German National Reports on the 21st International Congress of Comparative Law

Edited by
MARTIN SCHMIDT-KESSEL

Gesellschaft für Rechtsvergleichung e.V.

Rechtsvergleichung und Rechtsvereinheitlichung
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Mohr Siebeck

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Preface by the Editor

The 21st General Congress of Comparative Law will be organised from October 23 to 28 at the CEDEP – Centro de Estudios de Derecho, Economía y Política in Asunción (Paraguay). The Congress is the internationally leading forum for the discussion of comparative law subjects and takes place every four years. The line of congresses mirrors the development of comparative law and the cities in which they were organised – Fukuoka, Vienna, Washington D.C., Utrecht, Brisbane, Bristol, Athens, Caracas, Teheran or The Hague – denominate the rhythm of the whole discipline.

The more than thirty sessions of the 21st Congress find their subjects in all legal disciplines, starting from legal theory and also dealing with classical questions of civil and commercial law, constitutional law and administrative law and criminal law. The German Association of Comparative Law by this book presents the German national reports delivered to the 21st Congress. The German comparative law academia therewith contributes to this congress on the variety topics presented by the International Academy of Comparative Law. At the Asunción Congress, the national reports will become part of the considerations and will support the General Rapporteurs appointed by the Academy for the respective sessions.

One large focus of the topics of the 21st Congress is on questions of (legal) effects of rule of law, softlaw, legal pluralism and bioethics. This does not only concern methodological aspects of comparative law but also certain areas of law including procedural issues as administrative silence, access to justice, contractualisation of civil litigation, alternative dispute resolution and specialised commercial courts. Moreover, several sessions will deal with legal consequences of emergencies like wars or natural catastrophes including climate change. Another set of topics refers to choice and information with particular questions connected to protection of individuals and their autonomy (protection and autonomy of adults, freedom of speech, hate speech). The theme of "social enterprises" could probably subjoin thereto some additional ideas and approaches. Other reports refer to topics of trans-border application of the law (as extraterritorial application and localising the place of damage). Several contributions show how much the digitalisation of the legal orders, the economies and the societies has reached also comparative law and in particular how important cryptocurrencies, the streaming industry, artificial intellignce, autonomous vehicles and smart contracts are for national legal orders, harmonisation or unification of the law and for comparative law. In this respect, additional methodological ques-

tions have to be dealt with, including on how to compare laws and legal disciplines still *in statu nascendi* im their national legal orders – possibly, a new kind of Constructive Comparative Law is emerging. The volume gives an overview over the state of discussions on the various topics within the German (legal) academia.

The order of the reports presented in this book refers to the systematic order proposed by the International Academy of Comparative Law, while the internal structure of the reports in most cases is based on questionnaires sent out from the General Rapporteurs to the National Rapporteurs. Usually the National Rapporteurs have organised their reports along the list of questions in these questionnaires.

The considerable number of publications concerning the Asunción Congress does not only consist of the several collections of national reports published on behalf of the several national associations of comparative law. Many General Rapporteurs will bring together all the national reports and the general report in a separate volume later on, to which I hereby refer. Furthermore, the International Academy of Comparative Law will publish all the general reports in an extra volume, to which I also would like to refer the reader – therefore, the General Reports written by German General Rapporteurs are not included in this volume. On this way, this book lost the national report by Patrick Leyens, on the "Liability of credit rating agencies", because he subsequently became General Rapporteur for his section.

Editing this book on behalf of the German Association of Comparative Law I am indebted to Ms. Judith Zölke, Ms. Joana Näger and Mr. Lukas Zühlsdorff and the whole team of my chair, who supported me in preparing the various papers collected in this book for publication. I also owe thanks to the whole team of our publisher, who helped to bring about this book in time.

Bayreuth/Tröpolach, August 2022 Martin Schmidt-Kessel

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The Revival of the Rule of Law Issue[1]

Helmut Philipp Aust

I. Introduction

The framing of a topic as one of a "revival" can be interpreted in different ways. With respect to the Rule of Law, it could point to an increasing awareness of its importance as well as to mounting challenges to the Rule of Law. This country report interprets the common theme in the latter sense. Arguably, our time is one in which the Rule of Law is no longer necessarily seen to be an "unqualified, universal good".[2] Attacks against the Rule of Law come from different corners. To some critical academics, the Rule of Law – and related notions like the *Rechtsstaat* and the *État de droit* – are only a form of bourgeois camouflage, a veneer for protecting the interests of those who control the means of production in liberal-capitalist societies.[3] Others seem to speak out against the Rule of Law – or act against its spirit – out of a sense of populist entitlement.[4] A sentiment of "we the people" may challenge various forms of elite rule – and the Rule of Law seems to be perceived by some as just another form of rule which has allegedly become detached from democratic decisions.[5]

