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Michael Stolleis, PhD*

LEGAL PLURALISM IN THE 19TH AND 20TH CENTURY**

Legal pluralism as a pre-modern and well-known phenomenon seemed to be domesticated by the "modern state" with its sovereign position as creator of the law. Today the phenomenon is back. Today lawyers struggle not only with multiple levels of normativity (national law, European law, international law, legal networks without a state) but also with the cultural diversities of interpretation and practice.

Key words: *Multi-normativity. – Legal pluralism. – Sovereignty. – Cultural diversity of law.*

What legal history and sociology of law, international law and legal theory are currently experiencing is a great "awakening". New perspectives are becoming apparent everywhere:

The vision of a state and a community of states in a regulated world, which are organized by "one law", has dissolved in an instant. For a long time lawyers dreamed of thinking that way. The notion that the law could merge nationally as well as internationally into a rational order, was the dream of not only taxonomists of natural law in the 17th and 18th century, but also of the 19th century positivism thinkers of pyramidally organized legal systems and the Pure Theory of Law by Hans Kelsen. If this had been reasonable, all human conflicts could be solved legally. Ultimately, all litigations and courts would vanish. A glance at a "codex", composed in universal language, would suffice.

* Prof. em. Dr. Dr. h. c. mult., Johann Wolfgang Goethe-Universität Frankfurt am Main, Max-Planck-Institut für europäische Rechtsgeschichte, stolleis@rg.mpg.de.

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If you think of it this way, a utopian character is instantly recognizable. Utopia could also be called absurdity because the diversity of interests, values, collective identities, physical characteristics, languages, rhythms, lifestyles and life blueprints, and the diversity of power, in particular, cannot be resolved. If you wanted to suppress diversity, one could only do it with force and, as we know from the experiences of the 20th century, this would be a futile undertaking. It is not easy to dissuade people from their “peculiarities” through sheer pleas or legal instructions. The world is and will remain diverse. Conformity achieved through force would be a homogenous and unbearable hell.

However, historical facts reveal that attempts to erase identities have been made time and again. A concept of something “different” is still a constant challenge for human beings. Even children want to be just “like everyone else”; they want the same clothes and the same toys. Anyone who is “different” has to face the fact that sooner or later they will be ostracized by the others or forced to fit in. Adults are not any better: mainstream societies isolate themselves from minorities; they prosecute and destroy them. Under the 18th century central idea of *égalité*, they want to eliminate everything that is different.¹ Traditional disparities in status, age, profession, opportunities, income (and so on) should no longer be apparent. Idealistically put, everyone was supposed to be subordinate to the force of the state, as a common “house of all societal interests” of the citizens. This is still true even today: equality is natural, inequality requires special legitimizing reasoning.

If you look back at the legal history of the modern era, you will realize that since the 15th and 16th centuries the “modern state” has emerged as the winner of the diverse corporative society of the late Middle Ages. The desire of the people in power to dominate led to the formation of the centrally governed state. The aristocracy lost its leading role during warfare: they either became impoverished or they became officers, diplomats, and officials. In the 16th century, the cities in Central and Eastern Europe lost their leading position due to financial and trade crises, as well as the occupation of the Eastern Mediterranean by the Ottomans. Meanwhile, the conquest and colonial western powers (Spain, Portugal, England, the Netherlands and France) conquered the world and got rich, under their respective state commands. The Roman Church lost its monopoly to Lutheranism and the Reformed Churches. Ever since we have known of the multiplicity of churches, religious communities and many small ideological groups.

¹ M. Stolleis, “Historische und ideengeschichtliche Entwicklung des Gleichheitssatzes”, *Gleichheit und Nichtdiskriminierung im nationalen und internationalen Menschenrechtsschutz* (Hrsg. R. Wolfrum), Heidelberg 2003, 7–22.

In other words: the modern state established itself and its control through legislation, above all different social orders. The state gained all power through the term “inner sovereignty”: aristocracy, cities, and churches had to obey the state, more precisely the “universal law” derived from it. In 1789, the *régime féodal* in France was brought down; in Germany and other European countries the privileges of the aristocracy were limited (patrimonial courts, entailed estates, tax exemption, latitude in military service, inequality of voting rights, etc.), and after medieval guilds were dissolved, the only thing left was the strong *state*. Its counterbalance was the liberal *society*. Because of this, the national public law confronted the law of socially free individuals, *ius publicum et privatum*. Public law consisted of constitutional law and administrative law on the one hand, and on the other hand of international law, as the law between sovereign states. Private law was the law of contracts, which were concluded between (theoretically) free individuals.

However, there were many things, perhaps even the majority, that were not so right about this simplified image. There were areas in which the state could not engage or where the old legal pluralism was maintained. A few examples:

(1) The churches defended their *proprium* of belief by claiming that they (and their legal order) were older than the modern state and that no one could decide externally what the heart of their faith was. This was their “spiritual” task only.

