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

Edited by
MARTIN SCHMIDT-KESSEL

Gesellschaft für Rechtsvergleichung e.V.

Rechtsvergleichung und Rechtsvereinheitlichung
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Mohr Siebeck

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Preface by the Editor

The 21st General Congress of Comparative Law will be organised from October 23 to 28 at the CEDEP – Centro de Estudios de Derecho, Economía y Política in Asunción (Paraguay). The Congress is the internationally leading forum for the discussion of comparative law subjects and takes place every four years. The line of congresses mirrors the development of comparative law and the cities in which they were organised – Fukuoka, Vienna, Washington D.C., Utrecht, Brisbane, Bristol, Athens, Caracas, Teheran or The Hague – denominate the rhythm of the whole discipline.

The more than thirty sessions of the 21st Congress find their subjects in all legal disciplines, starting from legal theory and also dealing with classical questions of civil and commercial law, constitutional law and administrative law and criminal law. The German Association of Comparative Law by this book presents the German national reports delivered to the 21st Congress. The German comparative law academia therewith contributes to this congress on the variety topics presented by the International Academy of Comparative Law. At the Asunción Congress, the national reports will become part of the considerations and will support the General Rapporteurs appointed by the Academy for the respective sessions.

One large focus of the topics of the 21st Congress is on questions of (legal) effects of rule of law, softlaw, legal pluralism and bioethics. This does not only concern methodological aspects of comparative law but also certain areas of law including procedural issues as administrative silence, access to justice, contractualisation of civil litigation, alternative dispute resolution and specialised commercial courts. Moreover, several sessions will deal with legal consequences of emergencies like wars or natural catastrophes including climate change. Another set of topics refers to choice and information with particular questions connected to protection of individuals and their autonomy (protection and autonomy of adults, freedom of speech, hate speech). The theme of "social enterprises" could probably subjoin thereto some additional ideas and approaches. Other reports refer to topics of trans-border application of the law (as extraterritorial application and localising the place of damage). Several contributions show how much the digitalisation of the legal orders, the economies and the societies has reached also comparative law and in particular how important cryptocurrencies, the streaming industry, artificial intellignce, autonomous vehicles and smart contracts are for national legal orders, harmonisation or unification of the law and for comparative law. In this respect, additional methodological ques-

tions have to be dealt with, including on how to compare laws and legal disciplines still *in statu nascendi* im their national legal orders – possibly, a new kind of Constructive Comparative Law is emerging. The volume gives an overview over the state of discussions on the various topics within the German (legal) academia.

The order of the reports presented in this book refers to the systematic order proposed by the International Academy of Comparative Law, while the internal structure of the reports in most cases is based on questionnaires sent out from the General Rapporteurs to the National Rapporteurs. Usually the National Rapporteurs have organised their reports along the list of questions in these questionnaires.

The considerable number of publications concerning the Asunción Congress does not only consist of the several collections of national reports published on behalf of the several national associations of comparative law. Many General Rapporteurs will bring together all the national reports and the general report in a separate volume later on, to which I hereby refer. Furthermore, the International Academy of Comparative Law will publish all the general reports in an extra volume, to which I also would like to refer the reader – therefore, the General Reports written by German General Rapporteurs are not included in this volume. On this way, this book lost the national report by Patrick Leyens, on the "Liability of credit rating agencies", because he subsequently became General Rapporteur for his section.

Editing this book on behalf of the German Association of Comparative Law I am indebted to Ms. Judith Zölke, Ms. Joana Näger and Mr. Lukas Zühlsdorff and the whole team of my chair, who supported me in preparing the various papers collected in this book for publication. I also owe thanks to the whole team of our publisher, who helped to bring about this book in time.

Bayreuth/Tröpolach, August 2022 Martin Schmidt-Kessel

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The Revival of the Rule of Law Issue[1]

Helmut Philipp Aust

I. Introduction

The framing of a topic as one of a "revival" can be interpreted in different ways. With respect to the Rule of Law, it could point to an increasing awareness of its importance as well as to mounting challenges to the Rule of Law. This country report interprets the common theme in the latter sense. Arguably, our time is one in which the Rule of Law is no longer necessarily seen to be an "unqualified, universal good".[2] Attacks against the Rule of Law come from different corners. To some critical academics, the Rule of Law – and related notions like the *Rechtsstaat* and the *État de droit* – are only a form of bourgeois camouflage, a veneer for protecting the interests of those who control the means of production in liberal-capitalist societies.[3] Others seem to speak out against the Rule of Law – or act against its spirit – out of a sense of populist entitlement.[4] A sentiment of "we the people" may challenge various forms of elite rule – and the Rule of Law seems to be perceived by some as just another form of rule which has allegedly become detached from democratic decisions.[5]

How these debates play out will depend on local context. Constitutional systems differ with respect to how they understand the Rule of Law, how it is conceptualized in the case law of courts and how the application of the Rule of Law is also embedded in a broader constitutional culture which is crucial especially for open-ended notions such as the Rule of Law.[6]

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[1] I would like to thank *Natalie Reglinski*, *Felix Schott* and *Viktoria Wollenberg* for valuable assistance in the preparation of this report which was finalized in early January 2022.

[2] *Thompson*, The Origin of the Black Act, 1975, 208; on this statement see *Tamanaha*, On the Rule of Law – History, Politics, Theory, 2004, 137–138.

[3] For a reflection of the remaining emancipatory potential of the Rule of Law see *Birkenkötter*, KJ 2021, 172 (with a cautious "yes" as answer).

[4] *Voßkuhle*, NJW 2018, 3154; *Frankenberg*, Autoritarismus – Verfassungstheoretische Perspektiven, 2020, 255 ff.; *Sajó*, Ruling by Cheating – Governance in Illiberal Democracy, 2021, 247 ff.

[5] *Müller*, Was ist Populismus? Ein Essay, 2016, 74 ff.; *Vokßuhle*, Demokratie und Populismus, in: Voßkuhle, Europa, Demokratie, Verfassungsgerichte, 2021, 219, 234; see also *Krieger*, EJIL 30 (2019), 971, 982.

[6] *Waldron*, Law and Philosophy 21 (2002), 137.

Approaching this topic from a German perspective might at first sight invite for some complacency. The idea of the *Rechtsstaat* seems to be almost unchallenged, an unqualified success story of German constitutional law. For a long time, German constitutional traditions were leaning more towards a Rule of Law-orientation that towards one of democracy.[7] The *Rechtsstaat* as an idea and as a constitutional concept has thrived across a number of different regimes in German history since the 19th century – with the exception of the period of National-Socialist rule between 1933 and 1945 and, in different ways, the time between the end of the Second World War and 1990 in the Eastern part of Germany. Even today, the institutions of the *Rechtsstaat* seem to be remarkably stable in Germany.[8] Yet, as this contribution will argue, any form of complacency could be misleading. A too self-assured German posture with respect to the Rule of Law derives in part from a tendency to externalize Rule of Law concerns. As a leading power in the EU and an apparently stable state, German actors in government, the judiciary, academia and civil society find it easy to criticise problematic trends of Rule of Law backsliding in Central and Eastern European countries. Rightly so, such forms of backsliding are identified as breaches of fundamental values of both EU primary law and of fundamental notions embodied in the European Convention on Human Rights.[9] It is to be expected that a state like Germany takes an active role in dialogues about such developments.[10] At the same time, many actors within Germany seem to be immune to criticism about deficiencies of the *Rechtsstaat* in Germany when it comes from the outside and, so to speak, "above". A danger emanating from such isolationistic tendencies is to adopt a too inwards-looking gaze and to thereby risk the foundations for European standards pertaining to the Rule of Law. Recent internal debates about *Rechtsstaatlichkeit* in Germany confirm this finding, as it will be shown against the backdrop of debates about the legal parameters for the fight against the Covid-19 pandemic and recent legislative attempts to further "material justice" (*materielle Gerechtigkeit*) through reforms of criminal procedure. As always, the choice of examples is subjective but I hope that they help to shed some light on current Rule of Law debates in Germany.

Accordingly, this country report will first provide some background to the Rule of Law debates in Germany, in particular its *Rechtsstaat* tradition (section

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[7] *Gärditz*, in: Herdegen/Masing/Poscher/Gärditz (eds.), Handbuch des Verfassungsrechts – Darstellung in transnationaler Perspektive, 2021, § 4 para. 23.

[8] See the overall thrust of the assessment by the European Commission, 2020 Rule of Law Report, Country Chapter on the rule of law situation in Germany, COM(2020) 580 final / SWD(2020) 304 final of 30 September 2020.

[9] See with respect to the EU *Kulick*, JZ 2020, 223 and with respect to the ECHR *Nußberger*, JZ 2018, 845; on the latter see also the contributions in *Aust/Demir-Gürsel* (eds.), The European Court of Human Rights – Current Challenges in Historical Perspective, 2021.

[10] Even a distinct legal debate about "rule of law transfers" is emanating in this context, see the contributions in *Holterhus* (ed.), The Law behind Rule of Law Transfers, 2019.

II.). It will then discuss how from a German perspective many current challenges to the Rule of Law seem to unfold primarily elsewhere. I discuss this under the rubric of an externalization of the Rule of Law crisis (III.), Following that the two already mentioned select challenges of the *Rechtsstaat* within Germany are assessed (IV.). Concluding observations will wrap up the country report.

At the outset, a brief remark on terminology is in order. The concept of the *Rechtsstaat* is not necessarily the same as the Rule of Law or the *Etat de droit*.[11] This contribution will use German terminology in italics and will differentiate between three related, yet different notions. Building on a definitional approach developed by Philip Kunig, this contribution will refer to the *Rechtsstaat* as a general ideal type of constitutionalism, to *Rechtsstaatlichkeit* as a descriptive term in order to refer to various concrete rules pertaining to the *Rechtsstaat* as articulated by relevant constitutional documents (such as the Basic Law) and to the *Rechtsstaatsprinzip* in order to refer to the constitutional principle set forth by the Basic Law.[12]

II. Of Watergates and Capstones: Traditions of the Rule of Law in Germany

The importance of the *Rechtsstaatsprinzip* in German constitutional law can only be understood against its historical tradition. As this country report is not primarily a historical contribution, it is, however, apt to first set out the current constitutional framework of this principle in the Basic Law (1.), before unearthing some of the most important lines in the development of the *Rechtsstaat* in constitutional thinking (2.). This section will finally assess how the current constitutional set-up has been lauded by many as the crowning achievement of the German *Rechtsstaat* tradition (3.).

1. The Starting Point: the Current Constitutional Set-up

Given its central importance, the *Rechtsstaat* is mentioned surprisingly indirectly in the Basic Law. It is evoked most clearly in Article 28, para. 1 of the Basic Law, where the *Rechtsstaat* figures among the fundamental principles that also the organization of statehood on the level of the *Länder* has to observe. Similarly, a requirement to respect *Rechtsstaatlichkeit* was included in Article 23, para. 1 of the Basic Law in its post-1992 emanation as a structural require-

[11] See also the succint overview in *Bäcker*, Rechtsstaat, in: Sellers/Kirste (eds.), Encylopedia of the Philosophy of Law and Social Philosophy, online edition, 2020, 1.

[12] *Kunig*, Der Rechtsstaat, in: Badura/Dreier (eds.), FS 50 Jahre Bundesverfassungsgericht, vol. II, 2001, 421, 424.

ment for the European Union to respect.[13] And in the year 2000, Article 16, para. 2 of the Basic Law was amended to the effect that it now refers to *Rechtsstaatlichkeit* as a condition for the extradition of German nationals to other member states of the EU and international tribunals.[14] None of the three provisions sets forth what *Rechtsstaatlichkeit* is supposed to mean. Instead, they presuppose what they aspire to regulate.[15]

The common approach in German constitutional law is to anchor the *Rechtsstaat* in Article 20 of the Basic Law which comprises a set of fundamental structural principles of the constitutional order.[16] Alongside affirmations of the principles of democracy, republicanism, federalism as well as the social nature of the state established by the Basic Law, Article 20, para. 3 stipulates: "The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice." In addition, the principle of the separation of powers as enunciated by Article 20, para. 2 is also seen to comprise important elements of the *Rechtsstaatsprinzip*: "All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies."[17]

These dry formulations hardly convey a clear picture of what the *Rechtsstaat* is supposed to embody. Most scholarly conceptions formulate a wide-ranging list of components which are arguably covered by or connected with the principle of the *Rechtsstaat*. These contain the principle of legality (*Vorrang des Gesetzes*) as well as the requirement that certain infringements of individual rights require a statutory basis (*Vorbehalt des Gesetzes*). Also the requirement of legal certainty and the principle of proportionality as a general requirement for the exercise of public authority in Germany are usually included.[18]

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

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

[15] *Von Arnauld*, Rechtsstaat, in: Depenheuer/Grabenwarter (eds.), Verfassungstheorie, 2010, § 21 para. 1; similarly *Sajó* (note 4), 237: "The RoL is a conceptual tool in search of its own content."

[16] This is reflected in the widespread practice of commentators of the Basic Law to deal with the *Rechtsstaatsprinzip* in the entries to Article 20, cf. for instance *Sommermann*, in: Huber/Voßkuhle (eds.), von Mangoldt/Klein/Starck – Grundgesetz-Kommentar, vol. II, 6th edn., 2018, Art. 20 paras. 226 ff.; *Kotzur*, in: Kotzur/Kämmerer (eds.), von Münch/Kunig – Grundgesetz-Kommentar, vol. I, 7th edn., 2021, Art. 20 paras. 137 ff.

[17] On separation of powers as a condition for *Rechtsstaatlichkeit* see *Grimm*, JZ 2009, 596, 599; see also *Schwerdtfeger*, Krisengesetzgebung – Funktionsgerechte Organstruktur und Funktionsfähigkeit als Maßstäbe der Gewaltenteilung, 2018, 177; but see *Möllers*, Gewaltengliederung – Legitimation und Dogmatik im nationalen und internationalen Rechtsvergleich, 2005, in which the connection between separation of powers and the *Rechtsstaatsprinzip* only plays a fairly marginal role.

