CHAPTER 5

RECHTSSTAAT AND INDIVIDUAL RIGHTS IN GERMAN CONSTITUTIONAL HISTORY

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1 *RECHTSSTAAT* AND RULE OF LAW: AN ENDLESS CONTROVERSY

Lorenz von Stein, one of the most important theorists of the *Rechtsstaat* in the German-speaking area, wrote in 1869 that the *Rechtsstaat* was a peculiarly German creation.[1] Von Stein saw the origins of the notion in the work of Robert von Mohl, who had reconstructed the history of the concept of *Rechtsstaat* from Hugo Grotius onwards.[2]

What exactly did Stein mean? Did he mean that only the concept of *Rechtsstaat* was peculiarly German, while there remained, notwithstanding the various formulations, a single, identical state-form? Or did he mean that the concept referred to a specific constitutional history that made it impossible to compare the typical German state-form with other forms of state? In my view, the second interpretation corresponds to Stein's intended meaning.[3] As my first task, then, I will attempt to support this point.

The question has also been addressed by Neil MacCormick, who, however, reaches conclusions quite different from those that will be defended here. MacCormick claims, in fact, that a comparison of the German and English cases shows that *Rechtsstaat* and rule of law, despite their different constitutional histories, rest upon the same underlying *principles*.[4] MacCormick singles out the following in particular: (1) the principle of legality, which is the same in the different contexts; (2) the principle of the general validity of legal precepts;[5] (3) the principle of the public nature of laws; and (4) the principle of non-retroactivity. These principles, aside from specific constitutional histories, make up the same Western constitutional tradition.

However, when MacCormick discusses the significance of these principles, he identifies them with the *political values* underlying the legal system. These values, he claims, vary according to the different constitutional histories. Thus for England the values are rooted in the tradition of common law, which was elaborated by the courts and, which laid the

P. Costa and D. Zolo (eds.), The Rule of Law: History, Theory and Criticism, 237–259.

foundations of the rule of law. In Germany, on the other hand, the doctrine of the *Rechtsstaat* precludes the possibility of the primacy of law over the state.[6] Indeed, it is precisely in the relationship between law and state – which in the German case is settled with the primacy of the state – that the most significant feature of the doctrine of the German *Rechtsstaat* emerges. Conversely, the English doctrine of the "government of law" is most clearly distinguished by grounding the rule of law on the superiority of law as proclaimed by the courts of justice.

A position similar to MacCormick's is defended by Hasso Hofmann. Hofmann, although he acknowledges that the term *Rechtsstaat* is specifically German and does not correspond to the English phrase "rule of law", claims that the two terms are part of an overall development of liberal thinking and political systems in Europe and North America.[7] Important milestones in this overall development are the works of Locke and Montesquieu.

The central principle that makes it possible to proclaim the universality of the *Rechtsstaat* is, according to Hofmann, the separation of powers, which is derived from the assumption of a *regimen mixtum*, in other words, from the underlying principle of balance.[8] On the basis of these observations, Hofmann regards the emergence of the *Rechtsstaat* as the achievement in history of an idea that may well lay claim to universal validity. The issue of the *Rechtsstaat*, then, belongs to the internal history of the constitutional development of the West. Consequently, if any attempt is made to assert the relativism of the concept, reference should be made not to the various national constitutional histories of the Western world, but rather, in Hofmann's view, to other cultures. In particular, Hofmann stresses the different conceptions of human rights in the Western traditions and in other cultures: suffice it to mention the emergence in the West of an individual morality as opposed to the centrality of an objective ethics (*objektive Sittlichkeit*) in other cultures (e.g. in Asian or in African cultures).

Hofmann's last point can hardly be denied but what does appear to be problematic in his account is his attribution of both concepts to the same *liberal thought*. If we are to fully grasp the difference between the two forms of state, what requires investigation, rather – aside from the issue of principles – is the system of political and constitutional relations that held among the forces in play.

Thus Franz Neumann writes: "The essence of the *Rechtsstaat* consists in the separation of the political structure from the legal system, which alone must guarantee, independently of the political structure, liberty and security. This separation is also what distinguishes the German

concept of *Rechtsstaat* and the English doctrine, in which the sovereignty of the parliament and the rule of law are interconnected".[9]

Neumann goes on to argue that the English bourgeoisie had succeeded in transforming its will into law through the Parliament, while the German bourgeoisie had found the laws already in place and strove to refocus and interpret them in order to achieve as much liberty as possible with respect to a more or less absolute state. On this basis, he concludes: "The German doctrine could be called liberal-constitutional, and the English one democratic-constitutional."[10]

Neumann recognizes, then, the difference between the two conceptions, but his conclusion is rather problematic as he ends up by reducing the German doctrine of the *Rechtsstaat* solely to its liberal version, thus omitting the conservative perspective and neglecting the complex constitutional solution that emerged after the foundation of the *Reich* in 1871. Finally, before embarking on an investigation of the German model, we need to examine one particular aspect of the English model, if we are to achieve a thorough understanding of the differences between the two constitutional perspectives.

Albert Venn Dicey, in his fundamental work *Introduction to the Study of the Law of the Constitution* (1885), set out three basic characteristics of the rule of law: (1) the supremacy of ordinary law; (2) equal status before the law; and (3) the derivation of constitutional rights from the individual rights proclaimed by courts of justice and parliament.[11]

It is certainly the third feature that links the meaning of "rule of law" to the specific constitutional history of England. Dicey held, in fact, that the English Constitution was pervaded by the rule of law "on the ground that the general principles of the Constitution (e.g. the right to personal liberty or the right of public assembly) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts".[12] He went on to claim: "Our Constitution, in short, is a judge-made Constitution and it bears on its face all the features, good and bad, of judge-made law".[13]

Dicey elaborated these considerations by comparing English constitutionalism with the situation on the European continent. While in most European countries the foundation of rights was a Declaration of Rights, in England rights were based on the law of the land: they were generalizations of judicial decisions confirmed by the laws of parliament, such as the *Habeas Corpus* Acts.

Thus while on the continent – Dicey considered in particular the French and the Belgian constitutions – it was possible to modify the constitution

following a special procedure, in England rights belonged to the constitution, in the sense that they were grounded in the ordinary law of the land, and could "hardly be destroyed without a thorough revolution in the institutions and manners of the nation".[14] In short, Dicey highlighted the peculiarity of the English case, which he finds in the specific constitutional guarantees of rights. This distinction was also valid for the German doctrine of the *Rechtsstaat*, which in its final version, as we shall see, allowed no primacy of law over the state. The German case was also characterized by a particular evolution of the form of the *Rechtsstaat*: from the liberal perspective of the first half of the nineteenth century to the consolidation of a substantially conservative conception following the foundation of the *Reich* in 1871.

2 THE IDEA OF *RECHTSSTAAT* IN EARLY GERMAN CONSTITUTIONALISM

An analysis of the transformations in the German doctrine of rights during the nineteenth century may help to reveal the specificity of the *Rechtsstaat* and its profound difference from the English case. If in England, rights – as Dicey claimed – were the result of judicial decisions that had contributed to forming the "law of the land", in the German states, the interpretation of rights varied from country to country and underwent a complex evolutionary process characterized, on the one hand, by the passage from natural law doctrine to positive law doctrine and, on the other, by the replacement of the liberal perspective with an essentially conservative view in the second half of the century, which was in turn marked by the primacy of the state over law. An investigation into these transformations will make it possible to highlight the constitutive elements of the German doctrine of the *Rechtsstaat*.

