The *Rechtsstaat* in a Substantive and a Formal Sense: Revisiting the Theory Development of the 1830s and 1840s

MARTIN SUNNQVIST

1. *Introduction*

"Rule of law" and "Rechtsstaat" are two concepts that are widely used to denote an essential characteristic of modern democratic societies, but they have been criticised for their vagueness and their openness to many different interpretations and meanings[1]. Indeed, they have been classified as «essentially contested concepts»[2]. The literature about the rule of law and the Rechtsstaat is vast[3], and all themes discussed there cannot be addressed here. The purpose of this article is not primarily to engage in the contemporary discussion about various definitions of the rule of law and the Rechtsstaat, but rather to go deeper into the development of the latter concept in the German scholarly discussion in the early 19th century. However, this is not only of historical interest: a deeper knowledge about this part of their background can help us use those two concepts in a more precise way. Finally, I will briefly relate the early 19th-century definitions of "Rechtsstaat" to the ongoing rule-of-law discussion in the EU.

A first question to discuss is the extent to which "Rechtsstaat", "rule of law", "État de droit", etc., are synonymous concepts. In the EU Budget Conditionality Regulation[4], «rule of law» in the English version corresponds to «Rechtsstaatlichkeit» (that is, a noun made out of an adjective based on the noun "Rechtsstaat") in the German version and to «État de droit» in the French one. Other language versions use «Estado de derecho» (Spanish), «estado de direito» (Portuguese), «stato di diritto» (Italian), «rättsstaten» (Swedish) and «retsstatsprincippet» (Danish – literally, "the principle of the Rechtsstaat"). By contrast, in the judgment of the Court of Justice of the European Union (CJEU) from 1979 where the "rule of law" was mentioned for the first time in the CJEU's case-law, «the principle of the rule of law within the Community context» in the English version corresponded to «[le] principe de la légali-

ISSN 1593-0793 / ISBN 978-88-6056-825-0 / © eum 2022

té communautaire» in the French one and to «[der Grundsatz] der Rechtsstaatlichkeit in der Gemeinschaft» in the German one[5], and in the *Les Verts* case from 1986, «a Community based on the rule of law» in the English version was «une communauté de droit» in the French one and «eine Rechtsgemeinschaft» in the German one[6]. To a large extent, it can be assumed that this variety seen in translations is due to the difficulties inherent in discussing the concept of "State" ("Staat", "État") in an EU context.

Neil MacCormick has argued that the two concepts of "rule of law" and "Rechtsstaat" essentially mean the same[7]. He considers that, aside from the reference to the word "State", which makes sense in a continental European context but not in Britain, those concepts are constituted by the same fundamental principles, namely that the norms of law are generally applicable[8], that there are «standing laws»[9], that laws are publicly available[10] and that *ex post facto* laws are forbidden (principle of non-retroactivity)[11]. In short, the rules of law should be generally applicable and foreseeable. To these formal criteria, he has added a discussion about whether the separation of powers ought to be considered part of the concept[12] as well as whether the Rechtsstaat and the rule of law aim at protecting liberty[13]. As regards the latter question, one problem is that the concept of "liberty" is as "essentially contested" as those of "rule of law" and "Rechtsstaat"[14].

Heinz Mohnhaupt has also identified an important commonality between the Rechtsstaat, the rule of law and similar concepts, namely their shared purpose of ensuring that the State is bound by law and justice[15]. As a basis for this thought, he has referred to the partially binding character that the fundamental laws or "leges fundamentales" of the 16th to 18th centuries had in relation to rulers even that far back. However, he considers that the concept of Rechtsstat has been precise enough to be used only since the 19th century[16]. Further, R.C. van Caenegem wrote that the English «equivalent» of the Rechtsstaat «would be»[17] the rule of law, thus understanding them as similar but perhaps not identical. He highlighted the separation of powers and the independence of the judiciary as essential elements of both the Rechtsstaat and the rule of law[18].

The view that the two concepts essentially mean the same has recently been questioned by Jens Meierheinrich[19], especially with reference to Neil MacCormick's view. According to Meierheinrich, the key difference between the two concepts «has to do with the question of where the rights of individuals originate»[20]. This, in turn, he relates to the key differences between the common-law and civil-law traditions – between concrete, case- and judge-oriented thinking, on the one hand, and abstract, theory- and professor-oriented thinking, on the other[21]. Interestingly, he has made this claim at a time when the importance of the historical and conceptual differences between the common-law and civil-law traditions are increasingly questioned or at least toned down[22] and have even been referred to as a «cliché»[23].

