GLOBAL PERSPECTIVES
ON LEGAL HISTORY 21

PETER COLLIN
AGUSTÍN CASAGRANDE (EDS.)

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

Vol. 1: Fundamental Questions

Ralf Seinecke

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MAX PLANCK INSTITUTE
FOR LEGAL HISTORY AND LEGAL THEORY

Ralf Seinecke

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1 Diversity and legal pluralism

Legal pluralism and diversity are closely linked. Yet the phenomena they describe and the spectrum of questions they each raise must be differentiated. Diversity, as Peter Collin puts it, refers to all kinds of "immutable" or "fluid" differences, like "age, ethnicity, gender, race, physical abilities, sexual orientation", "education, religious belief, work, experience" etc., and, therefore, represents the broader concept.[1] These phenomena can easily be addressed with legal questions and they could go by the label 'pluralism' as well. The traditions of 'pluralistic legal thought' or of 'legal pluralism', however, focus on problems that cannot be fully accommodated under the rubric of 'diversity'.

Legal pluralism does not refer just to any kind of pluralism, for, as the term suggests, it addresses legal questions. There are important differences between legal pluralism and other pluralisms, such as political, social or economic pluralism. For instance, even if political pluralism is closely connected to legal issues, it does not coincide with the concept of legal pluralism. Political pluralism raises fundamental questions on how political diversity must be dealt with. Legal forms, like statutes, constitutions, or customs, as well as legal principles, like the rule of law or democratic participation, bear important instructions on that. Be that as it may, political issues need not be solved on a legal plane. Answers to these questions can also be explored through diplomacy or through other channels of political negotiation or through political power. It must be noted, however, that pluralism in political and constitutional theory preceded the notion of 'legal pluralism', which came into its own only in the late 1960s and 70s.[2] This is not only

1 See the introduction by Collin and Casagrande in this volume; on conceptual issues see Brauner (2020).

2 See Seinecke (2015) 58–61.

true for the concept of political pluralism, introduced by Harold Laski in his "Studies in the Problem of Sovereignty" in 1917,[3] but also for the renaissance of political pluralism in Germany in the 1950s and 60s.[4] It was only after invocations of 'pluralism' began to proliferate in political and constitutional theory that its use in legal history and legal anthropology came to be branded as "legal pluralism".[5] From there on it migrated back to political theory, before finding its way again into legal theory.[6] Even though political pluralism and legal pluralism have much in common, a sharp distinction needs to be drawn. The issues legal pluralism addresses are fundamentally legal in nature and relate not just to the concept of law in general, but more specifically also to the legal sources, the methods, and the doctrine, as well as to the conflict of laws or jurisdiction and to legal identities.

The relationship between legal pluralism and legal diversity is two-sided. On the one hand, the normative agendas they pursue are different. While legal diversity explores the question of equality, for legal pluralism equality is not an issue.[7] Legal pluralism juxtaposes different legal orders, conflicting jurisdictions, coexisting legislators, and competing concepts of law. That is why equality cannot be a core issue for legal pluralism. On the contrary, from the perspective of legal pluralism, the idea of equality is always susceptible to ideology. If the legal life world of a group, for instance, an indigenous group, is treated equal to the so-called 'modern' Western law, and, therefore, is measured by 'modern' Western legal standards and backed by 'modern' Western power, the notion of equality becomes highly vulnerable to ideology. On the other hand, legal pluralism fits into the theoretical perspective of legal diversity. It grants the power of legislation and the monopoly of law to many communities. Therefore, legal pluralism is closely linked to questions of group identity and culture, to legal autonomy and rights – questions central also to debates on diversity.

In what follows, the history of pluralistic legal thought in Germany will be delineated. Here 'pluralistic legal thought' will be used synonymously

3 Laski (1917); on Laski see Seinecke (2015) 56–57.
4 See Stolleis (2011) 255–258; Seinecke (2015) 57–58.
5 E. g. Koselleck (1967) 33; Benda-Beckmann (1970); Gilissen (ed.) (1971).
6 E. g. Santos (1977); Santos (1987); Santos (1995); Teubner (1992, 1996); for further reading, see Seinecke (2015) 58–65, and Seinecke (2018) 18–19.
7 See again Collin's and Casagrande's introduction in this volume.

with 'legal pluralism'. Since the German nation state was formed as late as in 1871, Germany, in this context, refers to works in the German language or of German speaking scholars. Finally, as this essay resides in the field of history of science, it focusses on jurisprudence, and not on the political and institutional history, nor on the history of applicable law – even though it necessarily takes a sideways glance at German legal and political history. This essay, which, therefore, could also be titled: "Legal pluralism in German language jurisprudence", tries to show two things. Firstly, on a more methodological plane, it attempts to provide a template for writing a history of legal pluralism *avant la lettre* (II.). Secondly, it tries to rewrite a similar story for German legal thought. Its main thesis is that the traditions of pluralistic legal thought never fully disappeared from German jurisprudence, especially not from German private law. Even though the legal pluralism of the Old Reich perished with the *Heiliges Römisches Reich Deutscher Nation* (Holy Roman Empire of the German Nation) in 1806 (III.), its tradition was never broken. Legal pluralism was subject to manifold debates in the 19th century, but to many more in the 20th century (IV.). One last word of introduction: unfortunately, this story revolves around 'white men'. Cultural, ethnic, religious diversity in the 19th- and early 20th-century Germany was restricted to different German tribes and territories, like the Saxons or the Bavarians, and to two monotheistic religions, Christianity and Judaism. It would be a challenge to accommodate other ethnicities or cultures into this history for the sake of diversity. The question of gender is, however, different, for women have long been discriminated against in the German territories. As they were not admitted to the legal profession until the first half of the 20th century,[8] a history of women's legal thought in Germany almost seems impossible to reconstruct within the 19th-century context; for the 20th century, however, it still would be highly feasible and necessary.

2 Ways to legal pluralism

It is important to acknowledge that as a concept legal pluralism is open and vague. In fact, the need for research into legal pluralism derives from a variety of possibilities for ideas and imagination. For this reason, legal pluralism became a fruitful concept for historiography, anthropology, political

8 See Röwekamp (2011).

science, and legal theory. At the same time, there is no formal consensus on the exact definition of the term. Only simple and more general definitions have gradually gained acceptance, of which the best known comes from Sally Engle Merry in 1988: Legal pluralism "is generally defined as a situation in which two or more legal systems coexist in the same social field".[9]

This simple definition raises many questions.[10] What does "situation" mean: a conflict or a general order? Is "legal system" a jurisprudential system or just any kind of legal order? Does "coexistence" mean coordinated or competing orders? And where do the boundaries of the "social field" lie? Very early on in the debates on legal pluralism, it was possible to note a "pluralism of legal pluralisms".[11] It revealed itself in infinite definitions and a great diversity of phenomena, such as the various 'legal orders' applying to indigenous communities, rival alternative socio-normative orders, soft law, the fragmentation of international law, transnational private law, and many more. This pluralism of legal pluralisms considerably complicates the analysis of legal pluralism. Any definition à la "legal pluralism is …" now seems arbitrary. Above all, definitions limit the open concept and thus restrict its potentials. For this reason, the reflection of one's own knowledge-interest is central to the search for a concept of legal pluralism.

In order to trace the history of legal pluralism in German legal thought since 1800, at least three approaches seem possible. They all use legal pluralism as a 'research term', and not as a 'source term'; however, it is important to emphasize at the outset that legal pluralism is not an empirical phenomenon, like a table, a house, or even law, for "a variety of factors produce the perception of legal pluralism".[12] The use of the term particularly depends on the normative bias of the describing subject.[13] Many social orders can exemplify 'legal pluralism' – or not: indigenous legal orders either testify to legal pluralism or are seen as non-legal customs of so-called 'savages'; alternative socio-normative orders within the state constitute legal pluralism or are condemned as illegal parallel orders; the various institutions and dispute

9 Merry (1988) 870.
10 For this Seinecke (2015) 14–20.
11 E. g. Benda-Beckmann (1994) 12; Tamanaha (2001) 173; for a typology see Seinecke (2015) 27–49.
12 Davies (2010) 809.
13 See Seinecke (2018) 15.

settlement mechanisms in international law are examples of legal pluralism or can be seen as fragments of the broken unity of international law; transnational private law can confirm legal pluralism or can refer to a simple set of treaties based on state norms and state enforcement. Far from being a value-free term, 'legal pluralism' is always susceptible to ideology, as its use is highly dependent on political, moral or scientific preferences.

A first possible way to access legal pluralism is through attention to the diversity of the law or of the legal issues. Analytically at least, five legal pluralisms can be distinguished: conflicts in substantive law, competing legal institutions or jurisdictions, coexisting legal and non-legal orders, the different origin of laws, and, finally, different nomoi, worldviews or ideologies in law.[14] Each of these levels is based on the analysis of an empirical socio-normative or legal order.

A second way to apprehend legal pluralism is by envisioning its ideological potential. The concept can be approached through the spectrum of its "interaction" and "nomos":[15] "Legal pluralism is the interaction between a first, dominant legal order and a second, alternative legal order: legal pluralism is the nomos of nomoi."[16]

This approach to legal pluralism is based on a double-sided concept of law. It divides law into two spheres, one strictly doctrinal or practical and the other more cultural or ideological. Both act in concert to form a legal order, for example when indeterminate legal terms are (re-)defined with respect to social or moral expectations. The question of legal pluralism then must be raised on the cultural plane. On this second legal layer, competing ideologies manage to permeate the legal domain and become the law – and that is where one can observe legal pluralism.

Both approaches, however, are of little help in the search for 'traditions of pluralistic legal thought'. They analyze empirical phenomena and ascribe different legal pluralisms to them – or not. They do not help with writing a history of jurisprudence. A history of legal pluralism in legal thought, in contrast, needs to focus on the scientific use of the term. Therefore, a third approach seems more promising. It draws on early debates on legal plural-

14 More detailed Seinecke (2017) 217–219.

15 See Seinecke (2015) 362–373; Seinecke (2017) 218–219; for the concept of "nomos" Cover (1983).

16 Seinecke (2015) 362.

ism, in order to reconstruct the concept. It subsequently examines the use of the term 'legal pluralism' in legal anthropology in the 1970s and 1980s as well as in political and legal theory in the late 1980s and 1990s.[17] Four common characteristics can be identified in the early usage of the word 'legal pluralism' between the 1970s and 1990s: (1.) law without a state, (2.) alternative law, (3.) interlegality, and (4.) nomos. These four characteristics should not be misunderstood as comprising a definition when, in fact, they represent "family similarities" in the usage of the word 'legal pluralism'.[18] And their influence in the history of German legal thought can now be researched – even though the term 'legal pluralism' was born only in the second half of the 20th century.

2.1 Law without a state

The polemical battle cry of legal pluralism is "law without a state".[19] Almost all debates on legal pluralism are about non-state law. But non-state law can mean a lot. As a non-political law, it is related to grown social laws. As a non-statutory law, it refers to oral legal cultures or legal customs.[20] As a non-institutionalized law, it takes informal social practices seriously in normative terms. As a non-differentiated law, it is close or identical to religious, moral or ethical norms. As a non-state enforceable law, it remains at a distance from the state's monopoly of force, i. e., its courts and official enforcement of law. As a non-public law, it must rely on private lawmaking and autonomous legal spaces.

This diversity of non-state laws underpins the notion of 'law without a state'. The prevalence of legal pluralism is usually assumed in areas where the state is deemed not fully developed or not strong enough, and it does not fully control legislation and enforcement processes. This applies to indigenous legal orders as well as to parallel societies or international public and private law. 'Law without a state' always is more bottom-up than top-down. It is always more private or social than public or sovereign.

17 See Seinecke (2015) 20–27.
18 See Wittgenstein (1984 [1953]), §§ 67, 43.
19 See Seinecke (2015) 20–22.
20 See Seinecke (2018).

2.2 Alternative law

Debates on legal pluralism are rarely solely negative. The dictum 'law without a state' already refers to a second, alternative law. This other law is as diverse as non-state law and can refer to many forms of (alternative) orders and legalities: legal customs, particular or territorial statutes and common law, municipal, land or imperial statutes, Roman or Canon law, natural or rational law, customary law or *Juristenrecht* (lawyer's law), indigenous or religious, inter- or transnational, or social or global legal orders. There is a wide range of alternative laws.

The many names of alternative law not only describe other ideas of substantive law. They also argue about fundamentally different concepts of law. The oral and local signature of legal customs and practices can hardly be compared to modern state law and its justice. The salvation of the soul that always is at stake in religious law has no equivalent in secular legal orders. The ethical and moral dimension of natural law cannot be translated into a liberal and positive law. Alternative law often is about a true alternative to 'modern' law, meaning that phenomena, notions, and ideas that go by the term 'law' would probably not be conceived as 'law' from a 'modern' point of view.