In general, it can be said that until 1871 there was, in the German territories, a predominance of liberal ideas.[15] Let us begin, then, by attempting to define this *liberal* interpretation of the *Rechtsstaat*, paying particular attention to the doctrines of fundamental rights.

The southern German constitutions (Bavaria, 1818; Baden, 1818; Württemberg, 1819; Hessen-Darmstadt, 1820) reflected a process of *positivization* of fundamental rights. In these charters, in fact, there was no reference either to *Urrechte* (original rights) or to *Menschenrechte* (human rights); but only to *bürgerliche und politische Rechte*[16] (civil and political rights) or to *staatsbürgerliche Rechte*[17] (citizens' rights). The constitutional documents gave expression to a positivized conception of fundamental rights; theory, on the other hand, was still split between

natural law doctrine and positive law doctrine, and this tension was relieved only in the second half of the century.

The beginnings of the theory of the *Rechtsstaat* were also marked by the opposition between conservative and liberal perspectives. The former conception was expressed in the work of Friedrich Julius Stahl, who grounded his doctrine of the *Rechtsstaat* on the monarchic principle.[18] He is the source of the following well-known definition of the *Rechtsstaat*: the *Rechtsstaat* "must determine with precision and with certainty the boundaries and the limits of its activity, as well as the free sphere of its citizens, according to the modalities of law".[19]

This was a *legal* formulation of the *Rechtsstaat*, which became widespread during the nineteenth century and was taken up also by authors of liberal orientation.[20] Providing a *political* definition of the limits of state action was, however, the responsibility of the monarch, who was considered the interpreter of that Christian vision of the world that, in Stahl's view, was the foundation of the legal system. In this conception rights were merely concessions by the sovereign, and only as such did they constitute limits to the power of the government.[21]

The liberal doctrine of the *Rechtsstaat*, on the other hand, was divided between natural law and positive law doctrines. On the liberal front the different grounding of rights – natural law or positive law – expressed the tension between *doctrine*, which strove for the recognition of the inalienable rights of man, on the one hand, and on the other the consideration of the *constitutional reality* dominated by the monarchic principle and resistant to the principles of the constitution-based state.

The natural law perspective was quite heavily influenced by the legal doctrine of Kant,[22] especially in the work of Carl von Rotteck. Rotteck's conception, built upon a natural law foundation, joined individual original rights with the reality of the state in the doctrine of the *Rechtsstaat*. He recognized, in fact, the rights, which each individual bears in the state "not as a citizen, but as a legal entity" and, which could be conceived of even "without the state".[23] These were rights over which a majority decision had no legal power.

Among these rights Rotteck included in particular the right of personality or freedom and noted that an individual, on entering a state, became a free member of a free association in which he could confirm and safeguard his rights.[24] In short, following Kant, for Rotteck inalienable rights belonged to man as such, but could be realized only within the union of the state.

Rotteck, like Carl Welcker,[25] developed the natural law perspective up to the elaboration of an abstract rational *Rechtsstaat*, which he was

forced to adapt, however, to the existing reality of the constitutional monarchy.[26]

Unlike Rotteck, Mohl developed his conception of the *Rechtsstaat* from a perspective of positive law.[27] In his analysis of the 1819 Constitution of Württemberg, he treated the reality of the state as a condition, which imposed itself on human behaviour. Moreover, in his study of public law in Württemberg he never spoke of original rights but only of citizens' rights (*Rechte der Staatsbürger*).[28]

Mohl's analysis focuses on the written constitution and on the rights it confers on the citizen. Only the *Rechtsstaat* – as distinct from the state of patrimony, despotism, and theocracy – had citizens. These citizens were granted a legal property (*rechtliche Eigenschaft*),[29] by virtue of which they enjoyed precise rights laid out in the Constitution (of Württemberg, in Chap. III): equality before the law, protection of personal freedom, freedom of thought, freedom of conscience, protection of property before the state, freedom of movement, and freedom of enterprise.[30] The absence of reference to other rights, such as the right of assembly, did not, however, exclude them. In a later work, in fact, Mohl elaborated the general principles of the *Rechtsstaat* and extended the rights conferred on citizens, including in particular the active and passive right to participation in the political process, religious freedom, and the freedom to create associations.[31]

The identification of the general principles of the *Rechtsstaat* derived, in Mohl's work, from the precise delineation of the aims of this form of state: in the first place, the preservation of the legal system throughout the state; in the second place, support for the rational purposes of individuals, in cases in which their means are inadequate,[32] but also intervention on behalf of each member of the state in the "freest possible exercise and use of his forces".[33] The identification of the aims of the state led Mohl to overcome the natural law approach and to interpret a specific positive legal system – that of Württemberg – according to his constitutional ideal.[34]

The problems we pointed out in the analysis of political theory appeared also in the German doctrine of public law in the first half of the nineteenth century. The doctrine of public law also revealed different foundations of rights. The natural law perspective underlay the work of Johann Christoph Freiherr von Aretin,[35] whereas other authors, such as Friedrich Schmittener, while attributing a natural law character to rights, maintained that these rights, as such, expressed a merely ethical force; in order to become rights they had to be recognized by the state legal system through legislation and under the protection of the judiciary.[36]

The guarantee of rights was the essential criterion of the *Rechtsstaat*. Heinrich Zoepfl wrote that by *Rechtsstaat* was meant "the idea of a state in which individual liberty is fully guaranteed".[37] Aretin declared that the *Rechtsstaat* was a constitutional state "in which one governs according to the general rational will and one aims solely for the common good. By common good we mean the broadest freedom and security of all the members of the civil society".[38]

According to Aretin, it was the constitutional monarchy that best realized this form of the state, since it solved the great problem of how to reconcile "the power necessary to govern with the broadest possible freedom of the citizens".[39] But who determined the possible space for freedom? The answer to this question made it possible to outline the architecture of the state-form, progressively defining the idea of the *Rechtsstaat*.

Zoepfl held that subjects could claim their *Volksrechte* (people's rights) from the sovereign. The legislative power made it possible to guarantee the people's rights by posing them as natural limits (*natürliche Grenze*) to state power.[40] The people, in fact, had a right to autonomous legal production, in which it expressed its ethical conscience (*sittliches Bewusstsein*) by participating in legislation through the process of popular representation. Thus the German doctrine of the *Rechtsstaat* gradually laid the foundations of rights in *legislation* through representation. In this connection Dieter Grimm writes: "Popular representation was the means by which early constitutionalism established the relationship between fundamental rights and the legislature".[41]

Finally, the doctrine of public law posed the problem – crucial for the *Rechtsstaat* – of the relationship between statute law and constitution. Zoepfl declared that the constitution expressed "the concept of legal principles that are valid in a state from the point of view of the form of sovereignty (*Beherrschungsform*) and government, that is from the point of view of the organization of the state's power and the rights of the people and their reciprocal relationships".[42] Aretin asserted that the constitution was "the law of all laws" (*das Gesetz aller Gesetze*),[43] whose precepts bound both the legislature and the representative assembly. In particular, Aretin pointed out that certain constitutions, such as that of Württemberg, declared null and void all laws that were in contrast with the constitution.[44]

The constitution as foundation of the *Rechtsstaat* was recognized also in the work of one of the most important exponents of German liberalism, Carl von Rotteck. "The essence of the constitution", he wrote,

"consists in the national representation (*National-Repräsentation*), which must express the interests and the rights of the people against the government". Only this representation was adequate to the task of "realizing the idea of the true general will and turning a state of force (*Gewalt-Staat*) into a *Rechtsstaat*".[45]

Yet the superiority of the constitution over statute law – which was one of the essential principles of the *liberal doctrine* of the *Rechtsstaat* and which could have become the basis for the compatibility between *Rechtsstaat* and democracy – did not take hold[46] in the reality of German constitutional history, and even the *constitutional* foundation of fundamental rights was abandoned for a merely *legislative* foundation of rights in the realization of the *Rechtsstaat*, which consolidated itself in the second half of the nineteenth century.

