Justice without the State within the State

Judicial Self-Regulation in the Past and Present

Edited by
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Contents

III. Referential Field II: The World of Economy

IV. Non-State Actors within State Structures

V. Justice in Areas of Limited Statehood

VI. Challenges in the Modern World: ›Pre-Modern‹ Forms and Innovations

Preface

This volume is the result of a cooperation between two research endeavours: the project »Regulated Self-Regulation from a Legal Historical Perspective« and the research focus »Extrajudicial and Judicial Conflict Resolution«. The former was supported by the Cluster of Excellence »Formation of Normative Orders« (Frankfurt am Main), the latter by the LOEWE research promotion programme administered by the federal state of Hesse. Within the context of the project »Regulated Self-Regulation from a Legal Historical Perspective«, Gerd Bender, Stefan Ruppert, Margrit Seckelmann and Michael Stolleis provided substantial conceptual and organisational support.

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Frankfurt am Main, November 2015
Peter Collin

I. Perspectives, Fundamental Terms, and Typologies

Justice without the State within the State – Introductory Considerations

I. Preliminary remarks

This edited volume documents the results of two workshops. The first workshop, a symposium of the LOEWE[1] Research Focus ›Extrajudicial and Judicial Conflict Resolution‹,[2] took place in November 2012 and had the title »Justice without the State«. The word »justice« was applied in a dual function, namely, on the one hand in terms of »judiciary«, thus institutionalized conflict resolution, on the other hand in terms of »justness«. The participants were to address the question of how non-state bodies of conflict resolution could generate justice, even serve concepts of justice which cannot be ensured by the state court system. The speakers came from Europe and North America and dealt with this subject both in a historical and in a contemporary perspective. The second workshop – with the title »Justizielle Selbstregulierung im 19. und 20. Jahrhundert« (»Judicial Self-Regulation in the 19th and 20th Century«) – took place at the end of January and the beginning of February 2013 and was organized within the framework of the Frankfurt Cluster of Excellence[3] Project »Regulated Self-Regulation from a legal historical perspective«.[4] The investigation focus of that project determined the agenda of the workshop. Acting on the assumption that non-state self-organization does manifest itself not only in norm-setting and administrative but also judicial variations, it was intended to show the multifariousness of this phenomenon and to discuss in which way such patterns could be understood as

1 LOEWE (Landes-Offensive zur Entwicklung Wissenschaftlich-ökonomischer Exzellenz / state offensive for the development of scientific and economic excellence) is a support program of the federal state Hesse (URL: https://wissenschaft.hessen.de/loewe).

2 URL: www.konfliktloesung.eu.

3 Cluster of Excellence »The Formation of Normative Orders« (URL: www.normativeorders.net).

4 URL: www.rg.mpg.de/regulated_self_regulation_from_a_legal_historians_perspective.

expressions of self-regulation. The main focus was – aside from taking a peripheral glance at France and Great Britain – on the German development.

The two workshops pursued different questions but met in a common research interest, namely the question of how does non-state justice function. For this reason the decision to print the contributions of both workshops in one volume is self-explanatory. Based on the assumption that non-state justice in the state polities of the modern age nearly always interacts with state power, the title »Justice without the State within the State«[5] was selected among others also to signalize the inadequacy of a fixed dichotomy between »state« and »non-state«. In fact it is a matter of different degrees on a scale. And the subtitle »Judicial Self-Regulation in the Past and Present« intends to indicate the links between the past and the current situation. It is necessary to counter perceptions that non-state conflict resolution is merely a present-day phenomenon and a present-day problem, because such perceptions can be induced due to the topical debates on the arbitral jurisdiction of sport federations, the conflict resolution in the case of »Stuttgart 21«, online dispute resolution, arbitration bodies established in free trade agreements, Muslim courts in Western Europe, new forms of American university jurisdiction (in cases of sexual harassment), etc. Recent research approaches to »non-state justice« also tie in with such current manifestations.[6] But here, too, it becomes visible that many forms of non-state justice have traditional roots – whose functionality and legitimation certainly are to be clarified in the light of current challenges. And, secondly, it is to be emphasized that non-state (or parastatal) justice has always existed and – as is the case today – has often been the subject of crisis debates. In 1919 the expansion of extrajudicial bodies was noted with alarm (»… everywhere we see conciliation authorities, conciliation boards, arbitration commissions appear«[7]), and in the 1920's it was among jurists that the expanding commercial arbitration crowded out the state courts and eroded principles of the rule of law. Numerous discussion topics which were relevant at that time also play an important role at present.

