756

Leonard Wolckenhaar

Categories and Concepts, Themes, References, and Outlooks in the Conference Discussions on "Law and Diversity". A Structured Summary*

The depth and the variety of the topics and questions addressed in the contributions were mirrored in the multifaceted richness of the correspondingly lively discussions that followed all the presentations. Due to this breadth, however, only selected aspects from these can be touched upon here. The following summary thus attempts to identify and focus particularly on certain recurring basic themes, or particularly striking problems and observations. It, therefore, cannot make any claims of completeness but, instead, tries to bundle and sort individual and scattered statements to bring to the fore overarching themes, or memorable accentuations voiced in the conference discussions. The aim is, therefore, to present and suggest some possible structuring and certain approaches of categorisation, all the while being fully aware that there can be other equally legitimate forms in which the extensive discussions could be summarised. For this purpose – elaborating contours, exposing or highlighting overarching aspects, and sketching out some structuring according to them – this summary will largely refrain from quoting concrete statements or mentioning names. Furthermore, references are only made in selected cases, particularly when it seemed apt to point to some examples of explanatory, further or in-depth literature.

1   Functions of diversity in law, shared experiences, and '*Sonderwege*'

In view of the title of the conference series, addressing 'Law and Diversity' in studies and comparisons from both a European *and* a Latin American per-

spective, it came as no surprise that the overall question of national, country-, or legal-culture-specific traditions and specialties immediately emerged as a dominant field of discussion. Therefore, these aspects did not only take up a large part of the contributions, but also of the discussion.

For both regions of the world, the discussion gave the impression that the emergence of the individual (nation) states seemed to have been a crystallization point and a catalyst for significant debates on 'Law and Diversity', whereby, in all the examples presented in this regard, problems of social, cultural and, in each case peculiarly associated with this, legal diversity arose in different ways. Therefore, the reflections focussed on the possibilities of explaining such differences.

A first dividing line between the European and Latin American examples was apparent in the fundamentally different basic experiences that were each shared, and that shaped the respective discussions as a sort of common ground and frame of reference. On the one hand, in the case of Latin American countries, this common background and reference point was the central, but, at the same time, heterogeneously experienced role of Europe. On the other hand, among the European examples, the tradition of Roman law[1] and the increasingly widespread idea of a democratic state could be identified as a common ground.

As soon as the participants took a closer look at the lower and more concrete level of the individual national case studies, however, it became clear that, in view of the historical-empirical findings, further attempts at a comprehensive and, at least for the continents, generalised presentation would bring considerable difficulties. Coming, for example, from the seemingly paradoxical observation that Brazilian authors speak for their country of a '*Sonderweg*' while, at the same time, referring to ideas of order and evolution that are depicted as universal ones, the question was raised as to

---

1 For perceptions on the role of Roman law as common background see prominently KOSCHAKER (1966). From nowadays, and against the backdrop of increasing Europeanisation of current (private) law: ZIMMERMANN (1992); in the same line ZIMMERMANN (2002) 248 f., emphatically claiming the "unabated actuality" of Koschaker's message and explaining the differentiated understanding (255); cf. also 311: importance of Roman Law for "the Latin West and Middle Europe" in being the "basis of an essentially uniform legal culture" ("Grundlage einer im wesentlichen einheitlichen Rechtskultur"). See further, especially, the references there 252, no. 45, among them, *inter alia*, BELLOMO (1995); for English and Spanish literature see only ZIMMERMANN (2001/2010).

what extent the national traditions and developments might be more appropriately understood as a bundle of individual 'Sonderwege'.[2] However, insofar as the discussion revolved around this figure of 'Sonderweg', the usefulness of this category did not remain undoubted. Attendees were urged to consider that developments perceived by some as 'Sonderweg' occurred everywhere and at all times, and, in this respect, they represented more the normal situation than a remarkable, special deviation as such. Based on the heterogeneous empirical findings of the individual contributions, it was therefore concluded that the impression of a 'Sonderweg' character with regard to individual countries constitutes, in turn, an overarching commonality of historical experiences with 'Law and Diversity': all national traditions represented a special path, of course, at least in the sense that they were specific answers to specific problems.

For this question of special national, cultural or state-specific traditions, it particularly turned out that from the (legal) historical approach to the phenomenon of 'diversity', the respective understanding of the *function* attributed to diversity in the context of law is of high importance. The validity of such function-oriented approach to possible specialities was especially evi-