How these debates play out will depend on local context. Constitutional systems differ with respect to how they understand the Rule of Law, how it is conceptualized in the case law of courts and how the application of the Rule of Law is also embedded in a broader constitutional culture which is crucial especially for open-ended notions such as the Rule of Law.[6]

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[1] I would like to thank *Natalie Reglinski*, *Felix Schott* and *Viktoria Wollenberg* for valuable assistance in the preparation of this report which was finalized in early January 2022.

[2] *Thompson*, The Origin of the Black Act, 1975, 208; on this statement see *Tamanaha*, On the Rule of Law – History, Politics, Theory, 2004, 137–138.

[3] For a reflection of the remaining emancipatory potential of the Rule of Law see *Birkenkötter*, KJ 2021, 172 (with a cautious "yes" as answer).

[4] *Voßkuhle*, NJW 2018, 3154; *Frankenberg*, Autoritarismus – Verfassungstheoretische Perspektiven, 2020, 255 ff.; *Sajó*, Ruling by Cheating – Governance in Illiberal Democracy, 2021, 247 ff.

[5] *Müller*, Was ist Populismus? Ein Essay, 2016, 74 ff.; *Vokßuhle*, Demokratie und Populismus, in: Voßkuhle, Europa, Demokratie, Verfassungsgerichte, 2021, 219, 234; see also *Krieger*, EJIL 30 (2019), 971, 982.

[6] *Waldron*, Law and Philosophy 21 (2002), 137.

Approaching this topic from a German perspective might at first sight invite for some complacency. The idea of the *Rechtsstaat* seems to be almost unchallenged, an unqualified success story of German constitutional law. For a long time, German constitutional traditions were leaning more towards a Rule of Law-orientation that towards one of democracy.[7] The *Rechtsstaat* as an idea and as a constitutional concept has thrived across a number of different regimes in German history since the 19th century – with the exception of the period of National-Socialist rule between 1933 and 1945 and, in different ways, the time between the end of the Second World War and 1990 in the Eastern part of Germany. Even today, the institutions of the *Rechtsstaat* seem to be remarkably stable in Germany.[8] Yet, as this contribution will argue, any form of complacency could be misleading. A too self-assured German posture with respect to the Rule of Law derives in part from a tendency to externalize Rule of Law concerns. As a leading power in the EU and an apparently stable state, German actors in government, the judiciary, academia and civil society find it easy to criticise problematic trends of Rule of Law backsliding in Central and Eastern European countries. Rightly so, such forms of backsliding are identified as breaches of fundamental values of both EU primary law and of fundamental notions embodied in the European Convention on Human Rights.[9] It is to be expected that a state like Germany takes an active role in dialogues about such developments.[10] At the same time, many actors within Germany seem to be immune to criticism about deficiencies of the *Rechtsstaat* in Germany when it comes from the outside and, so to speak, "above". A danger emanating from such isolationistic tendencies is to adopt a too inwards-looking gaze and to thereby risk the foundations for European standards pertaining to the Rule of Law. Recent internal debates about *Rechtsstaatlichkeit* in Germany confirm this finding, as it will be shown against the backdrop of debates about the legal parameters for the fight against the Covid-19 pandemic and recent legislative attempts to further "material justice" (*materielle Gerechtigkeit*) through reforms of criminal procedure. As always, the choice of examples is subjective but I hope that they help to shed some light on current Rule of Law debates in Germany.

Accordingly, this country report will first provide some background to the Rule of Law debates in Germany, in particular its *Rechtsstaat* tradition (section

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[7] *Gärditz*, in: Herdegen/Masing/Poscher/Gärditz (eds.), Handbuch des Verfassungsrechts – Darstellung in transnationaler Perspektive, 2021, § 4 para. 23.

[8] See the overall thrust of the assessment by the European Commission, 2020 Rule of Law Report, Country Chapter on the rule of law situation in Germany, COM(2020) 580 final / SWD(2020) 304 final of 30 September 2020.

[9] See with respect to the EU *Kulick*, JZ 2020, 223 and with respect to the ECHR *Nußberger*, JZ 2018, 845; on the latter see also the contributions in *Aust/Demir-Gürsel* (eds.), The European Court of Human Rights – Current Challenges in Historical Perspective, 2021.

