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1 Introduction

This contribution is an invitation to reflect, on a comparative basis (Ibero-America and Europe) as to how the law responded to social and cultural diversity during the 19th and 20th centuries. The topic chosen is that of the construction of a legal personality in relation to the tensions existing between legal-political projects based on the principle of equality, on the one hand, and the special legal regimes applicable to specific groups under Brazilian law, on the other.

Beside the issue of the considerable time-span proposed for discussion, the research controversy is rooted in a multiplex contemporary debate, which covers, *inter alia*, discussions about what theories of justice are adequate to plural societies;[1] about analytical and normative deficits in theories and policies related to multiculturalism;[2] and about struggles for redistribution and recognition in contemporary societies.[3]

Considering a strictly historical approach, a relevant historiographical trend in Brazil directly related this theme deals with the paths and dilemmas of citizenship construction. Such historiographical production is deeply influenced by T. H. Marshall's seminal work on citizenship building in England. Brazilian historiography emphasizes a citizenship concept defined as

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1 Forst (2002); Vita (2000).

2 Bocarejo (2011); Costa / Werle (1997).

3 Honneth / Fraser (2003).

the exercising of civil, political and social rights. The citizen is a rights holder. Based on this premise, researchers have investigated the differentiation of subjects in terms of which rights may be exercised, the struggles for rights recognition, obstacles and ambiguities against such exercise, and the expansion of full citizenship, which encompasses the three dimensions of rights.[4] Such historiography reflects its time, i. e. the transition from dictatorship to democracy in the 1980s. This conjecture inserted new goals into the agenda: the return of political and civil liberties, the redeeming of social debt in an unequal society, and the new consensus around a democratic Constitution. The emphasis on the 'Rights Talk' makes sense in this context and was a response to the impetus of vigorous social movements in civil society.[5]

However, I will not follow this path, already proven productive elsewhere and represented in highly relevant works. Instead of taking "citizenship" as an organizing historiographical category, I intend to explore other normative semantic occurrences, in order to map out the effects produced by the legal categorization used to define types of legal subjects. It is important to have in mind the fact that citizenship, apart from representing a historiographical category, is also a native concept, which is part of the normative semantics of *longue durée*.

Diversity, in a productive sense for our purpose, refers to the definition of groups according to difference markers (gender, ethnicity, etc.). The members of a group, according to certain criteria of belonging, are equal among themselves in a certain aspect, and different from those who are not members and from other groups. Diversity is a relational concept – of the member of a group vis-à-vis non-members, and of a group compared to other groups.[6] In this sense, diversity is a paradox that encompasses both equality (belonging to the group) and difference (between members, and between groups); it is the unity of identity and difference.[7] Constitutions, since the

4 The best synthesis is that of Carvalho (2004). For the 19th century and the beginning of the 20th century, see Mattos (2000); Grinberg (2002). For social rights, see Gomes (2005), Santos (1994). For discussion on the building of social rights in Brazil, see Bercovici / Massonetto (2004). For a discussion in a transregional perspective of inequality regimes, see Góngora Mera (2019).

5 For social movements by the end of the Dictatorship, see Sader (1988); Cardoso (1983).

6 Duve (2014).

7 Bastias (2020); De Giorgi (1998).

end of the 18th century, have set in motion an inflection in the unfolding of this paradox. The equality of people before the law becomes the default position, and inequalities need special justification.[8]

My contribution investigates the unfolding of this paradox in Brazilian law. It starts from the following premise: the principle of legal equality, as stated in the first Constitution of 1824,[9] is combined with the creation of special legal regimes applicable to certain groups of persons. The major thread of my contribution is to investigate how normative (legal) categories integrate equality and differentiation. Mainly, I scrutinize three kinds of justifications to differentiating regimes of legal subjects (2–4): I will call them 'subordination', 'disciplination' and 'assimilation'. Each regime is a 'mask', which corresponds to one specific legal subject. The metaphor of the mask to reflect on the concept of person, which has a long history, has been used here to express a synthesis of the legal regime of justification of differences.

Thereafter, I will examine the aim of the Federal Constitution of 1988, in force nowadays; in spite of the many barriers to its effectiveness, it represented a point of inflection towards the above-mentioned regimes (5).

Three masks of three different kinds of subjects as configured by legal normativity: this inventory is far from exhaustive. Other masks might as well have been analyzed. They do not exclude each other, either: one such group, as 'Indians', can be classified as subordinate, disciplined, or assimilated. Masks are resources which emphasize, in one way, some single aspects, and may be matched to assist in the interpretation of a specific historical situation.

My argument is not analytical, as it does not aim at the conceptual clarification of the principle of equality,[10] nor is it an exhaustive discussion of the concepts constructed by proponents of legal dogmatics about legal subjectivity. Indeed, the term 'legal subjectivity' is an open category for exploring some of the distinctions produced by law. Nor do I advocate a normative argument for justifying the best principle capable of recognizing people's rights.[11] My focus lies on the issue of the legal construction of a personality of equal subjects, in the context of diversity in the population as a whole, from a legal-historical perspective.

