

Izvirni znanstveni članek
UDK 342.41:321.7

State and law in today's world

A brief approach

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1. Introduction

The topic of the relationship between State and law is of great importance and current. The modern era was characterized by the understanding that the State's monopoly on the use of force also implied a monopoly on the production of law. This understanding was much more of a fiction than a practical observation. It was based on the so-called monist paradigm of law, according to which there is no State without law and no law without the State, as well as the premise that everything that the State does not prohibit, it allows. With this, the source of all rights would be in state power. The understanding of the State and law in the 21st Century is no longer based on this fiction. The plural reality of law is a fact, and the State needs to provide answers. This paper provides a brief approach to this topic based on the reflections developed in the latest books published by the author.¹

2. The origin and development of the State and Law

The close link between the State and the Law is a construction of modernity. The historical analysis of the State demonstrates that in its origins the State was a military association, an

¹ In this sense, see the following books: MALISKA, Marcos Augusto. *Pluralismo Jurídico e Direito Moderno. Notas para Pensar a Racionalidade Jurídica*. 2. ed. Curitiba: Juruá, 2022; MALISKA, Marcos Augusto. *Introdução à Sociologia do Direito de Eugen Ehrlich. Aportes para uma Reflexão Atual sobre Pluralismo e Constituição*. 2. ed. Curitiba: Juruá, 2015; MALISKA, Marcos Augusto. *Fundamentos da Constituição. Abertura. Cooperação. Integração*. Curitiba: Juruá, 2013; MALISKA, Marcos Augusto. *Estado e Século XXI. A integração supranacional sob a ótica do Direito Constitucional*. Rio de Janeiro: Renovar, 2006.

aristocratic warrior alliance between tribes with similar languages, led by a military leader and followed by free men with the aim of waging war.²

Alongside this purely military function, the State incorporated two others that are very directly linked to it: the tax function and the police function. The State needed to make the necessary material conditions available to the king or military leader. Initially, the forced demand for gifts arises and expands into formal extortion. However, it was the Romans who established a regulated tax system in the provinces. In addition to this tax activity, the State also developed, very early on, police activity, especially to contain cases of insubordination and revolt.³

State judicial power emerged over a long historical path, initially in small States and City-States, then in Great States, in the Roman Empire, in the Carolingian Empire and in England. State legislative power, in turn, emerged in these same States much later. State administrative power itself, partially comparable with current state powers, only emerged in France in the 17th century.⁴

Law, in turn, does not originate in the State, but in the clan, in the domestic community.⁵ The law was defined as an order of habitual behavior, while the State was characterized as a coercive order. The law existed independently of the State. There has historically been no interdependence between the State and the law.

There are four aspects that contribute to giving so much emphasis to the State as a source of law: (i) its participation in the formation of law through the act of legislating; (ii) its participation in the administration of justice through state courts and in part also through other government bodies; (iii) its power to command over state bodies, which serve as an instrument to execute its laws; (iv) the conception that the maintenance of a situation that corresponds to the law is only possible, whether in the first or last instance, through the coercive force of the State.⁶

From the formation of absolutist States, the centralization of law in the State was accompanied by the development of the concept of sovereignty, as an attribute of State Power. At this historical moment, the Judge appears as an agent of the State who enforces the state order.⁷

² EHRLICH, Eugen. *Grundlegung der Soziologie des Rechtes*. 4th Edition revised and organized by Manfred Rehbinder. Berlin: Duncker & Humblot, 1989, p. 124-125.

³ EHRLICH, Eugen. *Grundlegung der Soziologie des Rechtes*, p. 125.

⁴ EHRLICH, Eugen. *Grundlegung der Soziologie des Rechtes*, p. 125.

⁵ EHRLICH, Eugen. *Grundlegung der Soziologie des Rechtes*, p. 124-125.

⁶ EHRLICH, Eugen. *Grundlegung der Soziologie des Rechtes*, p. 125-126.

⁷ EHRLICH, Eugen. *Die juristische Logik*. 2^a ed. Tübingen: Mohr Siebeck, 1925, p. 92-93.