---

2 On pluralities of "*Sonderwege*" instead of *the Sonderweg*", especially ("[i]n the global trajectory of Marxist historical thought") LIM (2014) 280. For general examples of discussions centred around this concept in transnational or global perspective, just see the reports on the 2010 Seoul conference on 'Postcolonial Reading of Sonderweg: Deconstructing Exceptionalism as National Narrative': LEE/HA (2010) (188 f.: "For the most part, participants agreed with the assumption that every nation has its own Sonderweg, although the term was used with slightly different meanings. […] However, this conference's primary aim was to deconstruct the normative conceptions of the imagined 'West' in the logic of the Sonderweg paradigm, which have imposed the hegemony of Western modernization on the historiographies of European and Asian nations." On "widespread European Sonderweg narratives" [in the plural], cf. 189 referring to a contribution by Stefan Berger); DITTRICH (2011) on "the proliferation of Sonderwege in Europe". For the history of the use of the term in the more conventional, Germany-focussed context and the respective controversies see only WEHRHEIM et al. (2020) where "Sonderweg" is selected as one of the most important historiographical "(Leit-)Begriffe" and some data on its use over time is presented, but also with further references for the finding that "the notion of 'Sonderweg' is not necessarily restricted to the German case" (12), and, as a voice of a participant in these controversies, just as an example, KOCKA (1987a), especially the references in KOCKA (1987b) 62 f., no. 51; in a way, also, from a more specific legal historian's view, GRIMM (1987) esp. 172–179, and 185 f. Very recently, there is again some debate (on the debate and its history) in Germany, see only WINKLER (2021).

dent in the field of 'nation building' and the case examples of 'state shaping' processes in the 19th and 20th centuries.

The degree to which the underlying manifestations of diversity differed with regard to the national reports, which in each case interacted with the mostly state resources of the law, will only be shown here very briefly and in examples: while, in the case of Spain, the problem of law and diversity from the perspective of the 'national' might have been fuelled, in particular, by a historically grown regionalism, which, in the course of nation-state formation, had to be transformed into constitutional law, in Belgium, it was the question of language heterogeneity and the lack of congruence between language and nation-state borders that was at the forefront of the debate as a historical experience of 'Law and Diversity'.

Such country-specific characteristics and developments were also examined through the lens of intellectual history, observing the level of scholarly reflection in academia: in the course of the conference, for example, the *Genossenschaftstheorie* was discussed as an influential doctrine, especially for Germany, being an example of a special theoretical means, or attempt, of doing justice to the plurality of (collective) features, or maybe also interests, and of being able to represent them in the language of law. Such initially European, or even merely national, experiences or ideas obviously had an influence on Latin American discourses, but, over there, they seem to have receded behind the dominant experiences of ethnic and generally (post-)colonial diversity that were, in this form, alien to the European context of their origin. In the discussion of the Latin American cases, it, accordingly, became clear that, here, especially with regard to processes of 'nation building' and 'post-colonial state shaping', the debates and struggles primarily concerned questions of political representation and the definition of an indigenous identity and its possible legal consequences.

Overall, this 'functional' approach to diversity from the angle of legal history, using the example of 'nation building' and 'state shaping', already raised many basic questions or themes that have guided the discussions in other places: be it processes of 'migration', 'transformation' or 'translation' of ideas, and the problems of grasping them in a methodically adequate way;[3] be it the problem of unity and (or *vs.*) 'diversity' in what can be called

---

3 Cf., e. g., for an account on the dimension of 'time' in the context of 'legal transplant': GALINDO (2014).

'multi-level-systems'; or, not least, the never negligible question of the political dimension in the face of highly charged and conflictual concepts and underlying problems. These themes of the discussion will now be examined a bit closer.

2 Migration and transformation of concepts and ideas

Together with the obvious and general key question of the existence of possibly different national traditions in the respective experience of 'Law and Diversity', another of the overarching themes of the discussion thus appeared to be the question of how, and under which transformations, ideas on relations of diversity and law, or on mechanisms for implementing diversity in the language of law, made their way from Europe to Latin America.

In the European context, the example of the aforementioned *Genossenschaftstheorie* and the fate of its reception overseas were presented, and as a broader supranational example, theories of a special legal status or legal order of certain, in the broadest sense, 'non-state' actors such as the church(es) were also discussed.

However, in the Latin American context, it remains to be noted that it seems less accurate to speak of a mere 'receiving' of ideas, since the corresponding findings should rather be understood as processes of active and creative adaptation and transformation. Although it has been recognized with reference to various case studies that there was a dominant direction in the migration of ideas, these ideas underwent a transformation in the specific context of the respective place and time of reception. In Latin America, European-shaped thinking about law not only met with a corresponding legal culture formed by the *derecho indiano*, but the experience of 'Law and Diversity', especially in the context of the ongoing state building, could not be separated from an examination of the consequences of colonialism emanating from Europe, characterised above all by an emphasis on an *ethnic* dimension of diversity.

In this context, the question of the functioning of certain codification debates as well as the role of the respective country-specific legal-education systems – another important object of observation – were felt to be worthwhile for further inquiry, especially concerning phenomena of context-dependent adaptation of originally external concepts. Even though the latter were only partially and exemplarily considered here, the potential such an

approach to the underlying question could have became apparent. Especially examining the training of legal practitioners was seen as promising to better identify phenomena such as the influence of certain lines of tradition or the integration of disciplines such as sociology, anthropology or postcolonial studies and their (partly "migrated" and thereby transformed) traditions.