[18] See, for instance, *Jarass*, in: Jarass/Pieroth, Grundgesetz-Kommentar, 16th edn., 2020, Art. 20 paras. 37 ff.; *Sachs*, in: Sachs (ed.), Grundgesetz-Kommentar, 9th edn., 2021, Art. 20 para. 74 ff.

These lists, some of them numbering more than 140 sub-principles[19], have led some scholars to question whether there is any coherent principle of the *Rechtsstaat* at all. Most famously, it was Philip Kunig who provocatively sounded the death knell for an overarching principle of the *Rechtsstaat* in 1986 as a matter of constitutional law *de lege lata*. Instead, he pleaded in favour of an approach which would focus on the individual constitutional rules as they stand.[20] Important as this contribution was, it has not been successful in changing the mainstream view in German constitutional thinking which still emphasizes the *Rechtsstaat* as an overarching principle.[21]

Focusing only on individual guarantees of *Rechtsstaatlichkeit* would entail the risk of doing away with constitutional principles of a general nature in general.[22] It is hence a question of methodological preferences and outlook; yet arguably with at least one important ramification, given that the constitutional principles set forth by Article 20 enjoy special constitutional protection under the so-called "eternity clause" of Article 79, para. 3 of the Basic Law.[23] In concrete terms, this means that at least a certain core content of the *Rechtsstaatsprinzip* is not subject to constitutional amendment. In addition, affirming the general nature of the *Rechtsstaatsprinzip* also means that it can function as a residual constitutional provision, providing for argumentative support when dealing with unanticipated situations.[24]

Irrespective of this consequence of the doctrinal construction of the *Rechtsstaatsprinzip*, the "summative approach", as it is described by Kunig, also risks cutting loose the *Rechtsstaat* from its origins in German constitutional history.[25] Against the background of this rich tradition, it seems unlikely that the founding fathers and mothers of the Basic Law understood *Rechtsstaatlichkeit* as being encapsulated merely in discrete individual provisions of the Basic Law.[26]

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[19] *Sobotta*, Das Prinzip Rechtsstaat – Verfassungs- und verwaltungsrechtliche Aspekte, 1997, 253 ff. (with a list of 142 features of *Rechtsstaatlichkeit* under the Basic Law).

[20] *Kunig*, Das Rechtsstaatsprinzip. Überlegungen zu seiner Bedeutung für das Verfassungsrecht der Bundesrepublik Deutschland, 1986; *Kunig* (note 12), 422–423.

[21] See, for instance, *Schmidt-Aßmann*, Der Rechtsstaat, in: Isensee/Kirchhof (eds.), Handbuch des Staatsrechts, vol. I, 1987, 987 (990 ff.); *Schulze-Fielitz*, in: Dreier (ed.), Grundgesetz-Kommentar, vol. II, 3rd edn., 2015, Art. 20 (Rechtsstaat) para. 45; *Nußberger*, Das Tafelsilber des Verfassungsstaats – Rechtsstaatlichkeit als europäischer Grundwert, in: Heinig/Schorkopf (eds.), 70 Jahre Grundgesetz – In welcher Verfassung ist die Bundesrepublik?, 2019, 191, 192; see however *Bäcker*, Gerechtigkeit im Rechtsstaat – Das Bundesverfassungsgericht an der Grenze des Grundgesetzes, 2015, 190–191.

[22] *Huber*, Rechtsstaat, in: Herdegen/Masing/Poscher/Gärditz (eds.), Handbuch des Verfassungsrechts – Darstellung in transnationaler Perspektive, 2021, § 6 para. 15.

[23] *Sachs* (note 18), Art. 20 para. 76.

[24] *Schulze-Fielitz* (note 21), Art. 20 (Rechtsstaat) para. 45; *Sachs* (note 18), Art. 20 para. 76; see also *Funke*, AöR 141 (2016), 637, 641.

[25] *Schulze-Fielitz* (note 21), Art. 20 (Rechtsstaat) para. 45.

[26] See also *Payandeh*, Judikative Rechtserzeugung – Theorie, Dogmatik und Methode der Wirkung von Präjudizien, 2017, 189–190, 197.

2. Traditions of the Rechtsstaat in German Constitutional Thinking

A standard account of the history of the *Rechtsstaat* in German constitutional thinking is likely to describe a series of ever-expanding moves, where today's material conception of the *Rechtsstaat* has developed out of previous, primarily formal conceptions which date back to the 19th century.[27] There is a grain of truth to such narratives, but they are at the same time somewhat of an oversimplification.[28]

The idea of the *Rechtsstaat* took hold in German public law thinking in the first half of the 19th century.[29] At the time, the notion embodied a formal dimension, but also a broader appeal to reason as a standard for measuring the exercise of governmental powers. To this extent, the idea of the *Rechtsstaat* was much more encompassing than just being a collection of formal guarantees. At least until the unsuccessful revolution of 1848 the *Rechtsstaat* was hence an aspirational symbol for a much broader overhaul of the system of government. It was mostly in the period of constitutional monarchies set in place at around and after the 1848 revolution that the very strong formal tradition of the *Rechtsstaat* took hold in German public law thinking. This tendency was accompanied by the lack of appeal of democratic thinking for many of the relevant actors at the time.[30]

The *Rechtsstaat* was a key concept for the 19th century *Bürgertum*, meant to preserve a sphere of economic and physical freedom from state interference.[31] Accordingly, a strong tradition developed that infringements in life, liberty and property required an act of parliament, but that also all other forms of the exercise of governmental authority depended on respecting the *rechtsstaatliche Form*, i.e. formal guarantees such as certainty of the law and the protection of legitimate expectations. In constitutional systems which kept close checks on democratic empowerment, i.e. through systems of census suffrage and the ex-

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[27] See, for instance, *Will*, Staatsrecht I, 2021, § 16 para. 6.

[28] For overviews on the historical development of the notion of the *Rechtsstaat* see *Scheuner*, Die neuere Entwicklung des Rechtsstaats in Deutschland, reprinted in: Forsthoff (ed.), Rechtsstaatlichkeit und Sozialstaatlichkeit – Aufsätze und Essays, 1968, 461 ff. [1960]; *Stolleis*, Rechtsstaat, in: Erler/Kaufmann (eds.), Handwörterbuch zur Deutschen Rechtsgeschichte, vol. IV, 1990, 367 ff.; *Hofmann*, Geschichtlichkeit und Universalitätsanspruch des Rechtsstaats, Der Staat 34 (1995), 1, 4–12; *Bäcker* (note 21), 130 ff.

[29] On earlier antecedents of the Rule of Law going back to antiquity see *Thomalla*, „Herrschaft des Gesetzes – nicht des Menschen". Zur Ideengeschichte eines staatsphilosophischen Topos, 2019, 39 ff.

[30] *Grimm*, Verfassung und Privatrecht im 19. Jahrhundert – Die Formationsphase, 2017, 196 [1979]; from the perspective of today's constitutional order see *Möllers*, Demokratie, in: Herdegen/Masing/Poscher/Gärditz (eds.), Handbuch des Verfassungsrechts – Darstellung in transnationaler Perspektive, 2021, § 5 para. 106; *Dreier*, Verfassungskontroversen der Weimarer Republik, in: Dreier/Waldhoff (eds.), Weimars Verfassung – Eine Bilanz nach 100 Jahren, 2020, 9, 26.

[31] *Kunig* (note 20), 22.

clusion of women from the vote, the *Rechtsstaat* was able to make an astonishing career as a defining feature of German constitutional thinking. It can be wondered to what extent a certain fixation on "governing orderly", through well-defined channels of bureaucratic routines, helped to establish the *Rechtsstaat* as a notion of German public law par excellence.[32]

Read from the 20th and 21st centuries, this story is at times cut off from its beginnings – and hence the *Rechtsstaat* was imagined to have originated with its emphasis for the formal side of things. But especially in the light of the developments in the 20th century, it is important to remember the broader basis of original conceptions of the *Rechtsstaat*. It was by no means just bureaucracy with a better name, but as Ernst-Wolfgang Böckenförde highlighted in his influential essay on the historical evolution of the concept, a holistic concept which cannot be reduced to either a formal or a material side.[33] To Böckenförde, the *Rechtsstaat* is essentially a *Schleusenbegriff*, a watergate-like concept, meant in the sense that while its meaning is open-textured, it contains a well-defined core and does not lose its distinct identity despite different political content being poured into the forms of the *Rechtsstaat*. Böckenförde magisterially traced how this holistic notion of the *Rechtsstaat* gave way to a more formal understanding in the 19th century and to remaining more or less stable until the end of the Weimar era.

In this regard, it can be questioned whether the Constitution of the Weimar Republic did not yield any major impulses for thinking about the *Rechtsstaat*, as it is at times held in the literature.[34] The Weimar Constitution contained a wide-ranging set of social rights, which were not deemed to be enforceable as such but which indicated that the Rule of Law tradition could be combined with other forms of proactive state measures.[35] It was during this phase that Hermann Heller coined the phrase of the "*soziale Rechtsstaat*", even if this formulation was developed with a certain sense of scepticism on his part on the practical meaning of the social rights set forth by the Weimar Constitution.[36] It was also during the Weimar time that Carl Schmitt formulated his highly influential

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[32] *Mayer*, Deutsches Verwaltungsrecht, Vol. 1, 3rd edn., 1924, 58 (*Rechtsstaat* as the „Staat des wohlgeordneten Verwaltungsrechts"); this position is influential until today: see, for instance, *Meinel*, Das Bundesverfassungsgericht in der Ära der großen Koalition: Zur Rechtsprechung seit dem Lissabon-Urteil, Der Staat 60 (2021), 43, 46 (idea of the *Rechtsstaat* as an extrapolation of administrative law-oriented conceptions of legality).

[33] *Böckenförde*, Entstehung und Wandel des Rechtsstaatsbegriffs, in: Böckenförde, Recht, Staat, Freiheit, 1991, 143, 148 [1969].

[34] *Huber* (note 22), para. 10.

[35] See further *Mangold*, Gleichheitsrechte und soziale Grundrechte: Internationale und vergleichende Dimension, in: Kleinlein/Ohler (eds.), Weimar international – Kontext und Rezeption der Verfassung von 1919, 2020, 119, 126; *Meinel*, Sozialer Rechtsstaat und soziale Grundrechte: Verfassung und soziale Frage in Weimar, in: Dreier/Waldhoff (eds.), Weimars Verfassung – Eine Bilanz nach 100 Jahren, 2020, 197.

[36] *Heller*, Rechtsstaat oder Diktatur?, in: Heller, Gesammelte Schriften, vol. 2, 2nd edn.

views on the relationship between the political and non-political parts of constitutional law in his 1928 treatise "*Verfassungslehre*". To Schmitt, the *Rechtsstaat* embodied the non-political part of the Constitution in an almost ideal-typical way.[37] Through this characterisation, Schmitt contributed considerably to the above-mentioned standard narrative of *Rechtsstaatlichkeit* being a primarily formal and non-political notion which, consequently, is supposed to stand in considerable tension with the idea of democracy.[38]

In the twelve years of National-Socialist rule, the *Rechtsstaat* was tested most severely and ultimately done away with.[39] In the words of Jens Meierhenrich, the *Rechtsstaat* was both racialized and ultimately, if anything, replaced by a very idiosyncratic form of *rule by law* rather than anything resembling the *Rule of Law*.[40] Attempts by National-Socialist jurists to salvage parts of the idea of the *Rechtsstaat* and adapt it to the requirements of the new regime can best be seen as initiatives aiming at winning over "bourgeois" jurists who had not yet made up their minds about the National-Socialist government.[41]

3. Culmination of a Tradition? The Rechtsstaat under the Basic Law

After the civilizational breakdown of National-Socialist rule and the various forms of state crime it brought about, it seemed to be a given that a new system of government would need to be built around notions of the Rule of Law. Yet, it was not entirely clear what this was supposed to mean. Also in this regard, the way towards the adoption of the Basic Law in 1949 was not straightforward.[42]

What emerged as the new constitutional order was a blend of different influences, some stemming from long-established German legal traditions, some deriving from the impact of the occupying powers which communicated their preferences for the new constitutional order in various forms to those involved

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1992, 443, 450 [1929]; on the slow reception of this phrase in the Federal Republic see *Stolleis*, Geschichte des öffentlichen Rechts in Deutschland, Vierter Band 1945–1990, 2012, 283.

[37] *Schmitt*, Verfassungslehre, 1928, 125.

[38] See further *Hofmann*, Legitimität gegen Legalität: der Weg der politischen Philosophie Carl Schmitts, 6th edn., 2020, 40.

[39] For a thorough assessment of discourses on the *Rechtsstaat* in that time see *Bäcker* (note 21), 147–160.

[40] *Meierhenrich*, Remnants of the Rechtsstaat – An Ethnography of Nazi Law, 2018; on the tension between *Rule of Law* and *rule by law* see *Tamanaha* (note 2), 92–93; on the racialization of the entire legal system *Liebscher*, Rasse im Recht – Recht gegen Rassismus – Genealogie einer ambivalenten rechtlichen Kategorie, 2021, 181.

[41] *Stolleis* (note 28), 374; *Stolleis*, Geschichte des öffentlichen Rechts in Deutschland, Dritter Band 1914–1945, 1999, 330–338; see also *von Arnauld* (note 15), para. 8 who speaks of a "Gespensterdebatte".