The positions of liberalism were given political voice in the constitutional debates of Paulskirche[47] and went into crisis with its failure. The *Rechtsstaat* was conceived of as a state of fundamental rights that considered liberty as the highest value.[48] All the debates of Paulskirche echoed this line; the national assembly wanted to make fundamental rights the basis of German unity. Thus the delegate Georg Beseler, a liberal exponent of the centre-right wing, who, together with Friedrich Christoph Dahlmann, head of the Constitutional Commission, declared that the fundamental rights had to be guaranteed constitutionally and that, on this basis, it was possible to leave the police state behind and give birth to the *Rechtsstaat*.[49]

In June 1848 the Constitutional Commission drafted an outline of a Declaration of the Fundamental Rights of the German People, which asserted the principle of equality before the law and rejected class privileges, thereby eliminating any residue of feudalism.[50] On 27 December of the same year, the Declaration of the Fundamental Rights was proclaimed. In commenting on the introductory law, Theodor Mommsen stated that the Declaration, "the *Magna Carta* of the German nation, guarantee of liberty for all future generations, truly contains what it promises: the *fundamental rights* of the German people".[51]

However, the Declaration of Rights was rejected by Prussia, which already had its own constitution, ratified in December 1848, while Bavaria and Hannover refused to publish it. Finally, the Fundamental Rights were declared devoid of validity by the Federal Declaration of 23 August 1851.[52] It was the end of the constitutional experience of Paulskirche.

3 THE CRISIS OF THE LIBERAL DOCTRINE OF THE *RECHTSSTAAT*

The Paulskirche failure prevented the establishment of a liberal conception of the *Rechtsstaat*, proclaiming the superiority of the constitution among the sources of law and the pre-state character of rights (although the doctrine did not lack, as we have seen, positive law readings in the interpretation of rights). These principles were asserted in the doctrine but they were not applied in German constitutional history in the nineteenth century. The end of Paulskirche marked the beginning of the crisis of the liberal perspective and the liberals ended up accepting a compromise with the monarchic principle that guaranteed the rights of individuals in civil society.

This position found expression in the work of Johann Kaspar Bluntschli, who held that the natural liberty of man was a legal freedom (*rechtliche Freiheit*), that is limited by law, and that consequently the political problem consisted in finding "the right connection between freedom and the legal system".[53] Legal freedom meant two things: *Volksfreiheit* (people's freedom), which was realized in the state, and individual freedom, which was grounded "in the individual life of the soul" (*in dem Individualleben der Seele*) that is in a reality that the state was neither called on nor able to dominate.[54]

The relationship between the public law and the two meanings of freedom determined the different state forms. Bluntschli accepted the primacy of the constitutional monarchy, which did not permit the "freedom of the people" to become the "power of the people" (as in democracy), and did not allow individual freedom to stray into anarchy. In constitutional monarchy, by contrast, the "freedom of the people", namely political freedom, was an institution of the state, while individual liberty belonged to private law and guaranteed the legal sphere of the individual. In this way the terms of the compromise were clearly set out: on the one hand, constitutional monarchy was accepted; on the other, the state was obliged to "respect and guarantee individual freedom in the same way as all private law".[55]

Joseph Held, too, distinguished between civil rights and political rights. The former – among which the right to property and personal freedom – were not attributed to the individuals by the state but belonged to each person as such.[56] Political rights, on the other hand, derived from the state and could be granted only by the state; in this sense they were not strictly speaking rights but rather *duties*[57] that

subjects had toward the state. This understanding was also to be given to employment in public office, participation in political elections, etc.

The liberal position, then, tended to guarantee, ultimately, from a standpoint of positive law, the security of individuals' rights and the autonomy of civil society, but it had to accept the compromise with the constitutional monarchy. After 1848, the most systematic formulation of the compromise with constitutional monarchy, which was accepted by liberal doctrine, appeared in Otto von Bähr's work on the *Rechtsstaat*.

The first and fundamental step towards the creation of a *Rechtsstaat*, according to Bähr, was the issue of a fundamental law (*Grundgesetz*) or a constitution. The aim of a constitution, he wrote, was "the definition of the rights and obligations with which the state, represented by its organs, presents itself before individuals and the formulation of the rules which govern the acts of the legal system within the organism of the state".[58] Bähr continues to give formal expression to the superiority of constitutionally posited principles, which determined the activity of the organs of the state and the whole of relations between the state and the citizen, but at the centre of his construct, as will soon be clear, lay the form of legislative power.

Bähr used the foundation of the constitution to outline the structure of the *Rechtsstaat*: in the first place, legislation. Laws established fixed rules in changing social relations. "Legislation must take on the most sacred good of the nation, the law".[59] And just as law came to maturity in the conscience of the nation, so could legislation not be the product of a single individual, but rather had to be the result of an agreement between people and sovereign.

However, Bähr warned, law and legislation could find their true meaning and genuine force (*Macht*) only where "they find a judicial authority designed for their realization".[60] Accordingly, Bähr elaborated his doctrine of the *Rechtsstaat* on the principle of *representation* and on the need for a *separation of powers*. But his systematic construction went further. He pointed out, in fact, that, in addition to legislation and judicial authority, there was also the executive power, which expressed "the life of the organism of the state". The judicial power and the executive power were both subject to law, but in different ways. The judge represented the legal system and his decisions were *objective law*, while the executive power intervened not from the standpoint of the objective legal system but rather on the basis of the *subjective interests* that it represented on any given occasion.

It followed that adjudication and administration had to be separate functions and that the safeguarding of the legal system performed by the

judiciary was to be given priority. It was therefore necessary that the administration be subjected to judicial power; this, wrote Bähr, "is an essential condition of the *Rechtsstaat*".[61] Bähr's logical treatment of the question led him to identify the principles of *administrative justice*.[62] This was undoubtedly one of the most important developments in the liberal doctrine of the *Rechtsstaat* to ensue from the principle of legality and from the need to subordinate the administration to a judicial authority of public law in order to safeguard citizens' rights before the administrative authority of the state.[63]

For Lorenz von Stein, Bähr had the merit of recognizing the centrality of popular representation in the legislative process and of having supported the independence of the judiciary from the sovereign. In a more recent examination of Bähr's work, on the other hand, Michael Stolleis argues that by restricting the concept of *Rechtsstaat* to the safeguarding of rights in administrative disputes Bähr *formalizes* the doctrine[64] and makes it *non-political*. This, according to Stolleis, is what characterizes the specific German variant of the rule of law.[65] Given the considerations we have made thus far – with particular reference to the crisis of the liberal doctrine of the *Rechtsstaat* – we are certainly induced to embrace Stolleis's interpretation.

The foundation of the Second Empire in 1871 gave birth to new constitutional relations and the acknowledged superiority of the monarchic principle became the foundation of a conception that completely perverted the doctrine of the *Rechtsstaat*.

