

## The *Rechtsstaat* and its Rule of Law Counterpart: A Recentring

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### ABSTRACT

The constitutional landscapes in Germany and the United Kingdom are inconceivable without the *Rechtsstaat* and the rule of law respectively. At the same time, the two concepts should not be understood as only existing within their national context. They should, instead, be conceived of as a bridge between the constitutional frameworks of the two countries as they are fundamentally similar in nature. This article takes Meierhenrich's '*Rechtsstaat* versus the Rule of Law', in which he argued that historical, philosophical, and conceptual differences exist between the two concepts, as a starting point. In contrast to his conclusion, this article maintains that Meierhenrich's argument is based on a mischaracterisation of the *Rechtsstaat* concept's historical development and that, in fact, the opposite is the case: both concepts are fundamentally similar. This article guides the reader through the most significant historical reference points of the *Rechtsstaat* and the rule of law and in doing so, analyses the aims that govern both concepts. Regarding the rule of law, it examines the formal and substantive understandings of the concept and how today's understanding of the concept compares with its historical roots. In relation to the *Rechtsstaat*, it analyses its underlying aims and the different phases of its historical development: the concept's substantive origins, the 'formal era', and the modern *Rechtsstaat*. This article focuses especially on the *Rechtsstaat*'s 'formal era' as an important stage in the concept's evolution and in this way corrects the assertion advanced by Meierhenrich that this phase in the *Rechtsstaat*'s development amounted to nothing more than a reactionary episode.

*Keywords:* rule of law, *rechtsstaat*, legal history, comparative public law

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## I. INTRODUCTION

The *Rechtsstaat* and the rule of law are fundamentally similar concepts. An examination of the historical development of both concepts allows for an understanding that they are based on the same foundational aims and core tenets.

This view stands in stark contrast with Jens Meierhenrich's argument that not only semantic but fundamental historical, philosophical, and conceptual differences exist between the two concepts.<sup>1</sup> According to him, conceptions of the *Rechtsstaat* and the rule of law have converged only after the Second World War, which should not lead one to assume that this has always been the case.<sup>2</sup> As I contend in this article, however, Meierhenrich's argument is based on a fundamental mischaracterisation of the *Rechtsstaat's* historical and conceptual development. Correcting this mischaracterisation can lead to a better understanding of the fundamentally similar nature of the *Rechtsstaat* and the rule of law.

This article is divided into four sections. It starts with a brief summary of the arguments that led Meierhenrich to his conclusion (Section II). The next section outlines the fundamental aims of the English rule of law concept by examining Dicey's definition as well as today's understanding of it (Section III). It then takes a close look at the three phases of the *Rechtsstaat's* historical development: its liberal origins, the 'formal era' and the *Rechtsstaat* of the *Grundgesetz* (German Basic Law) (Section IV). Finally, the final section brings together the findings of the preceding sections to underscore the conceptual continuity in both concepts and the fundamental similarity between the *Rechtsstaat* and the rule of law (Section V).

## II. JENS MEIERHENRICH'S REASONING

Meierhenrich's main argument is that the difference between the idea of the *Rechtsstaat* and the rule of law is fundamental and more than merely a variation on a theme. He argues that accounts equating the two concepts ignore historical, philosophical, and conceptual differences that exist between them.<sup>3</sup> While he concedes that the 'conceptions of the *Rechtsstaat* and of the rule of law have, for all intents and purposes, converged, a trend that has continued in the twenty-first century', he sees the modern *Rechtsstaat* as something that was crafted in post-war Germany and therefore as an aberration in the concept's historical development.<sup>4</sup> To support this argument, he submits that the *Rechtsstaat* was 'subject to reinvention from the get-go'.<sup>5</sup> According to him, the originally liberal *Rechtsstaat* concept was, after the failed revolution of 1848, replaced by a reactionary idea of the *Rechtsstaat* which

<sup>1</sup> Jens Meierhenrich, 'Rechtsstaat versus the Rule of Law' in Jens Meierhenrich and Martin Loughlin (eds), *The Cambridge Companion to the Rule of Law* (Cambridge University Press 2021).

<sup>2</sup> *ibid* 66.

<sup>3</sup> *ibid* 39, 40.

<sup>4</sup> *ibid* 66.

<sup>5</sup> *ibid* 66.

reduced its role to that of a guarantor of institutional form, with authoritarian legalism being the ‘order of the day’ after 1870.<sup>6</sup> On the basis of his understanding of the formal *Rechtsstaat* as a reactionary idea, he concludes that Heller’s ‘social *Rechtsstaat*’, which he crafted during the last years of the Weimar republic, and the *Rechtsstaat* as it was set out in the post-war *Grundgesetz*, completely invented the concept anew.<sup>7</sup> He submits that, overall, the *Rechtsstaat* concept’s ‘colourful history’ makes it historically, philosophically, and conceptually problematic to reduce the idea of the *Rechtsstaat* to that of the rule of law.<sup>8</sup>

With these points in mind, the next sections examine the foundations of the English rule of law concept as well as the historical development of the *Rechtsstaat*, focusing in particular on the argument that the liberal *Rechtsstaat* idea was replaced with a reactionary concept in the aftermath of the 1848 revolution.

### III. THE ENGLISH RULE OF LAW CONCEPT

Despite numerous attempts to lend the concept analytical precision, today’s discourse on the rule of law revolves around an idea with ambiguous contents. In light of this ambiguity, a number of public lawyers ‘have apparently abandoned even the attempt to understand and restate the rule of law doctrine, thinking it futile and unrewarding’.<sup>9</sup> Judith Shklar even went as far as asserting that the concept has become entirely devoid of meaning owing to its over-use and adoption as a rhetorical tool for political point-scoring on all sides.<sup>10</sup> Yet, the concept remains a central constitutional principle of the United Kingdom and carries tremendous intellectual force. I seek to edge closer to a better understanding of the concept by way of exploring its foundational aims, historical reference points and different conceptions.

The English rule of law concept has been described as ‘an amalgam of standards, expectations and, aspirations: it encompasses traditional ideas about individual liberty and natural justice, and, more generally, ideas about the requirements of justice and fairness in the relations between government and governed’.<sup>11</sup> At the core of this ‘amalgam’ stands the principle that ‘all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts’, as Lord Bingham has formulated.<sup>12</sup> In this way, the rule of law ‘constitutes a shield against tyranny or arbitrary rule’ as

<sup>6</sup> Jens Meierhenrich, *The Remnants of the Rechtsstaat: An Ethnography of Nazi Law* (Oxford University Press 2018) 79, 81.

<sup>7</sup> Meierhenrich (n 6) 86; Meierhenrich (n 1) 53.

<sup>8</sup> Meierhenrich (n 1) 41, 66.

<sup>9</sup> RW Blackburn, ‘Dicey and the Teaching of Public Law’ [1985] Public Law 679, 692–3.

<sup>10</sup> Judith Shklar, ‘Political Theory and The Rule of Law’ in Allan C Hutchinson and Patrick Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell 1987) 1.

<sup>11</sup> Trevor RS Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford University Press 1994) 21.

