

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

Edited by
MARTIN SCHMIDT-KESSEL

Gesellschaft für Rechtsvergleichung e. V.

*Rechtsvergleichung
und Rechtsvereinheitlichung*

84

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 intelligence, 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* in 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 Issue¹

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

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.; *Voßkuhle*, *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

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 succinct overview in *Bäcker*, *Rechtsstaat*, in: Sellers/Kirste (eds.), *Encyclopedia 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

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

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

¹⁵ *Von Arnould*, *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-principles¹⁹, 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

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-

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 Scheuener, *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 watertight-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

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

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 Arnould* (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 (“*Schlufstein 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

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 Arnould (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 Arnould (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

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, 22 ff.; *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, 359 ff.

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; *Volkemann*, *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), 12 ff.; *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 *Notte/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.

onwards, this perspective was increasingly considered to contribute to a form of myopia with an excessive focus on formally defined forms of state action.⁵⁷ In a nutshell, the argument was that through this fixation, German public law scholarship would lose out of sight how more informal means of governance would impact on individuals and society. New tools would be needed in order to embrace “the reality” of governing today. Departing from these assumptions, the so-called new school of administrative law (*neue Verwaltungsrechtswissenschaft*) attempted to liberate administrative law from an allegedly too narrow focus on examining the legality of administrative decisions before the courts.⁵⁸ Instead, a new focus on “steering theory” and others forms of new public administration were considered to be opportune.⁵⁹ But in the broader scheme of things, these debates do not seem to have shattered the standing of the *Rechtsstaatsprinzip* as a cornerstone of German constitutional thinking – and proponents of the *Neue Verwaltungsrechtswissenschaft* would rightly refute the claim that this was ever part of their mission. Accordingly, there is a widespread consensus that *Rechtsstaatlichkeit* is not just an expression of a long tradition in Germany, but remains a defining features of today’s constitutional order.⁶⁰

III. Externalizing the Rule of Law Crisis

In light of this success story of the *Rechtsstaat* in Germany, it is perhaps no wonder that German constitutional law might be a relevant point of orientation for actors abroad.⁶¹ From a German perspective, so much is expected at least with respect to German participation in the European Union. Article 23, para. 1 of the Basic Law posits that German membership in the EU is premised on respect for certain key constitutional values, *Rechtsstaatlichkeit* of the EU being

⁵⁷ On the relationship between this discourse and skepticism towards the usefulness of the notion of the *Rechtsstaat* see *Magen*, Zwischen Reformzwang und Marktskepsis: Die Verwaltungsrechtswissenschaften in der Berliner Republik, in: Duve/Ruppert (eds.), *Rechtswissenschaft in der Berliner Republik*, 2018, 270, 274–275.

⁵⁸ Programmatic in this regard *Vofskuble*, Die Reform des Verwaltungsrechts als Projekt der Wissenschaft, *Die Verwaltung* 32 (1999), 45; see also *Eifert*, VVDStRL 67 (2008), 286; for critical explorations see the contributions in *Burgi* (ed.), *Zur Lage der Verwaltungsrechtswissenschaft*, Berlin 2017 = *Die Verwaltung*, Beiheft 12; especially *Gärditz*, Die “Neue Verwaltungsrechtswissenschaft” – Alter Wein in neuen Schläuchen?, *Die Verwaltung*, Beiheft 12 (2017), 105, 109–110.

⁵⁹ *Huber* (note 22), para. 107; for critical remarks in this regard see *Schaefer*, Die Umgestaltung des Verwaltungsrechts – Kontroversen reformorientierter Verwaltungsrechtswissenschaft, 2016, 23 ff., 377 ff.; *Augsberg*, Die Lesbarkeit des Rechts – Texttheoretische Lektionen für eine postmoderne juristische Methodologie, 2009, 19; *Gärditz* (note 58), 110 (to whose text I owe the discovery of the critique by Ino Augsberg); *Funke*, JZ 2015, 369, 374–375.

⁶⁰ See, for instance, *Gärditz*, Der Begriff der Regierung, in: Krüper/Pilniok (eds.), *Die Organisationsverfassung der Regierung*, 2021, 25 (30); *Huber* (note 22), para. 13.

⁶¹ See also the contributions in *Holterhus* (note 10).

one of them. While early on it provided for some conceptual head-wrangling whether this concept could be plausibly applied to the EU⁶², this debate seems to have receded somewhat into the background.⁶³ Despite not being a state, the EU commits itself to *Rechtsstaatlichkeit* and cognate concepts in Article 2 TEU, depending on the respective language version of the Treaty.