5 The impetus for this title is based on a formulation by Livia Holden (Gilgit / Nantes), who kindly agreed to the use thereof as title of this volume.

6 Brynna Connolly, Non-State Justice Systems and the State: Proposal for a recognition typology, in: Connecticut Law Review 38 (2005), 239–294; Miranda Forsyth, A Typology of Relationships between State and Non-State Justice Systems, in: Journal of Legal Pluralism 56 (2007), 67–113; Matthias Koetter / Tilman J. Roeder / Gunnar Folke Schuppert / Rüdiger Wolfrum (eds.), Non-state Justice Institutions and the Law. Decision-Making at the Interface of Tradition, Religion and the State, London 2015.

7 Justus Wilhelm Hedemann, Das bürgerliche Recht und die neue Zeit, Jena 1919, 14 (»… überall sehen wir Einigungsämter, Schlichtungsausschüsse, Schiedskommissionen auftauchen«).

The contributions to this volume shall illustrate the diversity of the organizational and procedural forms of non-state or parastatal conflict resolution, the variety of the interaction with the state and the spectrum of the debate on functionality and legitimacy of such institutions. For a better understanding of the individual contributions in the context of this volume's comprehensive approach some considerations follow on those fundamental terms and distinctive criteria which acted as guidelines for the articles and – to different degrees – became operative: state/non-state, justice, self-regulation.

II. Fundamental terms and fundamental distinctive criteria

1. State/non-state

What does »without the state« actually mean? Firstly it should be said that such a characterization presumes the existence of a state, even if it is only a rudimentary state. Consequentially this volume contains contributions which place their focus in the period from the beginning of the 17th century to the present. But even such »eased« conditions require clearance on how statehood or non-statehood can be defined with reference to conflict resolution und justice.

a) For this purpose types can be carved out which are situated on a scale between state and non-state or respectively between state recognition and state non-recognition. Miranda Forsythe, for example, lists seven models of non-state justice where the distinctive criterion is the manner of the relationship to the state. The latter ranges from repression (i. e. illegality of the non-state institution) to limited state recognition to complete integration into the state apparatus. Here we are not dealing with state *or* non-state conflict resolution, but with less or more statehood.[8]

b) But it is also quite thinkable to concentrate on specific groups of criteria, for example: persons, organizations, and normative standards. With the aid of these groups of criteria manifestations of »justice without the state« can be analyzed to a greater extent than in a (more limited) institutional perspective. This will be elucidated briefly.

At the beginning stands an ideal-typical, artificial characterization of state justice which serves as a notional point of departure – even if this characterization shows a strong Continental European coloration. This constructed state justice possesses the following attributes: state officials are the decision-makers;

8 Forsyth, A Typology of Relationships (note 6), 67–113. Similar categorizations are to be found in Matthias Koetter, Non-State Justice Institutions: A Matter of Fact and a Matter of Legislation, SFB-Governance Working Paper Series, No. 43, Collaborative Research Center (SFB) 700, Berlin, June 2012, 12.

the institutions of conflict resolution are state courts which are a part of the organizational structure of the state, i. e. they are constituted and financed by the state and integrated in state mechanisms of revision and correction; the decisive standard is the law set by the state but neither non-state norms nor interests of economic, social, religious, ethnic, local and other groups. In the case of departures from these provisions one can speak of *non-state jurisdictional elements*. In this sense the phrase »without state« is not only understood in the sense of non-state institutions but also in the sense of the existence of diverse non-state factors which determine or influence the decision or the procedure.