<sup>12</sup> Tom Bingham, *The Rule of Law* (Penguin 2010) 8.

political rulers and their agents must exercise power under legal constraints, respecting accepted constitutional limits.<sup>13</sup> This core principle gives expression to John Locke's famous assertion that 'wherever law ends, tyranny begins'.<sup>14</sup>

Aside from Locke, the concept owes much to AV Dicey, who introduced it into English constitutional discourse.<sup>15</sup> Dicey identified three elements of the rule of law. The first element of the rule of law, he stated, is the 'absolute supremacy... of regular law as opposed to the influence of arbitrary power'. The rule of law, secondly, contains equality before the law. The third element is that the unwritten constitution in the United Kingdom can be said to be pervaded by the rule of law because civil liberties are a result of judicial decisions, instead of flowing from a written constitution.<sup>16</sup>

Dicey's fundamentally liberal understanding of the rule of law is characterised by formal requirements intended to protect individual liberty and guarantee equality before the law. Dicey went further, however, as he, with his third element, tied the rule of law concept directly to the particularities of English constitutional history, suggesting that the rule of law is a product of the common law tradition.<sup>17</sup> An understanding of the rule of law as a product of the common law tradition would run counter to the assertion that the rule of law and the *Rechtsstaat* are fundamentally similar concepts. It has, however, been identified early on that Dicey has overstated the link between the rule of law and the English common law tradition. By 1935, the rule of law had been described as 'in no way peculiar to this country' in an influential textbook.<sup>18</sup> In more contemporary discussions of the rule of law, Dicey is similarly seen as having 'no doubt... exaggerated the merits of the British version of the doctrine, at the expense of other Western democracies'.<sup>19</sup> Judith Shklar went further and maintained that Dicey's rule of law concept was 'trivialised as the peculiar patrimony of one and only one national order', leading her to state that his definition amounted to an 'unfortunate outburst of Anglo-Saxon parochialism'.<sup>20</sup> While Dicey's formulation of an inseverable connection between the rule of law and the English common law tradition was exaggerated, his definition was influential for the development of the concept. To this day, the great majority of expositions on the rule of law start with Dicey's definition even though 'the constitutional law of [today] differs in many respects from that of 1885'.<sup>21</sup>

The discourse on the rule of law has, even though Dicey's definition might serve as a starting point, evolved since the late 19th century. Today, a fundamental

<sup>13</sup> Trevor RS Allan, 'Rule of law (Rechtsstaat)', *Routledge Encyclopedia of Philosophy* <[www.rep.routledge.com/articles/thematic/rule-of-law-rechtsstaat/v-1](http://www.rep.routledge.com/articles/thematic/rule-of-law-rechtsstaat/v-1)> accessed 6 February 2023.

<sup>14</sup> John Locke, *Two Treatises of Government* (Peter Laslett ed, Cambridge University Press 1988) 400.

<sup>15</sup> Martin Loughlin, *Foundations of Public Law* (Oxford University Press 2010) 315.

<sup>16</sup> Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan 1915) 198–199; Constitution Committee, *Constitution—Sixth Report* (HL 2006–07) Appendix 5.

<sup>17</sup> Loughlin (n 15) 316.

<sup>18</sup> ECS Wade and GG Phillips, *Constitutional Law* (2nd edn, Longmans 1935) 102.

<sup>19</sup> Allan (n 11) 47.

<sup>20</sup> Shklar (n 10) 5, 6.

<sup>21</sup> Emlyn CS Wade and G Godfrey Phillips, *Constitutional Law* (6th edn, Longmans 1960) 59.

distinction is made between formal and substantive understandings of the rule of law. Formal conceptions confine the rule of law to formal and procedural aspects of legality.<sup>22</sup> They focus on the manner in which the law was declared (i.e., in a properly authorised manner and by a properly authorised person), the clarity of the norm and the temporal aspect of the norm (i.e., whether it is retrospective or prospective).<sup>23</sup> Lon Fuller attempted to provide clarity as to what the formal elements refer and spelled out eight requirements: laws should be (1) general, (2) publicly promulgated, (3) prospective, (4) intelligible, (5) consistent, (6) practicable, (7) not too frequently changeable, and (8) congruent with the behaviour of officials.<sup>24</sup> Joseph Raz, another influential proponent of a formal understanding of the rule of law, maintained that the rule of law does not place substantive limits on the content of the law by only governing the manner in which government may pursue its ends.<sup>25</sup> This line of argument led him to the conclusion that the rule of law is morally neutral and does not have to exist within a specific political system, for example a democratic one.<sup>26</sup>

Proponents of a substantive understanding, on the other hand, incorporate the formal elements of rule of law into their understanding but in addition explicitly include substantive elements. The substantive elements frequently concern the inclusion of protections of individual rights within the rule of law framework. In view of this focus on the protection of individual rights, Ronald Dworkin termed the substantive understanding the ‘rights conception’. He described that this conception assumes that citizens have moral rights and duties with respect to each other and political rights against the state. The conception insists that these rights are recognized in positive law so that they might be enforced. The rule of law, under this definition, does not distinguish between the rule of law and substantive justice but requires that the ‘rules in the book capture and enforce moral rights’.<sup>27</sup> Similar to the rights conception is Tom Bingham’s account of a substantive understanding. His definition of the rule of law rests upon eight points and includes the condition that ‘the law must afford adequate protection of fundamental human rights’.<sup>28</sup> Bingham stated that while he recognises ‘the logical force in Professor Raz’s contention’, he ‘would roundly reject it in favour of a “thick” definition, embracing the protection of human rights within its scope’.<sup>29</sup> The key distinction between both understandings is, therefore, whether the rule of law is a constitutional principle that exists alongside other constitutional principles, such as the

<sup>22</sup> Jeremy Waldron, ‘The Rule of Law as an Essentially Contested Concept’ in Jens Meierhenrich and Martin Loughlin (eds), *The Cambridge Companion to the Rule of Law* (Cambridge University Press 2021) 123.

<sup>23</sup> Paul Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ [1997] Public Law 467, 467.

<sup>24</sup> Lon L. Fuller, *The Morality of Law* (Yale University Press 1964) 39.

<sup>25</sup> Joseph Raz, ‘The Rule of Law and its Virtue’ (1977) 93 *Law Quarterly Review* 195, 197.

<sup>26</sup> *ibid.* 196.

<sup>27</sup> Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 11–12.

<sup>28</sup> Bingham (n 12) 66.

<sup>29</sup> *ibid.* 67.

protection of fundamental rights, or whether it includes such principles within its scope.

No definitive conclusion has been reached as to whether the United Kingdom's constitution today includes a substantive or formal rule of law understanding. Tom Bingham concedes that his assertion concerning the inclusion of the requirement to afford adequate protection of fundamental human rights 'would not be universally accepted as embraced within the rule of law'.<sup>30</sup> At the same time, fundamental rights and civil liberties are afforded robust protection by the judiciary, especially after the introduction of the Human Rights Act 1998, whether this requirement is included within the scope of the rule of law or not. The rule of law, furthermore, takes a central place within the UK's constitution, as evidenced by judicial dicta suggesting that the 'rule of law is the ultimate controlling factor upon which our constitution is based'.<sup>31</sup>

It might be counterintuitive to observe that the rule of law is a cornerstone of the British constitutional landscape, while disagreement remains around whether it includes substantive elements within its scope. This predicament can be settled, however, when the rule of law is considered in light of its underlying aims. Formal and substantive understandings of the concept are both based on the aim of safeguarding individual autonomy and securing the enjoyment of personal liberty through the rule of law's application. In this way, the foundation of both conceptions is indeed substantive; including, as outlined, ideas of moral autonomy and the respect for the individual.<sup>32</sup> This fundamental similarity of both conceptions explains how the concept can be such an important constitutional principle even though disagreement lingers as to how its aims can be best achieved. Focusing on the concept's aims, furthermore, allows for an understanding as to why modern rule-of-law thinking is still influenced by Dicey's definition. His definition was centred on the same aims that are still informing the discussion around the concept today. This historical continuity is central to the concept of the rule of law, and it is something that the rule of law shares with its *Rechtsstaat* counterpart, as the next section demonstrates.

#### IV. THE GERMAN *RECHTSSTAAT* CONCEPT

##### A. KANT'S INFLUENCE ON THE *RECHTSSTAAT*

The combination of the words *Recht* and *Staat* to form *Rechtsstaat* have been introduced into the political and constitutional discussion by Robert von Mohl in his

<sup>30</sup> *ibid* 136.

<sup>31</sup> *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868 [51].

<sup>32</sup> Allan (n 11) 28, 39.