[10] Even a distinct legal debate about "rule of law transfers" is emanating in this context, see the contributions in *Holterhus* (ed.), The Law behind Rule of Law Transfers, 2019.

II.). It will then discuss how from a German perspective many current challenges to the Rule of Law seem to unfold primarily elsewhere. I discuss this under the rubric of an externalization of the Rule of Law crisis (III.), Following that the two already mentioned select challenges of the *Rechtsstaat* within Germany are assessed (IV.). Concluding observations will wrap up the country report.

At the outset, a brief remark on terminology is in order. The concept of the *Rechtsstaat* is not necessarily the same as the Rule of Law or the *Etat de droit*.[11] This contribution will use German terminology in italics and will differentiate between three related, yet different notions. Building on a definitional approach developed by Philip Kunig, this contribution will refer to the *Rechtsstaat* as a general ideal type of constitutionalism, to *Rechtsstaatlichkeit* as a descriptive term in order to refer to various concrete rules pertaining to the *Rechtsstaat* as articulated by relevant constitutional documents (such as the Basic Law) and to the *Rechtsstaatsprinzip* in order to refer to the constitutional principle set forth by the Basic Law.[12]

II. Of Watergates and Capstones: Traditions of the Rule of Law in Germany

The importance of the *Rechtsstaatsprinzip* in German constitutional law can only be understood against its historical tradition. As this country report is not primarily a historical contribution, it is, however, apt to first set out the current constitutional framework of this principle in the Basic Law (1.), before unearthing some of the most important lines in the development of the *Rechtsstaat* in constitutional thinking (2.). This section will finally assess how the current constitutional set-up has been lauded by many as the crowning achievement of the German *Rechtsstaat* tradition (3.).

1. The Starting Point: the Current Constitutional Set-up

Given its central importance, the *Rechtsstaat* is mentioned surprisingly indirectly in the Basic Law. It is evoked most clearly in Article 28, para. 1 of the Basic Law, where the *Rechtsstaat* figures among the fundamental principles that also the organization of statehood on the level of the *Länder* has to observe. Similarly, a requirement to respect *Rechtsstaatlichkeit* was included in Article 23, para. 1 of the Basic Law in its post-1992 emanation as a structural require-

[11] See also the succint overview in *Bäcker*, Rechtsstaat, in: Sellers/Kirste (eds.), Encylopedia of the Philosophy of Law and Social Philosophy, online edition, 2020, 1.

[12] *Kunig*, Der Rechtsstaat, in: Badura/Dreier (eds.), FS 50 Jahre Bundesverfassungsgericht, vol. II, 2001, 421, 424.

ment for the European Union to respect.[13] And in the year 2000, Article 16, para. 2 of the Basic Law was amended to the effect that it now refers to *Rechtsstaatlichkeit* as a condition for the extradition of German nationals to other member states of the EU and international tribunals.[14] None of the three provisions sets forth what *Rechtsstaatlichkeit* is supposed to mean. Instead, they presuppose what they aspire to regulate.[15]

The common approach in German constitutional law is to anchor the *Rechtsstaat* in Article 20 of the Basic Law which comprises a set of fundamental structural principles of the constitutional order.[16] Alongside affirmations of the principles of democracy, republicanism, federalism as well as the social nature of the state established by the Basic Law, Article 20, para. 3 stipulates: "The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice." In addition, the principle of the separation of powers as enunciated by Article 20, para. 2 is also seen to comprise important elements of the *Rechtsstaatsprinzip*: "All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies."[17]

These dry formulations hardly convey a clear picture of what the *Rechtsstaat* is supposed to embody. Most scholarly conceptions formulate a wide-ranging list of components which are arguably covered by or connected with the principle of the *Rechtsstaat*. These contain the principle of legality (*Vorrang des Gesetzes*) as well as the requirement that certain infringements of individual rights require a statutory basis (*Vorbehalt des Gesetzes*). Also the requirement of legal certainty and the principle of proportionality as a general requirement for the exercise of public authority in Germany are usually included.[18]

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[13] See further *Wollenschläger*, in: Dreier (ed.), Grundgesetz-Kommentar, vol. II, 3rd edn., 2015, Art. 23 para. 74.

[14] See further *von Arnauld/Martini*, in: Kotzur/Kämmerer (eds.), von Münch/Kunig – Grundgesetz-Kommentar, vol. I, 7th edn., 2021, Art. 16 paras. 66 ff.