8 See the introduction by Collin and Casagrande in this volume.

9 Years of Brazilian Constitutions: 1824, 1891, 1934, 1937, 1946, 1967, 1969 and 1988.

10 See Kirste (2019).

11 In his comment to this paper, Stephan Kirste argues that it is the principle of human dignity, not the principle of equality, which is a "reason for acknowledging all human

2 Subordinate subjects

The first Brazilian Constitution of 1824 (in force until 1891) presented a roll of civil and political rights of Brazilian citizens in article 179. In item XIII, it stated that "[t]he law will be equal to all, whether it protects or punishes, and will compensate each one in the proportion of their merits." The Constitution made no express reference to slavery, legally abolished in 1888. The constitutional protection of the right to private property, however, was used to assure slave ownership. Slavery was indirectly implied in the rules that defined citizenship and political rights. Article 6, I stated that Brazilian citizens are "those born in Brazil, whether free-born or freedmen, even if of a foreign father, as long as he was not in service of a foreign nation". Freedmen, considered as Brazilian citizens for censitary suffrage purposes, could vote in primary elections (Articles 91 and 94). The distinction between free-born and freedman (who was born a slave, or had been enslaved) revealed the marks that a slave-holding society had left on a so-called liberal Constitution.

The meanings of equality and its relation to special regimes were the object of a variety of discourses. This is the case of José Maria Avellar Brotero (1798–1873), first professor of natural law in the law school founded in São Paulo in 1827.[12]

All men are controlled by physical laws of nature, composed of the same substances, have the same faculties and are bound to natural law. But the elements they are constituted of (water, fire, air, and earth) are not equally distributed – a condition that engenders a variety of dispositions. The equilibrium among elements varies from person to person. No man is completely equal to another. The disparity "arising from the many colours that shape the human races" is noticeable (§ 94). Equality is understood as a "mutual dependence and reciprocity of obligations among men" (§ 96). Brotero's conclusions, at this point, are extensively based upon the essay by William Laurence Brown (1755–1830), in the French translation by Denis-François Donnant.[13] For Brown, equality – properly understood – is

beings as persons in law". In effect, the Federal Constitution of 1988 gave centrality to the principle of human dignity (art. 1, III). To enter this normative discussion lies outside my objectives.

12 Brotero (1829).

13 Brown (1793); Donnat (1799).

not the same as a levelling, which leads to anarchy and despotism; equality and dependence are not incompatible.

Moving from natural law to the legal reflection of national law, the classifications of Justinian law and *ius commune*, by means of multiple filterings and textual mediation, new questions took centre-stage in the discussion. This was the case when it came to distinguishing between *persona / res / actio* and the different statuses. By the middle of the 19th century, other forms of systematization challenged the Roman tripartition and another semantics took place – subjective rights and capacities – as a reference to the legal personality. I will present some examples.

Paschoal José de Mello Freire dos Reis (1738–1798) was the first professor of national law in the University of Coimbra. His work, "*Institutiones Iuris Civilis Lusitani, cum Publici tum Privati*" (Lisbon, 1789/1793), is divided as follows: Book 1 is devoted to public law; the following books are devoted to private law, organized in the "Justinian way". Hence, Book 2 refers to persons, Book 3 to things, and Book 4 to actions.

Book 2, "*De Jure Personarum*", is organized according to different qualities related to freedom, citizenship and family. Such differentiation, which Mello Freire borrows from previous literature, will have a prodigious presence in the 19th century, among Brazilian jurists of the Empire.[14]

Based on the tripartition of status, Mello Freire distributes and presents a plethora of differentiations:

- As for the rights related to freedom, the main divide is between free men and slaves;
- The second division refers to citizenship: citizens vs foreigners; citizens by birth or by domicile. There are different orders of citizens: patrician, equestrian and plebeian;
- As for the family, some hold positions as *pater familias*, while others are *filius familias*; some are mothers and others, daughters. Children are born in wedlock, or legitimized, or adopted. These are the legal ways of acquir-

14 In the commentaries of Mello Freire, the influential Portuguese lay jurist, Manuel Almeida de Souza Lobão (1744–1817), defines a "person" – in the legal sense – "as the man as considered in a certain state". And status means "a certain quality of man, and according to such quality he is entitled to certain rights in regard to other men", Boehmer, ad Jus ff. Liv. I. Tit. 5. n.I., (Lobão, 1818), 5. Lobão makes reference to Justus Henning Böhmer, *Introductio in ius digestorum*. For an introductory and insightful discussion, see Hespanha (1995).

ing authority *(patria potestas)* in the family. The authority of the husband over his wife – by consent or by force of the natural law – relates to her person and her property.