*Staatsrecht des Königreichs Württemberg*.<sup>33</sup> The ‘intellectual foundations’ of the *Rechtsstaat*, however, lie in Immanuel Kant’s *Rechtslehre* (Doctrine of Right).<sup>34</sup>

At the centre of Kant’s *Rechtslehre* stands the *rechtlicher Zustand*.<sup>35</sup> Byrd and Hruschka translate the *rechtlicher Zustand* as ‘juridical state’ owing to its linguistic proximity to *status iuridicus* which Kant uses elsewhere.<sup>36</sup> The term *status iuridicus* is not only linguistically intertwined with the word *Rechtsstaat*—a disciple of Kant’s, Johann William Petersen, invented the term ‘*Rechtsstaat*’ as a direct translation of it, expressly referring to Kant’s theory—but is also the source of the idea behind the *Rechtsstaat*.<sup>37</sup> According to Kant, individuals possess rights by virtue of being human beings.<sup>38</sup> As these rights exist *a priori*, individuals already possess them in a state of nature, a state in which there is no distributive justice.<sup>39</sup> In this state of nature, however, these rights are not secured and, in this way, have only provisional character.<sup>40</sup> In the juridical state, on the other hand, individual rights can be secured because there is, in contrast to the natural state, a judge who may reach a final binding decision when rights are in dispute and a state power to enforce the judge’s decision.<sup>41</sup> Kant defined the juridical state as ‘the relationship among human beings which contains the conditions solely under which everyone can enjoy [“*teilhaftig werden kann*”] his rights’.<sup>42</sup> Thus, Kant’s idea behind the juridical state is to make it possible for everyone not only to *have* subjective rights (which is also the case in the natural state) but to be able to *exercise* them.<sup>43</sup> It has its purpose in safeguarding the liberty and property of its citizens and guaranteeing formal equality of opportunity.<sup>44</sup>

When it comes to the institutional structure of the juridical state (in other words, how the juridical state can be realised and how a nation-state can become a *Rechtsstaat*), the *Gesetz* (law as statute) is of central importance. It is ‘the axis around which the constitution of [Kant’s] *Rechtsstaat* revolves’.<sup>45</sup> Kant, furthermore, considers the idea of separation of powers to be essential for the functioning of his *Rechtsstaat*: it is the legislature that must authorise all acts that change, enforce, or demarcate rights, the executive that must enforce rights in accordance

<sup>33</sup> Robert von Mohl, *Das Staatsrecht des Königreichs Württemberg*, vol 1 (Laupp 1829) 8.

<sup>34</sup> Roman Herzog, ‘Art. 20 und die allgemeine Rechtsstaatlichkeit’ in G Dürig and others (eds), *Grundgesetz-Kommentar* (CH Beck 2021) 3. See also Immanuel Kant, *Die Metaphysik der Sitten, Erster Theil: Metaphysische Anfangsgründe der Rechtslehre* (Nicolovius 1797).

<sup>35</sup> Joachim Hruschka, *Kant und der Rechtsstaat und andere Essays zu Kants Rechtslehre und Ethik* (Karl Alber 2015) 15.

<sup>36</sup> Sharon Byrd and Joachim Hruschka, *Kant’s Doctrine of Right* (Cambridge University Press 2010) 25.

<sup>37</sup> *ibid* 15, 25.

<sup>38</sup> *ibid* 27.

<sup>39</sup> *ibid* 23.

<sup>40</sup> Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Harvard University Press 2009) 165.

<sup>41</sup> Kant (n 34) 312–313; Byrd and Hruschka (n 36) 26.

<sup>42</sup> Kant (n 34) 305, 306.

<sup>43</sup> Hruschka (n 35) 17.

<sup>44</sup> Wolfgang Böckenförde, *State, Society, and Liberty: Studies in Political Theory and Constitutional Law* (JA Underwood tr, St Martin’s Press 1991) 51; Ripstein (n 40) 268.

<sup>45</sup> Böckenförde (n 44) 52.

with law and the judiciary that must decide disputes and on remedies in accordance with law, with the laws flowing from the will of the citizens.<sup>46</sup> With this institutional framework, Kant's idea of the juridical state as a 'coming together of men under laws' can be realised.<sup>47</sup>

The fundamentally liberal framework of the Kantian *Rechtsstaat*—based on the legality of state action and the protection of individual autonomy as the core of the state's *ratio*<sup>48</sup>—remains visible and continuous throughout the *Rechtsstaat's* historical development up until today, as the next sections demonstrate.

## B. ROBERT VON MOHL AND THE LIBERAL *RECHTSSTAAT*

Robert von Mohl introduced the concept of the *Rechtsstaat* into constitutional and political discussion.<sup>49</sup> His concept stands for the liberal and substantive *Rechtsstaat* like no other and was profoundly influential for the development of today's concept.

According to Mohl, a *Rechtsstaat* is a certain type of state, specifically a state governed by the law of reason.<sup>50</sup> When referring to a 'state', Mohl is characterising a type of nation-state and not a conceptual state of being. His starting point, therefore, distinguishes his understanding from Kant's juridical state. The 'sense and goal' of the state which Mohl describes is 'the protection of the citizen against state authority'.<sup>51</sup> The highest order in the *Rechtsstaat*, therefore, is the citizen's liberty.<sup>52</sup> Mohl's *Rechtsstaat* is comprised of three elements.<sup>53</sup> Firstly, the point of reference of the political order is the free, equal, and self-determined individual and not any kind of supra-personal idea.<sup>54</sup> Secondly, the function of the state is the safeguarding of individual liberty and individual self-fulfilment.<sup>55</sup> Thirdly, the organisation of the state should be in accordance with the principles of reason which includes the recognition of fundamental civil rights and equality before the law, the existence of an independent judiciary, the rule of law (in the form of statutes) and some form of parliament that can influence the legislative process.<sup>56</sup> As part of this third organisational element, the constitution of Mohl's *Rechtsstaat* revolves around the *Gesetz* (law as statute) which, according to him, is a general norm that comes into

<sup>46</sup> Carsten Bäcker, *Gerechtigkeit im Rechtsstaat* (Mohr Siebeck 2015) 134; Ripstein (n 40) 173; Kant (n 34) 313.

<sup>47</sup> Kant (n 34) 313.

<sup>48</sup> Bodo Pieroth, 'Historische Etappen des Rechtsstaats in Deutschland' (2011) 33 *Juristische Ausbildung* 729, 730.

<sup>49</sup> Mohl (n 33) 8.

<sup>50</sup> Böckenförde (n 44) 49.

<sup>51</sup> Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer tr, Duke University Press 2008) 170.

<sup>52</sup> Robert von Mohl, *Die Polizei-Wissenschaft nach den Grundsätzen des Rechtsstaates*, vol 1 (Laupp 1832) 5.

<sup>53</sup> Böckenförde (n 44) 49.

<sup>54</sup> Mohl (n 33) 9; Böckenförde (n 44) 49.

<sup>55</sup> Mohl (n 33) 8ff; Böckenförde (n 44) 49.

<sup>56</sup> Mohl (n 33) 18, 23, 268ff, 453, 451ff, 529ff; Böckenförde (n 44) 50.



existence with the consent of parliament and preceded by public discussion.<sup>57</sup> Individual autonomy, therefore, is the ultimate source of justification of the *Rechtsstaat*. It is clear from Mohl's tripartite arrangement, which entails the creation of structures to realise the core tenet of liberty, that his version of the *Rechtsstaat* was based on the Kantian attempt to 'reconcile the establishment of order with the maintenance of freedom' through the medium of the law.<sup>58</sup>

Mohl's *Rechtsstaat* idea is, in spite of suggestions to the contrary,<sup>59</sup> a radical concept as he advocated for an overhaul of the organisation and function of the state. As part of his *Rechtsstaat* concept, formal and substantive elements come together to establish a new type of state. When his *Rechtsstaat* is compared with Dicey's rule of law understanding, we find that both concepts have very similar foundational aims—guaranteeing individual liberty and equality before the law through the rule of law instead of arbitrary rule—but differ when it comes to the elements of Mohl's *Rechtsstaat* that are related to the political organisation of the state. Mohl's *Rechtsstaat* concept is central to the concept's subsequent evolution. Not only can today's *Rechtsstaat* be traced back directly to Mohl's idea, but his understanding also highlights that the aims the *Rechtsstaat* is based on are shared with its rule of law counterpart.

To understand the *Rechtsstaat's* subsequent development, it is important to be aware of the interplay between the legal and the political realm as part of Mohl's *Rechtsstaat*. His concept was embedded in a programme of political liberalism. This connection between legal discourse and the political realm was, primarily, owing to the fact that the academic treatment of public law itself was 'highly politicised' in the first half of the nineteenth century, which was 'unavoidable' at the time.<sup>60</sup> Mohl's *Rechtsstaat* was the political *Leitideal* (guiding principle) of constitutional liberalism, and even though Mohl insisted that his *Rechtsstaat* concept is not tied to a specific form of government, it could best be realised in a constitutional monarchy.<sup>61</sup> This explicit politicisation of constitutional law led to the shift in focus towards the formal elements of the *Rechtsstaat*.