When one returns to the above-mentioned groups of criteria, the following considerations present themselves:

Persons: At first the question arises: »Who are the decision-makers?« On the one end of the spectrum one finds judges who are state officials, on the other end there are private persons, for example in private arbitration-boards. Hence a combination of private personnel and state organizational elements is also possible – e. g. in the case of laymen within state courts. They can participate in the decision-making together with the judge (for example in the German »Schöffengericht«, which consists of one judge and two lay judges), but they can also have the competence of rendering judgment without the judge such as in a jury. Therefore one can also speak of weighty non-state elements within state jurisdiction.

Organizations: Organization means the institutional integration into the state apparatus. Bodies of conflict resolution can be organized as part of the organization of the state, that means as state courts or as quasi-judicial institutions (for example commissions) within the state administration. To be distinguished from these bodies and institutions are bodies of conflict resolution in parastatal organizations in the manner in which they established themselves in the 19th century, for instance chambers of commerce or public law cooperatives for the management of infrastructures or in the area of social insurance.[9] Forms of conflict resolution which belong to the self-government of ethnical groups could also be classified as part of the parastatal sector. Such forms – commercial arbitration courts, arbitration bodies in umbrella organizations of the private economy or in private pension funds – are, nonetheless, part of the private sector. In the latter instance one finds a broad spectrum between state and non-state.

However, a functional element of state integration also involves state control. Bodies of conflict resolution which reside in the non-state sector can be state-

9 See Peter Collin, Konzeptionen, Spielarten und Wechselbeziehungen administrativer und justizieller Autonomie in Deutschland im späten 19. und frühen 20. Jahrhundert, in: Quaderni Fiorentini per la storia del pensiero giuridico moderno XLIII (2014), 165–228, 208 ff.

integrated to a great extent if their decisions are absolutely revisable by the state. But a limited supervision, for example concerning grave errors[10] or the violation of constitutional principles,[11] is also possible. Manifold variations are imaginable.

Normative Standards: The main normative standard of state jurisdiction is the law set by the state. The regard for non-state norms implies that non-state elements are incorporated into the decision-making. That is the case to a lesser extent when customs of social groups are to be considered such as in the German trade law,[12] to a greater extent when non-state law completely determines the decision. In the reverse case it is thinkable that non-state law governs but that some essential state requirements assume validity, for example norms which ensure a fair trial or which guarantee compliance with constitutional principles.[13] – Also with regard to the normative standards there is a lot of space for different combinations and intensities.

2. Justice

Justice in a broad sense means a state in which an appropriate balance of interests and of the allocation of goods takes place. But if one wants to work with an understanding of justice that shows a specific reference to the issue addressed in this volume, this understanding has to be concretized and different layers of meaning then have to be distinguished. A first differentiation can be between system-related justice and single-case-related justice.

a) System-related justice: System-related justice does not ask for justice in an individual case, but applies the appropriate functional conditions for the reproduction of a functional system. Proposals on how such a system-related justice can be understood were worked out by Niklas Luhmann,[14] whereby one has to distinguish between internal and external dimensions.

aa) Internal system-related justice: Law as a functional system has the task to stabilize behavorial expectations. Law can only perform this task when it treats equal cases equally, in other words: when its operations are predictable. Therefore law must be internally consistent. Thus justice is the consistent application of the law, moral requirements are consequently excluded.[15]

10 § 1059 Zivilprozessordnung (German Code of Civil Procedure).
11 See for instance Matthias Koetter, Non-State Justice Institutions (note 8), 27.
12 § 346 Handelsgesetzbuch (German Commercial Code).
13 See Koetter (note 8), 27.
14 Niklas Luhmann, Gerechtigkeit in den Rechtssystemen der modernen Gesellschaft, in: id., Ausdifferenzierung des Rechts, Frankfurt a. M. 1999, 374–418.
15 See in detail Thomas Osterkamp, Juristische Gerechtigkeit, Tübingen 2004, 124 ff.