2.3 Interlegality

The most challenging concept from the early debates on legal pluralism is "interlegality".[21] It links official and alternative law, state law and non-state law, or even more radically, all kinds of laws and legal orders. Interlegality is at odds with modern legal thought and its rationality. Lawyers seek decisions and clear solutions; they try to cope with diversity and not conjure it up. Interlegality, on the other hand, is the exact opposite. The term describes the intricate interplay of different laws, socio-legal orders or 'legalities'. Boaventura de Sousa Santos introduced this concept as the "phenomenological counterpart of legal pluralism":

> "We live in a time of porous legality or of legal porosity, of multiple networks of legal orders forcing us to constant transitions and trespassings. Our legal life is constituted by an intersection of different legal orders, that is by interlegality. […]

21 It was introduced by Santos (1987) 298.

> Interlegality is a highly dynamic process because the different legal spaces are non-synchronic and thus result in uneven and unstable mixings of legal codes (codes in a semiotic sense)."[22]

From an analytical perspective, there are two interlegalities: social and legal interlegality. Social interlegality describes the interaction of official law – normally a state law – and a social order. It focuses on the subject of action in normative complex situations. People are repeatedly exposed to contradictory normative requirements, for example when family loyalties are challenged by legal obligations or when economic constraints give rise to a disavowal of legal rules.[23]

As soon as social orders are recognized as legal, social interlegality is transformed into legal interlegality. In legal doctrine, interlegality is a common phenomenon. The search for legal unity has produced numerous mechanisms to deal with it. The doctrine of the sources of law organizes various legal sources, like statutes, doctrine and customs, in a hierarchy. Thus, according to the so-called *Statutenlehre* (theory of statutes) of the Old Reich, statutes took precedence over common law. Methodology knows numerous rules of precedence such as *lex posterior derogat lex priori*, *lex specialis derogat legi generalis* or *lex superior derogat legi inferiori*. In conflict of laws, certain points of reference decide on the applicable law. Finally, concepts of legal autonomy grant legislative powers to social groups. Thus, interlegality is able to express the negotiated relationship between official and alternative law in one term. It is, therefore, a key feature of legal pluralism.

2.4 Nomos

The first three characteristics, i. e., law without a state, alternative law and interlegality, are almost obviously related to legal pluralism. The fourth feature, "nomos", is not evident on the surface of the texts. This fascinating concept was introduced to legal theory by Robert Cover, and it is also closely linked to an intriguing concept of legal pluralism:[24]

> "We inhabit a nomos – a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void. […] No set of

22 Santos (1987), emphasized in the original.
23 For an economical motivated legal pluralism, see the famous study of Moore (1973).
24 On the legal pluralism of Robert Cover, see Seinecke (2015) 260–281.

> legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live."[25]

Nomos points to all kinds of normative narratives, ideas and theories that give 'meaning' to texts and the law. It is not restricted to ideologies or worldviews. It rather includes structures that influence the understanding of the legal world – from political ideas to scientific premises.

Important for the concept of legal pluralism is now that the early debates on it all were driven by a political, ideological, or scientific agenda. In legal anthropology, legal pluralism came into its own alongside other agendas, like the political recognition of indigenous rights and legal orders.[26] Aside from his research on legal pluralism, Boaventura de Sousa Santos also vigorously advocated and influenced global left-wing politics.[27] In the same way, Teubner's search for 'law without a state' was underpinned by his own state-critical attitude and a set of scientific presumptions. This nomological and ideologically critical dimension often explains the call for alternative law and legal pluralism. That makes it one of the central issues in discussions on legal pluralism.

3 Legal pluralism in the Old Reich and legal unity in the German nation state

At the beginning of the 19th century, there was a fundamental political and legal change in the German language and culture arena. In 1806, the dissolution of the Holy Roman Empire of the German Nation brought forth numerous sovereign states. It was not until 1871 that the German Reich was founded. These changes had considerable consequences for the constitution of the law and for legal thought. Old institutions such as the *Reichskammergericht* (Imperial Chamber Court) in Wetzlar, the *Reichshofrat* (Aulic Council) in Vienna or the *Reichstag* (Imperial Diet) in Regensburg had perished with the Reich in 1806. After 1871, however, new institutions were intro-

25 Cover (1983) 4–5, emphasized in the original.
26 See Seinecke (2015) 61–62.
27 See Seinecke (2015) 209–211, 218–223.

duced such as the *Reichsgericht* (Imperial Court of Justice), the *Reichskanzler* (Chancellor), and the *Reichstag* (Parliament).

3.1 Legal pluralism in the Old Reich

In the Old Reich, there was a great diversity of legal pluralisms. Among them were pluralisms of legal sources and substantial law, of legal institutions and the genesis of law, as well as the relationship between law and non-law and a 'nomos of nomoi', i. e., competing legal ideologies. All five analytically distinguishable legal pluralisms can be found in the legal epoch of the Old Reich.

A simple and vivid example of the pluralism of legal sources in the Old Reich is provided by the *Reichskammergerichtsordnung* of 1495 (statute of the Imperial Chamber Court). Article 3 stated the official oath of the judges and assessors, who

> "should be faithful to our Imperial Chamber Court, and to be diligent, and to judge by the common laws of the Reich, and also by the honest, honorable, and reasonable orders, statutes, and customs of the principalities, reigns, and courts, which are brought before them, to judge according to their best understanding as to the high and to the low, and not to be moved by anything else."[28]

In this oath, the common laws, i. e., the scholarly Roman and Canon law, were treated on par with the particular or territorial orders, statutes, and customs. No source was backed by a higher law or afforded greater dignity. They all gave guidelines for judicial action. The words used shed light on one important aspect: Only the common laws are called 'law' at this point. The other normativities lack this attribute. They are just orders, not legal orders, mere statutes, not legal statutes and simple customs, not legal customs – and they had to be proven in front the court. Only if there was evidence for them, could they be applied.

A second example represents the institutional and jurisdictional legal pluralism in the late phase of the Old Reich. In an essay from 2007, Anja Amend reports on a legal dispute over the guarantee of a Frankfurt-based merchant.[29] The merchant refused payment and won the dispute with his creditor before the Frankfurt *Schöffengericht* (lay judges court). Both went on

28 Schmauss / Senckenberg (eds.) (1747) 7; more easily accessible in Buschmann (1994) 176.
29 Amend (2007).

to appeal to different higher courts. The merchant "filed a defamation suit with the Imperial Chamber Court", while the creditor "appealed to the Aulic Council because of his defeat with a reconvention suit".[30] This gave rise to the problem of legal pluralism: For both courts adjudicated differently. One judged in favor of the merchant, whereas the other did not. The city of Frankfurt now faced a fundamental legal question: How should the city act? Which judgement should be enforced? Should the city follow the Imperial Chamber Court or the Aulic Council? The city reacted in a simple manner. Enforcement was suspended and nothing happened. In a letter from 1791, the city of Frankfurt explained its reaction:

> "Since We are willing to live up to the decrees of both supreme courts of the Reich, which are equally respectable to Us, […] but at the same time do not see a chance to follow the conflicting commands, and at the same time find no instruction in an imperial statute, that tells us, which supreme court we should follow, if both their commands override each other, We thought it advisable, in order to evade further consequences of this jurisdiction conflict, to look for a settlement between the litigants."[31]

The Frankfurt city authorities saw themselves in a jurisdictional dilemma. They had no competence to resolve the jurisdictional conflict between both imperial supreme courts. Therefore, they preferred "to leave everything in status quo" and consult the Caesar for a decision. Regardless of the legal difficulties, the case offers a striking example of the institutional legal pluralism in the Old Reich.

3.2 Legal unity in the German nation state

After the foundation of the German Reich in 1871, most forms of the old legal pluralisms were lost. Pluralism of legal sources and of substantial laws had to give way to the unity of German private law. Institutional legal pluralism was abolished by clearly defined jurisdictions. The distinction between the legal and other social systems, i. e., between law and non-law, became ever more established and professionalized. In ideological terms, German private law turned into national law and state law. Traces of the old legal pluralism only could be found in the genesis of the *Bürgerliches Gesetzbuch* (German Civil Code, BGB).

30 Amend (2007) 8.
31 Amend (2007) 7.

This new unity of German private law was established by positive law. The so-called "codification principle" eliminated the pluralism of legal sources and substantial law.[32] Article 55 of the *Einführungsgesetz zum Bürgerlichen Gesetzbuch* (Introductory Act to the German Civil Code, EGBGB) from 1896/1900 stated decidedly: "The private law provisions of the federal states shall cease to have effect unless otherwise provided in the Civil Code or in this Act."

This was meant to be comprehensive and conclusive. In contrast to the private law of the Reich, which in principle remained "in force" (article 32), the diverse private laws of all the federal states lost their validity. Most importantly, "federal state laws" did not only mean statutes, for according to article 2, they meant "every legal norm", and this had extensive consequences for the legal sources of German private law. Gottlieb Planck soberly described this fundamental change in 1901:

> "According to art. 2, federal state laws are to be understood as all legal norms from the federal states, whether they are based on law, an ordinance, a decree of a competent authority, or on customary law. One can also express this negatively in the sense that all legal norms which are not based on imperial laws are to be regarded as federal state law. In particular, common law also belongs here. This did not become law by an act of the legislation of the individual states or by particular customary law, but on the basis of a general German customary law and was recognized as such by laws of the former German Reich. But in the sense of art. 55, it nevertheless belongs to the federal state laws, because it is not based on a law of the present German Reich."[33]

Thus, the old substantial legal pluralism and pluralism of legal sources was passé. With a stroke of the pen of the legislator, entire legal worlds were rendered waste.

This substantial unity in German private law was accompanied by an institutional one. Prima facie the "judicial sovereignty of the individual states" was preserved.[34] However, the "judicial unity" was the responsibility of the Imperial Court of Justice.[35] Above all, there were no alternatives to state courts anymore. According to article 15 of the *Gerichtsverfassungsgesetz* (Court Constitution Act) from 1877:

32 Planck (1901) Preliminary remark 1 on the third section of the EGBGB, 130.
33 Planck (1901) Art. 55 EGBGB, remark 3; my translation.
34 See Kern (1954) 97, 99.
35 See Kern (1954) 98.

> "The courts are state courts.
>
> Private jurisdiction is abolished; it is replaced by the jurisdiction of the federal state in which it was exercised. […]
>
> The exercise of religious jurisdiction in secular matters has no civil effect. This applies in particular to matrimonial matters and matters of betrothal."

The unity of private law was preceded by the unity of state jurisdiction. The institutional legal pluralism of the older times was replaced by the "state courts" of the new German Reich.

4 Legal pluralism in German legal thought

The concept of legal pluralism developed here, along with a brief reflection on the fundamental political changes of 1806 and 1871, are pivotal to reimagining the history of legal pluralism in German legal thought. This brief history, however, represents more a 'patchwork story' than a coherent narrative. It brings together three traditions from German jurisprudence: (1.) the famous debates from 19th-century legal history between Savigny and Thibaut, Beseler and Puchta,[36] as well as Gierke and the German Civil Code, (2.) the two most famous positions from German legal positivism, namely of Hans Kelsen and Gustav Radbruch, and (3.) the more recent traditions of German legal sociology and anthropology, as represented by the writings of Eugen Ehrlich, Franz von Benda-Beckmann, and Gunther Teubner.

4.1 Friedrich Carl von Savigny and Anton Friedrich Justus Thibaut

After the defeat of Napoleon in October 1813, in June 1814, Anton Friedrich Justus Thibaut (1772–1840) completed a short paper titled "Ueber die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland" (On the necessity of a general civil law for Germany). The upcoming restoration was not yet a definite outcome. The Congress of Vienna was not slated to begin until September 1814. When Thibaut finished his essay, the future of the German sovereign states still appeared undecided.

