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The Limits of Equality: Special Law in the Age of
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Diversity and legal protection are related issues that are set in dialectical terms in European legal experience during the 19th and 20th centuries. In fact, if we consider the problem of diversity and legal protection looking at the relations between the legal system and society, we can appreciate a tension between a “society *within* the legal order and a society *outside* the legal order”.¹ Society assumed in the legal system did not reflect real society, which, due to its complexity, was not entirely subsumable in the framework established by legal norms. The development of social rights, fundamental rights, or even human rights² could be considered as legal responses to this gap.

A key factor in this respect seems to be represented by the monistic configuration of the legal system, i. e. its tendency to reduce the multiform nature of legal phenomena, by assigning to some key principles a special ordering function: the principle of legality which reduced the regimes of normativity focusing on the core program for codification of statutory law; the principle of sovereignty which shaped the constitutional dimension in the absorbing gravity of the state person; the principle of equality which led a process of *reductio ad unum* of the social fabric in the legal scope. In this strong monistic configuration, the issue of diversity would have represented an implicit unsolved problem and a permanent challenge. The following pages will focus on this connection between the issue of diversity and legal protection with the configuration of the legal system.

First I will identify some particular features of legal monism in the 19th century in order to define the relationship between diversity and legal protection. Second I will provide a survey of how, in this historical context, monistic legal systems addressed the problem of diversity; in particular, the purpose will be to consider the function of special law. To this end, considering in particular Italian legal experience, I will take into account three

1 CAZZETTA (2016). See also ROSANVALLON (2011).

2 BOBBIO (1990); COSTA (2018).

examples that enable us to observe three different approaches to the issue: one relating to *inclusion*, another emphasizing *exclusion*, and a third focused on *anti-assimilation*.

1 Background and historical roots: Law and diversity between the modern and contemporary ages

In its history, legal protection seems to have been marked by the interchange of two major attitudes. On the one hand, the legal experience up to the 18th century is based on the idea of *distinguishing persons*. This approach appreciates the difference among multiple types of legal persons, and aims to implement a *principle of justice*, i. e. allowing the *just order* to be fulfilled, and thus provides *effective*, albeit *differentiated*, legal protection for all the members of society. On the other hand, the approach that characterizes the experience of the 19th and 20th centuries takes shape from the idea of *distinguishing the rights of the person*. This approach identifies and formalizes rights, unifies the legal person, aims to implement a *principle of liberty* and a program for equality, i. e. allowing the *proprium* of each individual to be fulfilled, and thus ensuring *provision* of legal protection for all members of society. From the point of view of legal history, it is especially useful to understand *what is in the middle between* the two attitudes (distinguishing persons/distinguishing rights) and to consider their dynamic interaction.

As a matter of fact, the invention of the rights of human beings, i. e. of legal protection related to a natural person as such, presents this ambivalence in *its very origins*. On the one hand, natural rights bring a new consideration of the link between law and diversity, providing a form of legal protection that consists in establishing the rights of the person; at the same time, as I will explain, these new rights of the individual have an eminently instrumental function: they serve to justify and allow the application in the New World of the traditional European legal order, based on the approach of distinguishing persons.

Take the example of the idea of natural rights in Iberian Scholasticism of the Early Modern Age, and in particular of the thought of Francisco de Vitoria.³ Here the problem is combined with the idea of allowing just order,

3 VITORIA (1967 [1538]), sectio III, 2, 4–9. See also SOTO (1545); ACOSTA (1596), lib. II, cap. XII, XIII; CASAS (1997 [1553]), vol. II, 934–948; MOLINA (1613), vol. I, tract. I, disp. 105.

of which *Respublica Christiana* is the bearer, to be introduced in regions of the world that still do not know this tradition, but that can (and must) be included in it. The problem of legal protection here (and of governance of diversity) is still a *problem of justice* (to enforce the *just* legal order).⁴ With this approach, rights, which are provided to the human being because of his *humanitas*, offer a place of occurrence in the New World for the traditional, social, and political pluralism that characterizes European legal space. In other words, we could say that in Iberian Scholasticism – even if the idea of rights of the human being is conceived – legal pluralism is, at the same time, the *premise* and the *outcome*.

The powerful laboratory of natural law thought, instead, emancipates itself from this approach. The new approach consists in enhancing a different performativity of rights and in addressing a different issue: to found a new foundation of legal order, and in particular to redefine the issue of individual freedom in relation to social cohesion. Here, rights are used to solve a *problem of liberty* (to protect the *proprium* of each individual). This perspective puts the problem of otherness in a different light, since it does not make it a problem to be included in the just legal order. On the contrary, it assumes diversity as a problem to be overcome in the framework of a new order that is based on formal equality and on a new rationality, in order to regulate the regimes of freedom of the individual.

This new approach makes it possible to link rights to *legal monism*. Up until this point, legal protection could only take place in relation to a general and abstract type of person (the natural person), and the legal order was configured as a system.⁵

I wanted to emphasize this premise by comparing the Iberian Scholasticism approach with that of natural law thought, because it is this second theoretical trend that, in my opinion, is embedded in the experience of the 19th century. Despite some relevant points of detachment from the approach of natural law thought of the Modern Age, the idea of linking in a monistic way the problem of social cohesion and that of rights of individuals (and consequently the approach to the problem of diversity), finds in this time its complete achievement.

4 MECCARELLI (2017).

5 It is the passage from the *Ordo* to the *Systema*, understood as paradigms of the legal system. See CAPPELLINI (1984) and CAPPELLINI (2010) 243–246; HESPANHA (2012).

2 Diversity and legal protection in the monistic legal systems of the 19th century

In the following pages I am going to describe some features of the monistic space for rights that we can find in European legal systems in the 19th century. I aim only to recall, in a very synthetic way, devices and legal figures well known to historiography, in order to better define the theoretical background of my analysis.

A. *Natural person as single and general type of legal person*: Doctrines of natural law see the rights of the person as individual rights which arise from a *pactum societatis* and also serve as tools to give shape to social structure; they are responsible for ensuring security to those who abandon the state of nature, and to define the regime of liberty compatible with civil coexistence. Legal order, therefore, is built on the basis of rights.⁶ This implies that this order is designed for an abstract and general type of legal person, in which each *socius* can recognize itself, in the same way as the others. The doctrines of natural law exclude the hypothesis of a legal order of differences. On the contrary, they support the idea of a single legal status in a legal system, as a consequence of the establishing of society.

It is important to outline that in the legal system of the 19th century, based on the primacy of statutory law and on the equality principle, reference to the abstract individual addressee of the legal provisions is actually a reference to a real socio-economic type: the bourgeois individual. As a matter of fact, legal protection that was equally provided for each person had a diverse impact in real society. This made possible, behind the screen of formal equality, to rule diversities without differentiating legal persons.

B. *Monistic reduction of legal-political structures in state form*: Theories of natural law on legal requirements for social cohesion lead to the idea of a unitary political power (*persona moralis*), emerging from the *pactum societatis* as the main actor in the constitutional dimension.⁷ The ordering factor here is not *iurisdictio*, which allows for the recognition of a plurality of powers inside the same legal order; on the contrary, here the ordering factor is

⁶ COSTA (2018).