On a related note, Paolo Alvazzi del Frate and Alberto Torini have understood the rule of law as guaranteeing «rights and freedoms already existing in the society» whilst in the Rechtsstaat, the «state adopts an act of "self-limitation", whereby it spontaneously reduces its powers»[24]. However, this refers to developments in Germany after

1848, with «a "compromise" between constitutional liberalism and the *Monarchisches Prinzip* apparatus»[25]; the "monarchical principle" referred to here means that the entire power of the State was concentrated in the sovereign, who had limited his own powers through constitutional laws, representation of the people, and so on[26]. In this article, I will confine myself to discussing the developments in the «Vormärz», that is, before the liberal revolutions of 1848 – in France in February and in Germany in May[27]. This focus also means that I will not discuss the origin of the concept of the rule of law, since it developed somewhat later: it was introduced in 1867 and popularised by Albert Venn Dicey in 1885[28]. It is also worth noting that the French concept of "État de droit" was not introduced until the 20th century[29].

In the contemporary discussion, reference is sometimes made to a "thick" and a "thin" version of the concept(s) of "rule of law" and "Rechtsstaat". This is in fact similar to discussing the substantive versus formal senses of "rule of law" or "Rechtsstaat", with the "thick" or substantive version including, for example, positive rights and the "thin" or formal version focusing on formal legality. The "thin" version is considered to be a subset of the "thick" version[30]. Hence the "thin" version can also be understood as the basis for the "thick" version, such that the "thin" version contains some fundamental aspects of the rule of law and the Rechtsstaat, to which the "thick" version adds some, or many, extra features.

What I will show in this article is that of the 19th-century German versions of the "Rechtsstaat", the first, more elaborate one – shaped by Robert von Mohl – is a "thick" version and that features were later taken away from it by Friedrich Julius Stahl to form a "thin" version. I believe that placing the two versions in a chronological context and in the context of the development of the liberal constitutional law will add to our understanding of the meaning and importance of the "Rechtsstaat" concept in its different versions. However, rather than using using "thick" and "thin", I will discuss the "substantive" and "formal" senses of "Rechtsstaat", where Mohl developed the former and Stahl the latter. I will do this even though Heinz Mohnhaupt considers it «highly problematical» to divide the Rechtsstaat into a formal concept and a substantive one[31]. My rationale for doing so is that I think using terms that convey something concrete about what they refer to makes understanding easier.

2. *The origin of the word "Rechtsstaat"*

The inventor of the word "Rechtsstaat" was Johann Wilhelm Petersen, better known under the name of Placidus, who used it in 1798 about the proponents of Immanuel Kant's philosophical theories of law[32]. In doing so, he juxtaposed the conservative professors of public law, or «Staats-Rechts-Lehrer», for whom «law was always subservient to the interests of the sovereign»[33], with the enlightened thinkers, or «Rechts-Staats-Lehrer»[34], for whom «law, not the state, should rank supreme in the governance of social life»[35].

The concept of the Rechtsstaat was thus introduced in the context of Kant's enlightened ideas and his theories about the freedom of the individual and «the largest possible room for liberty as the generally

Carl Theodor Welcker, litography by Johann Heinrich Hasselhorst

first purpose of the state»[36]. The liberal public-law scholars of the early 19th century also used the concept: Carl Theodor Welcker developed it to denote a State governed by reason; Carl von Rotteck developed it further and required that legislation should be made by Parliament. Next in line was Johann Christoph von Aretin, who in 1824 identified the constitutional State with the Rechtsstaat: a State that is governed in accordance with the general will and liberty, and where security is guaranteed for all citizens[37].

However, the two legal scholars who developed the concept of the Rechtsstaat in a way that is interesting for the different definitions of it are the above-mentioned Robert von Mohl and Friedrich Julius Stahl. In the German legal culture of the 1830s and 1840s, Mohl was among the more liberal scholars[38] while Stahl was among the more conservative ones[39]. Mohl worked in Kant's Enlightenment tradition[40] and saw the protection of the liberty of the individual as an important part of the Rechtsstaat, whilst Stahl combined the Rechtsstaat with the monarchical principle. Mohl first defined his version of the Rechtsstaat, and Stahl then redefined it[41], causing the concept to undergo a «profound metamorphosis»[42].

3. *The Rechtsstaat in a substantive sense*

Robert von Mohl was the first to treat the Rechtsstaat concept in a scholarly manner[43]. He began his 1832 book about administrative law, *Die Polizei-Wissenschaft nach den Grundsätzen des Rechtsstaates*, with a discussion about the concept and purpose of the State[44]. His use of the word "Rechtsstaat" in the title of the book popularised the Rechtsstaat concept[45], and defining and spreading that concept was in fact his most important achievement[46].

To Mohl, the State was the order according to which people lived together in a specific geographical area. The purpose of the State could be nothing other than the purpose of life according to the general will, because the State was only a means to further the general will[47]. Based on this assumption, Mohl distinguished different types of state, each based on a certain type of general will. The Rechtsstaat was defined by reference to the purpose of life as defined by the senses and by reason[48]. Hence the Rechtsstaat «was the name for a revolu-

tionary institution dedicated to the pursuit of ends that are at once "sensual" ["sinnlich"] and "reasonable" ["vernünftig"]»[49].