4 THE *RECHTSSTAAT* AND SUBJECTIVE PUBLIC RIGHTS

Beginning with Carl Friedrich von Gerber, passing through Paul Laband up to Georg Jellinek, the conception of *Rechtsstaat* underwent a profound transformation that marked the definitive defeat of the liberal standpoint. The work of Gerber anticipated the orientation that was consolidated with the foundation of the Second Empire. In his well-known essay from 1852, Gerber recognized that the state did not absorb the entire social life of men, since much of this life remained outside the orbit of the state. There were, therefore, "people's rights", which constituted limits for state power, but these were not rights proper, i.e. subjective rights: these rights, he wrote, "remain merely negations, restricting state power in the limits of its faculties; they are to be considered only as limits of the monarch's rights from the standpoint of the subjects".[66]

In a later work this perspective was made systematic. Gerber stated explicitly, in connection with the rights of the individual, that they were

in no way to be considered "rights in a subjective sense, rather they are *legal propositions*, that is *precepts of objective law*".[67] The issues at stake were freedom of conscience, freedom to profess a scientific conviction, freedom of the press, freedom of education and occupational choice, freedom to go before one's natural judge, freedom of assembly and association, freedom to expatriate, and individual freedom of the person.

The individual liberties of the liberal tradition, which, from Locke to Kant, had been recognized as belonging to men by virtue of their common humanity, were now conceived of as a mere reflex of objective precepts, that is as an expression of general laws. In this way, the balance between the legal system and personal freedom that had been a mainstay of liberal doctrine was overturned. Only the sovereignty of the state held sway, and the *Rechtsstaat* was transformed into *Staatsrecht* (the law of the state). In this connection Gerber stated quite clearly: "the force of the will of the state, the power of the state, is the law of the state. Public law is therefore the doctrine of the power of the state".[68]

After the foundation of the Empire, Laband picked up on Gerber's doctrine, but formulating as *given* the premises that Gerber had merely anticipated.[69] In his words: "rights to freedom or fundamental rights are precepts for the power of the state, which the state gives itself. These rights constitute limits for the competence of officials and guarantee the individual his natural freedom of behaviour in certain spheres, but they do not constitute subjective rights of citizens. They are not rights, for they have no object".[70]

It was Jellinek's task to formulate the doctrine of the *Rechtsstaat* in the era of Wilhelm II. Although he substantially shared the positive law approach of his predecessors, he distinguished himself from the doctrine of rights of Gerber and Laband. Jellinek introduced the distinction between (1) *status passivus*, (2) *status negativus*, (3) *status positivus*, and (4) *status activus*, which constituted at the end of the nineteenth century, the most systematic formulation of the doctrine of *Rechtsstaat* and individual rights.

The *status passivus* (or *status subjectionis*) referred to the situation of the individual who has only duties – such as the obligation to perform military service – and no rights. The *status negativus* (or *status libertatis*) was the condition of a man who possessed the right to freedom. But these rights were not conceived of from a perspective of natural law; rather, the standpoint was that of historicism. "Although some would like to make them appear as though they were the product of a general theory of man and state", he wrote, "nonetheless, in their specific legislative form, they [fundamental rights] can only be explained *historically*".[71]

This meant, at the same time, that constitutions acknowledged no rights as pre-existing to the state and that constitutional precepts were merely prescriptions addressed to the legislator. It is true that Jellinek admitted that certain statutory precepts, such as those that recognize freedom of religion, could have immediate validity, but in general constitutional prescriptions required, in order to be valid, the actual action of the legislator. In this sense, Jellinek concluded, the fact that the laws enacted in conformity with constitutional precepts turned to the advantage of individual interests was an effect of objective law, not the satisfaction of any subjective legal claim.[72]

From Jellinek's positive law perspective it was the law that provided foundation for the rights to freedom. Indeed, he wrote that "every freedom is nothing but the exemption from illegal constraints".[73] Nonetheless, Jellinek distinguished his position from that of Gerber who, it will be recalled, had resolved the rights to liberty into objective law. This position was tenable, according to Jellinek, only in a period prior to the institution of administrative courts; the creation of these agencies, however, had made it possible to recognize and safeguard "the interest of the individual that was hidden in the formulas of the fundamental rights".[74]

The *status positivus* (or *status civitatis*) referred to the state conferring on the individual subjective public rights, that is to say a precise legal capacity: the capacity to "activate precepts in the legal system" (*Normen der Rechtsordnung in Bewegung zu setzen*) so as to spur the intervention of an authority to annul an illegal administrative act".[75]

Finally, the *status activus* (or *status activae civitatis*) consisted in ascribing political rights to the citizen.

This systematic account of the *Rechtsstaat* in the era of Wilhelm II in the second half of the nineteenth century rested on several precise principles:

1. The state possessed its own legal personality. Personality meant, for Jellinek, the capacity to possess rights. The state had its own will in which it expressed the will of a community. The conception of the state as a "legal personality" was common to both Jellinek and Laband.[76] This position implied the superiority of the state over the legal system. Jellinek stated, in fact: "It turns out that the state is a purposeful entity constituted by human individuals ... which ... possesses its own will ...; it also turns out that the legal system, on the basis of the above-mentioned de facto condition, which exists independently, is able to regulate the formation of the will of the state. In this way, the state, *by creating its own legal system*, establishes itself as a subject of law".[77]

2. The state attributed to the individual a legal personality and, at the same time, the capacity to demand legal protection from the state. Jellinek pointed out that the person who granted the legal protection and the one who was obliged to provide it were the same, i.e. the state. It followed that the state could fulfil its obligation only by "limiting its activity with respect to its subjects".[78]
3. The rights conceded by the state were individual rights – subjective public rights – which represented "an expansion of natural freedom" and could be in no sense conceived of, as in Gerber's doctrine, as a mere "reflected right" of objective law.

These points allow us to assert that the Jellinek's conception expressed in the most systematic way the German doctrine of the *Rechtsstaat* in the second half of the nineteenth century, a doctrine centred on the sovereignty of the state, on the legislative – and not constitutional – foundation of rights, and on the criteria of administrative justice. Certain principles of the liberal tradition – the pre-state status of rights, the primacy of the constitution – had been completely lost.[79]

5 *RECHTSSTAAT* AND DEMOCRACY: COMPATIBILITY OR IRREMEDIABLE OPPOSITION?

The foregoing considerations have shown the controversial character of the German doctrine of the *Rechtsstaat*. Attention has been directed to the liberal standpoint, the conservative interpretation (Stahl), and the solution found through the compromise between liberalism and conservatism. It was this last approach, which finally held sway, largely due to the systematic work of Jellinek.

The great variety of doctrinal positions helps explain the current difficulty in presenting an adequate interpretation, especially about the relationship between *Rechtsstaat* and democracy. Can the two doctrines be compatible, and, if so, what conception of the *Rechtsstaat* can democracy coexist with? The plurality of answers serves to show how difficult the problem is, which derives both from the present-day evolution of democracy and from the lack of clarity on the various nineteenth-century interpretations of the *Rechtsstaat*.

Werner Kägi accepts the possible coexistence of the two doctrines in the state-form of constitutional democracy,[80] in that the underlying principles of both are oriented toward the same end. For this to be possible, for Kägi, democracy must not be conceived of in Rousseau's terms as "totalitarian democracy"; rather, the majority principle must operate within the limits of law. The people must not place itself above

the constitution and the law, but must recognize rights that exist prior to and above the state; it is on this basis that a democratic *Rechtsstaat* may be built.[81]

However, this position expresses only a *doctrinal* point of view. In particular, it takes into account only the liberal interpretation, which builds the *Rechtsstaat* on the foundations of pre-state rights, and considers democracy only in the version supplied by Rousseau. What is needed is an examination of the actual constitutional reality in the German area.