⁷ A good example is Hobbes's theory of the construction of the social contract, which brings into play the absolute power of the sovereign: HOBBS (1904 [1651]), part I, ch. XIII–XIV; part II, ch. XVII.

sovereignty, which claims the original character, absoluteness, and uniqueness of political power and prevents the recognition of constitutional importance for different social bodies or territorial entities within it.⁸ The pages in which Rousseau shows us the indivisibility of sovereignty⁹ are exemplary. In Rousseau's legal order, social cohesion is only made up of individuals, the politically active citizens. Social bodies or territorial entities cannot affect or complicate that perfect sovereignty represented by the sovereign people.

This is the approach that knows renewed developments in the 19th and 20th centuries. Despite some relevant changes in the legal system, in these centuries the attitude to link rights and social cohesion in a monistic way was confirmed and consolidated.

C. *The idea of an equivalence between law and statutory law*: The assumption of an equivalence between these concepts is related to a process of *reductio ad unum* of the sources of law and of overcoming the multi-normative dimension which was related to the different legal fields. This process, which takes place on both a theoretical and real level, was obtained¹⁰ with the use of two systematic instruments: the principle of legality (i. e. the idea that law must be produced only through the law enacted by political power) and the codification of law (i. e. a particular way of organizing legislative norms in relation to a main legal field, so that they present themselves as a closed and self-sufficient system of norms).

D. *Jurisprudence, case law, and hypostatization of law*: In the context of an equivalence between law and statutory law, jurisprudence and also case law change their function from sources of legal production to instruments that ensure law enforcement. It is a process that, not by chance, has roots in the theoretical turn of the Early Modern Age which discloses the perspective of the *Systema* in substitution for that of the *Ordo* and modifies the tasks of the jurist. The jurist's constructive activity, from the epistemological point of view, no longer responds, as in the culture of *ius commune*, to a reason that recognizes order from phenomenal reality. Modern reason insists on the human being, not on things. As Grotius explained, order is obtainable, *sicut mathematici*,¹¹ by way of abstraction. This new jurisprudence proceeds from

8 FIORAVANTI (2004) 47–68; COSTA (1999) 66–160; STOLLEIS (2008) 194–215.

9 ROUSSEAU (1762), lib. II, ch. IX.

10 GROSSI (2000); HALPÉRIN (2014) 1–34.

11 GROTIUS (1625), Prolegomena, post medium e ante finem.

axiomatic postulations and is carried out as a logic-deductive activity, oriented to the demonstration of truth.¹² It no longer draws from social facts to build and justify order; on the contrary, it is conceived starting from formal assumptions. In this way, jurisprudence carries out a new task: it aims to hypostatize rules and ordering categories and to promote the subsumption of the reality in them. This trend was completed in the 19th century, mainly thanks to the success of Savigny's approach to the study of Roman law as current law (*System des heutigen Römischen Rechts*) and its refinement in the conceptual construction of the *Begriffsjurisprudenz*.¹³

Also in this context, case law – think of the 19th-century success of the institution of supreme courts and courts of *cassation*¹⁴ – was configured as a tool of implementation of the positive law that checks the proper enforcement of statutory law. The production of case law is a way to support axiological and ideological options at the basis of the normative choices made by the legislator.¹⁵

E. *The programmatic value of the principle of equality and the subsumptive dynamic for providing legal protection*

The protection of individual rights implies consideration of different contexts (social, political, cultural, anthropological) and values (freedom, justice, solidarity, dignity, etc.) through the unique lens of equality. Before referring to a real socio-political context, the principle of equality promotes a project for social and political reality to create a society of free and equal citizens.¹⁶ This programmatic egalitarian attitude imprints a typical top-down dynamic in the relationship between rights enunciated in statutory law and social facts, since this kind of legal system is conceived to subsume reality in its norms.

The relationship between rights and equality is oriented in such a way; it is a matter of applying the programmatic egalitarian attitude to the relationship between the rights enunciated by law and the reality of social facts. Rights – thanks to the fact that they are provided for by statutory law *ex ante*

12 HESPANHA (2012) 307–358; TARELLO (1976); VILLEY (2013).

13 CAPPELLINI (1984); VANO (2000); HAFERKAMP (2004); RÜCKERT (1988 and 2011); REIS (2013); HESPANHA (2012 and 2013).

14 HALPÉRIN (1987); TARUFFO (1991); ALVAZZI DEL FRATE (2005); MECCARELLI (2005).

15 MECCARELLI (2011a).

16 FIORAVANTI (2009) 105–133; ROSANVALLON (2011); MECCARELLI (2017).

and in a general and abstract form – assume the position of a pre-established factor, the factor of invariance. The multiplicity of social configurations and the claims of legal protection can be traced to this factor of invariance. Equality, besides being the lens with which law ‘sees’ reality, gives shape to legal protection, in the sense that it conforms to a project for social and political reality.¹⁷

3 Regimes of legality and the governance of diversities

Monistic legal systems in the 19th century were designed to protect rights, but not on the basis of diversity. Of course modern law has been concerned with diversity, but necessarily only in an instrumental way if we consider that the core of its development has been represented by the issue of the individual before that of the society. For this reason, rather than legal discourse on diversity (that never takes the importance of an ordering factor of the legal order), legal experience in the Contemporary Age offers us many different legal solutions on diversities to provide answers on distinct and multiple fronts.

I would like to analyze below three types of responses to the problem of diversity implemented in the social, criminal, and colonial legal fields. A final example will be proposed in the conclusion that will concern a different kind of regime of legality. This will consist of the creation of a higher normative regime, the constitutional regime, together with the introduction of a new class of rights, such as fundamental and human rights, that would be unavailable to the sovereign political power of each state. This last development represents, in my opinion, the real inflection point of the monistic approach to the relationship between diversity and law.

3.1 Social issues and special statute laws: Integration of new areas of legal protection in the project for equality

Social issues during the 19th century represent a major challenge to the egalitarian construction of the civil code. As is well known, social change, as a result of the Second Industrial Revolution, led to the emergence of novel needs for legal protection, which the codified private law was not able to

17 MECCARELLI (2017).

provide. Problems linked to labor in industrial production – such as liability for accidents at work, social security, and health protection, including the features of the employment contract itself as a special contract – led to the emergence of a new sphere of rights, a new disciplinary area (social law and then labor law). Moreover, a complication in the framework of constitutionally relevant social actors arose: new collective subjects such as trade unions and mass political parties took shape.¹⁸

In this new scenario, social rights represented an important novelty for our theme: they responded to a different demand for legal protection, shifting the focus from the individual to social structure; they provided legal protection for individuals as collective rights; they assigned to the state an *obligation “to do”*, while the “traditional” civil rights required from the state an obligation “not to do”.¹⁹

Social rights are also interesting in another respect: the implementation of this new level of legal protection was, in fact, obtained through the use of *special legislation*. In response to the challenge of social issues, the Italian legal system responded by activating normative regimes, outside the scope of the codified law.