[15] *Von Arnauld*, Rechtsstaat, in: Depenheuer/Grabenwarter (eds.), Verfassungstheorie, 2010, § 21 para. 1; similarly *Sajó* (note 4), 237: "The RoL is a conceptual tool in search of its own content."

[16] This is reflected in the widespread practice of commentators of the Basic Law to deal with the *Rechtsstaatsprinzip* in the entries to Article 20, cf. for instance *Sommermann*, in: Huber/Voßkuhle (eds.), von Mangoldt/Klein/Starck – Grundgesetz-Kommentar, vol. II, 6th edn., 2018, Art. 20 paras. 226 ff.; *Kotzur*, in: Kotzur/Kämmerer (eds.), von Münch/Kunig – Grundgesetz-Kommentar, vol. I, 7th edn., 2021, Art. 20 paras. 137 ff.

[17] On separation of powers as a condition for *Rechtsstaatlichkeit* see *Grimm*, JZ 2009, 596, 599; see also *Schwerdtfeger*, Krisengesetzgebung – Funktionsgerechte Organstruktur und Funktionsfähigkeit als Maßstäbe der Gewaltenteilung, 2018, 177; but see *Möllers*, Gewaltengliederung – Legitimation und Dogmatik im nationalen und internationalen Rechtsvergleich, 2005, in which the connection between separation of powers and the *Rechtsstaatsprinzip* only plays a fairly marginal role.

[18] See, for instance, *Jarass*, in: Jarass/Pieroth, Grundgesetz-Kommentar, 16th edn., 2020, Art. 20 paras. 37 ff.; *Sachs*, in: Sachs (ed.), Grundgesetz-Kommentar, 9th edn., 2021, Art. 20 para. 74 ff.

These lists, some of them numbering more than 140 sub-principles[19], have led some scholars to question whether there is any coherent principle of the *Rechtsstaat* at all. Most famously, it was Philip Kunig who provocatively sounded the death knell for an overarching principle of the *Rechtsstaat* in 1986 as a matter of constitutional law *de lege lata*. Instead, he pleaded in favour of an approach which would focus on the individual constitutional rules as they stand.[20] Important as this contribution was, it has not been successful in changing the mainstream view in German constitutional thinking which still emphasizes the *Rechtsstaat* as an overarching principle.[21]

Focusing only on individual guarantees of *Rechtsstaatlichkeit* would entail the risk of doing away with constitutional principles of a general nature in general.[22] It is hence a question of methodological preferences and outlook; yet arguably with at least one important ramification, given that the constitutional principles set forth by Article 20 enjoy special constitutional protection under the so-called "eternity clause" of Article 79, para. 3 of the Basic Law.[23] In concrete terms, this means that at least a certain core content of the *Rechtsstaatsprinzip* is not subject to constitutional amendment. In addition, affirming the general nature of the *Rechtsstaatsprinzip* also means that it can function as a residual constitutional provision, providing for argumentative support when dealing with unanticipated situations.[24]

Irrespective of this consequence of the doctrinal construction of the *Rechtsstaatsprinzip*, the "summative approach", as it is described by Kunig, also risks cutting loose the *Rechtsstaat* from its origins in German constitutional history.[25] Against the background of this rich tradition, it seems unlikely that the founding fathers and mothers of the Basic Law understood *Rechtsstaatlichkeit* as being encapsulated merely in discrete individual provisions of the Basic Law.[26]

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[19] *Sobotta*, Das Prinzip Rechtsstaat – Verfassungs- und verwaltungsrechtliche Aspekte, 1997, 253 ff. (with a list of 142 features of *Rechtsstaatlichkeit* under the Basic Law).

[20] *Kunig*, Das Rechtsstaatsprinzip. Überlegungen zu seiner Bedeutung für das Verfassungsrecht der Bundesrepublik Deutschland, 1986; *Kunig* (note 12), 422–423.

[21] See, for instance, *Schmidt-Aßmann*, Der Rechtsstaat, in: Isensee/Kirchhof (eds.), Handbuch des Staatsrechts, vol. I, 1987, 987 (990 ff.); *Schulze-Fielitz*, in: Dreier (ed.), Grundgesetz-Kommentar, vol. II, 3rd edn., 2015, Art. 20 (Rechtsstaat) para. 45; *Nußberger*, Das Tafelsilber des Verfassungsstaats – Rechtsstaatlichkeit als europäischer Grundwert, in: Heinig/Schorkopf (eds.), 70 Jahre Grundgesetz – In welcher Verfassung ist die Bundesrepublik?, 2019, 191, 192; see however *Bäcker*, Gerechtigkeit im Rechtsstaat – Das Bundesverfassungsgericht an der Grenze des Grundgesetzes, 2015, 190–191.

