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Manuel Bastias Saavedra

1. Introduction

The increased awareness of global interdependencies, which has characterized the intellectual mindset since the late-20th century, has certainly cast doubt not only on the unitary self-representation of the nation-State and its institutional infrastructure¹, but also on more recent ‘imagined communities’, such as ‘Europe’². Many of the themes that have acquired ascendancy in political and legal discourse in recent decades, such as multiculturalism, legal pluralism, plurinationalism, but also ultra-nationalism and religious fundamentalism, among others, point to the unmasking of the *imaginary*³, artificial, and necessarily contingent act of constructing unity out of diversity. As in the tale of the Emperor’s new clothes, the belief in the unitary representations of national or supranational communities cannot be sustained once the differences on which they are founded have been pointed out. The centripetal identity-paradigm of the nation-State is being eroded by the centrifugal diversity-paradigm of global society and its quest to find ‘truer’ representations in ethnic, racial, national, or religious communities.

Legal-historical research has not remained absent from these debates. In recent decades, legal historians have begun to highlight the ‘diversity within unity’ of the early modern juridical experience.⁴ The manner in which the *ancien régime* culture, for example, constructed unity and difference was based on the unity and indivisibility of God and the order he gave his Creation, while difference was sustained through the image of the body and the harmony achieved by the necessary diversity and autonomy of its organs.⁵ This worldview thus presup-

¹ Arjun Appadurai, *Modernity at Large: Cultural Dimensions of Globalization* (Minneapolis, MN, London: University of Minnesota Press, 1996).

² Thomas Duve, “Von der Europäischen Rechtsgeschichte zu einer Rechtsgeschichte Europas in globalhistorischer Perspektive,” in: *Rechtsgeschichte - Legal History* 20 (2012).

³ In the constructivist sense used by Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London, New York, NY: Verso, 2006 [1983]).

⁴ Paolo Grossi, *El Orden Jurídico Medieval* (Madrid: Marcial Pons, 1995), 221.

⁵ António M. Hespanha, “Fazer um império com palavras,” in *O Governo dos Outros: Poder e Diferença no Império Português*, ed. Ângela Barreto Xavier and Cristina Nogueira da Silva (Lisboa: Imprensa de Ciências Sociais, 2016), 71.

posed the existence and necessity of hierarchies and inequalities, and the function of law was to sustain these differences through status and privilege, which corresponded to the place which persons occupied in the natural order.⁶

The importance of the diversity and pluralism of the early modern legal order, however, was not always evident to legal historians. As legal scholarship began to reorganize itself around equality beginning in the nineteenth century, the pluralism and diversity of the legal culture of the *ancien régime* fell out of favor both in legal and legal-historical observation.⁷ It has taken a particular kind of *anthropological* re-reading of the early modern legal tradition to grasp its alterity and refocus the historical narratives on the issues of jurisdictional autonomy, legal pluralism, and personal status and privileges.⁸ But the closer legal historians come to the problems of contemporary law, the more difficult it appears to view diversity and pluralism as anything more than a normative aspiration of contemporary society. It seems that the question of how law handles diversity within the systematic, unitary framework of contemporary equality-based legal systems has yet to be decided. If legal-historical research has been successful in reconstructing diversity and plurality within a juridical order based on difference, can the legal historian aspire to successfully reconstruct diversity and plurality in a legal order based on unity and equality? And if so, how?

This article suggests understanding the challenges of diversity for legal history as being constituted by a fundamental difference in observation between law and society in the contemporary world. The reorganization of law around the principle of equality meant that law could no longer recognize any differences that were not produced by law itself. Social categorizations hitherto considered to be natural and were, as such, meaningful for law, were replaced by the abstract principle of equality before the law, which created a fracture between socially and legally relevant differences. This fracture is, for example, at the root of the discomfort often produced by early Latin American constitutions and their neglect of the particular circumstances of indigenous populations. But it is also at the root of the demands for the recognition for particular groups or categories of persons that have hitherto been absent from legal observation. The heightened awareness of contemporary legal discourse to the problem of diversity is nothing more than a reflection of the way society is revealing the blind spots of the legal system.

⁶ António Manuel Hespanha, *Imbecillitas: As bem-aventuras da inferiidade nas sociedades de Antigo Regime* (Belo Horizonte: Universidad Federal de Minas Gerais, 2008), 26–28.

⁷ Thomas Duve, “Sonderrecht in der Frühen Neuzeit,” *Mitteilungen des Sonderforschungsbereichs „Pluralisierung und Autorität in der Frühen Neuzeit. 15.-17. Jahrhundert* 2007.