[42] See further *Hailbronner*, Traditions and Transformations – The Rise of German Constitutionalism, 2015, 76ff.; *Rensmann*, Wertordnung und Verfassung – Das Grundgesetz im Kontext grenzüberschreitender Konstitutionalisierung, 2007, 43–46.

in the drafting of the new constitution.[43] Eventually, the Basic Law committed itself to the notion of *Rechtsstaatlichkeit*, which is not entirely synonymous with related concepts of the Rule of Law or the *Etat de droit*, but overlaps with them in significant parts.[44] Yet, it is also clear from the debates in the Parliamentary Council, the body which drafted the Basic Law, that *Rechtsstaatlichkeit* would not simply mean the return to a status quo ante, i.e. the time before the National Socialists came to power in 1933.[45]

At least two expansive moves enriched the concept: First of all, the strong role attributed to the protection of fundamental rights in Articles 1 to 19 of the Basic Law underlined that a purely formal understanding of the *Rechtsstaat* would no longer be apposite. Certainly, also the Weimar Constitution provided for fundamental rights. But their normative status and enforceability were greatly enhanced under the Basic Law. This occurred due to the introduction of a constitutional complaint procedure (activated from 1951 onwards)[46] as well as by virtue of the guarantee of Article 19, para. 4 of the Basic Law. This latter provision stipulates that in the case of any violation of a person's right by public authority, recourse to the courts is available – a guarantee dubbed the "capstone" of the Rule of Law in Germany ("*Schlußstein im Gewölbe des Rechtsstaats*").[47]

Second, the concept of the *Rechtsstaat* was coupled with an emphasis on *Sozialstaatlichkeit*, i.e. a social dimension of statehood. This latter development led to a considerable process of soul searching in the German public law scholarship, with more conservative voices lamenting a detrimental impact of this notion on established concepts of the liberal *Rechtsstaat*. Especially Ernst Forsthoff, a disciple of Carl Schmitt and himself not uncompromised after his early flirtations with National Socialism in 1933, detected a turn away from the bourgeois concept of the *Rechtsstaat*.[48] In contrast, Wolfgang Abendroth, a constitutional law scholar with more socialist leanings, emphasized the interrelated nature of the *Rechtsstaat* and the *Sozialstaat* under the Basic Law.[49] At the

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[43] For an overview see *Hesse*, Die Verfassungsentwicklung seit 1945, in: Benda/Maihofer/Vogel (eds.), Handbuch des Verfassungsrechts, 2nd edn., 1994, § 3; for an English language overview of the conditions under which the Basic Law was formulated see also the "prologue" in *Collings*, Democracy's Guardians – A History of the German Federal Constitutional Court, 1951–2001, 2015, xiv ff.

[44] *Schulze-Fielitz* (note 21), Art. 20 (Rechtsstaat) para. 5; for a concise and thoughtful exploration of commonalities and differences see *von Arnauld* (note 15), paras. 12–16; for a monographic treatment see *Heuschling*, Etat de droit, Rechtsstaat, Rule of Law, 2002; furthermore *Bleckmann*, GYIL 20 (1977), 406.

[45] *Stolleis* (note 36), 213–214; *Bäcker* (note 21), 161; see also in this context *von Arnauld* (note 15), para. 10.

[46] See further *Nußberger*, JZ 2010, 533.

[47] *Thoma*, Über die Grundrechte im Grundgesetz für die Bundesrepublik Deutschland, in: Wandersleb/Traumann (eds.), Recht-Staat-Wirtschaft, vol. 3, 1951, 9.

[48] *Forsthoff*, VVDStRL 12 (1954), 8.

[49] *Abendroth*, Zum Begriff des demokratischen und sozialen Rechtsstaats im Grundgesetz

time, he seemed to be in the minority position and his writings are still much less part of the mainstream than Forsthoff's.[50] But, as a recent contribution by Constitutional Court Judge Astrid Wallrabenstein underlines, despite the neglect of Abendroth in the academic discourse, his position has ultimately won the day.[51] Still today, the normative potential of the principle of the *Sozialstaat* is regarded with some scepticism in parts of the academic literature.[52] Increasingly, however, the case law of the Constitutional Court has embraced it.[53] Accordingly, it is no longer à jour to pretend that *Rechtsstaat* and *Sozialstaat* would be irreconcilable opposites and that a premium must be put on the *Rechtsstaat*.[54]

A similar story of rapprochement can be told for the relationship between the principles pertaining to democracy on the one hand and the *Rechtsstaat* on the other. Long-held to be in contradiction, it is today commonly held that under the constitutional order of the Basic Law one cannot be had without the other.[55] As Christoph Möllers has formulated, the principle of democracy determines who gets to decide, the *Rechtsstaatsprinzip* is about the forms in which such decisions take place.[56]

At the same time, debates on the *Rechtsstaat* have gradually led to a certain fatigue with established concepts. For quite some time, the possibility to challenge all forms of public conduct before the courts was seen to be the ultimate success story of the *Rechtsstaat* in German constitutional law. From the 1990s

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der Bundesrepublik Deutschland, reprinted in: Forsthoff (ed.), Rechtsstaatlichkeit und Sozialstaatlichkeit – Aufsätze und Essays, 1968, 114 [1954].

[50] See further on the controversy between Forsthoff and Abendroth *Stolleis* (note 36), 280–281; *Heinig*, Der Sozialstaat im Dienst der Freiheit. Zur Formel vom „sozialen Staat" in Art. 20 Abs. 1 GG, 2008, 22ff.; *Möllers*, Der vermisste Leviathan – Staatstheorie in der Bundesrepublik, 2008, 40; *Meinel*, Der Jurist in der industriellen Gesellschaft – Ernst Forsthoff und seine Zeit, 2nd edn., 2012, 359ff.

[51] *Wallrabenstein*, in: Herdegen/Masing/Poscher/Gärditz (eds.), Handbuch des Verfassungsrechts – Darstellung in transnationaler Perspektive, 2021, § 7, para. 62; see also already *Kunig* (note 20), 29; see further *Meinel*, Verteilung als Verfassungsfrage. Zur Entwicklung einer Problemstellung, in: Boysen/Kaiser/Meinel (eds.), Verfassung und Verteilung – Beiträge zu einer Grundfrage des Verfassungsverständnisses, 2015, 19, 29; *Volkmann*, Grundzüge einer Verfassungslehre der Bundesrepublik Deutschland, 2013, 261–262.

[52] See, for instance, *Wittreck*, in: Dreier (ed.), Grundgesetz-Kommentar, vol. II, 3rd edn., 2015, Art. 20 (Sozialstaat) para. 24; *Heinig* (note 50), 12ff.; *Schorkopf*, JZ 2008, 20, 28 (with a call to focus on the dialectical development of *Rechtsstaat* and welfare legislation in the 19th century).

[53] A landmark decision is BVerfGE 125, 175 – Hartz IV (2010) in which human dignity and the guarantee of *Sozialstaatlichkeit* are coupled in order to provide a ground for a fundamental right to minimum subsistence; for a comparative constitutional law perspective on the decision see *Nolte/Aust*, European exceptionalism?, Global Constitutionalism 2 (2013), 407, 425.

[54] *Wallrabenstein* (note 51), para. 68; see also *Calliess*, Rechtsstaat und Umweltstaat: zugleich ein Beitrag zur Grundrechtsdogmatik in mehrpoligen Grundrechtsverhältnissen, 2001, 58–65.

[55] *Möllers* (note 30), para. 87.

[56] *Möllers*, VerwArch 90 (1999), 187, 201.

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

III. Externalizing the Rule of Law Crisis

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

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

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

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

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

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

one of them. While early on it provided for some conceptual head-wringing whether this concept could be plausibly applied to the EU[62], this debate seems to have receded somewhat into the background.[63] Despite not being a state, the EU commits itself to *Rechtsstaatlichkeit* and cognate concepts in Article 2 TEU, depending on the respective language version of the Treaty.

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

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

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

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

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

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

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

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

crisis discourses[68], ranging from the Euro crisis and the future of Greece as a member state participating in the Euro[69] to the "migration crisis" of the years immediately following 2015[70] and the United Kingdom leaving the EU[71]. In each of these debates and discourses, much was at stake – be it whether the EU needed a better democratic grounding, whether the big jump towards the Constitutional Treaty should be taken, what the ever-elusive concept of solidarity means when weighed against "Northern" fixations on austerity and budgetary rigor and what future the Common European Asylum System might have.

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

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

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

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

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

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

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

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

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

of Poland and Hungary against triggering sanctions against either of them.[75] Accordingly, the Commission started various infringement proceedings against the two states, giving rise to CJEU case law in which Article 19 TEU was re-interpreted with a constitutionalist mindset[76], highlighting the importance of the proper functioning of domestic judiciaries for the *Gerichtsverbund*[77] that EU and national courts form together.[78] In addition, legislation has been adopted which tries to introduce a conditionality mechanism for access to EU funds, requiring compliance with the core value of *Rechtsstaatlichkeit* as set forth by Article 2 TEU.[79] At the time of writing, this legislation remains the subject of ongoing legislation before the CJEU.[80]

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

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

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

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

[77] This notion builds on *Voßkuhle*, NVwZ 2010, 1.

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

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

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

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

[82] BVerfGE 154, 17 – PSPP (2020).

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

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

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

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

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

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

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

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

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

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

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

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

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

[90] See Press Release of the European Commission of 2 December 2021, available at https://ec.europa.eu/commission/presscorner/detail/en/inf_21_6201?fbclid=IwAR1w6wbHhdcA5vxlqXTohUjxcgF7mJbpSBxTXjxaNWXpMJ0MIzb9Zyuwv7I.

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

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

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

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

[95] *Barczak*, JZ 2020, 1125, 1127.

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

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

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

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

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

1. The fight against the Corona pandemic and the Rechtsstaat

Across the globe, societies have been in the grip of the corona virus. Different states have adopted different regulatory techniques whose legality needs to be assessed against the backdrop of the respective constitutional frameworks[98], but also in the light of commitments these states have entered into in terms of international human rights law.[99] If we focus on the legal debate about the pandemic in Germany, it can be noticed that a certain isolationist tendency that we have already diagnosed with respect to other Rule of Law-related issues, has played out here too. The international legal framework for the fight against the pandemic did not receive a lot of attention, neither among the general public (which is not surprising), nor in more academic circles.[100] A domestic focus on the Basic Law and issues of fundamental rights protection and concerns about *Rechtsstaatlichkeit* took centre-stage.[101]

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

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

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

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

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

a) Different phases of the pandemic

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

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

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

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

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

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

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

federal level. Such forms of guidance were exercised throughout that winter through ever more frequent meetings of an informal body consisting of the Chancellor and the prime ministers of the *Länder*. Without a formal competence to decide on measures, this grouping nonetheless exercised considerably factual influence. Yet, it was not always successful in exerting a sufficient compliance pull to curb the steeply rising numbers of infections in early 2021.[107]

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

A further phase of the fight against the pandemic commenced in parallel to the interregnum between the outgoing Merkel government and the new "traffic light" coalition formed between the Social Democrats, the Green Party and the Liberals in the autumn of 2021. In particular the latter party had built their electoral campaign on opposition against alleged legislative and executive overreach in fighting the pandemic, without however questioning the existence and seriousness of the virus as such (as the right-wing "Alternative for Germany" has since the spring of 2020). The political constellation after the federal elections in September 2021 then pushed the new governing parties to ease the regulatory framework as the pandemic seemed to be under control. Soon the new government had to realize that this was premature which led to considerable legislative back and forth between October and December 2021.[110]

b) Selected concerns pertaining to Rechtsstaatlichkeit in the pandemic

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

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[107] *Kingreen* (note 104), 2768.

[108] This model was suggested early on by Christoph Möllers in an interview, see *Amann*, „Rechtlich betrachtet braucht man für einen Lockdown keine Ministerpräsidenten – Interview mit Christoph Möllers", Der Spiegel of 10 February 2021, available at https://www.spiegel.de/politik/deutschland/christoph-moellers-fuer-lockdown-braucht-angela-merkel-aus-juristischer-sicht-keine-ministerpraesidentenkonferenz-a-f9424cc8-540f-4b34-a6c8-d839ff4fc102.

[109] *Kingreen* (note 104), 2770.

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

aa) Confusion over the legal sources of regulation

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

bb) Certainty of the law

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

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

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

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

[113] *Wißmann*, JöR N.F. 69 (2021), 619.

[114] *Dreier*, DÖV 2021, 229, 235 ff.

[115] *Volkmann*, NJW 2020, 3153, 3157–58.

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

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

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

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

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

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

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

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

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

cc) The fight against the pandemic as a state of exception?

A third concern relates to a broader assessment of the development of the constitutional system in pandemic times. Here, two competing schools of thought can be identified – even though a disclaimer is warranted from the outset that this characterization involves a fair degree of oversimplification.

For one critical stream of voices, the Federal Republic has witnessed a major transformation of an unprecedented extent. These critical voices have diagnosed the coming into existence of a "state of exception" in all but its name.[122] The "general rule of distribution" between the state and its citizens would have been upended when it comes to the question whether the exercise of freedom or its restriction needs to be justified.[123] Quite a few of these critical voices also diagnose that the administrative courts as well as the Federal Constitutional Court would have exercised too much judicial self-restraint and would have given the executive and the legislative a degree of leeway which would have been inconceivable under the applicable standards before the pandemic. This latter criticism culminated in very critical reactions to two decisions that the Federal Constitutional Court passed on the so-called "federal emergency break" in November 2021.[124] The most drastic comment came from Oliver Lepsius, an influential constitutional law scholar and public intellectual who diagnosed nothing less than a "reconstruction of the *Rechtsstaat*" in an op-ed piece for the Frankfurter Allgemeine Zeitung.[125]

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[122] This idea was introduced into the legal discourse early on by *Volkmann*, Der Ausnahmezustand, Verfassungsblog, 20 March 2020, available at https://verfassungsblog.de/der-ausnahmezustand/; *Mayen*, NVwZ 2020, 828; *Rennert* (note 112), 1269; tentatively in the early phases of the pandemic *Kotzur*, in: Kämmerer/Kotzur (eds.), von Münch/Kunig – GG-Kommentar, vol. I, 7th edn., 2021, Art. 20 paras. 174–176; debates on the adequateness of the state of exception as an analytical criterion coincided with the publication of important monographs on the topic which had been completed before the outbreak of the pandemic: *Kaiser*, Ausnahmeverfassungsrecht, 2020; *Barczak*, Der nervöse Staat. Ausnahmezustand und Resilienz des Rechts in der Sicherheitsgesellschaft, 2020. To Anna-Bettina Kaiser, the pandemic did not warrant to speak of a state of exception, see *Jestaedt/Kaiser*, Kritik ja, Krise nein – Das Staatliche Pandemiemanagement im Lichte des Verfassungsrechts, Verfassungsblog of 31 March 2021, available at https://verfassungsblog.de/kritik-ja-verfassungskrise-nein/.