[22] *Huber*, Rechtsstaat, in: Herdegen/Masing/Poscher/Gärditz (eds.), Handbuch des Verfassungsrechts – Darstellung in transnationaler Perspektive, 2021, § 6 para. 15.

[23] *Sachs* (note 18), Art. 20 para. 76.

[24] *Schulze-Fielitz* (note 21), Art. 20 (Rechtsstaat) para. 45; *Sachs* (note 18), Art. 20 para. 76; see also *Funke*, AöR 141 (2016), 637, 641.

[25] *Schulze-Fielitz* (note 21), Art. 20 (Rechtsstaat) para. 45.

[26] See also *Payandeh*, Judikative Rechtserzeugung – Theorie, Dogmatik und Methode der Wirkung von Präjudizien, 2017, 189–190, 197.

2. Traditions of the Rechtsstaat in German Constitutional Thinking

A standard account of the history of the *Rechtsstaat* in German constitutional thinking is likely to describe a series of ever-expanding moves, where today's material conception of the *Rechtsstaat* has developed out of previous, primarily formal conceptions which date back to the 19th century.[27] There is a grain of truth to such narratives, but they are at the same time somewhat of an oversimplification.[28]

The idea of the *Rechtsstaat* took hold in German public law thinking in the first half of the 19th century.[29] At the time, the notion embodied a formal dimension, but also a broader appeal to reason as a standard for measuring the exercise of governmental powers. To this extent, the idea of the *Rechtsstaat* was much more encompassing than just being a collection of formal guarantees. At least until the unsuccessful revolution of 1848 the *Rechtsstaat* was hence an aspirational symbol for a much broader overhaul of the system of government. It was mostly in the period of constitutional monarchies set in place at around and after the 1848 revolution that the very strong formal tradition of the *Rechtsstaat* took hold in German public law thinking. This tendency was accompanied by the lack of appeal of democratic thinking for many of the relevant actors at the time.[30]

The *Rechtsstaat* was a key concept for the 19th century *Bürgertum*, meant to preserve a sphere of economic and physical freedom from state interference.[31] Accordingly, a strong tradition developed that infringements in life, liberty and property required an act of parliament, but that also all other forms of the exercise of governmental authority depended on respecting the *rechtsstaatliche Form*, i.e. formal guarantees such as certainty of the law and the protection of legitimate expectations. In constitutional systems which kept close checks on democratic empowerment, i.e. through systems of census suffrage and the ex-

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[27] See, for instance, *Will*, Staatsrecht I, 2021, § 16 para. 6.

[28] For overviews on the historical development of the notion of the *Rechtsstaat* see *Scheuner*, Die neuere Entwicklung des Rechtsstaats in Deutschland, reprinted in: Forsthoff (ed.), Rechtsstaatlichkeit und Sozialstaatlichkeit – Aufsätze und Essays, 1968, 461 ff. [1960]; *Stolleis*, Rechtsstaat, in: Erler/Kaufmann (eds.), Handwörterbuch zur Deutschen Rechtsgeschichte, vol. IV, 1990, 367 ff.; *Hofmann*, Geschichtlichkeit und Universalitätsanspruch des Rechtsstaats, Der Staat 34 (1995), 1, 4–12; *Bäcker* (note 21), 130 ff.

[29] On earlier antecedents of the Rule of Law going back to antiquity see *Thomalla*, „Herrschaft des Gesetzes – nicht des Menschen". Zur Ideengeschichte eines staatsphilosophischen Topos, 2019, 39 ff.

[30] *Grimm*, Verfassung und Privatrecht im 19. Jahrhundert – Die Formationsphase, 2017, 196 [1979]; from the perspective of today's constitutional order see *Möllers*, Demokratie, in: Herdegen/Masing/Poscher/Gärditz (eds.), Handbuch des Verfassungsrechts – Darstellung in transnationaler Perspektive, 2021, § 5 para. 106; *Dreier*, Verfassungskontroversen der Weimarer Republik, in: Dreier/Waldhoff (eds.), Weimars Verfassung – Eine Bilanz nach 100 Jahren, 2020, 9, 26.