⁸ Bartolomé Clavero, *Tantas personas como estados: Por una antropología política de la historia europea* (Madrid: Tecnos, 1986); Carlos Garriga, “Orden jurídico y poder político en el Antiguo Régimen,” *Istor. Revista de historia internacional* 16 (2004); António M. Hespanha, “Early Modern Law and the Anthropological Imagination of Old European Culture,” in *Early Modern History and the Social Sciences: Testing the Limits of Braudel’s Mediterranean*, ed. John A. Marino (Kirkville, MO: Truman State University Press, 2002) For an overview of this discussion, see Manuel Bastias Saavedra, “Jurisdictional Autonomy and the Autonomy of Law: End of Empire and the Functional Differentiation of Law in 19th-Century Latin America,” *Rechtsgeschichte – Legal History* 26 (2018).

Framed in this manner, we can identify two central methodological questions for understanding diversity within legal history. First, what kind of diversity *is* the subject of law? Second, what kind of diversity, ignored by law, can become subject of legal-historical research?⁹ Both questions represent two sides of the same coin, but I think only the second question challenges traditional approaches to legal history. While legal history traditionally deals with legal sources and can therefore observe social differences as they are constructed by law, the problem the second question poses is how the legal historian deals with that which is *not* necessarily found in legal sources, with that which is *not* a subject of law. Does the blind spot of law unavoidably become a blind spot for legal history? And if not, what criteria do we use to decide which social differences that are not relevant to law should be considered in legal-historical research?

If the question is framed in this manner, the issue of diversity becomes a problem of observation, and not of identity (culture, race, ethnicity, gender, and so on). The focus on identity seems justified from the perspective of legal theorists who, as Marc Amstutz has argued, fulfill the function of taking the expectations of society for law and making them available for use in the legal system.¹⁰ The questions of identity thus take place in political and social debates, and are carried by political and social movements, and as such are not entirely selected by the theorist. The challenge is how this procedure can be used in legal history, where contemporary political and social demands are not necessarily relevant, and where the shortcut of selecting contemporary categories for use in legal-historical research carries the problem of recreating the blind spots of law in a different manner.

Framing the challenges that diversity poses for law as a problem of observation requires understanding diversity as a paradox. This argument implies two complementary ideas. First, it implies that diversity cannot be defined in abstract, i.e. it cannot be thought of as a concept, because the distinctions on which it is founded are historically contingent. In this sense, what we may understand as diversity is the result of distinctions that have been meaningful in different moments, but that submitted to deconstructive observation only reveal their contingent and paradoxical character. Seen in this manner, diversity can only be understood as the paradox of the unity of identity and difference. Second, understanding diversity as a paradox requires a methodology – and not a category – to find it in the primary sources. I suggest that sources must be treated in a constructivist manner, thinking of them not as different ways of *accessing* reality, but rather treating them as fragments that presuppose different manners of *constructing* reality. This article follows this structure of the argument. In the next section, by drawing on systems theoretical instruments, I discuss conceiving diversity as paradox as a manner of distinguishing the observations of law from those of the legal historian. In the

⁹ Peter Collin, “Research Area ‘Law and Diversity’: State, Perspectives, and Fundamental Problems,” (unpublished manuscript, 2018), Max Planck Institute for European Legal History.

¹⁰ Marc Amstutz, “Der zweite Text: Für eine Kritische Systemtheorie des Rechts,” in *Kritische Systemtheorie: Zur Evolution einer normativen Theorie*, ed. Marc Amstutz and Andreas Fischer-Lescano (Berlin, Bielefeld: De Gruyter, transcript, 2013), 400.

subsequent section, I discuss three methodological approaches that may help to reintroduce socially relevant differences into the field of observation of the legal historian.

2. *Diversity as Paradox*

In the literature on diversity one is constantly confronted with categories that, when critically tested, appear to carry no substance. Armando Guevara Gil, for example, following recent anthropological literature, has written about the shortcomings of the category of *indígena*: “The emphasis on the particularities and localism of Andean identities leads to the problem of the appropriateness of the concept of *indígena* to refer to the multitude of very differentiated and fragmented local identities.”¹¹ Seen from the perspective of the local identities, the category of *indígena* tends to create a homogeneous representation of what is actually quite heterogeneous. And if one takes the issue of self-identification further, continues Guevara Gil, problems arise in cases where anthropologists would tend to classify linguistic and ethnic communities as ‘indigenous’ even when the communities themselves explicitly reject this identification altogether. Here we see a paradox emerging: are indigenous peoples, indigenous peoples?

Untangling this question goes beyond the objectives of this contribution, but it does provide a good example of the problems that arise once one goes down the path of trying to define operative categories of diversity. In political systems characterized by formal notions of State law it may make sense to identify *indígenas* in order to recognize diverse forms of life and histories; but this suppresses the diverse forms of life and histories *between* indigenous peoples; and we could then identify each different indigenous community only to find that some of them actually identify themselves as Peruvian citizens and farmers. All of these perspectives provide a different answer to the fundamental question of ‘who are the indigenous peoples?’¹², which seeks to identify a unity that can sustain all the differences, i.e. find a category that contains no paradox.

