Plurality of Legal Systems and Democracy

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Abstract

The key problem addressed in the paper is that of the legal pluralism, more specifically the pluralism of legal systems within one state that pursues the accommodation of religious freedom claims. In its controversial Refah decisions the Strasbourg Court held that the prohibition of the Turkish Welfare Party was “necessary in a democratic society” because its plan to set up a plurality of legal systems was not “compatible with fundamental democratic principles”1. This paper tries to inquire into the notion of legal pluralism, tries to test normative assumptions made by the Court in its regard and argues that a “no plurality” approach would be overly simplistic and that a liberal approach would require different degrees of pluralization (some of which already exist to accommodate differences and diversity within a society) to be extended to religion, without however endangering constitutional democracy.

It is necessary to point out at least two major theoretical contexts in which this problem should be considered. One is undoubtedly the issue of ‘militant’ democracy: once we assume that constitutional democracy and legal pluralism are incompatible, we give a (part of) definition of democracy, which entitles

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us to reject any changes proposed to it while retaining the claim to be
democratic. If we know what is democracy in a substantive sense, which values
it is designed to protect (e.g. secularism or fundamental rights) we can
legitimately reject any changes to that vision as a measure protective of such
values.  

Another context that is relevant is the issue of universality and cultural
relativism. It first appears when we attempt to define democracy as a
substantive notion, which necessarily assumes a value judgement. It also
becomes relevant if we mind that the rationale of legal pluralism is the
necessity to recognize, respect and tolerate different views and visions of
‘happiness’. In its pure form the idea of relativism and legal pluralism is
represented in the classical version of state-centered international law system,
where states posses equal and unlimited internal sovereignty. However even
within the State any kind and instance of legal pluralism is about the respect
and tolerance of the different normative values and views. Only
straightforward consensus on all the rules and values as universal can justify
total rejection of legal pluralism.

The paper will start by an attempt to clarify the understandings of legal
pluralism in social sciences and law. The second part will try to construe a
liberal argument in favor of advancing legal pluralism to a certain degree,
basing on the individual right to freedom of religion and conscience. Instead
of relying on the ‘collective rights’ argument, it rather believes that individual
rights provide a sufficient basis for this claim, as far as religious life and
consciousness are deemed an important part of individual personality and self-
determination. The third part tries to balance the claims of legal pluralism by
considering arguments against such a model of society.

**Keywords:** Plurality; Democracy; Legal Systems; Human Rights.

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1 See *infra*, text accompanying notes 35-39.

2 See *infra*, note 8, text for the note 25 and page 14.