[123] With reference to the "rechtsstaatliche Verteilungsregel" formulated by Carl Schmitt in his Verfassungslehre (1928, 126 ff.): *Mangold* (note 101), 9; see also the drastic formulation of a "total prerogative for protection" ("totaler Schutzvorbehalt") in *Wißmann*, JöR N.F. 69 (2021), 619, 620.

[124] BVerfG, Decision of 19 November 2021, Cases 1 BvR 781/21 and others – Bundesnotbremse I; Decision of 19 November 2021, Cases 1 BvR 971/21 and 1 BvR 1069/21 – Bundesnotbremse II (not yet published).

[125] *Lepsius*, Frankfurter Allgemeine Zeitung, 10 December 2021, 9; many considerations developed in this short piece build on a more fundamental critique in *Lepsius*, JöR N.F. 69 (2021), 705; for a rejoinder to the F.A.Z. article see *Reimer*, F.A.Z. Einspruch of 15 December 2021, available at https://www.faz.net/einspruch/exklusiv/einspruch-exklusiv-groteske-kritik-an-karlsruhe-17686510.html.

Unsurprisingly, this critical outlook on the constitutional implications of the fight against the pandemic is not shared in general.[126] Whereas most scholarly contributions on the reaction against the pandemic are ready to acknowledge that not all exercises of governmental authority were lawful, few go so far as to diagnose a general redesign of the *Rechtsstaat*.[127] Accordingly, a significant number of contributions reject the rhetoric of the Ausnahmezustand.[128]

What to make of these two perspectives? First of all, it is important to mention that it is not possible to divide the entire group of German constitutional law scholars neatly into one group or the other. There are many shades in-between and everything else would be a significant problem of its own. As Thorsten Kingreen has underlined, whether "the *Rechtsstaat* has worked as it should" is not a question which can easily be assessed from the perspective of constitutional law scholarship. Instead, legal scholars would tend to focus primarily on individual measures and their legality. But, as Kingreen also emphasises, they can be susceptible to analysing underlying trends and shifts.[129] I would submit that a significant part of the constitutional law scholarship has attempted to do just that.[130] However, I would caution against too sweeping generalizations in the second year of the pandemic. Also in comparative perspective, there seems to be a mismatch between the intensity of restrictions ordained for the fighting of the pandemic and the concerns about an undermining of fundamental rights and the *Rechtsstaat* in Germany. At times, the severity of some academic criticism has spilled over into a public discourse where some forms of protest can only be labelled as idiosyncratic (at best). To be sure, there is no responsibility of academic commentators for the abuse of their positions by other participants in a public debate.[131] But it seems that a particular form of an overlegalized culture in Germany has generated an at times obsessive focus on whether individ-

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[126] It is at times insinuated that the state of exception thesis would be shared quasi unanimously among constitutional law scholars, see, e.g., *Rennert* (note 112), 1269.

[127] For a particularly well-balanced assessment see *Dreier* (note 114); see also *Schuppert*, Die Corona-Krise als Augenöffner – Ein rechts- und damit zugleich kultursoziologischer Essay, JöR N.F. 69 (2021), 439, 444; *Ruschemeier* (note 103), 459 (with a particular emphasis on the precarious epistemic basis for governance in the pandemic).

[128] *Dreier* (note 114), 229–230; *Kaiser* , RuP 57 (2021), 7; *Gusy*, DÖV 2021, 757; *Kluckert* (note 105), § 2 paras. 85–87.

[129] *Kingreen* (note 104), 2767.

[130] See also *Ruschemeier* (note 103), 452.

[131] This was a categorical mistake by some political actors who blamed constitutional law scholars for contributing to a radicalization of protest, see *Hirte*, Auch Sachverständige tragen Verantwortung für die Gesellschaft und sind Teil der politischen Willensbildung, Verfassungsblog of 23 January 2021, available at https://verfassungsblog.de/auch-sachverstandige-tragen-verantwortung-fur-die-gesellschaft-und-sind-teil-der-politischen-willensbildung/; *Krings*, Kritik ist kein Selbstzweck, Verfassungsblog of 2 April 2021, available at https://verfassungsblog.de/kritik-ist-kein-selbstzweck/; for critique see *Rixen*, Heribert Hirte und die Wissenschaft, Verfassungsblog of 20 January 2021, https://verfassungsblog.de/heribert-hirte-und-die-wissenschaft/.

ual measures undertaken in the fight against the pandemic conform to ideals of the *Rechtsstaat*. The essence of a pandemic is its pervasiveness. This has inevitable consequences for the constitutional order. Admitting so much does not mean that a state of exception has taken hold.

2. A Lack of Rechtsstaatskultur: The Act for the Realization of Material Justice

The second example for recent Rule of Law related discourses in Germany pertains to a less prominent issue.[132] The example concerns the addition of an additional ground to reopen criminal proceedings even after an acquittal which has acquired force of law. Until late 2021, § 362 of the German Code on Criminal Procedure (StPO) only included four such grounds, which related to manifest deficiencies in the way in which a trial was conducted or concerned a credible confession of a person who had been acquitted. This state of the law goes back to the late 19th century and was unchanged for the most time since, with infamous exceptions in the time between 1933 and 1945 where National-Socialist legislation provided for the possibility to reopen cases where the "*gesundes Volksempfinden*" so required.[133] It was before the background of this experience that the Basic Law introduced a special provision on the principle of *ne bis in idem* in Article 103, para. 3 which has to date been understood by most scholars in constitutional law to be a bar against introducing further grounds for reopening criminal court cases beyond the state of the law as it existed before the National Socialists came to power.[134] Art. 103, para. 3 of the Basic Law is a particular emanation of the *Rechtsstaatsprinzip*[135], setting forth that the considerations of material justice must yield to the stability of the law, i.e. the legally protected expectation that a criminal case is closed once and for all if a charged individual has been acquitted.[136]

In the 19th legislative period of the Bundestag (2017–2021), a motion for a new ground for opening up closed cases pertaining to murder and a number of international crimes was introduced into parliament as a new § 362 No. 5 of the Code on Criminal Procedure.[137] This initiative took place before the background of a

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[132] Some parts of this subsection were published previously as *Aust*, "Realizing Material Justice": Ne Bis in Idem and the Rule of Law under Pressure in Germany?, Verfassungsblog of 3 January 2022, available at https://verfassungsblog.de/realizing-material-justice/.

[133] On this historical dimension see *Brade*, AöR 146 (2021), 130, 136; *Remmert*, in: Dürig/Herzog/Scholz, Grundgesetz-Kommentar, 85th instalment, 2018, Art. 103 Abs. 3 para. 18.

[134] *Nolte/Aust*, in: Huber/Voßkuhle (eds.), von Mangoldt/Klein/Starck – Grundgesetz-Kommentar, vol. III, 7th edn., 2018, Art. 103 para. 178 with further references.

[135] *Schulze-Fielitz*, in: Dreier (ed.), Grundgesetz-Kommentar, vol. III, 3rd edn., 2018, Art. 103 III, para. 37; *Remmert* (note 133), Art. 103 Abs. 3 para. 7; *Kunig/Saliger*, in: Kämmerer/Kotzur (eds.), von Münch/Kunig – Grundgesetz-Kommentar, vol. II, 7th edn., 2021, Art. 103 para. 63.

[136] *Schulze-Fielitz* (note 135), Art. 103 III para. 35.

[137] See BT-Drs. 19/30399 of 8 June 2021; BGBl. 2021 I, 5252.

tragic murder of a 17-years old girl in 1981. New means of DNA analysis seem to confirm that a man who was tried but eventually acquitted in the 1980s was indeed the perpetrator. After the Bundestag passed this piece of legislation in the summer of 2021, it took a remarkable period of time before the Federal President Frank-Walter Steinmeier signed it into law on 22 December 2021, not without the unusual (but not unprecedented) step of voicing his concerns about the constitutionality of the act in a press statement.[138]

This contribution is not the right place to go into the doctrinal details of the constitutionality of the act of legislation.[139] The proposed legislation was subject to numerous academic contributions and its conformity with the Basic Law were also the subject of an expert hearing in the Federal Parliament's legal committee in which views differed on the matter.[140] What is more relevant for the present report, is the justification and rhetoric with which this piece of legislation was accompanied. The draft bill was introduced into Parliament by the parliamentary groups of the Christian Democrats and the Social Democrats, at the time the parties forming the coalition government. Remarkably, the Federal Ministry of Justice refused to participate in the legislative process for the reason of constitutional doubts on the matter.

The act was introduced into Parliament with the title "*Gesetz zur Herstellung materieller Gerechtigkeit*" – meaning that the Act was literally supposed to realize material justice. The explanation of the legislative initiative further sets out that "legal peace" ("*Rechtsfrieden*") and the "sense of justice of the population" would suffer as much in the case of an unwarranted acquittal as in the case of a conviction which turns out to be unjustified. The argumentation culminates in various and repeated findings that acquittals would be "unbearable" ("*unerträglich*") if the person acquitted would in reality be the perpetrator. As already convincingly argued by Björn Schiffbauer, it is this rhetoric of unbearableness and the quest for material justice which makes this seemingly innocuous piece of legislation damaging for the *Rechtsstaat*. It plays with the idea that material justice can be optimized with a simple twitch of the legislator. And what is worse, it insinuates that the previous legislative framework was unbearable and unjust.[141] By labelling these arguments as attempts to optimize material justice and the *Rechtsstaat*, the legislation confuses *Rechtsstaatlichkeit* with

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[138] See Press Release of 22 December 2021, available at https://www.bundespraesident.de/SharedDocs/Pressemitteilungen/DE/2021/12/211222-Gesetzesausfertigung-StPO-362.html;jsessionid=C847971D70523779C8D8988B2A277DE4.1_cid323.

[139] For critical statements see *Aust/Schmidt*, ZRP 2020, 251; *Slogsnat*, ZStW 133 (2021), 741; *Brade* (note 133); *Eichhorn*, KriPoz 6 (2021), 357; for criminal law scholars arguing in favour of the constitutionality see *Kubiciel*, GA 2021, 380; *Hoven*, JZ 2021, 1154.

[140] For the expert statements by *Aust, Buermeyer, Conen, Eisele, Gärditz, Kubiciel* and *Schädler* see here: https://www.bundestag.de/dokumente/textarchiv/2021/kw25-pa-recht-wiederaufnahme-strafverfahren-847544.

[141] *Schiffbauer*, NJW 2021, 2097.

enforcement of the law, a category mistake which is, unfortunately, popular these days.[142]

This piece of legislation thereby gives us a snapshot of broader debates on the relationship between the *Rechtsstaat* and justice, between positive constitutional law and natural law in German academia. The early years of the Federal Republic witnessed a revival of natural law approaches, which were supposedly a reaction to the positivist inclinations of lawyers in the late Weimar era as well during National Socialism.[143] Today, it is the prevailing view that this criticism of positivism was eventually misguided as, for instance, the rise of the National Socialists and their grip on the judiciary had nothing to do with positivism properly understood, but was instead based on an anti-positivistic turn to interpreting vague general provisions of the law in line with National Socialist ideology.[144]

The *Gesetz zur Herstellung materieller Gerechtigkeit* is blind towards history in a dual sense: It overlooks, first, that it builds unwittingly on role models from National Socialist time and, to make matters worse, then works with vocabulary inspired by Gustav Radbruch's famous formula how to distinguish between law and non-law, justice and injustice in the transitional period after massive state crime.[145] When writing about the continuing authority of law from the Nazi era, Radbruch coined the expression of unbearableness which, vague as it is, served to distinguish those situations where legal security and stability protected also legal decisions from the Nazi era from those where a correction would need to take place.[146]

Ultimately, this piece of legislation confuses law and justice. It portrays a misguided sense of the relationship between the *Rechtsstaat* and justice. It might be uncontroversial to hold that the aim of all state conduct in a *Rechtsstaat* is justice.[147] But justice should not be an argument within the ordinary legal discourse. A *Rechtsstaat* proceduralizes claims for justice in the forms of the law.[148]

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[142] See also *Möllers*, Freiheitsgrade – Elemente einer liberalen politischen Mechanik, 3rd edn., 2021, 209; for a differentiated view see *Nußberger* (note 21), 195.

[143] For a thorough assessment of this natural law revival see *Foljanty*, Recht oder Gesetz – Juristische Identität und Autorität in den Naturrechtsdebatten der Nachkriegszeit, 2013.

[144] See the seminal contribution by *Rüthers*, Die unbegrenzte Auslegung – Zum Wandel der Privatrechtsordnung im Nationalsozialismus, 8th edn., 2017, especially at 98–99 on the limited explanatory value of positivism; see also *Bäcker* (note 21), 163, 166.

[145] This point was already made in the expert hearing of the Federal Parliament's Legal Committee expert hearing by *Conen* (note 140).

[146] *Radbruch*, SJZ 1946, 105; see further *Bäcker*, Rechtssicherheit oder Gerechtigkeit – Von der Radbruchschen Formel zurück zum Primat der Rechtssicherheit, in: Schuhr (ed.), Rechtssicherheit durch Rechtswissenschaft, 2014, 34.

[147] *Huber* (note 22), para. 66; see also *Kunig* (note 20), 362 with an emphasis on the procedural dimension.

