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

Vol. 1: Fundamental Questions

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Introduction

1   Problems of definition and understanding

1.1   Diversity as reality – concept – discourse – normative resource?

The term "diversity" has different levels of meanings in several respects. Firstly, this applies in terms of content: "The word means difference and aims at equality."[1] So the term does not convey a message about equality or inequality, but about the relationship between the two. Secondly, the term has a twofold function: a descriptive and a normative one.[2] It refers to a certain reality, which it contours through its terminology, and calls for a certain way of dealing with it. At the same time, this reality is also normatively shaped. Diversity does not refer to all differences between people or social groups, but only to certain ones. What these are results from certain value decisions,[3] which can be based, for example, on the desire to eliminate disadvantages or on the effort to counteract the disintegration of societies.

However, "diversity" is not only seen as a term or concept, i. e. a theoretical construct. Steven Vertovec defines it as "a wide-ranging corpus of normative discourses, institutional structures, policies and practices".[4] Thus, for legal historians, diversity would not only be observable and describable as a theory, but also as a practice. But to what extent is this concept really suitable for linking investigations of the past with it in a meaningful way? The question is relevant because diversity is, first of all, only used to describe a highly modern concept that as a legal problem – at least in this terminology – has only come into the field of vision of lawyers in recent decades. Both in some of the common diversity criteria (e. g. gender) and in the way diversity is dealt with (diversity management), it is difficult to draw a line to the past or to discover parallels there.

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1 Toepfer (2020) 1.
2 Foblets (2010) XIII; Lembke (2012) 50; Duve (2013) 3 f.
3 Lembke (2012) 52.
4 Vertovec (2012) 288.

Nevertheless, this attempt seems worthwhile. For diversity in its normative dimension – not just as a mere description of difference and manifoldness – has a core function that can be observed throughout the ages: the marking of differences as important, as signalling a need for action and therefore as normatively relevant. However, this poses a problem. If in the past there was no specific diversity concept that named the relevant differences to be regulated by diversity management, then which differences should be addressed? For it is not sufficient to refer only to those differences that were explicitly addressed by the law of the time, but also to those about which that law was silent, but which were at the same time tacit premises of the legal order – or those differences that state law ignored, but which were made the subject of regulation by non-state actors.

If one asks about the decisive factors of social differentiation in the last 200 years, one has to consider two things. Firstly, one must ask by which guiding differences society as such is characterised and secondly, which different social groups become normatively relevant within such a differentiated society.

The first point refers to social theories with a broad scope. Contemporary social science thinking is strongly influenced by the assumption that modern society is a functionally differentiated society. In the course of the 19th and 20th centuries, this functional differentiation has increasingly replaced segmental and stratificational differentiation as the guiding social differentiation. However, this statement does not apply absolutely and in all its implications. Because functional differentiation does not completely eliminate stratificational and segmentary differentiation. This is pointed out above all from a non-European perspective, whereby a critique of the Western fixation on functional differentiation also resonates. Different perspectives are possible here. One can see the existence of non-functional forms of differentiation as an expression of insufficient functional differentiation[5] and thus classifies these forms rather as a manifestation of still existing backwardness. Or one can accept, for example, segmentary differentiation, which is expressed in ethnic groups and religious communities, as a normal component of modernity, and assign this differentiation an "equal" place next to functional differentiation.[6] It is also possible, however, to derive the insuffi-

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5 On their different expressions: Colomy (1990) 470 ff.
6 Also Ziemann (2017) 10; Amato (2020) esp. 81.

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ciency of functional differentiation, especially in non-Western countries, from the "internal" constructional weaknesses of functional differentiation, namely when one subsystem (e. g. politics) dominates another subsystem (e. g. law) and prevents it from developing autonomously.[7]

Even taking these controversies into account, however, it can be said that functional differentiation at least has become effective as a paradigm. This must be emphasised, especially from the perspective of legal history. For at the same time as the erosion of traditional forms of differentiation, an equality-based legal system emerged. This was no coincidence. The new legal system was a liberal legal system. Similarly, the emergence of functional differentiation was seen as the result of political upheavals for which the liberal movement of the time was largely responsible. Functional differentiation was considered a liberal project, as it were.[8] Or to put it another way: the elimination of old differentiations – and that sense a de-differentiation – can be seen as a characteristic of the beginning of modernity.[9] The individual living under the conditions of functional differentiation also corresponded to the liberal image of man. The individual was not – as in a corporative society – integrated into these functional systems as a "whole", but is temporally and occasionally integrated, in certain audience roles or performance roles *(Publikums- und Leistungsrollen)*.[10] Simmel emphasized this early on by highlighting human individuality as a result of the "crossing of social circles".[11] Here, people are not understood either as atomized individuals or as mere collective members,[12] but find themselves in a multifaceted "role pluralism".[13] On the one hand, they are free and equal[14] because they are not fixed on belonging to a group from the outset. On the other hand, they are unequal, since every human being moves in completely different constellations of system affiliations.[15]

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7 Neves (2001) 258.
8 Holmes (1985).
9 Rüschemeyer (1991) 380.
10 Stichweh (2000b) 88.
11 Simmel (1890) 103.
12 Lichtblau (2019) 13 ff.
13 Tyrell (1998) 136.
14 Schimank (1998) 69.
15 Simmel (1890) 102 ff.

This does not deny the existence of inequality and of classes and strata. It is just that – unlike in a stratificational society – these no longer represent the guiding difference. However, this does not solve the problem of "social inequality". Social inequality is expressed above all through unequal access to functional systems, e. g. in terms of sharing in the economy, political participation or the use of educational and health care services ("multi-dimensionality of inequality"[16]). Terminologically, as already mentioned, this is expressed as a problem of exclusion and inclusion in relation to certain subsystems.[17] Whether and to what extent someone is hindered from participating in functional systems, however, does not only depend on their belonging to a particular class or stratum, but is also explained by a bundle of different factors, which include not only class affiliation but also ethnicity, age, sexual orientation and gender,[18] and being situated in a certain location.[19] From this perspective, then, social inequality does not primarily describe one difference, but rather the result of the combination of different differences with regard to sharing in the different functional systems. Social inequality becomes a problem because a society based on the guiding difference of functional differentiation in principle promises equal access to the functional systems and inequality – unlike in stratified societies – is therefore not taken for granted as a matter of course.[20] From this perspective, the actual guiding difference is that of inclusion and exclusion. This does not abandon the perspective of functional differentiation, but inclusion and the functioning of functional differentiation are placed in a relationship of mutual conditionality.[21] Seen in this light, certain differences or combinations of differences can then be raised as a central theme from the point of view of social inequality and addressed as a special need for action in politics or law.

This brings us back to diversity. In a positive, supportive variant, diversity policy is not aimed at integration into society as such, but at enabling participation – i. e. inclusion – in individual functional systems, e. g. partic-

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16 LUHMANN (1985) 120.
17 STICHWEH (2000b) 85 ff.
18 On the connection of gender difference with both stratificatory and segmental differentiation: TYRELL (2008) esp. 147 f.
19 STICHWEH (2000b) 97; SCHIMANK (1998) 62.
20 SCHIMANK (1998) 73.
21 NEVES (1992) 147 ff., esp. 186 Fn. 19.

ipation in the legal system through legal aid, the recognition of certain languages as court languages, or participation in the health system through affordable health insurance. Conversely, diversity policy in a repressive variant aims at exclusion in relation to certain sub-areas, e.g. in relation to the political system by withholding the right to vote, or in relation to the economic system by not granting legal capacity to act and thus the ability to conclude contracts. Diversity as discourse is thus a discourse about which group characteristics are relevant in relation to participation in social sub-systems.