For the purposes of this contribution, the theoretical debate whether the EU can be a *Rechtsstaat* is not that important either. From the perspective of both EU and German constitutional law, the multi-level dimension of governance is key: Expectations pertaining to the Rule of Law are shared between the EU and its member states and the latter also have an interest in the functioning of the Rule of Law in other member states, if only for the reason that the principle of mutual trust requires them to generally accept many judicial and other decisions taken in other EU member states.⁶⁴ In the process of European integration, *Rechtsstaatlichkeit* can no longer be understood as a concept which has only domestic repercussions. It has become a notion of European constitutional law and membership in the EU requires respect for this key value of the Union.⁶⁵

In recent years, the Rule of Law has become a focal point for debates on the future of European integration. To a certain extent, these debates seem to have displaced other notions and concepts which were of central importance for the future of the European integration process. If one traces major academic debates in Germany on the EU and its future, the 1990s were a decade in which the alleged democratic deficit of the EU stood centre stage.⁶⁶ The first decade of the 2000s then witnessed an intense debate about the possibilities and limits of a EU Constitution in the proper sense.⁶⁷ The last ten years have given way to various

⁶² It should be noted, however, that the concept of *Rechtsstaatlichkeit* figured already in early discourses on European integration, see *Mangold*, *Gemeinschaftsrecht und deutsches Recht – Die Europäisierung der deutschen Rechtsordnung in historisch-empirischer Sicht*, 2011, 37 with footnote 25, 161.

⁶³ See further *Calliess*, in: *Calliess/Ruffert* (eds.), *EUV/AEUV*, 6th edn., 2022, Art. 2 EUV para. 26; *von Bogdandy*, *Ways to Frame the European Rule of Law: Rechtsgemeinschaft, Trust, Revolution, and Kantian Peace*, *EuConst* 14 (2018), 675.

⁶⁴ *Von Bogdandy* (note 63), 686 ff.; *Vofskuble* (note 4), 3155–3156; *Nußberger* (note 21), 199–200; *Kulick* (note 9); *Wendel*, *Rechtsstaatlichkeitsaufsicht und gegenseitiges Vertrauen – Anmerkung zum Urteil des EuGH v. 25.7.2018, Rs. C-216/18 PPU (Minister for Justice and Equality gegen LM)*, *EuR* 54 (2019), 111; *Payandeh*, *Das unionsverfassungsrechtliche Rechtsstaatsprinzip*, *JuS* 2021, 481 (488).

⁶⁵ *Pech*, *The Rule of Law*, in: *Craig/de Búrca* (eds.), *The Evolution of EU Law*, 3rd ed., 2021, 307, 318.

⁶⁶ *Böckenförde*, *Welchen Weg geht Europa?*, 1997, 37 (speaking of democratic legitimacy in the EU as precarious).

⁶⁷ Starting already in the 1990s with *Grimm*, *JZ* 1995, 581; *Pernice*, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited*, *CMLR* 36 (1999), 703; *Peters*, *Elemente der Theorie einer Verfassung Europas*, 2001; *Calliess*, *JZ* 2004, 1033; in retrospect see the contributions on “Verfassung im Nationalstaat: Von der Gesamtordnung zur europäischen Teilordnung?” by *Mayer* and *Heinig* respectively: *VVDStRL* 75 (2016), 7 and 65.

crisis discourses⁶⁸, ranging from the Euro crisis and the future of Greece as a member state participating in the Euro⁶⁹ to the “migration crisis” of the years immediately following 2015⁷⁰ and the United Kingdom leaving the EU⁷¹. In each of these debates and discourses, much was at stake – be it whether the EU needed a better democratic grounding, whether the big jump towards the Constitutional Treaty should be taken, what the ever-elusive concept of solidarity means when weighed against “Northern” fixations on austerity and budgetary rigor and what future the Common European Asylum System might have.

The Rule of Law Crisis is arguably different in nature. It is not a sectoral crisis, but one which affects the entire operation of the EU legal system in a cross-cutting manner.⁷² What started as attempts to “reform” the judicial system in Hungary and Poland and had at first sight probably rather indirect effects on the functioning of EU law has developed into a full-blown attack against core concepts of the primacy of EU law and the authority of the CJEU – attacks of a magnitude which are unprecedented in the history of European integration.⁷³ This relates in particular to the decision of the Polish Constitutional Tribunal of 7 October 2021 in which the core constitutional concept of the primacy of the EU legal order was held to be unconstitutional.⁷⁴

At the EU level, several steps were taken to respond to the developments in Poland and Hungary, in particular as the infamous Article 7 TEU procedure did not prove to be a viable approach due to the combined resistance on the part

⁶⁸ For an overview see *Calliess*, NVwZ 2018, 1; as well as the contributions in *Ludwigs/Schmahl* (eds.), *Die EU zwischen Niedergang und Neugründung – Wege aus der Polykrise*, 2020; *Hailbronner*, *Beyond Legitimacy – Europe’s Crisis of Constitutional Democracy*, in: *Graber/Levinson/Tushnet* (eds.), *Constitutional Democracy in Crisis?*, 2018, 277: “For anyone under the age of thirty-five, the European Union has been in a state of almost perpetual crisis.”