3   Freedom and equality, democracy and dictatorship, uniform law and special law

Among the recurring themes of the discussion was the relationship between the presented examples and topics and 'freedom' as one of the underlying key concepts of many forms of diversity thinking. It was brought to the fore, particularly when discussing the topic of 'autonomy', but also in the discussions on lines of thought concerning codification and (or *vs.*) special law. In these regards, it was argued that 'freedom' was the fundamental problem of 19th-century legal thought. This claim was at the same time a denial that concurring concepts, namely 'equality' or 'justice', could have been in this predominant position: to the extent that the idea of equality also became virulent in the 19th century, it was to be understood primarily as a corollary of the guiding principle of individual freedom. The 'social law' that emerged in various ways, for example, was understood less from the perspective of inclusion and exclusion than from the issue of intervention in spheres of freedom. Even where 19th-century law and legal scholarship were concerned with 'the social issue', the question of freedom had a formative effect as the determining background. Therefore, one of the important angles from which 'social' issues were treated lay in the finding that certain persons were not *really* free (due to social disadvantage). The possible lack of equality or the need to establish equality played, at most, a secondary, derived role.

In addition to the point of the primacy of 'freedom' over 'equality' in the 19th century, there were also warnings against conceiving the idea of equality, even in this rather subordinate importance, as a specific product of the 19th century. Thus, for instance, it was mentioned that canon law has always been centrally concerned with equality, as could be seen, for example, in marriage law of the 12th or 13th centuries. Considerations or regulations that, using modern terms, could be labelled as 'social security' or 'consumer

protection' were also recognisable much earlier, as could be clearly learned from the works of Karl Härter and Michael Stolleis.[4]

Regarding the 19th-century thinking on special law, for the eminent protagonists of the historical school, their idea of *ius singulare* was highlighted, which, for them, was never seen as unconnected from *ius commune*. In such a system, it was not possible to integrate phenomena such as Bismarck's legislation on social security.

Just like these remarks on 'freedom' and 'equality', 'democracy' and 'dictatorship' were touched upon as keywords that were also addressed in various panels. Using examples from different, especially Romanic, countries, the participants also addressed the connection between special, in particular social, legislation, 'corporatism' and dictatorship. This referred to political programmes of – mainly – the interwar period[5] which, contrary to liberal-individualistic principles, combined a pronounced emphasis on diversity with an often clearly authoritarian bent by fundamentally drawing on the inequality of humans, or their social formations and groups (mostly centred on the feature of 'vocation' or 'profession').

This inequality was meant to be reflected in a correspondingly differentiated political, constitutional or legal order that integrally included characteristic subdivisions into special units or suborders. At the same time, however, these different groups, orders, communities or organizational entities with the (special) law applicable to them – or, even, also (co-)created by them – were mostly thought of as elements of one higher whole, usually a dictatorial, authoritarian or, at least, hierarchical state. Supporters of a mindset of special law, such as corporatists, thus, often showed a high affinity for dictatorship. However, a differentiated picture was called for here, as well, since, as the example of Spanish legal biographies was said to show, connections could also be drawn precisely from the idea of *uniform* law or *codification* to those of corporatism and dictatorship.

---

4 For the extensive research in this area, see especially the multi-volume series "Repertorium der Policeyordnungen der Frühen Neuzeit" edited by Härter and Stolleis; cf. further, e. g., Härter (2010) as an English language contribution.

5 See for important, also comparative aspects as a recent overview of several European countries: Costa Pinto (ed.) (2017). For corporatist "transnational diffusion" between Europe and Latin America now: Costa Pinto / Finchelstein (eds.) (2020).

4   From freedom to autonomy?

As mentioned, close ties to the concept of 'freedom' could be made for most of the topics presented. This was of special importance, however, for the panel on 'autonomy'. 'Autonomy' is a word that acquired remarkable power wherever it was used. It was – and still is – often associated with high expectations, but in very different contexts. This multitude of the term's contexts of use is especially emphasised whenever more fundamental studies from a legal perspective, in the broadest sense, are concerned. The legal *historian's* perspective of this conference, however, showed, not least in the discussions, some more special characteristics that normally do not gain that much attention in such overviews and descriptions of autonomy's various meanings in the legal context.[6]

But, even under the specific perspective of the conference, it nevertheless became apparent, once more, in how many different contexts and with how many different meanings 'autonomy' functioned as a key concept. Maybe, they can be sorted into two broader categories: on the one hand, 'autonomy' could appear with a strongly subjectivist or individualistic connotation, whereas, on the other, it could also be used in contexts that were more oriented towards collectives or organisation(s).

With respect to the first dimension, references to Kantian traditions and, especially, the concept of 'private autonomy' played the dominant role, of course. Thus, here, the area of private law was mainly concerned. But criminal law was also mentioned (especially regarding the notion of 'free will'). These examples already show that, also for the variety of mentioned examples on 'autonomy', the overarching question on the role of the concept of 'freedom' was relevant. Wherever autonomy thus included ideas of certain "spaces of freedom", its enormous importance, especially for post-colonial contexts, was noted, *inter alia*. It was suggested to inquire in this direction for further specialties. For sure, colonial experiences had significant effects on discourses on 'autonomy'.

