

Rechtsstaat und Rechtsstaatlichkeit in Germany

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Rechtsstaat (the law-based-state) and Rechtsstaatlichkeit (the German variant of the rule of law) are core concepts of German constitutional thought. Canonized together with the principle of democracy, the concepts of the republican, federalist and social welfare state and the indispensable guarantee of the human dignity they refer to a 200-year-tradition. From the perspective of a formal understanding, the term Rechtsstaat describes the type of state architecture and political order system in which all publicly applied power is created by the law and is obliged to its regulations and underlies numerous fragmentations of power and control mechanisms ("Bindung und Kontrolle"). Rechtsstaatlichkeit in this sense is a collective term for numerous (sub-)principles that allow the taming of politics by the law and shall avoid arbitrariness. From the perspective of a more substantive understanding, Rechtsstaatlichkeit also expresses democratic concerns and the respect to individual human freedom and equality and thus the commitment to a liberal and just constitutional order. In Germany, both perspectives are represented and both relate to the totalitarian unlawful regime established inbetween 1933-45 as an anti-model. The discourse is strongly characterized by the self-certainty of a role model Rechtsstaat formed by the Grundgesetz (GG), the German constitution. From this, integrating the German state into transnational networks will always require adequate provisions for the strict law-based exercise of power.

I. The Principle of Rechtsstaatlichkeit under the Grundgesetz

Originally, from 1949, the *Grundgesetz* explicitly names the *Rechtsstaat* only in Art. 28 GG whereby the constitutions of the federal states (*Bundesländer*) have to conform to the principles of the republican, democratic and social *Rechtsstaat*. A similar homogeneity rule pointing to the European level was

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included in Art. 23 I GG in 1992. Thereby Germany shall participate in the development of the European Union as long as it is obliged to the rule of law and the principles of democracy, the social and federal state and subsidiarity and provides basic human rights protection equal to the *Grundgesetz*. Since 2000, Art. 16 II GG further allows the extradition of German citizens to a member state of the European Union or to an international court as long as the the rule of law is observed.

The *Grundgesetz*' concept of the rule of law is composed of various rules and principles on the state architecture, the structures of constitutional bodies and basic rights guarantees that comprise requirements for the state organization and procedure. Art. 20 GG comprises several rule of law principles, however not *the* German rule of law principle: the separation of powers in par. 2, and in par. 3 the obligation of the legislation to the constitution and of the executive and the judiciary to law and justice ("*Gesetz und Recht*"). From here the predominance of the constitution and of the law shape the legal order by a vertical hierarchy of norms. *Rechtsstaatlichkeit* in a German understanding also encompasses the unlawfulness of retroactive liabilities, the proportionality of means, the individual dissolution of conflicts between legal certainty and justice in hardship cases, and complete and effective judicial review in cases with relevance to individual freedom and property rights (Art. 19 IV GG). In her book on the principle of *Rechtsstaat* Katharina Sobota (1997) counted not less than 142 (sub-)principles on the basis of the *Grundgesetz*. Besides these, however, no further normative content of the principle is generally approved.

The concept of *Rechtsstaat* goes back to the early 19th century, when German scholars - strongly impressed by the reason-based philosophy of Immanuel Kant - formulated a rule of law program in order to rationalize political rule and to institutionalize liberal claims against absolutist state-conceptions ("*gute policey*") (see Böckenförde 1969: 144-150; Martini 2009: 308). The state should be shaped and framed, bound and limited by the law in three ways: (1) the state administration should be based on law ("*Gesetz-mäßigkeit der Verwaltung*"), (2) regulation by formal law should be required especially for all state action relevant for individual freedom and property rights ("*Gesetzesvorbehalt*"), and (3) all administrative actions should be subject to judicial review. All three of these set formal requirements without providing specific substantive normative standards. This lead to an understanding of *Rechtsstaatlichkeit* as a formal provision. Finally, around 1900, judicial positivism as the leading paradigm in constitutional theory made for the complete exclusion of substantive and, therefore, politically contested criteria from the concept of *Rechtsstaatlichkeit* (see Böckenförde 1969: 155). In 1928, Hans Kelsen in his "*Pure Theory of Law*" ("*Reine Rechtslehre*") radically

affirmed the identity of the state and the law. The state was nothing but *Rechtsstaat* in a formal sense of the term.