In his 1832 book, Mohl referred to another book about the constitutional law of the Kingdom of Württemberg which he had published a few years earlier[50]. In that book he had defined the different types of State more precisely, contrasting the Rechtsstaat against the patriarchal, theocratic and despotic States, whose central feature was the clan, the faith and the despot, respectively[51]. This makes it clearer what he meant, in a linguistic sense, by "Rechtsstaat" – that its central feature is the law ("Recht"), not the clan, faith or despot. Hence, of the four types of State, the Rechtsstaat was the only one that had individual citizens who enjoyed rights set out in a constitution[52].

According to Mohl, the Rechtsstaat depended on a conviction among the people that life has a purpose in itself and that the future is uncertain. Hence the reasonable purpose of life that was common to humans was that their natural powers could develop in all directions, but individuals needed to acquire and enjoy the means necessary for this to happen. There could be two obstacles to such development: the unlawful will of other human beings and the overwhelming forces of external obstacles. It was the task of the State to remove these obstacles. The effects of the unlawful will of other people were removed by judicial acts, that is, through conflict resolution in courts of law, and those of the overwhelming forces of external obstacles were removed by administrative law. Hence justice and administration were fundamental to the Rechtsstaat, which actually – in Mohl's opinion – ought to be called the "Recht- und Polizei-Staat" ("law and administration state"), or even the "Verstandes-Staat" ("State of reason")[53]. If the term "Rechtsstaat" suggests a State where the law is the central feature, the other two terms suggest that the administrative law of a State is important in order for that State to function well and that reason is the basis for law and administration, respectively. As Michael Stolleis has noted, access to conflict resolution through courts and to public welfare through administrative law requires not only substantive elements but also formal ones[54].

In Mohl's opinion, the Rechtsstaat could be divided into various sub-categories such as democracy, aristocracy and monarchy. Hence the Rechtsstaat was not particularly closely connected to democracy; rather, the important thing was how the rights of individuals were protected and that the law was the most important feature of the State. Any State, even a feudalistic monarchy, could develop into a Rechtsstaat, step by step[55]. While Mohl did not discuss the functions of the State in terms of the separation of powers, he did stress that judges had to be independent and able to set aside unconstitutional laws. He understood the constitution as superior to the laws, emphasising that in case of a conflict, the higher norm must prevail, even when a conflict was substantive in nature[56].

In his 1832 book *Die Polizei-Wissenschaft nach den Grundsätzen des Rechtsstaates*, where he defined the Rechtsstaat more precisely, Mohl began by defining the tasks of the State in an administrative context, based on the concept of "Polizei" ("[law of] administration") and the principle of the Rechtsstaat:

> On the one hand, the liberty of the citizen is the basis for the entire law-based state; a citizen can and ought to move freely in all directions, in

> which he follows a reasonable purpose and does not infringe the rights of another. The only purpose of the entire State with all its agencies is to protect this liberty and make it possible. On the other hand, there are uncountable cases where the individual is hindered in his reasonable activities by the overwhelming forces of external obstacles and where he demands the help of the State[57].

This led him to some conclusions. On the one hand, the State should not interfere if citizens were able to remove obstacles by teaming up with other citizens for a certain purpose or by bringing civil actions against other interfering citizens. Administrative law and the State administration were to be reserved for cases where citizens were unable, either alone or together with others, to solve the problems themselves. On the other hand, the State must always interfere if citizens are unable to solve their problems themselves, provided that the purposes they pursue are sensible, permitted by the law and generally useful[58].

What is particularly interesting in Mohl's theory is that his point of departure was the individual citizen[59] who joined other individuals to form the State. His theory belongs in the category of theories of a social contract[60], and he did not see the State and society as identical[61]. Thus Mohl did not presume the existence of the State. This explains why his Rechtsstaat has not only formal characteristics but also substantive ones, and why the purpose of his State is to protect liberty. In the words of Martin Loughlin, who takes a somewhat broader perspective, Mohl's concept of the Rechtsstaat consisted of three main elements: «governmental order was the product of earthly aims of free, equal, and rational individuals», «the aim of a governing order must be directed towards the promotion of the liberty, security, and property of the person», and «the state should be rationally organized» with a «responsible government, judicial independence, parliamentary representation, rule by means of law, and recognition of basic civil liberties»[62].

Mohl himself is characterised by Michael Stolleis as

> a [...] liberal who belonged to the pragmatic-rationalist wing of liberalism, a systematically thinking positivist and an empiricist of constitutional and administrative law, but not really a State theorist[63].

Even though Mohl was before his time in several respects, it should be noted that his scepticism towards the separation of powers was accompanied by the view that the government could not be accountable to the parliament[64], meaning that he opposed notions that would today be seen as natural parts of a Rechtsstaat in a substantive sense if democracy is included in it.

4. *The Rechtsstaat in a formal sense*

If Robert von Mohl was the first to apply scholarly methods to the Rechtsstaat in a substantive sense, Friedrich Julius Stahl was the first to apply such methods to the Rechtsstaat in a formal sense. He did this in his work on the philosophy of law, under a sub-heading referring to the law and the State based on a Christian world-view. In the first edition, published in 1837, that sub-heading was *Christliche Rechts- und Staatslehre* ("Christian philosophy of law and the State"); in the second edition, from 1846, it was *Rechts- und Staatslehre auf*

der Grundlage christlicher Weltanschauung ("Philosophy of law and the State on the basis of a Christian world-view").