Beside this rather subject-oriented line of use of the term 'autonomy', there was, as mentioned, a second dimension in the discussions. There, 'autonomy' came into play in a more organisation- or collectivity-oriented

---

6 Cf. as one recent example under the initial question "Autonomy – which Autonomy?": Jestaedt (2020).

sense. In this perspective, the concept of autonomy raised the question of the relationship between diversity and phenomena that could be labelled as legal 'multi-level systems', for example. Moreover, the concept of 'multi-level systems' itself could serve as a possible grid of analysis for examinations of certain aspects of 'law and diversity' as well.[7]

A concrete question was asked about the comparability of the observations on municipal autonomy with federal structures. The keywords 'diversity and federalism' also provided a historical example of how this organisational dimension of autonomy can be linked with the subjectivist-individualistic side of autonomy that was addressed before: here, reference was made to the period of different regional penal codes in Italy. Finally, several hints on the relationship between autonomy and concepts of sovereignty could be related to the keyword 'federalism' as well.

More fundamentally, with regard to this second dimension of autonomy, it was asked whether certain patterns can be discerned of what exactly is organised by or in the form of 'autonomy', and whether this is a generally relatively clear and broadly shared concept or, rather, a phenomenon that may vary greatly from sector to sector, and of course from legal culture to legal culture.

Related to this, the discussion of the question proceeded as to whether differences between different legal cultures can be seen in the functioning of what can be called 'self-regulation' in a broad sense. As already mentioned, some of the intellectual backgrounds behind concepts of autonomy, such as *Genossenschaftslehre*, turned out to be very specifically rooted in the traditions of certain countries or legal traditions. This finding led not only to the question of similarities and differences, but also of possible transfers or migrations of ideas across (legal) spaces (see above, under "2"), whereby the question of possible connections between Germany, France, and South America was raised.

In all of this, the difficulty of distinguishing between autonomy as a political and a legal concept and, also, of distinguishing between its descriptive and its normative use, which were registered at different points in the discussion, always seemed to be part of the problem. It also became clear that, above all, caution is required because autonomy serves both as a

---

7 For recent observations on the attractiveness but, also, the inflationary use of 'multi-level systems' terminology, see Chanos (2019).

research concept and may appear, at the same time, as a term from the sources themselves, while the meaning of both is not necessarily congruent.

5   (Legal) pluralism

Just like autonomy, another term which lacks a clearly determined meaning and a limited context of use is 'pluralism'. However, some main lines of the discussion could be observed. As the conference dealt with traditions of 'pluralist' *legal* thinking from the angle of 'diversity', it seemed that, all in all, the discussion somewhat moved towards a curbing of any possible 'pluralism' euphoria. The tendency was to add water to the, at least for some, exceedingly pluralistic wine.

This concerned the role of the state or of superordinate central legal orders. The importance of both was emphasised several times. Partly, it was even doubted that something like 'legal pluralism' could be imagined without any such framework or pivotal point at all. It was claimed that one must not neglect the fact that, empirically, such aspects of unity or of monist orientation were quite strong in the '*Altes Reich*' despite all the ancient regime's 'legal pluralism'. Here, one could not speak of an unregulated side-by-side, or even jumble, of different legal systems and instances. The purpose of *ius commune*, which was given as an example, was to avoid conflicts and regulate clashes. There had also been rules governing the relationship between the *Reichshofrat* and *Reichskammergericht*. Participants also emphasised the fact that pre-modern 'legal pluralism' had always, at least, found itself in conflict with an equally extremely pronounced pre-modern 'anti-pluralism'. In the seemingly pluralistic conditions of this past, often, a *divide et impera* tended to be expressed.

And, even where one deems it appropriate to speak of 'legal pluralism' for historical constellations, this would be, according to some comments, useless for discussions nowadays or, even more so, as a legitimation of today's legal pluralist intentions, since the historical phenomena that might be described as 'legal pluralism' have nothing in common with those of the present. This was particularly evident in the example of historical *lex mercatoria* on the one hand, and what is discussed today under the same name – but being of a very different nature – on the other. In any case, legal pluralism was probably only ever taking place within some kind of overarching and shared 'constitution', or order, in the broadest sense. Thus, this part of the discussions, too,

ultimately touched categories such as 'competence', 'sovereignty' or 'multi-level systems'.