The transition from the absolutist State to the Rule of Law did not change this centralizing characteristic of law in the State. The revolutions of the 18th century, especially the French Revolution, affirmed the sovereign power of the State to rule the law. The codification of law at the beginning of the 19th century consolidated this understanding.

In this historical trajectory, the work of Hans Kelsen deserves reference. For Kelsen, there is no law without the State and no State without law. The State here is considered as a legal phenomenon. The State is a corporation that differs from other corporations due to its normative order. The State is the community created by a national legal order. The Theory of the State as a Theory of the Rule of Law is the theory in which the State is qualified as a valid legal order. The theory of the Rule of Law is a theory of Objective Law.⁸

In the opinion of historian Eric Hobsbawm (Hobsbawm said this in the 1990s), there is currently a change in the long historical wave of construction and gradual strengthening of territorial States or national States in the political sense of the term. This trend has dominated the developed world since at least the 16th century and until around the 1960s. From the 1960s onwards, this trend appears to have reached its limit. If there is no reversal, this development will lose momentum. According to the historian, perhaps this phenomenon is temporary, but it was reinforced, in the 1970s, by the ideology of neoliberal governments, explicitly directed against the State, to weaken it, to deliberately reverse the historical trend towards strengthening its role, both in the economic area and, in general, in all its functions.⁹

The centralization of law in the State was expressed in the so-called monist paradigm of law. Legal monism identifies all law with the State.

3. From the monist paradigm of law to the pluralist paradigm. The sovereign creation of law and the autonomous creation of law.

Initially, it is important to say that the law is much broader than the State. When we talk about law, we talk about how people relate to each other. Thus, law is essentially a social phenomenon.

Understanding law as a social phenomenon, we can say that the pluralistic paradigm of law is much more suitable for describing the legal phenomenon than the monistic paradigm.

When understanding law from the pluralist paradigm of law, it is possible to say that the State's formal law is just one, quite important, aspect of the concept of law.

⁸ KELSEN, Hans. *Allgemeine Staatslehre*. Berlin: Verlag Dr. Max Gehlen, 1966, p. 47.

⁹ HOBBSAWM, Eric. *O Novo Século*. Entrevista a Antonio Polito. Translated by Claudio Marcondes. São Paulo: Companhia das Letras, 2000.

The theme of the State and law can currently be seen from the distinction between the concepts of sovereignty and autonomy. Within the scope of constitutional law, the concept of autonomy developed in the 20th century to express the power of the member states of a Federation. So, for example, we say that the State of California, in the United States, is an Autonomous State. Or the State of Hidalgo, Mexico. Or the State of São Paulo, in Brazil. Thus, autonomy is a concept that was developed linked to public law, as an expression of the power of self-organization of legal entities governed by internal public law. In addition to the member states, constitutional law also designates municipalities and certain administrative law entities as autonomous.

The concept of autonomy, as it was developed by German civil law in the 19th century, brings new possibilities for understanding the relationship between State and law.¹⁰ The concept of autonomy, as the creation of an objective law, differs from that of private autonomy, understood as the exercise of a subjective right.¹¹

This distinction sheds light on an approach to law produced by autonomous (non-sovereign) legal entities, so common in the reality of 21st century law. As an example of autonomy in the sense of creating objective law, there is the Collective Labor Convention (*Tarifvertrag*) and canon law (*Kirchenrecht*). Within the scope of constitutional law, in the so-called horizontal effectiveness of fundamental rights (*Drittwirkung von Grundrechten*), the concept of autonomy of civil law in the face of fundamental rights is also understood as an expression of objective law.