36 For a discussion on Georg Friedrich Puchta (1798–1846) and Georg Beseler (1809–1888), see Seinecke (2020) 295–308.

Even as Thibaut pleaded for the formation of "Germany" in this political situation,[37] the "exaggerated demand" for "unconditional unity" was not a matter of concern for him.[38] On the contrary, the "wealth of the manifold" guaranteed "Germans always an excellent place among the peoples",[39] while "everything could easily sink to platitude and dullness if the omnipotent hand of a single person were able to bring the German peoples to a full political unity".[40] For the time being, Thibaut hoped only for legal unity:

> "I, on the other hand, am of the opinion that our civil law (by which I shall here always mean private and criminal law, and the process) must be changed completely and quickly, and that the Germans cannot be happy in their civil relations in any other way than if all the German governments, by joining forces, contribute to the creation of a code of law that is enacted for the whole of Germany and remains distinct from the will of the individual governments."[41]

Four months later, in October 1814, Friedrich Carl von Savigny (1779–1860) replied to this demand with the famed book, "Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft" (On the vocation of our age for legislation and jurisprudence), regarded as the manifesto of the *Historische Rechtsschule* (Historical School of Jurisprudence). Savigny's plea was clear: legal unity should be established through jurisprudence, not by legislation – especially not as early as 1814. With Thibaut in mind, he wrote:

> "On this purpose we agree: we want the foundation of a secure right, secure against arbitrary intervention and unjust attitudes; likewise, community of the nation and concentration of its scientific aspirations on the same object. For this purpose, you demand a code of law, but this would only produce the desired unity for half of Germany, while the other half would separate more sharply than before. I see the right means in an organically progressive jurisprudence that can be common to the whole nation.
>
> We also agree in the evaluation of the present condition, because we both recognize it as deficient. But you see the cause of the evil in the sources of law, and you believe that you can help by a civil code: I find it rather in us and believe that we are not called to a civil code just because of that."[42]

37 Thibaut (1959 [1814]) 5; all quotes from this work are my translation.
38 Thibaut (1959 [1814]) 7.
39 Thibaut (1959 [1814]) 8–9.
40 Thibaut (1959 [1814]) 9.
41 Thibaut (1959 [1814]) 12.
42 Savigny (2000 [1814]) 161; all quotes from this work are my translation.

This debate between Thibaut and Savigny gained worldwide attention.[43] In Germany, legal historians called it *Kodifikationsstreit* (codification controversy), whereby Thibaut is regarded as the defender of codification and Savigny as its opponent. Thibaut demanded a new code of law, Savigny a new jurisprudence and lawyers trained in history and science. In the end, Savigny was generally proclaimed the "winner", but this image has been put into perspective by recent research.[44] In the first half of the 19th century, however, the Historical School, which was decisively influenced by Savigny and gained enormous influence over German jurisprudence.[45] Its program for a new historical jurisprudence attracted many followers. Nevertheless, Savigny, like Thibaut, had to contend with a profusion of legislation emanating from the many sovereign states after 1815.

Thibaut and Savigny were not alone in the discussion about legal unity and codification. Many more voices took an independent stand and many revisited their writings.[46] Between the end of the Old Reich in 1806 and Napoleon's Waterloo in 1815, German lawyers struggled to find solutions to reconcile territorial statutes and common law, legal diversity and national law, and German lands and the German nation,[47] which led to the debate on legal pluralism and legal unity in Germany.

4.1.1 Law without a state

In this debate, both Thibaut and Savigny advocated for a private law without a state. Savigny was not alone in his awareness of the political impossibility of a German nation state, for Thibaut was also cautious about how the "future political conditions" would shape the course.[48] That is why the code could not have emanated from the state or, more precisely, from a nation state. Nevertheless, Thibaut permitted state influences on the code, for it should have been the task of a "patriotic association of all German govern-

43 For the international reception of Savigny and his "Beruf" Rückert/Duve (eds.) (2015) and Meder/Mecke (eds.) (2016).

44 See Schöler (2004) 86–131; very clear Rückert (2012) 1930: "There's a lot wrong with that".

45 See Haferkamp (2018).

46 See Schöler (2004) 88–106, 113–123.

47 See Dölemeyer (1982) 1421–1439.

48 Thibaut (1959 [1814]) 10.

ments"[49] to establish "an equal civil constitution for eternal times".[50] In the legislation he demanded "collegial negotiations" and "the unification of many from all countries".[51] For Thibaut, only such a community could have guaranteed "complete freedom of the voices" and "universality of consideration".[52] Furthermore, the code needed the "solemn guarantee of the great foreign allied powers" "like an international treaty".[53]

On the other hand, Savigny left no room for the state to make substantive private law. This was different only for procedural law and legal institutions. His private law was jurisprudence, namely an "organically progressive jurisprudence which can be common to the whole nation".[54]

4.1.2 Alternative law

These differences continue owing to their different expectations of alternative law. Thibaut demanded a uniform, "general", "civil", and national code of law for substantive civil and criminal law as well as the process.[55] He contrasted this code with the manifold laws derived from the "Old German Codes", the "native Particular Laws", the old "Reich Laws", the "received foreign codes, the Canonical and Roman laws".[56]

For Savigny, on the other hand, legislation should not establish law. He advocated a totally different idea of the origin of law:

> "The sum of this view, then, is that all law arises in the way which the dominant, not entirely appropriate use of language calls customary law, i. e., that it is first produced by custom and popular belief, then by jurisprudence, everywhere, that is, by internal forces that are still operating, not by the arbitrariness of a legislator."[57]

That is why Savigny investigated history and Roman law: He believed that law would be found in its original state there, free from commentaries and

49 Thibaut (1959 [1814]) 24.
50 Thibaut (1959 [1814]) 24.
51 Thibaut (1959 [1814]) 40–41.
52 Thibaut (1959 [1814]) 40.
53 Thibaut (1959 [1814]) 41.
54 Savigny (2000 [1814]) 161.
55 Thibaut (1959 [1814]) 59, 12.
56 Thibaut (1959 [1814]) 13–14.
57 Savigny (2000 [1814]) 14.

glosses, from reception and reform. He sought the politically or historically genuine and therefore more authentic and better law.

For Savigny, the desirable "state of civil law" was dependent on "three pieces": "first of all a sufficient source of law, then a reliable staff, finally a functional form of the process".[58] While he left the domain of the process to sovereigns and legislation, e. g. "in the form of provisional orders or instructions to the courts" or by "recording customary law",[59] it was only lawyers with scientific training, i. e., those systemically and historically informed, who could guarantee the correct handling of the historical sources.[60] This class of lawyers was an integral part of his idea of an alternative private law.

4.1.3 Interlegality

The differences in their concept of law also explain the differences in their understanding of interlegality. Thibaut discredited the old legal pluralism of the "territorial statutes" as "chaotic" and an "endless jumble":[61] "The rampant local customs and habits are only too often mere legal laziness".[62] Moreover, the territorial laws were "so incomplete and empty" that they alone could not be relied on to carry a decision. Again and again, they needed the "received foreign law books".[63] Above all he called the "Roman code" a "mismatched work"[64] and even the "wisdom of the classics" did not help, "since now the whole thing […] was a truly ghastly mixture of clever and great, consequent and inconsistent provisions".[65] It is this legal pluralism that he did not want. That is why he pleaded for a new uniform codification.

On the other hand, Savigny held on to the sources of law of the Old Reich. His skepticism about a new national codification and his hope for a new historical jurisprudence left him with no other choice. Under the head-

58 Savigny (2000 [1814]) 111.
59 Savigny (2000 [1814]) 132.
60 See Haferkamp (2018) 31–110.
61 Thibaut (1959 [1814]) 14.
62 Thibaut (1959 [1814]) 60.
63 Thibaut (1959 [1814]) 14.
64 Thibaut (1959 [1814]) 15.
65 Thibaut (1959 [1814]) 19.

ing, "What we should do where there are no codes", he explicitly acknowledged the interlegality of the Old Reich:

> "As far as the source of law is concerned […], I am convinced that its reintroduction in the place of the [French] Code [Civil], or its retention where the Code did not apply, would be the same combination of common law and the territorial laws that had previously prevailed throughout Germany: I consider this source of law to be sufficient, indeed excellent, as soon as jurisprudence determines what its duty is and what can be done only by it."[66]

This commitment to the old pluralism of legal sources was only consistent. The problems posed by the old legal pluralism should have been solved by an academic legal professional. He vigorously opposed the "indescribable violence" of the "idea of uniformity" with a view to the "great diversity of territorial laws":[67]

> "That is why it is a mistake to believe that the general will gain life through the destruction of all individual circumstances. If in every state, in every city, even in every village, an idiosyncratic self-confidence could be generated, the whole would also gain new strength from this increased and multiplied individual life."[68]

4.1.4 Nomos

In this passage, Savigny also combined his idea of law with his ideological claim and his idea of the German nation:

> "Therefore, when the influence of civil law is mentioned, the particular law of individual territories and cities must not be regarded as disadvantageous. The civil law deserves praise in this respect, insofar as it influences or is capable of influencing the feelings and consciousness of the people […]. Yes, for this political purpose, no state of civil law seems more favorable than that which was formerly common in Germany: great diversity and idiosyncrasy in terms of detail, but with the common law as the basis everywhere, which always reminded all German tribes of their indissoluble unity."[69]

Germany between diversity and unity – this was Savigny's idea for German private law. Thibaut chose a different route. His notion of unity reiterated the idea of the German nation, but did not accommodate the diversity of

66 Savigny (2000 [1814]) 111–112.
67 Savigny (2000 [1814]) 41–42.
68 Savigny (2000 [1814]) 42.
69 Savigny (2000 [1814]) 42–43.

German peoples: "But the same laws produce the same customs and habits, and this equality has always had a magical influence on peoples' love and loyalty".[70] It was precisely for this reason that Thibaut demanded a general German civil code. Such a code "from all national power" would unite the German people even more deeply.[71]

4.1.5 Conclusion

The legal ideas proposed by Savigny and Thibaut represented two different paths to German nation building. For Savigny, law emanated from the people and from customs, which meant that the nation had to also grow 'from below'. It was the great task of academic jurisprudence to trace the national law back to its Roman roots and the people's spirit – completely different for Thibaut, for whom law is decreed 'from above', in a way that it shapes customs and habits as well as the feeling for the nation.

Thibaut and Savigny, however, both demanded a law without a state. One as the task of national legislation, in 1814 this had to be supra-state legislation, the other as a challenge for jurisprudence. For one, this meant a codification and for the other, the old interlegality of the Reich with new historically and systematically trained lawyers. Despite these differences, they cherished the same dream: the hope for the German nation.

4.2 Otto von Gierke and the German civil code

One of the loudest voices on the way to German legal unity was of Otto von Gierke (1841–1921),[72] who accompanied the drafts for the new German Civil Code as a sharp critic. Above all, he criticized the individualistic and Roman spirit of the new codification.[73] His slogan of the "drop of socialist oil", which should "seep through" private law, is still a dictum today.[74]

Gierke is a key figure in the search for legal pluralism in German jurisprudence. He wrote his treatises and lectures, his polemics and critiques in

70 Thibaut (1959 [1814]) 33.
71 Thibaut (1959 [1814]) 59.
72 On the different interpretations of Gierke, see Dilcher (2017 [1974/75]) 301–307.
73 See Gierke (1889b); all quotes from Gierke's works referenced here are my translation.
74 Gierke (1889a) 13.

the "delayed saddle time" of German jurisprudence.[75] Gierke was a child of the epoch between the Old Reich and the new German Reich. He studied in Berlin and Heidelberg in the late 1850s and participated in the German-German War of 1866 as well as in the Franco-German War of 1870/71.[76] The first volume of his *Das deutsche Genossenschaftsrecht* (The German Cooperative Law) was completed in 1868, only a few years before the foundation of the German Reich. His *Deutsches Privatrecht* (German Private Law) appeared in the first volume in 1895, one year before the German Civil Code was passed. Gierke knew the old legal world just as well as he saw the new one rise.

4.2.1 Law without a state

Gierke gave no simple answer to the question of 'law without a state'. On the one hand, Gierke focused on the wealth of "human associations", e. g. "religious communities, estates, professional classes", "tribes or territorial groups".[77] For him, they were all "capable of producing law".[78] On the other hand, he assigned the state a privileged role for justice:

> "The organized community is capable of generating justice to an increased degree: above all the state as an organized national community; but also the church, the community, every cooperative."[79]

As soon as Gierke granted the state increased legal power, he again restricted it with regard to "every cooperative". His preference for state law is obvious in many passages of his German Private Law. He regarded the "life of law" as "most intimately interwoven with the life of the state"[80] and, in addition, he gave state law a "superior position" in comparison to the "law set by any other association".[81]

There were various reasons for his ambivalence toward law with or without the state. The dominance of state law followed "the circumstances of the

75 For this assumption of a "delayed saddle time" see Seinecke (2020) 274–275.
76 For Gierke's biographical data see Dilcher (2012); Bader (1964).
77 Gierke (1895) 119–120.
78 Gierke (1895) 119–120.
79 Gierke (1895) 120.
80 Gierke (1895) 122.
81 Gierke (1895) 127.

present".[82] It also corresponded to Gierke's national political worldview.[83] At the same time, as a legal historian, Gierke was very familiar with the history of law without a state.[84] And as a private law scholar, he, of course, defended non-state law:

> "In our century, autonomy has suffered many further losses, but at the same time it has conquered new areas of power with the rejuvenation of the corporate system. Of course, it can never regain its medieval significance in the modern state, even from afar, and the least it can do in private law is to reassume its old role. But in its changed forms, it continues to represent a lively creative force even today. More and more, jurisprudence has restored the concept of autonomy without, of course, always acknowledging its full scope. Autonomy is therefore recognised in modern German private law as an independent and peculiar source of law."[85]

This ambivalence between state law and non-state law is also apparent in Gierke's concept of law and power:

> "The law in itself is a power, but only internal, not external power. For its completion, therefore, it requires an organized power, which places itself at its service. This service is above all rendered to him by the state, by ordering the persecution of law […]. In turn, the law serves the state for this purpose by permeating all its orders and consolidating them by elevating power relations to legal relations. […] But law and state always remain two independent powers of life. […] Power is not law: there is power without law. There is also powerless law."[86]

Gierke's concept of law was dependent on the state or some social power. But it was not exhausted by it. Both sides, i. e., power or state and law, appear to be dialectically intertwined. Gierke's legal thinking oscillated between the theory of cooperatives and the reality of the state, between the autonomy of private law and the power of state law.