Systems theory takes a different approach to this problem by making paradoxes foundational:

¹¹ Jorge Armando Guevara Gil, *Diversidad y complejidad legal: Aproximaciones a la Antropología e Historia del Derecho* (Lima: Fondo Ed. de la Pontificia Univ. Católica del Perú, 2009), 86.

¹² It is interesting to observe how different scholars have addressed this issue, and how taking a nuanced approach only leads down a rabbit hole of ever-growing distinctions. See, e.g. Jeff Cornthassel, “Who Is Indigenous? ‘Peoplehood’ and Ethnonationalist Approaches to Rearticulating Indigenous Identity,” *Nationalism and Ethnic Politics* 9, no. 1 (2010); Les W. Field, “Who Are the Indians? Reconceptualizing Indigenous Identity, Resistance, and the Role of Social Science in Latin America,” *Latin American Research Review* 29, no. 3 (1994); Lawrence A. Reid, “Who Are the Indigenous? Origins and Transformations,” *The Cordillera Review. Journal of Philippine Culture and Society* 1, no. 1 (2009); Hilary N. Weaver, “Indigenous Identity: What Is It and Who Really Has It?,” *The American Indian Quarterly* 25, no. 2 (2001).

“When observers continue to look for an ultimate reality, a concluding formula, a final identity, they will find the paradox. Such a paradox is not simply a logical contradiction [...] but a foundational statement: The world is observable *because* it is unobservable.”¹³

Luhmann conceives of the world as an unobservable unity which however can be observed in different manners.¹⁴ As long as the place of the *unobservable unity* was occupied by God, and the differences that could be observed in the world were seen as the product of His creation – the separation of light from darkness; of the land from the seas; of the reasonable from the unreasonable creatures; the sequence of the days, and so forth –, the *ancien régime* semantic of unity and difference served to conceal the paradoxes of observation. The rational observer could make sense of things based on the epistemological assumption of “one observer-one nature-one world”.¹⁵ If differences, however, can no longer be presupposed to arise from creation, we are only left with paradoxes: the self-referential foundation of differences.¹⁶ According to Luhmann’s conception we are thus left with differences as that which can be observed in world that can otherwise never (or no longer) be observed under the prism of unity.

Systems theory thus recognizes paradoxes as foundational because they are intrinsic to observation and, thus, are at the foundation of all knowledge and all action. When speaking of observers in systems-theoretical terms, however, we are very far from the subject-object paradigm of the philosophy of conscience. Luhmann speaks of observations as operations that use distinctions to separate two sides with the function of designating one of those sides.¹⁷ An observation is thus a unity composed of three elements: the distinction, an indicated side, and a not-indicated side. It is, as such, the unity of a difference. For the observer, however, the unity of the operation becomes unobservable, concerned only with the inner side of the distinction, which is, of course, necessary to build up more complex structures. The inner side of the indication has connective value, allowing new operations to build on the previous ones. Complexity can only build on indications that have been made, and not on those that have not.

Social systems are understood as observers in the above sense and they are the observers that, Luhmann argues, should be observed by sociology. Systems are distinctions, namely the difference between system and environment. As such they are tautological or paradoxical; they are produced by the distinctions they use to operate constructing both system and environment. The internal side of the distinction, the system, can operate, build up its struc-

¹³ Niklas Luhmann, “The Paradox of Observing Systems,” *Cultural Critique* 31 (1995): 46.

¹⁴ Niklas Luhmann, *Die Gesellschaft der Gesellschaft* (Frankfurt am Main: Suhrkamp, 1998), 155–156.

¹⁵ Niklas Luhmann, “Deconstruction as Second-Order Observing,” *New Literary History* 24, no. 4 (1993): 765.

¹⁶ Luhmann, “Deconstruction as Second-Order Observing,” 770.

¹⁷ This is meant to indicate that not only individuals, as psychological systems, observe. Observing systems can be biological (the body, cells, etc.), neurophysiological (the brain), or social (families, the legal system, historians), and irrespective of their material reality, they are defined by the distinctions they use. Luhmann, “Deconstruction as Second-Order Observing,” 767.

tures and increase its internal complexity, while the environment remains an indeterminate horizon of meaning. Different systems use the system/environment distinction in different manners, meaning that the answer to the questions ‘what is system’ and ‘what is environment’ will depend on the distinction used by the observer. The legal system, for example, is based on the distinction law/non-law; it is the manner in which the recursive operation of this distinction has built up structures to sustain and reproduce the distinction law/non-law. But, as any system, law is based on a difference (law/non-law) and, therefore, cannot observe its own unity: it can only operate as law, and not as non-law.