1.2   Contingencies and national differences

However, diversity – in the sense of marking social differences as normatively relevant – is highly contingent even within the 200 years of modernity.[22] The question of what difference makes a difference in legal terms is answered differently at different times. For example, different confessional affiliations can become less important for the legal system over time. The same also applies to gender affiliations – here, however, one has to deal with different effects of the legal system: gender affiliations can lose importance as a reason for discrimination, but gain importance as a reason for privileging. In addition, stratificational differences that persist in modernity can undergo a change of form. Traditional status differences linked to birth can be replaced by functional, occupational differences to which certain privileges and collective rights of participation are linked.[23] Trends towards the individualisation of self-images can give rise to new criteria of distinction that are propagated as authoritative. New collective identities can make their claims in parallel with the general recognition of the "formal individual".[24] The history of the social movements that can be subsumed into the modern concept of diversity already shows variability in the view of the relevance of social differences. The origin can be seen in those movements that emerged in the 1960s, especially in the USA, and can be summarised under the keyword "affirmative action". At first, the focus was on the black population, later expanded to other ethnic minorities; at the end of the 1960s,

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22   Bastias Saavedra (2018) 3.
23   Kraus (2005).
24   Robertson (1992) 184.

women were included, and people with disabilities in the 1970s.[25] From the 1980s onwards, the human resources departments of large companies discovered diversity and established "diversity management". The 1990s saw an expansion, in two respects. First, diversity became global, as the concept of diversity was established in many other countries. Secondly, the concept of diversity was extended to include other features. Contemporary understandings of diversity-relevant differences include, for example: age, ethnicity, gender, race, physical abilities, sexual orientation, education, religious belief, work experience.[26]

The broadness of the spectrum becomes even more visible when one takes into account the different environmental conditions for diversity at the national level. Considerable differences already result from whether we are dealing with states with or without imperial structures. The European nation-states of the 19th century created an identity for themselves by constructing a "national character" and by producing a nationalist ideology, thus distinguishing themselves from their European neighbours, but even more so from non-Christian and non-white societies.[27] However, when states were organised as empires, their multi-ethnic and multi-religious characteristics had to be taken into account. This did not speak against hegemonic forms of shaping difference, but coordination mechanisms and spaces of autonomy had to be made available that left sufficient room for the different identities. Another factor to be taken into account is the degree of democratisation, whereby – by comparison – advanced democratic structures did not necessarily have to be associated with growing recognition of diversity and self-organisation based on it, as the French example shows. Liberal policies could contribute to opening or cement the rule of certain elites. Economic development could produce open competitive orders or corporatist structures in which numerous special orders could emerge. Education policy could aim at equal general schooling for all or allow school structures that reflected economic inequality and / or religious difference. Social policy could distribute benefits in an egalitarian manner, create special groups of beneficiaries or stagger the allocation of benefits according to criteria of belonging to certain groups.

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25 Vertovec (2012) 289.
26 Vertovec (2012) 289, 295.
27 Osterhammel (2004) 179 f.

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Contrasts, but also commonalities, become particularly visible when not only states but also world regions are included in the comparison. The following reasons speak for a comparison of European and Latin American perspectives.

On the one hand, we are dealing with a common normative basis to a certain extent. Old European legal ideas also flowed into Latin America, especially through law of the Spanish colonial power. The norms and legal institutions, some of which date back to the European Middle Ages, were part of the legal order of the new nation states for a long time after independence. However, the adaptation to a special context linked to the indigenous peoples and slavery, incorporated from Europe, would modify the inherited tradition, forming a particular law of a casuistic and jurisprudential nature, which regulated each corporation, family and religious or political community differently, depending on the customs and needs of the local government.[28] Thus, from the beginning of colonisation, domestic practices of social control were established for those defined as minorities (Indians, women, mestizos, those detached from the domestic sphere, etc.) and judicial disputes over the bodies of slaves conceived as things, produced a *Derecho Indiano* that provided particular solutions depending on the different statuses of the "souls". Different statuses determined the juridical practices that, when exercised on the actors, consolidated the paradigmatic situations instituted by law, considered in its radical function of a symbolic order that justified and consolidated the violence of the conquest.[29]

But the ideas of the Enlightenment, modern constitutions and codifications aimed at national legal unity were equally part of the arsenal of European and Latin American states. It can be said that there was a new common normative basis: a law that did not regulate social life comprehensively, but only to an indispensable degree,[30] and in terms of content, the basic assumption of a law based on equality without privileges and differences in class. This universalism inherent in the declarations, however, must be observed through the particular appropriation in each political community. In the Latin American case, the idea of equality at the national level would clash

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28 Tau Anzoátegui (2021).

29 Garriga (2019).

30 This fundamental difference between "Western" law, on the one hand, and Islamic and Talmudic law, on the other, is pointed out by Glenn (2014) 366.

with the complexities of the localisms inherited from the Indian legal order, with its traditional social pre-understanding based on an unequal structuring of society, particularly when considering gender, race and ethnicity.

Therefore, despite the consolidation of political principles that oriented towards equality, the legal system also included norms that directly or indirectly recognised or created inequality.

When it comes to the question of where the focus of regulation lay and to which socio-structural conditions regulators and users of regulation referred, significant contrasts between Europe and Latin America become apparent, especially in the persistence of personal bondage, in the treatment of ethnic groups, in the continued effect of pre-capitalist economic structures, in the role of immigration, etc.

Characteristic in Latin America is above all a continuity of pre-modern rationalities based on differentiated structures founded on a logic of inequality. Even when liberal European legal and political thought of the 19th century also penetrated the Latin American region, it had to pass through the filter of the pre-modern colonial legal and political tradition. In the history of legal discourse, this is clearly evident in the interpretations of constitutions and notions of equality, which were always read in the light of the traditional status-based value system.[31] It should also be noted that, despite the declaration of liberal principles – such as equality – which were quickly incorporated into the political discourses of the new constitutional law, there continued to be a persistence of modes of social regulation, especially social control, within the framework of domestic political and economic structures. There was, for example, the long-term continuity of the domestic order of the "estancias" and "ranchos" as a model for the organisation of social life. This *dispositif* of social control was able to remain effective as long as its practices were made "invisible" against the backdrop of the paradigm of a modern unified national legal system. This was also possible because of a certain pragmatism that prevailed in the legal discourse of Latin American elites, which brought some normative practices into the light and left others in the dark. Thus, it was possible to criticise some of these practices that contradicted modern conceptions of law, while remaining silent about others whose continued existence was in the interests of the elites. As a

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31 CLAVERO (2016).

result, the modern liberal project, far from recognising diversity in order to equalize social differentiation, in some areas actually led to the systematic repression of ancestral cultural expressions that did not belong to the Catholic tradition, or reduced the "universe" of equality to those householders, excluding women, children, and other household members, African Americans and indigenous people.

This constellation of problems was made even more complex by the immigration process, which added a new layer of normativity based on national differences. While the elites continued to cling to the concept of a unified national state organisation based on a formally egalitarian legal subjectivity – occluding race, gender and indigenous people – there was the formation of institutions that we would call private today, whose members embodied "national differences" within the "nation-state". Here we see a difference between Europe and Latin America. The civil society organisations in Latin America, which initially emerged from immigrant collectives, maintained an integral system of mutual "socorros" (assistance) that was not – as in the German associations – organised around individual activities, but on the basis of a comprehensive solidarity among people with a common national past and a common religious background (Poles, Italians, Germans, etc.).