In nineteenth-century German constitutional history, liberalism reached a compromise with the constitutional monarchy, on the basis of which the House of Representatives and the Upper House, on the one hand, and the monarchy, on the other, both contributed to the exercise of the legislative function. Legislative precepts excluded the possibility of a separation between politics and law in the sphere of legislation.[82] In this constitutional context, dominated by positive law, the legality of the administration and the "statutory reservation" were the principles of the *Rechtsstaat* specifically designed to protect individuals from possible arbitrary action by the administration.[83]

After the First World War the unlimited power of parliaments aroused the fear that majorities might violate the constitution. During the Weimar Republic, the *Staatsgerichtshof* (the Constitutional Court of the Reich) had been called on, on the basis of article 19 of the Constitution, to examine issues of constitutionality that might arise within a *Land* or between *Länder*, or between the *Reich* and the *Länder*. What is more, there were other courts that were involved in examining questions of constitutionality, such as the *Reichsgericht* (the Supreme Court of Appeal).

It was only after the Second World War that Germany instituted a centralized *richterliches Prüfungsrecht* (judicial examination) of constitutionality, which was entrusted exclusively to the *Bundesverfassungsgericht* (Federal Constitutional Court). It is this turning point – which marks the primacy of the Constitution over the legislator – that establishes the insuperable contrast between the *constitutional democracy* of today and the German *Rechtsstaat*, and makes democracy compatible with certain liberal interpretations of the *Rechtsstaat*.[84]

The democracy established in post-war Germany elevated the Federal Constitutional Court to "guardian of the Constitution" and made of it a constitutional organ in the process of formation of political will. The establishment of a system of constitutional justice eliminated all possible tension between legality and legitimacy, and secured their full coincidence.[85]

It is worth pointing out that the conception of the constitution has also undergone a transformation in German constitutional democracy with respect to the *Rechtsstaat*: the Constitution no longer represents merely a limitation of state power with respect to the freedom of the citizen; rather it constitutes also "the legal positivization of the fundamental values of the life of the community".[86] We are dealing with values or principles of justice, which postulate a "validity for all spheres of law";[87] their realization, i.e. the creation of the social premises that can make each individual's freedom effective, is the necessary condition of individual freedom.[88] It is above all this overcoming of *formalism* that makes the *Rechtsstaat* incompatible with the reality of contemporary constitutional democracy.

The constitutionalization of fundamental rights and the primacy of the constitution over statute law, then, make the gap between the *Rechtsstaat* and constitutional democracy unbridgeable, or rather they impose a redefinition of the contents of the doctrine of the *Rechtsstaat*. Thus Grimm introduces the concept of a *material* as opposed to a *formal Rechtsstaat*. Only the former, in his view, can coexist with democracy. It consists in assuming a *double legality*: that of the constituent democratic decision, which lays down the principles of the constitutional system and that of the legislative power. The first decision is based on a broader consensus than can be attained by the legislator with majority decisions. Contrasts between the two levels of decision can be resolved only by the Constitutional Court.

The error of those who, on the other hand, claim a new formalization of the *Rechtsstaat*[89] – and, in Grimm's opinion, a consequent return to a positive law approach – consists in asserting the unlimited freedom of the legislator. Rather, Grimm maintains, two-tiered legality (*zweistufige Legalität*) "is none other than a synonym for constitution".[90]

In the post-war period, Konrad Hesse, before Grimm, had also distinguished between formal and material elements of the *Rechtsstaat*. He had observed that the *Rechtsstaat* provides for the primacy of law, but he added that in the German Fundamental Law of 1949 the primacy of the law was identified with the primacy of the Constitution and that "this separates substantially the principle of the present *Rechtsstaat* from previous conceptions".[91] The constitutional limitation of state powers corresponds to the conception of the *formal Rechtsstaat*, but the Constitution binds the state agencies not only formally but also *materially*, by establishing ties of precise legal *contents*.

In short: the *Rechtsstaat*, on the one hand, shapes the reality of the state through the constitution and legislation and, on the other, obliges

all powers of the state to pursue the contents of law.[92] In particular, Hesse notes, the contents are those of the equality and dignity of the person. This joining of formal and material elements is the foundation of the "social *Rechtsstaat*".[93]

Finally, Hesse admitted that the *material Rechtsstaat* is compatible with democracy, since the principles of the former were in his view also the principles of the democratic system. The *Rechtsstaat* and democracy are underpinned by two different forms of legality, the former on the *institutional* level and the latter on the *political* level. Democracy, in fact, must realize through a participatory political process the principles that the *Rechtsstaat* sets out as constitutional precepts. It appears clear, then, that a reutilization of the concept of *Rechtsstaat* in the age of democracy can only take place on the basis of a profound transformation of the concept. The notion should be understood as constitutional (not legislative) and material (not formal) *Rechtsstaat*: a transformation, which makes it utterly different from the nineteenth-century *Rechtsstaat*.

NOTES

1. L. von Stein, *Die Verwaltungslehre* [1869], vol. 1, *Die vollziehende Gewalt*, Zweite ungearbeitete Auflage, Aalen: Scientia Verlag, 1962, p. 296.
2. R. von Mohl, *Die Geschichte und Literatur der Staatswissenschaften*, Erster Band, Erlangen: Verlag von F. Enke, 1855, pp. 229 ff. Actually, before Mohl, K. Th. Welcker had used the term *Rechtsstaat* in *Die letzten Gründe von Recht, Staat und Strafe* [1813], Aalen: Scientia Verlag, 1964, p. 25. Cf. E.W. Böckenförde, "Entstehung und Wandel des Rechtsstaatsbegriffs", in id., *Staat, Gesellschaft, Freiheit*, Frankfurt a. M.: Suhrkamp, 1976, p. 66.
3. The same view is held by E.W. Böckenförde, op. cit., p. 85.
4. N. MacCormick, "Der Rechtsstaat und die rule of law", *Juristen Zeitung*, 39 (1984), p. 67.
5. MacCormick notes that, in the German tradition, this principle is recognizable in the work of Kant, *Metaphysiche Anfangsgründe der Rechtslehre* [1797], in particular §42, and, in the English tradition, in the work of Locke, *The Second Treatise of Government*, §136; cf. N. MacCormick, op. cit., p. 68.
6. This position had been upheld by Gustav Radbruch, who saw in the primacy of law over the state a return to natural law; in G. Radbruch, *Rechtsphilosophie* [1914], 5th edn., Stuttgart, 1956, §26, p. 284.
7. H. Hofmann, "Geschichtlichkeit und Universalitätsanspruch des Rechtsstaats", *Archiv für Rechts- und Sozialphilosophie*, Beiheft 65, Stuttgart: Franz Steiner Verlag, 1996, p. 9. On the European form of the *Rechtsstaat*, see M. Fioravanti, "Lo Stato di diritto come forma di Stato. Notazioni preliminari sulla tradizione europeo-continentale", in R. Gherardi and G. Gozzi (eds), *Saperi della borghesia e storia dei concetti fra Otto e Novecento*, Bologna: Il Mulino, 1995.
8. H. Hofmann, op. cit., p. 27.