4.2.2 Alternative law

This ambivalence toward state law also characterizes Gierke's conception of alternative law. Ontologically, it depended on the living existence of "collective organisms": "The organic theory regards the state and the other

82 Gierke (1895) 127.
83 Differentiated on Gierke's nationalism Dilcher (2017 [1974/75]) 333–334.
84 See Gierke (1868).
85 Gierke (1895) 148.
86 Gierke (1895) 118–119.

associations as social organisms".[87] Gierke claimed supra-individual or social entities as "living" or "living beings" just like humans.[88] And, as social associations, they of course had legal power.

Accordingly, in addition to state law, Gierke distinguished between three further types of law: "autonomous statutes",[89] "customary law" and "lawyer's law".[90] Arranged in a simple matrix, laws and statutes hung on different legislation. Laws came from the state, whereas autonomous statutes derived from other associations. Both differed from customary law by the degree to which they were organized in the community. Only organized associations had the power to set law consciously or positively. Gierke's customary law, on the other hand, depended on traditional categories, i. e., a "practice" *(consuetudo)* and the "formation of a legal opinion" *(opinio iuris)*.[91] Finally lawyer's law was some sort of customary law. It started as "court usage". Later, through "constant practice", with the support of "the opinion […] of its legal validity", it would become true customary law.[92]

4.2.3 Interlegality

Although Gierke recognized all kinds of law as true law, he was not interested in interlegality. He advocated national legal unity, a term that dominated the historical sections of his German Private Law:

> "The rise of the German spirit in the Wars of Liberation also gave new impetus to national legal life. Since then, the nation has been striving for two grand goals in regard to law and in the state: unity and Germanity."[93]

Full of pathos, he then recounted the story of the unity of private law:

> "Immediately after the extension of its jurisdiction in 1873, however, the German Reich took on the task that had never been solved throughout centuries of German history, of producing a German civil code. Before the century ends, the work will, according to human opinion, be completed and thus unity will also be realized in the main in private law."[94]

87 Gierke (1902) 12.
88 Gierke (1902) 16.
89 See Gierke (1895) 142.
90 Gierke (1895) 159, 174.
91 Gierke (1895) 165–170.
92 Gierke (1895) 178–179.
93 Gierke (1895) 22.
94 Gierke (1895) 23.

This hope for the unity of private law certainly did not blind Gierke to the problem of contradictions in law. The recognition of law, statute and custom as equal law had to lead to a "clash of legal sources".[95] However, Gierke dissolved these conflicts not by an interlegal concept of law. He stuck with the tried and tested methods like *lex specialis* or *lex posterior* rule.[96] For conflicts of territorial law he relied on the doctrines of international private law and the old "Doctrine of Statute".[97] The fundamental recognition of foreign law was important here. "Foreign law is law", Gierke wrote decisively. [98] In the end, however, he was less concerned with the interaction of laws and statutes, customary and lawyer's law than with national legal unity.

4.2.4 Nomos

Gierke's belief in legal unity is closely related to his nomos. He was driven by a sincere belief in the German nation and participated in the German Wars of Unification as a lieutenant and captain. This is also evident in his scientific work. For Gierke, the nation, like all other communities, could lay claim to an existence of its own and to an independent life. He even experienced this national spirit himself:

> "But there are the hours when the community spirit reveals itself to us with elementary power in an almost obvious form and fills and overwhelms our inner being in such a way that we hardly feel our individual existence as such anymore. I lived through a consecrated hour of this kind here in Berlin Unter den Linden on July 15, 1870."[99]

His critique of the Roman law epitomized this hope for the German nation. He was a great sceptic of the so-called 'reception' of Roman law in Germany:

> "Because help had to come. And it came. But now it came from the outside. One grasped for foreign law, one took up the Roman laws with its supplements, not because, but although it was a foreign law. One found no other way out. Admittedly, this was now a medicine and a very radical medicine for the previous state of illness. But the medicine contained its poison, which caused new diseases! Especially

95 Gierke (1895) 183.
96 Gierke (1895) 183.
97 Gierke (1895) 210.
98 Gierke (1895) 212.
99 Gierke (1902) 24.

since excessive doses were swallowed and soon, out of mere habit, continued to be consumed!"[100]

This critique is very important to Gierke's famous reviews of the draft German Civil Code. Next to that, a second philosophical presumption is central to Gierke's nomos. He believed in communities and cooperatives as such. In 1902, he addressed the students of the University of Leipzig in his famous "Speech at the Rectorate's inauguration":

> "Also you, my dear fellow students, may permeate yourself with the feeling that you are living members of a living whole. […] Awaken and cultivate in yourself the awareness that the life of a higher order is taking place in your life at the same time; it is this higher order that carries along the individual, and to which humanity owes its history and its dignity. Recognize what you owe as parts of the whole to the whole and give joyfully to the community what is due to the community!"[101]

4.2.5 Conclusion

Gierke appears prima facie as an early advocate of legal pluralism. The recognition of non-state law as genuine law did not cause him any problems. His concept of law was open to non-state legal orders: the law of the church and all sorts of communities or cooperatives. Nevertheless, Gierke repeatedly tended toward national and state law and gave it a prominent position. Therefore, at second glance, one notes the disappearance of legal pluralism. Gierke lacked a sense for interlegality. His credo was legal unity. Legal conflicts had to be resolved. In principle, only one law was applicable. Legal, political, and state unity were among his central goals. Gierke's nomos was national, which is why he is an important witness for the ambivalent and 'delayed saddle time' in German jurisprudence between 1871 and 1900 – between the old legal pluralism and the new unity of private law in Germany.

4.3 Eugen Ehrlich and Hans Kelsen

When Eugen Ehrlich (1862–1922) published his *Grundlegung der Soziologie des Rechts* (Fundamental Principles of the Sociology of Law) in 1913 and

100 Gierke (1895) 8.
101 Gierke (1902) 35–36.

Hans Kelsen (1881–1973) reviewed it in 1915, much had changed compared to the political, legal, and scientific situation of the 19th century.[102] Empirical disciplines, such as sociology or psychology, posed new challenges to jurisprudence. At the same time, *Neukantianismus* (Neo-Kantianism) had become prominent in legal philosophy and theory by then. In 1871, the German people gained their delayed nation state, and since 1900, they have their German Civil Code. Democracy, at that time, was no longer just a political dream and it would take only a few more years before it became true in Germany and Austria.

However, Kelsen and Ehrlich did not argue in Germany. Kelsen lived in Vienna and Ehrlich was a professor in Chernivtsi, Bukovina. Their quarrel took place within the borders of the Imperial and Royal monarchy of Austria-Hungary, which perished in 1918. Their old world was swept away after the first great war. No European emperor was to rule an empire after that. The Caesars went into exile or lost their lives. The Reichs became republics.

During this period of radical change, Kelsen and Ehrlich fought over the sense and nonsense of sociology of law. Their dispute is no less well known than the Thibaut-Savigny-controversy. Here Kelsen, the "jurist of the century", is usually regarded as the "winner".[103] Both, however, only discussed the possibilities of legal sociology. In retrospect, they had engaged in a battle on the foundations of legal pluralism. Even today, Eugen Ehrlich is repeatedly stylized as the father of legal pluralism and hardly any lawyer represents the "ideology of legal centralism" more than Hans Kelsen.[104]

The center of Kelsen's legal concept was Vienna. The city in the heart of the Habsburg Empire and later the seat of the Austrian Republic. Ehrlich's Chernivtsi, on the other hand, lied in the periphery, on the edge of Austria-Hungary. After the end of the Habsburg Monarchy, Chernivtsi, along with the Bukovina, first fell to Romania, then to the Soviet Union – today it

102 This debate only serves as a starting point here and hopefully helps to illustrate the conflicting positions of Eugen Ehrlich and Hans Kelsen on legal pluralism. The following reconstruction is primarily oriented toward Ehrlich (1989 [1913]); Ehrlich (1975 [1913/1936]); Kelsen (2008 [1934]). Their debate started with Kelsen (1915), followed by Ehrlich (1916), Kelsen (1916), finally ending with Ehrlich (1916/17) and Kelsen (1916/17). For a deeper reconstruction of the debate, see Rottleuthner (1984).

103 H. Dreier (1993).

104 See Griffiths (1986) 3, 23–29.

belongs to Western Ukraine. Klaus Lüderssen described the extent of the city's diversity using the example of its buildings:

> "One only has to ask about the architecture: in the Chernivtsi of the second half of the 19th century, it condensed great traditions: Oriental-Moorish […], as well as Roman-Gothic […], and demonstrates the coexistence of religious groups: the Israelite temple, the Romanian church, the Ukrainian church, the Armenian church, the Orthodox Paraskiva church. In addition, there are the external signs of ethnic orientation: the 'German House', the 'Jewish House', the 'Turkish Fountain', the 'Russian Lane', but also the Baroque German Theatre, and contemporary art styles such as the Art Nouveau façades of the Sparkasse […], professional modern industrial architecture […] and visions of Galician abandonment."[105]

Of course, architecture also flourished in Vienna. But the political, religious, ethnic, national and legal conditions in Vienna were not as manifold as in Chernivtsi and the Bukovina. The *Allgemeines bürgerliches Gesetzgebuch für die gesammten Deutschen Erbländer der Oesterreichischen Monarchie* (General Civil Code of Austria) of 1812 was closer to Vienna than to Chernivtsi. The city society of Vienna was different from the rural society of the Bukovina, whose customs and habits Ehrlich and the students from his seminar had tried to record. These legal customs were oriented less to the official law of the state than to the practiced traditions. Therefore, Ehrlich became the pioneer of the "Global Bukovina".[106]

4.3.1 Law without a state

Ehrlich relied on society, not on the state. He emphasized this right away in the preface to his Fundamental Principles of the Sociology of Law. As a slogan, he postulated: "At the present as well as at any other time, the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself."[107] Ehrlich's law was societal law. He developed it in a detailed discussion in his "The state and the law".[108] Like Savigny, he made a strong argument, taking the origin of law as his point of departure – before and beyond the state: "Still more important is the fact that

105 Lüderssen (2003) VII–VIII; my translation.
106 See Teubner (1996); and below [chapter 4.6].
107 Ehrlich (1975 [1913/1936]) xv.
108 Ehrlich (1975 [1913/1936]) ch. VII, 137–170; on his critique of state legal pluralism Seinecke (2015) 103–107.

the greater part of legal life goes on in a sphere far removed from the state, the state tribunals, and state law".[109] He posed this rhetorical question:

> "Must these relations wait until they receive mention in a statute before they can become legal relations, in spite of the fact that the basic institutions of our society furnished the order for the affairs of mankind for thousands of years without this aid?"[110]

From that Ehrlich concluded:

> "There are millions of human beings who enter into untold legal relations, and who are fortunate enough never to find it necessary to appeal for aid to a tribunal of any sort. Since the relation which has never come into contact with legislation and judicial adjudication, after all, is the normal relation, it follows that in the very cases that constitute the rule, everything would be lacking that is necessary to determine whether we are dealing with a legal relation or not."[111]

For Ehrlich, law originated first in customs and in social "associations".[112] This is why, he concluded, law and social normativity lay so close together: "The legal norm is therefore only one of the rules of action and thus related to all other social rules of action."[113]

Ehrlich did not restrict this theory to matters concerning substantive law. He assumed the same for the emergence of courts. They did "not come into being as organs of the state, but of society".[114] Again it was history, where he found non-state justice: "We find the jurisdiction of the head of the clan, of the head of the house, of the elder of the village. We find family courts and village courts."[115] According to Ehrlich, however, this "conversion of the administration of justice into a function of the state", came far later than the law.[116] After this conversion, the courts created "norms for decision".[117] Those were legal norms of a "special kind" and indeed "a rule of conduct, but only for the courts".[118] By that, Ehrlich also explained the *déformation pro-*

109 Ehrlich (1975 [1913/1936]) 161–162.
110 Ehrlich (1975 [1913/1936]) 162.
111 Ehrlich (1975 [1913/1936]).
112 Ehrlich (1975 [1913/1936]) ch. II & III, 26–38, 39–60.
113 Ehrlich (1975 [1913/1936]) 39.
114 Ehrlich (1975 [1913/1936]) 121.
115 Ehrlich (1975 [1913/1936]) 140.
116 Ehrlich (1975 [1913/1936]) 143.
117 Ehrlich (1975 [1913/1936]) 121–136.
118 Ehrlich (1975 [1913/1936]) 122–123.