The result of this temporal interplay of religious, social and state-legal values is a very heterogeneous normative integration, which in turn shows similarities and differences at the spatial level, be it supranational, national, regional, local, or even from ranch to ranch. This phenomenon of multinormativity was registered and partly processed by the legal discourse of the 19th and 20th centuries, but at the same time neglected. This neglect of multinormativity and diversity is due to the self-limitations of 19th-century Latin American nationalisms. Indeed, as a result of the codification of law – both public and private – and also as a consequence of self-proclaimed "exceptionalism", it was almost impossible to recognise local phenomena as overarching. In the face of this double national (historical-narrative) and state (legal-mythological) pressure, little is known about that normative knowledge from which the need to recognise normative diversity arises.

2   Aspects of the relationship between law and diversity

2.1   Consideration and non-consideration of social difference through law

When talking about law and diversity, attention is initially focused on those cases in which the law takes social differences as a reason for regulations. Here we are dealing with diversity, which is addressed by law as diversity. However, what about diversity that is ignored by law, in other words: what about those social differences that do not appear in legal texts?[32] This can concern social differences of an ethnic, cultural, religious, but also economic nature – differences that are permanently reproduced in social practice, that have an inclusive or exclusionary effect, but that can also be associated with different notions of appropriateness, fairness and binding force.

Here, a relativisation is necessary in several respects: first, even a disregard of social difference in the sense of renouncing the setting of different legal consequences can be a reaction to social differences – namely in an egalitarian sense. The aim can then even be elimination of diversity as a social fact. Second, legislation linked to seemingly neutral criteria ultimately affects certain social groups in a particular way – the term for this is indirect discrimination.[33] We are thus dealing with the indirect legal constitution and regulation of diversity. And third, even if the law, e.g. codifications of civil law, does not know certain social differences, these can be taken into account at another level or in another dimension of law, for example in case law, in private standard setting or in other forms of legal practice. This can be described in different ways by legal theory. In the sense of Kelsen, one can assume different levels of legal concretisation at different levels of lawmaking[34] – that would be a hierarchical model in which diversity is treated differently in the different hierarchical levels of law. In the sense of legal pluralism, however, one can also speak of the coexistence of several legal systems. This also depends on how broadly one defines the concept of law

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32 This is treated as a central question in Bastías Saavedra (2018) 3.

33 In more recent times, however, the law has in turn reacted to this with countermeasures; see for Germany § 3 Abs. 2 Allgemeines Gleichbehandlungsgesetz (General Act on Equal Treatment), which equates indirect discrimination with direct discrimination.

34 See only Paulson (2003) esp. 35 f.

and where one draws the line to non-legal norms.[35] The discussion about diversity and law is, therefore, also a discussion about the concept of law.

2.2 Dealing with diversity in terms of content and organisation: Possibilities and limits of typification

The previous remarks, however, do not yet address the question of how the law deals with diversity *in terms of content*. But it is difficult to draw up a catalogue of types that comprehensively covers the range of legal reactions to diversity. Basically, one can distinguish between the elimination of differences (which also includes assimilation) and the management of differences, which includes hegemonic control as well as the granting of autonomy rights.[36] However, this categorisation cannot be applied to all varieties of diversity. It should be noted that we are dealing with a complex variety of diversity relations, for which in turn different legal mechanisms come into play. This diversity can be described as follows:

– relations between the state and groups (autonomy rights, opportunities for participation in public decision-making processes …)
– relations between the state and individuals (entitlements to public aid, access to education …)
– legal status of groups under civil law (granting of association rights …)
– rights of individuals under civil law (for example in labour law, family law or inheritance law)
– relations between groups and their members (membership rights)
– relations between groups (cooperation rules)

As is already clear from this list, we are dealing with a multitude of actor constellations. This already indicates that it is not only the state that acts as a manager of diversity. Rather, the legal handling of diversity can be observed at different organisational levels, involving state, semi-state and non-state actors. Here, one can indeed make generalisations and identify the following basic modes: state regulation, private-state co-regulation, regulated self-regulation, private / societal self-regulation. Certain forms of judicial regulation

35 On this, see above all TAMANAHA (2000). Critical of Legal Pluralism's fixation on "legal" normativities: DUVE (2017a) 91.
36 MCGARRY / O'LEARY (1993) 4 ff.; following them KYMLICKA / NORMAN (2000) 12 ff.

can also correspond to this (ordinary state courts, mixed state courts, semi-state courts, private courts). However, we must take into account the fact that not every type of diversity is equally open to all modes of regulation. There is a high potential for self-regulation where collectives capable of action have formed around diversity characteristics. Self-regulation, on the other hand, is more difficult, for example, in the case of disabled people or of those with diversity characteristics who are only able or willing to organise to a limited extent.

Attempts of this kind of typification could be continued. Here, perhaps, the benefit of resorting to other debates, in which extensive arsenals of categories have already been built up, may prove to be useful, for example, the debates on regulated self-regulation, non-state justice, legal pluralism and governance.

3 Manifestations of law and diversity in theory and legal practice

3.1 Preliminary remark: The dominant paradigm of equality-based law

Before turning to the manifestations of law and diversity dealt with in this volume, it is important to keep in mind the fact that the legal treatment of diversity took place against the backdrop of the prevailing paradigm of equality-based law. This will only be sketched here on the basis of three key concepts, whereby German references will be used for illustration (but which also play a central role in Latin America, e. g. in Argentina[37]): person, codification, and system.

Until the 18th century, the term "person" (persona) was equated with the human being, but "persona" was rather a general notion of description, not a legal term with legal consequences, i. e. connected with concrete rights. Legal capacity was not addressed to the person as such, but rather was status-dependent in its manifestation, and therefore differed. This changed only at the beginning of the 19th century, when the general legal capacity came to be associated with being a human being.[38] This general legal capacity became the cornerstone of private law. Whereas in the past differ-

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37 Tau Anzoátegui (1988).
38 Hattenhauer (2011).

entiation was the norm, it has now become an exception requiring justification.[39] However, the – legal – guarantee of general legal capacity did not have as equalising an effect as it seemed at first glance. Firstly, this guarantee was powerless in the face of legal differentiation requirements, and secondly, the general private legal personality did not correspond to that of a general citizenship. As far as pre-March constitutions[40] even spoke of such a right, they associated this with a reservation of restrictions on the granting of *concrete* civil rights.[41]

Codifications, at least those of the 19th century, also had a levelling effect. This happened in several ways: their levelling effect unfolded not only personally[42] and territorially but also in factual terms, by not recognising pluralistic solutions to legal problems and thus adopting a "monistic" approach.[43] Added to this, there is also the exclusion (or disregard) of legal areas, which – as Pio Caroni puts it – refer to "special, individual and sectoral relations".[44] However, restrictions must be observed here as well. Firstly, this did not eliminate special law, but only shifted it to the margins – to special legislation. Secondly, the codifications of the 19th century embodied more of the law of a minority, because they primarily manifested the legal ideas of the (educated) bourgeoisie. Thirdly, it should be pointed out that the codifications (of private law) were actually quite "weak" law, since they contained a large number of dispositive provisions.[45]

Differences were also levelled out by the formation of law in systems, which can be described as a determining trend in the development of jurisprudence in the first half of the 19th century – with practical consequences for later legislation. The idea of a system required starting from guiding principles, which had to be conceived consistently. Special law for particular groups – *ius singulare* – formed a foreign body in it. It did not result from legal rationality but from extra-legal political considerations – at least according to the predominant view in the Historical School of Law.[46] In this

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39 Duve (2003) 167, 175.
40 Constitutiones before the March Revolution of 1848.
41 Schulze (1982) 91 ff.
42 Duve (2003) 175. From a sociological perspective, Stichweh (2000a) 382 f.
43 Kroppenberg (2009) 1918 f.
44 Caroni (2003) 30.
45 Caroni (2008) 76 f.
46 Haferkamp (2017) 232 f.

respect, the systematic legal approach that has shaped the modern understanding of law has also proved to be hostile to diversity. However, special law was not excluded from law; it was not illegitimate, but rather considered worthy of consideration – however, at the price of the purity of the principle. In addition, special law could also develop its own system rationalities, which in turn were based on guiding concepts and principles – as in the case of the law of merchants, i. e. commercial law.