### C. THE 'FORMAL ERA'

The substantive *Rechtsstaat* concept was highly influential in the years before the failed 1848 revolution and influenced both constitutional life and political thinking.<sup>62</sup> After 1848, *Rechtsstaat* thinking entered a new phase, with the focus on the formal elements of the concept.<sup>63</sup> The next section highlights the continuity in

<sup>57</sup> Mohl (n 33) 36–37; Böckenförde (n 44) 52.

<sup>58</sup> Loughlin (n 15) 318.

<sup>59</sup> Meierhenrich (n 6) 78.

<sup>60</sup> Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland. Band 2: Staatsrechtslehre und Verwaltungswissenschaft 1800–1914* (CH Beck 1992) 119.

<sup>61</sup> Katharina Sobotta, *Das Prinzip Rechtsstaat* (Mohr Siebeck 1997) 311; Bäcker (n 46) 139.

<sup>62</sup> Böckenförde (n 44) 53.

<sup>63</sup> *ibid.*

*Rechtsstaat* thinking during the ‘formal era’ and shows that it would be inaccurate to describe the formal *Rechtsstaat* as nothing more than a ‘reactionary’<sup>64</sup> iteration. The examination focuses on the two most influential *Rechtsstaat* thinkers of the postrevolutionary era: Friedrich Julius Stahl and Rudolf von Gneist.

(i) *The Content of Friedrich Julius Stahl’s Rechtsstaat Concept*

Stahl’s definition of the *Rechtsstaat* concept is widely accepted as the encapsulation of the formal *Rechtsstaat* understanding *par excellence*.<sup>65</sup> His definition starts with a statement that makes the *Rechtsstaat* out to be a historical necessity: ‘[t]he state shall be a *Rechtsstaat*; that is the answer, and it is also the very evolutionary impulse of the modern age’.<sup>66</sup> Outlining the objective of the *Rechtsstaat*, Stahl described that it should ‘precisely determine and unswervingly secure the paths and limits of [the state’s] activity as well as the free spheres of its citizens in the manner of the law’.<sup>67</sup> Furthermore, it should not ‘implement moral ideals further than benefits the legal sphere’ and only determines ‘the manner of realising’ the objectives and substance of the state and not these objectives in themselves.<sup>68</sup> Stahl directly contrasted his understanding to the liberal *Rechtsstaat* understanding by no longer describing it as a type of state but rather as a formal element that, divorced it from political ends, restrains the political ruling power.<sup>69</sup>

The slashing of the concept’s explicitly political (and substantive) elements should not be misunderstood as leaving merely a reactionary version, however. While Stahl’s *Rechtsstaat* is ‘apolitical’ to the extent that it restrains the political ruling power of whatever kind,<sup>70</sup> his definition remains attached to the central aim of a liberal *Rechtsstaat* idea: the idea that state actors can only act in the limits provided by the law in order to protect individual liberty. The connection of Stahl’s *Rechtsstaat* to liberal core of the concept does not align with Meierhenrich’s argument that ‘law and liberty, this hallmark of the liberal variant of the *Rechtsstaat*, was pushed to the margins of legal and political thought’ in postrevolutionary Germany.<sup>71</sup> That his argument cannot stand becomes even clearer when the material features of Stahl’s *Rechtsstaat* and the political environment that provided the setting for the *Rechtsstaat*’s shift to a greater focus on its formal elements are considered.

<sup>64</sup> Meierhenrich (n 1) 58.

<sup>65</sup> Bäcker (n 46) 140.

<sup>66</sup> Friedrich Julius Stahl, *Rechts- und Staatslehre auf der Grundlage christlicher Weltanschauung. Zweite Abteilung: Die Staatslehre und die Principien des Staatsrechts* (5th edn, Mohr 1878) 137ff.

<sup>67</sup> *ibid.*

<sup>68</sup> *ibid.*

<sup>69</sup> Böckenförde (n 44) 54.

<sup>70</sup> *ibid.* 54.

<sup>71</sup> Meierhenrich (n 1) 58.

(a) Material features of Stahl's *Rechtsstaat*

Stahl has opted for a *Rechtsstaat* concept that appears disconnected from moral ideals. According to him, those legal norms that have been passed by the constitutionally established state institutions are legally binding and enforceable, even if they might seem to go beyond the limit of reason.<sup>72</sup> His focus on the procedural aspects rather than the content of laws marks an explicit repudiation of the substantive *Rechtsstaat* that aimed to create a state governed by the law of reason. Yet, even under his definition, state authorities do not enjoy completely unfettered powers to pass laws. While his *Rechtsstaat* concept contains no formal limits to the ability of the state to pass laws, Stahl's definition accepts that there are material limits.<sup>73</sup> A state that ignores the existence of a 'higher order' which exists 'independently of the state' would be an absolutist state.<sup>74</sup> The core of this 'higher order' is attacked when state actors, for example, force a citizen to practice a certain religion or do a certain job.<sup>75</sup> It follows that the law is independent of outside influences, such as morals, religion, or public opinion, only if one takes an internal view of the legal system. This is the case as a citizen could not seek redress in court if state authorities exceed the material limits.<sup>76</sup> Once the state is considered from a philosophical perspective, however, it becomes clear that the law is founded on supra-positive norms (which Stahl calls the 'higher order') and which the law is in constant interaction with.<sup>77</sup> Therefore, it is not entirely accurate to decry Stahl's *Rechtsstaat* as nothing more than a 'proceduralist' account, as Meierhenrich has done.<sup>78</sup> His definition should instead be seen as a development of the *Rechtsstaat* concept which focuses on the concept's formal elements while being embedded in a larger philosophical idea. Furthermore, the focus on the formal elements is itself based on a substantive foundation as it is aimed at protecting individual liberty. The rejection of the liberal political programme behind the substantive *Rechtsstaat* does not alter the fact that Stahl's *Rechtsstaat* was based on a fundamentally liberal idea concerning the environment the concept was intended to create.

(b) The political environment after 1848 and liberal continuity in the formal *Rechtsstaat*

Stahl's definition was met with general recognition and accepted as expressing the essence of the *Rechtsstaat*, with Gneist declaring that every opponent of

<sup>72</sup> Friedrich Julius Stahl, *Die Philosophie des Rechts* (2nd edn, Mohr 1847) 117–118, 155.

<sup>73</sup> Sobotta (n 61) 323.

<sup>74</sup> Stahl (n 72) 155, 157.

<sup>75</sup> *ibid* 156.

<sup>76</sup> *ibid* 156ff.

<sup>77</sup> Sobotta (n 61) 334ff.

<sup>78</sup> Meierhenrich (n 1) 58.

Stahl's views could 'affirm' this principle 'verbatim'.<sup>79</sup> Gneist's declaration of a consensus around Stahl's definition is surprising as the *Rechtsstaat* was central to liberals' politics before 1848 and Stahl was a conservative thinker. Once the constitutional and political environment is considered, however, it is possible to see that the formal *Rechtsstaat* developed out of the substantive *Rechtsstaat* idea instead of the being a reactionary reinvention of it.

The *Rechtsstaat* had, in the years leading up to the 1848 revolution, often been used as a synonym for a constitutional state and one that protected fundamental rights.<sup>80</sup> At the same time, even though a liberal nation-state did not materialise after the 1848 revolution, constitutionalism 'had already carried the day' throughout Germany.<sup>81</sup> Prussia, for example, was for the first time in its history a constitutional state with an elected parliament which marked a completely new starting point for the political and constitutional developments in the Prussian state.<sup>82</sup> The existence of a constitutional state led to the realisation of many demands that were inherent to the original substantive *Rechtsstaat* concept, for example the guarantee of civil liberty in most of its manifestations, equality before the law, independence of the judiciary and the organisation of criminal procedure.<sup>83</sup> The existence and importance of a constitutional state was broadly accepted and even conservative thinkers, especially Stahl, opposed Friedrich Wilhelm IV's plan to abolish the constitution and parliament again after 1849 with great determination (and in the end successfully).<sup>84</sup> Furthermore, even though the subject of fundamental rights was left 'trauma-stricken' as a result of the failed the *Paulskirchenverfassung* (Frankfurt Constitution) of 1849, many demands connected to fundamental rights, for example freedom of movement or equality of all religious groups, were fulfilled by the legislature.<sup>85</sup> Many aspects of the substantive, pre-1848, *Rechtsstaat* idea had, therefore, already achieved constitutional protection.