(2) Merchants and craftsmen held their ground. This was either because of the customs, the common law which had been in effect for centuries, the *lex mercatoria*, or the old customs of the guilds (in a renewed form), which allowed them to decide independently who was a foreman, journeyman or apprentice. All the old legal instruments of the medieval guilds appeared again in the late 19th century in the form of parliamentary legal acts.

(3) In agricultural societies there were (and partly still are today) certain rules related to family law, inheritance law, and land law. One example is the prerogative of the oldest son to inherit the farm, his duty to care for his parents and siblings, inequalities between male and female heirs, but also the older formations of land law (collective ownership, family property). This is visible especially in the countries of Southeast European.²

² M. Stolleis (Hrsg.), *Konflikt und Koexistenz. Die Rechtsordnungen Südosteuropas im 19. und 20. Jahrhundert, Band I – Rumänien, Bulgarien, Griechenland*, Frankfurt am Main 2015; Th. Simon (Hrsg.), *Konflikt und Koexistenz. Die Rechtsordnungen Südosteuropas im 19. und 20. Jahrhundert, Band II – Serbien, Bosnien-Herzegowina, Albanien*, Frankfurt am Main 2017.

These were, in a manner of speaking, relics of the Ancien Régime. Due to the 19th century excitement about technical and scientific progress, about the expansion of the democracy and the abolition of corporative inequalities, it was believed that those relics would slowly disappear. And this actually happened. With industrialization, the labor movement emerged as well as the host of workers, and consequently the modern mass society, as described by Gustave Le Bon towards the end of the 19th century. Beyond the nations, a technical universal culture developed in the 20th century, which flooded the old social and legal forms with an irresistible force. Indigenous, so-called primitive people did not stand a chance against that. The revolution of electronic communication, which started in the last third of the 20th century, flooded all territorial and legal limits with an unspeakable force. Immediately attempts were made to establish normative barriers against this – so far without great success.

Perhaps I exaggerated slightly when I talked about the triumph of the modern sovereign state over all traditional, cultural and social diversities. I have mentioned examples for “relics” of the Ancien Régime, but this leads to the illusion that the path from the premodern pluralism of law to the uniform legal system, controlled by the state, is a one-way street.

This, however, is not the case. Legal pluralism has been deliberately created and used within the modern egalitarian parliamentary regime. It was evident early on in the 19th century that the state cannot and should not determine everything. Wise counsellors kept arguing that one should provide society with room to develop and empower it to decide its own matters. This facilitates society’s adaptation to new circumstances and results in a more pronounced identification with the state. Evidence of this development can be found in the examples below.

(1) A free society, which also stresses economic liberalism, regards contracts as the primary form of trust. The contract is the actual legislator, determining what is just in the relationship between the parties involved. These contracts are signed between seller and buyer, family members, cooperative associations and commercial partnerships, as well as companies and their employees. In doing so, a legal network is constructed within society; they are legislators in their own realm. The 19th century’s new constitutions provided room for these developments by guaranteeing basic rights, such as freedom of trade and liberalism, freedom of land acquisition, religious freedom, and freedom to emigrate. Society claimed its “private autonomy”, especially out of economic motivation.

(2) When old governments had to rebuild their lands during the crises after the French Revolutionary Wars, they recalled that the once free and wealthy cities owed their prosperity to the fact that they regulated themselves. As such, cities in post-1806 Prussia were given back their

self-administration, which they had lost during the absolutism period. While retaining control at the national level, cities were allowed to govern their own budgets, personnel, planning laws, etc. These rights were passed on to rural districts and smaller communities in the late 19th century. In other words: the state withdrew and allowed for local legal pluralism by way of self-government.

(3) Universities were treated in a similar fashion. The old, independent universities of the Middle Ages became increasingly state controlled in the modern era and had to give up their *autonomy*. Given the large-scale university reforms of the early 19th century, their own jurisdiction was taken away, but they were granted an idealistically understood *scientific freedom*. This resulted in the state's role in external financing and steering, while universities were granted the *self-administration in matters of science*, following Wilhelm von Humboldt's famous educational model.³

(4) Similarly, the state relinquished many areas during the industrialization, which should have been state-governed but were determined to be managed more beneficially by society at large, while keeping the state's supervision. Examples include (a) technical control boards,⁴ (b) industrial norming institutions,⁵ (c) new social securities, which developed their own self-administration,⁶ (d) self-administration of associations for lawyers and notaries, medical doctors, and craftsmen. In all of these areas, professions joined forces and established internal "laws" which were, however, controlled and approved by the state. The same applied to associations which shaped the 19th century and had to have their statutes approved by the state. As was previously the case, this example demonstrates state-controlled autonomy, a modern legal pluralism.⁷

³ W. von Humboldt, "Über die innere und äussere Organisation der höheren wissenschaftlichen Anstalten", *Gesammelte Schriften*, Band X, Berlin 1903–1936, 250–260.