[31] *Kunig* (note 20), 22.

clusion of women from the vote, the *Rechtsstaat* was able to make an astonishing career as a defining feature of German constitutional thinking. It can be wondered to what extent a certain fixation on "governing orderly", through well-defined channels of bureaucratic routines, helped to establish the *Rechtsstaat* as a notion of German public law par excellence.[32]

Read from the 20th and 21st centuries, this story is at times cut off from its beginnings – and hence the *Rechtsstaat* was imagined to have originated with its emphasis for the formal side of things. But especially in the light of the developments in the 20th century, it is important to remember the broader basis of original conceptions of the *Rechtsstaat*. It was by no means just bureaucracy with a better name, but as Ernst-Wolfgang Böckenförde highlighted in his influential essay on the historical evolution of the concept, a holistic concept which cannot be reduced to either a formal or a material side.[33] To Böckenförde, the *Rechtsstaat* is essentially a *Schleusenbegriff*, a watergate-like concept, meant in the sense that while its meaning is open-textured, it contains a well-defined core and does not lose its distinct identity despite different political content being poured into the forms of the *Rechtsstaat*. Böckenförde magisterially traced how this holistic notion of the *Rechtsstaat* gave way to a more formal understanding in the 19th century and to remaining more or less stable until the end of the Weimar era.

In this regard, it can be questioned whether the Constitution of the Weimar Republic did not yield any major impulses for thinking about the *Rechtsstaat*, as it is at times held in the literature.[34] The Weimar Constitution contained a wide-ranging set of social rights, which were not deemed to be enforceable as such but which indicated that the Rule of Law tradition could be combined with other forms of proactive state measures.[35] It was during this phase that Hermann Heller coined the phrase of the "*soziale Rechtsstaat*", even if this formulation was developed with a certain sense of scepticism on his part on the practical meaning of the social rights set forth by the Weimar Constitution.[36] It was also during the Weimar time that Carl Schmitt formulated his highly influential

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[32] *Mayer*, Deutsches Verwaltungsrecht, Vol. 1, 3rd edn., 1924, 58 (*Rechtsstaat* as the „Staat des wohlgeordneten Verwaltungsrechts"); this position is influential until today: see, for instance, *Meinel*, Das Bundesverfassungsgericht in der Ära der großen Koalition: Zur Rechtsprechung seit dem Lissabon-Urteil, Der Staat 60 (2021), 43, 46 (idea of the *Rechtsstaat* as an extrapolation of administrative law-oriented conceptions of legality).

[33] *Böckenförde*, Entstehung und Wandel des Rechtsstaatsbegriffs, in: Böckenförde, Recht, Staat, Freiheit, 1991, 143, 148 [1969].

[34] *Huber* (note 22), para. 10.

[35] See further *Mangold*, Gleichheitsrechte und soziale Grundrechte: Internationale und vergleichende Dimension, in: Kleinlein/Ohler (eds.), Weimar international – Kontext und Rezeption der Verfassung von 1919, 2020, 119, 126; *Meinel*, Sozialer Rechtsstaat und soziale Grundrechte: Verfassung und soziale Frage in Weimar, in: Dreier/Waldhoff (eds.), Weimars Verfassung – Eine Bilanz nach 100 Jahren, 2020, 197.

[36] *Heller*, Rechtsstaat oder Diktatur?, in: Heller, Gesammelte Schriften, vol. 2, 2nd edn.

views on the relationship between the political and non-political parts of constitutional law in his 1928 treatise "*Verfassungslehre*". To Schmitt, the *Rechtsstaat* embodied the non-political part of the Constitution in an almost ideal-typical way.[37] Through this characterisation, Schmitt contributed considerably to the above-mentioned standard narrative of *Rechtsstaatlichkeit* being a primarily formal and non-political notion which, consequently, is supposed to stand in considerable tension with the idea of democracy.[38]

In the twelve years of National-Socialist rule, the *Rechtsstaat* was tested most severely and ultimately done away with.[39] In the words of Jens Meierhenrich, the *Rechtsstaat* was both racialized and ultimately, if anything, replaced by a very idiosyncratic form of *rule by law* rather than anything resembling the *Rule of Law*.[40] Attempts by National-Socialist jurists to salvage parts of the idea of the *Rechtsstaat* and adapt it to the requirements of the new regime can best be seen as initiatives aiming at winning over "bourgeois" jurists who had not yet made up their minds about the National-Socialist government.[41]

3. Culmination of a Tradition? The Rechtsstaat under the Basic Law

After the civilizational breakdown of National-Socialist rule and the various forms of state crime it brought about, it seemed to be a given that a new system of government would need to be built around notions of the Rule of Law. Yet, it was not entirely clear what this was supposed to mean. Also in this regard, the way towards the adoption of the Basic Law in 1949 was not straightforward.[42]

What emerged as the new constitutional order was a blend of different influences, some stemming from long-established German legal traditions, some deriving from the impact of the occupying powers which communicated their preferences for the new constitutional order in various forms to those involved

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1992, 443, 450 [1929]; on the slow reception of this phrase in the Federal Republic see *Stolleis*, Geschichte des öffentlichen Rechts in Deutschland, Vierter Band 1945–1990, 2012, 283.