⁶⁹ See the contributions by *Calliess* and *Schorkopf* on “Finanzkrisen als Herausforderung der internationalen, europäischen und nationalen Rechtsetzung” respectively: VVDStRL 71 (2012), 113 and 183.

⁷⁰ See the contributions by *Krajewski* and *Thym* on migration law respectively: VVDStRL 76 (2017), 123 and 169.

⁷¹ See only *Ruffert*, JZ 2018, 1005; *Thiele*, EuR 2016, 281.

⁷² See also *Pech* (note 65), 318 (“unprecedented and critical challenge”); *Schmidt*, *Verfassungsaufsicht in der Europäischen Union – Eine akteurszentrierte Analyse der Rechtsstaatlichkeitskrise in der Europäischen Union*, 2021, 42.

⁷³ See further on the background of the situation in Poland *Sadurski*, *Constitutional Crisis in Poland*, in: *Graber/Levinson/Tushnet* (eds.), *Constitutional Democracy in Crisis?*, 2018, 257 ff.; *Sadurski*, *Poland’s Constitutional Breakdown*, 2019; on the situation in Hungary see *Halmay*, *A Coup against Constitutional Democracy: The Case of Hungary*, in: *Graber/Levinson/Tushnet* (eds.), *Constitutional Democracy in Crisis?*, 2018, 243 ff.

⁷⁴ Assessment of the conformity of the Polish Constitution of selected provisions of the Treaty on the European Union, case no. K 3/21, available at <https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej>.

of Poland and Hungary against triggering sanctions against either of them.⁷⁵ Accordingly, the Commission started various infringement proceedings against the two states, giving rise to CJEU case law in which Article 19 TEU was re-interpreted with a constitutionalist mindset⁷⁶, highlighting the importance of the proper functioning of domestic judiciaries for the *Gerichtsverbund*⁷⁷ that EU and national courts form together.⁷⁸ In addition, legislation has been adopted which tries to introduce a conditionality mechanism for access to EU funds, requiring compliance with the core value of *Rechtsstaatlichkeit* as set forth by Article 2 TEU.⁷⁹ At the time of writing, this legislation remains the subject of ongoing legislation before the CJEU.⁸⁰

For the Rule of Law debates in Germany, these debates are to some extent external as they do not seem to concern *Rechtsstaatlichkeit* “at home”. In fact, German government officials continue to reclaim the authority of EU law and show themselves appropriately concerned about the developments in other EU member states.⁸¹ It is met with a certain irritation, if not indignation, that in October 2021 the Polish Constitutional Tribunal relied in its reasoning on the German Constitutional Court’s PSPP ruling from May 2020 in which the *ultra vires* control mechanism formulated a long time ago was activated for the first time.⁸²

From the start, the Constitutional Court was criticized for delivering a blueprint for courts in other member states how to disobey EU law and challenge the authority of the CJEU.⁸³ In a remarkable turn to the general public, two of

⁷⁵ For an overview see *Pech/Scheppele*, *Illiberalism Within: Rule of Law Backsliding in the EU*, Cambridge Yearbook of European Legal Studies 19 (2017), 3, 28.

⁷⁶ See, for instance, CJEU, Case C-64/16 (*Associação Sindical dos Juizes Portugueses*), ECLI:EU:C:2018:117; CJEU, Case C-216/18 PPU (LM), ECLI:EU:C:2018:586.

⁷⁷ This notion builds on *Vofskuble*, NVwZ 2010, 1.

⁷⁸ See further *Schorckopf*, German Law Journal 21 (2020), 956; *Pech* (note 65), 331 ff.

⁷⁹ Regulation 2020/2092 (EU, Euratom) of the European Council and the Parliament on a general regime of conditionality for the protection of the Union budget, 22 December 2020, OJ, L1 433/1; on the possibilities for such a nexus between the Rule of Law and the budgetary interests of the EU see the study by *Symann*, *Schutz der Rechtsstaatlichkeit durch europäisches Haushaltsrecht – Plädoyer für einen neuen Sanktionsmechanismus*, 2021.