[148] *Hesse*, Der Rechtsstaat im Verfassungssystem des Grundgesetzes, in: Hesse et al. (eds.), Staatsverfassung und Kirchenordnung – Festgabe für Rudolf Smend zum 80. Geburtstag am 15. Januar 1962, 1962, 71, 77; see also *Scheuner* (note 28), 488; *Sommermann*, Jura 1999, 337;

In the context of the principle of *ne bis in idem*, it is, in addition, the Basic Law itself which has made a decision on the appropriate balance between justice and legal security. The *Gesetz zur Herstellung materieller Gerechtigkeit* flies in the face of this premeditated balancing exercise area undertaken by the Constitution itself.[149] The act and the public debate accompanying its creation reveal a lack of respect for the formal dimension of the *Rechtsstaat*. As opposed to the seemingly supreme goal of realizing material justice, the more formal dimensions of the *Rechtsstaat* seem to be of secondary importance to some actors.[150]

3. Interim conclusion

This section of the contribution has presented two distinct examples of how concerns for *Rechtsstaatlichkeit* have recently been negotiated in Germany. Both do not paint overly hopeful pictures, but for contrasting reasons. In the latter example of the *Gesetz zur Herstellung materieller Gerechtigkeit*, we witness a lack of appreciation of the importance of the formal dimensions of the Rule of Law. The debate is particularly unfortunate as it illustrates how difficult it is to persuade large parts of the political and legal circles of the value that *Rechtsstaatlichkeit* has opposed to seemingly more important considerations of material justice.

The picture is different with respect to the fight against the pandemic. Here, the debates revolving around the measures to fight the pandemic have partly portrayed an alarmist touch, at least in my view. The corona pandemic is the first test of this magnitude for the constitutional order of the Basic Law. Whereas there has been no shortage of other crises in the history of the Federal Republic, this is arguably the most wide-ranging one as it affects the lives of all citizens and residents alike.[151] Restrictions are felt by everyone and the German public discourse has generated a particular focus on the restrictions on fundamental rights which were undertaken in order to fight the pandemic. This has led to sometimes strange and perpetually repeated language like the discourse on "privileges" for the vaccinated and the question when fundamental rights would be "given back" to the people. Even though this is layperson's talk, it affects the perception of the Basic Law by wider parts of the population and may have nurtured frustration and discontent.

Bäcker (note 21), 313; for a differentiated perspective see *Reimer*, Gerechtigkeit als Methodenfrage, 2020, 10–12; *Kotzur*, Rechtsstaat als Sammelbegriff – Versuch der Konturierung und Kontextualisierung, in: Rosenau/Kunig/Yildiz (eds.), Rechtsstaat und Strafrecht – Anforderungen und Anfechtungen, 2021, 9, 11.

[149] I developed this point previously in *Aust*, Frankfurter Allgemeine Zeitung of 17 June 2021, 6; see also on the general point *Schulze-Fielitz* (note 135), para. 37.

[150] Similar in a different context *Huber* (note 22), para. 67.

[151] See on majority/minority dynamics and fundamental rights protection *Meinel* (note 32), 57.

V. Concluding Observations

Despite these two negative examples, the institutions of the *Rechtsstaat* have remained remarkably stable in Germany.[152] So far, mainstream political parties have mostly not given in to populist tendencies which remain confined to the officials, members and voters of mostly one right-wing opposition party. There are only very few cases of outright non-compliance with court decisions by public authorities and where this happened, a stern and formally unusual reaction by the Federal Constitutional Court by press release has helped to settle the matter.[153]

In line with the mandate for rapporteurs, this country report has set out the current constitutional set-up, its history as well as some current challenges make for a German contribution to debates about "the revival of the Rule of Law issue". Admittedly, this is a subjective assessment which comes with its own biases. In summary, this combined historical, conceptual and doctrinal contribution has sought to contribute to answering some of the lead questions that the World Congress wishes to study. The Rule of Law, understood in its German variant of the *Rechtsstaatsprinzip*, is an inherently dynamic notion. It comprises formal as well as material elements. Properly understood, it has an inherently international – and in the case of a EU member State like Germany also European – dimension. It seems to me that this latter aspect, the connection between "external" and "internal" Rule of Law debates is not always fully acknowledged. For a state which prides itself of its Basic Law and indeed celebrates "constitutional patriotism", it seems to be a particular challenge to think through the external implications of internal constitutional debates. From a comparative perspective, this may seem like a minor problem when compared to the situation in other states. Accordingly, there is no need for neither alarmism nor complacency. A nuanced assessment of the state of health of the *Rechtsstaat* will in any case be helpful when it comes to the external dimension of *Rechtsstaatspolitik*, i.e. the attempts to contribute to transnational debates about the Rule of Law where a strong German position can easily become undermined by too much emphasis on one's own virtues.

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[152] It is perhaps telling that a comparative volume on constitutional crises from 2018 does not include a country report/chapter on Germany, see *Graber/Levinson/Tushnet* (eds.), Constitutional Democracy in Crisis?, 2018.

[153] See the Press Release of the Federal Constitutional Court: Einstweilige Anordnung: Stadt muss ihre Stadthalle der NPD für Wahlkampfveranstaltung überlassen, 26 March 2018, available at https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2018/bvg18-016.html;jsessionid=E8BB438CDB668A7B5A2B9138B13157D0.1_cid394; see further on this episode *Nußberger* (note 21), 197.

Soft Law – Its Place, Potential and Prospects

Olaf Meyer

I. Introduction

The notion of a privately made law – understood as any rule or body of rules from a non-state source that nonetheless has binding normative effect – has long been a feature of German law. It is therefore at first glance surprising that no German term for this phenomenon has ever established itself, instead there is frequent use of the anglicism "soft law". The expression first appeared in public international law as an umbrella term for legally non-binding resolutions and memoranda of understanding.[1] It has however since also found use in private law.

The English term may however also be a sign that in this context it regularly concerns rules which transcend national borders and directly serve the facilitation of exchange with other nations. Uniform rules bring many advantages to trade.[2] They avoid the uncertainties of private international law concerning the determination of the applicable law.[3] They are also more responsive to the peculiarities of international cases than national codifications, which are generally tailored to domestic legal relations.[4] And ultimately, they create a level playing field for the parties, on which – contrary to the solution via private international law – no side can benefit from a home advantage.

Previous attempts at achieving uniformity of laws through state measures have often proven to be difficult, protracted, bureaucratic and altogether ever less promising.[5] In a globalized world, in which around 200 independent states try to defend their respective interests, compromises even today can often only be reached with great difficulty. There are of course shining examples of uniform law by states such as the UN Convention on Contracts for the Interna-

[1] *Heusel*, „Weiches" Völkerrecht, 1991; *Basedow*, in: FS Kronke, 2021, 659, 660.

[2] See *Kropholler*, Internationales Einheitsrecht, 1975, 9 et seq.; *Jarass*, Privates Einheitsrecht, 2019, 41 et seq.; *Berger*, JZ 1999, 369 et seq.; *Schwenzer*, 58 Vill. L. Rev. 723 (2013).

[3] *Meyer*, Principles of Contract Law und nationales Vertragsrecht, 2007, 36 et seq.

[4] *David*, The International Unification of Private Law, in: International Encyclopedia of Comparative Law, Vol. 2, 1971, 5-15, 7 et seq.; *Leible*, ZVglRWiss 97 (1998), 286, 307 et seq.; *Schnyder/Grolimund*, in: FS Schlechtriem, 2003, 395, 396; *Stein*, Lex Mercatoria, 1995, 23 et seq.

[5] *Kötz*, RabelsZ 50 (1986), 1 et seq.; *Kronke*, JZ 2001, 1149 et seq.; *Bonell*, AJCL 38 (1990), 865 et seq.; *Basedow*, RabelsZ 81 (2017), 1, 16 et seq.

tional Sale of Goods (CISG)[6] or the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[7] However, most attempts to create uniform law by means of treaties between states have ultimately failed, such as the recently discussed idea of a world commercial code on the initiative of Switzerland.[8] It is therefore reasonable to conclude that the days of the international convention as the classic instrument of uniformity of laws between states are largely behind us.

Uniformity of laws by private actors is not beset by these problems.[9] When creating new rules, they are bound neither by bureaucratic processes of public international law nor by political vanities of individual states. However, in contrast to the state determined hard law, they lack mandatory application. The combination of the terms "soft" and "law" even appear contradictory at first glance, as law is traditionally understood as rules which we must abide by no matter what.[10] The lack of state authority should however be weighed against the speed with which soft private rules can be created, and their substantive responsiveness to the needs of the parties, which is guaranteed by the technical expertise of the drafters. This contribution therefore focusses on internationally created soft law. This does not however mean that there cannot also be privately made rules which are only conceived for application within a given state.

For the purposes of this report, the role of soft law in the German legal system shall be examined from three different perspectives: Part II. concerns the different theories in German legal scholarship to explain the applicability of privately made law. Part III. then illustrates the typical line of argument in legal practice to draw on soft law to resolve a specific legal dispute. These routes are in no way uniform, rather they can vary greatly according to the respective area of the law, and accordingly Part IV. examines three specific examples. Part V. summarises the findings.

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[6] 94 Member States (31.12.2021).

[7] 169 Member States (31.12.2021).

[8] United Nations Commission on International Trade Law, Possible Future Work in the Area of International Contract Law: Proposal by Switzerland on Possible Future Work by UNCITRAL in the Area of International Contract Law, 45th Session, New York, 25 June-6 July 2012, A/CN.9/758, ('Swiss Proposal'). Further: *Meyer*, in: Schwenzer/Spagnolo (eds.): Boundaries and Intersections: 5th Annual MAA Schlechtriem CISG Conference, 2014, 57 et seq.

[9] Cf. *Drobnig*, in: FS Max-Planck-Institut, 2001, 745 et seq.; *Mertens*, RabelsZ 56 (1992), 219 et seq.; *Köndgen*, AcP 206 (2006), 477 et seq.

[10] *Schwarze*, EuR 2011, 3.

II. Soft Law in German Legal Scholarship

The applicable force of non-state law has been a subject of study by German scholars for many generations. The discussion however does not typically occur under the notion of "soft law", rather under different terms, some of which are more expansive and also encompass state uniform law and case law of international courts, and others which are more narrowly defined and for example only concern certain categories of private rules. This makes a comparison of the theories difficult. They are not sharply delineated – indeed some authors draw on ideas from different areas. Further is the consideration that this is not a purely German legal problem, rather, the discussion is a global one, and therefore German scholars exchange ideas with their colleagues in other parts of the world.

1. The lex mercatoria

The oldest German contributions to privately made law originate from the discussion on the existence of an autonomous law merchant. Long before the term "modern lex mercatoria" established itself, in particular the law professor from Freiburg Hans Großmann-Doerth recorded in several contributions his observations on the formation of "autonomous law of world trade".[11] In his habilitation treatise of 1930 he contrasted state law with the contractual law of international sales and carved out the numerous respects in which the statutory law was replaced by private standard rules in everyday practice. He began his remarks with the clear thesis: "State law is the source of law which has the least significance for international sales… It is for international sales printed paper, nothing more".[12]

The academic discussion picked up in the 1950s, as weighty voices in France and England began to give this self-made law of business a theoretical underpinning and thereby an independent existential basis outside of any state order.[13] A significant proponent of this new teaching was a German emigrant: Clive Schmitthoff devoted a large proportion of his creative ability to investigating the new law merchant.[14] He saw two sources of the new world commercial law, namely international legislation in the form of state treaties and model

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[11] *Großmann-Doerth*, JW 1929, 3447 et seq.; *id.*, Selbstgeschaffenes Recht der Wirtschaft und staatliches Recht, Antrittsvorlesung vom 11. Mai 1933, see further Blaurock/Goldschmidt/Hollerbach (eds.), Das selbstgeschaffene Recht der Wirtschaft – Zum Gedenken an Hans Großmann-Doerth (1894–1944), 2005.

[12] *Großmann-Doerth*, Das Recht des Überseekaufs, Band I, 1930, 40.

[13] See most recently *Toth*, The Lex Mercatoria in Theory and Practice, 2017, 31 et seq.

[14] *Schmitthoff*, in: Macdonald (ed.), Current Law and Social Problems, Vol. 2, 1961, 129 et seq.; *id.*, JBL 1968, 105 et seq.; *id.*, 15 International Social Science Journal 1963, 259 et seq. On Schmitthoffs life and work cf. most recently the Monograph of *Wulfert-Markert*, Clive M. Schmitthoffs Konzeption eines transnationalen Welthandelsrechts, 2018.

laws, and the unwritten international custom. Schmitthoff worked from England, but also published his findings in German.[15]

At the peak of the lex mercatoria debate in the 1980s and 1990s there followed a series of contributions from notable German legal scholars which reflected the whole spectrum of opinion. To present them all would be beyond the scope of this contribution. There were however both voices of support[16] as well as opposition[17]. International renown was achieved by Klaus Peter Berger's contributions on the creeping codification of the lex mercatoria.[18] The central question in these discussions was mostly the theoretical categorization of these sources of rules of international commerce, i.e. whether they can exist autonomously outside of all state legal systems, or whether they are in effect there solely by the "grace" of state law, to the extent the state recognizes their applicability. There has, however, for the most part not been any deeper discussion of the specific substantive content of lex mercatoria.

Once the arguments had been largely exchanged the discussion notably died down. This is certainly not least because the practical significance of an autonomous lex mercatoria is too low to adequately justify the academic resources devoted to it.

2. Transnational Law

A second important strand of literature has amassed under the description "transnational law". The term is very much in fashion: Not only are there countless publications, there are also for example Chairs of transnational law at universities, post graduate courses as well as academic journals on the subject. Of course, this is not an originally German concept either. The oldest German language source for the term is probably in the writings of Gutzwiller in the early 1930s.[19] But it was when the public international lawyer and later judge at

[15] *Schmitthoff*, Das neue Recht des Welthandels, RabelsZ 28 (1964), 47 et seq.

[16] From the abundant literature e.g. *Grundmann*, in: Jickeli/Kotzur/Noack/Weber (eds.), Jahrbuch junger Zivilrechtswissenschaftler 1991, 43 et seq.; *Kappus*, IPRax 1993, 137 et seq.; *Mertens*, in: FS Odersky, 1996, 857 et seq.; *Stein*, Lex Mercatoria – Realität und Theorie, 1995; *Berger*, in: id. (ed.), The Practice of Transnational Law, 2001, 1 et seq.; *id.*, in: Hartkamp/Hesselink/Hondius (eds.), Towards a European Civil Code, 3. edn 2004, 43 et seq.; *von Hoffmann*, in: FS Kegel, 1987, 215 et seq.; *Blaurock*, ZEuP 1993, 247 et seq.