3.2   On the content of this book

The question of how law is challenged by diversity is ubiquitous today. However, the legal-normative dimension of diversity can only be understood if the differences of national and regional contexts are taken into account. Therefore, the reader will find in this volume a dialogue between different traditions that invites us to think about "law and diversity" without starting from the traditional assumptions of "centre" and "periphery", or "model" and "deviation".

The choice of topics for this volume was based on fundamental questions concerning the relationship between law and diversity (further volumes will deal with how law and diversity manifest themselves in individual fields of law – in public law, private law and criminal law). The texts are main contributions and commentaries, each from different countries. The editors have linked the topics to specific questions, which are to guide the texts. On this basis, the main contributions deal with the respective topic comprehensively for a specific country. The commentaries address the questions raised by the main contributions and combine them with an outlining presentation of the topic in their respective national legal culture.

3.2.1 Thinking on diversity and law

The first thematic block focused on two interlinked theoretical-historical questions of thinking about law and diversity. On the one hand, the focus is on the statements of those sociological theories that dealt with social differentiation and could offer theoretical orientation to jurists, and on the other hand, on the traditions of pluralistic thinking within the legal field.

Alfons Bora's main contribution is devoted to the development of sociological models of social differentiation in relation to Germany. That is, he focuses on answering the question of how specific patterns of observation of social differences, economic inequality, cultural / religious / ethnic diversity as well as functional differentiations have emerged in sociological theorising, and examines which of these differences have been considered crucial for describing and analysing society from a sociological perspective. Bora presents a cartography of the various sociological theories of social differentiation, distinguishing between two approaches: "the dimension of the theoretical perspective or mode of approach, on the one hand, and the dimension of the particular model of social order taken by a scientific theory, on the other". Within these approaches, he distinguishes between normative and descriptive perspectives. In this way, he arrives at different ways of looking at things, which he describes with the terms "equality", "integration", "alterity" and "differentiation".

It is clear that such a grid of enquiry need not be limited to the history of German social scientific thought. Agustín Casagrande takes up the cartography laid out by Bora and unfolds it in an account of the development of the reception of theoretical models in the Argentine debate, from the first positivist theories (Comte) at the beginning of the 20th century to the conceptualisation of a local knowledge that seeks to distance itself from the logic of the model of the global North and postulates an epistemology of the South in the decolonial turn of recent decades. In this way, a dialogue emerges between two traditions that often cross the same conceptual register, but are populated by radically different contexts and ideas, and therefore vary in their socio-legal consideration of diversity.

The second group of contributions deals with pluralistic traditions of legal thought. The main contribution by Ralf Seinecke is commented on by Armando Guevara-Gil and Rodrigo Míguez Núñez. This thematic block examines the extent to which certain legal concepts were developed that could function as a counter-model to the concept of the state's monopoly on lawmaking, or at least modified this concept. In other words, the aim was to find out: to what extent were groups outside the state (occupational groups, ethnic groups, religious communities, etc.) seen as legitimate producers of law? To what extent were areas of judicial autonomy outside the state recognised? Was social diversity also reflected in a diversity of legislative and judicial powers?

Ralf Seinecke answers these questions in a contribution that seeks to sort out the difference and disambiguation of the plurivocal terms of legal pluralism and diversity. In it, he outlines a legal conceptual history for the German area that strives for an onomasiology of legal pluralism – avant la lettre – and a semasiology of the academic use of the term in jurisprudence. With a focus on private law and an analytical structure that summarises the characteristics of legal pluralism (law without a state, alternative legality, interlegality and nomoi), the author creates a genealogy that ranges from the Savigny-Thibaut debate to the positions of Ehrlich and Kelsen to the work of Radbruch after National Socialism and ends with the theories of the 1970s to the present: Benda-Beckmann and Teubner.

Armando Guevara Gil's comment takes up Seinecke's challenge and problematises the possibility of the emergence of pluralistic traditions of thought in Peruvian jurisprudence – pointing out that the limited resources of this discipline have tended to stand in the way of the emergence of elaborate independent theorising. Indirectly, however, long-term pluralist traditions of thought can be traced in the development of legislation and legal institutions, in a way that reverses the traditional liberal narrative of the standardisation of law. Codification here becomes a vehicle for the development of plural logics of social control. On the one hand, it is proposed to overcome the metaphors of spatiality in order to find diversity according to the temporal conditions in each of the different jurisdictions. An example is given by referring to the difference between religious regulations and civil-secular regulations; thus the age and residence requirements for priests as well as their rules regarding contact differed from those for laypeople. Institutionally, this is expressed in the changing diversity of procedures and law-producing organisations: mining, military, clergy, merchants, water management, justices of the peace, etc. The totality of legal traditions, logics and forms determines a universe of diversities that is theoretically captured by legal pluralism.

Míguez Núñez considers the Chilean experience in his comment. There, in a historical perspective, two processes are closely related to the theory of legal pluralism: on the one hand, the process of monopolising the production of law on the basis of state law and eliminating customary law as a source of law – a process that runs through the 19th and 20th centuries, especially in civil law – and, on the other hand, the experience of non-state actors seeking recognition of alternative forms of organisation within the

state. Thus, in a long journey that begins with the problem of customary law in the experience of *Derecho Indiano*, the long monist tradition is outlined, whose actors range from Andrés Bello to the strong Kelsen's receptionin Chilean jurisprudence to the critique of monist law in the 1990s. At this point, numerous lines of connection to Seinecke's account also emerge, especially through the observation of the processes of reception of Kelsen's legal doctrine, which were not only "Viennese" but also strongly American. The call for the reactivation of other modes of non-state law formation subsequently also leads to the demand for greater consideration of the experiences of the indigenous population.

3.2.2 Tendencies

The theoretical preliminary explanations are followed by a thematic field in which the authors deal with different national experiences in coping with the tension between equality and inequality. The emergence of the modern nation-state was associated with a promise of equality, since this nation-state was built on the idea of a constitutive people, not on a multitude of ethnic, religious and other groups. At the same time, concepts of what this constitutive people should be like resulted in discrimination effects. The creation of a uniform citizenship had an equalising effect, but was associated with demarcations and exclusions. The attempt to legally protect the interests of certain groups could – because of the embedding of these attempts in a certain dominant legal logic – paradoxically also produce discrimination effects.

The first panel focused on the topic of "Diversity and Nation-Building". Here, the example of four countries – Brazil, Belgium, Spain / Catalonia and Argentina – is used to examine the extent to which the development of nations and nation states in the 19th and 20th centuries also brought with it problems in dealing with diversity. This problem arose above all where groups with different languages, ethnic origins, religious orientations or cultural identities existed within a national territory. How were these groups classified in a uniform model of citizenship? Which basic models of inclusive or exclusive problem solving become visible?