⁸⁰ See, for instance, the Opinion of Advocate General Campos Sánchez-Bordona of 2 December 2021, Case C-156/21, *Hungary v European Parliament and Council of the European Union*.

⁸¹ See, for instance, Press release by the Federal Foreign Office, 08.10.2021, available at <https://www.auswaertiges-amt.de/de/newsroom/maas-polnisches-verfassungsgericht/2488094>.

⁸² BVerfGE 154, 17 – PSPP (2020).

⁸³ *Mayer*, JZ 2020, 725 (732); *Zimmermann*, Karlsruhe gefährdet die europäische Integration, *Frankfurter Allgemeine Zeitung*, 15 July 2021, 6; *Basedow et al.*, *European Integration: Quo Vadis? A critical commentary on the PSPP judgment of the German Federal Constitutional Court of May 5, 2020*, ICON 19 (2021), 188, 193; see for differentiated assessments *Haltern*, *Revolutions, real contradictions, and the method of resolving them: The relationship between the Court of Justice of the European Union and the German Federal Constitutional*

the Constitutional Court judges involved in the PSPP judgment explained that in their view this criticism was unfair. In particular, the then President of the Constitutional Court, Andreas Voßkuhle, explained in various interviews with leading German newspapers, but also in later academic publications how the argumentation of the Constitutional Court could not be used to bolster attempts at undermining judicial independence in other member states. In essence, he argued that the German Constitutional Court wanted to instigate the CJEU to take its mandate of control more seriously.⁸⁴ Accordingly, the act of defiance would have been undertaken with a view to enabling more judicial control of public authorities – and would run contrary to the intentions behind judicial reforms in other member States.⁸⁵

This is certainly a plausible contextualization of too easy comparisons between the PSPP judgment and judicial disobedience with the CJEU in other jurisdictions.⁸⁶ However, as a former Judge of the First Senate, Johannes Masing, has argued in a recent high-profile contribution on the Federal Constitutional Court, the PSPP decision will inevitably impact the ability of the CJEU to hedge in problems of *Rechtsstaatlichkeit* in other EU member states.⁸⁷ The PSPP judgment and subsequent rhetoric of involved judges are infused with a “the Court can do no wrong” attitude which other actors in the European *Rechtsprechungsverbund* may find hard to stomach, as they come with a certain introverted attitude.⁸⁸ It was probably out of a consideration not to appear as too lenient vis-à-vis a powerful state in the centre of the EU that the Commission started infringement proceedings against Germany in reaction to this

Court, ICON 19 (2021), 208, 210 (admitting that the FCC “undermines the CJEU’s authority in difficult times”); *Petersen/Chatziathanasiou*, Primacy’s Twilight? On the Legal Consequences of the Ruling of the Federal Constitutional Court of 5 May 2020 for the Primacy of EU Law, Study requested by the AFCO Committee of the European Parliament, PE 692.276, April 2001, 60–61.

⁸⁴ For a summary of his response to the critics see *Voßkuhle*, Applaus von der „falschen“ Seite – Zur Folgenreantwortung von Verfassungsgerichten, in: Voßkuhle, Europa, Demokratie, Verfassungsgerichte, 2021, 334; for the interviews see: *Di Lorenzo*, *Wefing*, „Erfolg ist eher kalt“, Interview with Andreas Voßkuhle, DIE ZEIT of 14 May 2020, 6; *Janisch*, *Kornelius*, „Spieler auf Augenhöhe“, Interview mit Peter M. Huber, Süddeutsche Zeitung of 13 May 2020, 5; *Müller*, „Das EZB-Urteil war zwingend“, Interview with Peter M. Huber, Frankfurter Allgemeine Zeitung of 13 May 2020, 2.

⁸⁵ This view also finds support in the literature, see *Polzin*, Pandora oder Montesquieu? Die *ultra vires*-Kontrolle von Völker- und Unionsrecht durch nationale Verfassungsgerichte, AöR 146 (2021), 1, 47–48.

⁸⁶ See also *Biernat*, GLJ 21 (2020), 1104, 1114–1115.

⁸⁷ *Masing*, Das Bundesverfassungsgericht, in: Herdegen/Masing/Poscher/Gärditz (eds.), Handbuch Verfassungsrecht, 2021, § 15 para. 169; a similar point was also made by the Polish Judge of the CJEU, see *Grunert*, “Polens Gesellschaft muss sich entscheiden”, Interview with Marek Safjan, Frankfurter Allgemeine Zeitung of 15 December 2021, 4.