The differential theoretical elements of systems theory may be a manner with which to address law and diversity. In order to operate, law has to be one side of a distinction, it cannot be the unity of law and non-law; it cannot be paradoxical. Of course, as any system – or any distinction – law is founded on a paradox: the initial distinction that separated law from non-law. But since paradoxes have no connective value, the legal system has to conceal the paradox in order to operate – it has to deparadoxify the paradox. Deparadoxification is the creative use of paradoxes: it is the manner in which new distinctions are introduced to conceal the foundational paradox and thus neutralize the effect of the paradox by displacing it into the future.¹⁸ The distinction between natural and human law, the mythical origin of property and the conception of natural rights as rights before rights, and more recently the distinction between legislation and adjudication or the distinction between morality and legality, have all been techniques of deparadoxification – as the ways in which law *unsees* its own contingency.¹⁹

Diversity, however, cannot be understood in the same way. The problem of diversity is that, as such, it does not allow operationalization: laws cannot address, and historians cannot research diversity without selecting and generating exclusions. When laws or research focus on ethnic diversity, for example, this produces an inner, operative side and an outer, indeterminate side, which however includes all other forms of diversity excluded from the indication. To know something about diversity a selection has to be made: diversity has to be sexual, or religious, or racial, or ethnic, or linguistic, and so on. These kinds of selections are deparadoxifications of the paradox of diversity. Diversity, however, must be a paradox because it represents a unity that, as such, cannot be observed. In other words, diversity as paradox is the unity of identity and otherness, the unity of different and same; and the challenge posed by diversity is that it does not allow fixation and, therefore, has no connective value.

Diversity can only become visible as either identity or difference²⁰, and this distinction must be made by an observer. This allows us to resume the example provided by Guevara

¹⁸ Gunther Teubner, “Economics of Gift – Positivity of Justice: The Mutual Paranoia of Jacques Derrida and Niklas Luhmann,” *Theory, Culture & Society* 18, no. 1 (2001): 36.

¹⁹ Niklas Luhmann, “The Third Question: The Creative Use of Paradoxes in Law and Legal History,” *Journal of Law and Society* 15, no. 2 (1988).

²⁰ Compare this to a broad characterization provided in a recently published diffusion article: “Without a unitary definition, diversity represents a relatively open concept, which can be fundamentally distinguished by two approaches. The first is concentrated on the ‘otherness’ of individuals based on their

Gil's exposition of the difficulty of fixating the category of *indígena*. The discussion that opened this section showed the difficulty of using the same category when applied by different observers. Where the local indigenous communities saw differences (their community in relation to others), the anthropologist viewed identity (as all of them belonging to an indigenous identity); and where the anthropologist viewed difference (as the difference indigenous/non-indigenous), the self-identification of the community saw identity (as belonging to a Peruvian political community). And beyond the example, there are certainly other observers: the political constitution, the ILO and its Indigenous and Tribal Peoples Convention, the media, artists, judges, and so on. In this manner, the category *indígena* is not problematic as a question of substance (*if* there are indigenous peoples or not) but rather because of the incommensurability of different manners in which different observers assign the distinction indigenous/non-indigenous.

And, of course, there is the legal system as an observer which generates distinctions that are meaningful for the connection of its own operations (e.g. making decisions). The manifold distinctions used by the early-modern juridical culture were founded on the conception that what *was* in the world had to have a correlate in the juridical literature. The assumption of natural social differences was grasped through the *iura singularia* or *privilegia* through which groups of persons or social circumstances found a correlate in the juridical sphere: nobles, poor and miserable persons, older people, the sick, merchants, and so on. Later, after the Spanish conquest, the question of how to classify the original inhabitants of the American continent of course required a juridical solution, which was found in the analogy of the *personae miserabiles*.²¹ The structural openness of the *ius commune* could not not-see the “*indios*”: “Los indios del Perú, como los demas de Occidente, son, y deben ser reputados entre las personas que el Derecho llama *miserables* [...]”²² One could certainly question if this was a ‘fair’ depiction of the peoples it designated, but for now it is only important to highlight the fact that when law *observed* indigenous peoples it was *as* miserable – it was reducing the complexity of reality to serve its own self-referential distinctions.

Looking at the way law *sees* the world in this context, legal historians are able to glimpse into the manner in which social differences were constructed in society more generally.²³ But with the beginning of the age of written constitutions, the increasing importance of the principle of equality eroded the relative symmetry between societal and juridical difference. The fixation of differences through privileges was mostly replaced by legal distinctions that no

belonging to specific groups, while the second approach focuses on the similarities between groups and the possibility of diverse identities.” (*My own translation*). Gerd Grözinger and Marlene Langholz-Kaiser, “Bewusste Anerkennung von Unterschieden: Diversität in der Wissenschaft,” *Forschung & Lehre*, 3/18 (2018): 199.

²¹ Duve, “Sonderrecht in der Frühen Neuzeit,” 37–38.

²² Campo y de la Rynaga (1671) quoted in: Duve, “Sonderrecht in der Frühen Neuzeit,” 38.