Let us ask ourselves the importance of this novelty with respect to the monistic legal configuration that I described in the previous chapter. First of all, we must consider that this novelty affected the *axiological framework* at the basis of the civil code. By means of social law it was a matter of improving a socio-economic function for private law; the consequence was also to draw a legal space for *social solidarity*, which was not included in the values protected by the civil code.

We know that this issue strongly questioned legal thought, in both private and public law, during the 19th and the first half of the 20th centuries; and we also know that the debate that followed resulted in several solutions, from the revision of the methods of interpretation of law, to a redefinition of the boundaries of legal fields (think of the idea of social law as an autonomous legal field to the discovery of comparative law),²⁰ to the proposal of a rewriting of the civil code as a code of private social law.²¹ In this wide and

18 CAZZETTA (2007 and 2017); GROSSI (2000); MARCHETTI (2006); GREGORIO (2013).

19 COSTA (2018); LONGO (2012).

20 PETIT (1995); HALPÉRIN (2001); PADOA SCHIOPPA (2001).

21 SABBIONETTI (2010); GROSSI (2000); CAZZETTA (2007); AUDREN (2013).

complex debate, we can find different attitudes towards the significance of special laws for the legal system.

In the Italian debate, in particular in the final decades of the 19th century, all special statute laws above were seen as a way of responding to the new social demand for legal protection, without destabilizing the basis of traditional private law in the civil code. Above all, it is the *dialectic between special statute laws and the code* that took importance in relation to the construction of the legal system.²² It was precisely the tension (or the axiological differential) between them, to offer the opportunity for the judge to play a role in the composition of the diverse interests and values protected by the different norms. This is a theme that was carried out by those jurists who, while considering the possibility of a social function for private law, still proposed a traditional vision of the legal system, based on liberal values and therefore, on the conceptual chain of natural person/equality/legality.

Biagio Brugi, Professor of Roman and civil law, offers an interesting example in this regard. In his vision, society, which is in continuous evolution,²³ induces changes in law; there is a “*latent law*” that can be discovered by the judge and the jurist, above all, through an evolutionary interpretation of the law.

Brugi sees in special law a useful and necessary instrument (“special laws are the only way for us to follow the development of the law”)²⁴ in order to grasp the change that society requires from the law and thus “*to face the ageing*” of the code.²⁵ Special law’s usefulness, Brugi notes, is greater in historical periods of transition like the current one, in which old and new interests from different sectors of society coexist. Special law considers new demands and brings out latent law without replacing and affecting the civil code. It also offers to jurists and judges the heuristic margin they would not have otherwise.²⁶

Through special statute law, new ordering principles can be introduced into the legal system: principles based on real and legitimate interests spread in society that express “ambitions and expectations in the national conscious-

22 GROSSI (1989); GROSSI (2000) 21–25; CAZZETTA (1991 and 2007); MECCARELLI (2011a).

23 BRUGI (1891) 172.

24 BRUGI (1905) 32.

25 BRUGI (1911a), vol. I, VII and 172.

26 BRUGI (1901) 167 and BRUGI (1889) 190–203.

ness". The function carried out, in the past, by customary law, adds Brugi, is now – in the most complex framework of industrial society – to be recognized in special statute law.²⁷ This special law brings out the new law and it does not matter if in a way it is not harmonized with the pre-existing law; it will be above all a duty of legal science to understand and *explain old and new law as a system*. The proliferation of special legislation is seen positively because it facilitates precisely that process of progressive construction of the legal system on the scientific level and, therefore, the groundwork for a more complete reform of statutory law, including also a new codification more in tune with the historical phase (and therefore, in Brugi's view, in the perspective of a new code of private social law).²⁸ For this *preparatory function*, the special law also has, in doctrines like this one, a systemic value.

There is one last aspect of his doctrine that deserves to be highlighted: it is a reflection made precisely in relation to the problem of the relationship between *law and diversity*. Special law represents the most suitable instrument to allow the legal system to *appreciate inequalities*;²⁹ special statute laws in fact "break the comfortable uniformity of the general laws"³⁰ and therefore serve to correct precisely those "abstract equalities" which each code tends to produce (the code binds the "inequalities of real life to a network of abstract equalities in which the greatest antitheses are forced"); special laws satisfy, therefore, the "need to bring the unforgettable diversities of the social substance back into legislation".³¹

27 BRUGI (1891) 96–97.

28 BRUGI (1889) 194–203; BRUGI (1891) 172.

29 BRUGI (1911b) 42: We gained "the beneficial persuasion that not infrequently it is appropriate to replace the abstract equality of a single law with certain differences of special laws, in order to treat differently, for the sake of justice, unequal quantities" ("la benefica persuasione che non di rado è opportuno sostituire all'astratta eguaglianza di un'unica legge certe diversità di leggi speciali, per trattare diversamente, a scopo di giustizia, quantità diseguali"). This awareness leads to "a sense of social equivalence of all, which is like a new aspect of legal equality" ("sentimento di una equivalenza sociale di tutti, che è come un nuovo aspetto della eguaglianza giuridica") (27). See also BRUGI et al. (1927) 15.

30 BRUGI (1908) 49: "they break the convenient uniformity of general laws".

31 The civil code reduces the "real-life inequalities in a network of abstract equalities in which the greatest antitheses are forced" ("le diseguaglianze della vita reale in una rete di eguaglianze astratte in cui sono forzate le più grandi antitesi"); special laws thus satisfy "the need to bring back into legislation the unforgettable diversity of social substance" ("il bisogno di riportare nella legislazione le diversità indimenticabili della sostanza sociale"), BRUGI (1908) 54.

I insisted on Brugi's thought because it seems to me very representative of the recurring arguments dealt with by doctrine on the function of special law and on its relationship with the civil code. The issue of the function of special laws – as a tool to face the phases in which old and new needs coexist – returns in several other works on the social function of private law, such as the well-known essay by Vittorio Polacco, *La funzione sociale della legislazione civile*³² or in the essay by Camillo Cavagnari, *Nuovi orizzonti del diritto civile*,³³ and in that of Enrico Cimbali, *La nuova fase del diritto civile negli rapporti economiche e sociali*,³⁴ just to mention a few.