Then, after World War II, on the base of the *Grundgesetz* a rather material understanding of *Rechtsstaatlichkeit* emerged which was opposed to the formal legal positivism in the time of the Weimar republic and to the material evolvement of the law during the Nazi dictatorship (Böckenförde 1992: 332-339). The understanding of the rule of law on the basis of the *Grundgesetz* in its core connects to a culture of universal human rights complemented by a historically grown understanding of social justice. *Rechtsstaat* in this sense must be understood as the complete anti-model to the social and political self-concept of the national-socialist state. Today, the principle of proportionality allows to verify all actions taken by the legislation and by the administration as regard to substance at the measure of human rights.

II. Obligation to the law and judicial control

The German understanding of the rule of law is based on a strict etatist concept of the law, i.e. all legal norms have to reference the state. All relevant regulations have to be pre-formulated by legislation, whereby the competences of the federal parliament and the provincial legislative bodies have to be observed. Non-legislative regulations – like by-laws and decrees – need a statutory source of legitimacy and have to fit into the legal order. Social norms like religious or expert laws and technical standards may exist besides statute as long as they do not cause collisions. They may even be ensured, for example, by the freedom of religion (Art. 4 GG) or within the private autonomy guarantee. As a standard of legality, however, they can only be drawn on as far as they are approved by the statutory legal order or by jurisdiction.

The principles of the supremacy of statutory law and the pre-formulation of state-actions by legislation ("*Vorrang und Vorbehalt des Gesetzes*") both express a comprehensive concept of the obligation to the law and judicial control. Executive actions, therefore, are strictly bound to the law. Explicit statutory competences are required whenever individual human rights are affected by state action. The statutory competence not only approves the act, but also restricts it to the legally approved. The more intense the state action affects human rights, the more specifically the competence has to be formulated by legislation in order to provide the necessary democratic legitimacy and - from a rule of law point of view - satisfy the demands of proportionality (E. g. for competences in the case of privacy relevant security measures see German Constitutional Court, decisions of 2004/3/4 "Acoustic surveillance of private living space" and 2008/3/11 "License plate scan").

Accompanying the obligation of executive actions to the law, *Rechtsstaatlichkeit* requires close judicial review with a strict standard of review (Art. 20 III GG). In the Grundgesetz it is ensured by a complex system of different recourses to the courts and stages of appeal for judicial self-control and by the independency of the judges (Art. 92, 95, 97 GG). Procedural law is approved as a self-consistent legal matter with specific dogmatics. Art. 19 IV GG guarantees access to judicial review in cases of state action against individual basic rights. Only exceptionally, judicial review may not be compulsorily exercised by courts but by adequate control instances. E. g. for the control of intelligence a confident parliamentary control is approved (see German Constitutional Court, decision of 1970/12/15 "Telephone surveillance for intelligence purposes"). And within the range of individual autonomous choice of action non-state arbitration bodies may serve for judicial review purposes instead of courts. In cases of criminal court procedure, constitutional rights guarantee fair trial principles (Art. 101-103 GG).

The legislative and its obligation to the constitution (Art. 20 III GG) and especially to the basic human rights is controlled by the Federal Constitutional Court ("*Bundesverfassungsgericht*", Art. 92-93 GG). The instrument of individual constitutional complaint ("*Verfassungsbeschwerde*", Art. 93 Abs. 1 Nr. 4a GG) keeps this control in dynamic, the Courts competence to dismiss statutory law provides the necessary force for effectiveness. Accordingly, over a period of sixty years since the enactment of the *Grundgesetz*, the German legal order has been smoothly but comprehensively "constitutionalized" (see Schuppert / Bumke 2000).