²³ See, e.g., António M. Hespanha, “Sabios y rústicos: La dulce violencia de la razón jurídica,” in *La Gracia del Derecho: Economía de la Cultura en la Edad Moderna*, ed. António M. Hespanha (Madrid: Centro de Estudios Constitucionales, 1993); António Manuel Hespanha, *Como os juristas viam o mundo. 1550-1750: Direitos, estados, pessoas, coisas, contratos, ações, e crimes* (Lisboa, 2015).

longer necessarily corresponded with social differences outside of law. In the newly founded Latin American republics, to continue with our example, the indigenous condition was no longer a difference that could be observed by law. In other words, indigenous peoples were not necessarily assimilated – sustaining their linguistic, ethnic, and cultural differences – but when confronted with the legal system they had to be treated according to the distinctions relevant to the legal system (citizen/non-citizen; owner/non-owner; buyer/seller; married/single; and so on).²⁴ The reorganization of law around the principle of equality meant that law could no longer recognize any differences that were not produced by law itself – it was, again, reducing the complexity of reality to serve its own self-referential distinctions.

With this representation of law the question of diversity becomes necessarily more complex because diversity (identity/difference) within law no longer corresponds with diversity in society.²⁵ Further, looking at the way law *sees* the world in this context, historians of law are no longer able to glimpse into the manner in which social differences are constructed in society more generally. And if the indigenous identity is no longer relevant in the diverse sources of law – the constitution, codes, legislation – legal history can concern itself with legal distinctions, that affect indigenous populations *as* citizens, buyers/sellers, victims, plaintiffs, and so on, but for which the particularities of the indigenous condition carry no legal meaning. Alternatively, the legal historian can look for the sources of law that affect the indigenous populations particularly, i.e. *as* indigenous persons (which is found fundamentally in legislation), as the manner in which law generates a legally relevant difference between indigenous/non-indigenous.²⁶

This approach, however, ties the observations of the legal historian to the observations of law; but the flip side of this is that it ties legal history to the blind spots of law. Can this be avoided? This brings us to the question of how the legal historian deals with that which is *not* necessarily found in legal sources, with that which is *not* a subject of law. How can social representations of diversity be reintroduced into legal historical observation? In my view there are two alternatives. The first, and most common solution, is that the historian

²⁴ The following can be provided as an example: “La independencia del Perú, como la de muchos otros países, hispanoamericanos, se vio fuertemente influida por el pensamiento liberal e individualista. Siguiendo sus doctrinas, se reclamó la igualdad legal de todos los peruanos, aboliendo las viejas repúblicas coloniales y las leyes discriminatorias. El resultado era bastante triste. A fuerza de reclamar la unidad del país, se ignoraron las verdaderas y hondas diferencias entre sus pobladores, como si se creyera que aboliendo las distinciones legales e implementando instituciones comunes se produciría, automáticamente, una igualdad.” In Tamar Herzog, “Percibir el otro: El código penal de 1924 y la división de los peruanos en personas ‘civilizadas’, ‘semi-civilizadas’ y ‘salvajes’,” in *Observation and Communication: The Construction of Realities in the Hispanic World*, ed. Johannes-Michael Scholz and Tamar Herzog (Frankfurt am Main: Vittorio Klostermann, 1997), 403.

²⁵ Theoretically, this could be related to what has been identified as ‘superdiversity’, as the ‘diversification of diversity’. See Steven Vertovec, “Super-Diversity and Its Implications,” *Ethnic and Racial Studies* 30, no. 6 (2007).

²⁶ See e.g., Denise F. d. Silva and Mark Harris, eds., *Indigenous Peoples and the Law: Critical Concepts in Law*, 4 vols. (Abingdon Oxon, New York, NY: Routledge, 2019); Irene Watson, ed., *Indigenous Peoples as Subjects of International Law*, Indigenous peoples and the law (Abingdon Oxon, New York, NY: Routledge, 2018).

introduce the distinction. But this implies a selection which, as we have said, reconstructs its own exclusions. This is the theoretical reason for why applying contemporary distinctions, such as ‘cultural diversity’, to historical research may simply be a way of transferring our own blind spots to the past, and may perhaps even prevent us from gaining a better understanding of the inclusions and exclusions that were functional to other historical contexts. For the historian, therefore, diversity must remain a paradox: it can be observed as a selection, but it cannot be the historian’s selection.

The distinction should thus focus not on diversity but on the levels of observation. The legal historian must uncouple *her* observations from the observation of law. This is the underlying idea behind first- and second-order observations. Law, in this case, is the first-order observer operating through its own distinction of law/non-law, blind to its own unity, and blind to its environment. The legal historian, by contrast, as second-order observer is tied to her *own* distinctions – and is, thus, also a first-order observer – but not to those of law. As such, second-order observation can observe the unity of law/non-law, it can observe the manner in which distinctions were made, and it can observe the contingency of the indication. As second-order observer, the legal historian can switch between law *and* non-law, can reveal the contingency of the distinction, and can observe how the deparadoxification of diversity occurs on both sides of the distinction. If diversity is taken as a paradox then law will be the place where the legal historian will have to search for answers: law itself will have to be disentangled and its boundaries will have to be redrawn, known sources will have to be re-read and new sources will have to be introduced.