In this context, there was an intense discussion about Hans Kelsen, who is probably the most prominent modern thinker of a (positivist) legal order (which, at least for him, necessarily also meant: state order) and its 'unity', founded in one central point. The debated issue of whether or not, and to what extent, Kelsen, who at first sight appeared to be a 'monist' *par excellence*, could also be described as a 'pluralist', proved to be unproductive, or at least imprecise, insofar as this could be assessed in very different respects. With regard to the *Stufenbau* of the legal system, where, according to Kelsen, extensive 'discretionary power' exists at each level (which could also be interpreted as a kind of 'pluralism'), one would arrive at a very different conclusion, as compared to the classic example of church law, which Kelsen also discussed and integrated into his monist system of (state) law.[8] The latter case showed a characteristically non-pluralist image of Kelsen, which was also the case for the remarks on his dispute with the *Anerkennungstheorie* formulated by Bierling.[9]

The warning not to underestimate features of legal unity and, above all, the power of the state in possible pluralistic exuberance was finally applied in a similar way to the example of contract law. However, this warning was also called into question by others, for, here, a controversy arose as to whether the decisive factor in a contract was ultimately the concern for, and the interest in, its guaranteed enforcement: if one places the emphasis on this aspect (which was also criticised by some as a very 'public-law' view), the indispensable central role of the state is unmistakable, even in the case of all non-state or 'private' lawmaking (as could be demonstrated by the example of the conclusion of a contract). According to this view, what ultimately matters to the parties of a contract is to obtain an enforceable judgement in case of conflict – even an arbitral award depends on the state's enforcement. The key phrase "in the shadow of the Leviathan" was repeatedly invoked here.[10]

---

8 KELSEN (2019 [1925]) 322–330 [133–136], esp. 325 [134].

9 Just as examples for accounts on the divide (or even similarities) between Kelsen and Bierling: YOON (2009) 50–79; or SEINECKE (2015) 118–120 (and on Bierling in general, 74–84).

10 Classically: SPITTLER (1980). For a re-examination of this "path-breaking article" see now BEYER / GIRKE (2021).

In general, warnings were made against an overly broad understanding of 'legal pluralism' (and, thus, also 'law'), completely losing contours, and against a "romanticisation" of legal pluralist constellations. In particular, such constellations were by no means necessarily related to 'republican', or even 'democratic', ideas. These ideas, on the other hand, could conversely go together with pronounced legal concepts of unity or uniformity quite well. Finally, participants mentioned the fact that 'legal pluralism' is also an ideology and that this should never be ignored when talking about it. In the case of 'pluralism', as in the case of 'autonomy', it was, therefore, particularly noticeable that a distinction had to be made between its character as a legal concept and as a political one.

6   Politics and ideology, multi-level systems and discrimination

Here again, another recurring theme of the discussions emerged: the relationship between 'Law and Diversity' and the dimensions of politics and ideology. It became visible through the examples of 'autonomy' and 'pluralism', especially in the connections to a category such as 'multi-level systems' that could be made in several respects, but also through another, more concrete, example: anti-discrimination law.

First, it was argued that equality and equal treatment, or problems of (non-)discrimination, should be more closely linked to the category of 'status'. This should also take into account the connections existing between *economic* positions and legal positions, such as so-called passive *vs.* active citizenship, voting and other participation rights, as well as their restrictions or gradations, etc. In (post-)colonial contexts and in countries with indigenous population groups, there is often a great deal of diversity, i. e. inequality of treatment, and, if you like, 'discrimination' in terms of legal consequences depending on the status attributed. But this was particularly and equally true of German legal history in the 19th century, for example. The federal or fragmented state structures in Germany, at that time, or, so to speak, the 'multi-level system(s)', which also included municipalities and other bodies, had even expanded this constellation. Thus, what could be shown were "different combinations of disadvantages or social differences with different legal statuses on different legal levels" (Collin).

An issue that was also raised was the difficulty to recognize some specific disadvantageous status legally (even when focusing more on the fight against

disadvantages instead of discrimination *per se*): for the legislator, it might be easier, for example, to refer to 'race and gender' than to 'socioeconomic status', as the latter's "recognisability" iss legally difficult to grasp. As an example, it was reported that, in England, a person's 'accent' is used in social reality as an important distinguishing feature, but formal legal conclusions could hardly be linked to it.

In a certain way, 'multi-level systems', as a category for analysis, returned several times in the discussion of 'discrimination and anti-discrimination'. One of the examples one could interpret as its application concerned the case of Chile with regard to the legal interplay (or coexistence, or also conflict) between the national and the international level. What was referred to, here, was the influence of human-rights directives of international or supranational origin and, accordingly, the judicature by international human-rights courts and its impact on national courts and the legal development at national level in general. It was shown precisely, here, how grave shifts and breaks due to changing political conditions in a country could be, while the legal framework may be remaining partly the same.

It was also the example of Chile, under the Pinochet dictatorship, that led the discussion to the question of discriminatory effects, whether intentional or unintentional, which can be caused through the means of an alleged anti-discrimination law, or through postulates of equality that were established in a specific historical-ideological context. This issue could be described as the "use of anti-discrimination law in favour of discriminatory practice". In addition, with reference to some examples, it was noted that there is the possibility of presenting something precisely as recognition and appreciation of differences, and thus as an adequate legal expression of diversity, when it is perceived by others as exactly the opposite, i. e. as discrimination that needs to be overcome, and thus as unjust.