The relativization of formal equality is another recurrent argument in this debate. Vittorio Polacco, this time in the pages of his other well-known essay *Le cabale del mondo legale* (The cabal of the legal world), reiterates Brugi's theses, outlining that special laws present the great advantage of taking into account “the *de facto* inequalities, by way of exceptions to the common law” (i. e. the law in civil code); this is understood from “the particular conditions of the various social classes”; it is a matter of considering “a living and palpitating reality more than all the systems conceived or conceivable by the aesthetes of law”.³⁵

In 1901, Bassano Gabba, reflecting on already thirty-year-old special social legislation, explains that the principle of “law-equality” must be replaced by the principle of “law-proportion”; it will no longer be the time for legal uniformity, on the contrary, it will be the time of legal specialty “that must be proportionate to the various conditions of the citizens”. In fact, if society is an organism, Gabba's discourse continues, law must then regulate the actions of individuals “so that these actions achieve, all in tune, a supreme purpose: the well-being of the organism”. In particular, law no longer performs a function of simple protection; rather it provides a function “of

32 POLACCO (1929) 35–37.

33 CAVAGNARI (1891).

34 CIMBALI (1907) 37–55.

35 POLACCO (1928) 51: “the real inequalities, due to exceptions in common law, if the particular conditions of the various social classes so require, a reality that is alive and throbbing more than all the systems conceived or conceivable by the aesthetes of Law” (“delle diseguaglianze di fatto, per via di eccezioni alla legge comune, se così vogliono le condizioni peculiari delle varie classi sociali, realtà viva e palpitante più di tutti i sistemi pensati o pensabili dagli esteti del Diritto”).

integration and improvement of the forces of individuals”. It will be “*law-integration*” rather than “*law-indifference*”.³⁶

The same attitude to understanding latent law, by way of the axiological differential between code and special legislation, is present in the writings of Francesco Carnelutti devoted to issues of labor law.³⁷ Carnelutti sees in social legislation *extra codicem*, not a mere exceptional or contingent law; on the contrary, he considers this as a place of occurrence of a “latent law [...] which is, independently of the norms of the codes, in the depths of social life”;³⁸ social law, by stressing the current common law (i. e. the law in civil code), allows the *emergence of a new law*, which the jurist can correctly identify and describe, by way of interpretation of the law.

In the first decades of the 20th century we can find this idea, together with the one that recognizes in special legislation a preparatory moment of new ordinary law, in the studies carried out by Pietro Cogliolo and Filippo Vassalli on *war legislation* related to civil law issues.³⁹ In particular, Cogliolo considers the axiological basis of special war legislation in two ways: first of all, it is an example of *ius singulare*, which – even though it represents “a deviation from fundamental principles, justified by extraordinary needs of time and place”⁴⁰ – is the bearer of its own *ratio* and “therefore it is not true that singular law should have no other interpretation than material and literal law; on the contrary, it is possible to penetrate its spirit and to enforce it, with the breadth that is compatible with the exceptional boundaries, in which and for which the singular norm was created.”⁴¹ Furthermore, special war legislation may also consist of norms which, although required from the war conjuncture, do not consist of exceptional measures; on the contrary,

36 GABBA (1901) 10–18: “non sarà più la uniformità, ma la specialità che dovrà appunto *proporzionarsi* alle svariate condizioni dei cittadini”; “in modo che queste riescano tutte intonate e dirette a uno scopo supremo: il benessere dell’organismo”.

37 CAZZETTA (2007) 192–202.

38 CARNELUTTI (1913) 8–10: “diritto latente [...] che sta, indipendentemente dalle norme dei codici, nell’intimo della vita sociale”. We can find the same attitude in CIMBALI (1907).

39 VASSALLI (1939); COGLIOLO (1916). See MOSCATI (2016).

40 COGLIOLO (1916) 5: “una deviazione dai principi fondamentali giustificata da esigenze straordinarie di tempo e di luogo”.

41 COGLIOLO (1916) 7: “perciò non è vero che la legge singolare non debba avere altra interpretazione che quella materiale e letterale, ma è invece possibile penetrare nel suo spirito e applicarla con quella larghezza che si concilia con i confini eccezionali nei quali e per i quali la norma singolare è stata creata”.

they “contain true principles of common law”. As a consequence, when the war will be over, “there will remain some rules created in wartime, which appear worthy of continuing even in peacetime”.⁴²

On the basis of these examples, we can try to derive some general evaluations on the significance of the juxtaposition of code /special statutory law with respect to the problem of the governance of social differences. It seems to me that, even though social issues introduced important innovations on performing legal protection, they did not cause a discontinuity with respect to the model of governance of diversity represented by the civil code.

In fact, it seems like it was a change of plan of action and not of the emergence of a form of legal protection with a different nature. The social question in the 19th century and for a large part of the 20th century was still addressed, above all, as a question of *liberty* (to be guaranteed even to those in socially disadvantaged conditions), in line with the original idea of providing rights in order to protect the self of the individual.⁴³ The other aspect connected to this problem, the claim of *justice*, seems to me to stay in the background.

As we have seen, the strong argument in support of social law was the gap between formal and substantive *equality*. The objective of social law is therefore a more effective enforcement of the principle of equality, so as to bind the performativity of rights to the new value of solidarity too. Paradoxically, the spaces of social rights are spaces where the programmatic aptitude of the principle of equality takes on more strength, because it gains a greater capacity to set itself in relation to the social facts. Special law in social matters is a legal sphere that adheres to society, but in line with the principle of legality; within the format of statutory law, it still performs in a subsumptive way.

In this use of special legislation we can, therefore, recognize an approach aimed at saving the framework of codified law, by integrating the process of implementing social protections into the program for equality, the same program that already characterized the protection of individual rights.

42 COGLIOLO (1916) 7, 8: “contengono dei veri principii di diritto comune”; as a consequence, when the war will have finished, “rimarranno tuttavia alcune norme create nel tempo di guerra, che si appalesano degne di continuare a vivere anche nel tempo di pace”.

43 BOBBIO (1990) 67–86; LONGO (2012) 8–17; CAZZETTA (2019).

One last remark is related to the propensity of Italian legal doctrine to carry out an integrated reading of codified law and special law. The commitment to an evolutionary interpretation of the law, in fact, is conceived as an interpretation of statutory law.⁴⁴ Therefore, it tends to remain within the perimeter of the principle of legality. The complication of the regimes of legality does not break the system of legal monism.

3.2 Political dissent and the double regime of legality in criminal law: an exclusionary function for special statute laws

Criminal law is the second area in which I would like to observe the relationship between special law and codified law in relation to the problem of diversity. Social law, indeed, represents only one side of the answer of European states to the social question during the 19th century; the other dark side is represented by exceptional criminal law, designed to neutralize the political dissent that arose from social claims.

In order to analyze this second example of special statute law let us consider, first of all, that the principle of legality represented the main ordering factor of penal systems on the European continent. In continuity with the ideas expressed during the Enlightenment (think, for example, of Beccaria's ideas),⁴⁵ statutory law, organized in the form of a *criminal code*, was used to perform as a monistic device, determining the normative fabric of criminal law, its functions, and its configuration as a closed system. Under this light, each form of criminal law needed to be included within the articulated scope of the codified law.

However, if we consider the regimes of legality during the 19th century, this statement seems to be only partially confirmed. Legal penal systems, indeed, consisted in a *dual normative regime*, an ordinary regime, i. e. the *penal code*, and a special regime, i. e. *special and emergency statute laws*. It is a matter of a quantitative growth and qualitative complication of the penal legal system, which can be easily observed in the phase of social and political change that characterized the end of the 19th century. In that conjuncture, the hegemonic rhizome of legality in criminal law (statute law as a toll to

44 COSTA (1989); GROSSI (2000); MECCARELLI (2011a).

45 BECCARIA (1965 [1764]), § I–V.

fully exercise sovereignty)⁴⁶ came back to emerge again. I am thinking in particular of the fight against anarchist and socialist political movements, that in Italy reached a dramatic turn in 1894 and 1898,⁴⁷ quite in synchrony with other European countries such as France, Germany, and Spain.