Lourenço Trigo de Loureiro, professor of law at the Recife Law School, based his work, "Institutions of Brazilian Civil Law [Instituições de Direito Civil Brasileiro]", on Mello Freire – with due modifications.[15]

- Rights related to freedom follow the main division among free-born men, freedmen and slaves. Slaves are born as such or become enslaved. They are born of servile status if their mother is a slave *(partus sequitur ventrem)*, or they become so as an effect of *ius gentium* (as is the case of war prisoners) or *ius civile*. By the time he writes, Lourenço Trigo de Loureiro advocates that, in Brazil, there should only be slaves by birth and no enslaved persons.
- The second division is between Brazilian citizens and foreigners. Either citizens are citizens by birth or they acquire this status by manumission, domicile or naturalization. Brazilian citizens are entitled to political rights ("not every citizen is entitled to the same sort of political right, but only those who possess the necessary qualities to the fulfilment of those rights in accordance with the common good"). Loureiro excludes from this classification the categories of noblemen, knights and commoners, since they do not correspond to the inequalities admitted in the Constitution (art. 179, 13–16).
- The following division is between those who are *sui juris* (father and mother of the family) and those who are *alieni juris* (persons under the authority of the family). Loureiro highlights the fact that words such as fathers, mothers, sons and daughters express natural conditions. On the other hand, terms such as *pater familias* and *filius familias* denote a civil relationship of authority and subjection. Family defines an unequal society, where each person is subject to parental or marital authority.

I do not intend to analyze each status and its corresponding distinction. It is enough to remark that the three statuses of freedom, citizenship and family cover a wide range of differentiations and modes of subordination.[16]

15 Loureiro (1851).
16 For a wide-ranging discussion about the status of slaves, see Dias Paes (2019).

The status categories also play a role in order to organize key areas of the procedural law.[17] Actions are used to defend or claim a status (§ 3):

- Freedom-status actions can be classified as follows: freedom-status actions in general (§ 23), actions of maintenance of the freedom status (§ 24), actions to secure freedom by indemnity (§ 25), freedom-status actions brought by the Emancipation Fund (§ 26), and actions of re-enslavement (§ 27).
- Citizenship-status actions comprise actions of justification of nationality (§ 46) and actions of justification of nobility (§ 47).
- Family-status actions are divided into: parental actions (§ 56), possession in the womb (§ 57), divorce (§ 58), nullity of marriage in general (§ 59), nullity of marriages of non-Catholics (§ 60), spousals (§ 61), and marriage licences (§ 62).

The Course in Brazilian Civil Law [Curso de Direito Civil] by Antonio Ribas (1818–1890), lecturer at the Law School in São Paulo, presents a completely different universe.[18] The General Part of the Course includes the following sections: [I] Rights and their general elements, [II] Persons, [III] Things, and [IV] Legal acts.

The first section is structured around this premise: "Freedom is the essence of man. A right is freedom circumscribed by law." On the one hand, the status classification is presented, due to its historical relevance, as a review of its development in Roman law, but, on the other hand, this approach undermines the power of justification of subject differentiations. A person is a subject capable of exercising rights. Persons are provided by nature with rationality and freedom – 'persons' meaning men. The law may provide this capability to other persons or divest them of their natural personality (in the case of slaves, for instance).

The author of the first project of Civil Code (1864), Augusto Teixeira de Freitas (1816–1883), starts from the broader metaphysical notion of "entity".[19] Persons are entities provided with the ability to acquire rights. These persons may have a visible existence or an ideal one. Even the slave is a

17 Correa Telles (1880).
18 Ribas (1880).
19 Freitas (1864) art. 16 ss.

person, since he or she may acquire rights, albeit under countless restrictions. The distinction between legal and *de facto* capacity enables a differentiation among persons to be made: "For us, personal status, in a broad sense, means any situation, considered by this Code as classes, in order to establish a prohibition, and to state capacities and incapacities."[20] The concept of capacity does not require status-based differentiations. Freitas is polemical towards "so many useless classifications of persons in Civil Law Codes … I run from the word status."[21]

The first Brazilian Civil Code, in force as of 1st January 1917, adopts the following differentiation: General Part and Special Part. The General Part is composed of Book I – Persons; Book II – Things; and Book III – Legal facts. The Special Part is composed of Book I – Family Law; Book II – Property Law; Book III – Law of Obligations; and Book IV – Succession Law. Projects presented as early as 1889 already used the same categorization, derived from the German legal literature and used in the Civil Codes of Germany, Japan and Switzerland.[22]

The Civil Code consolidates a new semantics: persons as legal subjects, personality, legal and *de facto* capacities, and degrees of capacity (absolute or relative capacity).

The author of the approved project, Clovis Bevilacqua (1859–1944),[23] professor at the Law School of Recife, comments that the status theory lost its previous importance. In his handbook, the concept of status is still used in the context of nationals and foreign persons, the family (married / single, relatives, age-related: minors and adults), competence and gender. However, the use of status categories becomes residual, and no longer plays an effective role to organize hierarchies and differentiations.