Pedro Ribeiro's main contribution, which served as a starting point for the discussion, deals with the case of Brazil. Ribeiro reconstructs the chequered history of those sociological ideas that emerged from the 1930s

onwards and later became accepted as common academic and popular ways of thinking about the specificities of Brazilian identity. Starting from a tripartite division of political-epistemic positions referring to socialism-communism, fascism-corporatism and liberalism-democracy, the author shows how certain imaginaries became horizons of expectation, which in turn served to write Brazil's history either as a deficit of homogeneity and of modernity, or as conditions of possibility for the unfolding of an alternative modernity.

This view of diversity in the construction of national identity is taken up by the other authors. The Belgian comment by Bruno Debaenst makes the substantial differences with Brazil visible, but also shows a commonality, namely a deficit finding as a starting point. In Belgium, it is the lack of a common language (Flemish in the north and French in the south, plus German-speaking areas and Brussels as a mixed-language city); in this context, linguistic diversity also reflects religious, political and socio-economic differences. Debaenst shows how, especially since the beginning of the 19th century, linguistic diversity and the attempt to arrange this diversity mark the Belgian path to national identity.

The question posed at the beginning of Ribeiro's contribution about what constitutes national specificity in the formation of national identity – and thus in the management of internal heterogeneity – is answered by Alfons Aragones for Spain and the national identity of Catalonia within Spain. For this, he chooses a codification-historical perspective that looks at the relationship between national civil law codification and regional law. It becomes apparent that regional identity did not have to come into conflict with legal unity. Only when regional legal traditions were not given sufficient consideration in the process of national codification did resistance form. However, this also shows that social differentiation played a role. The struggle of the regional Catalan elites was primarily directed at the preservation of regional law, which strengthened the socio-economic position of these elites. To legitimise this, narratives of Catalan identity were created in which the self-image of these elites was stylised into the ideal image of the "Catalonian".

Ezequiel Adamovsky questions Ribeiro's contribution from a double perspective. First, he notes that the paradigm of the "deficit", which serves as an explanation for the late entry into modernity, is not only a typical case of Brazilian cultural interpretation, but also generally part of a liberal concept

that assumes a lack of civil society in peripheral countries. In this sense, the process of colonial disciplining repeated by Latin American elites is also on a par with the social disciplining processes in Europe's "class society". On the other hand, the idea of "capacity" as a prerequisite for equality is highlighted, which served as one of the forms of constructing diversity to justify hierarchy and subjugation. This last aspect is taken as a starting point to analyse the case of Argentina, whose colonial division was based on a "caste system", which, however, was eliminated at the time of independence, not least because of the participation of the lower classes in the armed struggles. Nevertheless, one can observe how racial differentiations continued to shape social practice. At the same time, these racial differences are made invisible by constructing the Argentine national character around the model of the immigrant white Argentine. The process of nation-building is here presented as a tension between the politics of egalitarian postulates and the invisibilising strategies of the state, which manifest themselves in, for example, historical narratives and censorship practices.

The tension between equality and discrimination, which is visible in state action and social practice, is also dealt with in the following thematic focus. Under the title "Legal Lines of Development of Discrimination and Anti-Discrimination", two different national perspectives will be used to ask to what extent the negative or positive evaluation of unequal treatment has become the subject of legal discourse. At what point did it become clear that a certain typ of unequal treatment required special legitimisation – or that it could not be legitimised? This also included dealing with different terminological manifestations: when did words like "discrimination" or similar terms appear as legally relevant concepts in legal literature, case law or the language of statute law? Which social groups were meant by them? What was the meaning of such terms?

Fernando Muñoz first looks at the history of the term "discrimination" and then describes the path to the formation of the legal term, in particular on the basis of the jurisdiction of the US Supreme Court. When describing the Chilean development, which he deals with in the following, two moments of constitutional development come to the fore. First of all, it is striking that the Pinochet regime's constitution of 1980 contained broad prohibitions of discrimination. Paradoxically, this solidified existing patterns of discrimination, because the constitutional norms were primarily directed against "arbitrary" and "irrational" discrimination, thus leaving traditional

unequal treatment, such as that of men and women, untouched. This way of thinking continued in the post-dictatorial phase. Although the new constitution banned discrimination against same-sex unions, this is undermined by case law that largely follows the old patterns of argumentation.

In her commentary on development in Czechoslovakia and subsequently the Czech Republic, Barbara Havelkova also focuses on the transformation from dictatorship to democratic republic. The socialist dictatorship in its egalitarian logic aimed at eliminating socio-economic inequality, but did not account for the socio-cultural dimension of inequality and, therefore, the discrimination mechanisms anchored in society. It remained with postulates at the constitutional level. This lag in development compared to Western European states and a neoliberal narrative that generated mistrust against state-imposed equality made the implementation of European anti-discrimination standards in the post-dictatorial period considerably more difficult.

In the next thematic complex, "Anthropological Approaches", the main contribution by Orlando Villas Bôas Filho deals with the problem of the juridification and judicialisation of social conflicts and the normative dimensions of diversity resulting from this process. In his study, which draws particularly on French theory but is applied to the case of Brazilian indigenous peoples, the author shows the effects of the juridification of conflicts around land claims and the recognition of different ways of life. On the one hand, the "legal common sense" based on state law and a language of invisibilisation of otherness is examined and countered with a sociological and anthropological critique. On the other hand, the analysis of practical cases shows how legal demands are neutralised by the imposition of legal categories that deny forms of otherness. The legal recognition of diversity is thus undermined by embedding it in legal categories.

In his commentary on Villas Bôas Filho, Eduardo Zimmermann proceeds in two steps. He starts bye showing how progressive thinking and racist concepts entered into an alliance in Argentina at the beginning of the 19th century: backwardness could only be overcome through the dominance of the (Northern European) white race; the postulate of equality proved illusory under the rule of a socio-biological approach. This is followed by comments on Villas Bôas Filho, which draw particular attention to the differences between legal categories and empirical findings. Is it not in the logic of legal categories that they must detach themselves in their abstractness from

the concreteness of real diversity? Are indigenous groups actually better able to assert their interests when they operate within the logic of their traditional conflict resolution? Do the mechanisms of modern state justice not also offer adequate solutions? The ambivalence of state law in dealing with the legal problems resulting from diversity thus becomes clear in both contributions.

Nancy Yáñez also addresses the problem of juridification and, without denying the difficulties of enforcing rights, does not subscribe to the pessimistic view that juridification serves to enforce the legal common sense of the state. Her commentary does not focus exclusively on Chile, but covers the entire Latin American spectrum. She shows how indigenous rights have gained recognition in recent decades. The indicator is not only the recognition of these rights in the constitutions of individual states, but also the jurisdiction of the Inter-American Court of Human Rights, which, by setting a minimum standard, creates the conditions for a meaningful coordination of different legal and anthropological conceptions. This also challenges state juridical monism and enables a dialogue in which communities with their different conceptions of rights and legal practices have their say.

3.2.3 Legal frameworks

While the previous thematic blocks focused on how normative knowledge and socio-historical framework conditions combined in the acceptance, rejection or ignorance of diversity and were reflected in the mentality of the actors, the following thematic block looks at the juridical ciphers of thinking about diversity. It deals with constitutional structural patterns that fundamentally mark the relationship between equality and difference, i. e. "legal personality", which is the starting point for both egalitarian thinking and the freedom that allows for difference, and "autonomy", which denotes individual and collective spaces of freedom in which diversity can unfold. Finally, the "languages of law" are dealt with. Here it becomes visible to what extent linguistic diversity is taken into account and practiced by lawmakers and the application of law.