fessionnelle of the legal profession. Through the perpetual orientation toward the law of the courts, the lawyers lost their sense of social law. That deprived the jurisprudence of the fullness of its subject matter and limited it to "the science of the application of the law created by the state".[119]

Parallel to this critique of a state-centered concept of law, Ehrlich's narrative on the emergence of the state continued. To him, the state first emerged only as a "military association" and an "orderly system of taxation".[120] Already in its "early period", it "developed crude police activity".[121] However, "after a long interval", the "administration of justice" and "much later […] legislation" accompanied the functions of the state, until a "true administration by the state […] did not arise until the seventeenth century in France".[122] Ehrlich, thus, once again, underscored the contingent relationship between state and law. For Ehrlich – like Gierke – the state was only one association among many, a "social association".[123]

Hans Kelsen intensely contradicted this understanding of law and state. He rejected any kind of "dualism" in theory.[124] For him, the scientific distinction between law and state only fulfilled an "ideological function",[125] namely the "legitimization of the state by law".[126] For Kelsen, law and state were one: "All law is state law".[127] He called this the "identity of law and state":[128] "The state is a legal order. But not every legal order is already called a state […]. The legal order is called the state when it has reached a certain degree of centralization."[129]

Kelsen did not analyze the concepts of law and state in their historicity. His epistemological interest was committed to a purely positive, objective

119 Ehrlich (1975 [1913/1936]) 19.
120 Ehrlich (1975 [1913/1936]) 138.
121 Ehrlich (1975 [1913/1936]) 138.
122 Ehrlich (1975 [1913/1936]) 139.
123 Ehrlich (1975 [1913/1936]) 42.
124 See Kelsen (2008 [1934]) 115–117, 127–128; all quotes from Kelsen's works referenced here are my translation.
125 Kelsen (2008 [1934]) 116.
126 Kelsen (2008 [1934]) 128.
127 Kelsen (1984 [1911]) X.
128 Kelsen (2008 [1934]) 117–128.
129 Kelsen (2008 [1934]) 117–118.

and "ideology-free"[130] jurisprudence. Kelsen's "'pure' doctrine of law" aimed to "liberate jurisprudence from all foreign elements".[131] He offered this polemical analysis:

> "In a completely uncritical way, jurisprudence has merged with psychology and biology, with ethics and theology. Today there is almost no particular discipline left that a jurist would not penetrate even though he is not competent in it. Yes, he believes he can enhance his scientific reputation by borrowing from other disciplines. However, the actual jurisprudence is lost."[132]

Kelsen's radical ideas on law and state did not come from ignorance.[133] They followed consequently from his pure methodical conception of jurisprudence.

4.3.2 Alternative law

For this very reason, Kelsen did not leave open the possibility of an alternative law. His "pure jurisprudence is a theory of positive law", i. e., a theory of valid or applicable law, not of a hoped-for law.[134] Even if law was available to politics, it always was a law without legal alternatives. As soon as alternative law was implemented through political will or by judges, it no longer was an alternative but a positive and valid law. For Kelsen, there either was the law or there was no law.

Epistemological pureness and legal positivism forced Kelsen to presume the unity of the legal system. In the first sentences of his chapter, *Die Rechtsordnung und ihr Stufenbau* (The Legal Order and its Stepped Structure), under the first subheading *Die Ordnung als Normensystem* (The Order as System of Norms), he wrote:[135]

> "Law as order or the legal order is a system of rules of law. And the first question that needs to be answered here is the one posed by pure jurisprudence in the following way: What constitutes the unity of a variety of legal norms, why does a certain legal norm belong to a certain legal order?"[136]

130 Kelsen (2008 [1934]) 117.
131 Kelsen (2008 [1934]) 1.
132 Kelsen (2008 [1934]) 1–2.
133 Kelsen was well informed, see e. g. Kelsen (1922) 4–74.
134 Kelsen (2008 [1934]) 1.
135 See Kelsen (2008 [1934]) 73–89.
136 Kelsen (2008 [1934]) 62.

Like so much else, Kelsen presupposed the question of legal unity.[137] And whoever asks for unity will find unity. Kelsen then spelled out the logic of his question starting with state enforcement acts, then proceeding to judicial decisions and the laws determining them, and not least the constitution. Behind the constitution he postulated the notorious "basic norm" as a "condition of all law-making", as being "not set, but […] presupposed".[138]

This positive-normative and state-centered legal order was totally alien to Ehrlich. His law was a law without a state, a law without courts, a law without coercion:

> "Three elements, therefore, must, under all circumstances, be excluded from the concept of law as a compulsory order maintained by the state – a concept to which the traditional juristic science has clung tenaciously in substance, though not always in form. It is not an essential element of the concept of law that it be created by the state, nor that it constitutes the basis for the decisions of the courts or other tribunals, nor that it be the basis of a legal compulsion consequent upon such a decision. A fourth element remains, and that will have to be the point of departure, i. e., the law is an ordering."[139]

This turn toward normality and "ordering" twisted Kelsen's perspective 180 degrees.[140] Ehrlich's law was "living law", which "constitutes the foundation of the legal order of human society".[141] He preferred "customary law" to the lawyer's law and the statutory law, thereby contrasting the "law of life" with the "legal rule", or the "organizational form" with the "decision-making norm".[142] But Ehrlich did not romanticize the 'living law' at all; instead, he understood it sociologically and empirically:

> "This then is the living law in contradistinction to that which is being enforced in the courts and other tribunals. The living law is the law which dominates life itself even though it has not been posited in legal propositions. The source of our knowledge of this law is, first, the modern legal document; secondly, direct observation of life, of commerce, of customs and usages, and of all associations, not only of those

137 On the numerous prepositions in Kelsen's theory Seinecke (2015) 127.
138 Kelsen (2008 [1934]) 66–67; on the basic norm H. Dreier (1990) 27–90.
139 Ehrlich (1975 [1913/1936]) 23–24.
140 See on the other hand Kelsen (2008 [1934]) 25–28.
141 Ehrlich (1975 [1913/1936]) 502; on the "living law" Ehrlich (1967 [1911]); Ehrlich (1986 [1920]); Ehrlich (2007 [1920]).
142 On customary law Ehrlich (1975 [1913/1936]) ch. 19, 436–471; on the "rule of life", see Ehrlich (1903) 36; on "organizational form" and "norms for decision" Ehrlich (1973 [1906]) 7–14; on "The Norms for Decision" Ehrlich (1975 [1913/1936]) ch. VI, 121–136.

that the law has recognized but also of those that it has overlooked and passed by, indeed even of those that it has disapproved."[143]

Ehrlich understood the sociology of law as a "science of observation".[144] He was concerned with "method", with "phenomena" and "facts".[145] Of course, Ehrlich's newly founded sociology of law could not provide the methodological instruments of today's empirical social sciences. But his alternative law was meant to be sociological, less normative, and by no means doctrinal. He sought 'living law' in the customs and order of social associations.

4.3.3 Interlegality

Ehrlich's sociological jurisprudence focused on the social emergence and empirical observation of law. However, this did not necessarily mean interlegality. Rather, some elements of Ehrlich's legal thought seem to presuppose a general and uniform sense of law, social order and ratio. For instance, he cherished the "teachers of the law of nature school in the seventeenth and eighteenth centuries" as well as the "founders of the Historical School". With both, he positively conceived the (one) "nature of man" or the (undivided) "legal consciousness of the people".[146] In a rarely read essay, he even presumes that the "social order […] is mainly the same in the civilized states", yes, "even among the savages and the barbarians".[147] In consequence, this could also mean that the living law had to be quite similar, or even the same, in all societies.

Besides these little doubts, Ehrlich's thinking was driven by a strong sense for interlegality. This interlegality was not limited to the contradiction between the official and the living law. Ehrlich's methodological credo *Freirecht* (free law) also pleaded for it. This method or movement was highly critical of the normative quality of state law.[148] While Ehrlich did not negate the normative power of this law in the books, he demanded an interplay of state law, legal doctrine, and free law – with a huge bias toward free law.

143 Ehrlich (1975 [1913/1936]) 493.
144 Ehrlich (1975 [1913/1936]) 473.
145 Ehrlich (1975 [1913/1936]) 473–474.
146 Ehrlich (1975 [1913/1936]) 15–16.
147 Ehrlich (1922) 241–242.
148 For the so-called "Freirechtsschule" or "Freirechtsbewegung" see Rückert (2008) 201–224.

That is why Ehrlich defended and widened the gaps in doctrine and law.[149] He demanded that the free judge close these gaps sociologically with the 'living law'.[150] The alternative law supplemented, ensnared, and undermined the state law: "So in the last analysis the state of the law is a resultant of the cooperation, the interaction, and the antagonism of state and society."[151] Finally, Ehrlich's concept of legal science or doctrine was an interlegal one. He gave the doctrine of legal sources a sociological turn. He called for "the facts of the law themselves", and with that he meant: "usage", "relations of domination and of possession", "agreements", "articles of association", "dispositions by last will", and "succession" – but from a sociological perspective.[152] And, most importantly, Ehrlich gave all kinds of communities an equal right to legislation and lawmaking.

Kelsen, on the other hand, was not interested in interlegality. He relied on normative hierarchy. The logic of his *Stufenbau* (hierarchical structure) and his *Grundnorm* (basic norm) was deductive and hierarchical. This becomes particularly clear in his examination of the "conflict between norms of different levels" or the problem of "unconstitutional law".[153] Kelsen's solution to the problem was impressively simple: "The lower level norm shall remain in force despite its content contrary to the higher level norm. This happens in accordance with the principle of legal force laid down by the higher level norm itself."[154] In Kelsen's legal theory, there was no place for inconsistency and, therefore, no room for interlegality. As an epistemological premise, the "unity of the legal system" was irrevocably established.

4.3.4 Nomos

The search for ideological preferences in Kelsen's and Ehrlich's work is difficult. Even the classification of both into political camps is hardly possible. While Kelsen is usually assigned to a liberal, socialist, and democratic spectrum, Ehrlich's political labels have largely proved to be wrong.[155] Pri-

149 See Ehrlich (1903) 17; Ehrlich (1888).
150 See Ehrlich (1918) 313; Vogl (2009) 115; Rehbinder (1995 [1988]) 196.
151 Ehrlich (1975 [1913/1936]) 388.
152 Ehrlich (1975 [1913/1936]) 474.
153 Kelsen (2008 [1934]) 84–89.
154 Kelsen (2008 [1934]) 87.
155 For Kelsen see H. Dreier (1990) 249, fn. 2; for Ehrlich Vogl (2003) 321–325.

ma facie, their debate had a mere theoretical or academic character. Both sought some kind of 'pure jurisprudence', even Ehrlich: "The name sociology of law therefore expresses the fact that it is a pure legal science, with the exclusion of any practical application, be it in jurisprudence or in legal policy."[156]

For Kelsen as much as for Ehrlich, it was important that jurisprudence or legal theory should not be judged by their practical and political applicability. However, many other methodological presumptions of both fell far apart. Kelsen believed in critical objectivity, scientific accuracy and methodical stringency. These attributes characterized his ideal of an "anti-ideological" legal theory.[157] Ehrlich, on the other hand, demanded artistic and methodological freedom: "Method is as infinite as science itself."[158] This was the final sentence of his *Fundamental Principles of the Sociology of Law*.

At second glance, Kelsen's legal theory was directly connected to his political theory. Firstly, Kelsen's pure theory of law is decidedly committed to the rule of law: "Before the law, but not before culture, all are equal."[159] Secondly, Kelsen was very concerned with the "Verteidigung der Demokratie" (defense of democracy) in the 1930s.[160] The positive concept of law referred directly to legislation, which in democracy was the responsibility of the parliament. This is the place where different interests and values, class differences and ideologies, in short, diversity and pluralism, were negotiated.

4.3.5 Conclusion

After 1900, the setting of legal pluralism changed. The so-called *etatistischer Rechtspositivismus* (state legal positivism) now had the applicable law on its side. This, of course, also changed the debates in the German-speaking jurisprudence. Kelsen decisively asserted the identity of law and the state. For him, every kind of dualism was tantamount to ideology. There was no alternative law to state law and, therefore, no room for interlegality. But he did not demonize every form of pluralism. His political hope for the rule of law

156 Ehrlich (1986 [1913/14]) 179.
157 See the chapter "Die anti-ideologische Tendenz der Reinen Rechtslehre" in Kelsen (2008 [1934]) 16–18.
158 Ehrlich (1975 [1913/1936]) 506, further 472.
159 Kelsen (1984 [1911]) 371.
160 See Kelsen (2006 [1932]); Kelsen (2006).

and democracy shifted pluralism only to another place: to legislation and to the parliament. Kelsen advocated political pluralism.