⁸⁸ Such an attitude in the Constitutional Court’s case law and the accompanying discourse was diagnosed before, see *Schönberger*, Der introvertierte Rechtsstaat als Krönung der Demokratie? Zur Entgrenzung von Art. 38 GG im Europaverfassungsrecht, JZ 2010, 1160.

judgment.⁸⁹ After the Commission considered the German government's response satisfactory, these proceedings were discontinued.⁹⁰ It is not entirely unironic that the German government has apparently committed itself to using all means at its disposal to prevent further cases of *ultra vires* control from arising – leading to the question how this can be brought about without itself undermining judicial independence in Germany.⁹¹

Just as some participants of the debate on the PSPP judgment seem to find it difficult to accept that *Rechtsstaatlichkeit* in Germany can be measured from the outside, this has also been the case in other situations. One recent example pertains to the reactions to a CJEU decision in May 2019 highlighting the lack of independence of the German prosecutorial offices.⁹² The decision concerned the requirement of independence of judicial authorities issuing arrest warrants in the context of the system of the Common European Arrest Warrant.⁹³ Reactions to this decision ranged from describing it as a “stab into the heart” of the German *Rechtsstaat*⁹⁴ to the finding that the current organization of the German prosecutorial services would be part of nothing less than the constitutional identity of the German Federal Republic.⁹⁵

There may be good reasons to be critical of the decision of the CJEU. Just as in other cases, its findings might be a consequence of a too one-dimensional fixation of “independence” which is not able to account for nuances in political and legal organizational cultures of the member states.⁹⁶ But it is another question whether disagreements on this question should quasi-automatically trigger reactions which all too quickly brandish national constitutional identity.⁹⁷ Just as in the PSPP case, context matters and some forms of discursive resistance to European influences should not be equated to judicial reforms in other EU

⁸⁹ See further for remarks on the role of the equality between the member states *Calliess*, NVwZ 2020, 897, 904; *Nußberger*, JZ 2021, 965, 969–970; *Walter*, Wohin steuern die Ultra vires- und die Identitätskontrolle? Eine Zwischenbilanz anhand der Entscheidungen des Bundesverfassungsgerichts im PSPP-Verfahren, *Integration* 44 (2021), 211, 218.

⁹⁰ See Press Release of the European Commission of 2 December 2021, available at https://ec.europa.eu/commission/presscorner/detail/en/inf_21_6201?fbclid=IwAR1w6wbHhdcA5vxlqXTTohUjxcgF7mJbpSBxTXjxaNWXpMJ0MIzb9Zyuvv7I.

⁹¹ See further *Ruffert*, Verfahren eingestellt, Problem gelöst?, *Verfassungsblog* of 7 December 2021, available at <https://verfassungsblog.de/verfahren-eingestellt-problem-gelost/>.

⁹² CJEU, Decision of 27 May 2019, ECLI:EU:C:2019:456.

⁹³ Article 6(1), 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision, O.J. L 190, 18/07/2002 P. 0001 – 0020.

⁹⁴ *Eisele/Trentmann*, NJW 2019, 2365.

⁹⁵ *Barczak*, JZ 2020, 1125, 1127.

⁹⁶ See *Gärditz*, GSZ 2019, 133; see also *Gärditz*, Neutrale Strafverfolgung und demokratische Strukturverantwortung, *Verfassungsblog* of 9 August 2020, available at <https://verfassungsblog.de/neutrale-strafverfolgung-und-demokratische-strukturverantwortung/>.

⁹⁷ For a differentiated analysis see *Kluth*, NVwZ 2019, 1175.

member states. But the message is similar: at the centre of the EU, in the member state with a most distinguished tradition of *Rechtsstaatlichkeit*, it appears to be difficult to accept lessons from abroad – or for that matter from “above”.

IV. A Turn Inwards: Current Challenges of the Rule of Law in Germany

A certain isolationist tendency is also discernible in primarily domestic debates about the *Rechtsstaat*. I would like to illustrate this diagnosis with respect to two distinct sets of issues, the debates on the constitutionality of measures against the Corona pandemic on the one hand (1.) and recent attempts to introduce new legislation in the field of criminal procedure with a view to “realizing material justice” (2.). These two examples should not deflect from the fact, however, that in comparison the idea of the *Rechtsstaat* is held in high esteem in academia, legal practice as well as politics (3.).