This, then, led to the discussion about problems regarding the concept of discrimination itself, and possible alternatives. The example prominently discussed by Catharine MacKinnon was mentioned, in which a woman complained that she had been sexually harassed by her superior and, thus, discriminated against, whereupon the superior replied that it could hardly be discrimination as he behaved in the same way towards men, too, and thus practised equal treatment.[11] A new reflection on the definition of 'discrim-

---

11   MacKinnon (1987) 107 f.

ination' was, therefore, deemed necessary. This also applies to the question of whether the focus, somehow, shifts away from the protection of certain social groups and, simply, onto the prevention of undesirable behaviour. Finally, it was asked whether reflections and problematisations of concepts like these can be observed in the different legal systems.

Following on from this, the question was raised as to when, and in what context, the term 'discrimination' first appeared in legal discourse in the different countries. It was also considered necessary to investigate and compare the further conceptual history of the term in the respective countries. In the case of English law, as an example, it was briefly outlined that, in 1918, there was the concept of 'sex disqualification', whereas, in the 1960s, the dominant theme was 'race relations' and, then, in the 1970s, 'sex discrimination' was introduced as a legal term. Such shifts and changes show how extremely historically contingent, how differently, at different times, different groups were seen as (not) experiencing discrimination at all. In politics as well as in law and legal discourse, 'autonomy', 'pluralism' and 'discrimination' are repeatedly used consciously and purposefully by specific actors in specific contexts to achieve specific goals, or to implement certain 'ideologies'.

Thus, the presentations and discussions on discrimination and anti-discrimination law – but, by far, not only them – were those that especially showed how much an adequate legal-historical investigation of 'Law and Diversity' must, at the same time, include an account of political and ideological history when dealing with such highly charged, and flexibly *chargeable*, concepts as 'discrimination' or 'equal treatment', which occupy key positions in both the legal and political discourse (as it was similarly discussed with the example of 'autonomy' – and this is by no means important only for these particular terms).

7   Problems of method

These strands of the discussion made clear how central an analysis of term usages is for the issues raised. It would, therefore, be necessary to clarify the question of the extent to which a legal-historical account of 'Law and Diversity' is to be understood primarily as conceptual history, and which dimensions (possibly not only the political) it must include. In general, the topic of 'discrimination' was the starting point for methodological discussions and

Leonard Wolckenhaar

also for differences of opinion, especially with regard to a 'conceptual history' approach.

It was also noted, among other things, that, as far as the word 'discrimination' is concerned, it can only convey a very partial view, since the potential discriminators themselves are unlikely to ever actively use this term for their actions and identify with it. Another suggested category of analysis, not only in connection with the topic of 'discrimination', was 'normalisation', which has recently been strongly addressed by researchers in various disciplines.[12]

Among the other methodological problems discussed, especially in connection with the 'conceptual history' approach, one can probably also count the broad and multifaceted issue of 'language and translation', which appears, not least, in the context of 'discrimination'. Apart from the many different ways in which the term 'discrimination' is used, it seemed questionable, for example, whether central terms such as 'discrimination' are used in this context, in German law, in the same or a similar way in other languages and legal systems. At the same time, reference was made to a substantial discourse, which emphasises the fact that discrimination does not lie in every disadvantage or preference, but that, when making distinctions for their discriminatory or, on the contrary, anti-discriminatory character, it always depends on the respective contexts of social power structures in which the distinctions are made (e.g., the promotion of women).

The issue of language, translation and translatability was, thus, far from being relevant only for the panel that was explicitly dedicated to it, but pervaded the overall discussion and emerged at different, connectable levels, both as a methodological problem and as an object of investigation. As regards especially the latter, among the most striking issues were problems of (il)literacy of the historically involved persons and of the diverging perspectives of the speaker(s) in sources (for example, from missionary contexts).

On the topic of 'language', a connection was even and also seen with the possible analytical category of 'self-regulation', which, apart from that, came into play primarily through the topic of 'autonomy', but also at the very beginning, when sociological approaches were more widely discussed (while

---

12 As an example for relatively recent contributions, see only the works of Jürgen Link on "normalism", e.g. LINK (2006 or 2018).

there was, surprisingly, less talk of 'self-regulation' than of 'constitutional embedding of differences'). Specifically, this came up with the example of the influential role of the *academias* in establishing an authoritative, standardised form of the Spanish language in Latin America. Particular reference was also made to the interrelation between the legal profession and the writing of authoritative dictionaries in the 17th and 18th centuries, and to the maybe surprising observation that, in colonial times, 'native languages' may have received greater academic or official attention than in post-colonial times, because priests were required to speak at least one locally rooted language and they also compiled collections, dictionaries, etc. A collection of "cultural curiosities" by Catherine II, empress of Russia, was also mentioned as another example in this context.