[17] Vgl. *von Bar*, Osnabrücker rechtswissenschaftliche Abhandlungen 1985, 19, 28 et seq.; *Herber*, IHR 2003, 1 et seq.; *Lorenz*, Die Lex Mercatoria: Eine Internationale Rechtsquelle?, in: FS Neumayer, 1985, 407, 429; *Sandrock*, JZ 1996, 1, 8 et seq.; *Spickhoff*, Internationales Handelsrecht vor Schiedsgerichten und staatlichen Gerichten, RabelsZ 56 (1992), 116 et seq.; *Triebel/Petzold*, RIW 1988, 245 et seq.; *Schmidt*, in: Murakami/Marutschke/Riesenhuber (eds.), Globalisierung und Recht. Beiträge Japans und Deutschlands zu einer internationalen Rechtsordnung im 21. Jahrhundert, 2007, 153 et seq.; *von Breitenstein*, in: FS Sandrock, 2000, 111 et seq.

[18] *Berger*, The Creeping Codification of the New Lex Mercatoria, 2nd edn 2010.

[19] *Gutzwiller*, Internationales Jahrbuch für Schiedsgerichtswesen 3 (1931), 123, 128 et passim.

the International Court of Justice in The Hague Philip Jessup chose the expression as the title for his Storrs Lectures at the University of Yale Law School in 1956[20] which gave the decisive push for the subsequent worldwide flood of publications. Already at the beginning of the 1980s one had the impression of a "transnational law explosion".[21]

Yet the meaning of the term remains highly unclear to this day. What transnational law means, varies from author to author.[22] Jessup for example used the term in a purely functional sense to describe all law for cross border cases, without thereby saying anything about the characteristics of such law. It is accordingly not the law here which is transnational, but the facts of the case it decides.[23] Eugen Langen on the other hand, understands the term in his strongly legal-philosophical monograph, as those legal rules which different legal orders agree upon.[24] His idea consists of resolving legal disputes neither by allowing a more or less arbitrary decision in favour of one of the national laws over the other through the operation of private international law, nor by entirely avoiding the national law via the lex mercatoria. Instead, the judgment should be based upon principles common to all legal orders involved.[25] Langen's analysis is thus admittedly largely based on state made law, privately made soft law does not assume a significant role for him.

In recent times, however, transnational law theory has turned its attention to privately made soft law. The definition here relates not to the content of the rules, rather to their originators. Distinct from traditional international law, which is a treaty of public international law agreed "inter nationes", transnational law is created by non-state communities, i.e. by business federations, NGOs or other networks of civil society.[26] It is often equated with "law beyond the nation state".[27] There does however remain a variety of opinion on whether transnational law completely excludes state made law, or if it at least includes legal principles common to all legal orders.[28] Numerous legal questions can then

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[20] *Jessup*, Transnational Law, 1956.

[21] *Baade*, AJCL 31 (1983), 507.

[22] On the different definitions of transnational law see e.g. *Bamodu*, 4 International Arbitration Law Review (2001), 6; *Siehr*, in: Holl/Klinke (eds.), Internationales Privatrecht – Internationales Wirtschaftsrecht, 1985, 108 et seq.; *Spickhoff*, RabelsZ 56 (1992), 121 et seq.

[23] *Calliess*, Zeitschrift für Rechtssoziologie 23 (2002), 185, 188.

[24] *Langen*, Transnationales Recht, 1981, 13. See also from the same author Transnational Commercial Law, 1973.

[25] *Langen*, Transnational Commercial Law (fn. 24), 33.

[26] *Viellechner*, in: Calliess (ed.), Transnationales Recht, 2014, 57, 69; *Quack*, in: Schuppert (ed.), Global Governance and the Role on Non-State Actors, 2006, 81 et seq.; *Sieber*, Rechtstheorie 41 (2010), 152, 163 et seq.

[27] *Calliess/Maurer*, in: Calliess (ed.), Transnationales Recht, 2014, 1; *Michaels/Jansen*, AJCL 54 (2006), 843 et seq.; *Michaels*, 23 Maastricht Journal of European and Comparative Law (2016), 352 et seq.

[28] Vgl. *Teubner*, JZ 2015, 506, 507.

be analysed from this perspective: The effect of transnational law on individual areas of the law,[29] the process of making rules[30] and of course the relation to state made law.

3. Sociological Approaches – The Global Bukowina

A further school of thought is system theory, a complex socio-legal approach to explain the formation and organisation of self-contained societal systems. The approach of Gunther Teubner's has achieved considerable attention also outside of Germany.[31] His starting point is that state-made law cannot keep pace with the requirements of globalisation. Therefore, privately made global sub-orders begin to form, although not in a uniform pattern, but for their respective self-contained societal circles. In this analysis the lex mercatoria is but one such system, namely as the law of cross border commerce. Further similar independent systems emerged in other areas such as those of internet governance (lex electronica), sport (lex sportiva), financial markets (lex financiaria), and corporate organization (corporate governance) etc.[32]

The setting of rules within these systems occurs in an autopoietic fashion, i.e. rather like in a state, from within.[33] Decisive factors for the emergence of an autonomous legal order are firstly the structural organization of the system, whereby for example strong business federations can assume the role of rule-setter; and secondly they need their own legal authority, which can enforce these rules with binding effect for its members. This function would be assumed by the international arbitral tribunals for the lex mercatoria, the special sport tribunals for sport, the arbitration instance of the ICANN for the law of internet domain names. For letter of credit-related disputes, the ICC now offers the so-called DOCDEX procedure, which regularly disposes of disputes which are only seldom subsequently brought to court.[34]

This approach can explain the autonomous effect of soft law by understanding the systems as autonomous bubbles uncoupled from state law. Accordingly there is no state monopoly on law making, and neither does privately made law

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[29] *Calliess* (ed.), Transnationales Recht, 2014; *Zumbansen* (ed.), The Oxford Handbook of Transnational Law.

[30] *Calliess/Zumbansen*, Rough Consensus and Running Code – A Theory of Transnational Private Law, 2010.

[31] *Teubner*, Rechtshistorisches Journal 15 (1996), 255 et seq.; *Fischer-Lescano/Teubner*, Regime-Kollisionen, Zur Fragmentierung des globalen Rechts, 2006. See also *Weller*, in: Gottschalk/Michaels/Rühl/von Hein (eds.), Conflict of Laws in a Globalized World, 2007, 242, 249 et seq.

[32] *Teubner*, in: FS Hopt, 2010, 1449 et seq.; *id.*, ZaöRV 2016, 661 et seq.; *id.*, ZaöRV 2003, 1 et seq. Further *Röthel*, JZ 2007, 755 et seq.

[33] *Teubner*, Recht als autopoietisches System, 1989.

[34] *Jäger/Haas*, in: Schimansky/Bunte/Lwowski (eds.), Bankrechts-Handbuch, 5th edn 2017, § 120 no. 21.

have to be traced back to some constitutionally compatible basic norm ("Grundnorm") as per the monistic model of Hans Kelsen. Global law must rather be understood in a pluralistic sense, as a space with several actors, operating to a large extent independently of each other.[35]

4. Legal History Approaches

The final mention goes to the works which attempt to explain the effect of privately made law from a historical perspective. Private law-making is by no means a child of recent history.[36] On the contrary: The private law codifications of nation states in the 19th century replaced a practice that had been cultivated for hundreds of years previously of deciding legal cases according to the usus modernus pandectarum and local usages, without this ever having been so decreed by any political authority.

Known works in this field include first of all the historical analysis by Stephan Meder of the ius non scriptum, which he understands not only as law passed down orally, but rather every form of law which is not passed top-down by a state.[37] He includes customary law, rules created through private autonomy and also law derived from interpreting written law. Nils Jansen focussed on the process of creating binding authority in the past.[38] Rudolf Meyer investigated the development of *bona fides* from the middle ages to the new lex mercatoria.[39] There is of course a whole series of further historical works, which compare the lex mercatoria of the middle ages with current legal practice, from which they draw conclusions about the autonomous creation of legal rules.[40]

III. Soft Law in German Private Law

In the practical application of soft law before German courts, the theoretical categorisation as a source of law mostly only plays a subordinate role. This is because here it regularly does not concern the autonomous application of soft law outside of the state legal order. In any case before state courts the Rome I Regulation does not permit the choice of a non-state law as the sole source of

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[35] On global legal pluralism see also *Michaels*, 51 Wayne L. Rev. (2005), 1209; *id*., in: Schiff Berman (ed.), Oxford Handbook of Global Legal Pluralism, 2020, 629 et seq.

[36] On international commercial clauses on the eve of the codified private law cf. e.g. *Röder*, forum historiae juris 2006, available online at http://www.forhistiur.de/zitat/0610roeder.htm (last access January 2022).

[37] *Meder*, Ius non scriptum – Traditionen privater Rechtssetzung, 2nd edn. 2009.

[38] *Jansen*, The Making of Legal Authority – Non-legislative Codifications in Historical and Comparative Perspective, 2010.

[39] *Meyer*, Bona fides und lex mercatoria in der europäischen Rechtstradition, 1994.

[40] See e.g. *Wieacker*, in: FS Kötz, 1981, 575 et seq.

law.[41] The situation is different before arbitration tribunals, where German procedural law as the lex arbitri, following the example of Art. 28(1) Uncitral Model Law, permits the choice of "rules of law" in place of a national law (§ 1051(1) ZPO). This of course also includes non-national rules.[42] However, such choice seems to be rare in German arbitration practice.[43]

The decisive issue here moreover is the interaction between hard and soft law. According to Art. 20(3) GG (German Basic Law), the judiciary is bound by "statute and law". The starting point for deciding every legal dispute therefore lies in state law. Sources of soft law can however also be drawn upon, if the state legal order appears open to such, i.e. when it opens a door through which soft standards can find their way into the hard law. The German legal order has several such openings, through which soft law can have effect.

1. Private Autonomy

The simplest way to elevate soft law to a legal obligation is via private autonomy. The freedom to conclude contracts and determine their content is not directly stated in German law, but is silently necessarily implied in the BGB.[44] If the parties to a contract have therefore agreed to integrate a certain text into their agreement, what is agreed thereby becomes part of the contract. By such means the parties can avail themselves of pre-formulated drafts by non-state organisations and give them contractual force.

Such is the case for example where the contractual parties agree a body of rules of an international commerce organisation. An example is the standard forms of contracts of the Grain and Food Trade Association (GAFTA) on which it is estimated that 80 % of the world's trade in grain is shipped. Also of great significance are the ORGALIME General Conditions for engineering industries and the model contract of the FIDIC for consulting engineers. In the area of industrial machinery and facilities the United Nations Economic Commission for Europe (UNECE) has passed numerous conditions of contract and supply.

Yet the best-known producer of such rules is of course the International Chamber of Commerce (ICC) based in Paris. It is no coincidence that its date of founding in 1919 is in the period following the first world war, as cooperation based on trust between state delegates did not yet appear very promising in view

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[41] BeckOK BGB/*Spickhoff*, 60. ed. 1.8.2021, VO (EG) 593/2008 Art. 3 Rn. 11; *Diedrich*, RIW 2009, 378 et seq.; *Leible/Wilke*, in: FS Kronke, 2001, 297, 302.

[42] BeckOK ZPO/*Wilske/Markert*, 42. edn 1.9.2021, ZPO § 1051 Rn. 4; MüKoBGB/*Martiny*, 8th edn 2021, Rome I Regulation Art. 3 no. 39; *Wegen/Asbrand*, RIW 2016, 557, 560.

[43] *Berger*, ULR 2014, 519, 522.

[44] Freedom of contract in Germany is regularly seen as emanating from the general freedom of action, which is constitutionally protected in Art. 2(1) GG (German Basic Law), see BVerfGE 89, 48, 61; 95, 267, 305 et seq.

of the painful wounds of the war, and trade associations took it upon themselves to re-assert the building blocks of international commerce. To this day the ICC has published hundreds of legal texts, including a model term on force majeure and hardship,[45] but also a model term on the contractual consequences of bribery.[46] These rules are then made legally binding between the parties by means of a corresponding agreement.

Indispensable nowadays in the area of international trade in goods are the Incoterms, a collection of definitions of 11 typical trade terms on the allocation of risks and responsibilities in the transport of goods. Already in 1936 the ICC published the first version of the Incoterms, to thereby create an international uniform understanding of the terms; since then several new versions have been published. They acquire their applicability by means of the parties incorporating them into their contract.[47] The ICC even suggests a model formulation for doing so in the introduction to the Incoterms.

The applicability of such model rules as part of the written contract is of course always subject to mandatory statutory law. This means that a contractual rule which contravenes mandatory statutory law is void and will not be applied. In this way mandatory state law limits the capacity of soft law to provide uniform legal solutions across states.[48] As each state decides itself what its mandatory provisions are, uniformity of law can never be completely achieved by means of contractual agreements; mandatory provisions in the applicable law can always generate uncomfortable surprises. However, in the realm of commercial law, private autonomy extends especially far and – in contrast to consumer contract law or employment law – state law sets only few mandatory limits.

If, however, one contractual party has unilaterally set the standard terms in question, without giving the other party a meaningful possibility of influence, then there is a standard terms test, and in German law according to § 310(1), 2nd sentence BGB also in relationships between businesses. This is where the subordination of soft law to mandatory statutory law is most clearly evident. The internationally uniform contractual rule is subject to the German § 307 BGB; according to which provisions in standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract. The rule in question is then not applied; however, the

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[45] ICC Force Majeure and Hardship clauses 2020.

[46] ICC Anti-corruption Clause 2012, ICC Publication No. 740E. Further *Meyer*, Korruption und Vertrag, 2017, 238.

[47] MüKoHGB/*Maultzsch*, 5th edn. 2021, HGB § 346 no. 126; EBJS/*Fest*, 4th edn. 2020, HGB § 346 no. 390.

[48] *Zahn/Ehrlich/Neumann*, Zahlung und Zahlungssicherung im Außenhandel, 2010, no. 1/16; *Jarass* (fn. 2), 88.

contract otherwise remains valid. The gap thus arising is closed by statutory provisions (§ 306 BGB).