The categories of person and personality acquire an inclusive aspect in the Civil Code. Following the abolition of slavery, every human being is a person. Legal personality is the ability – as recognized by the law – to exercise rights and make binding amendments to their duties and obligations, as assigned to natural persons and to business entities and properties under certain conditions.

20 Freitas (1864) art. 26.
21 Freitas (1864) art. 26.
22 Merêa (1917) xii; Pontes de Miranda (1981) 98.
23 Bevilaqua (1908).

Next to the inclusiveness of personality, the Civil Code establishes certain degrees and differentiations by employing the distinction between legal and *de facto* capacity. Whoever is provided with personality is therefore provided with legal personality. But natural persons are classified in different degrees of *de facto* capacity.

In fact, Article 5 defines those natural persons who are fully incapable of fulfilling civil acts by themselves: minors (under 16), insane individuals of all kinds, the deaf and unable to speak who are not able to express their own will, and individuals declared dead *in absentia*. Article 6 defines the natural persons who have a limited capacity: persons aged 16–21, married women, prodigal persons and Amerindians.

The concept of *de facto* capacity enables several differentiations among subjects. Modes of subordination of incapable persons are exercised by means of guardianship and representation. Equality (as they are all persons) is combined with differentiations and subordinations. The concept of capacity allows pre-understandings, which justify differentiations to make them operative in law. The restricted capacity of the married woman was justified in the debates about the Civil Code in the House of Representatives in these terms:

> "No one ignores the fact that the psychological constitutions of men and women are remarkably different; such differences do not enable us to declare that a man is superior to a woman; they simply allow us to affirm that men and women perform different functions in society and the family. Whenever a more intense intellectual, moral and physical energy is required, then, a man is more suitable than a woman; on the other hand, whenever a larger amount of dedication, persistence and emotional development is required, a man can certainly not surpass his spouse."[24]

Bevilaqua, an advocate of the full legal capacity of the married woman, summarizes the rationality of such distinction, as introduced in the Civil Code: "The reason for the restriction imposed to the capacity of the married woman does not derive from mental disadvantages, but from the different functions each of the spouses are required to perform."[25]

The restricted capacity of the married woman was repealed only by Law 4.121 from 27th August 1962, known as the Statute of the Married Women,

24 Projeto do Código Civil Brasileiro (1902) 113.
25 Projeto do Código Civil Brasileiro (1902) 113.

which changed many articles of the Civil Code and the Code of Civil Procedure.

Emblematic of this section, I reproduce a copy of a watercolour painted by French artist Jean-Baptiste Debret (1768–1848), who travelled to Brazil in March 1816 as part of a mission tasked with the establishment of a Beaux-Arts School in Rio de Janeiro. According to Debret's notes, we are able to identify the individuals he represented: "Following old habit, still in force amidst this class, the head of the family walks in front of his family, followed by his children, lined by age, starting from the younger."[26] The man is a government official. Then come the daughters, and the pregnant wife. After them comes the chambermaid: a mixed-race woman, clearly distinguished from the other slaves by the nature of her service. Then follow the other slaves, all barefoot, and the last one is a new acquisition. Debret depicts an exemplary father, head of a family, a citizen and a free man – all the other individuals are subject to his authority, both parental and marital, as well as to his ownership.

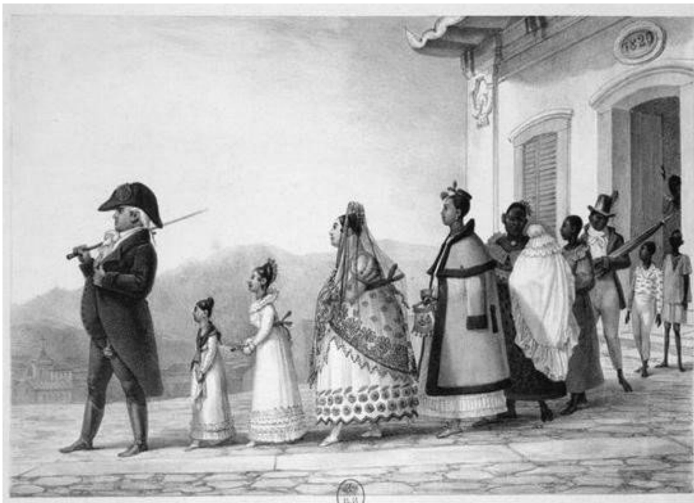

Figure 1: J.B. Debret, a government official, c. 1820–1825.