The post-1848 *Rechtsstaat* can be seen as part of a political compromise between moderate conservatives and liberals.<sup>86</sup> This compromise led to the separation of the *Rechtsstaat's* formal and substantive elements. A state could be a *Rechtsstaat* without guaranteeing fundamental rights. But it was a *Rechtsstaat* that, while insisting on its formal elements, remained based on a substantive foundation.

<sup>79</sup> Rudolf von Gneist, *Der Rechtsstaat* (Julius Springer 1872) 60; Böckenförde (n 44) 54.

<sup>80</sup> Michael Stolleis, 'Rechtsstaat' in Wolfgang Stämmler, Adalbert Erler, and Albrecht Cordes (eds), *Handwörterbuch zur deutschen Rechtsgeschichte*, vol 4 (Erich Schmidt 1990) 369.

<sup>81</sup> Böckenförde (n 44) 54.

<sup>82</sup> Christopher Clark, *Preußen. Aufstieg und Niedergang. 1600–1947* (Richard Barth, Norbert Juraschitz, and Thomas Pfeiffer trs, 2nd edn, Deutsche Verlags-Anstalt 2007) 574.

<sup>83</sup> Böckenförde (n 44) 54.

<sup>84</sup> Hans-Christof Kraus 'Nur Reaktion und Reichsgründung? Ein neuer Blick auf Preußens Entwicklung 1850 bis 1871' in Wolfgang Neugebauer (ed), *Oppenheim-Vorlesungen zur Geschichte Preußens: an der Humboldt-Universität zu Berlin und der Berlin-Brandenburgischen Akademie der Wissenschaften* (Duncker & Humblot 2014) 229.

<sup>85</sup> Stolleis (n 80) 371ff.

<sup>86</sup> *ibid* 155.

The substantive foundation of the formal *Rechtsstaat* fits neatly into Nicholas Barber's argument around linguistic precision when it comes to characterising the rule of law and the *Rechtsstaat*. He put forward that it would be better to characterise the different conceptions of the *Rechtsstaat* and the rule of law as 'legalistic and non-legalistic' rather than as formal and material. This linguistic distinction is important, he argued, as 'legalistic models of these concepts may contain substantive demands, but these demands relate to the legal process and to the form that rules ought to take' while 'non-legalistic conceptions also include claims that are not directly related to the legal process, such as, for example, rights to freedom of expression and autonomy'.<sup>87</sup> We find this distinction in Stahl's *Rechtsstaat*. He adopted the existing elements of the concept that relate to the legal process, and which stand on a liberal and substantive footing themselves. He, however, rejected liberal demands around the incorporation of political liberties and active citizenship under the *Rechtsstaat* heading.<sup>88</sup> This *Rechtsstaat* understanding is not dissimilar to the rule of law understandings advocated for by Dicey and Raz and is not merely a reactionary concept.

The failure to acknowledge the liberal and substantive foundation of Stahl's formal *Rechtsstaat* is where the confusion as to the role of his understanding in the concept's historical development emanates from. His idea should be understood as a shift of focus towards the legalistic elements of the concept and not as a reactionary reinvention. The understanding of the Stahl's *Rechtsstaat* as a stage in the concept's evolution explains why conservatives and liberals were able to agree on his *Rechtsstaat* after 1848.

(ii) *Gneist's Rechtsstaat*

(a) Content of Gneist's *Rechtsstaat*

Gneist expressly takes up Stahl's definition but pours his *Rechtsstaat* concept into a very particular institutional form.<sup>89</sup> His understanding of the *Rechtsstaat* is based on three fundamental ideas. It means, firstly, 'government in accordance with laws' in the way that laws constitute the parameters and limits of an executive that is able to act on its own authority. It, secondly, refers to an 'organisational framework' for the administration according to the principle of 'self-government'.<sup>90</sup> He understands this idea of self-government not as the state freely administering its affairs but as the fulfilment of local governmental functions by society regulating itself through offices of state in accordance with state laws.<sup>91</sup> It

<sup>87</sup> Nicholas Barber, 'The Rechtsstaat and the Rule of Law' (2003) 53 *University of Toronto Law Journal* 443, 445.

<sup>88</sup> Stolleis (n 80) 371.

<sup>89</sup> Rudolf von Gneist, *Der Rechtsstaat und die Verwaltungsgerichte in Deutschland* (2nd edn, Julius Springer 1879) 33; Böckenförde (n 44) 55.

<sup>90</sup> Böckenförde (n 44) 56.

<sup>91</sup> Gneist (n 89) 286ff; Böckenförde (n 44) 56.

is, thus, aimed at political co-responsibility, at reconciling democratic participation and executive rule.<sup>92</sup> His *Rechtsstaat*, finally, refers to an independent administrative jurisdiction that exercises the necessary control of the administration through a procedure that is locally based and close to the matter in question.<sup>93</sup> Gneist imagined that his ideas about the *Rechtsstaat* could be realised through permanent administrative laws, the reform of local government and the creation of independent administrative courts.<sup>94</sup>

We find that Gneist's *Rechtsstaat* concept is closely tied to the realm of administrative law. The connection of the concept to the realm of administrative law is striking since the *Rechtsstaat* had before only been considered as a concept at the heart of constitutional law. To gain a better understanding of the ties between his *Rechtsstaat* and its substantive and politically liberal origins, it is valuable to trace the political environment in which his ideas developed.

(b) The 'consolidation' of the *Rechtsstaat*

Gneist is often mentioned in one breath with the politically conservative Stahl when the development of the *Rechtsstaat* is traced.<sup>95</sup> Yet, his own career can throw an interesting light onto the relationship between political liberals and the emergence of the depoliticised *Rechtsstaat* idea. A young Gneist took an active role during the revolutionary events of 1848/49, arguing for the rights of junior staff within the University of Berlin and, as an elected member of the Berlin City Council, for a constitutional arrangement which respected the rights of both crown and parliament. After the revolution failed, he was under police surveillance and had to wait ten years to secure a full professorship.<sup>96</sup> Gneist himself, in a letter to Robert von Mohl in 1860, described the failed revolution as a 'deep break in our political consciousness'.<sup>97</sup> This impact of the failed revolution helps to explain the desire to strengthen the liberal demands that had already been secured.

In the decades after the revolution, Gneist and the majority of political liberals focused on the 'consolidation' of the *Rechtsstaat* to secure and protect individual rights.<sup>98</sup> To achieve this goal, they concentrated mostly on the reform of administrative law and the administrative courts to 'enforce [this consolidation] on the long way down to the lowest administrative authority'.<sup>99</sup> Focusing on reform of administrative law was not a new strategy; it had been a priority of political

<sup>92</sup> Stolleis (n 80) 386.

<sup>93</sup> Gneist (n 89) 270ff.

<sup>94</sup> Böckenförde (n 44) 56.

<sup>95</sup> Cf Meierhenrich (n 6) 79.

<sup>96</sup> Frank Lorenz Müller, 'Before "the West": Rudolf von Gneist's English Utopia' in Riccardo Bavaj and Martina Steber (eds), *Germany and 'The West': The History of a Modern Concept* (Berghan Books 2015) 157; Stolleis (n 80) 385.

<sup>97</sup> Erich Hahn, 'Gneist and the Prussian *Rechtsstaat*: 1862–78' (1977) 49 *Journal of Modern History* 1361, 1363.

<sup>98</sup> Stolleis (n 80) 388.

<sup>99</sup> *ibid* 382.

liberals since the start of the nineteenth century and was included in the *Paulskirchenverfassung* (Frankfurt Constitution) of 1849.<sup>100</sup> After 1848/49, it was taken up as the liberals' main project to secure the achievements connected to the *Rechtsstaat*, with Gneist spearheading this movement which culminated in the establishment of independent administrative courts.<sup>101</sup> The focus on administrative law reform to protect individual rights tells a story about the nature of *Rechtsstaat* thinking in Germany at this time. The concept was not understood as a synonym for constitutionalism anymore, as it had been before 1848, but it was also not merely a reactionary shadow of the concept's substantive origins. The *Rechtsstaat* was now accepted as one constitutional principle among others which stood on substantive foundations and was aimed at protecting the liberty of all citizens.