In these regions, economic and social changes produced by the Industrial Revolution stimulated the emergence of new forms of political organization connected to the exercise of freedom of association, like trade unions, mass political parties (in particularly related to socialist and anarchist ideals), which gave voice to discontent from the sectors of major social disadvantage. In this novel framework, political dissent took radical forms, very soon becoming an issue for the established social and political order; the conflict was perceived as a real “fight for survival”⁴⁸ for the ruling class in liberal states. The reaction to such a danger consisted in enforcing extraordinary measures in order to increase the capacity of social control and the level of punishment. In particular, these norms aimed to anticipate the possibilities of problems of those behaviors, which constituted possible premises for criminal facts, connected to political claims; the aim was, in fact, “to hit anarchism at its source”.⁴⁹ Sensitive areas of upcoming political rights were therefore being affected.

In the following pages I will analyze more closely the legislative response and the dynamics of the expansion of the penal system in Italy. I will also compare this experience with France’s in order to consider, with more elements, the function of special criminal law.

In Italy a brand new penal code (the so-called *Zanardelli Code* of 1889), which was in tune with the better standards of liberal legal culture,⁵⁰ had just been enacted when it came to issuing the emergency laws against anarchism and socialism. In that conjuncture we can observe, therefore, an interesting example of a dual normative regime in statutory law (which is a recurring dynamic in the Italian penal system).⁵¹

46 COSTA (2007); SBRICCOLI (2009 [2001]) 1240–1244; SBRICCOLI (2009 [2002]) 31–32; SBRICCOLI (2009 [2004]) 233–234.

47 COLAO (2007); BERTI (2009); MECCARELLI (2011b).

48 DIENA (1895) 318–319.

49 DIENA (1895) 306.

50 SBRICCOLI (2009 [1998]) 616–623.

51 SBRICCOLI (2009 [1998]) 592–597; LACCHÈ (2016).

In particular, political emergency was contrasted with the declaration of the *state of siege* (a siege against an enemy from within the state territory) in Sicily (January 13, 1894) and in Tuscany (January 16, 1894); besides the enactment of extraordinary measures, the suspension of ordinary criminal law and the enforcement of war criminal law would be issued. Moreover, on July 19, 1894 Parliament approved the so-called 'Anti-anarchist acts': nr. 314 which set new norms on crimes committed with explosive materials; nr. 315 which established new provisions on instigation to commit a crime and apologia for criminal offense, committed through the press; nr. 316 which provided special measures for national security conferring extraordinary powers to police authorities (a temporary act enforced until December 31, 1895). A second emergency happened in 1898: a state of siege was declared on May 7 and 9, 1898 in Milan, Florence, Livorno, and Naples. The act of July 17 nr. 297 brought back into force (until June 30, 1899) the temporary previous act nr. 316 of 1894, in order to provide urgent measures for the maintenance of national security and public order. The framework of the emergency legislation of the last decade of the 19th century was then concluded with one final measure: the enactment of a decree, i. e. an act with the force of a statute law, issued directly by the executive power, before it was discussed and approved by Parliament. It was the controversial decree of June 22, 1899 nr. 227, enforcing measures on national security and on the regulation of press; with these norms the government, chaired by Luigi Pelloux, intended to close the state of emergency by lending stabilization in a special law to the whole set of measures for control of political dissent, provided in the previous years by way of emergency law.⁵²

In this sequence of measures, we find three different forms of special criminal law: *declarations of the state of siege* acknowledged the state of (civil) war against the anarchist and socialist, in order to face this enemy with the special tools of war criminal law. *Special statutory laws* in order to neutralize political dissent added new specific measures to the discipline already provided for by the penal code. The *decree of the executive* tried to enforce

52 The decree nr. 227 (June 22, 1899) would be withdrawn on April 5, 1900. A few weeks earlier, in a famous ruling on February 20, 1900, the Supreme Court (Corte di Cassazione di Roma), by upholding an appeal by a convicted felon for an offense stipulated in that decree, considered the decree as having already expired as a consequence of another decree enacted from the government on June 30, 1899 in order to suspend Parliament (on the basis of the king's prerogative to prorogue Parliament's sessions).

emergency measures circumventing Parliament's scrutiny. The emergency measures mentioned above affected *freedom of assembly, of association, and of speech*, extending the field of action of the penal system, weakening the accuracy in the description of criminal offense, enriching the catalogue of criminal offenses, increasing the degree of penal punishment, and also allowing police control through preventative measures.

These kinds of special norms combined in ordinary penal law in two different ways: providing either *modifications* or *integrations of the normative regulation already available* or providing *new norms not to be included in the criminal code*. In both cases we can see a complementarity between ordinary and extraordinary rules: criminal code and exceptional measures composed together *a unitary normative framework* devoted to the protection of liberal political order.

In France the situation was similar: in response to anarchist terrorist attacks (but indirectly, also to socialist danger) extraordinary legislation was issued between 1892 and 1894: the act of April 2, 1892 provided alterations of articles 435 and 436 of the French Criminal Code (crimes committed using explosive materials); the act of December 12, 1893 provided alterations of articles 24 paragraph 1, 25, and 40 of the law of July 29, 1881 on the regulation of freedom of press; the act of December 18, 1893 enacted norms on conspiracy; the act of December 18, 1893 carried out alterations of article 3 of the act of June 19, 1871 on explosives; the act of July 28, 1894 enacted special provisions (including also preventative measures) in order to neutralize anarchist plots. Despite some relevant differences on the way to combine special law and criminal code, French and Italian cases reveal the same axiological approach.⁵³

Here, too, it was a matter of targeting the organization of political dissent, including in the scope of criminal law. In the French case, no different from what would happen in Italy a couple of years later, freedom of association, of assembly, and of speech were affected. From the point of view of legislative regimes, also here exceptional norms had the effect to *widen the penal system*, modifying the existing ordinary discipline and providing completely new norms. In parliamentary debates such as in legal doctrine⁵⁴ emergency measures were presented as complementary in relation to other penal norms.

53 For a more in-depth analysis, see MECCARELLI (2011b).

54 JOUSSEAUME (1894) 6 and 43–44; LOUBAT (1895) 5.

A meaningful similarity between the Italian and French cases can be found in the legal discourse on these provisions. This can be seen first of all by considering the arguments to justify the dual level of legality that was given in the legal debate both in Italy and in France. The recurring argument – a similar discursive approach found in countries such as Spain, in which in that same phase the problem of political dissent was dealt with⁵⁵ – is that of the *defense of social order* against the subversive projects expressed by the anarchist and socialist political movements. From such absolute threat – and not just “for the safety of a determined state, but for *all civilized society*”⁵⁶ – the state was legitimized to defend itself using appropriate special measures.