9. F. Neumann, *Die Herrschaft des Gesetzes*, Frankfurt a. M.: Suhrkamp, 1980, p. 204.
10. Ibid., p. 210.
11. A.V. Dicey, *Introduction to the Study of the Law of the Constitution* [1885], 10th edn., New York: St. Martin's Press, 1967, pp. 202–3.
12. Ibid., p. 195. Jennings criticized certain aspects of Dicey's reconstruction. In particular, he observed that, in connection with Dicey's assertion that the constitution consisted essentially in the recognition of the rights of individuals, it was necessary to highlight also the extension of the intervention of public authorities in the sphere of private actions. Jennings added that – with regard to Dicey's analysis of the relationships between legislative power and judicial power – if parliament did not accept the interpretation given by the judges, it could always modify the contents. Cf. I. Jennings, *The Law and the Constitution* [1933], London: University of London Press, 1959, pp. 55–8. Jennings pointed out that the English Constitution contained the political ideas of its builders and, from this perspective, expressed the principles of the victory of the parliament over the Stuarts. The sovereignty of the parliament derived from a political movement that had been recognized as law of the land. This was the meaning to attribute – on his view – to Dicey's assertion that law determined the Constitution. In this sense – according to Jennings – Dicey was merely enunciating the individualistic theories of nineteenth-century Whigs; ibid., p. 314. On Jennings's critique of Dicey cf. J. Harvey and L. Bather, "Über den englischen Rechtsstaat. Die 'rule of law'", in M. Tohidipur (ed.), *Der bürgerliche Rechtstaat*, Frankfurt a. M.: Suhrkamp, 1978, vol. 2, p. 359 ff.
13. A.V. Dicey, op. cit., p. 196.
14. Ibid., p. 201.
15. Cf. W. Wilhelm, *Metodologia giuridica nel secolo XIX* [1958], Milano: Giuffrè, 1974, p. 158.
16. Cf. The Bavarian Constitution of 26 May 1818, title IV, §9, in W. von Rimscha, *Die Grundrechte im süddeutschen Konstitutionalismus*, Köln-Berlin-Bonn-München: Carl Heymanns Verlag, 1973, p. 218.
17. Cf. The Constitution of Baden of 22 August 1818, II, §7, in W. von Rimscha, op. cit., p. 220, and the Constitution of Württemberg of 25 September 1819, chap. III, §21 in E.R. Huber (ed.), *Dokumente zur deutschen Verfassungsgeschichte*, Stuttgart/Berlin/Köln/Mainz: W. Kohlhammer, 1978, vol. 1, p, 190.
18. Cf. F.J. Stahl, *Das monarchische Prinzip*, Heidelberg: Verlag der akademischen Buchhandlung, 1845. Stahl held that "the monarchic principle is the foundation of German public law and of the German science of the state (*Staatsweisheit*)", ibid., p. 34. From a historico-constitutional point of view, the monarchic principle had been formulated in the *Wiener Schußakte* of 1820 where, in article 57, one reads: "since the *deutsche Bund* consists, with the exception of the free cities, of sovereign princes, in conformity with this fundamental concept the entire power of the state (*Staats-Gewalt*) must be assigned to the head of state (*Oberhaupt des Staats*), and the sovereign may be bound to collaborate with the ranks (*Stände*), on the basis of a territorial-rank constitution, only in the exercise of certain rights", in E.R. Huber, op. cit., p. 99. In this way the monarchic principle was formulated as "the fundamental principle of the new German constitutional public law", as Treitschke put it, cited in E. Kaufmann, *Studien zur Staatslehre des monarchischen Prinzips*, Leipzig: Brandstetter, 1906, p. 37. In this connection cf. W. von Rimscha, op. cit., p. 93.

19. F.J. Stahl, *Die Philosophie des Rechts* [1833–1837], vol. 2, *Rechts- und Staatslehre auf der Grundlage christlicher Weltanschauung*, Tübingen: Mohr, 1878, p. 137.
20. The legal definition of the *Rechtsstaat* as it was formulated by Stahl appeared, for example, in the work of a liberal writer like O. von Bähr.
21. Cf. W. von Rimscha, op. cit., p. 95.
22. The importance of Kant for the doctrine of the *Rechtsstaat* is decisive. Kant rejected any eudemonic conception of the state – which went back to Aristotelian tradition – and identified the purpose of the state not so much in the happiness of its citizens as in the harmony between the liberty of each individual and a universal law. Cf. I. Kant, *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis* [1793], Frankfurt a. M.: Vittorio Klostermann, 1992, in particular p. 39 ff. Although Kant did not use the term *Rechtsstaat*, but rather *rechtlicher Zustand* (legal state), after the publication of *Metaphysische Anfangsgründe der Rechtslehre* (1797) Kant and his followers were described as "die kritische oder die Schule der Rechts-Staats-Lehre" (the critical school or the school of the doctrine of the *Rechtsstaat*), in J.W. Placidus, *Literatur der Staatslehre – Ein Versuch*, Straβburg, 1798. In this connection cf. M. Stolleis, "Rechtsstaat", in A. Erler and E. Kaufmann (eds), *Handwörterbuch zur deutschen Rechtsgeschichte*, vol. 4, Berlin: Erich Schmidt Verlag, 1990, p. 367.
23. C. von Rotteck, *Lehrbuch des Vernunftsrechts und der Staatswissenschaften* [1830], vol. 2, Stuttgart: Halberger'sche Verlagshandlung, 1848, p. 135. The same positions were upheld by P. Pfizer in the entry "Urrechte oder unveräu·erliche Rechte" (original or inalienable rights), in C. von Rotteck and C. Welcker (eds), *Das Staats-Lexikon* [1834–1843], vol.12, Altona: Verlag von Johann Friedrich Hammerich, 1848, p. 689. Pfizer wrote: "The proponents of natural law define as inalienable rights those innate rights of man that cannot be lost, neither through contract nor by renunciation".
24. C. von Rotteck, *Lehrbuch*, p. 136.
25. C. Welcker, *Grundgesetz, Grundvertrag, Verfassung*, in C. von Rotteck and C. Welcker (eds), *Das Staats-Lexikon* [1834–1843], vol. 6, Altona: Verlag von Friedrich Hammerich, 1847, p. 162.
26. Cf. W. von Rimscha, op. cit., p. 103.
27. Elsewhere I have stressed the natural law perspective of R. von Mohl, exemplified by his including in the doctrine of the *Rechtsstaat* also the work of Hugo Grotius. In this connection, cf. G. Gozzi, *Democrazia e diritti. Germania: dallo Stato di diritto alla democrazia costituzionale*, Roma-Bari: Laterza, 1999, p. 36.
28. R. von Mohl, *Das Staatsrecht des Königreichs Württemberg*, Erster Band, Tübingen: Laupp, 1840, p. 312 ff.
29. Ibid., p. 316.
30. Ibid., p. 314.
31. R. von Mohl, *Enzyklopädie der Staatswissenschaften*, Tübingen: Laupp, 1859, pp. 329–31.
32. Ibid., p. 325.
33. R. von Mohl, *Die Polizeiwissenschaft nach den Grundsätzen des Rechtsstaates* [1832–1833], vol. 1, Tübingen: Laupp, 1844, p. 8. Mohl conceived of the *Rechtsstaat* also as a *Polizei-Staat*. The *Rechtsstaat* should not strive, in his view, only to protect rights. This is how Mohl defined the notion of *Polizei*: "The concept refers to all the different agencies and institutions designed to remove, by means of the power of the

state, the external obstacles which hinder the development of the forces of man and which the individual is not able to overcome"; ibid., p. 11. For Mohl, the *Rechtsstaat* should not limit itself to guaranteeing rights, but it should also strive for the realization of well-being; cf. M. Stolleis, "Rechtsstaat", p. 370.