In the 1837 edition, Stahl discussed the nature of the State (*Das Wesen des Staates*) in the beginning of the second part of the second volume[65]. In the second edition from 1846, that discussion is still in the second volume[66], but the text has been rewritten and it is now preceded by chapters on other themes that have been moved there from another part. In the 1837 version, Stahl mentioned the Rechtsstaat briefly when referring to Mohl[67], but he also wrote that the State existed only through law and that the law existed only through the State, such that the law and the State were inseparably joined and both were based on the will of God[68]. As a consequence of that view, the State could not be an organisation created by individuals who wished to protect their liberty[69].

In the 1846 version of his chapter on the nature of the State, however, Stahl discussed the Rechtsstaat on the basis of his definition of the State, which, in his opinion, has not been established because of the needs of individuals but because of the needs of the people or the nation[70]. The State was an entity that maintained order and promoted social life – it was both «a realm of law, a "Rechtsstaat", and a realm of morality, a moral community»[71]. Indeed, Stahl saw no contradiction in this, because of the deep unity between law and morality[72]. The realm of morality was the community of people, under a common God and a common sovereign[73].

When explaining his concept of "Rechtsstaat", Stahl wrote that the State should secure the liberty of the citizens but also protect the necessary morality. He declared that the State should be a Rechtsstaat, in line with liberal thinking[74], but his version was different from that of Mohl:

> The state should be a *Rechtsstaat*, that is the operative word and in reality it is also the impulse of our time. It should precisely determine and firmly secure the paths and limits of its actions as well as the free sphere of its citizens in the manner of the law, and it should not realise (force) moral ideas through State means, that is, directly, beyond the legal sphere, that is, only up to the most necessary extent. This is the concept of the Rechtsstaat, not that the State only takes care of the legal order without administrative purposes or only protects the rights of the citizens; it [the Rechtsstaat] in no way means the purpose and content of the State, but only the way and character by which purpose and content are realised[75].

Stahl contrasted the Rechtsstaat with the patriarchal, the patrimonial and the administrative State, which all intervened too much in the private lives of individuals, and he also contrasted it with the people's State («Volksstaat»), where the morality of individuals took precedence over the law. In his opinion, for the State to set limits for individual liberty was a lesser evil than for the State to be subordinated to the people's will[76].

Stahl's formal approach to the Rechtsstaat concept should be understood in the context of his conservative views[77], where the constitution was handed down by the monarch, not based on a social contract[78]. Further, Stahl equated not only the law and the State but also the State and society[79]. He did perceive the powers of the State as restricted, and he did see the need for a space of freedom for the individual[80], but his conception of a legally protected free sphere for citizens' private lives was different from Mohl's conception of the liberty of the individual as having existed before the State. When it came to judicial review

of legislation, Stahl differed from Mohl in that he only accepted that judges might examine whether laws were unconstitutional in a formal sense, that is, whether they had not been adopted and made publicly available in a correct manner[81].

It is important to note that Stahl did not oppose the Rechtsstaat as such, but rather modified the concept. He began a process of change in the Rechtsstaat concept that would reduce it to a mere principle of legality[82]. As a conservative, he was able – in particular before 1848 – to «amalgamate the untouchable "monarchical principle" with the most important liberal demands (representation, Rechtsstaat) into a "constitutional conservatism"»[83].

As Jens Meierheinrich has noted, in the post-revolutionary period of the 19th century, that is, after 1848, the Rechtsstaat «was reimagined as a purveyor of form – not substance»[84]. Meierheinrich has discussed whether this was because some of the goals of the liberals had been achieved[85], because the growing body of administrative law shifted the focus to formal criteria, or because the influence of conservative legal thought gained importance[86]. According to Michael Stolleis, the Rechtsstaat «was no longer a synonym for political liberties, active participation by citizens and substantive equality, but had been narrowed down to formal legal protection in civil and administrative matters»[87]. Conservatism had learnt that some deviations from the unrestricted monarchical principle were necessary, but it still found only «an apolitical and formal Rechtsstaat»[88] to be acceptable.

Even though Stahl can be described as a theorist behind a «reactionary Rechtsstaat»[89], the picture of him is much more complex than the label of «reactionary» would suggest[90]. His conservative views paved the way for a more procedural Rechtsstaat, without substantive liberties as a component part[91]. This in fact relates to how Mohl and Stahl understood the concept of a constitution. The proponents of the "monarchical principle", among them Stahl, had placed the power of the State outside the constitution, «außerhalb der Verfassung»[92], whilst Mohl and others accepted a substantive primacy for the contents of the constitution, «eine inhaltliche Vorrang der Verfassung»[93] that went well with substantive judicial review even of legislation.