⁴ I. vom Feld, *Staatsentlastung im Technikrecht. Dampfkesselgesetzgebung und -überwachung in Preußen 1831–1914*, Frankfurt am Main 2007.

⁵ M. Vec, *Recht und Normierung in der Industriellen Revolution*, Frankfurt am Main 2006.

⁶ H. Heffter, *Die Deutsche Selbstverwaltung im 19. Jahrhundert. Geschichte der Ideen und Institutionen*, Stuttgart 1969²; M. Stolleis, "Selbstverwaltung", *Handwörterbuch zur Deutschen Rechtsgeschichte* (Hrsg. A. Erler, E.-Kaufmann), Band IV, Berlin 1990, 1621–1625; M. Stolleis, *History of Social Law in Germany*, Heidelberg – New York 2014, 51.

⁷ P. Collin et al. (Hrsg.), *Selbstregulierung im 19. Jahrhundert. Zwischen Autonomie und staatlichen Steuerungsansprüchen*, Frankfurt am Main 2011; P. Collin et al. (Hrsg.), *Regulierte Selbstregulierung im frühen Interventions- und Sozialstaat*, Frankfurt am Main 2012; P. Collin et al. (Hrsg.), *Regulierte Selbstregulierung in der westlichen Welt des späten 19. und frühen 20. Jahrhunderts*, Frankfurt am Main 2014.

In this way, a complex balance developed during the course of the second part of the 19th century and especially in the 20th century, between the state-guaranteed “unity of the legal order”, on the one hand, and the state-incentivized legal pluralism, on the other hand. Modern societies, facing the pressure exerted by the demand for the equality of citizens, prefer to regulate everything juristically. However, they simultaneously realized that it is more effective and politically prudent that not everything be regulated by the state, moreover, to provide society its free spaces.

Due to the construct of private autonomy, society is able to regulate everything via *contracts*, while the state establishes prohibitive signs: contracts were not permitted to be unconscionable, exploitative or to be in violation of national, European, or international law. Thus, the privateers (and their egoism) were restrained within this framework.

Where society adheres to these limitations, further areas of a “regulated self-regulation” (the modern version of state-controlled self-administration) ensue. Therefore, the modern state does not distinguish between private and public law as apodictically as the 19th century state. The lines between these two forms have since blurred to an extent at which the distinction between public and private becomes impractical. Therefore, there exists not only a historical legal pluralism, which has to be overcome with all its imbalances, but also a calculated and much more important modern legal pluralism. The long postulated “unity of the legal order” thereby turns into a phantom.

In a practical sense, this means that the modern state is forced to develop new mechanisms to resolve conflicts between societal groups and their “semi-autonomous” partial legal orders. The points of interest are thus: (a) which institution is responsible for resolving the conflicts, (b) where does the “functional self-regulation” have to be restrained to prevent chaos, corruption and mismanagement, (c) where does diversity contradict the shared constitutional vision of equality and non-discrimination? Where does one have to intervene when facing religious, language-based, racial or sexual discrimination?

The impression of a modern rich legal pluralism is multiplied plentifully when looking beyond the still existing nation-state. One does not have to look further than the jurisdictional plurality, in terms of national orders within the European Union, to realize that there are more differences than similarities. A contemporary central point of discussion within Europe is the question of the extent of the levelling effects of European law and how much legal pluralism should be granted to these states (key word: subsidiarity principle). So, states organized as federal systems have to distinguish several levels: (1) communalities with self-administration, (2) single states within a federal system, (3) central states with a certain catalogue of competences, (4) the European Union. In

Germany, the expression *Mehrebenensystem* is now accepted. However, useless to say, the coining of an elegant term does not solve the problems automatically.

This diversity is especially pronounced when looking beyond European legislation to international law. Of course, there are as many diverse legal frameworks as there are states – 193, counting member states of the United Nations. At the same time, the global regulations of large organizations that created state-independent law have emerged (communication, Facebook, Google, International Sport, NGOs of all kind). Accepted regulations are applied worldwide by arbitration tribunals.⁸

It follows that legal pluralism did not only dominate the pre-state stage of the Middle Ages, but continued to do so and even expanding, despite the development of the modern state. Old jurisdictional forms were dismissed and remodeled into new ones, or replaced by preferences for non-state legislation, even in the 19th century, which is widely regarded as the classic century of state-regulated jurisdictional positivism. Ever since state and society have reconnected to form the *interventional state* of the industrial revolution and the period of war in the last third of the 19th century, legal pluralism has formed a part of the modern state's image. This does not only hold internally, in the case of the contemporaneous state, but also in the context of international law and the regulations of transnational organizations or economic complexes. We cannot escape legal pluralism in our history or the present. Our challenge as jurists is to clarify and regulate collision as well as to determine the frontiers of plurality where the basic rights of individuals and groups are in jeopardy. Legal vacuums cannot be tolerated.

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⁸ More details in M. Stolleis, *Public Law in Germany: A Historical Introduction from the 16th to the 21st Century*, Oxford 2017, 191.

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