3. *Law, Diversity, and Legal History*

As historians we are accustomed to studying a subject through different sources under the assumption that they act as different forms of looking at the *same* object. The discussion of the category *indígena*, however, led to the conclusion that the problems that arose with the category were not related to the signifier it designated but were rather a consequence of the incommensurability of the different manners in which different observers used the distinction. The differential approach explored thus far, therefore, dissolves the assumption of an independent reality that can be reconstructed through different sources and requires a radically constructivist approach to the primary sources arguing that they are actually *constructing* the objects they are observing. And for this to become operative, the legal historian must take into consideration the plurality of sources produced in and around legal communications and read them *against* each other. In the following, I propose three methodological approaches that can be used to reveal the way law deals with diversity.

a. Reconstructing the distinction between law and non-law:

The border that signals the distinction between what belongs to law and what does not has to be historicized and inductively reconstructed. This distinction can be reconstructed as the difference of what has *legal*-normative value and what has normative value outside of law²⁷, and how crossings in one direction or the other take place. The way this distinction is constructed can be used to explore how law reconstructs social difference as legally relevant differences, but also as an exploration into the arguments and reasons that are used for inclusion in and exclusion from law.

One example is Peter Collin's study into courts of honor in turn of the 20th century Germany as a locus of interaction between legal and non-legal normativities.²⁸ Collin argues that the treatment of professional honor was not uniform and varied starkly according to the manner in which representations of honor interacted with the State's legal bodies. As a normative resource that regulated the collective conduct of certain professions, honor was regulated and enforced in different manners according to the respective group. In relation to the way it was regulated, it could range from diffuse notions of honor within the group, professional codes of honor, up to state-sanctioned regulations. The manner of enforcement could also vary between spontaneous demonstrations of disapproval to sanctions through tribunals within the associations or through courts of honor established by the state. At this higher level of enforcement, it becomes possible to observe the divergences in normative rationalities between the decisions of the courts of first instance, based more on professional representations of honor, and higher courts in which legal conceptions acquire more importance.

Since the laws that regulated professional honor for the courts established by the state (for stock exchanges, for lawyers, and for medical practitioners) only provided general guidelines, the cases that could be considered offenses to professional honor had to be developed through the jurisprudential practice of the courts. The normative conceptions that informed the decisions of the courts of honor, therefore, did not come from sanctioned law but had to be 'found' through the consensus of the affected parties. Since the laws directed the courts to punish violations of honor, this was a way that non-legal normativity found its way into law. Collin correctly notes that the state's recognition of these courts was important for the process of introducing socially generated rules into law.²⁹ This points to the manner in which the distinction law/non-law was being constructed on two levels: first, in selecting which conceptions of honor could become legally-relevant, i.e. which non-legal norms could become legal norms; and, second, in selecting which professional associations acquired this

²⁷ This takes into consideration one aspect of the research program on multinormativity, though not the focus on the *tacit* knowledge on which norm-creation is based. See Thomas Duve, "Was ist ›Multinormativität‹? Einführende Bemerkungen," *Rechtsgeschichte – Legal History* 25 (2017).

²⁸ Peter Collin, "Ehrengerichtliche Rechtsprechung im Kaiserreich und der Weimarer Republik," *Rechtsgeschichte – Legal History* 25 (2017).

²⁹ Collin, "Ehrengerichtliche Rechtsprechung im Kaiserreich und der Weimarer Republik," 147–148.

institutional capacity – lawyers, members of the stock exchanges, and medical practitioners, and *not* members of other professions.

A second example of the construction of the distinction of law and non-law is Cristina Nogueira da Silva's discussion of the legal representations of the Portuguese Empire during the late nineteenth century.³⁰ In line with the increasing doctrinal importance of equality and uniformity in the course of the nineteenth century, the Portuguese imperial space was beginning to be imagined by contemporary legal scholars as a homogeneous juridical continuum in which the different parts of the empire – in Europe, in Africa, and in America – participated equally. An 1869 decree extending the application of the Portuguese Civil Code to the overseas territories was an attempt to correct the perceived discontinuity in civil law which had been introduced through its enactment in 1867. Nogueira, however, highlights that the increasing importance of constructing a uniform juridical space was accompanied by the recognition of the plurality of the overseas territories. As such, the introduction of the metropolitan codes was intended to transitorily coexist with, but also overcome, the different normative orders that existed in the different territories of the Portuguese empire.