bb) External system-related justice: Internal system-related justice is strictly formal and only related to the operations of the legal system. But one cannot ignore the fact that the environment of the law, that means other functional systems, can beset the law with its own requirements which may irritate the law. The law has to react to these irritations. So the focus switches to the law-environment-relationship, thus to extra-legal criteria. In this perspective justice is the »adequate complexity of the legal system«. In the words of Luhmann that means: »A decision-making system better correlates with its environment in such measure that it can reflect external complexities internally and bring these to a decision, that means decide appropriately.«[16] So the conception of justice opens itself to non-legal criteria – however that is possible only to a limited extent – otherwise the law would lose its internal consistence. A system-related perspective, however, is indifferent to the question whether a decision in an individual case is just. For this purpose other conceptions offer proposals which will be sketched hereafter.

b) Single-case-related justice: If one tries to systemize conceptions of single-case-related justice, one initially has to do with a seemingly fairly unclear set of categorizations whose elements stem from considerations of both legal philosophers and legal sociologists. One can tie in with these the following considerations:

aa) Initially a distinction is to be drawn between material justice and procedural justice. This differentiation refers to different objects: for material justice the result of conflict management is the crucial point of reference, in the case of procedural justice the modality of the formation of the result is decisive. In view of the procedural aspect of justice one has to further differentiate: shall it evaluate with regard to its function to achieve a just result (that is external procedural justice) or shall it evaluate with regard to being as an end in itself (internal procedural justice)?[17]

bb) The second differentiation concerns the perspective of evaluation – which can consist of an objective or a subjective perspective.[18] The objective approach is based on normative conceptions on justice, which can be of philosophical, legal or economic origins. The subjective approach emanates from the involved or potentially involved persons' expectations or experiences. These expectations

16 »Seiner Umwelt entspricht ein Entscheidungssystem besser in dem Maße, als es externe Komplexität intern abbilden und zur Entscheidung bringen, d. h. sachgerecht entscheiden kann.«, see Luhmann, Gerechtigkeit in den Rechtssystemen (note 14), 405.

17 Klaus F. Röhl, Verfahrensgerechtigkeit (Procedural Justice). Einführung in den Themenbereich und Überblick, in: Zeitschrift für Rechtssoziologie 14 (1993), 1–34, 6.

18 Röhl, Verfahrensgerechtigkeit (note 17), 6.

or experiences are sought by empirical surveys. Admittedly objective and subjective approaches can interfere with each other. The question of when within these differentiations a result or a procedure can be considered as just – a question which is treated in numerous legal-sociological and legal-philosophical papers in particular[19] – will not be further dealt with in this context. The findings are also not undisputable and they differ depending on space and time. Therefore claims of cultural universality are inappropriate. At this point it was merely the intention to sketch the range of conceptions and understanding of justice on the basis of references occurring explicitly or implicitly within the framework of this volume.

3. Self-regulation

a) *General conceptualizations*: The term »self-regulation« can look back on a long conceptual tradition and is utilized in different disciplinary contexts and associated with different meanings. The socio-scientific and legal debate partly adopts biological or cybernetic understandings of self-regulation or self-organization. It partly resorts from a decidedly liberal understanding of a self-regulated commercial society, and partly one also connects self-regulation with new concepts of societal coordination in which the analytical concept of governance plays a prominent role.[20] But as a common denominator it can be stated that self-regulation can be understood as a mode of autonomous coordination of social units – whereas there are a fundamental differences between national legal cultures.[21]

In order to separate self-regulation from such activities which only serve the coordination of individual, private purposes, it is furthermore necessary to include only such sets of actions which (at least also) show a reference to the public weal. Public weal, however, shall here not be connected with fixed

19 For an overview see only Osterkamp, Gerechtigkeit (note 15); Axel Tschentscher, Prozedurale Theorien der Gerechtigkeit, Baden-Baden 2009.