Initially, the discussion focuses on the topic of "the constitutional embedding of differences" and, thus, on how diversity manifests itself at the constitutional level. Some general questions guide the debate: when were the problems of certain social, ethnic or religious groups addressed in constitu-

tions? In what way were and are they taken into account – as a prohibition of unequal treatment, in the form of granting special rights, as a requirement of assimilation? What tendencies can be observed at the constitutional level?

The main contribution by Manuel Bastias Saavedra introduces the topic of "Constitutional Law and Diversity" using the example of Chile. The author first makes clear the difference to the thought patterns of the colonial Ancien Régime. There, social reality and law are seen as identical. The social differentiation that exists in reality is willed by God and finds its appropriate expression in law. The modern constitutions since the end of the 18th century, on the other hand, proceeded from the principle of equality. Legal inequality could no longer result from a social order, but could only be created by law. The 19th-century constitutions ignored the old status distinctions based on ethnic criteria and introduced new ones – initially through the distinction between the categories of nationality – which covered all Chileans – and (active) citizenship, which was determined primarily by gender, age and economic and/or intellectual capacity. It was only in the course of the 20th century that much of this regimentation was removed. The constitutional recognition of religious diversity was initially only recognised in the admission of private practice of non-Catholic denominations; it was only from the second half of the 19th century that the equality of denominations was gradually extended, even though many constitutional norms continued to be shaped by Catholic values. Ethnic diversity, on the other hand, was not the subject of constitutional regulation until very recently, although it must be noted here that quite a few territories of indigenous groups were not within the reach of state power and, after their incorporation, were subject to a special legal regime and not to the constitutional "normal" order, so that part of the indigenous population could not invoke constitutional guarantees. Chilean constitutional law thus made traditional social differences invisible on the one hand, but on the other hand partially perpetuated them by indirectly preserving them in new constitutional categories.

The commentary by Agnieszka Bień-Kacała and Anna Tarnowska on Polish development draws attention to four constitutions: two liberal ones, from 1921 and 1997, respectively, and two authoritarian ones, from 1935 and 1952. The 1921 and 1935 constitutions were written for a multi-ethnic, multi-religious and multi-lingual society, the 1952 and 1997 constitutions for a largely homogeneous people. In principle, all these constitutions assumed

a category of citizenship that applied to all inhabitants, which – unlike in early Chilean development – was not limited by criteria of economic and intellectual ability (though this was standard in the 20th century anyway). However, this was partially undermined in the authoritarian constitutions: by meritocratic and class criteria for the passive suffrage in the 1935 constitution, and indirectly, in the designation of "workers and peasants" as bearers of people's democracy, in the 1952 constitution. In religious terms, the pre-war constitutions reveal a privileging of the Catholic Church despite postulated religious tolerance (which can also be observed subliminally in constitutional practice after 1997), while the communist constitution of 1952 was largely silent on the position of the Church (the struggle against the Church did not take place here at the constitutional level, but rather in administrative practice). The privileging of large landholdings in the pre-war constitutions as well as in the 1952 constitution (for agricultural collectives) can be seen as a special form of constitutional differentiation; this special constitutional treatment of ownership of land found a certain continuation in the privileging of the peasant family farm in the 1997 constitution.

The question of the legal level (below the constitution) at which diversity is processed is discussed in the topic area "System and codification – external-isation or integration of special law". The starting point for the considerations are the major codifications of the 19th and 20th centuries with their systematising, and thus also equalising, regulatory concept. The discussion followed a series of guiding questions aimed at organising the debate: what effects did the enactment of codifications and the development of systematic thinking have on the "special laws" of certain social groups? Did codifica-tions and systems tend to have a diversity-levelling effect due to their uni-versalistic claim? Or could special legal spaces be integrated into them?

In his main contribution on Italian development, Massimo Meccarelli outlines the general characteristics of modern codified law: legality, sover-eignty and formal equality. This is associated with an abstractness of law that is divorced from social reality and leaves little room for consideration of the "particular". The question is how the law maintains its principled monistic claim, and, at the same time, enables itself to process special problem sit-uations through special legislation. To this end, Meccarelli identifies three strategies, which he substantiates with examples: integration through pro-tective special law in the case of social and labour law, exclusion through special regimes that negate the guarantees of the rule of law in the struggle

against political crime, and an anti-assimilative approach in the case of colonial law.

The first commentary on Meccarelli comes from Carsten Fischer and Hans-Peter Haferkamp, who deal with the German development, specifically with the attitude of German jurisprudence to the relationship between the system and *ius singularis*. *Iura singularia* were rights assigned to certain groups of persons (e. g. minors, the elderly, soldiers, women, merchants). Traditionally, they were strictly divorced from general civil or natural law – which embodied "strict" law – and assigned less to genuine law than to "utilitas". This contrast could then be intensified when law was conceived as a system that was controlled by superordinate principles, that embody the claim to equality and universality. Starting from the insight that special law could not simply be ignored, even by a jurisprudence committed to the systemic concept, in the 19th century there was a discussion about the possibilities and the way of integrating this special law into jurisprudential systems and into codifications. Taking up Meccarelli, the authors state that Italian jurisprudence dealt with this problem rather pragmatically, while German scholarship was more committed to a purist perspective. However, this does not yet take into account the issue of how jurisprudence and scholarship solved the problem of special law and general law in application – this remains a blind spot.

Jean-Louis Halpérin analyses the French codification process, which was not only an ideal type of monistic legislation, but also an exemplary model for the development of codification in other countries. His contribution, which begins with the Revolution of 1789, shows the contradictions inherent in the model, especially the exclusion of women from the postulated principle of equality in family law. On the other hand, he follows Meccarelli's approach by highlighting the peculiarities of the French system with regard to labour law and the special orders of criminal law, as well as the anti-assimilationist thrust of colonial law manifested in the distinction between French subjects and French citizens; the discriminatory law of the Vichy regime can be classified under the same heading.

Thiago Reis, who discusses the Brazilian case, first emphasises the importance of problematising the methodological criteria, especially with regard to the understanding of the concepts of "equality" and "inequality" and the temporal and factual contextuality of the perspectives on "diversity". In this context, the Brazilian case is interesting because the Brazilian Civil Code was

enacted at a time (1916) when the liberal-monist concept of the 19th century had already lost much of its reputation and there was a greater openness to socio-political intervention in general law. However, Reis also draws attention to another aspect of the relationship between codification and special law that is typical for Brazil (although not unique to Brazil). With the emergence of corporatist structures and the concomitant weakening of parliament, the relations between general law and special law also shift. This relationship is, therefore, not only determined by legal-theoretical preferences and the temporary dominance of certain regulatory needs, but also simply by power relations.

A key term in the debate on law and diversity is "autonomy". Distinguished from the term "private autonomy", which describes individual freedom in the field of private law, it is used to describe the right of non-state groups or sub-state entities to set their own law and, if necessary, to enforce it by their own judicial or administrative means. However, the concept of autonomy has taken different legal forms in different national legal cultures. In this block, the contributions focus on the specific national contours of the concept of autonomy and the role it played in the legal discourse of the 19th and 20th centuries.

The main contribution is by Peter Collin, who unfolds the diverse uses of the concept of autonomy in German jurisprudence since the beginning of the 19th century. Two main lines become visible. On the one hand, the attempt to expand autonomy, i.e. to enlarge the circle of those collective actors who can claim autonomy, becomes recognisable. For many social groups, autonomy becomes a legitimate legitimation narrative for achieving their own regulatory power. On the other hand, the discussion about autonomy is embedded in the debate about state sovereignty and the concept of law. It is noticeable that in particular the Germanist branch of jurisprudence has a preference for non-state regulatory powers, and thus for a pluralist understanding of law – as already made clear in the contribution by Seinecke in this volume. With the victory of the etatist concept of law, however, the meaning of autonomy disappears. In the present, it is more of a legal-political catchword without specific legal consequences.