26 Lago (2008) 169.

3 Disciplined subjects

The Juvenile Code of 1927 is highly representative of another regime of legal subjectivity built outside the semantic patterns of 'status' and 'civil capacity'. The problem of 'social defence' – how to prevent criminality and fight begging and vagrancy – as well as the 'social question' – how to regulate work beyond the framework of the civil law contract – match one another to form a specific regulation of abandoned and delinquent juveniles.[27]

From 1870, we can identify a widespread literature that merges criminology, the 'new criminal school', positivism and other scientistic theories.[28] Legal scholarship combines with medical scholarship to offer the concepts of the normal subject and the abnormal (criminal) subject.[29] Such knowledge points the way to the development of preventive policies formulated in subject classifications, introducing disciplinary and educational regimes in special imprisonment facilities (penitentiaries, correctional colonies, etc.). The judge performs a role of supervision of a mixture of knowledge and practice, aimed at the reformation of abnormal individuals. These ideas and practices go beyond the criminal field. This mixture of legal, medical, sanitary, and psychiatric knowledge justified the existence of a separate legal regime applicable to sections of the population in order to prevent disorder, normalize, moralize and provide assistance. The establishment of a 'new urban order' demanded the social control of multiple segments of the population: prostitutes, workers' movements' leaders and juvenile delinquents. The criminal question, the social-defence question, and the social question are treated jointly.

The Juvenile Code of 1927 is the result of wide-ranging debates and policies which had involved jurists, physicians and educators since the turn of the century. In the first quarter of the 20th century, we see the creation of government-funded shelters, professional training schools, and reform institutions. Until that time, secular and religious charitable associations – supported by private donations – had been in charge of the care of sick people in general, the mentally impaired, the blind, the deaf and unable to speak, as well as of abandoned children. Laws of assistance and protection modified

27 Alvarez (2003).
28 Dias (2017).
29 Alvarez (2003) 150–151.

the very sense of "assistance", defined as part of the State's duty of social care, as they branched off into prevention, coercion and repression.

The juvenile question became emblematic of new conceptions of assistance and the maintenance of order in society. João Cândido de Albuquerque Mello Mattos, first Juvenile Court judge in Rio de Janeiro, and author of the Juvenile Code project, declared that the State, "in view of the maintenance of social order, and because of human solidarity, is required to intervene in a preventive and corrective manner, in order to protect and rehabilitate these juveniles, future active citizens, who will take part in the public life of the Nation".[30]

The Code has an ambitious scope, imposing regulations from the moment the baby is born onwards. There is thorough regulation for different categories of abandoned children and juvenile delinquents. The Code sets out rules regarding the internment in institutions or the placement in foster care of children of unknown parents, of "maritally abandoned children" (children who are born of known parents, and later abandoned), and of "morally abandoned children" (children who live with their family or legal guardians but are vulnerable to abuse, ill treatment, and harsh punishments, or living with inappropriate role models and will, therefore, likely turn into vagrants, beggars, libertines and criminals).[31] The Code also provides specific rules for the removal of parental rights; the conditions for supervised freedom; and, also, the sheltering and internment of minors in hospitals, asylums and institutions. As for juvenile delinquents, the Code establishes different degrees of criminal responsibility; it defines specific procedures in a separate jurisdiction. By defining the concept of social danger and abuse, the Code also regulates the work regime of minors, banning them from "immoral" and "hazardous" occupations.[32]

The Juvenile Code of 1979 and the National Policy of Minor Welfare, both implemented during the Dictatorship, maintained the special regime for minors – a doctrine known as "minors in irregular situation".

Emblematic of these developments, we show photos (figures 2–4) of juvenile inmates interned in the Correctional Institute of São Paulo [Insti-

30 Mineiro (1929) iv.

31 With the concept of "moral abandonment", the Juvenile Code enlarges the concept of "abandonment" contained in the Civil Code and spells out a special framework for it.

32 Another example of the wide-ranging nature of the Code is the fact that it allowed the judges to restrict children's and young people's access to the cinema and theatre.

tuto Disciplinar de São Paulo], founded in 1900 and supported by the State.[33]