34. W. von Rimscha, op. cit., p. 92.
35. J.C. Freiherr von Aretin, *Staatsrechts der konstitutionellen Monarchie*, vol. 1, Altenburg: Literatur-Comptoir, 1824, p. 153 ff.
36. Cf. F. Schmittener, *Grundlinien des allgemeinen oder idealen Staatsrechts*, Giessen: Georg Friedrich Heyer's Verlag, 1845, p. 558. In this connection and, more in general, for an analysis of the doctrines of rights of early German constitutionalism, cf. D. Grimm, "Die Entwicklung der Grundrechtstheorie in der deutschen Staatsrechtslehre des 19. Jahrhunderts", in id., *Recht und Staat der bürgerlichen Gesellschaft*, Frankfurt a. M.: Suhrkamp, 1987, p. 314. I owe largely to Grimm's essay the following considerations in this paragraph.
37. H. Zoepfl, *Grundsätze des allgemeinen und des constitutionnell-monarchischen Staatsechts* [1841], Heidelberg: Akademische Verlagshandlung von C.F. Winter, 1846, p. 56. Zoepfl's position, which was first close to the liberals and later to the conservatives, are analysed by M. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol. 2, München: Verlag C.H. Beck, 1992, p. 91 ff.
38. J.C. Freiherr von Aretin, op. cit., p. 163.
39. Ibid., p. 164.
40. H. Zoepfl, op. cit., p. 227. Also Zachariä conceived of rights as limits to governmental power. In particular, Zachariä recognized a natural liberty, which, however, could not be unlimited (*unbeschränkt*). It was the law that established the limits; cf. H.A. Zachariä, *Deutsches Staats- und Bundesrecht*, Erste Abtheilung, Göttingen: Vandenhoeck und Ruprecht, 1841, p. 227 ff., in particular p. 237. On the contradictions in Zachariä's position, split between adhesion to the principles of Kantian philosophy and the conservative perspective, cf. M. Stolleis, *Geschichte*, p. 170.
41. D. Grimm, op. cit., p. 319.
42. H. Zoepfl, op. cit., p. 244.
43. J.C. Freiherr von Aretin, op. cit., p. 229.
44. §91 of the Constitution of Württemberg proclaims: "All laws and provisions which ¨ are in contrast with the present constitution are null and void. The other are subject to constitutional revision (*verfassungsmägieβen Revision*)", in E.R. Huber, *Dokumente*, p. 198. In this connection, R. von Mohl noted that the citizen was bound to obey laws only if they were passed in conformity with the Constitution and if they had a constitutional content, and he recalled that the Constitution of Württemberg, §21, established that the citizen was bound to obedience only in conformity with the Constitution (*verfassungsmägieβen Gehorsam*); cf. R. von Mohl, *Das Staatsrecht*, pp. 324, 326: cf. also D. Grimm, op. cit., p. 316.
45. C. von Rotteck, *Constitution*, in C. von Rotteck and C. Welcker (eds), *Das Staatslexikon* [1834–1843], vol. 3, Altona: Verlag von Johann Friedrich Hammerich, 1846, p. 527.
46. In this connection cf. R. Wahl, "Der Vorrang der Verfassung", *Der Staat*, 1981, p. 491 ff. Of the same opinion U. Scheuner, "Die rechtliche Tragweite der Grundrechte in der deutschen Verfassungsentwicklung des 19. Jahrhunderts", in E. Forsthoff, W. Weber and F. Wieacker (eds), *Festschrift für Ernst Rudolf Huber*, Göttingen: Verlag Otto Schawartz, 1973, p. 155.

47. Following the German general elections, which were held in the States of the Confederation with a predominantly majority system, a meeting was held on 18 May 1848 that marked the beginning of the activities of the first national assembly of the German people. The aim was to draft a new constitution of Germany, and work began with the fundamental rights. In December 1848 the fundamental rights came into force for all of Germany. The constitutional problem was intertwined with that of the state-form and, more precisely, with the relationship between Austria and Prussia. The issue was whether Austria should enter the new state and renounce its unity or whether, on the contrary, it should maintain its unity, reducing its ties with Germany to relationships of international law. On 27 March 1849 a constitution was approved that excluded Austria, and Friedrich Wilhelm IV was offered the crown of the Empire. But his refusal to accept the imperial power that was offered by a democratically elected assembly marked the definitive crisis of the national assembly of Frankfurt. On the events of the Paulskirche cf. H. Lutz, *Zwischen Habsburg und Preußen. Deutschland 1815–1866*, Berlin: Siedler, 1985. See also J.-D. Kühne, *Die Reichsverfassung der Paulskirche*, Frankfurt a. M.: Metzner, 1985.
48. Cf. G. Haverkate, "Deutsche Staatsrechtslehre und Verfassungspolitik", in O. Brunner, W. Conze and R. Kosellek (eds), *Geschichtliche Grundbegriffe*, Band 6, Stuttgart: Klett-Cotta, 1990, p. 75. On the issue of the Paulskirche cf. A.G. Manca, *La sfida delle riforme. Costituzione e politica nel liberalismo prussiano (1850–1866)*, Bologna: il Mulino, 1995, especially the first chapter.
49. Cf. the statement by G. Beseler, in F. Wigard (ed.), *Verhandlungen der deutschen constituirenden Nationalversammlung zu Frankfurt/M*., vol. 1, Frankfurt a. M., 1848, p. 701.
50. Cf. Artikel II of the *Entwurf. Die Grundrechte des deutschen Volkes*, in J.G. Droysen (ed.), *Die Verhandlungen des Verfassungs-Ausschusses der deutschen Nationalversammlung*, Leipzig: Weidmann'sche Buchhandlung, 1849, p. 374.
51. See Mommsen's comment on the Introductory Law of the declaration of 28 December 1848 in Th. Mommsen, *I diritti fondamentali del popolo tedesco*, ed. by G. Valera, Bologna: il Mulino, 1994, p. 118.
52. The deliberation states: "The so-called fundamental rights of the German people ... cannot be considered legally valid", in E.R. Huber (ed.), *Dokumente zur deutschen Verfassungsgeschichte*, vol. 2, Stuttgart-Berlin-Köln-Mainz: W. Kohlhammer, 1986, p. 2.
53. J.C. Bluntschli, *Allgemeines Staatsrecht*, München: Verlag der literarisch-artistischen Anstal, 1852, pp. 667–8.
54. Ibid., p. 669. In this connection cf. D. Grimm, op. cit., p. 324.
55. J.C. Bluntschli, *Allgemeines Staatsrecht*, p. 670.
56. J. Held, *System der Verfassungsrecht der monarchischen Staaten Deutschlands mit besonderen Rücksicht auf den Constitutionalismus*, part 1, Würzburg: Verlag der Stahel'schen Buch- und Kunsthandlung, 1856, p. 253. On Held, see D. Grimm, op. cit., pp. 324–5.
57. J. Held, op. cit., p. 256.
58. O. von Bähr, *Der Rechtsstaat*, Kassel and Göttingen: Georg H. Wigand, 1864, p. 49.
59. Ibid., p. 12.
60. Ibid., p. 12.
61. Ibid., p. 54.