Stahl defined the formal Rechtsstaat as early as in 1846, that is, before the revolutionary year of 1848. Hence his theory cannot have been influenced by the failure of the 1848 liberal revolutions. This circumstance is in fact not fully acknowledged by Meierheinrich[94]. Further, the Rechtsstaat was originally, in Mohl's version, defined substantively[95]. The reasons for the differences between the two scholars' views can be traced to their political and legal-philosophical inclinations in the 1830s. It should be added that Mohl actually changed his view on the Rechtsstaat after 1848, towards a more formal version of the concept[96].

5. *Conclusions*

Regulation 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, which I mentioned at the beginning of the article, provides the following definition of «the rule of law» or, in the German version, «Rechtsstatlichkeit»:

> "the rule of law" refers to the Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law[97].

This definition includes several criteria that go far beyond the Rechtsstaat in a formal sense: the law-making process must be transparent, accountable, democratic and pluralistic, and the separation of powers and effective judicial protection by independent and impartial courts guarantee fundamental rights. These criteria in fact also go beyond the fundamental, formal principles that Neil MacCormick sees as common to the Rechtsstaat and the rule of law. As a result of the above definition and the CJEU case-law upon which it builds, the theoretical discussion about whether the Rechtsstaat and the rule of law are identical, similar or different has been superseded, at least in an EU context[98]. While there might still be different opinions about details, this is not a general problem, since the core features of the principle are well defined[99], and those features clearly show that the Rechtsstaat in the EU sense is a Rechtsstaat in a substantive sense[100].

The usefulness in an EU law context of the theory of the Rechtsstaat in a substantive sense is strengthened by a comparison of Robert von Mohl's and Friedrich Julius Stahl's views on the state. According to Mohl, individuals had gathered together and formed the State in order to protect their liberties. According to Stahl, by contrast, the State and the sovereign were "already there". Even though the social contract has been used as a model for understanding and legitimising States, how States and laws actually developed in the distant past is shrouded in mist. A more useful model is to understand the principles included in the Rechtsstaat concept as having sedimented down to the deeper layers of law over a long period of time such that they now limit possible outcomes on the surface level; this is an understanding that includes the Rechtsstaat in the substantive sense[101].

However, in the EU context, something similar to the social contract can actually be identified. States have voluntarily joined the EU, and the ones that have done so – at least those who did so in the past few decades – were aware even at the time of accession that adherence to the Rechtsstaat principle is precondition for joining[102]; indeed, this has been among the criteria for joining[103]. That the Rechtsstaat in a substantive sense is opposed by "illiberal States" is hardly surprising[104], and nor is it surprising that the Rechtsstaat in a substantive sense is fundamental to a union where the protection of the rights of individuals can be enforced through judicial mechanisms.

[1] This article is part of a project financed by the Riksbankens Jubileumsfond. In line with the requirements of Riksbankens Jubileumsfond, it is published in open access under the CC BY licence.

[2] N. MacCormick, *Der Rechtsstaat und die rule of law*, in «Juristenzeitung», vol. 39, n. 2, p. 66. See also J. Waldron, *The Rule of Law as an Essentially Contested Concept*, in J. Meierheinrich, M. Loughlin (eds.), *The Cambridge Companion to the Rule of Law*, Cambridge, Cambridge University Press, 2021, pp. 121-136.

[3] See, among many publications, especially L. Heuschling, *Etat de droit - Rechtsstaat - Rule of law*, Paris, Dalloz, 2002; M. Loughlin, *Foundations of Public Law*, Oxford, Oxford University Press, 2010, pp. 312-341; and, most recently, J. Meierheinrich, M. Loughlin (eds.), *The Cambridge Companion to the Rule of Law*, Cambridge, Cambridge University Press, 2021; and G. Amato et al. (eds.), *Rule of Law versus Majoritarian Democracy*, Oxford, Hart, 2021.

[4] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I , 22.12.2020, p. 1.

[5] Case 101/78, *Granaria BV*, 13 February 1979, ECLI:EU:C:1979:38, p. 5.

[6] Case 294/83, *Les Verts*, 23 April 1986, ECLI:EU:C:1986:166, p. 23.

[7] N. MacCormick, *Der Rechtsstaat und die rule of law*, in «Juristenzeitung», vol. 39, n. 2, pp. 65-70.

[8] «Allgemeingültigkeit von Rechtsnormen», ivi, p. 68.

[9] A quote from Locke, in German «das Prinzip der Dauerhaftigkeit», *ibidem*.

[10] «das Öffentlichkeitsprinzip: Gesetze müssen verkündet werden, sie müssen all denen zur Kenntnis gebracht werden, die sie betreffen», *ibidem*.

[11] «das Rückwirkungsverbot von Rechtsnormen», *ibidem*.

[12] Ivi, p. 69.

[13] Ivi, pp. 69-70.

[14] *Ibidem*.

[15] «das Ziel der Bindung des Staates durch Gesetz und Recht», H. Mohnhaupt, *Zur Geschichte des Rechtsstaats in Deutschland. Begriff und Funktion eines schwierigen Verfassungsprinzips*, in «Acta Facultatis Politico-iuridicae Universitatis Scientiarum Budapestinensis», vol. 34, 1993-94, p. 43.