20 Laura Elena Knop, Gibt es einen Selbstregulierungsdiskurs? Und wenn ja, wie viele? Zur Semantik des Begriffs Selbstregulierung, in: M. Mercè Darnaculleta y Gardella / José Esteve Pardo / Indra Spiecker gen. Döhmann (eds.), Strategien des Rechts im Angesicht von Ungewissheit und Globalisierung, Baden-Baden 2015, 300–318.

21 M. Mercè Darnaculleta y Darnaculleta, Wahrnehmungen »regulierter Selbstregulierung« in der angelsächsischen und kontinentaleuropäischen Literatur (seit den 90er Jahren des 20. Jahrhunderts), in: Peter Collin / Gerd Bender / Stefan Ruppert / Margrit Seckelmann / Michael Stolleis (eds.), Regulierte Selbstregulierung in der westlichen Welt des späten 19. und frühen 20. Jahrhunderts, Frankfurt a. M. 2014, 57–73.

substantial contents. Rather one has to refer to the concrete understanding of public weal of the contemporaries.[22]

Although the debate on self-regulation is primarily a present-day debate as it receives its impulses from current regulatory problems, the phenomenon has a historical dimension. Since the emergence of the commercial society at the beginning of the 19th century the question has continually arisen how the power is to be distributed between state and organized societal players. In this field of tension a wide variety of organizational forms of societal self-regulation more or less strongly tied to the state power have emerged. Here specific national patterns became visible which were explored by German legal history to a great extent;[23] but also in other societies self-regulatory structures – with own legal-cultural contours – emerged.[24]

b) *Judicial self-regulation*: Up to now, however, the debate – both from a historical and present-day perspective – has focused on non-judicial forms of self-regulation. Self-norm-setting has so far been at the center of attention,[25] but other modes such as the assumption of supervision-tasks (imaginably by the state) and other administrative functions have also attracted scientific attention. Particularly in newer research on non-state justice the phenomenon has moved into focus – without one explicitly associating it with the concept of self-regulation. However, this research contains relevant lists of criteria which help to identify not only the intensity of the dependency on the state but also the dependency on the law (in terms of dependency of the law set by the state).[26]

22 Peter Collin, »Gesellschaftliche Selbstregulierung« und »regulierte Selbstregulierung« – ertragversprechende Analysekategorien für eine (rechts-)historische Perspektive?, in: Peter Collin / Gerd Bender / Stefan Ruppert / Margrit Seckelmann / Michael Stolleis (eds.), Selbstregulierung im 19. Jahrhundert – zwischen Autonomie und staatlichen Steuerungsansprüchen, Frankfurt a. M. 2011, 3–31, 9 f.

23 See the contributions in Peter Collin / Gerd Bender / Stefan Ruppert / Margrit Seckelmann / Michael Stolleis (eds.), Selbstregulierung im 19. Jahrhundert – zwischen Autonomie und staatlichen Steuerungsansprüchen, Frankfurt a. M. 2011, and Peter Collin / Gerd Bender / Stefan Ruppert / Margrit Seckelmann / Michael Stolleis (eds.), Regulierte Selbstregulierung im frühen Interventions- und Sozialstaat, Klostermann, Frankfurt a. M. 2012.

24 See the contributions in Peter Collin / Gerd Bender / Stefan Ruppert / Margrit Seckelmann / Michael Stolleis (eds.), Regulierte Selbstregulierung in der westlichen Welt des späten 19. und frühen 20. Jahrhunderts, Frankfurt a. M. 2014.

25 Miloš Vec, Recht und Normierung in der industriellen Revolution, Frankfurt a. M. 2006, 293 ff.; Ina vom Feld, Staatsentlastung im Technikrecht. Dampfkesselgesetzgebung und Dampfkesselüberwachung in Preußen 1831–1914, Frankfurt a. M. 2007, 234 ff.