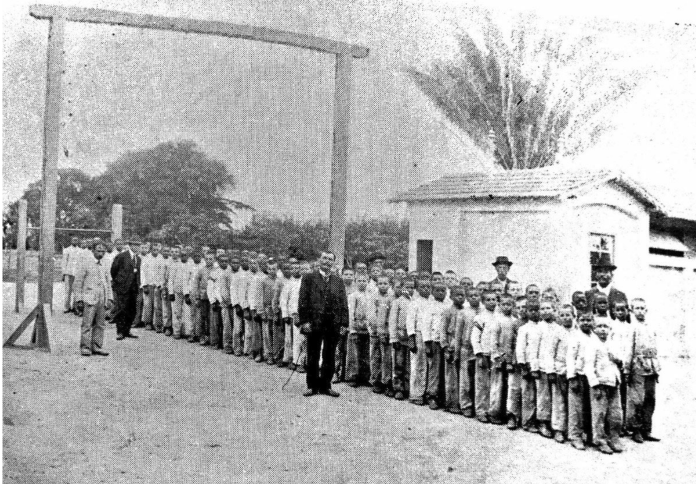

Figure 2: gymnastics

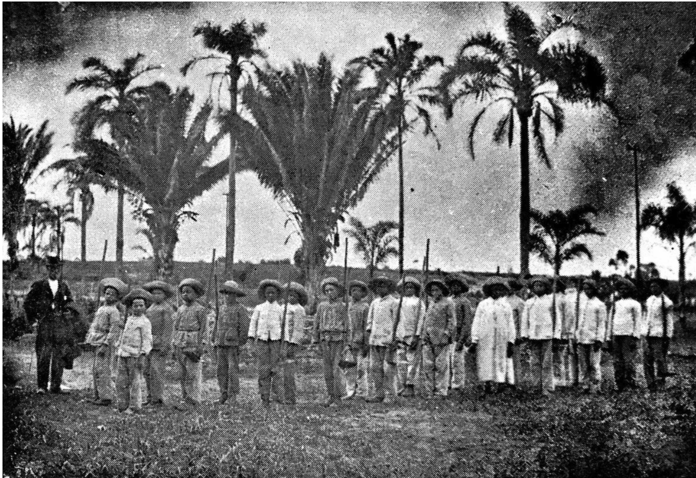

Figure 3: leaving for work

33 Motta (1909).

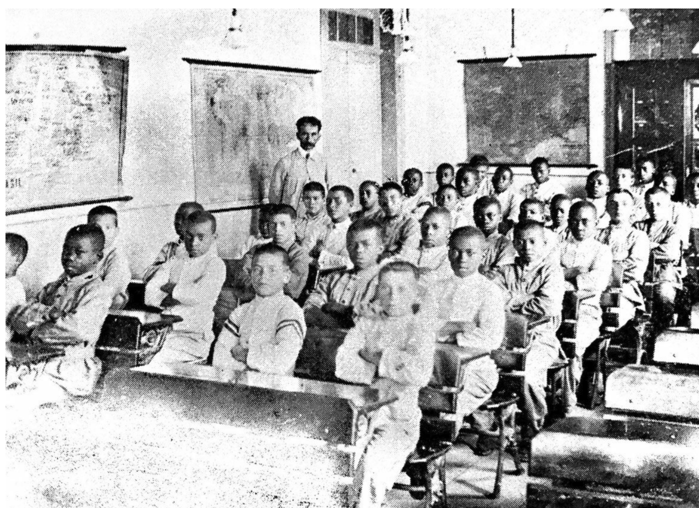

Figure 4: a classroom

4 Assimilated subjects

The special regime applicable to Amerindian populations dated back to colonial times. By the end of the 18th century, Amerindians were made equal in status to minors (law of 1798).[34] By the 1830s, the status of Amerindians was equal to that of orphans. I will focus here on the legislation of the Republic (20th century).[35]

In the first decade of the 20th century, the construction of the railways and territorial expansion by Europeans in the southern and south-eastern regions faced resistance from indigenous peoples such as the Xoclengues in Paraná and Santa Catarina and the Kaigangs in São Paulo. In 1908, on the occasion of the 16th Congress of Americanists, Brazil was accused of massacring indigenous people in the country.

In this context, in 1910, the Service for the Protection of Indians and the Placement of National Workers (Serviço de Proteção aos Índios e Localização de Trabalhadores Nacionais [SPILTN]) was created, and it was placed

34 Perrone-Moisés (1992).

35 For a synthesis, see Melatti (2014).

under the authority of the Ministry of Agriculture, Industry and Commerce. The department was responsible for two governmental policies: to assimilate the Amerindians into "civilized society" and to promote the settlement of poor rural workers in Agricultural Colonies. By the end of the decade, these two policies were set apart and the Service for the Protection of Indians (or SPI) was restricted to the fulfilment of the first task.[36]

Pursuant to the Civil Code of 1917, Amerindians are classified as persons with limited capacity, as mentioned above. The Code stated that "the Indians will be subject to guardianship, according to a special body of laws and regulations, a condition that will be removed once they adapt to civilization". Thus, the indigenous condition was seen as transitional; it would prevail only for as long as Amerindians were not assimilated. The Code, as well as specific legislation enacted to support the assignment of the SPI, were highly influenced by the ideals of Positivism, which considered such protection as a means to the progressive evolution of indigenous people.

Decree 5.484 of 1928 granted the legal guardianship of Amerindians to the State. Amerindians were classified according to the civilizational level they were deemed to have attained. For each group, the decree defined specific rules for civil registration, marriages, and deaths; in relation to criminal law; and, finally, regarding the occupation of the land. The policy on Amerindians introduced by the SPI guaranteed that indigenous populations were allowed to live according to their traditions; it promoted the demarcation and protection of their own territory; it guaranteed citizen's rights in conformity with their stage of civilizational advancement, as the legislator saw it at the time. At the same time, policies were implemented supporting secular education, professional training, as well as the introduction of tools and better agricultural practices. The core aim of the policy on Amerindians was their integration and assimilation into Brazil's European civilization.