Nogueira's study thus shows how the application of the Civil Code was discontinuous across the Portuguese empire because of the simultaneous recognition of native *usos e costumes* (habits and customs). Of particular relevance, however, is that both the unitary conception and the recognition of diversity were constructed from the perspective of the metropolis. Since the 1850s the Portuguese empire had recognized the legal validity of native *usos e costumes* in spaces where European influence was scarce not only as a manner of recognizing the diversity of local cultures but also, through the appointment of European judges, as a manner of incremental 'civilization'. The extension of the Civil Code towards the Portuguese territories thus sustained this recognition of local law and not only required the application of *usos e costumes* by Europeans but also their codification. Ultimately, the extension of the Portuguese Civil Code sought the gradual reduction and elimination of the diversity of the overseas territories by selectively sustaining its diversity. Nogueira's study is thus a good example of the crossings between law and non-law by highlighting how *usos e costumes* were introduced into (or reconstructed within) Portuguese law, and how they were gradually eliminated from legal observation.

b. Disentangling law as a homogeneous representation

Another alternative is to disentangle the homogenous representation of law in order to see how the same issues are represented in different areas of law. António Manuel Hespanha, for example, has recently argued that early modern European law can be understood as a set of related communicative systems comprised by a sphere of oral law, a sphere of scriptural

³⁰ Cristina Nogueira da Silva, "A dimensão imperial do espaço jurídico português: Formas de imaginar a pluralidade nos espaços ultramarinos, séculos XIX e XX," *Rechtsgeschichte – Legal History* 23 (2015).

law, and a sphere of academic law. Taking only the shared dispositive of ‘telling the law’ Hespanha seeks to redraw the boundaries of legal historical research:

“This approach renders established assumptions problematic, such as the separation between ‘romantic’ and ‘germanistic’ laws, the all-inclusiveness of ‘national’ or state laws, and the all-embracing unity of learned law (identified with academic legal doctrine). Conversely, it supports emergent research interests on such subjects as the artificiality and complexity of ‘nations’, the coexistence in the same territory of different legal communities, separated by the divide orality/writing or by peculiar practices of telling the law, and the impact of the ‘materialities’ of legal communication over the contents of law. This methodological shift will suggest new aggregations and divides, far from those cultivated by a historiography oriented by concepts like ‘nation’, ‘state’, streams of legal thought, and religious or philosophical credos.”³¹

This underscores the importance of understanding the legal historian as a second-order observer: the manner in which law describes itself can be seen as contingent and, accordingly, does not have to inform the manner in which the historian constructs her own units of observation.

In a sense, this can be used to highlight the internal differentiation of law, e.g. in the way different areas of law follow different logics. Tamar Herzog’s article on the Peruvian Penal Code of 1924, for example, shows how criminal law was mobilized to construct differences in assigning criminal liability to fulfill the aspirations of social uniformity consecrated in the Peruvian constitution and civil code. The introduction of the difference between ‘civilized’, ‘semi-civilized’, and ‘savages’ to assign criminal liability was a manner of constructing differences within law in response to the perceived failures of the constitution and codes of the 19th century which presumed abstract equality in conditions of stark cultural difference. The Penal Code of 1924 thus became a way of creating the desired homogeneity of the population by submitting ‘semi-civilized’ and ‘savage’ individuals to agricultural colonies where they could receive ‘civilization’, unlike criminals who were ‘educated’ in prisons. Further, ‘savages’ could be sent to these colonies for a period of up to 20 years and the penalty was not decided according to the severity of the crime. Herzog also argues that though the 1991 Penal Code, which revised the one from 1924, removed the more racist distinctions of its predecessor reintroduced the differences in assigning criminal liability through the figure of “error de comprensión culturalmente condicionada”³²

Unfortunately, this article does not deal with the more interesting question about *if* and *how* judges applied these distinctions. Since the Penal Code did not indicate definitions of ‘civilized’, ‘semi-civilized’, and ‘savage’ persons this was left to the common sense “de los que tenían que aplicar los textos y, presumiblemente, totalmente evidentes y de fácil deducción.”³³ Perhaps, as Herzog argues, the lack of a legal definition of these categories of persons was because it was otherwise ‘obvious’ to lawmakers. The application of the difference by

³¹ António M. Hespanha, “Southern Europe (Italy, Iberian Peninsula, France),” in *The Oxford Handbook of European Legal History*, ed. Heikki Pihlajamäki, Markus D. Dubber and Mark Godfrey (Oxford: Oxford University Press, 2018), 333.

³² Herzog, “Percibir el otro,” 413.

³³ Herzog, “Percibir el otro,” 407.

judges, nevertheless, would have been interesting to analyze since it would reveal if the lack of legal definition led to a lack of enforcement or if, by contrast, some kind of racist preconceptions found their way into legal reasoning and adjudication in a manner analogous to what Peter Collin described for honor courts in Germany. In any case, these kinds of cases reveal that even the presumed unity of criminal law can be suspended to observe discrepancies and different manners of constructing difference between the legal text and its application.

c. Distinguishing points of observation inside and outside law

This leads us to the final methodological approach: deciding which communications are inside and which are outside law. Systems theorists argue, for example, that legislation belongs to the political system and that legal scholarship belongs to the scientific system. By using this distinction one can make sense of the incommensurability of the observations made from different positions.