The specificity of the German case becomes particularly clear in contrast with another continental European legal tradition. Michele Pifferi looks at the history of the concept of autonomy in Italy and makes three different accentuations visible. On the one hand, he analyses the use of the concept of

autonomy as a legal-political concept in the historical narrative that accompanied the Risorggimento. Here, the concept of autonomy was used to describe the constitutional tension between federalism and unitarianism; by referring to the autonomous character of the medieval *citá*, an attempt was made to mitigate state centralism. Furthermore, it played a major role in the private law debate. When the classical liberal conception of private law came into crisis, attempts were made to combine a reduction of private autonomy – related to the individual – with an expansion of the possibilities of collective regulation; this was particularly important for the development of labour law. In a very different way, the understanding of individual autonomy in criminal law came into crisis: doubts about the concept of free will went hand in hand with the advance of deterministic concepts.

Agustín Casagrande presents a historical-conceptual study of the reception of the concept of autonomy in both public and private law in Argentina. Similar to Pifferi, the public-political use of the term was determined by the debate on Argentine federalism in the 19th century. In the case of civil law, the concept of autonomy is mainly discussed in the crisis of the classical liberal concept of private law. This takes place in the context – parallels to the Italian development can be seen here – of the emergence of labour law. The attribution of collective autonomy is synonymous with an empowerment of those social groups that are structurally inferior under the rule of an individualistic understanding of private autonomy. However, in Argentina – as Collin also described for the German development – the term remained without major performative power after integration into the legal vocabulary from the middle of the 20th century. In recent decades, however, its use has increased exponentially in the discourse of feminist demands, social movements and especially in the inclusion of disabled people.

In the thematic field "Legal Person", the contributions are dedicated to a legal category that is constitutive for the relationship between law and diversity. The category of the legal person is not only the basis of the private autonomy discussed above, it also levels the system of status differences of the Ancien Régime and promises general and equal freedom. At the same time, it is an abstractum that renders actual differences invisible, and its concrete design – especially gender-related – generates new categories of inequality. Discussions in this thematic field focus on the central question of whether and how this tension was discussed in the legal discourse of the 19th and 20th centuries.

Samuel Barbosa's main contribution deals with the Brazilian experience. To analyse the development of the category of legal personality, he uses the concept of the "mask" – a traditional but also sociological term – which serves as a model for observing three discursive formations underlying the construction of the legal subject. The first case examined is the definition of the person in Brazilian civil law discourses, which are later condensed into the legal code. There, the distinction between free men and slaves as well as between the *pater familias* and those who were subjected to the *patria potestas* (women, minors, etc.) appear trapped in a process that the author calls *subordinate subjects*. In the second strand of discourse examined, the category of the minor develops – a category that primarily allows state intervention towards those who are not integrated into the domestic sphere. This grouping is referred to as *disciplined subjects*. The third category refers to the status of the natives who were subjected to a process of assimilation by the emerging nation-state, through a transitional configuration that presented them as subjects to be civilised. This group is referred to by the author as *assimilated subjects*.

The commentary by Stephan Kirste, which deals with the German development, is located in the field of legal philosophy. First, he distinguishes between legal personhood, which "signifies the unity of rights attributed to a legal subject" and legal personality, which "is protected by a particular group of rights"; both "relate to each other like the potentiality of rights and actually having rights". Then he links Jellinek's status theory *(status negativus*, *status positivus*, *status activus*, *status subjectionis)* with this differentiation and thus renders the multidimensionality of the problem visible. However, when it comes to the question of who is granted these rights and for what reason, two lines of tradition become visible: a Kantian line, which refers to the inherent human dignity of every human being, and a positivist line originating from the historical school of law, which makes the holding of rights dependent on the decision of the respective legal system; the latter position, however, proved to be little resistant to the racially motivated deprivation of legal capacity during the National Socialist era. This was also the reason why, after 1945, human dignity became the overriding topos for the recognition of legal capacity, not only in Germany but all over the world.

Victoria Barnes's study of the experience of legal personality in England not only shows the diversity of treatment that goes beyond the level of citizenship – such as differential treatment relating gender, race, religion

or family status – but also involves a thorough analysis of the formation of the concept in the English legal system. Barnes presents, in addition to Blackstone's jurisprudential sources, the various cases that resolved the problems of recognition of people's rights, which were inscribed in ritual practices, customs and community knowledge that forged the relationship between nation-identity and legal personality. The dialogue she establishes with Barbosa is of special interest when it comes to the subject of slavery, where lines of demarcation between legal recognition are drawn on the basis of precise cases whose background also involves the historical-subjective positions of the magistrates who decided the central cases. As can be seen here, a reflection of national tradition, religion and juridical knowledge gives shape to diversities of treatment that are experienced in history.

In connection with the problems of legal recognition, a decisive aspect for the juridification effect of diversity appears, both in the legal-dogmatic representation and in the concrete practice of law: the legal language – a central factor that establishes processes of exclusion-inclusion in the context of the formation of national identity in the 19th and 20th centuries. Thus, the last block of studies – "Linguistic Diversity and the Language of Law" – considers this issue on the basis of a series of guiding questions that attempt to establish a comparative dialogue: how did linguistic diversity within a state manifest itself in the legal, administrative and judicial languages? Have laws been published in several languages? What mechanisms were used to ensure that minorities could also act in their language in court? How was the language of law used for purposes of assimilation or discrimination?

The exhaustive work that opens the series of debates corresponds to Gloria Lopera-Mesa, who exhibits a 200-year history of tensions between the search for the imposition of a monolingual system and the linguistic claims of the native peoples of Colombia. Not only does she note a marked difference with the traditions of denial of cultural (and linguistic) diversity in other Latin American countries, but she also shows the relationship between political, educational and religious projects that marked moments of identity recognition and denial for the inhabitants of the territory. The work shows, in turn, the instance of participation of non-state organisations in the regulation of the communities' own forms of normative production, the various conceptual translations (for example, of the word "constitution") into the native languages, but also the uses of the Spanish language to dominate and ridicule indigenous otherness. The Colombian experience

thus opens a field of inquiry that, far from being closed, demonstrates the importance of language and law in the construction of diversities (in a search for equality and identity).

For his part, Thomas Simon echoes Lópera-Mesa's proposal by analysing the case of Austria-Cisleithania during the second half of the 19th century, which can be read as a mirror that inverts the Colombian case. There, after analysing the problem of translation of the nation-state concept into German juridical-political knowledge, he postulates the difficulties of producing a single language for multi-linguistic and multi-ethnic imperial spaces. To this end, he observes three dimensions: firstly, the relationship between the form of normative production and the debate over the language of administrative communication, both at local and centralized levels; secondly, the constitutional recognitions of linguistic multiplicity; and, finally, the decisions of the administrative court and the Supreme Court, in which the right to linguistic determination of the legal subjects was claimed. It is clear that the discussion over language served as a base for structuring power relations, which can be seen in the interest in maintaining the German language in the administration, the local resistances and self-determinations and, finally, the disputes between the localities themselves that demanded a particular administrative language. The case studied by Simon demonstrates how the language of law is disseminated in the multiple sources of law in an intertwining of subjectivity and normativity.