In 1890, the Positivist Apostolate of Brazil presented to the Constituent Assembly a proposal to divide the Republic of the United States of Brazil in two: on the one hand, the "Brazilian Western States systematically federated, deriving from the merger of European, African and Aboriginal elements" and, on the other, the "Brazilian American States empirically configured,

36 Lima (1992).

constituted of savage hordes, sparse in the territory of the Republic". Both territories would have their autonomy acknowledged. The Federal Government would mediate between the two units, ensuring that their respective territories could not be crossed into without prior consent.[37] The endeavour of the Positivists, which recognized indigenous sovereignty, did not succeed. According to Brazilian law, Amerindians do not constitute a nation in the legal sense, since they do not relate to the State by treaties, as other countries do. Amerindians have the *possession* of the land where their communities are settled, but the State has the *property* of such lands.[38]

Due to corruption scandals and irregularities in its functioning, the SPI was replaced in 1967 by the Indian National Foundation [Fundação Nacional do Índio – FUNAI], created during the Dictatorship (1964–1985). In 1973, the Indian Statute was promulgated, establishing a legal framework regarding the situation of Amerindians under the law, aiming at "preserving the [indigenous] culture and integrating them, in a progressive and harmonious way, into the national community". Amerindians who are "not integrated into the national community" remain under the authority of FUNAI. This preservation policy followed the ILO Convention 107, incorporated into Brazilian Law in 1966. The Convention 169 of 1989 represented a shift in this paradigm and was to exert influence on the regime introduced by the Constitution of 1988, as we will see below.

In 1975, Mauricio Rangel Reis, in charge of the Interior Ministry, announced a government plan intended to accelerate the integration of indigenous populations and to promote their emancipation. In the following years, the government presented a bill to remove the provisions regarding the legal guardianship of indigenous communities. After a strong reaction from anthropologists, missionaries and the press, the government gave up. The end of guardianship was denounced as terminating the special protective system provided for in the indigenous-specific legislation, and as leading to the allocation of land for development projects (emancipated Amerindians would be removed from their traditional lands). The case is meaningful as the positive re-affirmation of legal guardianship, as a means of protection of the indigenous peoples.[39]

37 Lemos / Mendes (1890).
38 Cunha (1987).
39 Comissão Pró-Índio (1979).

Emblematic of this development is a video (https://www.youtube.com/watch?v=kWMHiwdbM_Q) featuring indigenous leader Ailton Krenak, in 1987, at the time of the Constituent Assembly (1987–1988). During his speech, he painted his face black as a sign of mourning, in light of the way that the Assembly addressed the indigenous question. This performance, beside a huge mobilization on the part of indigenous groups, was crucial to the change of direction of the Constituent Assembly's plans and, ultimately, to the approval of Articles 231 and 232 of the Federal Constitution. The chapter on indigenous rights was a turning point against assimilationist views towards these peoples.

Figure 5: Ailton Krenak, 1987

5 Citizen-constitution

The Constitution of 1988, called the "Citizen-Constitution", is the final stage in our analysis because it embodies a relevant inflection, as it aims at putting an end to long-term structures of exclusion in the country's history.

The Constituent Assembly was established a year before (01.02.1987). Compared to previous experiences, this process was rather singular, as it

was widely open to the participation of civil society in commissions, hearings and debates.[40] The Assembly was receptive to the requirements of social movements (black people, indigenous peoples, and women), which had gathered and co-ordinated their actions since the Dictatorship. These movements made a major contribution, as they gave a voice to international declarations and conventions, which left a distinguishing mark on the final text of the Constitution.

One of the fundamental principles of the Republic is to "to promote the well-being of all, without prejudice as to origin, race, sex, colour, age and any other forms of discrimination". (Article 3, IV). Combined with other principles and rules, such as the equality before the law (Article 5, *caput*) as well as the express determination that "men and women have equal rights and duties under the terms of this Constitution" (Article 5, I), struggles for the recognition of minorities and specific groups won constitutional support. Affirmative action to grant full access to universities, specific laws against gender and race discrimination, and provisions on reproductive rights and same-sex marriage are among the main themes at the heart of public debate in the last few decades.

As for children and young people, the Constitution overturned the previous regime based on the doctrine of "minors in irregular situation". Such regime was aimed at a specific social group of deprived children and young people, either abandoned minors, or offenders and misfits. It aimed at imposing social control and discipline. The new Constitution introduced the "integral protection" doctrine, destined for all children and young people. The Child and Young People Act of 1990, aligned with international conventions, created a special regime intended to replace "control" and "discipline" with the principle of the "social development" of this group. In the spirit of this normative landmark, the new Civil Code of 2002 no longer employs the expression "parental authority": instead, it prefers the term "family authority", in accordance with this new normative constitutional regime. Another change is noticeable in regard to long-term affiliation differentiations (children born to parents who are legally married, children born out of wedlock, and children by adoption), and relevant rights were abolished by the Constitution.