Gneist's own role during the so-called *Preussischer Verfassungskonflikt* (constitutional conflict, 1862–1866) emphasises the substantive foundations of the formal *Rechtsstaat*. The conflict was caused by the refusal of the (liberal-dominated) Prussian parliament to provide the funds for Wilhelm I's proposed improvement of the army. At issue was the question of who had the right to determine the army's character.<sup>102</sup> Gneist rejected the execution of the army budget, arguing that it was not sanctioned by statute.<sup>103</sup> When Otto von Bismarck (Prussia's Prime Minister) asserted that a court could not be allowed to add to the constitution by ruling on the army reform, Gneist replied that every law, and above all the constitution, was useless unless it could be enforced through a court.<sup>104</sup> Even though Bismarck was ultimately successful—coming up with the *Lückentheorie*, or gap theory, which rested on the argument that the constitution left a gap—this conflict shows that the post-1848 legalistic *Rechtsstaat* was a concept that put the rule of law (in contrast to arbitrary rule) at its centre. It did not leave a proceduralist concept, devoid of all content, but rather a central constitutional principle.

### (c) The *Rechtsstaat* as a two-piece puzzle

The *Rechtsstaat*, like its rule of law counterpart, can be understood as a two-piece puzzle. One piece of the puzzle is the formal (or legalistic) side of the concept, with the substantive (or non-legalistic) side of the concept constituting the other piece. The failed 1848 revolution caused the puzzle to break apart, creating the depoliticised *Rechtsstaat* which focused on the concept's legalistic elements. The connection of this evolution to the political environment can be described as 'uniquely German'.<sup>105</sup> Yet, even though one puzzle piece was removed, the remaining concept was not a new one. The *Rechtsstaat* had not been reinvented, its

<sup>100</sup> Cf §§181–182 of the Frankfurt Constitution.

<sup>101</sup> Stolleis (n 80) 372; Bäcker (n 46) 141.

<sup>102</sup> Müller (n 96) 156.

<sup>103</sup> Ernst Rudolf Huber, *Deutsche Verfassungsgeschichte seit 1789*, vol 3 (3rd edn, W Kohlhammer Verlag 1988) 281–285.

<sup>104</sup> Hahn (n 97) 1367.

<sup>105</sup> Stolleis (n 80) 371.

depoliticised iteration still had the same foundational and substantive aims as the concept's original iteration. This understanding highlights the similarity to the rule of law concept. After all, Dicey's understanding was of a legalistic nature, focusing on the virtues of the legal procedure and the need for the state to show a legal basis for its actions, while remaining safely placed on a substantive foundation.<sup>106</sup>

This continuity in *Rechtsstaat* thinking allowed for the second puzzle piece to be added again—i.e., for the concept to be *re-materialised*—at the end of the Weimar Republic and especially in the *Grundgesetz*.

#### D. THE DISAPPEARANCE OF THE *RECHTSSTAAT* AS A CONCEPT OF CLASSIC CONSTITUTIONAL SCHOLARSHIP

After 1870, the *Rechtsstaat* disappeared almost entirely from classic German constitutional law scholarship.<sup>107</sup> It was the strong role of the sovereign German state following the unification of Germany that 'banished [the *Rechtsstaat* concept] from its constitutional dimension'.<sup>108</sup> The concept, which had before been related to political and constitutional theory, became a dogmatic concept in constitutional law and was focused nearly completely on administrative law scholarship.<sup>109</sup> The *Rechtsstaat's* new role went hand in hand with a prevailing climate of juridical positivism in which ideas connected to political and constitutional theory were seen as 'political *raisonnement*', to be excluded from the juridical scope.<sup>110</sup> Gerhard Anschütz highlighted the new role for the *Rechtsstaat* when he described that the *Rechtsstaat* denotes 'a certain arrangement of the relationship between law, the administration, and the individual', whereby 'the administration may not interfere in the realm of individual liberty either against a law or without a legal foundation'.<sup>111</sup>

At the same time, however, the 'rule of law' as a guarantee of civil liberty was still 'very strongly present in this view of the [*Rechtsstaat*] concept', and the protection of civil liberty was concentrated in the 'constitutionality of the administration' and bound to the law through the introduction of judicial control procedures.<sup>112</sup> Even though the concept was not front and centre of constitutional scholarship at this time, it can be said that the belief in the law as a guarantee for and a guarantor of liberty has prevailed.<sup>113</sup> The focus on the concept's formal elements did not indicate a move away from its underlying aims but rather a

<sup>106</sup> Barber (n 87) 446.

<sup>107</sup> Luc Heuschling, 'Etat de Droit: The Gallicization of the *Rechtsstaat*' in Jens Meierhenrich and Martin Loughlin (eds), *The Cambridge Companion to the Rule of Law* (Cambridge University Press 2021) 78.

<sup>108</sup> Sobotta (n 61) 392.

<sup>109</sup> Böckenförde (n 44) 58; Heuschling (n 107) 78.

<sup>110</sup> Böckenförde (n 44) 58.

<sup>111</sup> Gerhard Anschütz and Georg Meyer, *Lehrbuch des deutschen Staatsrechts* (7th edn, Duncker & Humblot 1919) 29; Böckenförde (n 44) 58.

<sup>112</sup> Böckenförde (n 44) 58.

<sup>113</sup> Bäcker (n 46) 143.



shaping that was in line with the basic evolutionary principle of the *Rechtsstaat*: a focus on the security of liberty and property.<sup>114</sup> A lack of mention of the concept in classic constitutional scholarship need not indicate a vanishing of the concept as a constitutional principle. In fact, as a survey of the rule of law in British public law textbooks has showed: the rule of law, after Dicey's remarks on the concept, 'did not feature heavily in most public law textbooks' until approximately the middle of the 20th century.<sup>115</sup> And yet it remained a central constitutional principle in the United Kingdom. It is the same for the development of the *Rechtsstaat* concept: the *Kaiserreich* era marked a time of consolidation for the concept which laid the groundwork for its upcoming re-materialisation.

#### E. THE RE-EMERGENCE OF THE *RECHTSSTAAT* AS A CONCEPT AT THE HEART OF GERMAN CONSTITUTIONAL LAW

Even though the term '*Rechtsstaat*' did not appear in the Weimar Constitution, a legalistic *Rechtsstaat* based on the parliament's broad legislating power and a thorough control of the administration by administrative courts was constitutional reality in the Weimar Republic.<sup>116</sup> This understanding of the *Rechtsstaat* and its constitutional protection was not in principle 'up for debate'.<sup>117</sup> Jellinek went as far as uttering the fateful words in 1931 (a mere two years before the Weimar *Rechtsstaat* was destroyed following the Nazi's seizure of power) that the *Rechtsstaat* will 'remain in place in Germany'.<sup>118</sup>

The legalistic *Rechtsstaat*—which Sobotta termed a 'decapitated torso' of a *Rechtsstaat* concept owing to the lack of focus on the concept's substantive elements (or the second puzzle piece)—was able to fulfil its purpose for more than three decades.<sup>119</sup> However, legal scholars, foreseeing the rise of fascism, returned to the *Rechtsstaat* as a constitutional and substantive concept during the final years of the Weimar Republic.<sup>120</sup>

##### (i) Heller's '*Social Rechtsstaat*'

In his seminal 1929 essay, Hermann Heller formulated his idea of a 'social *Rechtsstaat*'.<sup>121</sup> He defined it as a state that would actively counter social inequality as otherwise, so he argued, the individual freedom and equality before the law which were the object of the *Rechtsstaat's* guarantees would be reduced to an empty

<sup>114</sup> Böckenförde (n 44) 59.

<sup>115</sup> Brian Christopher Jones, 'The Rule of Law in UK Public Law Textbooks: From Critique to Acceptance?' [2018] Public Law 594, 594–599.

<sup>116</sup> Cf art 68 and art 107 of the Weimar Constitution; Bäcker (n 46) 145.

<sup>117</sup> Stolleis (n 60) 363.