2. Commercial Usage and Commercial Customary Law

The incorporation of soft standards is more difficult where the parties have made no corresponding express agreement. It would only be possible to apply soft rules objectively if they have the quality of a commercial usage within the meaning of § 346 HGB (German Commercial Code). According to this provision commercial usages apply "between merchants", i.e. primarily only between groups of persons more closely defined in §§ 1 et seq. HGB. Between non-merchants, i.e. for example small business owners or freelance professionals such as lawyers, practices can be binding only in exceptional circumstances.[49]

A commercial usage establishes when a certain rule is voluntarily generally adhered to by the circles of people involved for a certain period of time.[50] In contrast to many other legal orders[51] the applicability of commercial usage in Germany is normative. This means that an agreement on applicability by the contractual parties is not necessary, not even a tacit agreement.[52] Moreover, merchants are bound by usages applicable to them even if they had no idea of their existence, perhaps because they have only recently entered the business and have not yet been able to gather any experience. However, the parties can contractually exclude the applicability of a usage.[53]

Commercial usages serve above all the interpretation of legal relationships and the fleshing out of contractual agreements. In the hierarchy of legal rules they stand above dispositive statutory law, but are subject to mandatory law.[54] Accordingly they cannot assert complete autonomy from state law. For example, a binding commercial usage could not develop if it was in clear contravention of German competition law.

There is however also an advantage to characterizing a rule as a commercial usage as opposed to its mere inclusion in the contract by means of private autonomy. In contrast to purely model contractual rules, commercial usages are only subjected to a limited standard terms test.[55] According to § 310(1), 2nd sentence

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[49] BGH, NJW 1952, 257; OLG Koblenz, NJW-RR 1988, 1306; Baumbach/Hopt/*Leyens*, 40th edn. 2021, HGB § 346 no. 3 et seq.

[50] BGH, NJW 1994, 659, 660; BGH, NJW 2018, 1957, 1959; EBJS/*Fest* (fn. 47), HGB § 346 no. 5.

[51] Cf. e.g. Art. 9 CISG, which follows a subjective model.

[52] BGH, WM 2000, 1744, 1745; OLG Frankfurt, NJW-RR 1986, 911, 912; MüKoHGB/*Maultzsch* (fn. 47), HGB § 346 no. 28.

[53] Baumbach/Hopt/*Leyens* (fn. 49), HGB § 346 no. 8.

[54] MüKoHGB/*Maultzsch* (fn. 47), HGB § 346 no. 31; Baumbach/Hopt/*Leyens* (fn. 49), HGB § 346 no. 10.

[55] MüKoHGB/*Maultzsch* (fn. 47), HGB § 346 no. 32; MüKoBGB/*Basedow*, 8th edn. 2019, BGB § 310 no. 17.

Civil Code the standard terms test requires appropriate regard for customs and usages in commerce. This means that if a soft law has solidified into a commercial usage through enduring and widespread use by its addressees over a period of time, this itself is a strong indication of its substantive fairness and transparency.[56]

Whether a commercial usage exists is decided before a court, if necessary, with the aid of expert testimony. It is in the nature of a commercial usage that it can change at any time, sometimes very quickly, such as when technical developments cause radical change in commercial practice. This also means that commercial usages can usually not be fixed in writing. Each codification would only be a kind of snap-shot of the practice at the current moment and commercial practice could at a later point in time already have assumed new forms. An exception is the Tegernsee Customs in timber trade.[57] These were developed by a commission of representatives of the German timber trade and regulate the domestic trade in round timber, sawn timber, wood-based materials and other semi-finished wood products.

As for the Incoterms, while there is still some debate, the prevailing view in Germany is that they do not, at least in their entirety, represent commercial usages.[58] As the ICC updates the rules on average every 10 years, the necessary enduring and consistent acceptance in practice can never occur. Nevertheless, some individual rules within the catalogue of obligations could correspond with a parallel commercial usage. This means that if the contractual parties have agreed, without further elaboration, supply "FOB Rotterdam", then the respective current definition in the Incoterms does not already apply as a matter of commercial usage; this requires still at least an indication of a corresponding intention of the contractual parties.

Commercial usages can harden over time into commercial customary law. This is the case where the involved groups of persons no longer merely follow the rule as a matter of societal convention, but rather because in the meantime a collective understanding has formed, that makes it legally binding (opinio iuris).[59] As customary law the rule then applies directly just as statutory law, it is no longer subject to any judicial test of fairness, neither does it need to be proven with the aid of expert testimony, and generally it is also no longer subject to change. The distinction from usage is not razor sharp, but in any event the requirements for application as a matter of customary law are very much higher.

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[56] OLG Frankfurt a. M., NJW-RR 1988, 1485, 1486; MüKoHGB/*Maultzsch* (fn. 47), HGB § 346 no. 128; MüKoBGB/*Basedow* (fn. 55), BGB § 310 no. 19.

[57] First version 1950, current version 1985, new version in preparation.

[58] EBJS/*Fest* (fn. 47), HGB § 346 no. 391.

[59] MüKoHGB/*Maultzsch* (fn. 47), HGB § 346 no. 20.

3. Soft Law as a Basis for Statutory Law

The legislator can take soft law as a basis for the formulation of new laws, which then apply directly as hard law. A special category of soft law form the so-called model laws, which are drafted by formulating agencies as a service to national and international legislators as a basis for their legislative initiatives through which an international uniformity of laws can be achieved.[60] Model laws, in contrast to international conventions, leave the legislator complete freedom in transposing the rules. A convention, insofar as it has not given its member states the possibility to lodge reservations over individual provisions, can only be ratified as a whole, whereas a model law merely represents a non-binding model. Accordingly states here have the option to transpose the model into national law in its entirety, to change individual rules as they see fit or even only to transpose a select few rules and otherwise take completely independent approaches. The model law therefore on the one hand leads to less uniformity of law than a convention, but it is precisely through this flexibility that it allows a greater number of states to at least orientate themselves on its rules, even those which would never have signed a convention with the same content.[61]

The German legislator has not taken up many model laws to date. Germany has no special legislation for contracts concluded via modern means of communication and has therefore not implemented the Uncitral Model Law on Electronic Commerce (1996). For the same reason, Unidroit's Model Franchise Disclosure Law (2002) has not been implemented. There was no need to implement the 1997 Uncitral Model Law on Cross-Border Insolvency, as foreign insolvency proceedings were already fully recognized in Germany at that point in time. However, in 2018 Uncitral adopted a new Model Law on Recognition and Enforcement of Insolvency-related Judgments, which goes further in recognizing foreign court decisions in insolvency proceedings; it remains to be seen if the German legislator picks up on this model law to update its current provisions.[62]

The most successful model law in Germany is arguably the Uncitral Model Law on International Arbitration. They were completely incorporated into the German Civil Procedure Rules (§§ 1025 et seq. ZPO) in 1998 with only few exceptions,[63] as part of a reform programme to make Germany a more attractive location for international commercial arbitration.[64] The German legislator consciously followed the model law's aim of harmonisation, recognising the rules as

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[60] *David* (fn. 4), 5-212; *Kronke* (fn. 5), 1153; *Schneider/Nietsch*, in: FS Jayme II, 2004, 1361, 1362 f.; *Basedow* (fn. 5) 17 f.

[61] *Kropholler* (fn. 2), 105 et seq.

[62] *Tashiro*, in: Braun (ed.), Insolvenzordnung, 8th edn. 2020, Prior remark to §§ 335–358 no. 22.

[63] *Schumacher*, BB 1998, Beil. 2, 6 et seq.

[64] As per the official justification for the legislation, BT-Drs. 13/5274.

representing an international consensus, known and respected around the world.

In many areas of the law, EU legislation is more dominant than autonomous legislation by the Member States. The question then becomes whether and to what extent the EU legislator is willing to consider soft law as a basis for the creation of regulations and directives. A very recent example is the Whistleblower Directive (Directive (EU) 2019/1937 of 23 October 2019 on the protection of persons who report breaches of Union law); recital 31 of which names as one of its influences the Council of Europe Recommendation on the Protection of Whistleblowers of 30 April 2014, a soft instrument.

The model law can keep a form of independent significance for the statutory law upon which it is based, long after it has been enacted, namely for interpretation as evidence of the course of the legislative process. The model law can thereby inform about the political background of the law and about the intentions which the legislator pursued.

4. Soft Law as a Standard for Interpretation

Even where soft law has not served as a model for a specific rule, it can be drawn upon as a standard when interpreting statutory law. It would then work as persuasive authority, which draws its force from the high regard it enjoys in relevant circles or from the reputation of its originator, comparable for example to the learned opinion a well-known professor. Likewise soft law can reveal much about widely held views in legal practice. Of course, this does not make it strictly binding; but it would be a good indication of success in legal proceedings, to know that the soft law rules are on one's side.

Potential cases for application are numerous, but the effect appears clearest in the context of open legal terms or general clauses, the precise meaning of which must be determined in the individual case. The unclarity of statutory norms makes their application in practice difficult and unforeseeable. If however the judge can orientate themself on objective standards, which enjoy high regard in practice, then this makes the standards by which the parties must conduct themselves more foreseeable and also increases acceptance of the judgment delivered.

A well-known example for this quasi-binding effect of privately made rules comes from sport:[65] If there is a skiing accident in which one participant is injured by another, the tort law claim to damages is determined by § 823(1) BGB. This requires that the injury was caused "intentionally or negligently". What negligence means is defined in § 276(2) BGB: A person is negligent if they fail to

[65] On the liability law relevance of extra-statutory rules of conduct in sport cf. *Grunsky*, Haftungsrechtliche Probleme der Sportregeln, 1979; *Zimmermann*, VersR 1980, 497; *Looschelders*, JR 2000, 265.

take the care necessary in the circumstances. What rules of conduct apply in the specific case of skiing is not provided further at statutory level. However, the international skiing federation FIS (Fédération Internationale de Ski), a private association based in Switzerland, has drafted the "Rules for the Conduct of Skiers and Snowboarders", which represent a worldwide consensus on safe behaviour for skiing. German courts have often referred to these rules in tort cases in order to substantiate what constitutes "negligence" in within the meaning of § 823(1) BGB.[66] If a skier follows the FIS-rules, rarely will they be held to have violated the applicable standard of care.

There is however disagreement as to the basis of application of the FIS rules. Prevailing opinion does not see them as strictly binding, rather merely as context specific rules of conduct.[67] Accordingly they merely represent a guideline for the judge, and could require modification in an individual case, for example if technical developments in skiing equipment require greater care by the skier.[68] But there are also voices which categorise the FIS rules as customary law.[69] Customary law binds the judge just as statutory law, though of course subject to the requirement, that the FIS rules are also regarded as binding in skiing circles (opinio iuris).

IV. Specific Examples

1. UCP 600

The most successful model contract texts of the ICC certainly include as well as the Incoterms the Uniform Customs and Practices for Documentary Credits (UCP 600); these also enjoy high regard in German business.[70] The UCP work so well that the German legislator has thus far not seen the need for additional statutory regulation of letter of credit operations. Interestingly, to this day there is no clear agreement in German scholarship as to the legal nature of the UCP.

The prevailing view assumes that they are standard rules for contracts which can be agreed by the parties by exercise of their private autonomy. This starting point is uncontroversial in that the UCP apply if the parties have incorporated them into their contract.[71] Art. 1 UCP itself requires as a condition for their

[66] BGH, NJW 1972, 627, 628; OLG Brandenburg, NZV 2006, 662 et seq.; *Tienes*, NJOZ 2011, 1553 et seq.; *Dambeck*, DAR 2007, 677 et seq.

[67] BGH, NJW 1972, 627; BGH, NJW 1987, 1947, 1949; OLG Düsseldorf, VersR 1990, 111; MüKoBGB/*Wagner*, 8th edn. 2020, BGB § 823 no. 802; *Heinemeyer*, DAR 2013, 685, 686 et seq.; *Tienes* (fn. 66), NJOZ 2011, 1553 et seq.

[68] *Heermann/Götze*, NJW 2003, 3253 et seq.

[69] OLG Hamm, NJW-RR 2001, 1537, 1538, OLG Stuttgart, NJW-RR 2010, 684, 685.

[70] *Schütze*, Das Dokumentenakkreditiv im Internationalen Handelsverkehr, 5th edn 1999, no. 28; *Liesecke*, WM 1976, 258.

[71] *Lenz*, EuZW 1991, 297, 298; *Westphalen*, IWRZ 2019, 251, 253.

applicability that the text of the credit expressly indicates that it is subject to the rules. The UCP thus apply as standard terms.

As pre-formulated contractual terms the UCP however are in principle subject to the standard terms test. At conclusion of contract, they are regularly presented by one side, and in this respect there is normally no room for negotiation, as otherwise the advantages of a uniform text would be lost to the bank.[72] In the academic literature the validity of some of their rules is indeed disputed, in particular concerning the exclusion of liability in favour of the banks.[73] Yet in practice thus far there appears to be no special problems, in any case none of the UCP terms have to date fallen foul of the standard terms test in German courts.

If on the other hand the parties make no reference whatsoever to the UCP, then it would appear that they cannot objectively be said to be included in the agreement. In particular, according to the prevailing view, they do not apply in their entirety as customary commercial law.[74] This is because the conventional definition of commercial custom requires a settled usage over a longer period of time. Just as the Incoterms, the UCP have of course been in use for a long time, but they are updated on average every ten years by the ICC and adapted to new conditions. For this reason, no long, unbroken practice can ever establish. The same argument, according to the prevailing view, also precludes their categorisation as a commercial usage in their entirety. There are opposing voices here, that advocate reference to the UCP in their entirety as usage.[75] Others concede that at least individual aspects (such as for example the abstractness of letters of credit from the underlying transaction) do indeed have a long tradition.[76] Admittedly this is a moot point in practice, as the standard terms of the bank always expressly refer to the UCP anyway.[77]

The view has also been expressed that the UCP are an expression of an independent international legal order, such as part of the lex mercatoria or as international customary law.[78] The prevailing view rejects this reasoning for the same reason it rejects their categorisation as commercial usage.[79]

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[72] *Westphalen* (fn. 71) 252. Of a different view in this respect though see *Schütze* (fn. 70) no. 18.