As mentioned before, in terms of method, it was emphasised at several points that, when examining the 'migrations' or 'translations', and thereby, also, the 'adaptions' and 'transformations' of certain ideas among disciplines (e. g., from social science to legal science), but even more so geographically (foremost: between Europe and Latin America), an *institutional* aspect needs to be taken into consideration and must not be underestimated. This institutional aspect could be combined very well with *biographical* studies. Such an approach would need to shed light on 'mechanisms' through which, before different forums and in different contexts, such as 'law schools', the media, court practice, political language, etc., certain ideas or terms were 'received', 'translated' or (re)defined in a specific manner. Such, in the broadest sense, institutional determinations and dynamics were deemed to be of high importance when aiming at an adequate understanding of concepts or practices that were – seemingly – common and shared transnationally. *Vice versa*, the same holds for an analysis of the absence, or failure, of certain concepts, or practices, in particular countries. Not least, such developments could often be illuminated quite well with the example of historically influential individual actors. Different ones were mentioned, especially Latin American scholars. This entire field was grasped under the label "translation as a *social mechanism*".

Not least, it was repeatedly discussed which kind of sources would be suitable to answer the questions raised. At various points, warnings were issued against narrowing the focus to 'law in books'.

Leonard Wolckenhaar

8   Category schemes and terminology for further investigations

Closely linked to these mainly methodological questions, the possibly most fundamental task was, of course, to develop premises, theories and hypotheses that would guide and pre-structure research. This was not so much about the sources, their own terminology and the methodically correct handling of them, but, rather, about the design of an appropriate formation of categories (*Kategorienbildung*) and research terminology, which should, not least, be informed by social science.

First, there were discussions on particular topics for, so to speak, 'smaller' categorial schemes better tailored to the respective fields. From these, one example might be picked out, here: the scheme of 'subordination', 'disciplination' and 'integration', which was suggested for the case study of Brazil on the topic of 'diversity and legal personality', was discussed regarding its possible applicability to other examples. One of them was Russia, where a very different picture might be shown as, with regard to ethnical diversity, a policy of 'full integration' was pursued over there. In addition, regarding the English example, the question was discussed as to what extent a separation between addressing ethnical and religious diversity is possible. Finally, and this again touched on the possible category of 'multi-level systems', it was asked whether, in terms of 'status' and personhood, differences could be identified between (more or less effectively) centrally governed structures and their legal orders, on the one hand, and more federalist ones, on the other.

But, besides these more detailed and narrow questions, what was largely discussed were the problems and possibilities of a general conceptual scheme at an abstract and overarching level. In an attempt to take up, for this purpose, the four-field scheme initially outlined in the conference by Alfons Bora,[13] the discussion concentrated especially on the issue of 'alterity'. In parts, it was doubted whether this aspect could, for example, be applied to the German context. On the contrary, as some suggested, in the case of Germany, a serious lack of 'alterity' thinking might be seen as typical and as what is, precisely, making the German tradition that problematic. Even though there was a certain degree of agreement with this judgment, it was also suggested that one should interpret the concepts of certain German

---

13 See the contribution by Bora in this volume.

legal theorists such as Klaus Günther ("the sense of appropriateness")[14] or Gunther Teubner[15] as an expression of alterity thinking. And, especially for the latter, it was emphasized how normative his conceptions would be.[16]

This was also why it was repeatedly noted that the scheme created by Bora was not meant to be a historical description, or a tool, to localise certain persons or certain, even if they are typified, theoretical positions within it. Rather, it should serve heuristic purposes in an ideal-typical way. That explains the possibility of placing the work of one single author in different sectors of this scheme. Discussing the scheme, it was also asked whether it is correct to put 'multinormativity' (and thus, probably, 'legal pluralism' in a certain sense as well) in its empirical sector. Here, it was argued that the emphasis on such terms would often come along with a "normative claim" as well, and that discussions centred around such terms would often, also, aim at shifting the focus more towards alternative or deviating normativities, and open the field to the possibility of also regarding (or establishing) them as 'law'.

This objection, thus, also concerned the fundamental question of the 'identity of law' that was, of course, posed at various points in view of differentiation and diversity throughout both conferences.

Bibliography

Bellomo, Manlio (1995), The Common Legal Past of Europe, 1000–1800, Washington, D.C.

Beyer, Judith, Felix Girke (2021), The State of Custom: Gerd Spittler's "Dispute settlement in the shadow of the Leviathan" (1980) today, in: Zeitschrift für Rechtssoziologie 41, 3–20

Chanos, Antonis (2019), Mehrebenenrecht. Zum Multi-Level Approach am Beispiel des europäischen öffentlichen und Privatrechts in Recht und Rechtswissenschaft, in: Rechtstheorie 50, 287–306

Costa Pinto, Antonio (ed.) (2017), Corporatism and Fascism. The Corporatist Wave in Europe, London

---

14 Günther (1993).

15 Cf. only Teubner (2009); Teubner/Korth (2009).

16 For a discussion of relevant aspects, see Günther (2016).

Costa Pinto, Antonio, Federico Finchelstein (eds.) (2020), Authoritarianism and Corporatism in Europe and Latin America. Crossing Borders, London