40 Pilatti (2008).

This was the first Constitution to dedicate a special chapter to indigenous peoples. The core of the constitutional pact is to guarantee the physical existence and cultural reproduction of indigenous peoples in perpetuity. Amerindians are entitled to the right to a future made up of a traditional way of life. With this in mind, the Constitution acknowledges the Amerindians' original rights over their traditionally occupied lands, and the Union is responsible for demarcating them. Traditionally occupied lands remain in permanent possession of indigenous peoples, who are entitled to their exclusive usufruct, independently of the imposition of national development projects. The constitutional framework requires the full recognition of a traditional way of life, with its own social organization, customs, languages, beliefs and traditions. After 1988, the number of ethnogenesis processes, i. e. self-identification as an Amerindian, increased greatly, in a movement directed at reverting the assimilation promoted by the State. The latest decennial census (2010) collected data on 896,917 indigenous individuals, on c. 255 peoples, and on speakers of more than 150 different languages.[41] The Constitution also recognizes the right to a future for other traditional groups such as the *quilombolas* (descendants of former slaves, who live in communities with distinctive cultural practices).

Beside the special principles and provisions applicable to the law, the Constitution has also instigated universal policies, such as the Unified Health System [Sistema Único de Saúde] and the Social Security and Social Assistance systems. As far as political rights are concerned, an old provision from 1881 has been repealed, which banned illiterate persons from voting.

6 Final remarks

The project of the "invention of equality", as Pierre Rosanvallon[42] named it, which took place in European and North-American countries at the end of the 18th century, established three different meanings for equality: the rejection of privileges; independence from forms of subordination; and citizenship (defined as the participation in a community of persons with rights). In Brazil, the invention of equality combined with the reinvention of patterns of differentiation of persons. The creation of special regimes for groups of

41 See https://pib.socioambiental.org/pt/P%C3%A1gina_principal.
42 Rosanvallon (2011).

persons continued in the 19th and 20th centuries. Equality before the law and differential legal regimes combine in a variety of ways during the time span considered in this research.

Whatever the results may have been, I have meant to emphasize how such a variety of differentiating categories of groups and subjects were employed and invented through regulation and jurisdiction. Some of these categories belonged to the revered European legal tradition, which was translated into local conditions. Strata of a long-standing semantics remain and merge with another semantics, derived from the patterns of liberalism and constitutionalism. Citizenship does not replace status, rather, it is a type of status subject to limitations. The rhetoric of liberties, rights and categories, embodied in universalization pretensions (such as the concept of "person"), matches old and new hierarchies, which are re-signified and rearranged by discourses and practices. Difference markers (race, gender, and ethnicity) and mechanisms of subordination, control and discipline (such as guardianship and imprisonment) are set in motion for the definition of boundaries and belonging to groups.

From a conceptual perspective, we may say that 'equality' – or the notion of the 'equal' – are incomplete predicates, which raise the following question: 'equality' and 'equal' in which way? Equality is not the same as identity (equality in every aspect). The invention of equality was a project devised to justify relevant aspects for the determination of the belonging to a group of equal entities (subjects).[43] However, I would also like to emphasize what the relevant issues (difference markers) are, which justify differential regimes.

If it is true that equality can be expressed in many ways, as Rosanvallon indicated, then, the same can be said in regard to the differentiation of persons. The masks point towards multifarious logical operations, which are at stake in the process.

43 Gosepath (2011).

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Appendix

1824 Constitution of the Empire of Brazil (first constitution granted by Emperor Pedro I)
1888 Law 3.353: Slavery Abolition Act
1910 Decree 8.072: Protection of Indians and Placement of National Workers Service [Serviço de Proteção aos Índios e Localização de Trabalhadores Nacionais (SPILTN)], since 1918 referred to only as Protection of Indians Service
1916 Civil Code
1927 Decree 17.943: Juvenile Code (also: Mello Mattos Code)
1928 Decree 5.484: Regulates the situation of Amerindians in the national territory
1943 Decree-Law 5.452: Consolidation of Labour Laws
1962 Law 4.121: Statute of the Married Woman
1967 Law 5.371: Creates the National Indian Foundation
1966 Decree 58.824: Incorporates the ILO Convention 107 of 1959 into national law, "Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries"
1973 Law 5.889: Statute of Agricultural Workers
1973 Law 6.001: Indian Statute
1979 Law 6.667: Juvenile Code
1988 Federal Constitution (in force)
1999 Law 8.069: Child and Young People Statute
2002 Law 10.406: Civil Code
2003 Law 10.741: Elders Act
2004 Decree 5501: Incorporates the ILO Convention 169 into national law