It is interesting to consider that the criminal relevance of political dissent was perceived as a consequence of an *abuse* in exercising political rights.⁵⁷ Jean Casimir-Perier, at that time Prime Minister, during the parliamentary debate on the law of December 12, 1893, spoke about the need for a “*social preservation*”⁵⁸ against the anarchist threat; it was to face political actors (and persons) which put themselves in contrast with *every kind of social organization*.⁵⁹ As a matter of fact, this last argument is very significant, those measures did not affect the freedom of citizens: they were only directed towards those “*who put themselves outside society*”.⁶⁰

The Italian Minister of the Interior and Prime Minister Francesco Crispi also argued on the *abuse of constitutional guarantees* in order to justify exceptional measures.⁶¹ In a statement of August 9, 1894 addressed to the heads of the local government administration (the *prefetti*) giving guidelines on the enforcement of the three anti-anarchist acts of July 1894, he explained that “the use of law cannot be without rules; freedom cannot be without a discipline” and “our democratic monarchy must support the greatest individual, political, and social freedoms secured by the order firmly preserved”.⁶²

55 MARTÍN MARTÍN (2009).

56 DIENA (1895) 318: “pour la sécurité d’un État déterminé, mais pour toute société civilisée”.

57 ROLIN (1894) 126.

58 JOUSSEAUME (1894) 58.

59 DIENA (1895) 318; ROLIN (1894) 125–126.

60 LOIS annotées (1894) 649: “qui se sont placés eux mêmes hors de la société”.

61 COLAO (2007) 708.

62 CRISPI (1894) 34, parte II, 360: “l’uso del diritto non può stare senza una regola; la libertà non può stare senza una disciplina” and “la nostra Monarchia democratica deve offrire lo

The argument of social preservation against the “impolitic destructiveness” of some political actors⁶³ highlights a “performative’ aptitude” of the legal measures against the enemy,⁶⁴ and also an *ideological short-circuit* in the liberal discourse on political rights. It is on this basis that the nature of a “political crime” was not used for crimes with an anarchist foundation.⁶⁵ The fact of denying the *political nature* of this kind of crime had the outcome of excluding them from the special treatment accorded by the law to crimes of opinion. For example, we can think of the refusal to grant extradition, or the requirement of a jury in trial.

In this perspective the distinction between instruments for the *protection of moral order* and for the *protection of social order* is also relevant. If the *protection of moral order* has an object limited to immoral behavior, the *protection of social order* is broader, including any behavior potentially dangerous “to political order and to state order.”⁶⁶ The criminal code would aim at the *protection of the moral order*; special legislation, instead, would be devoted to the *defense of the social order* (of that social order assumed as being the only possible order), to neutralize the threats to its very own existence.⁶⁷ By specializing the function of norms, the dual regime of legality allows the penal system, when facing the issue of political dissent, to deal with the twofold issue of *preserving the effectiveness of political rights* and *denying their abuse*.

That is why we argue that special criminal law would be structurally necessary to the very centrality of the criminal code. The differentiation of normative regimes ensured that political dissent could be addressed by special instruments, and, at the same time, prevented, to reconsider the setting of criminal code in order to deal with the unsolvable latent contradictions of the liberal legal system, stressed between protection of individual freedom and protection of the established order. The dual regime of statutory law is considered, therefore, as a device conceived in order to defend the constitutional foundation and the configuration of this legal order. They were the

spettacolo delle maggiori libertà individuali, politiche, sociali assicurate dall’ordine saldamente mantenuto.”

63 ALESSI (2011) 122; see also MARTÍN MARTÍN (2009) 899.

64 COSTA (2009) 5.

65 DIENA (1895) 319–322; ROLIN (1894) 126–129.

66 ARANGIO RUIZ (1896).

67 ARANGIO RUIZ (1896); UGENTI SFORZA (1893–1899) 56; ROLIN (1894) 126; JOUSSEAUME (1894) 58.

foundation and configuration of a *conformative* kind, whose attitude was to refuse inclusion (or even to ensure exclusion) of new socio-political phenomena to the liberal model.⁶⁸ In that kind of legal order there was no margin to incorporate social diversity in the project for civil coexistence.

For this reason – to return to considering the ideological short circuit which emerged above concerning the *abuse* of political rights – the exercise of political dissent was protected as a freedom insofar as it was consistent with the fundamental values of liberal order; but whenever it became a vehicle of promoting a new model of society, political dissent challenged the holding capacity of that rigid constitutional foundation, becoming a problem to be solved with criminal law.

What we have tried to highlight shows how criminal law is a relevant field for analyzing the relations between ordinary (codified) law and special statute law; here special legislation is exceptional legislation, which is therefore characterized by a tension to exclude the social field's potential or real enemies of the established order. The maintenance of legal monism and the implementation of the program for equality needed such exclusionary devices.

3.3 Colonial exception and colonial special law: an anti-assimilating approach to governance of diversity

A third example of special law applied to the problem of diversity can be investigated within the colonial context in the 19th and 20th centuries. Colonial law consists in a special legal regime, legitimated precisely from the idea that colonial diversity is irreducible and incompatible with respect to the egalitarian understanding of the legal system. This was a consequence of the fact that colonial territories seemed to belong to a different space-time configuration in relation to the standards of civilization.⁶⁹

According to this premise, Italian legal science of the first half of the 20th century (especially after World War I) recognized in colonial law a specific scientific discipline, as attested to by the growing number of studies in this field⁷⁰ devoted to the search for foundations, boundaries, and features; this

68 CAPPELLINI (2011); COSTA (2009) 14–16; CAZZETTA (2009).

69 COSTA (2004/2005 and 2009); NUZZO (2004/2005); MEZZADRA/RIGO (2006); MARTONE (2008); BASCHERINI (2009 and 2012); BASSI (2018). See also KOSKENNIEMI (2001) 11–178; PETIT (2002); SOLLA SASTRE (2019).

70 BERTOLA (1943). See COSTA (2004/2005).

represents quite an autonomous legal field in relation to the others arisen during the 19th century.