[16] Ivi, pp. 43-45.

[17] R.C. van Caenegem, *An Historical Introduction to Western Constitutional Law*, Cambridge, Cambridge University Press, 1995, p. 16.

[18] *Ibidem*. See also R.C. van Caenegem, *The "Rechtsstaat" in Historical Perspective*, in R.C. van Caenegem, *Legal history. A European Perspective*, London/Rio Grande, Hambledon Press, 1991, pp. 185-199.

[19] J. Meierheinrich, *Rechtsstaat versus the Rule of Law*, in J. Meierheinrich, M. Loughlin (Eds.), *The Cambridge Companion to the Rule of Law*, Cambridge, Cambridge University Press, 2021, pp. 39-67.

[20] Ivi, p. 64.

[21] Ivi, pp. 64-65.

[22] See, e.g., D. Freda, *"Law Reporting" in Europe in the Early-Modern Period: Two Experiences in Comparison*, in «The Journal of Legal History», XXX, n. 3, pp. 263-278; D. Freda, *Legal education in England and Continental Europe between the Middle Ages and the Early Modern Period: a Comparison*, in O. Moreteau et al. (eds.), *Comparative Legal History*, Cheltenham, Elgar, 2019, pp. 242-260; V.G. Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, in «Columbia Journal of European Law», VII, 2001, pp. 63-126.

[23] Freda *"Law Reporting"* cit., p. 263.

[24] P. Alvazzi del Frate, A. Torini, *Rule of Law between the Seventeenth and Nineteenth Centuries*, in G. Amato et al. (eds.), *Rule of Law versus Majoritarian Democracy*, Oxford, Hart, 2021, p. 13.

[25] L. Lacchè, *Rule of Law Metamorphoses in the Twentieth Century*, in G. Amato et al. (eds.), *Rule of Law versus Majoritarian Democracy*, Oxford, Hart, 2021, p. 29.

[26] M. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol. 2, *1800-1914*, München, Beck, 1992, pp. 102-105; E.-W. Böckenförde, *Der deutsche Typ der konstitutionellen Monarchie im 19. Jahrhundert*, in E.-W. Böckenförde, *Staat, Freiheit: Studien zur Rechtsphilosophie, Staatstheorie und Verfassungsgeschichte*, Frankfurt am Main, Suhrkamp, 1991, pp. 273-305.

[27] Caenegem, *An Historical Introduction* cit., pp. 218-224; G. Gozzi, *Rechtsstaat and Individual Rights in German Constitutional History*, in P. Costa, D. Zolo (eds.), *The Rule of Law. History, Theory and Criticism*, Law and Philosophy Library vol. 80, Dordrecht, Springer, 2007, pp. 240-247.

[28] Caenegem, *An Historical Introduction* cit., p. 16; Loughlin, *The Cambridge Companion* cit., pp. 315, 317.

[29] Caenegem, *An Historical Introduction* cit., p. 16; Loughlin, *The Cambridge Companion* cit., pp. 322-323.

[30] J. Møller, *The Advantages of a Thin View*, and A. Bedner, *The Promise of a Thick View*, in C. May, A. Winchester (eds.), *Handbook on the Rule of Law*, Cheltenham, Elgar, 2018, pp. 21-33, 34-47; in the EU context, see C. Saenz Perez, *Judicialising the Rule of Law Through the Preliminary Ruling*, in J.M. Castellà Andreu, M.A. Simonelli (eds.), *Populism and Contemporary Democracy in Europe. Old Problems and New Challenges*, Cham, Springer/Palgrave Macmillan, pp. 233-249.

[31] «die höchst problematische Aufteilung», Mohnhaupt, *Zur Geschichte des Rechtsstaats in Deutschland*, cit., p. 45.

[32] *Ibidem*; Heuschling, *Etat de droit - Rechtsstaat - Rule of law*, cit., pp. 1-2, 36-37.

[33] J. Meierheinrich, *The Remnants of the Rechtsstaat. An Ethnography of Nazi Law*, Oxford, Oxford University Press, 2018, p. 77.

[34] Meierheinrich, *Rechtsstaat versus the Rule of Law* cit., p. 55.

[35] Meierheinrich, *The Remnants of the Rechtsstaat* cit., p. 77.

[36] «[der] möglichst [größte] Freiheitsraum als [der erste] Zweck des Staates überhaupt», Mohnhaupt, *Zur Geschichte des Rechtsstaats in Deutschland*, cit., p. 45.

[37] Ivi, pp. 47-48.

[38] Stolleis, *Geschichte des öffentlichen Rechts* cit., pp. 172-176.

[39] Ivi, pp. 152-153.

[40] Meierheinrich *The Remnants of the Rechtsstaat* cit., p. 75.

[41] Heuschling, *Etat de droit - Rechtsstaat - Rule of law*, cit., p. 74.

[42] «subit une profonde metamorphose», *ibidem*.