62. In this connection, O. von Bähr recognizes the importance of the principles enunciated by R. von Gneist in *Das heutige engl. Verfassungs- und Verwaltungsrecht*, Berlin: Springer, 1857.
63. In the copious literature on the question, see in particular L. von Stein, "Rechtsstaat und Verwaltungsrechtspflege", *Zeitung für das privat- und öffentliche Recht der Gegenwart*, 6 (1879). Stein recognizes the originality of Otto von Bähr's work compared with the "academic" treatments of the doctrine of the *Rechtsstaat*, just as, for example, that of Mohl. Stein, who introduced the distinction between constitution and administration, asserted that the mere constitution was not sufficient to guarantee a people liberty. What was needed, above all, was a jurisdiction that safeguarded the rights and the liberty of individuals against the administration as well; ibid., p. 316.
64. The formalization of the *Rechtsstaat* in the second half of the nineteenth century continued also with the creation of administrative law as an autonomous discipline, due above all to Otto Mayer; cf. M. Stolleis, "Rechtsstaat", p. 372.
65. Ibid., p. 371.
66. C.F.W. von Gerber, "Sui diritti pubblici" [1852], in id., *Diritto pubblico*, Milano: Giuffrè, 1971, p. 67.
67. C.F.W. von Gerber, *Grundzüge des deutschen Staatsrechts* [1865], Leipzig: Tauchnitz, 1880, reprint Hildesheim/Zürich/New York: Olms-Weidmann, 1998, p. 34 (the second italics are mine).
68. Ibid., p. 3.
69. D. Grimm, op. cit., p. 334.
70. P. Laband, *Das Staatsrechts des deutschen Reiches* [1876–1882], vol. 1, Tübingen: Laupp, 1876, reprint of 5th edn., Tübingen, 1911, Aalen: Scientia Verlag, 1964, p. 151.
71. G. Jellinek, *System der subjectiven öffentlichen Rechts* [1892], Tübingen: Mohr, 1905, p. 95.
72. Ibid., p. 97.
73. Ibid., p. 103.
74. Ibid., p. 102. For these reasons Jellinek, criticizes the theses of Laband, who, as we have seen, denied the existence of subjective rights, cf. Jellinek, op. cit., p. 102, n. 2.
75. Ibid., p. 106.
76. P. Laband, *Das Staatsrechts des deutschen Reiches* [1876–1882], vol. 1, Tübingen: Laupp, 1876, reprint of 5th edn., Tübingen 1911, Aalen: Scientia Verlag, 1964, p. 94. Laband observed that the conception of the state as juridical personality of public law implied that the subject of the power of the state was the state itself. He went on to say that Jellinek also shared his position (ibid., p. 95). Finally, Laband claimed that the sovereign was the only representative of the state. It was on this representation of the state that sovereignty was founded, thus only the *Kaiser*, on Laband's view, could act on behalf of the *Reich* (ibid., p. 229). Substantially similar assertions are to be found also in Jellinek. Indeed, he claimed that the state "is the only association that rules by virtue of a force which is intrinsic to it, original, legally derived from no other force", in G. Jellinek, *Allgemeine Staatslehre*, Berlin: Verlag von O. Häring, 1900, p. 158. Jellinek added that "any power of state domination can come only from the state itself" (ibid., p. 370). Finally, with respect to the sovereignty of the state, the monarch was the supreme organ of the state. He was holder of a right of the sovereign "conferred by the state", G. Jellinek, *System*, p. 150.
77. G. Jellinek, *System*, p. 32 (italics mine).
78. Ibid., p. 67.

79. Böckenförde asserts, in contrast, that the doctrine of the *Rechtsstaat* in the second half of the nineteenth century continued to be the liberal doctrine. It was a purely *formal* concept of the *Rechtsstaat*, which survived until the end of the Weimar Republic; cf. E.W. Böckenförde, "Entstehung und Wandel des Rechtsstaatsbegriffs", p. 76. A different view is expressed by Haverkate, who stresses the conservative character of the concept of the *Rechtsstaat* in the second half of the century; cf. G. Haverkate, "Deutsche Staatsrechtslehre", p. 74.
80. W. Kägi, "Rechtsstaat und Demokratie", in *Demokratie und Rechtsstaat. Festgabe zum 60. Geburtstag von Zaccaria Giacometti*, Zürich: Polygraphischer Verlag A.G., 1953, p. 107. Also Bäumlin posits the reciprocity of democracy and *Rechtsstaat* on the basis of a common horizon of values. Thus, according to this interpretation, the responsibility of those governing towards those governed in the democratic state-form corresponds to the centrality of the dignity of the person in the *Rechtsstaat*; cf. R. Bäumlin, *Die rechtstaatliche Demokratie*, Zürich: Polygraphischer Verlag, 1954, p. 91.
81. Ibid., pp. 129, 136.
82. G. Leibholz, "Demokratie und Rechtsstaat", in *Schriftenreihe der Landeszentrale für Heimatdienst in Niedersachsen*, Heft 5, Bad Gandersheim, 1957, p. 28.
83. Ibid., p. 28. Thoma also identified in the principle of legality the foundation of the *Rechtsstaat*; cf. R. Thoma, "Rechtsstaatsidee und Verwaltungswisseschaft", *Jahrbuch des öffentlichen Rechts der Gegenwart*, 4 (1910), p. 196 ff.
84. On this interpretation cf. G. Bongiovanni and G. Gozzi, "Democrazia", in A. Barbera and G. Zanetti (eds), *Le basi filosofiche del costituzionalismo*, Roma-Bari: Laterza, 1997, p. 215 ff.
85. G. Leibholz, op. cit., p. 11.
86. G. Böckenförde, op. cit., p. 81.
87. Entscheidung des Bundesverfassungsgerichts (BVerfGE) 7, 198 (205).
88. G. Böckenförde, op. cit., p. 79.
89. The conception of a formal *Rechtsstaat* has been supported by public law experts and political scientists of left-wing orientation (Abendroth, Maus, Preu·, etc.); cf. D. Grimm, "Reformalisierung des Rechtsstaaats als Demokratiepostulat?" *JuS* (1980), 10, p. 706.
90. Ibid., p. 708. The polemical reply to the conception of the *Rechtsstaat* in a material sense formulated by Grimm highlights how this perspective tends to establish the primacy of the constitutional judge over the legislator and how, on the basis of an "evaluative" examination of the modes of behaviour of individuals, the judge ends up by "juridifying" the political potential of conflict; cf. F. Hase, K.-H. Ladeur and H. Ridder, "Nochmals: Reformalisierung des Rechtsstaats als Demokratiepostulat?" *JuS* (1981), 11, p. 796. On the contrary, the formalization of the *Rechtsstaat* establishes, according to these authors, the centrality of the process of legislation and, as a consequence, the enhancement of the "conditions of formation of an opinion and of a will which is social-decentralized, political and non-state, scientific, cultural", ibid., p. 795.
91. K. Hesse, "Der Rechtsstaat im Verfassungssystem des Grundgesetzes", in M. Tohidipur (ed.), op. cit., vol. 1, p. 293.
92. Ibid., p. 299.
93. Hesse's reconstruction is based on the German Fundamental Law (*Grundgesetz für die Bundesrepublik Deutschland*), where, in art. 28, par. I, one reads: "The constitutional system of the *Länder* must draw on the principles of the republican, democratic and social *Rechtsstaat* in conformity with the present Fundamental Law". Hesse identifies the *Grundgesetz* as the constitutional foundation of the "social *Rechtsstaat*".