1. The fight against the Corona pandemic and the *Rechtsstaat*

Across the globe, societies have been in the grip of the corona virus. Different states have adopted different regulatory techniques whose legality needs to be assessed against the backdrop of the respective constitutional frameworks⁹⁸, but also in the light of commitments these states have entered into in terms of international human rights law.⁹⁹ If we focus on the legal debate about the pandemic in Germany, it can be noticed that a certain isolationist tendency that we have already diagnosed with respect to other Rule of Law-related issues, has played out here too. The international legal framework for the fight against the pandemic did not receive a lot of attention, neither among the general public (which is not surprising), nor in more academic circles.¹⁰⁰ A domestic focus on the Basic Law and issues of fundamental rights protection and concerns about *Rechtsstaatlichkeit* took centre-stage.¹⁰¹

⁹⁸ For an overall assessment from the first year of the pandemic see *Heinig/Kingreen/Lepsius/Möllers/Volkmann/Wißmann*, JZ 2020, 861; see also *Thielbörger*, Germany – Federalism in Action, in: Kettemann/Lachmayer (eds.), *Pandemocracy in Europe – Power, Parliaments and People in Times of COVID-19*, 2022, 91; *Kaiser/Hensel*, Federal Republic of Germany: Legal Response to Covid-19, *Oxford Constitutional Law*, 21 April 2021, available at <https://oxcon.oup.com/view/10.1093/law-occ19/law-occ19-e2>.

⁹⁹ For an overview see *Joseph*, *Journal of International Humanitarian Studies* 11 (2020), 249.

¹⁰⁰ For an international law perspective on the pandemic see *Peters*, *Die Pandemie und das Völkerrecht*, JöR N.F. 69 (2021), 685; specifically on the WHO *von Bogdandy/Villareal*, *ZaöRV* 80 (2020), 293; on the implications for EU law see *Müller*, *VVDStRL* 80 (2021), 105.

¹⁰¹ The range of contributions on fundamental rights issues of the fight against the pandemic is endless, see only *Mangold*, *VVDStRL* 80 (2021), 7; *Edenharter*, JöR N.F. 69 (2021), 555; *Gärditz*, *NJW* 2021, 2761; *Leisner-Egensperger*, *NJW* 2021, 2415.

The regulatory framework in Germany has dynamically changed at different levels of the federal system throughout the pandemic.¹⁰² As this text is finalised in the first days of 2022 when the Omicron variant has just become prevalent, it should be mentioned that the pandemic is far from over and that further evolutions of the regulatory framework will be inevitable. Accordingly, this section is dealing very much with a moving target. It is fair to say that this was a general problem for constitutional law scholarship throughout the pandemic, especially as wide parts of the academic community appeared to be as unprepared for the pandemic as it was the case for the political branches.¹⁰³

a) Different phases of the pandemic

For the sake of orientation for international readers, different phases of the pandemic and the accompanying regulatory activities in Germany can be distinguished.¹⁰⁴ After the first cases of Covid-19 appeared in Germany, the public authorities had recourse to the sweeping blanket clause in the Act for the Protection against infectious diseases (§28 IfSG).¹⁰⁵ This changed over time and more targeted clauses for fighting the Coronavirus were adopted. A central challenge for the fight against the pandemic was the coordination of legislative competences on the federal level and the implementation by the *Länder* who are responsible to implement federal legislation under Article 84 of the Basic Law.¹⁰⁶ In theory, this model allows for a targeted form of implementation where the local context and evolution of the pandemic can be taken into account. This model also sets forth, however, a regime of limited supervisory powers of the federal level.

Over time, and especially in the dire winter of 2020/2021, there was, however, a growing level of discontent with the way different *Länder* and their executives dodged responsibility and rather seemed to wait on political guidance from the

¹⁰² The most comprehensive – and in my view also commendably balanced and fair – assessment of the legal implications of the Corona measures can be found in *Kersten/Rixen*, *Der Verfassungsstaat in der Corona-Krise*, 2nd edn., 2021 (a first edition was published in 2020); more recently, two former Judges of the Federal Constitutional Court have published books which aim at a general public, see *di Fabio*, *Coronabilanz – Lehrstunde der Demokratie*, 2021 and *Papier*, *Freiheit in Gefahr – Warum unsere Freiheitsrechte bedroht sind und wie wir sie schützen können*, 2021.

¹⁰³ Mention should be made, however, of an important monograph preceding the pandemic by *Klafki*, *Risiko und Recht. Risiken und Katastrophen im Spannungsfeld von Effektivität, demokratischer Legitimation und rechtsstaatlichen Grundsätzen*, 2017; a more positive picture of the degree of preparedness is given by *Ruschebieter*, *JöR N.F.* 69 (2021), 449, 451.

¹⁰⁴ For a similar categorization of different phases see *Kingreen*, *Der demokratische Rechtsstaat in der Corona-Pandemie*, *NJW* 2021, 2766, 2767 ff.