In 1918 Santi Romano – a reference author in the field of constitutional and administrative law – published a course on colonial law.⁷¹ In his work, he drew the traits of the discipline in relation “to the various branches of public and private law”, identified its “formal and material” sources, and defined its nature as special law. A similar attitude aimed at defining the domain of colonial law can be found in many other contributions. Even if the theoretical edification does not seem to have achieved conclusive results,⁷² it is evidently a commitment to explore the possibility of a *dogmatic understanding* of colonial law,⁷³ or to describe its *principles*,⁷⁴ or to consider colonial law in a *theoretical* and *historical perspective*.⁷⁵ Colonial law takes the features of a legal *system* that admits internal partitions⁷⁶ such as public law⁷⁷ or labor law,⁷⁸ private law, administrative law, penal law, international law, procedural law, comparative law, etc.⁷⁹ It is much more than just a special kind of statutory law: it is a “single discipline”⁸⁰ that includes various branches of law. The scope of its specialty is also reinforced by corresponding special jurisdiction.⁸¹

There are many issues that could be taken into account considering colonial law. Here we want to focus in particular on the features that make this legal field *special*. As Romano explains, it is a “*non-exceptional special law*”: its norms are differentiated from the ordinary norms of the state, nevertheless colonial law is still a “normal law”. It is not special *per se*, as in the case of exceptional law that consists in “anomalous” law, due to conjuncture (for example situations of war, emergency, etc.); colonial law, explains Romano,

71 ROMANO (1918).

72 MARTONE (2008) 30–44.

73 CIAMARRA (1915).

74 BORSI (1938a); TAMBARO (1934).

75 MALVEZZI (1928); MONDAINI (1908 and 1939).

76 BORSI (1938a) 120–121. See also MALVEZZI (1928) 15–16.

77 GIANTURCO (1912); ARCOLEO (1914).

78 PERGOLESII (1938).

79 BORSI (1938a) 123–127; CUCINOTTA (1933).

80 ROMANO (1918) 21.

81 ROMANO (1918) 196–202; MALVEZZI (1928) 255–280; CUCINOTTA (1933) 216–308; BORSI (1938a) 289–335. See MARTONE (2002 and 2008); BASCHERINI (2009) 255. On the different systems of mixed jurisdiction applied to the semi-colonial territories, see FUSAR POLI (2019).

appears special only when compared with another law that rules similar objects. The specialty of colonial law, in other words, is a consequence of the fact that it applies to a special territory (the colony) within the state.⁸² The same approach is also confirmed in later works such as those of Umberto Borsi: the specialty is the consequence of the “adaptation of rules and legal institutions to the environmental conditions which they refer to”.⁸³ In fact, colonial and metropolitan law are “two kinds of territorial law” enforced in different parts of the territory of the state.⁸⁴

Colonial law is, therefore, conceived as a separate legal regime, albeit within the same state legal order.⁸⁵ Metropolitan and colonial law represent two separate particular spaces within a single legal space. Coessential to the concept of the colony is the impossibility of a fusion with the metropolitan territory. Colonial law is incompatible with an assimilatory paradigm; it has, indeed, an anti-assimilatory function.⁸⁶

In order to explain this, it is necessary to consider the axiological foundation of the autonomy of colonial law which is twofold: it serves to support the “social function of colonization”, i. e. the “moral conquest” of the colonized peoples, “associated with the exploitation of the natural resources of the territories inhabited by them”.⁸⁷ This composition of these two tasks – to civilize colonial people and to satisfy the interest of the civilizer state – is an

82 ROMANO (1918) 22–23, 28–31 and 101–114; CUCINOTTA (1933) 62–63.

83 BORSI (1938a) 130: “La specialità del diritto coloniale, che non è anomalia od eccezione, bensì adattamento delle norme e degli istituti giuridici alle condizioni dell’ambiente al quale si riferiscono.”

84 BORSI (1938a) 129. See COSTA (2004/2005) 195–199; BASCHERINI (2009) 258.

85 CUCINOTTA (1933) 5–6.

86 ROMANO (1918) 33, and also 111–113: “A colony, in fact, that has been amalgamated and has become an integral part of the metropolis is no longer a colony” (“Una colonia, infatti, che sia stata fusa e sia diventata parte integrante della metropoli non è più colonia”). See COSTA (2004/2005) 208–210; SOLLA SASTRE (2015).

87 BORSI (1938a) 8: “Il fine diretto” of the colonizing states “più che il perfezionamento di altri popoli in sé stesso, è la conquista morale dei medesimi associata allo sfruttamento delle risorse naturali dei territori da essi abitati”. The clarification on p. 9 is also meaningful: “Behind abstract ideal statements it is always necessary to seek the reality of concrete spiritual or material interests of the colonizing states, which however in our time often coincide with those of the colonized countries.” (“dietro le astratte enunciazioni ideali occorre sempre ricercare la realtà di interessi concreti spirituali o materiali degli Stati colonizzatori, che però al tempo nostro coincidono spesso con quelli dei paesi colonizzati.”)

important aspect, since it defines the particular notion of the specialty of colonial law.⁸⁸

Colonial law differs, therefore, from the previous examples we have considered: in the case of social law, the special legal regime was aimed at the integration of new subjects and social phenomena into the equality initiative; in the case of criminal emergency law, the special legal regime corresponded to an exclusionary strategy (the enemies of society must be placed outside society); colonial law shows us an anti-assimilating approach in employing special law. These last two look very similar. The anti-assimilation approach, however, does not represent the exclusion of colonial subjects from society, as was the case of the enemy of society within criminal emergency law; the colonial subject is still a member of society, he is subjected to its rules; although special, they are normal rules according to the cultural and anthropological gap of colonial space / time.

The aim of assigning different legal statuses to different natural persons is obtained through a distinction between citizens and colonial subjects:⁸⁹ citizens are considered as *subditi optimo iure* (i. e. “constituent elements of the state”); this is a quality not recognizable in colonial subjects which are only constituent elements of the colony (moreover, the quality of colonial subjects does not correspond to a general and unitary status; on the contrary it “may be different according to the different colonies belonging to the same state”). As a consequence, colonial subjects “do not have fullness of political rights, as far as the public life of the metropolis is concerned”.⁹⁰ More generally, according to this understanding we can observe that the former are citizens within the national legal system and a subject on the international level, the latter are always subjected also to domestic law (i. e. they cannot claim rights against the state as, on the contrary, happens in the case of citizens).

88 This approach is also present in other works, for example see ROMANO (1918) 105–114, in particular 107–108; MALVEZZI (1928) 8–14; GIANTURCO (1947). The mix between civilizing function and satisfaction of economic interests of the colonizing state as a feature of colonial politics is also corroborated by the critical analysis of CIMBALI (1906). See COSTA (2004/2005) 173–191; PETIT (2002) 578–589; CIANFEROTTI (1984) 15–61.

89 ROMANO (1918) 123–127; BORSI (1938a) 234–240 and (1938b); CUCINOTTA (1933) 189–209. See COSTA (2004/2005) 217–227; MEZZADRA / RIGO (2006) 179–185; MARTONE (2008) 1–44; NUZZO (2004/2005 and 2006); BASCHERINI (2009) 272–276; FALCONIERI (2011) 46–62.

90 ROMANO (1918) 125; CUCINOTTA (1933) 189.

We can ask ourselves if this anti-assimilating approach reproduces the pluralism of legal persons in the first colonial period, the Modern Age, more focused on the American chessboard. In fact, the two phases are only apparently in continuity.⁹¹

In colonial law of the 19th and 20th centuries, the anti-assimilating approach implied a withdrawal of the principle of the uniqueness of the legal person. In the Modern Age, on the other hand, the approach, although discriminatory, remained inclusive, since its aim was to include Indigenous diversity in an order of diversities already based on multiplicity of legal persons. The former assumes a monistic comprehension of the legal order, the latter a pluralistic comprehension.