[43] Mohnhaupt, *Zur Geschichte des Rechtsstaats in Deutschland*, cit., p. 48.

[44] R. von Mohl, *Die Polizei-Wissenschaft nach den Grundsätzen des Rechtsstaates*, Tübingen, Heinrich Laupp, 1832, vol. I, pp. 3-65. Cf., as regards the definition and translation of "Polizei" as "administrative law", p. 10; see also Stolleis, *Geschichte des öffentlichen Rechts* cit., pp. 248-258.

[45] Caenegem, *An Historical Introduction* cit., p. 16.

[46] E. Angermann, *Robert von Mohl 1799-1875. Leben und Werk eines altliberalen Staatsgelehrten*, Neuwied, Hermann Luchterhand, 1962, p. 119.

[47] «Der Zweck des Staates kann kein anderer seyn [*sic*], als der Zweck des Lebens nach der herrschenden Volksansicht, denn er ist ja blos ein Mittel zur Beförderung der letzteren.», Mohl, *Die Polizei-Wissenschaft nach den Grundsätzen des Rechtsstaates*, cit., p. 5.

[48] «[D]em sinnlichen vernünftigen Lebenszwecke [des Volkes entspricht] der so genannte *Rechtsstaat*», *ibidem*.

[49] Meierheinrich *The Remnants of the Rechtsstaat* cit., p. 78.

[50] R. [von] Mohl, *Das Staatsrecht des Königreiches Württemberg*, Tübingen: Heinrich Laupp, 1829.

[51] Ivi, pp. 6-22.

[52] Gozzi, *Rechtsstaat and Individual Rights in German Constitutional History*, cit., p. 242.

[53] Mohl, *Das Staatsrecht des Königreiches Württemberg* cit., pp. 8-9, 11.

[54] M. Stolleis, *Rechtsstaat* in *Handwörterbuch zur deutschen Rechtsgeschichte*, vol. 4, Berlin, Erich Schmidt, 1990, col. 370; see also Mohnhaupt, *Zur Geschichte des Rechtsstaats in Deutschland*, cit., p. 49; Angermann, *Robert von Mohl 1799-1875*, cit., pp. 128-130.

[55] Mohl, *Das Staatsrecht des Königreiches Württemberg* cit., pp. 14-19. See also Meierheinrich *The Remnants of the Rechtsstaat* cit., pp. 78-79.

[56] C. Gusy, *Richterliches Prüfungsrecht. Eine verfassungsgeschichtliche Untersuchung*, Berlin, Duncker & Humblot, 1985, pp. 43-47.

[57] Translation mine. «Auf der einen Seite nämlich ist die Freiheit des Bürgers die Grundlage des ganzen Rechtsstaates; er darf und soll sich nach allen Richtungen, in welchen er einen vernünftigen Zweck verfolgt und auf kein Recht eines dritten Stößt, frei bewegen. Der ganze Staat mit allen Einrichtungen ist nur dazu bestimmt, diese Freiheit zu schützen und möglich zu machen. Auf der andern Seite sind der Fälle unzählige, in welchen der Einzelne durch übermächtige äussere Hindernisse in seiner vernunftgemässen Thätigkeit gehindert wird, und in welchen er also die Hülfe der Staates verlangt.», Mohl *Die Polizei-Wissenschaft* cit., vol. I, p. 14.

[58] Ivi, pp. 14-21.

[59] Angermann, *Robert von Mohl 1799-1875*, cit., pp. 121-124.

[60] Heuschling, *Etat de droit - Rechtsstaat - Rule of law*, cit., p. 44.

[61] Gusy, *Richterliches Prüfungsrecht* cit., p. 44

[62] Loughlin, *The Cambridge Companion* cit., p. 318.

[63] «einen [...] Liberalen, der zum pragmatisch-rationalistischen Flügel des Liberalismus gehörte, einen systematisch denkenden Positivisten und Empiriker des Staats- und Verwaltungsrechts, nicht aber eigentlich einen Staatstheoretiker», Stolleis *Geschichte des öffentlichen Rechts* cit., pp. 173-174.

[64] Ivi, p. 175.

[65] F.J. Stahl, *Die Philosophie des Rechts nach geschichtlicher Ansicht*, vol. 2, *Christliche Rechts- und Staatslehre*, Heidelberg, Akademische Buchhandlung, 1837, pp. 1-20.

[66] Ivi, pp. 102-130.

[67] Stahl *Christliche Rechts- und Staatslehre* cit., p. 298.

[68] Ivi, p. 11.

[69] Ivi, p. 17.

[70] Stahl, *Rechts- und Staatslehre auf der Grundlage christlicher Weltanschauung* cit., pp. 102-103.

[71] «ein Reich des Rechts, "Rechtsstaat", und ein Reich der Sitte, ein sittliches Gemeinwesen», ivi, pp. 105-106.

[72] Ivi, p. 106.

[73] D. Grosser, *Grundlagen und Struktur der Staatslehre Freidrich Julius Stahls*, Staat und Politik vol. 3, Köln/Oplanden, Westdeutscher Verlag, 1963, pp. 54-56.