¹⁰⁵ *Ruschebieter* (note 103), 454; *Kluckert*, *Verfassungs- und verwaltungsrechtliche Grundlagen des Infektionsschutzrechts*, in: *Kluckert* (ed.), *Das neue Infektionsschutzrecht*, 2nd edn., 2021, § 2 paras. 80 ff.

¹⁰⁶ On this particular aspect see *Waldhoff*, *NJW* 2021, 2772.

federal level. Such forms of guidance were exercised throughout that winter through ever more frequent meetings of an informal body consisting of the Chancellor and the prime ministers of the *Länder*. Without a formal competence to decide on measures, this grouping nonetheless exercised considerably factual influence. Yet, it was not always successful in exerting a sufficient compliance pull to curb the steeply rising numbers of infections in early 2021.¹⁰⁷

Against the backdrop of this somewhat inconclusive picture, the federal legislature finally stepped up and adopted far-reaching measures including a nightly curfew in April 2021, whose applicability depended on a certain number of registered infections in the respective area.¹⁰⁸ This legislative move bypassed the level of implementation on the part of the *Länder* as the new legislation was considered to be self-executing, i.e. prohibiting certain forms of conduct without a requirement of further administrative action on the part of the *Länder*. These rules were passed as law with a strict sunset clause from the beginning, thereby ensuring that they would not be applicable beyond the 30th of June of 2021. Due to its overriding nature, this piece of legislation was dubbed the “federal emergency brake” (*“Bundesnotbremse”*).¹⁰⁹

A further phase of the fight against the pandemic commenced in parallel to the interregnum between the outgoing Merkel government and the new “traffic light” coalition formed between the Social Democrats, the Green Party and the Liberals in the autumn of 2021. In particular the latter party had built their electoral campaign on opposition against alleged legislative and executive overreach in fighting the pandemic, without however questioning the existence and seriousness of the virus as such (as the right-wing “Alternative for Germany” has since the spring of 2020). The political constellation after the federal elections in September 2021 then pushed the new governing parties to ease the regulatory framework as the pandemic seemed to be under control. Soon the new government had to realize that this was premature which led to considerable legislative back and forth between October and December 2021.¹¹⁰

b) Selected concerns pertaining to Rechtsstaatlichkeit in the pandemic

For the sake of this contribution, three points of particular relevance stand out:

¹⁰⁷ Kingreen (note 104), 2768.

¹⁰⁸ This model was suggested early on by Christoph Möllers in an interview, see Amann, „Rechtlich betrachtet braucht man für einen Lockdown keine Ministerpräsidenten – Interview mit Christoph Möllers“, *Der Spiegel* of 10 February 2021, available at <https://www.spiegel.de/politik/deutschland/christoph-moellers-fuer-lockdown-braucht-angela-merkel-aus-juristischer-sicht-keine-ministerpraesidentenkonferenz-a-f942cc8-540f-4b34-a6c8-d839ff4fc102>.

¹⁰⁹ Kingreen (note 104), 2770.

¹¹⁰ For an initial assessment see Kießling, *NVwZ* 2021, 1801.

aa) *Confusion over the legal sources of regulation*

First, the issue of *Rechtsstaatlichkeit* was discussed with respect to the forms of regulation with which the pandemic was fought. Especially in the beginning, there was considerable uncertainty about the relationship between legislation and various forms of executive lawmaking. Also in the purely executive realm, it took some time for the *Länder* to consolidate their regulatory reactions against the virus in the form of *Rechtsverordnungen*, i.e. the classic form of executive lawmaking under German public law. Prior to that, some local governments and even executives of the *Länder* resorted to *Allgemeinverfügungen*, i.e. a form of administrative acts addressed to a group of recipients.¹¹¹ A particular concern in the literature pertained to possibilities under the IfSG to allow the Federal Minister for Health to dispense from statutory legislation (so-called “*gesetzesvertretende Verordnung*”).¹¹² Conversely, there were also concerns that parliaments would encroach upon domains traditionally preserved for the executive.¹¹³ Both developments point to the potential undermining of a key concept of *Rechtsstaatlichkeit* under the Basic Law, i.e. a clear determination of different sources of law whose hierarchy is decided upon by the Constitution itself.¹¹⁴

bb) *Certainty of the law*

A second concern about *Rechtsstaatlichkeit* related to the requisite certainty of legislation and regulation. The clarity of rules is a key requirement of the *Rechtsstaatsprinzip* in general and also finds more specific emanations with respect to the legislative framework for executive lawmaking under Article 80 of the Basic Law.¹¹⁵ In particular with respect to the frequently changing legal framework, concerns were voiced that it would have been increasingly difficult for individuals to orient their behaviour against the yardstick of the law.¹¹⁶

The frequent changes to the legislative framework also seem to stand in tension with an underlying premise of *Rechtsstaatlichkeit*. According to some and in line with early thinking on the matter in the 19th century, the *Rechtsstaat* would also embody a particularly rational form of governing, perhaps understood as an antidote to the vagaries that political decision-making can imply.¹¹⁷

¹¹¹ Siegel, NVwZ 2020, 577; Ruschemeier (note 103), 455; Kluckert (note 105), § 2 paras. 191–195.