III. *Rechtsstaatlichkeit and the democratic principle*

The obligation of parliamentary decisions to the constitution and the strong position of the constitutional court within the constitutional setting of the *Grundgesetz* are far from being unchallenged as they may lead to an unbalance between the principle of democracy and the rule of law in favor of the latter. *Rechtsstaatlichkeit* limits - and shall limit! - the range of legitimate state action, including the parliament's range of decision. Democracy in the German understanding is disciplined by the rule of law in multiple relations: (1) According to the *Grundgesetz* all democratic state actions have to originate from the people (Art. 20 II GG). In a common sense, the rule is interpreted as the requirement of specific competence laws and the exercise of state action by a personnel whose legitimacy originates from the parliament. In this sense, democratic concerns are turned into structural requirements and, thus, into rule of law issues. (2) On the base of individual human rights guarantees the ground and the limits of individual freedoms become an issue of constitutional law to be enforced with the help of the courts. The

matter is withdrawn from democratic deliberation and transferred to the courts for ensuring lawfulness and proportionality in a legal sense. (3) Due to its far reaching competences – compared on an international scale – the German Constitutional Court can put an end to political and social debates in an *ex cathedra* manner by adding the "constitutional full-stop"; however, often enough it succeeds in re-integrating the opponent political parties. (4) Under the term "fortified democracy" ("*wehrhafte Demokratie*"), a number of legal instruments are approved - like the prohibition of political parties (Art. 21 II GG) or the loss of basic rights (Art. 18 GG), both to be stated by the Constitutional Court -, that allow to interrupt the democratic discourse for the purpose of ensuring the liberal democratic fundamental order of the state.

The limits to democratic deliberation and procedures based on rules and principles can be considered the main argument against an understanding of the rule of law with rich substantive content beyond the requirements of formal legality. And even the short history of the *Grundgesetz* has shown waves of the materialization and the re-formalization of the rule of law concept (Grimm 1980: 704.)

IV. Formal and substantive conceptions of Rechtsstaatlichkeit

There is agreement that *Rechtsstaatlichkeit* means at least formal legality, i.e. obligation to the law and judicial review. However, in how far it relates to additional - substantive - requirements like democracy, individual rights and social welfare is a very disputed question. And both of these variants we can find in "thinner" and "thicker" versions (see Tamanaha 2004: 91).

In order to be able to take position in this controversy the meaning of *Rechtsstaatlichkeit* in relation to other structural principles of constitutionality has to be taken into account, especially in relation to the principle of democracy and to the constitutional guarantee of basic human rights. If the constitutional demands are all reduced to their normative core in order to avoid overlaps, a formal variant of the rule of law will cover the more technical aspects to legal state actions ("how to rule?") which comprises the obligation to formal statute law, structures of state organization and judicial review and the liability of public authorities to pay compensation. The political substance that gives direction to state actions ("rule to which aim?") will be excluded from such a "thinner" conception. A substantive variant, however, will not separate formal and material elements, but, instead, emphasize their interdependence. Beyond the harmonization of contradicting freedom interests, it would also include the ensuring of the normative preconditions that the realization of the rule of law and especially the formulation of individual human rights claims are based on (see Kunig 2001: 434).

Today, the normative substance of *Rechtsstaatlichkeit* - as a constitutional principle and a legal standard for the constitutional courts - is predominantly reduced to the rules explicitly mentioned in the *Grundgesetz*. Thus, further substantive elements of the rule of law turn into political claims while, on the other hand, from the perspective of a formal understanding of the rule of law no substantive content has to be renounced as far as it is regulated elsewhere. Parallel to the unfolding of the constitutional order of the *Grundgesetz* within the German legal order by the courts, the meaning of the rule of law as a self-contained constitutional principle has more and more been reduced to the approval of the positivity of the statutory laws that conform with all of the provisions of the *Grundgesetz*.

V. Preconditions of *Rechtsstaatlichkeit*

Thus, terminologically, *Rechtsstaatlichkeit* according to the *Grundgesetz* can be differed from individual human rights and from the principle of democratic rule. However, the parallel historical development of these concepts will always determine each others meanings, and they can only unfold completely embedded in a context that encompasses the whole canon. Even if the liberal and secular state may feed upon preconditions that it cannot guarantee itself (*Böckenförde*), it may intend to preserve the moral, social and political grounds of democracy and *Rechtsstaatlichkeit* by adequate institutional and legal structures. In this regard, the *Grundgesetz* not only contains the principle of the social welfare state as a binding constitutional objective (Art. 20 I GG), but it also allows public school supervision (Art. 7 GG), it ensures free information by broadcast and press (Art. 5 I GG), and it protects religiously guided conveying of values and meaning in an individual and a collective dimension (Art. 4 GG). *Rechtsstaatlichkeit* in the sense of a German understanding of the rule of law will always be bound to the context of the democratic and social constitutional state.

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