While Kelsen took public law as his point of departure, Ehrlich's legal thinking originated from the older traditions of legal pluralism in German private law. He postulated a free and living law against codification. His law did not require the state; rather, it grew in social associations and depended on the social order, not as much on coercion. For this reason, he relied on the sociology of law, not on legal doctrine. Ehrlich opened up jurisprudence to allow in the infinite world of alternative law. For integrating the emerging interlegality through his methodological concept of free law, Ehrlich remains one of the most important forefathers of legal pluralism.

4.4 Gustav Radbruch and the National Socialist dictatorship

In spring 1945, with the end of the Second World War also came the end of National Socialism in Germany. Today, May 8 is an important part of the German culture of remembrance. In 1945, this date marked *Stunde Null* (zero hour) – which simultaneously characterized the end and a new beginning,[161] when German society in general, and German jurisprudence in particular, were confronted with a serious ethical crisis. Too many lawyers were involved in the National Socialist regime and its injustice. Lena Foljanty reports on this "crisis of law":

> "In National Socialism, crimes had been committed also in the name of the law and by the courts. Simply going over to the everyday agenda was not an option for lawyers after 1945. In the first publications after the end of the war, lawyers looked for a way to deal with the frequently invoked 'crisis of the law'. […] The so-called 'natural law renaissance of the post-war period' began as soon as war and National Socialism had ended."[162]

The new Federal Republic of Germany had not yet been founded when lawyers began to seek their salvation in a "renaissance of natural law". In legal philosophy, the keyword "natural law after 1945" is usually no longer taken as seriously anymore.[163] After the end of National Socialism, however, the self-image of jurisprudence was at stake. Therefore, the renaissance of

161 See Kauhausen (2007).
162 Foljanty (2013) 2; all quotes from this text are my translation.
163 E. g. Foljanty (2013) 3.

natural law was not merely a philosophical debate. The authors wrote from Catholic, Protestant or secular perspectives. They pursued various practical, political, or ideological concerns. Lena Foljanty continues to write about literary production:

> "The end of the Second World War and National Socialist rule did not silence German jurisprudence – on the contrary. Soon the first articles appeared, first in the daily press, then in the legal journals, which were gradually refounded from 1946 onwards. Small booklets were published, 60 pages, 70 pages, rarely more. Leafing through these first post-war publications, the presence of the recent past catches the eye. There was talk of 'painful' or 'bitter' experiences, of 'brute force' and 'barbarism', of a 'fever dream' and an 'apocalyptic epoch' that had now been left behind. […] The texts show consternation at what has happened and testify to the need to express it. But above all they speak of the awareness of a deep crisis of law and jurisprudence."[164]

The best-known voice from this "crisis of the law" today is that of Gustav Radbruch (1878–1949). Radbruch was neither at the center of discussions on natural law, nor did he represent any of the Christian or secular approaches.[165] He also had no personal involvement in National Socialism. As a former Reich Minister of Justice in the Weimar Republic and as a member of the *Sozialdemokratische Partei Deutschlands* (Social Democratic Party of Germany, SPD), he was forced to retire in 1933 as "one of the first teachers of law".[166] He did not go into exile, as he was forced to stay in Heidelberg. After the end of the war, he became dean of the Heidelberg Law Faculty. As an uncontaminated opponent of the regime, his word held considerable weight. Two short texts, from September 1945 and from August 1946, achieved extraordinary fame: *Fünf Minuten Rechtsphilosophie* (Five minutes of legal philosophy) and *Gesetzliches Unrecht und übergesetzliches Recht* (Statutory Lawlessness and Supra-Statutory Law), respectively. In the latter, Radbruch developed his famous 'formula' for the "conflict between justice and legal certainty":

> "The conflict between justice and legal certainty may well be resolved in this way: The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute

164 Foljanty (2013) 1.
165 See Foljanty (2013) 16–17.
166 Spendel (2003); for further biographical data R. Dreier/Paulson (1999).

> and justice reaches such an intolerable degree that the statute, as 'flawed law', must yield to justice. It is impossible to draw a sharper line between cases of statutory lawlessness and statutes that are valid despite their flaws. One line of distinction, however, can be drawn with utmost clarity: Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, the statute is not merely 'flawed law', it completely lacks the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice. Measured by this standard, whole portions of National Socialist law never attained the dignity of valid law."[167]

This so-called 'Radbruch formula' and the natural law debates after 1945 are usually not connected to legal pluralism. This is true only at first glance. On second glance, Radbruch's answer to National Socialist injustice contains all four elements of legal pluralism. It even establishes a genuine tradition of legal pluralism: 'transitional legal pluralism'.

4.4.1 Law without a state

Criticism of state law was a recurring motif in natural law literature after 1945. The "bogeyman of positivism"[168] was omnipresent in the debates. Adolf Süsterhenn, for example, formulated this clearly:

> "The legal positivist, who regards the state as the source of all law, naturally revolves around the state in his political thinking. He will be inclined to proclaim the supremacy of the state in all areas of life. For him, the state is ultimately the highest value of human life. […] In his basic attitude the legal positivist will always be state totalitarian. For if the state is the sole creator of law, then all other rights ultimately go back to state conferment and can, therefore, at any time be restricted or even abolished by the state."[169]

Süsterhenn reduced legal positivism to state positivism. In 1947, the word "state" primarily conjured images of the National Socialist state that had just been defeated. It was difficult to oppose this argument. The memories of recent German history were too present.

Radbruch also polemicized against "positivism". He shared the widespread thesis that "positivism" "has in fact rendered the German legal pro-

167 Radbruch (2006b [1946]) 7.
168 See Foljanty (2013) 23–36.
169 Süsterhenn (1991 [1947]) 116; my translation.

fession defenceless against statutes that are arbitrary and criminal".[170] But Radbruch did not turn against state law in general; in fact, the word "state" does not appear in both texts. Radbruch equated "positivism" with "power" and with "arbitrariness":[171]

> "The most conspicuous characteristic of Hitler's personality, which became through its influence the pervading spirit of the whole of National Socialist 'law' as well, was a complete lack of any sense of truth or any sense of right and wrong. Because he had no sense of truth, he could shamelessly, unscrupulously lend the ring of truth to whatever was rhetorically effective at the moment. And because he had no sense of right and wrong, he could without hesitation elevate to a statute the crudest expression of despotic caprice."[172]

Radbruch did not write about the state, but about "Hitler" and the "spirit of the whole of National Socialist 'law'". He was less interested in 'law without a state' than in some kind of law that was opposed to the National Socialist arbitrariness. His political enemy was National Socialism, not the state in general. Nevertheless, in dealing with National Socialist injustice, he did not rely solely on state law.

4.4.2 Alternative law

Radbruch's concept of alternative law corresponds to this criticism of National Socialist arbitrariness. Over and over again, he opposed law to arbitrariness and power. That is why he wrote of "National Socialist 'law'" – if at all – only using distancing commas.[173] He bound the proper use of the term "law" to "the will to justice", and with justice, he intended to "judge without regard to the person, to measure everyone by the same standard".[174] He described his notion of alternative law in the following words:

> "There are principles of law, therefore, that are weightier than any legal enactment, so that a law in conflict with them is devoid of validity. These principles are known as natural law or the law of reason. To be sure, their details remain open to question,

170 Radbruch (2006b [1946]) 7; see also Radbruch (2006a [1945]), First Minute. This accusation was not singular with Radbruch, but very common at the time. It can probably not be ascribed to any single author, see Foljanty (2013) 19.

171 See Radbruch (2006b [1946]) 7; Radbruch (2006a [1945]), Second Minute.

172 Radbruch (2006b [1946]) 7.

173 Radbruch (2006b [1946]) 8.

174 Radbruch (2006a [1945]), Third Minute.

> but the work of centuries has in fact established a solid core of them, and they have come to enjoy such far-reaching consensus in the so-called declarations of human and civil rights, that only the dogmatic sceptic could still entertain doubts about some of them."[175]

Radbruch did not spell out a natural law doctrine. His supra-statutary law had a corrective function. The starting point for Radbruch's legal thought were "legal enactments" that were "in conflict" with higher "principles of law". The same applies to his famous formula, which did not establish some concrete concept of natural law. Rather, it was a pragmatic formula about the "conflict between statute and justice" that "reaches such an intolerable degree that the statute […] must yield to justice". It was about the enactment of "positive law" where there was "not even an attempt at justice", where "equality" was "deliberately betrayed".[176] Radbruch did not aim to justify any kind of (positive) law, he just argued for the non-applicability of the National Socialist arbitrariness. His alternative law did not constitute a legal order, it only corrected the "flawed law" of National Socialism.

4.4.3 Interlegality

Although Radbruch, as a democrat and former minister of justice, pleaded neither for a law without a state nor for an alternative natural law, problems of interlegality were at the center of his two essays. Today, such disputes concerning state injustice after a societal or political radical change go by the keyword 'transitional justice'. Radbruch did not negotiate anything else. His cases revolved around informers and deserters, judges and executioners. He referred to four different types of cases:[177]

(1) A "justice department clerk" denounced a "merchant" who had left the inscription "Hitler is a mass murderer and to blame for the war" on "the wall of a WC". The denounced man was sentenced to death and executed. After the end of National Socialism, the Thuringian Criminal Court condemned the clerk "as an accomplice to murder".

(2) A "soldier from Saxony" deserted and was "discovered" while "stopping by his wife's apartment". On the run, he killed a sergeant. After the war,

175 Radbruch (2006a [1945]), Fifth Minute.
176 Radbruch (2006b [1946]) 7.
177 See for the cases Radbruch (2006b [1946]) 2–6.

he returned to Germany and was imprisoned. The "Chief Public Prosecutor" of Saxony then "ordered his release and the abandonment of criminal proceedings" against him.

(3) Judges made countless "inhuman judgments".

(4) Executioner's assistants helped with numerous unlawful executions.

All the cases described by Radbruch were normatively tragic. There was no simple and just solution. On the one hand, the injustice and arbitrariness of National Socialism and the guilt of those involved weighed heavily. On the other hand, the retroactive conviction of the damned would have relied on other forms of fundamental injustice. Radbruch, therefore, refused to impose a general rule in dealing with National Socialist arbitrariness:

> "In the language of faith, the same thoughts are recorded in two verses from the Bible. It is written that you are to be obedient to the authorities who have power over you, but it is also written that you are to obey God rather than men – and this is not simply a pious wish, but a valid legal proposition. A solution to the tension between these two directives cannot be found by appealing to a third – say, to the dictum: 'Render to Caesar the things that are Caesar's, and to God the things that are God's'. For this directive, too, leaves the dividing line in doubt. Or, rather, it leaves the solution to the voice of God, which speaks to the conscience of the individual only in the particular case."[178]

With the four mentioned cases and the normative tragedy in mind, Radbruch developed his interlegal 'formula'. He incorporated a second layer into the law. 'Justice' and 'equality' became directly applicable – but only as a corrective and only under certain circumstances. However, the positive law remained untouched. Therefore, Radbruch, for example, referred to the *Reichsstrafgesetzbuch* (German penal code) of 1871 and the laws of the Allied Control Council passed after 1945.[179] All these sources of law, the positive law of his time, and the supra-statutary law characterized Radbruch's understanding of interlegality.

4.4.4 Nomos

One last element is necessary to understand Radbruch's legal pluralism. In both texts, he was decisively committed to the *Rechtsstaat* (rule or govern-

178 Radbruch (2006a [1945]), Fifth Minute.
179 Radbruch (2006b [1946]) 8–9.

ment of law) and to democracy.[180] As a former minister of justice of the Weimar Republic, and as a democrat, he could not plead for natural law or a 'rule of justice'. In the first three editions of his legal philosophy of 1914, 1922 and 1932, Radbruch had advocated legal positivism.[181] This did not change fundamentally after 1945. He argued for the *Rechtsstaat* and a very limited correction of positive law.[182] In both essays from 1945 and 1946, he never assumed an applicable 'natural law'. He wrote about "principles of law" that "*are known* as natural law".[183] And he historicized this so-called 'natural law' empirically and positively. It was the "work of the centuries" and positively legislated in the "declarations of human and civil rights".[184] Radbruch's nomos is finally evident in the last two sentences of the essay:

> "We must seek justice, but at the same time attend to legal certainty, for it is itself a component of justice. And we must rebuild a Rechtsstaat, a government of law that serves as well as possible the ideas of both justice and legal certainty. Democracy is indeed laudable, but a government of law is like our daily bread, like water to drink and air to breathe, and the best thing about democracy is precisely that it alone is capable of securing for us such government."[185]

4.4.5 Conclusion

Even though Radbruch is usually not mentioned in the debates on legal pluralism, his famous essays from 1945 and 1946 made him a true pluralist. His supra-statutory law opened up a second normative layer in law to deal with the National Socialist arbitrariness and injustice. This law was no simple natural law, it gained its validity through history and through positive declarations. Anyhow, with his supra-statutory law, Radbruch had opened the box of interlegality. Cases relating to National Socialist arbitrariness had at first to be decided by positive law. But then, in a second step, the supra-statutary law had to be able to correct these results, if necessary. Even though

180 For Radbruch's notion of democracy Klein (2007) and *Rechtsstaat* Saliger (1995).
181 See Radbruch (1999a [1932]) § 9, p. 70.
182 See Foljanty (2013) 56.
183 Radbruch (2006a [1945]) Fifth Minute, emphasis added. In the German original, Radbruch (1999c [1945]), this distance toward 'natural law' is even more obvious. Radbruch there writes: "Man *nennt* diese Grundsätze das Naturrecht oder das Vernunftrecht." They are just 'called' natural law.
184 The "work of the centuries" emphasized first and foremost by Rückert (2015 [1998]) 131.
185 Radbruch (2006b [1946]) 11.