Dittrich, Klaus (2011), Conference Report: Postcolonial Reading of "Sonderweg", 03.12.2010–04.12.2010, Seoul, in: Connections. A Journal for Historians and Area Specialists, www.connections.clio-online.net/conferencereport/id/tagungs berichte-3546

Galindo, George Rodrigo Bandeira (2014), Legal Transplants between Time and Space, in: Duve, Thomas (ed.), Entanglements in Legal History: Conceptual Approaches (Global Perspectives on Legal History 1), Frankfurt am Main, 129–148, http://dx.doi.org/10.12946/gplh1

Grimm, Dieter (1987), Bürgerlichkeit im Recht, in: Kocka (ed.), 149–188

Günther, Klaus (1993), The Sense of Appropriateness. Application Discourses in Morality and Law, New York

Günther, Klaus (2016), Normativer Rechtspluralismus – Eine Kritik, in: Moos, Thorsten et al. (eds.), Das Recht im Blick der anderen. Zu Ehren von Eberhard Schmidt-Aßmann, Tübingen, 43–62

Härter, Karl (2010), Security and "gute policy" in early modern Europe: concepts, laws and instruments, in: Historical Social Research 35, 41–65

Jestaedt, Matthias (2020), Die Eigengesetzlichkeit des Rechts. Normativität, Kausalität und die Antwort der Verfassung, in: Rückert, Joachim, Lutz Raphael (eds.), Autonomie des Rechts nach 1945, Tübingen, 1–23

Kelsen, Hans (2019 [1925]), Allgemeine Staatslehre. Studienausgabe der Originalausgabe, Tübingen, Wien, 322–330 [133–136]

Kocka, Jürgen (1987a), Einleitung, in: idem (ed.), 7–20

Kocka, Jürgen (1987b), Bürgertum und Bürgerlichkeit als Problem als Probleme der deutschen Geschichte vom späten 18. zum frühen 20. Jahrhundert, in: idem (ed.), 21–63

Kocka, Jürgen (ed.) (1987), Bürgertum und Bürgerlichkeit als Probleme der deutschen Geschichte vom späten 18. zum frühen 20. Jahrhundert, Göttingen

Koschaker, Paul (1966), Europa und das römische Recht, 4th ed., Munich

Lee, Changnam, Youngjun Ha (2010), Reflections on national "Sonderwege" in the era of transnational history, in: Zeitschrift für Globalgeschichte und vergleichende Gesellschaftsforschung 20, 188–191

Lim, Jie-Hyun (2014), A Postcolonial Reading of the Sonderweg: Marxist Historicism Revisted [sic], in: Journal of Modern European History 12, 280–294

Link, Jürgen (2006), Versuch über den Normalismus. Wie Normalität produziert wird, 3rd ed., Göttingen

Link, Jürgen (2018), Normalismus und Antagonimsus in der Postmoderne: Krise, New Normal, Populismus, Göttingen

MacKinnon, Catharine A. (1987), Feminism Unmodified. Discourses on Life and Law, Cambridge (MA)

Seinecke, Ralf (2015), Das Recht des Rechtspluralismus, Tübingen

Spittler, Gerd (1980), Streitregelung im Schatten des Leviathan, in: Zeitschrift für Rechtssoziologie 1, 4–32

Teubner, Gunther (2009), Self-subversive Justice: Contingency or Transcendence Formula of Law?, in: Modern Law Review 72, 1–23

Teubner, Gunther, Peter Korth (2009), Zwei Arten des Rechtspluralismus: Normkollisionen in der doppelten Fragmentierung der Weltgesellschaft, in: Kötter, Matthias, Gunnar Folke Schuppert (eds.), Normative Pluralität ordnen, Baden-Baden, 137–168

Wehrheim, Lino, Tobias A. Jopp, Mark Spoerer (2020), Diskurs, Narrativ, Hitler, Turn. Konjunkturen geschichtswissenschaftlicher Begriffe im 'Clio Viewer', Working Papers of the German Research Foundation's Priority Programme 1859 "Experience and Expectation. Historical Foundations of Economic Behaviour", no. 27, Berlin

Winkler, Heinrich August (2021), Gab es ihn doch, den deutschen Sonderweg? Anmerkungen zu einer Kontroverse, in: Merkur 75, 17–28

Yoon, Zai-Wang (2009), Rechtsgeltung und Anerkennung. Probleme der Anerkennungstheorie am Beispiel von Ernst Rudolf Bierling, Baden-Baden

Zimmermann, Reinhard (1992), Das römisch-kanonische ius commune als Grundlage europäischer Rechtseinheit, in: Juristenzeitung 47, 8–20

Zimmermann, Reinhard (2001/2010), Roman Law, Contemporary Law, European Law. The Civilian Tradition Today, Oxford / Derecho romano, derecho contemporáneo, derecho europeo: La tradición del derecho civil en la actualidad, Bogotá

Zimmermann, Reinhard (2002), Europa und das römische Recht, in: Archiv für die civilistische Praxis 202, 243–316