<sup>118</sup> Walter Jellinek, *Verwaltungsrecht* (3rd edn (reprint), Verlag Dr Max Gehlen 1966) 97.

<sup>119</sup> Sobotta (n 61) 529.

<sup>120</sup> Bäcker (n 46) 145 and Böckenförde (n 44) 61, 66.

<sup>121</sup> Hermann Heller, 'Rechtsstaat or Dictatorship?' (Ellen Kennedy tr) (1971) 16 *Economy and Society* 127.

phrase for many citizens.<sup>122</sup> The social *Rechtsstaat* represents a ‘re-materialisation’ of the *Rechtsstaat* concept with a distinct focus on the social realities of society in the 1920s.<sup>123</sup> Heller refers explicitly to the origins of the *Rechtsstaat* by prefacing that the ‘sociological, political and juridical meaning of the modern *Rechtsstaat* can only be grasped if it is understood as the ‘rule of law’ in the original sense of its creators’.<sup>124</sup> He, furthermore, makes direct reference to Mohl’s *Rechtsstaat* concept which, according to him, had after the revolution of 1848 become ‘something formal-technical’ that required the ‘predictable application of the law’ without consideration of its content.<sup>125</sup> Heller’s effort to connect his understanding of the concept to its historical roots highlights that he did not, in contrast to Meierhenrich’s assertion, ‘invent [the *Rechtsstaat* concept] anew’.<sup>126</sup> He, instead, traced the concept back to its substantive roots and re-materialised a concept that was already in existence by adding the substantive component (or the second puzzle piece) again and, furthermore, adding a social component.

(ii) *Schmitt’s Bourgeois Rechtsstaat*

Carl Schmitt’s analysis of the *Rechtsstaat* in his 1928 work, and magnum opus, *Verfassungslehre* (Constitutional Theory) provides further evidence for the finding that a re-materialisation of the *Rechtsstaat* was possible because the concept never lost its identity.

In the preface to his book, Schmitt made it clear that the book is not a commentary on the constitution of the Weimar Republic but rather a theory of a particular type of state ‘which is dominant today’ and of which the Weimar constitution was one example.<sup>127</sup> Schmitt understood the liberal (or bourgeois, as he calls it) idea of freedom to be the core of the *Rechtsstaat* component of every modern constitution. He argued that the modern *Rechtsstaat’s* sense and goal, in line with its historical development, is ‘*liberté*, protection of the citizen against the misuse of state authority’.<sup>128</sup> From this ‘fundamental idea of bourgeois freedom’ follow two principles, he stated, constituting the *Rechtsstaat* component of every modern constitution. The principle of distribution, which implies that the individual’s sphere of freedom is presupposed as something prior to the state and the organisational principle which suggests that state power is distributed and comprised in a system of defined competencies.<sup>129</sup> He regarded the bourgeois *Rechtsstaat’s* principles as (at least in part) realised in the Weimar Constitution by the enumeration of basic

<sup>122</sup> Heller (n 121) 141; Böckenförde (n 44) 61.

<sup>123</sup> Sobotta (n 61) 530.

<sup>124</sup> Heller (n 121) 128.

<sup>125</sup> *ibid* 130.

<sup>126</sup> Meierhenrich (n 6) 86.

<sup>127</sup> Schmitt (n 51).

<sup>128</sup> *ibid* 170.

<sup>129</sup> *ibid* 170.

rights and duties of Germans and the indirect declaration of the organisational principle of separation of powers.<sup>130</sup>

Schmitt, thus, describes a distinctly substantive *Rechtsstaat* that is based on the aim of protecting individual liberty against state authority. He puts the two pieces of the *Rechtsstaat* puzzle together again, thereby going back to the concept's origins. Yet, his effort of re-establishing a substantive *Rechtsstaat* was only possible because the foundations of the concept remained intact throughout its historical development. The *Rechtsstaat* never lost its identity and was not, contrary to Meierhenrich's arguments, completely stripped of all substance during the formal era. The re-establishment of a substantive *Rechtsstaat* was a matter of adding substantive elements to a concept already in existence and not the emergence of an entirely new concept.

(iii) *The Nazi 'State of Injustice'*

The Weimar Republic was succeeded by a 12-year 'state of injustice' after the Nazi's seizure of power in 1933. This state of injustice was the opposite of a *Rechtsstaat*, highlighted by the German translation of 'state of injustice' as '*Unrechtsstaat*'. Theory and practice of the National Socialist state marked a clear and fundamental break with the intellectual foundations and fundamental aims of the *Rechtsstaat* and the National Socialist practice of proclaiming a 'new *Rechtsstaat*' can only be described as a 'deformation of the *Rechtsstaat*'.<sup>131</sup> I mention the break with *Rechtsstaat* traditions in Nazi Germany to underline that whenever I speak of a continuity in German *Rechtsstaat* thinking, I explicitly exclude the Nazi rule as there can be no continuity where a likeness is only in name.

F. THE *RECHTSSTAAT* CONCEPT IN THE *GRUNDGESETZ*

The substantive *Rechtsstaat* of the *Grundgesetz* brings the *Rechtsstaat*, as Meierhenrich concedes, 'in a substantive alignment with the rule of law'.<sup>132</sup> Interestingly, the question of why the drafters of the *Grundgesetz* decided to 're-materialise' the *Rechtsstaat*, after the term itself was not mentioned in the Weimar Constitution, is rarely asked. The next section examines this re-materialisation by way of exploring the discussions of the *Rechtsstaat* in the *Parlamentarische Rat* (Parliamentary Council)—the assembly that drafted and adopted the text that was to become the *Grundgesetz*—and the analysis of the *Rechtsstaat* by leading commentators in the aftermath of the passing of the *Grundgesetz*.

<sup>130</sup> *ibid* 172.

<sup>131</sup> Stolleis (n 80) 373; Klaus Stern, *Das Staatsrecht der Bundesrepublik Deutschland*, vol 1 (CH Beck 1984) 774.

<sup>132</sup> Meierhenrich (n 1) 53.

(i) *The Parlamentarische Rat*

During the deliberations in the *Ausschuss für Grundsatzfragen* (committee for fundamental questions) of the *Parlamentarische Rat*, a liberal *Rechtsstaat* that includes formal and substantive elements was—without much discussion—accepted as describing the essence of the *Rechtsstaat*. It was the chairman of the committee, Herrmann von Mangoldt, who made it clear that ‘the essence of the *Rechtsstaat* lies in the rule of law [*Herrschaft des Gesetzes*]’ and asserted that it is ‘the *Rechtsstaat* principle in the highest degree’ if civil liberties are protected while at the same time the connection between liberty and the social circumstances is recognised.<sup>133</sup> Furthermore, Richard Thoma, who was called to speak as an expert, stated that it is the task of Article 2 of the *Grundgesetz* to ‘enshrine the formal and material principles of the *Rechtsstaat* into the constitution’.<sup>134</sup> These statements highlight the realignment with the concept’s substantive origins.

(ii) *Comments on The Rechtsstaat in The Grundgesetz*

Hans Peter Ipsen saw the *Rechtsstaat* of the *Grundgesetz* as being inextricably tied to its substantive origins and, in a speech held six months after the *Grundgesetz* came into effect, went as far as stating that there is ‘unanimity’ that the *Grundgesetz* ‘in particular in guaranteeing fundamental rights and in the use of judicial power, makes use of legal instruments and structures that have been developed in the past’, and that ‘the *Grundgesetz* has spoken not only in the language of 1919, but in that of the nineteenth century’.<sup>135</sup> Ipsen, therefore, made it clear that the drafters of the *Grundgesetz* did not invent the *Rechtsstaat* anew. Instead, the post-war concept rests on the foundations laid in the nineteenth century.

Ernst Forsthoff, in his contribution to the annual conference of German constitutional experts in 1953, went even further in his examination of the relationship between the modern *Rechtsstaat* and its substantive origins.<sup>136</sup> He argues that the ‘western world has preserved and restored the *Rechtsstaat*, which was inherently bourgeois and associated with the bourgeois society of the nineteenth century, for the present state of affairs’.<sup>137</sup> This characterisation of the *Rechtsstaat* as a concept that goes beyond German borders is not dissimilar to Schmitt’s bourgeois *Rechtsstaat*—which is not surprising in light of the fact that Schmitt supervised Forsthoff’s doctoral thesis.