Radbruch did not demand a law without a state, his plea for *Rechtsstaat* and for democracy in the discussion of National Socialist arbitrariness made him the first advocate of a transitional legal pluralism.

4.5 Franz von Benda-Beckmann and postcolonial Malawi

After the so-called 'renaissance of natural law' ended in the 1950s, German jurisprudence rediscovered legal sociology in the following decades. Besides that, the social movements of the 1960s and 70s, of course, also influenced the course of German legal thought. Especially the left-wing jurisprudence gained a stronger voice in this time. Authors like Rudolf Wiethölter blustered against the "bourgeois law" of the 19th century in his notorious book *Rechtswissenschaft* (Legal Science).[186] Others like Rüdiger Lautmann proclaimed *Soziologie vor den Toren der Jurisprudenz* (Sociology on the Gates of Jurisprudence), alluding to the expression *Hannibal ante portas*.[187] These are the more general contexts in which Franz von Benda-Beckmann (1941–2013) wrote his famous dissertation, *Rechtspluralismus in Malawi* (Legal Pluralism in Malawi), published in 1970.[188] However, he did not write it as a legal sociologist or legal anthropologist, as he did later together with his wife Keebet von Benda-Beckmann.[189] Legal anthropology was not yet an established discipline in jurisprudence when Benda-Beckmann wrote his dissertation at the Institute for International Law at the University of Kiel.

4.5.1 Law without a state

The slogan, 'law without a state', did not appear in Benda-Beckmann's book on "Legal Pluralism in Malawi" at all. Surprisingly, Benda-Beckmann mainly wrote about state law. His study was based on sources from the official 'archives' of the state and on interviews with judges from different state courts. In this early work, Benda-Beckmann wrote as a lawyer who was

186 Wiethölter (1968).
187 Lautmann (1971).
188 Benda-Beckmann (1970); Benda-Beckmann (2007 [1970]).
189 See e. g. Franz and Keebet von Benda-Beckmann (2007); Franz and Keebet von Benda-Beckmann (2014).

applying for a Doctor of Law in Germany. He was, therefore, concerned with the reconstruction of the "judicial" and "legal system" of postcolonial Malawi.[190] He investigated "customary courts", "local courts", "local appeal courts", and "British courts", which were all part of a single judicial system.[191] The same was the case for substantive law. Benda-Beckmann wrote about the "law, which was applicable in the Malawian courts".[192] "Legal Pluralism in Malawi" was not on 'law without a state'.

4.5.2 Alternative law

Even though Benda-Beckmann was primarily dealing with the law applicable in state courts, he focused on "indigenous" or "customary laws" and "religious law". They represented two of "four complexes" of the Malawian legal order next to "local statutes" and "English law".[193] He, therefore, discussed in detail the applicability of "indigenous laws" under article 20 of the British Central Africa Order in Council from 1902. The crucial question was the meaning of the rule that courts should also be "guided by native law".[194] Ultimately, however, this analysis underscored that Benda-Beckmann's early work still had a bias toward the state, and hence only analyzed "weak legal pluralism".[195]

4.5.3 Interlegality

Anyhow, interlegality stood at the center of Benda-Beckmann's early concept of legal pluralism. He explained the introduction of the concept with respect to the sources of Malawian law:

> "The law applied in Malawian courts has different legal sources. If one generally speaks of a legal dualism, this is only a rough indication of the coexistence of two areas of law, that of 'English' law on the one hand and that of traditional law on the other. If, however, one considers that the laws of the individual tribes are usually

190 Benda-Beckmann (2007 [1970]) 13.
191 Benda-Beckmann (2007 [1970]) 38–41.
192 Benda-Beckmann (2007 [1970]) 46.
193 Benda-Beckmann (2007 [1970]) 46.
194 Benda-Beckmann (2007 [1970]) 57–62.
195 See Griffiths (1986) 5–6.

different, and that 'English' law is also composed of different types of law, it is more appropriate to speak of legal pluralism."[196]

Read in its time and context, i. e., German legal doctrine in 1970, this is a truly sophisticated explanation of legal pluralism. Benda-Beckmann not only points to the coexistence of different laws in the same legal field, i. e., the court. He also deconstructed the concepts of 'customary law' and 'western law' by emphasizing their internal legal pluralism. The indigenous law differed from tribe to tribe, just as English common law had manifold roots.

4.5.4 Nomos

Of course, in 1970, the fight for indigenous laws and indigenous rights was far from reaching its climax. Benda-Beckmann was not yet an anthropologist, he became one only later, in the 1970s, in Zurich.[197] He wrote the first German book on legal pluralism at an institute for international law. Even though legal positivism at these times only seldom meant to be a compliment, a more or less positivist and doctrinal approach dominated German practical jurisprudence. Anyhow, his work was not committed to the paradigms of legal positivism or the Historical School of Jurisprudence; it followed an empirical or descriptive method.

4.5.5 Conclusion

On the one hand, it is truly surprising that "Legal Pluralism in Malawi" still stuck to the paradigm of state law and, therefore, only developed a 'weak legal pluralism'. 'Law without a state' was not a core concept for Benda-Beckmann. Further, he investigated alternative law only from the perspective of state courts. On the other hand, read in its time, "Legal Pluralism in Malawi" was an important book for the later evolution of legal anthropology in Germany and the concept of legal pluralism in general. Methodologically, it was more empirical and descriptive than normative or doctrinal. Moreover, its subject, the different legal layers in a postcolonial state and in its adjudication, constituted interlegality and, therefore, was an important

196 Benda-Beckmann (2007 [1970]) 46.
197 For Benda-Beckmann's biographical data see Höland / Blankenburg (2012/13).

milestone toward the more elaborated concepts of legal pluralism in the 1980s and 1990s.

4.6. Gunther Teubner and the global law

After 1990, when new debates on 'legal pluralism' became possible with the end of the Cold War, Gunther Teubner was one of the most influential writers. In his two essays from 1992 and 1996, respectively, he developed his concept of a global legal pluralism: "The two Faces of Janus: Rethinking Legal Pluralism" and "Globale Bukowina. Zur Emergenz eines transnationalen Rechtspluralismus" (Global Bukovina. On the Emergence of Transnational Legal Pluralism).[198] Especially the latter, "Global Bukovina", became one of the most famous and important essays on global legal pluralism.

4.6.1 Law without a state

Hardly any other author represents the slogan "global law without a state" better than Gunther Teubner.[199] He fought against "the tremendous resistance" from a "world" which was "still conceptually dominated by the nation state" and against the "taboo of the unity of state and law".[200] By that, he did not bid a general farewell to the state. First of all, he directed his criticism against state-centered concepts of law:

> "Their arguments are based on the nineteenth-century notion of the unity of law and state: a so-called 'anational' law is unthinkable! On this viewpoint, any legal phenomenon in the world necessarily has to be 'rooted' in a national legal order; it needs at least a 'minimal link' to national law."[201]

Teubner identified numerous challenges in the recognition of non-state law: territorial validity, "coercive powers", "commercial customs", "standardized contracts", "private associations", "international arbitration" etc.[202] For him,

198 Teubner (1992); Teubner (1995); Teubner (1996); Teubner (1997a), the English title of the "Global Bukovina" slightly differed from the German one, that's why it was translated here independently.
199 Teubner (ed.) (1997b).
200 Teubner (1997a) 10.
201 Teubner (1997a) 10.
202 Teubner (1997a) 10.

they all arose with the question of the legality of a global *lex mercatoria*. He, however, did not look at them from the perspective of the nation state. Teubner's "new legal pluralism" was "nonlegalistic, nonhierarchical, and noninstitutional".[203] He pleaded for the autonomous recognition of a global or transnational law – independent of state law, state courts and state enforcement.

This focus on the social emergence of law set Teubner in a tradition that can be traced back to Eugen Ehrlich and Friedrich Carl von Savigny. He opposed the "hegemonic claims of politics".[204] Instead, he trusted "civil society", which would "globalize its legal orders".[205] He argued "empirically and normatively": "Empirically […] the political-military-moral complex will lack the power to control the multiple centrifugal tendencies of a civil world society. And normatively […] for democracy, it will in any case be better if politics is as far as possible shaped by its local context."[206] With that, legal pluralism became an alternative to "political theories of law", i. e., to "positivist" and "critical theories". While positivist theories "stress the unity of state and law", "critical theories tend to dissolve law into power politics".[207] Both focused excessively on the state, while legal pluralism made it possible to conceive the feasibility of "law without a state" – in a world where there is no global state and where there should be no global state.

4.6.2 Alternative law

For Teubner the alternative to political legislation was societal law. He conceptualized it with Eugen Ehrlich as a "living law".[208] But he didn't share his theory of legal sources. The missing "strong, independent, large-scale development of genuine legal institutions" spoke against the assumption of a global "lawyer's law".[209] Further, as the "operational criteria" for "customary law", like the "*consuetudo*" and the "*opinio iuris*", could not be found on a

203 Teubner (1992) 1448.
204 Teubner (1996) 259; see further Teubner (1997a) 5.
205 Teubner (1997a) 3.
206 Teubner (1997a) 3.
207 Teubner (1997a) 6.
208 Teubner (1997a) 6–7.
209 Teubner (1997a) 6.

global scale,[210] Teubner instead switched to a plural concept of legal sources, which he backed theoretically with systems theory:

> "Of course, this presupposes a pluralistic theory of norm production which treats political, legal and social law production on equal footing […]. However, taking into account the fragmented globalization of diverse social systems, this theory would give different relative weights to these norm productions. A theory of legal pluralism would perceive global economic law as a highly asymmetric process of legal self-reproduction. Global economic law is law with an underdeveloped 'centre' and a highly developed 'periphery'. To be more precise, it is a law whose 'centre' is created by the 'peripheries' and remains dependent on them."[211]

With that, Teubner redefined the focus of systems and legal theory, so that "sanction" would no longer serve as a "central concept for the definition of law".[212] The same was also true for other core "concepts of classical sociology of law" like "rule" or "social control".[213] Teubner proclaimed a "linguistic turn":[214]

> "Now, if we follow the linguistic turn we would not only shift the focus from structure to process, from norm to action, from unity to difference but, most important for identifying the legal proprium, from function to code […]. This move brings forward the dynamic character of a world-wide legal pluralism and at the same time delineates clearly the 'legal' from other types of social action. Legal pluralism is then defined no longer as a set of conflicting social norms but as a multiplicity of diverse communicative processes in a given social field that observe social action under the binary code of legal / illegal."[215]

Teubner's most important point here is to turn from function to code. Law could fulfil many different functions: "social control", "conflict resolution", "coordinating behavior", "securing expectations", or simply to "discipline and punish".[216] Therefore, Teubner focusses on communications in legal practice:

> "The phenomenon to be identified is a self-reproducing, worldwide legal discourse which closes its meaning boundaries by the use of the legal / illegal binary code and reproduces itself by processing a symbol of global (not national) validity."[217]

210 Teubner (1997a) 9.
211 Teubner (1997a) 11–12.
212 Teubner (1997a) 12.
213 Teubner (1997a) 12.
214 Teubner (1992) 1450.
215 Teubner (1997a) 14, emphasized in the original.
216 Teubner (1992) 1450.
217 Teubner (1997a) 12, emphasized in the original.