¹¹² Kingreen (note 104), 2767 ff.; Kluckert (note 105), § 2 paras. 131 ff.; Rennert, DVBl. 2021, 1269, 1275 ff.

¹¹³ Wißmann, JöR N.F. 69 (2021), 619.

¹¹⁴ Dreier, DÖV 2021, 229, 235 ff.

¹¹⁵ Volkman, NJW 2020, 3153, 3157–58.

¹¹⁶ Dreier (note 114), 237; Kingreen (note 104), 2771.

¹¹⁷ On this tradition see Böckenförde (note 33), 146; Stolleis (note 28), p. 371; on rationality and internal consistency of a legal system as requirements of *Rechtsstaatlichkeit* see O’Hara, Konsistenz und Konsens – Die Anforderungen des Grundgesetzes an die Folgerichtigkeit von Gesetzen, 2018, 53–65; from the perspective of today’s debate about the relationship between

If looked at from this perspective, the regulatory reactions to the pandemic can indeed seem puzzling at first sight. Not only the legislative and executive legal framework changed ever so frequently, also the underlying science on whose recommendations many political decisions were based, seemed to be constantly changing.

Do we hence see a betrayal of the idea of rationality at work here? I would tend to answer this question in the negative. Rather, some commentators seem to have had difficulties to adjust their legal and political sensorium to the fact that everyone has been constantly learning in a pandemic, including the natural scientists.¹¹⁸ As the scientific consensus on the virus only emerged slowly and had to process ever new twists in the pandemic, any expectation that legislation could translate scientific findings straightforwardly into the law in a coherent manner is misguided.¹¹⁹ But nonetheless there is an underlying problem here. If anything, the pandemic tests our expectations that law is supposed to be stable in order to allow for a point of orientation for citizens – an expectation that is then also operationalized under the requirements of certainty of the law. Even if individual rules are perfectly understandable, too frequent changes make it ever more difficult for the public to orient their behaviour towards the law. Here, I would indeed see a structural process at play which puts the *Rechtsstaat* to a severe test. At the same time, there is no easy answer to this problem. Incidentally, the swiftly changing legal framework has also created a dilemma for those who call for more parliamentary participation.¹²⁰ Short-breathed amendments in ever briefer intervals will reduce confidence in parliamentary lawmaking processes.¹²¹ The added value of parliamentary deliberation is hard to realize under these circumstances. While it is therefore convincing to state that the governing of the pandemic cannot be left to executives alone, it is also potentially dangerous to involve the legislature in the day-to-day running of the pandemic. What is gained in terms of deliberation can easily be lost in terms of confidence in the stability of the legal order.

expert rule and democracy see *Münkler*, *Expertokratie – Zwischen Herrschaft kraft Wissens und politischem Dezisionismus*, 2020, 222–225.

¹¹⁸ Questionable in this regard *Murswiek*, *NVwZ-Extra* 5/2021, 14ff.; see also *Murswiek*, *Wie wiegt man Corona?*, *Verfassungsblog* of 16 March 2021, available at <https://verfassungsblog.de/wie-wiegt-man-corona/>.

¹¹⁹ For differentiated assessments see *Rusche* (note 103), 458–459; *Münkler*, *JöR N.F.* 69 (2021), 535; *Gärditz*, *JöR N.F.* 69 (2021), 505.

¹²⁰ This has been a primary concern of constitutional law scholarship throughout the Corona crisis, see for prominent contributions in this regard *Heinig*, *Parlamentarismus in der Pandemie – Beobachtungen und Thesen*, *Verfassungsblog* of 25 November 2020, available at <https://verfassungsblog.de/parlamentarismus-in-der-pandemie/>; *Kingreen* (note 104), 2766; *Völkemann* (note 115).

¹²¹ See also, *mutatis mutandis*, *Barczak*, *Verallgemeinerung des Außergewöhnlichen – Generalisierungstendenzen einer vorsorgenden Sicherheitspolitik*, *ZRP* 2021, 122, 125 (warning against legislative overreach, albeit not in connection with the pandemic).