[37] *Schmitt*, Verfassungslehre, 1928, 125.

[38] See further *Hofmann*, Legitimität gegen Legalität: der Weg der politischen Philosophie Carl Schmitts, 6th edn., 2020, 40.

[39] For a thorough assessment of discourses on the *Rechtsstaat* in that time see *Bäcker* (note 21), 147–160.

[40] *Meierhenrich*, Remnants of the Rechtsstaat – An Ethnography of Nazi Law, 2018; on the tension between *Rule of Law* and *rule by law* see *Tamanaha* (note 2), 92–93; on the racialization of the entire legal system *Liebscher*, Rasse im Recht – Recht gegen Rassismus – Genealogie einer ambivalenten rechtlichen Kategorie, 2021, 181.

[41] *Stolleis* (note 28), 374; *Stolleis*, Geschichte des öffentlichen Rechts in Deutschland, Dritter Band 1914–1945, 1999, 330–338; see also *von Arnauld* (note 15), para. 8 who speaks of a "Gespensterdebatte".

[42] See further *Hailbronner*, Traditions and Transformations – The Rise of German Constitutionalism, 2015, 76ff.; *Rensmann*, Wertordnung und Verfassung – Das Grundgesetz im Kontext grenzüberschreitender Konstitutionalisierung, 2007, 43–46.

in the drafting of the new constitution.[43] Eventually, the Basic Law committed itself to the notion of *Rechtsstaatlichkeit*, which is not entirely synonymous with related concepts of the Rule of Law or the *Etat de droit*, but overlaps with them in significant parts.[44] Yet, it is also clear from the debates in the Parliamentary Council, the body which drafted the Basic Law, that *Rechtsstaatlichkeit* would not simply mean the return to a status quo ante, i.e. the time before the National Socialists came to power in 1933.[45]

At least two expansive moves enriched the concept: First of all, the strong role attributed to the protection of fundamental rights in Articles 1 to 19 of the Basic Law underlined that a purely formal understanding of the *Rechtsstaat* would no longer be apposite. Certainly, also the Weimar Constitution provided for fundamental rights. But their normative status and enforceability were greatly enhanced under the Basic Law. This occurred due to the introduction of a constitutional complaint procedure (activated from 1951 onwards)[46] as well as by virtue of the guarantee of Article 19, para. 4 of the Basic Law. This latter provision stipulates that in the case of any violation of a person's right by public authority, recourse to the courts is available – a guarantee dubbed the "capstone" of the Rule of Law in Germany ("*Schlußstein im Gewölbe des Rechtsstaats*").[47]

Second, the concept of the *Rechtsstaat* was coupled with an emphasis on *Sozialstaatlichkeit*, i.e. a social dimension of statehood. This latter development led to a considerable process of soul searching in the German public law scholarship, with more conservative voices lamenting a detrimental impact of this notion on established concepts of the liberal *Rechtsstaat*. Especially Ernst Forsthoff, a disciple of Carl Schmitt and himself not uncompromised after his early flirtations with National Socialism in 1933, detected a turn away from the bourgeois concept of the *Rechtsstaat*.[48] In contrast, Wolfgang Abendroth, a constitutional law scholar with more socialist leanings, emphasized the interrelated nature of the *Rechtsstaat* and the *Sozialstaat* under the Basic Law.[49] At the

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[43] For an overview see *Hesse*, Die Verfassungsentwicklung seit 1945, in: Benda/Maihofer/Vogel (eds.), Handbuch des Verfassungsrechts, 2nd edn., 1994, § 3; for an English language overview of the conditions under which the Basic Law was formulated see also the "prologue" in *Collings*, Democracy's Guardians – A History of the German Federal Constitutional Court, 1951–2001, 2015, xiv ff.

[44] *Schulze-Fielitz* (note 21), Art. 20 (Rechtsstaat) para. 5; for a concise and thoughtful exploration of commonalities and differences see *von Arnauld* (note 15), paras. 12–16; for a monographic treatment see *Heuschling*, Etat de droit, Rechtsstaat, Rule of Law, 2002; furthermore *Bleckmann*, GYIL 20 (1977), 406.