In the language of legal sources this meant "to define contracting itself as a source of law".[218] And "as soon as these contracts claim transnational validity, they cut off not only their national roots but their roots in any legal order".[219] By making contracting itself a genuine and autonomous source of law, however, Teubner was confronted with a substantial theoretical challenge. How could a contract or treaty put itself into effect? Without a legal order, every contract was only a "*contrat sans loi*".[220] That is why Teubner was looking for mechanisms that would "conceal the paradox of self-validation", the paradox of a contract that creates law without being backed by law.[221] His answer was intriguing: Teubner observed "three ways of de-paradoxification – time, hierarchy and externalization – that mutually support each other and make it possible".[222] With "time", he meant that the "present contract" was able to "extend itself into the past and into the future".[223] The contractual practice made it possible that a single contract referred to the "pre-existing standardization of rules" as well as "to the future of conflict regulation".[224] By that, the "contract" became an "element in an ongoing self-production process in which the network of elements" created "the very elements of the system".[225] "Hierarchy" then was ascribed less to a more systemic view than to a normative one. Teubner identified two different types of norms in the contractual practice. Primary rules of conduct were supplemented by secondary rules. The latter established a regime of legal recognition or procedural standards for setting the new law. Finally, the questions of validity and resolution of conflicts were "externalized". It was up to "arbitral tribunals" to negotiate and resolve them. As institutions, they were both non-contractual and contractual at the same time:

> "It refers to a pre-existing standardization of rules and it refers to the future of conflict regulation and, thus renders the contract into one element in an ongoing self-production process in which the network of elements creates the very elements of the system."[226]

218 Teubner (1997a) 18.
219 Teubner (1997a) 15.
220 Teubner (1997a) 15.
221 Teubner (1997a) 16.
222 Teubner (1997a) 16.
223 Teubner (1997a) 16.
224 Teubner (1997a) 16.
225 Teubner (1997a) 16.
226 Teubner (1997a) 17.

4.6.3 *Interlegality*

Even though Teubner was opting for legal pluralism and a plural concept of legal sources, he claimed "the unity of global law".[227] But this unity was conceived in terms of systems theory with "interlegality" at its heart:[228]

> "To gain a more precise understanding of this, one must proceed from the assumption that law, following the logic of functional differentiation, has established itself globally as a unitary social system beyond national laws. […] This unity is not a normative unity of law but is characterised by a multitude of fundamental contradictions of legal norms. Legal unity within global law is redirected away from normative consistency towards operative 'interlegality'. Interlegality does not only mean the existence of a static variety of normative systems which are strictly separated from each other […], but also of a dynamic variety of normative operations, in which 'parallel norm systems of different origin stimulate each other, interlock and permeate, without coalescing into united super-systems that absorb their parts, but permanently coexist as heterarchical formations'."[229]

Below the unity of the code, Teubner observed various "norm systems" and "numerous fundamental norm contradictions". But in the operations of law, i. e., in negotiations and decisions, this diversity is repeatedly transformed into a new unity.

As far as the legal doctrine was concerned, Teubner trusted in the principles of conflict of laws. He was looking for an intersystemic collision law. This meant that the "applicable national or transnational legal order" depended on where the "social sector of the legal relationship" was "located".[230] An intersystemic *comitas* and a transnational *ordre public* supported it.[231] Further on, a substantive law approach should "create a new rule of substantive law, which integrates elements of all competing legal orders".[232]

In addition to operative and doctrinal interlegality, Teubner offered a third option, which he named "interdiscursivity". With this term, he described the emergence of legal norms from non-legal norms. This fascinating figure worked with so-called "productive misunderstandings".[233] Social systems

227 Teubner / Korth (2012) 28.
228 See Seinecke (2015) 242–243.
229 Teubner / Korth (2012) 28, quoting Amstutz (2003) 213.
230 Teubner / Korth (2012) 35.
231 Teubner / Korth (2012) 37.
232 Teubner / Korth (2012) 38.
233 Teubner / Korth (2012) 47.

only seldom talked about law. However, when the legal system approached them with its *quaestio juris*, law confronted a "huge", but "creative misunderstanding".[234] Non-law became law. Legality arose from sociality.

4.6.4 Nomos

Gunther Teubner did not pursue an open ideological agenda. His commitment to "law without a state" or to the sociologic assumption of a global legal system did not imply a certain political point of view. Teubner was concerned with the limitation of the political claim of the modern state, and therefore with a different policy:

> "Its relative distance from international politics will not protect global law from its repoliticization. On the contrary, the very reconstruction of social and economic (trans)actions as a global legal process undermines its non-political character and is the basis of its repoliticization. Yet this will occur in new and unexpected ways. We can expect global law to become politicized not via traditional political institutions but within the various processes under which law engages in 'structural coupling' with highly specialized discourses."[235]

Teubner did not oppose politics. He simply voted for a different kind of politics, or more precisely, for manifold kinds of politics. He was interested in the idiosyncratic politics of many social systems: the politics of economy, of science, of religion or of art. In the language of political philosophy, that meant:

> "Rethinking legal pluralism in the end could open an 'ecological approach' to law and legal intervention. Indeed, the intellectual tradition of 'private law' which paved the way for law's historical extraordinary responsiveness to the economic system via the institutions of property, contract, and organization needs to be generalized. Social autonomy is the key word."[236]

4.6.5 Conclusion

Gunther Teubner joined the tradition of social law that was akin to Savigny's notion of law in a very specific way. His "law without a state" was primarily opposed to a politically mandated law on a global scale. However, "without a state" meant many things to Teubner: law without political mandate, law

234 Teubner/Korth (2012) 45.
235 Teubner (1997a) 4.
236 Teubner (1992) 1461.

without state coercion, and law without a center, but, finally, also: law without a simple function, structure, norm or unity. Therefore, his alternative global law focused on communication. The communicative use of the code legal / illegal established law. Teubner then conceptualized the global legal system as interlegal. It emerged at the borders between the legal and other social systems. Methodologically, he called for an interlegal conflict of laws regime by rendering legal sources to "interdiscursivity", i. e., he was calling for the metamorphosis of non-legal into legal norms. In addition, Teubner's alternative law as "living law" was, above all, contractual law. He established its validity solely based on the contractual practice itself, without any higher legal order.

5 Results

The history of legal thought in Germany is replete with references to legal pluralisms *avant la lettre*, prominently in the writings of Friedrich Carl von Savigny and Anton Friedrich Justus Thibaut, of Otto von Gierke, Eugen Ehrlich, Gustav Radbruch, and, not least, more recently, in the works of Franz von Benda-Beckmann and Gunther Teubner. Even though many of these authors did not use the word 'legal pluralism', their concepts and theories of law shared many features of it. Anyhow, their political, legal and scientific situation was central to their pluralistic legal thought. The most important political influence came from the establishment of the nation state. The enactment of the German Civil Code, and with that the end of the intricate validity of Roman law, brought about a fundamental change to law. Finally, the transition of scientific preferences and paradigms, from legal history, to state legal positivism, or legal sociology made different legal pluralisms possible and necessary. As a result, three types of legal pluralism in German legal thought can be distinguished: legal pluralism before and beyond the nation-state, legal pluralism inside the nation state, and, finally, transitional legal pluralism.

5.1 Legal pluralism beyond the nation state

Surprisingly, Friedrich Carl von Savigny's critique of codification from 1814 and Gunther Teubner's ideas on global law from 1992/96 developed kindred approaches to legal pluralism. Both claimed 'law without a state': one devel-

oped a general private law without a German nation state, the other a global legal pluralism without a world state. The critique of general political legislation was common to both. Both trusted in science and in well-educated lawyers. Both the Historical School and the sociological jurisprudence shared the same spirit.[237] That is why Savigny's and Teubner's theories of legal sources also corresponded in their reference to the people or the nation (customary and lawyer's law) on the one hand, and to social practices (contractual law) on the other. Both preferred an interlegal model of law and its application, and both did not call attention to their ideological preferences. In the end, both defended a liberal idea: the autonomy of law.

5.2 Legal pluralism in the nation state

At the turn of the 19th to the 20th century, Hans Kelsen described the fundamental change as follows: "All law is state law." State legal positivism had become the dominating mindset during the 20th century. In this new legal world of the 'delayed saddle time' of German jurisprudence, with the German Reich founded in 1871 and the German Civil Code from 1900, 'law without a state' took on a different meaning. There was no chance to dismiss state legal positivism and the codification of private law anymore. The German Reich and the German Civil Code were the fact, while they, of course, were subject to manifold critique. In this political, legal, and historical situation, Otto von Gierke, Eugen Ehrlich and Franz von Benda-Beckmann represent three ways of dealing with the state in legal thought. Gierke was a child of two worlds. He was an important legal thinker before and after the foundation of the German Reich and the enactment of the German Civil Code. It was easy for him to put the autonomous law of cooperatives next to the law of the state, though he had a strong bias toward the German nation state. He understood both realms as legally independent and autonomous. There was no need for a strong conception of interlegality. For Eugen Ehrlich, the situation was different. In the Bukovina, which represented the periphery of the Habsburg Monarchy, state law and the Austrian Civil Code of 1812 were far away. The new science of legal sociology paved the way for him to conceptualize the law of rural societies in the Bukovina. The 'living

237 For Teubner's sociological jurisprudence see Sahm (2017); Seinecke (2019) 134–139.

law' that he found there exemplified his notion of 'law without a state'. The methodological battle cry of "Freirecht" (free law) then made interlegality possible for him. The 'living law' undermined and supplemented state law. Finally, somewhat surprisingly, Franz von Benda-Beckmann wrote his book on "Legal Pluralism in Malawi" from the perspective of state law. However, in the postcolonial legal world of Malawi, he reconstructed the interlegal integration of indigenous law into applicable state law.

5.3 Transitional legal pluralism

Gustav Radbruch and his essays concerning the arbitrary and unjust dictatorship of National Socialist Germany established a third tradition of pluralistic legal thought. Right after 1945, when the German jurisprudence was under shock as National Socialists had abused the German law, and, moreover, German lawyers and law professors had actively supported them, Radbruch directed his critique of state legal pluralism only against the glaring inequities of National Socialist dictatorship. He called for higher legal principles to serve as alternative law. But this law was no system of natural law. It offered judges a formula to correct and deal with the most blatant injustices and the despicable arbitrariness of the National Socialist German state. Radbruch's interlegality tried to balance the principles of justice and legal certainty. However, his greater goal was to reestablish the *Rechtsstaat* and democracy in post-World War II Germany.

5.4 Legal pluralism in German legal thought

This short story that highlights the prevalence of pluralistic legal thought in German-speaking contexts points not just to three traditions of legal pluralism. For it also offers insights into the diversity of legal pluralism and its four themes: law without a state, alternative law, interlegality, and nomos. The different approaches to 'law without a state' were strongly dependent on the political and legal situation in Germany. Before the foundation of the German Reich, 'law without a state' meant something altogether different than after 1871. Similarly, 'law without a state' acquired a different meaning at the end of the National Socialist dictatorship in Germany and, not least, for the political and legal situation in the world society after the end of the Cold War. Further, the alternative laws in German legal thought never were

utopian, for they accounted for the empirical or doctrinal realities. In the 19th century, Friedrich Carl von Savigny's Roman law was still applicable in principle. Otto von Gierke's autonomous statutes and Eugen Ehrlich's 'living law' referred to empirical legal orders at the end of 19th and in the beginning of 20th century. Franz von Benda-Beckmann analyzed the post-colonial and indigenous law in Malawi with more empirical methods. The source of Radbruch's higher principles was the "work of centuries" and, even more importantly, a judicial practice that established itself right after 1945. Finally, Teubner claimed the reality of a contractual practice in transnational law. These debates, however, did not necessarily connect the 'law without a state' to a concept of interlegality, even though most alternative laws were accompanied by it. Particularly for Gierke, cooperative statutes or customary laws existed in parallel to state law – without any kind of interaction. And in Ehrlich's theory, interlegality appeared more as a reflex to his methodological critique of codification. For the other German-speaking legal pluralists, however, interlegality was always central to their concept of law. This notion of interlegality also entailed the use of the common Roman law and the Canon law, the imperial and territorial law, the statutes and codifications, the religious, rural and indigenous law, the supra-statutory law, the global contract law and, finally, the socio-legal normativity. After all, legal thought in Germany was linked to different nomoi. In the 19th century, the most important one was the faith in nation with its manifold consequences – for codification or for the application of the German and Roman law in the German sovereign states. Other than that, scientific preferences for legal history or sociology, as much as legal principles like the *Rechtsstaat* or democracy, shaped these legal pluralisms.

This history of legal pluralism in Germany finally ends with an intriguing historical hypothesis: At the threshold of the 20th century, German legal thought had changed fundamentally. This transformation mainly concerned the fundamental concepts of law, legal sources, and science. In the new German nation state, the meaning of old concepts, like customary and lawyer's law, and especially legislated law and statute, had changed, and with the codification and the codification principle, statutes and codes received greater validity, while customary law lost its power. If this hypothesis also applies to a history of legal pluralism, it is because it makes clear why histories of legal pluralism usually locate the origin of the concept back in early 20th-century jurisprudence, e. g. with Eugen Ehrlich, Max Weber or

Otto von Gierke.[238] In this epoch, the validity of non-state law was no longer self-evident. These early proponents of legal pluralism recognized alternative law as law – against the new dominance of codification and the proliferating law of the nation state.

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238 For the constructed histories in legal pluralism, see Seinecke (2015) 60–61; Seinecke (2018) 19.

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