[74] Ivi, p. 83.

[75] Translation mine. «Der Staat soll *Rechtsstaat* sein, das ist die Losung und ist auch in Wahrheit der Entwickelungstrieb der neuern Zeit. Er soll die Bahnen und Gränzen [*sic*] seiner Wirksamkeit wie die freie Sphäre seiner Bürger in der Weise des Rechts genau bestimmen und unverbrüchlich sichern und soll die sittlichen Ideen von Staatswegen, also direkt, nicht weiter verwirklichen (erzwingen), als es der Rechtssphäre angehört, d. i. nur bis zur nothwendigsten Umzäunung. Dieß ist der Begriff des Rechtsstaats, nicht etwa, daß der Staat bloß die Rechtsordnung handhabe ohne administrative Zwecke, oder vollends bloß die Rechte der Einzelnen schütze, er bedeutet überhaupt nicht Ziel und Inhalt des Staates, sondern nur Art und

Charakter dieselben zu verwirklichen.», Stahl, *Rechts- und Staatslehre auf der Grundlage christlicher Weltanschauung* cit., p. 106.

[76] Grosser, *Grundlagen und Struktur* cit., p. 83.

[77] Meierheinrich, *Rechtsstaat versus the Rule of Law* cit., pp. 58-59.

[78] P.C. Caldwell, *Conservative Critiques of the Rechtsstaat*, in J. Meierheinrich, M. Loughlin (eds.), *The Cambridge Companion to the Rule of Law*, Cambridge, Cambridge University Press, 2021, pp. 278-294, esp. pp. 283-284.

[79] Stolleis, *Geschichte des öffentlichen Rechts* cit., p. 153.

[80] Grosser, *Grundlagen und Struktur* cit. p. 82.

[81] Gusy, *Richterliches Prüfungsrecht* cit., pp. 31-34.

[82] Heuschling, *Etat de droit - Rechtsstaat - Rule of law*, cit., p. 74.

[83] «das untastbare "monarchische Prinzip" mit den wichtigsten liberalen Forderungen (Repräsentativsystem, Rechtsstaat) zu einem "konstitutionellen Konservatismus" zu verschmelzen», Stolleis, *Geschichte des öffentlichen Rechts* cit., p. 153.

[84] Meierheinrich, *Rechtsstaat versus the Rule of Law* cit., p. 58. See also Meierheinrich, *The Remnants of the Rechtsstaat* cit., pp. 10-11.

[85] E.-W. Böckenförde, *Entstehung und Wandel des Rechtsstaatsbegriffs*, in E.-W. Böckenförde, *Staat, Freiheit: Studien zur Rechtsphilosophie, Staatstheorie und Verfassungsgeschichte*, Frankfurt am Main, Suhrkamp, 1991, p. 151.

[86] Meierheinrich, *Rechtsstaat versus the Rule of Law* cit., p. 58.

[87] «war kein Synonym mehr für politische Freiheitsrechte, aktive Bürgerbeteiligung und materiale Gleichheit, sondern verengte sich auf *formalen* Rechtsschutz in Zivil- und Verwaltungssachen», Stolleis, *Rechtsstaat* cit., col. 371.

[88] «ein entpolitisierter, formaler [Rechtsstaat]», *ibidem*.

[89] Meierheinrich, *Rechtsstaat versus the Rule of Law* cit., p. 58.

[90] Stolleis, *Geschichte des öffentlichen Rechts* cit., p. 152.

[91] Meierheinrich, *Rechtsstaat versus the Rule of Law* cit., pp. 58-59.

[92] Gusy, *Richterliches Prüfungsrecht* cit., p. 72.

[93] *Ibidem*.

[94] Meierheinrich, *Rechtsstaat versus the Rule of Law* cit., p. 58.

[95] Ivi, p. 66.

[96] Meierheinrich, *The Remnants of the Rechtsstaat* cit., p. 78.

[97] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I , 22.12.2020, p. 1, Article 2(a).

[98] L. Pech, *The Rule of Law as a Well-Established and Well-Defined Principle of EU Law*, in «The Hague Journal on the Rule of Law», 2022, <https://doi.org/10.1007/s40803-022-00176-8>, 30 June 2022.

[99] Ivi, at fn. 61-63.

[100] Ivi, at fn. 79.

[101] K. Tuori, *Critical Legal Positivism*, Aldershot, Ashgate, 2002, pp. 236-237. See also the discussion of Tuori's theory in the introduction to this issue, Section 1.

[102] Pech, *The Rule of Law* cit., at fn. 24. See also X. Groussot and A. Zemskova's article in this issue.

[103] Cf. M. Sunnqvist, *The rule of law as a criterion for Europe* in *Legal History. Reflecting the Past and the Present. Current Perspectives for the Future*, Stockholm, Institutet för Rättshistorisk Forskning, 2021, pp. 290-291.

[104] Pech, *The Rule of Law* cit., at fn. 119-138.