In the case decided by the Federal Supreme Court of Brazil, involving UBC – Brazilian Union of Composers, the object of the judicial discussion was the objective rule of the association that did not provide for the exclusion of members without due legal process.¹² The association's normative system must comply with the fundamental rights guaranteed in the Constitution. UBC violated the fundamental right of the member, who was excluded from

¹⁰ The concept of autonomy was understood as the general authority to establish itself as a right independent of state law. The competence to create autonomous law was found in legal entities, corporations, unions, associations, or communities. So, for example, RUNDE, Justus Friedrich. *Grundsätze des gemeinen deutschen Privatrechts*. 5th ed., organized by Christian Ludwig Runde. Göttingen: Dieterich, 1817, § 2, p. 2; EICHHORN, Carl Friedrich. *Deutsche Staats- und Rechtsgeschichte*. Second Part. 4^a ed. Göttingen: Vandenhoeck & Ruprecht, 1835, § 258; GIERKE, Otto. *Das deutsche Genossenschaftsrecht. Erster Band. Rechtsgeschichte der deutschen Genossenschaft*. Berlin: Weidmannsche Buchhandlung, 1868, p. 3.

¹¹ According to Gierke, autonomy creates objective law, as it is the source of law and is clearly distinguished from subjective law. GIERKE, Otto von. *Deutsches Privatrecht. Erster Band. Allgemeiner Teil und Personenrecht*. Leipzig: Duncker & Humblot, 1895, p. 143. The concept of private autonomy, on the other hand, appears as a creation of subjective law, according to STOBBE, Otto. *Handbuch des Deutschen Privatrechts*. Vol. 1. Berlin: Wilhelm Hertz Verlag, 1871, p. 148.

¹² RE 201.819

the association without due legal process, not due to the exercise of a subjective right by UBC, but due to the exercise of its autonomy to create objective law, which violated the member's right.

The distinction between the concepts of "autonomy" and "private autonomy" is quite important for understanding the autonomous creation of law today. The objective autonomous law of social organizations can be seen in the rules of Big Techs, which are not an expression of a sovereign power, but of an autonomous power.

Sovereign is only the State, which has the power to force someone to do or not do something. There is only one sovereign law, that of the State. However, autonomous law, in the context of the transnational plurality of today's world, exists many.

Thus, it is possible to speak today of the replacement of the monist paradigm of law by the pluralist paradigm of law. The pluralist paradigm, in the context of a democratic constitutional order, implies that the State still holds sovereign power, the monopoly on the use of force, as Max Weber says.¹³ However, the State no longer has a monopoly on the production of law. In today's world, alongside the sovereign law of the State, there are many autonomous laws, which exist within the state legal order, as well as externally to it, mainly in transnational relations.

4. Modern law as an expression of three levels of legal rationality

Modern law cannot be reduced to the formal legal rationality of the State. It also comprises other rationalities, which I describe as normative legal rationality and material legal rationality. In other words, modern law manifests itself in three different levels of rationality.¹⁴

In terms of legal rationality, formal legal rationality is the place of state legal production, understood both in its legislative activity (statute) and jurisprudence (decisions of state courts). The importance of formal legal rationality lies in the prominent role played by the State. The modern State is the only social organization that has a monopoly on the legitimate use of force. The formalization of law by state authorities implies the absorption, by the legal rationality of the State, of empirical law. This is the legal form. Without the legal form, the law remains in its material state, as it, in fact, regulates social relations. The formalization of law through legal prescriptions in the form of statutes promotes a broad, adequate, and stable social consensus. This formalization, which can also be obtained through jurisdiction

¹³ WEBER, Max. *Politik als Beruf. Gesammelte Politische Schriften*. 5^o ed. Tübingen: Mohr Siebeck, 1988, p. 506.

¹⁴ MALISKA, Marcos Augusto. *Pluralismo Jurídico e Direito Moderno. Notas para pensar a racionalidade jurídica*. 2^a ed. Curitiba: Juruá, 2022, p. 173-212.

(decision rules), gives formal contours to the law of great importance for its stabilization and recognition by the political community in a broad sense.

Within the scope of material legal rationality, there is empirical law, that law which, contained in documents, practices, decisions, and extra-state norms, regulates the concrete case independently of state legislation. This level of rationality also includes community law, international law, *lex mercatoria*, doctrine, jurisprudence of community and international courts, custom and codes of good practice. In this classification, European Union regulations would not be state norms *per se*, but extra-state norms.¹⁵ An argument in favor of this understanding is the definition of the European Union as a government and not a State, as an autonomous, non-sovereign power.