There is also a second relevant difference which concerns the pre-understanding of the relationship between the legal order and territory.⁹² In the Modern Age, as we have already considered, the invention of natural rights was linked to a strategy to expand the European legal order towards the *possible space* to which the discovery of the New World had opened up. The invention of natural rights (which, in fact, not by chance are *ius peregrinandi*, *ius communicationis*, and *ius dominium*) essentially served to make it possible to operate in that possible space with the legal instruments of *ius commune*. This approach to otherness aimed at inclusion, but in the absence of an agenda for equality. The invention of rights allowed a communication system between Spanish and Indigenous people that implied for Indigenous people an obligation to conform to European organizational and cultural models.⁹³ As a final consequence, a hierarchization of society was improved through the establishment of a protective relationship (*tutela*) between European and Indigenous people. In this approach remains an understanding of the relation between legal order and territory based on a pluralistic paradigm of *iurisdiction*.

If the Modern Age is based on the suggestion of possible space, the colonial approach in the Contemporary Age assumes a different space to give shape to legal forms: that of the *decided space*. It implies the idea of a necessary interdependence between political power and territory intended in

91 One can also grasp the self-perception of specificity in the process of colonization of the contemporary age, compared to the former colonial system. See for example HARDY (1937) 2–63.

92 For a more in-depth description of the topic, see MECCARELLI (2015).

93 NUZZO (2004 and 2004/2005); NEUENSCHWANDER (2013).

a particular perspective: it is the process of affirmation and delimitation of political sovereignty that determines the territory in terms of the identification of external borders as well as its internal structure. From a theoretical point of view, the process of manifestation of political power stands before the delimitation of territory, so that space is decided by sovereignty. This scheme which has roots in natural law thought and in particular in Hobbes' theory, is durable and reproduces itself in subsequent contexts. A mature outcome is represented by the doctrines of the state in the late 19th and in the early 20th centuries. We can think of the *Allgemeine Rechtslehre*⁹⁴ (Italian legal thought is also aligned on these positions)⁹⁵ that emphasizes the state as a form of life (*Lebensform*), and in which the notion of territory remains a constitutive element,⁹⁶ corresponding to the personality of the state,⁹⁷ for the *Dasein* of the state.⁹⁸ Italian legal thought is also aligned on these positions.⁹⁹ This view is strengthened on the level of international law, which "accentuates the real nature of the state":¹⁰⁰ it recognizes the idea of political boundaries that delimit "a specific portion" of territory.

This understanding of the territory as a decided space makes geopolitical reality the object of subsumption in the legal format of the sovereign state, and makes history a place of implementation of this process. All that supports the operational model of colonial expansion is connected to the parable of national states. Although this requires an update of the traditional idea of state sovereignty, in the perspective of the implementation of the new

94 STOLLEIS (2008); MEZZADRA/RIGO (2006) 185–186.

95 FIORAVANTI (2001); SORDI (2003).

96 KJELLÉN (1917) 46–93, here 47–48: "Thinking of the land separately from the state has the consequence of evaporating the concept of state itself"; "Without land there is social existence, but nothing more" ("Wir koennen das Land aus dem Staat nicht wegdenken, ohne dass der Staatsbegriff sich verflüchtigt"; "Ohne Land gibt es gesellschaftliche Existenz, aber mehr auch nicht").

97 KJELLÉN (1917) 57: Territory "is the body of the state" ("Körper der Staates"); "it is the state itself" ("ist der Staat selbst").

98 JELLINEK (1914) 395–396: "The necessity of a delimited area for the existence of the state has only recently been recognized" ("Die Notwendigkeit eines abgegrenzten Gebietes für *Dasein* des Staates ist erst in neuerster Zeit erkannt worden").

99 FIORAVANTI (2004); SORDI (2003).

100 FISCHBACH (1922) 78–79: "International law emphasizes the substantive character of the state in almost all relations with its territory. Here the national territory is a piece of the earth's surface" ("Das Völkerrecht betont den sachenrechtlichen Charakter des Staates zu seinem Gebiet in fast allen Beziehungen. Hier ist das Staatsgebiet ein Stück der Erdoberfläche").

geopolitical concept of *empire*,¹⁰¹ we can say that during the first half of the 20th century, colonial space was essentially understood as a projection of national sovereignty of civilized countries.¹⁰² It is, moreover, a persistent approach if we consider that in 1948, the United Nations Charter (chapters XI and XX) still provided for the *trusteeship* of colonial territories in order to promote the progress of these territories and their entry into the international community.¹⁰³

The paradigm of decided space in conceiving the relationship between the legal order and territory is, then, embedded also in the colonial discourse of the 19th and 20th centuries. This means that colonial expansion is not detached from the monistic paradigm developed in Europe. The creation of a special legal regime for colonies and its anti-assimilatory function in relation to the issue of diversity has to be understood as a coherent consequence of this.

4 Concluding remarks

At the end of this survey, we can make a few brief concluding remarks. This overview aimed to show three different examples of the use of special legislation as a tool to rule diversity in monistic legal systems. It seems to me that this is confirmed in the starting statement: in the 19th and 20th centuries, legal systems tended to provide multiple responses to the problem of diversity; nevertheless, diversity did not take the prominence of a structuring category in the legal system.

Social law put in place a strategy for integration of diversity within the framework of the equality initiative; criminal emergency law (which con-

101 On this topic see the in-depth analysis proposed by COSTA (2004/2005) 229–252. See also MEZZADRA/RIGO (2006).

102 KOSKENNIEMI (2001) 98–178; COSTA (2004/2005) 252–257; MEZZADRA/RIGO (2006) 180–181; NUZZO (2012); LORENTE SARIÑENA (2010) 217–234; AUGUSTI (2013); FUSAR POLI (2019). As HARDY (1937) 452 already observed: “What seems to dominate in the origins of contemporary colonization are the intentions that are strictly political. For every nation, colonial policy is now a component, sometimes the most prominent, of its foreign policy” (“Ce qui semble dominer dans les origines de la colonisation contemporaine, ce sont les intentions proprement politiques. Pour chaque nation, la politique coloniale est désormais un élément, quelquefois le plus marquant, de sa politique extérieure”). See ROMANO (1902); MONDAINI (1902 and 1907).

103 NUZZO (2006). See also COSTA (2004/2005) 187–189.

cerned the same social phenomena, but considered their political importance) tended instead to implement a strategy aimed at excluding the enemies of society; colonial law tended to introduce anti-assimilating devices and dynamics in legal order.

Although these three different special normative regimes were performing different functions, they however shared one basic element. They were all consistent with the monistic configuration of the legal system, albeit in different ways. In fact, these were spheres of normativity and all an expression of the sovereignty of the state. The fact that they were opposed to certain principles of the metropolitan legal system did not call into question the fundamental function of those principles.

Special law, facing social and geopolitical challenges, performed as an instrument capable of renewing the perspectives of meaning for the axiological function of legal configurations of European states. This made it possible to implement a differentiated strategy to deal with emerging diversities, with the result to offer new legitimacy to the legal systems that were bearers of the universalistic program of equality. Legal monism, facing its own limits, showed its full hegemonic potential.

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