Zülâl Muslu essays a profound response to Lópera-Mesa's work by locating the tension between language and law in the space of the Ottoman Empire and Turkey. Three perspectives are observed here. The first is a decolonial approach towards the knowledge and interpretations of the formation of law and the social-community experience of the various actors located in these political spaces. Thus, not only the formative process of the official-legal language (and its difficulties of establishment) is studied, but also the philosophical assumptions of law that, far from understanding the structural premise as equity-equality, designate justice as "aequitas". On the other hand, she states the impossibility of pre-understanding the legal phenomenon and its language from a liberal point of view that places the individual as the subject of imputation of the norm, occluding the fact that it is the community that is the addressee of the law. Finally, on entering the subject of the language of law, she observes similarities in the plane of colonial presuppositions and their labelling as semi-barbarians, and the

diverse processes in the temporalisation of the attempts at the formation of a nation-state. There, she examines not only the problematic of forming a unique language as state policy and disciplining, but also the resistance that will precipitate in the claims for the recognition of diversity in the present.

Finally, Stefan Kirmse conducts a comparative study with the Colombian case to focus on the imperial and post-imperial experience of Russia. In addition to recontextualising the problem of diversity in a radically diverse space of imperial construction, he expresses the way in which law is the "cutting edge of colonialism". But far from expressing a single path of production of subjectivities, it is also the field of intercultural communication and resistance. In this context, it defines a double process similar to the Colombian one. The first was a tolerance based on liberal principles – structured in a contradiction with the conservatives' principle of civilisation – which resulted in the recognition of diverse religious experiences: Catholics, Orthodox, Muslims, etc. The second moment is the passage to a policy of homogenisation with the promotion of a Russian and Orthodox culture, which changed after the 1905 revolution. All these trends had an impact on the language of law. However, social linguistic plurality could never be eradicated by law, but rather Kirmse's work expresses the manner of the readjustment of the legal linguistic universe to the local experience of the Russian space, by means of interpreters, the local customs of the justices of the peace, etc.

4   Final remarks

If one tries to draw a conclusion, it should first be emphasised that a comprehensive finding is not possible. The present volume does not offer a systematic comparison between "Latin America" and "Europe", as only the experiences of individual national legal cultures have been drawn upon for each topic. Nevertheless, certain generalised statements can be made.

When Latin America and Europe entered modernity from the beginning of the 19th century, they had to cope with a different legal cultural heritage. The starting point in both continents was a stratified society. Differences in status as a marker of diversity can be found in Latin America as well as in Europe. In colonial Latin America, however, there is a much stronger emphasis on racial-ethnic differentiations, which also manifest themselves in legal differentiations.

At the beginning of the 19th century, or after the attainment of independence, a monistic fundamental tone initially prevailed. The dominant concept is a uniform law with a uniform citizenship and a legal subjectivity that is the same for all people; comprehensive codifications rather than special legal orders are to shape the law. In the course of the 19th century, constitutions were enacted everywhere that guaranteed equality, at least in principle.

But, apart from the fact that the legal postulate of equality was not enforced everywhere either – especially where slavery still prevailed until the second half of the 19th century – it created new inequality. This is particularly evident in Latin America. First of all, there is a progressing official repression of indigenous customary law, although this is not equally consistent in all Latin American states. The scope for individual and collective action was thus restricted for those groups that did not correspond to a certain understanding of civilisation. At the same time, the ruling elite personified itself in the form of the individual who was adequate to the modern legal system. Existing social, ethnic and racial differences were made invisible and petrified at the same time. At first glance, the same thing happened in Europe: here, too, modern legislation displaced customary law and special corporative law. However, especially in Central and Western Europe, standardisation processes had already begun well before the beginning of the 19th century and racial-ethnic criteria played only a relatively minor role outside the colonies.

Important differences can also be observed in the development of an egalitarian civic identity – but less so in the development of civic rights. Here, the development was largely parallel: just as in Europe, the active exercise of civic rights was originally largely linked to an education and wealth census. The consistent elimination of discrimination in voting rights only took place in the course of the 20th century. The same applies to the civic status of women. Serious differences are more noticeable in the discourses on the formation of national identity. In Latin American countries, these were long characterised by the assumption of a supposed "modernisation deficit", an idea which itself derived from the dominant "civilisational" model that implied racial and ethnic gradations. In subsequent periods, such ideas would reemerge in the context of immigration policy. In 19th-century Europe, too, the formation of national identity was not without friction.

However, ethnic-racial differences played less of a role than different regional identities or linguistic differences.

At the beginning of the 20th century, developments occurred that revealed further fundamental differences between Europe and Latin America. On the one hand, this concerned the effects of the rule of dictatorial or authoritarian systems. In Latin America, the emergence of authoritarian regimes was strongly linked to the revival of corporatist ideas of organisation. The allocation of opportunities for participation was not based on egalitarian criteria, but on the assessment of the weight of certain social groups and institutions. Similar corporatist patterns can also be found in dictatorial and authoritarian regimes in 20th-century Europe. The National Socialist regime and the communist dictatorships, however, took different paths. National Socialism eliminated egalitarianism and created – also on the level of law – a radical order of ethnic-racial differentiation, discrimination and elimination. The communist regimes, on the other hand, created a system of privileges and disadvantages that were largely, if not exclusively, based on membership of economically defined groups and classes – at least as far as important areas of life were concerned.

If, in terms of a ruling ideology, the 19th century can be seen as the century of classical liberalism based on the idea of legal equality, the 20th century can be described as a time in which progressive egalitarianism and increasing differentiation went hand in hand. On the one hand, we are dealing with a partially radical development of functional differentiation. The economy, politics, science, law, etc. perfected their own rationalities, whose autonomy was effectively secured by legal means. At the same time, processes of equalisation that had already begun in the 19th century were continued: the wealth and education census disappeared from the electoral law, racial discrimination was banned, and the equality of women progressed. On the other hand, new group and action complexes were identified that showed a special need for protection, and thus also created the justification for the law to make distinctions. An important strand in this development is the discovery of the working class as a group in particular need of regulation. The creation of a new labour law, the establishment of new forms of institutionalised political-economic participation and – at least in its origins – the creation of a public-law system of health, pension, accident and unemployment insurance were linked to this – a process that began in Europe but subsequently spread to Latin America; here, forms of worker

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protection and worker participation could certainly be reconciled with authoritarian political structures. Democratisation and with it the need for sensitivity to the needs of other vulnerable groups, but also a more elaborate understanding of human rights, created further group-related special legal orders.

Two characteristics in particular are formative for recent times. In Latin America, it was the recognition of a separate identity of indigenous groups, leading to the recognition of far-reaching – albeit different from country to country – autonomy rights, which in some countries has reached the constitutional level in the declaration of a "plurinational state". This also appears in recent theoretical discussions on Latin American legal pluralism[47] and the uses of the past that are deduced therefrom,[48] or in the reading of multi-normativity as an emergent of the recognition of the limits of state law.[49] In Europe, it was the realisation that an immigration society had emerged, resulting in ethnic, cultural and religious plurality; added to this was the growing weight and further differentiation of gender and sexual identity, but also the growing sensitivity to those disadvantages that arose from disability.

The last remarks once again demonstrate how important it is not to understand diversity in a uniform sense. If one wants to make the term diversity fruitful in legal history, it should rather be understood in the sense of a concept of reflection. Diversity in its legal consequences can then only be understood through differentiation and contextualisation. The common denominator is that it is about social activities in which social differences are marked as legally relevant. From this starting point, legal developments that do not fall into the scheme of a modern understanding of diversity can also be examined. Above all, such an understanding of diversity is suitable for putting traditional legal-historical narratives to the test.

47 Herzog (2021).
48 Duve (2017b).
49 Duve (2017a).

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