26 Connolly, Non-State Justice Systems (note 6), 239–294; Forsyth, A Typology of Relationships (note 6), 67–113.

And the research on »Popular Justice« has developed considerations on the question of which forms of the integration of laymen have generated a justice close to the people, a »popular justice«.[27] Still, the crucial question of judicial self-regulation is not as such being answered: Is the authorization to non-state (or parastatal) actors to execute judicial power (or the state toleration of self-administered justice) just a mode of the incorporation of societal knowledge – and thus a mode of instrumentalisation – or is it a form of commitment of autonomous power to social groups? The contributions in this volume attempt to provide some answers.

III. Notes on the contributions in this volume

A contribution by *Gunnar Folke Schuppert* opens this volume. His considerations focus on the question in which way regulating-collectives (»Regelungskollektive«) can be understood as jurisdictional communities (»Jurisdiktionsgemeinschaften«) and in which form they enforce their claims of validity. On this basis he develops typologies of law enforcement regimes which are not only characterized by different organizational constitutions but also by various normative rationalities.

The contributions in the following section II, »The World of Labor«, which are concerned with questions of labour law-related conflict resolution, reveal that such jurisdictional cultures also differ in an international perspective. The differences concern not only the level of juridification and the level of submission to state provisions, but also the question as such of whether such conflicts are subjected to the ordinary courts or special boards which consist of representatives of the concerned interest groups. The contributions of *Sabine Rudischhauser*, *Wilfried Rudloff*, *Gerd Bender* and *Ralf Rogowski* deal respectively with developments in France, Germany and Great Britain.

Widely autonomous law enforcement regimes were been also shaped in the economy (section III »The World of Economy«). The core institution of economic conflict resolution is the arbitration court, which is subjected to state law only to a minor degree and also decides on the basis of specific economic concepts of justice. The development of arbitral jurisdiction in Germany can be observed in *Jens Gal's* contribution. International arbitral jurisdiction has to a greater extent detached itself from state jurisdiction. This is demonstrated in the *Andreas Maurer's* contribution on the arbitration courts of the maritime industry.

Institutions which integrate non-state actors and non-state problem-solving rationalities, but at the same time are incorporated in state organizational

27 Émilie Delivré / Emmanuel Berger (eds.), Popular Justice in Europe (18th–19th Centuries), Bologna, Berlin 2014.

structures, are rampant in Western societies (section IV). Developments in Germany have offered numerous examples which in themselves embody different modes of state integration. This is shown in the contributions of respectively *Monika Wienfort* on patrimonial courts, of *Peter Collin* on juries, and of *Wolfgang Ayass* on conflict resolution bodies of social insurance.

Our notion of statehood emanates from organizational and decision-making structures which emerged in the Western world of the 19th and 20th century. These notions can only partly be transferred to societies with weak state power, to »Areas of Limited Statehood«[28] (section V). In those societies specific patterns arise, in which state and non-state normative rationalities overlap. Such patterns become visible in the contribution of *Katharine A. Hermes* on the early colonial society of North America and in in the contribution of *Matthias Kötter* on conceptions of non-state justice in developing countries.

To what extent non-state actors and non-state normativities shape and challenge the development of modern judicial decision systems is illustrated in the last section (»Challenges in the Modern World: ›Pre-Modern‹ Forms and Innovations«). On the one hand there is a strong inherent weight and impact of traditional non-state patterns of dispute settlement. *Silvia Tellenbach's* contribution shows this in respect of the complicated interplay of Islamic and secular law. On the other hand new needs for the appropriate treatment of specific problems of justice or the dissatisfaction with conventional institutions or procedures generate organizational patterns which fit neither in the traditional structures of state jurisdiction nor in conventional administrative structures. The contribution of *Linda C. Reif* demonstrates this with regard to the institution of the ombudsman. Finally, one can observe that the digital revolution leads to new forms of conflict resolution which are in operation outside of state jurisdiction but do not ignore state normativities. The manner in which this manifests itself, is treated in the contribution by *Joachim Zekoll*.

Peter Collin

28 Concerning this field of research see the Collaborative Research Center (SFB) 700 »Governance in areas of limited statehood«, Berlin (URL: www.sfb-governance.de/en/).