<sup>133</sup> Eberhard Pikart and Wolfram Werner (eds), *Ausschuß für Grundsatzfragen: Parlamentarischer Rat. Band 5* (Oldenbourg Wissenschaftsverlag 2010) 292, 1041.

<sup>134</sup> *ibid* 364.

<sup>135</sup> Hans Peter Ipsen, *Über das Grundgesetz* (JCB Mohr (Paul Siebeck) 1988) 16.

<sup>136</sup> Ernst Forsthoff, ‘Erster Beratungsgegenstand: Begriff und Wesen des sozialen Rechtsstaates’ in Ernst Forsthoff and others, *Die auswärtige Gewalt der Bundesrepublik: Berichte und Aussprache zu den Berichten in den Verhandlungen der Tagung der deutschen Staatsrechtslehrer zu Bonn am 15. und 16. Oktober 1953* (De Gruyter 2013).

<sup>137</sup> *ibid* 30.

While other commentators, chiefly Wolfgang Abendroth (as part of what has been dubbed the ‘Abendroth-Forsthoﬀ controversy’<sup>138</sup>), disagreed with the suggestion that the substantive *Rechtsstaat* of the nineteenth century has been completely restored and wanted to focus more on the concept’s social elements,<sup>139</sup> it is clear that the *Rechtsstaat* of the *Grundgesetz* is strongly influenced by and based on the substantive origins of the concept. The modern *Rechtsstaat* must therefore be understood as a result of, rather than an aberration in, the concept’s historical development.

## V. THE FUNDAMENTAL SIMILARITY BETWEEN THE *RECHTSSTAAT* AND THE RULE OF LAW

The *Rechtsstaat* and the rule of law take up central roles in German and British constitutional theory respectively. They represent a fundamentally liberal ideal and exist to create an environment in which an individual can live freely and make autonomous choices. As to how best to achieve this aim, there is disagreement concerning the separation of the formal and substantive elements of the concepts which has characterised the historical development of both concepts. Today’s versions of the concepts are products of and not aberrations in their historical development.

Meierhenrich has argued that this assertion does not ring true for the *Rechtsstaat*. Yet, the examination of the concept’s historical development has shown that the *Rechtsstaat* idea has always sought to ‘limit and contain the power and supremacy of the state in the interests of individual’, with the primacy of law over the political sphere appearing as a ‘recurring postulate of all thinking associated with the concept’.<sup>140</sup> Since the concept was introduced into German constitutional thinking, the focus has shifted on how this goal could best be achieved. The liberal concept in the first half of the nineteenth century combined legalistic and substantive elements and was a type of state that placed individual autonomy at the centre. The depoliticised concept that emerged after the 1848 revolution shifted the focus onto the legalistic aspects of the *Rechtsstaat*, with a special focus on the realm of administrative law. Yet, this iteration of the concept should not be understood as a reactionary iteration of the concept. It should rather be understood as a concept which rested on substantive foundations—with its aim to safeguard individual liberty and autonomy at the centre—and which influenced the *Rechtsstaat* as it exists today. At the end of the Weimar Republic, a concept emerged that re-materialised

<sup>138</sup> Clara Maier, ‘The Weimar Origins of the West German Rechtsstaat, 1919–1969’ (2019) 62 *The Historical Journal* 1069, 1088.

<sup>139</sup> Ernst Forsthoﬀ and others, *Die auswärtige Gewalt der Bundesrepublik: Berichte und Aussprache zu den Berichten in den Verhandlungen der Tagung der deutschen Staatsrechtslehrer zu Bonn am 15. und 16. Oktober 1953* (De Gruyter 2013) 87ff.

<sup>140</sup> Konrad Hesse, ‘Der Rechtsstaat im Verfassungssystem des Grundgesetzes’ in Konrad Hesse, Siegfried Reicke, and Ulrich Scheuner (eds) *Staatsverfassung und Kirchenordnung* (Paul Siebeck 1962) 75; Böckenförde (n 44) 69.

the *Rechtsstaat* and added social protections. Finally, today's *Rechtsstaat* takes up all three strings of emphasis. As Bodo Pieroth has identified, it embraces the liberal emphasis by virtue of being part of a western tradition of constitutionalism, the formal emphasis as it attaches great importance to procedures which guarantee sophisticated legal protection and finally a social emphasis as it also includes aspects of the social *Rechtsstaat* that was developed in Weimar.<sup>141</sup> The identification of the different strings of emphasis materialising in today's concept allows for an understanding that today's version of the concept marks a synthesis of the shifts of focus that appeared over the course of its historical development.

The rule of law is equally a product of its historical development and has also experienced shifts of focus concerning its formal and substantive elements. The rule of law is certainly embedded in a different constitutional tradition than the *Rechtsstaat* concept. The role of parliament or the judiciary is, for example, different in the United Kingdom to the role of these institutions in Germany. While that is the case, however, the rule of law is only one of a range of constitutional principles in the United Kingdom's constitutional set-up. In this set-up, it takes a unique role as it shares its fundamental aims and core tenets with concepts that similarly stand in the tradition of a certain idea of liberal constitutionalism, such as the *Rechtsstaat*. The connection of the rule of law to concepts that stand in the same tradition of liberal constitutionalism was already recognised in 1935 when the concept was described as 'in no way peculiar to this country', followed up by an assertion in the same publication thirty years later that the rule of law is 'now considered as a basic idea which can serve to unite lawyers of many differing systems, all of which aim at protecting the individual from arbitrary government'.<sup>142</sup> Importantly, this similarity between the *Rechtsstaat* and the rule of law is not a recent development that only started after the Second World War. Instead, the concepts have always been fundamentally similar. When Dicey defined the rule of law, he laid the foundations for its modern iteration. Even though he characterised it as something peculiar to the British common law tradition, he described a concept that found its intellectual sibling in the *Rechtsstaat*. Over the course of the rule of law's historical development, there have been fluctuations regarding the focus on its formal or substantive elements. Dicey's, and later Raz's and Fuller's, understanding focused more on the formal elements. Dworkin or Bingham, on the other hand, argued for a convergence of formal and substantive elements. The disagreements in relation to which elements to focus on, however, always took place within a certain intellectual arena. Specifically, an arena that was liberal to its core and always recognised the concept's fundamental aims: the safeguarding of individual autonomy and liberty. In this way, every rule of law definition and characterisation contributed to the concept as it exists today.

<sup>141</sup> Pieroth (n 48) 733.

<sup>142</sup> Wade and Phillips (n 18) 102; ECS Wade and AW Bradley, *Constitutional Law* (7th edn, Longmans 1965) 72–73.

Both the *Rechtsstaat* and the rule of law concepts are products of an overarching movement of liberal thought in Europe and North America and should, therefore, be acknowledged as being fundamentally similar.

## VI. CONCLUSION

A common argument that is often, and most prominently by Meierhenrich, put forward to refute an account that the *Rechtsstaat* and the rule of law are fundamentally similar is that the *Rechtsstaat's* historical development makes it substantially different from the rule of law concept. In this article, I have tried to show that this view reveals itself as inaccurate when both concept's historical developments and fundamental aims are examined.

The rule of law rests on Dicey's conception, which was more focused more on the concept's formal elements. Today, the concept is characterised by a disagreement as to whether it also includes substantive elements, but also an understanding that it remains based on the same aims that Dicey has laid out.

When the theory of a *Rechtsstaat* was first introduced, the concept was characterised by a convergence of both formal and substantive elements. During the 'formal era' a shift in focus toward the concept's formal elements took place. This shift should be understood as a stage in the evolution of the concept, which was influenced by the intent to separate the concept from its explicitly political elements, and not as a rupture or a reactionary reinvention of the concept. Furthermore, during the 'formal era', the concept remained on a substantive and liberal foundation which put the protection of individual liberty against state authority at the centre. The *Rechtsstaat* of the *Grundgesetz* builds on the foundations of the concept's origins, the modifications in the sphere of administrative law that were added during the 'formal era' and the re-materialisation which began to be discussed at the end of the Weimar Republic.

Germany and the United Kingdom may differ in their constitutional traditions, institutions, and history. The *Rechtsstaat* and the rule of law, however, must be understood as fundamentally similar concepts.