At the level of normative legal rationality, there are universally recognized human rights. Human rights are the criterion for the interlegal validity of law.¹⁶ The validity of state law (level of formal legal rationality) and legal pluralism (level of material legal rationality) is based on universal human rights. The level of normative legal rationality does not understand human rights in a unison way, but also considers cultural particularities, articulating transition bridges that will enable dialogue and learning.

The many sources of law, subject to empirical observation, insert the distinction between existence and validity. Validity is the compatibility of the law with the constitutional order, which expresses broad, adequate, and stable social consensus. In this way, within the scope of legal pluralism, the diffuse existence of law requires broad, adequate, and stable social consensus of the constitutional pact.

Kelsen's name is linked to legal monism. According to him, all law is state law. There is no law without the State and no State without law. When Kelsen advocates that the singularity of law is found in state law, he seeks the singularity that unites the plurality that forms society. In the clash with Carl Schmitt over the guardian of the constitution, Kelsen is described as a defender of pluralism.¹⁷ However, Kelsenian pluralism here is not legal, but political.¹⁸ Kelsen is an author who works in the context of the Rule of Law (*Rechtsstaat*), in which state law is at the center of the state's legal system.

¹⁵ HESPANHA, António Manuel. *Pluralismo Jurídico e Direito Democrático. Perspectivas do Direito no Século XXI*. Coimbra: Almedina, 2019, p. 71-94.

¹⁶ In this sense, see GAILHOFER, Peter. *Rechtspluralismus und Rechtsgeltung*. Baden-Baden: Nomos, 2016, p. 302.

¹⁷ MALISKA, Marcos Augusto. Acerca da Legitimidade do Controle de Constitucionalidade. *Crítica Jurídica*, Curitiba-PR, v. 1, n.18, 2001.

¹⁸ OUYEN, Robert Chr. van. *Der Staat der Moderne. Hans Kelsens Pluralismustheorie*. Berlin: Duncker & Humblot, 2003.

In the context of the Constitutional State (*Verfassungstaat*), the center of the legal system is no longer the state-law, but the Constitution. The binary code of law validity – legal/illegal – is replaced by the binary code – constitutional/unconstitutional.¹⁹ The constitutional/unconstitutional binary code is much broader than the legal/illegal code and it is also possible to include autonomous law, an expression of legal pluralism.

Thus, it is possible to speak of the existence of legal pluralism beyond the state-law, but it is not possible to say that there is legal pluralism outside the Constitution. The singular that unites plurality is no longer found in the state-law but is found in the Constitution.

The concept of Constitution is not understood here as a state Constitution, that is, a political document that only organizes the power of the State. By Constitution we also mean a document of society, that is, here we can talk about the concept of political community, which is more comprehensive than the notion of State itself. The Constitution regulates the functioning of democracy, and, in this sense, the Constitution regulates both state power and social powers that act in society.

In this context, the State, with its legitimate monopoly on the use of force, guarantees the validity of the constitutional order. This constitutional order, however, is not a closed, self-centered order, but an open order, which recognizes the existence of a legal pluralism and interacts with it. The sources of law today are many and diverse. The State can regulate legal pluralism both by incorporating rights into state-laws and by deciding on the valid law in the specific case in judicial proceedings. In this aspect, the importance of the jurist stands out. Lawyers, judges, and law professors have a great role in defining law in today's world, as the jurist's role is no longer just to apply state law to the specific case (subsumption process). The jurist today also has the function of constructing the law, for and from a specific case, of a law that is found in other normative orders.

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¹⁹ According to Neves, the Constitution is the most comprehensive reflective instance of the legal system, permeating all areas of validity - material, temporal, personal and territorial. The Constitution imports a reflective level of the "legal/illegal" code within the system, the constitutional/unconstitutional code. Constitutionality takes precedence over legality. NEVES, Marcelo. *Transconstitucionalismo*. São Paulo: Martins Fontes, 2009, p. 59.

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