An example of this can be seen in the way modern slavery is treated by the Brazilian judiciary, and how the ‘scientific’ reconstruction of slavery by the historian does not necessarily influence the ‘legal’ description of the courts. In her study of the contemporary jurisprudence in the application of article 149 of the Brazilian Penal Code, Mariana Dias Paes argues how many cases of modern slavery are not being recognized as crimes by the Brazilian judiciary based on its simplistic historical notions of slavery. Dias’ sample of 107 cases regarding the application of article 149 between 2006 and 2015 has shown that more than half (57) of the decisions have led to acquittals. Despite finding the conditions that are specified in the law, cases are acquitted based on stereotypical conceptions of slavery – restrictions to the freedom of movement, the complete subjection of the victim, or the complete negation of the victim’s free will. Through these decisions, the Brazilian judiciary has introduced a high threshold for recognizing the ‘condition analogous to slavery’.³⁴

Dias, a specialist in Brazilian history of slavery, notes how the judges’ image of slavery, sometimes informed by contemporary legal doctrine, contradicts the results of historical research produced in the last decades. Simplistic historical representations of slavery inform the jurisprudence in the application of article 149 of the Brazilian Penal Code and thus become an obstacle for combating modern slavery. Dias’ article shows very clearly how the condition of slavery cannot simply be derived from factual conditions but must be reconstructed by different observers and how this can lead to incongruous characterizations. It is also important in that it shows that even though the judges presume to draw upon historical knowledge, this may not actually be the case. What these kinds of incongruencies ultimately show is that processes of *translation* cannot be restricted to situations of intercultural contact but are also when dealing with different loci of structured observation: historical knowledge

³⁴ Mariana A. Dias Paes, “L’histoire devant les tribunaux: la notion d’esclavage contemporain dans les décisions judiciaires brésiliennes,” *Brésil(s)* 11 (2017).

is not immediately integrated into, but rather has to be reconstructed for the judicial observation.

A similar problem can be observed in the discrepant characterization of *indígenas* between legislation and the Civil Code. Between 1850 and 1910, the Chilean State, concerned with the loss of public lands, sought to limit the legal capacities of the indigenous inhabitants of southern Chile. A series of decrees (1853, 1855, 1856) submitted the sales of indigenous land to the supervision of Intendants; others (1856, 1857) restricted the conditions under which indigenous people could grant powers of attorney; and, another group of decrees (1874, 1883, 1893) eventually prohibited all sales of indigenous land.³⁵ Though mainly intended to be an instrument to safeguard the interests of the State, these decrees were also meant to avoid that indigenous peoples were taken advantage of in a time when land had acquired important speculative value. The decrees, ultimately, did not fulfill their intended effects.

One of the main findings of the *Comisión Parlamentaria de Colonización* of 1912, created to address “the many abuses committed against occupants of land and national settlers in zones of colonization”, was that the efforts to limit the sale of indigenous lands had failed because of the manner in which the judiciary applied (or failed to apply) the specific laws for the territory. In his report for the Commission, Carlos Ibarra, the *Protector de Indígenas* of Valdivia, discussed the way in which private legal instruments were used to dispossess local indigenous populations of their land. Many of these abuses were, according to Ibarra, due to the theoretical questions that the decrees had not addressed: “Can indigenous peoples renounce their condition?”; “Who are indigenous peoples?”; “Can an indigenous individual dispose of his real estate if he has acquired it through his own means, through inheritance or donation?”³⁶ Of course, the judge has to decide – and one way to avoid the problems posed by these questions is to disregard the appeal to consider the indigenous condition, and apply the Civil Code. The situation described here can be reframed as an example of how differences have to be constructed and cannot be simply derived from given natural or cultural facts, and how the State sought to introduce a difference that civil law could not observe through its own logic of abstract individual agency.

4. Conclusions

This contribution has argued that the ‘challenge of diversity’ must be treated as a problem of incongruent observations between law and society. This difference in observations becomes particularly salient as of the 19th century. The reorganization of law around the principle of

³⁵ Manuel Bastias Saavedra, “Weltgesellschaft, Functional Differentiation, and the Legal System: Modernisation of Law in the Chilean Frontier (1790-1850),” *Archiv für Sozialgeschichte* 57 (2017).

³⁶ Congreso Nacional, *Comisión Parlamentaria de Colonización: informe, proyectos de ley, actas de las sesiones y otros antecedentes* (Santiago: Sociedad Imprenta y Litografía Universo, 1912), 189–190.

equality meant that law could no longer recognize any differences that were not produced by law itself, thus creating a fracture between socially and legally relevant differences. This manner of understanding the problem poses particular challenges for the legal historian interested in studying diversity: can we only study the manner in which law constructs diversity within law? The solution proposed by this article has been to abstain from going down the rabbit hole of providing an operative category of diversity. Instead, I suggest thinking of diversity as paradox allows the legal historian to assume the position of a second-order observer and study how identity and difference is constructed by different observers both within and outside law – always taking into account the contingency of this and other distinctions. Ultimately, shifting, in this manner, between law and its blind spots, we may be able to gain further insights into our understanding of the history of law.

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