[45] *Stolleis* (note 36), 213–214; *Bäcker* (note 21), 161; see also in this context *von Arnauld* (note 15), para. 10.

[46] See further *Nußberger*, JZ 2010, 533.

[47] *Thoma*, Über die Grundrechte im Grundgesetz für die Bundesrepublik Deutschland, in: Wandersleb/Traumann (eds.), Recht-Staat-Wirtschaft, vol. 3, 1951, 9.

[48] *Forsthoff*, VVDStRL 12 (1954), 8.

[49] *Abendroth*, Zum Begriff des demokratischen und sozialen Rechtsstaats im Grundgesetz

time, he seemed to be in the minority position and his writings are still much less part of the mainstream than Forsthoff's.[50] But, as a recent contribution by Constitutional Court Judge Astrid Wallrabenstein underlines, despite the neglect of Abendroth in the academic discourse, his position has ultimately won the day.[51] Still today, the normative potential of the principle of the *Sozialstaat* is regarded with some scepticism in parts of the academic literature.[52] Increasingly, however, the case law of the Constitutional Court has embraced it.[53] Accordingly, it is no longer à jour to pretend that *Rechtsstaat* and *Sozialstaat* would be irreconcilable opposites and that a premium must be put on the *Rechtsstaat*.[54]

A similar story of rapprochement can be told for the relationship between the principles pertaining to democracy on the one hand and the *Rechtsstaat* on the other. Long-held to be in contradiction, it is today commonly held that under the constitutional order of the Basic Law one cannot be had without the other.[55] As Christoph Möllers has formulated, the principle of democracy determines who gets to decide, the *Rechtsstaatsprinzip* is about the forms in which such decisions take place.[56]

At the same time, debates on the *Rechtsstaat* have gradually led to a certain fatigue with established concepts. For quite some time, the possibility to challenge all forms of public conduct before the courts was seen to be the ultimate success story of the *Rechtsstaat* in German constitutional law. From the 1990s

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der Bundesrepublik Deutschland, reprinted in: Forsthoff (ed.), Rechtsstaatlichkeit und Sozialstaatlichkeit – Aufsätze und Essays, 1968, 114 [1954].

[50] See further on the controversy between Forsthoff and Abendroth *Stolleis* (note 36), 280–281; *Heinig*, Der Sozialstaat im Dienst der Freiheit. Zur Formel vom „sozialen Staat" in Art. 20 Abs. 1 GG, 2008, 22ff.; *Möllers*, Der vermisste Leviathan – Staatstheorie in der Bundesrepublik, 2008, 40; *Meinel*, Der Jurist in der industriellen Gesellschaft – Ernst Forsthoff und seine Zeit, 2nd edn., 2012, 359ff.

[51] *Wallrabenstein*, in: Herdegen/Masing/Poscher/Gärditz (eds.), Handbuch des Verfassungsrechts – Darstellung in transnationaler Perspektive, 2021, § 7, para. 62; see also already *Kunig* (note 20), 29; see further *Meinel*, Verteilung als Verfassungsfrage. Zur Entwicklung einer Problemstellung, in: Boysen/Kaiser/Meinel (eds.), Verfassung und Verteilung – Beiträge zu einer Grundfrage des Verfassungsverständnisses, 2015, 19, 29; *Volkmann*, Grundzüge einer Verfassungslehre der Bundesrepublik Deutschland, 2013, 261–262.

[52] See, for instance, *Wittreck*, in: Dreier (ed.), Grundgesetz-Kommentar, vol. II, 3rd edn., 2015, Art. 20 (Sozialstaat) para. 24; *Heinig* (note 50), 12ff.; *Schorkopf*, JZ 2008, 20, 28 (with a call to focus on the dialectical development of *Rechtsstaat* and welfare legislation in the 19th century).

[53] A landmark decision is BVerfGE 125, 175 – Hartz IV (2010) in which human dignity and the guarantee of *Sozialstaatlichkeit* are coupled in order to provide a ground for a fundamental right to minimum subsistence; for a comparative constitutional law perspective on the decision see *Nolte/Aust*, European exceptionalism?, Global Constitutionalism 2 (2013), 407, 425.

[54] *Wallrabenstein* (note 51), para. 68; see also *Calliess*, Rechtsstaat und Umweltstaat: zugleich ein Beitrag zur Grundrechtsdogmatik in mehrpoligen Grundrechtsverhältnissen, 2001, 58–65.

[55] *Möllers* (note 30), para. 87.

[56] *Möllers*, VerwArch 90 (1999), 187, 201.