[73] *Plett*, DB 1987, 925, 927 as well as *Westphalen*, WM 1980, 178, 180 et seq. and *id.*, RIW 1994, 453, 457.

[74] *Nielsen*, ZIP 1984, 230; *Westphalen* (fn. 71) 253; *Schütze* (fn. 70) no. 15 et seq.

[75] Even the BGH so said in an older, albeit isolated decision, AWD 1958, 57, 58. Further *Zahn/Ehrlich/Haas* (fn. 48) no. 1/17; *Liesecke* (fn. 70) 258; *Wälzholz*, WM 1994, 1457, 1458.

[76] *Westphalen* (fn. 73), 178; *Schütze* (fn. 70) no. 16.

[77] *Plett* (fn. 73), 925; *Nielsen* (fn. 74) 230.

[78] *Berger*, in: FS Schütze, 1999, 103, 105.

[79] *Westphalen*, RIW 1994, 453; *Schütze* (fn. 70), no. 12 et seq.; *Jäger/Haas* (fn. 34) § 120 no. 17 et seq.

2. UNIDROIT Principles

A second group of soft legal rules, whose effect in German law merits particular attention, are principles of law predominantly derived from comparative analysis. The inspiration for these bodies of rules were the US-American Restatements of Law, which do not assert any legal force for themselves either, but work solely as persuasive authority. The most well-known international restatement is the UNIDROIT Principles of International Commercial Contracts.

The success of the UNIDROIT Principles later tempted many imitators.[80] Often mentioned in the same breath as the UNIDROIT principles are the Principles of European Contract Law, which however in their approach were always conceived more as a model for the further development of European law than as directly applicable contract law. True to this understanding they later contributed to the most ambitious project of this kind by far, the Draft Common Frame of Reference (DFR), whose working group had its strategic headquarters in Osnabrück.[81] The works however ultimately lost political support in Brussels and therefore remained an essentially academic text, and they have not left any notable traces in legal practice. Nevertheless, to this day the restatement of principles continues to be chosen as a working method, most recently for the area of reinsurance the Principles of Reinsurance Contract Law (PRICL 1.0) 2019,[82] and the continuing works of the Principles for a Data Economy, a common project of the European Law Institute (ELI) and the American Law Institute (ALI), as well as the ELI Principles for the COVID-19 Crisis.[83] For the latter instruments it is too early to assess their effects.

The following remarks are therefore limited to the reception of the UNIDROIT Principles in Germany. Work on the Principles was followed with great interest in Germany.[84] On publication of the first edition in 1994 there was also a wave of publications from Germany, mostly with a positive, curious underlying tone. Many PhD theses analysed aspects such as the different possibilities of their application.[85] Adherents to the lex mercatoria doctrine saw here a contribution to the increasing significance of privately made law and to its creeping

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[80] Overview in *Wurmnest*, ZEuP 2003, 714 et seq.

[81] *Von Bar*, in: FS Henrich, 2000, 1 et seq.

[82] *Heiss*, ZEuP 2020, 999 et seq.

[83] *Twigg-Flesner*, EuCML 2020, 89, 92.

[84] See e.g. *Berger*, ZVglRWiss 194 (1995), 217 et seq.; *Drobnig*, in: Grundmann/Medicus/Rolland (eds.), Europäisches Kaufgewährleistungsrecht, 2000, 49 et seq.; *Wichard*, RabelsZ 60 (1996), 269 et seq.; *Michaels*, RabelsZ 62 (1998), 580 et seq.; *id.*, RabelsZ 73 (2009), 866 et seq.

[85] *Schilf*, Allgemeine Vertragsgrundregeln als Vertragsstatut, 2005; *Baumann*, Einheitliche Regeln der Auslegung internationaler Handelsgeschäfte – Eine rechtsvergleichende Untersuchung der UNIDROIT Principles, der Principles of European Contract Law und des Uniform Commercial Code, 2004; *Petz*, Die UNIDROIT Prinzipien für internationale Handelsverträge, 2001; *Meyer* (fn. 3).

codification. From Germany, two commentaries on the UNIDOIT Principles were published.[86]

The positive reception in German legal scholarship stands in contrast to the rather modest successes of the Principles in German legal practice. The primary means of giving a soft law instrument legally binding force is, as noted above, via a corresponding agreement by the parties. The Principles themselves also express this, when they hold in their preamble: "They shall be applied when the parties have agreed that their contract be governed by them." The private international law applicable by the German courts however, the Rome I Regulation, does not allow, as already noted above, the choice of a non-state law. While this was contemplated in the creation of the regulation[87] it was later excluded from the final draft. The parties could therefore in any event only integrate substantive parts of the Principles into their contract (so-called substantive choice of law).[88] But they would then be subject to the tests of mandatory rules of the applicable state law. The situation is different for arbitral tribunals, where a choice of the Principles as the only applicable law would be possible according to the German view.[89] Such cases do not seem to arise often in practice, anecdotal remarks in the literature reveal the occasional choice of law at most.[90]

The UNIDROIT Principles are correctly not regarded as a commercial usage within the meaning of § 346 HGB.[91] Not even the required widespread use in commercial circles is present. The rules are also too substantively general to be capable of characterisation as commercial usages.

The Principles were more successful as an influence on German legislation. Indeed, since the publication of the first edition of the Principles, no legislator in the world in projects concerning contract law has been able to ignore the Principles; they exert great force as a regulatory proposal, representing what the international community agrees upon, a product of very careful comparative law analysis, and developed and advocated by a highly regarded international

[86] *Vogenauer* (ed.), Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC), 2nd edn. 2015; *Brödermann*, UNIDROIT Principles of International Commercial Contracts – An Article-by-Article Commentary, 2018.

[87] Art. 3 (2) Proposal for a Regulation on the law applicable to contractual obligations (Rome I), COM(2005) 650 final provided: "The parties may also choose as the applicable law the principles and rules of the substantive law of contract recognized internationally or in the Community." Cf. here *Jud*, JBl 2006, 695 et seq.; *Heiss*, in: Ferrari/Leible (eds.), Rome I Regulation, 2009, 1, 9 et seq.; *Mankowski*, IPRax 2006, 101, 102; *Wagner*, IPRax 2008, 377, 379 et seq.

[88] IntVertragsR/*Ferrari*, 3rd edn. 2018, VO (EG) 593/2008 Art. 3 no. 19.

[89] BeckOK ZPO/*Wilske/Markert*, 43rd edn. 1.12.2021, ZPO § 1051 no. 4; *Drobnig*, ULR 1998, 385, 389 f.

[90] See *Brödermann*, IWRZ 2018, 246 et seq.; *id.*, IWRZ 2019, 7 et seq.

[91] *Kröll/Hennecke*, RIW 2001, 736, 741; *Basedow*, in: GS Lüderitz, 2000, 1, 5; *Meyer* (fn. 3), 328. From an international perspective most recently also *Muñoz*, Uniform Commercial Code Law Journal 50 (2021), 1 et seq. More openly *Horn*, in: Berger (ed.), The Practice of Transnational Law, 2001, 67, 77.

organisation. In Germany it was the reform of the law of obligations in 2001 that completely upended the hitherto existing system of contract law in the BGB and barely left a stone unturned. The direct impetus for this reform was the transposition of the consumer sales directive, but the legislator took the opportunity, despite great time pressure, to overhaul the entire law of obligations. Of the various international sources drawn upon for inspiration, the CISG, the UNIDROIT Principles and the Principles of European Contract Law stand out. This is documented by many references to them in the legislative materials.[92] At the same time the Max-Planck-Institute for Comparative and International Private Law in Hamburg held a conference examining the influence of the Principles in the German law of obligations.[93]

This leaves the question of whether German courts today refer to the Principles to interpret German law. This function as an interpretative aid for domestic law has been quite remarkable. It was not even envisioned in the original draft of the Principles, as it was simply thought improbable that there would be gaps in national legal orders which would be closed by external sources.[94] It was even more surprising when, within the first years since their publication, this became one of the Principles' primary functions in practice. This is so not only for arbitral tribunals; also the higher courts of various states have shown no hesitation in interpreting national law in light of the UNIDROIT Principles, to participate in the international development. The Unilex database[95] contains corresponding examples from Australia, Italy, Lithuania, The Netherlands, Paraguay, Russia, Spain, the United Kingdom and many other countries.

German courts unfortunately have been reserved in this respect, which is surprising given the role of the Principles in the reform of the law of obligations. There is one very fleeting reference to the Principles in justifying the contra proferentem rule in a judgment of the Frankfurt District Court from 2011;[96] other courts remain completely silent. Yet in the commentaries and related literature to the BGB there are references to the UNIDROIT Principles to this day, though these tend to take the form of additional comparative information rather than an extensive analysis of their relationship to German law.

The lack of success of the UNIDROIT Principles in practice relative to the Incoterms and the UCP 600 can be attributed to different causes. Firstly, the Principles do not originate from practitioners themselves, rather it is primarily the law of professors. UNIDROIT is indeed a highly regarded international organisation with a long tradition, but without the tightly interwoven network

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[92] Cf. BT-Drucks. 14/6040, 129, 181 et seq.

[93] *Basedow* (ed.), Europäische Vertragsrechtsvereinheitlichung und deutsches Recht, 2000.

[94] *Baptista*, Tulane Law Review 69 (1995), 1209, 1220; *Drobnig*, in: ICC, The UNIDROIT Principles for International Commercial Contracts: A New Lex Mercatoria?, 223, 228.

[95] www.unilex.info.

[96] LG Frankfurt, Judgment from 15th December 2011 – 2-13 O 302/10 –, juris.

with practice that the ICC has. The Principles thus do not directly emanate from practice and therefore also appear more attractive to professors than practitioners. Secondly, this is not specialist material, addressed to a relatively small circle of specialists. Both the Incoterms for transport of goods as well as the UCP for letters of credit are niche areas of the law, where comparatively small groups of experts communicate with each other. This presumably applies to an even greater degree in Germany than for example in England, where these areas feature more dominantly in legal education and also generally are covered more extensively in textbooks. In a small circle of experts it is easier to agree on standards. The Principles by contrast concern general contract law which is an extremely wide field with a correspondingly large number of interested parties. Following Teubner's analysis, there is accordingly no closed "system", in which a dominant rule could exert itself.

3. The Law of Corporate Governance

A particularly perceptible interaction between hard and soft law underway at present is in the area of corporate law obligations of conduct. Here over recent years many sub-areas have emerged, with experiments in hybrid frameworks to explain the law of the ever more complex demands of good corporate management. This means that the legislator sometimes only provides a framework and leaves the fleshing out to flexible soft law, sometimes even with express reference thereto in its legislative rules.

One prominent example is corporate governance: § 161 AktG (stock corporation act) demands that stock corporations comply with the recommendations laid out in the German Corporate Governance Code ("Deutscher Corporate Governance Kodex", DCGK).[97] While it remains possible for the corporation to deviate from the DCGK, it must explain each deviation and publish its decision permanently on its website ("comply or explain"). The Code thus relies on acceptance rather than compulsion. The legal nature of the DCGK is subject to much debate.[98] The expert commission responsible for drafting the Code was initiated by the Ministry of Justice in 2001, i.e. by the executive branch of the government. The ministry, however, restricted itself to an examination of the process by which the code came into being, its substantive fairness and whether it breached applicable law.[99] The rationale and the expediency of the recommendations on the other hand remain solely in the hands of the commission which from time to time releases updated versions.

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[97] See www.dcgk.de for the German version of the Code as well as for an English translation.

[98] Summary in Hüffer/*Koch*, 15th edn. 2021, AktG § 161 no. 3.

[99] Hölters/Weber/*Hölters*, 4th edn. 2022, AktG § 161 no. 3.

As for responsibility for violations of the law by corporations, compliance has in recent years developed into an independent area of the law. The birth of modern compliance is said to be the Siemens scandal in 2008, in which the German technology giant came to the attention of American and finally German law enforcement authorities for involvement in systematic bribe payments in a number of countries and ultimately saw itself confronted with fines and damages claims running into billions. In consequence, the installation of compliance departments in all large corporations has had a fundamental effect on the way business is conducted. Avoidance of corruption was only the beginning, and many other areas of the law were quickly adopted also, from competition law to data protection to product safety.[100]

Compliance means not only adherence to the law – such a duty has of course always existed. Much more than that, appropriate organisational measures should ensure that violations of the law do not occur. This presents the question of how these practices are to be determined. The law here is vague, for example with reference to the business judgment rule (§ 93 (1), 2nd sentence AktG). The legislator has left it to practice to flesh out these vague legal terms, and here numerous private regulatory proposals have emerged, such that there has even been talk of an "industry" of rule formation.[101] The market is competitive, the various private rule makers are therefore in open competition with each other, and the promise of reward is great.

To stay with the example of fighting corruption, in German criminal law it is an offence to pay a bribe.[102] The details, such as the distinction from socially customary gifts as gestures of politeness, remain unregulated in statute and must be decided in the individual case after weighing all the circumstances. For many years there has been a flood of publications which attempt to articulate recommended courses of action or best practices. These include first of all the Codes of Conduct, which every large corporation has drafted for itself in recent years. On the level of business federations there are several initiatives underway, such as the Guidelines on Gifts and Hospitality from the ICC in 2014.[103] Specifically in Germany there is the Kodex Medizinprodukte des Bundesverbandes Medizintechnologie[104] (Medicinal Products Code of the National Federation of Medical Technology) or the Wertemanagement Bau des Bayerischen Bauindustrieverbandes (Ethical Management in Construction by the Bavarian Federa-

[100] Hauschka/Moosmayer/Lösler (eds.), Corporate Compliance – Handbuch der Haftungsvermeidung im Unternehmen, 3rd edn. 2016.

[101] *Sampson*, Global Crime 2010, 261 et seq.

[102] The most important provisions are §§ 331 et seq. StGB (Strafgesetzbuch, German Criminal Code) for the bribery of state employees, § 299 StGB for bribery in private affairs.

[103] https://iccwbo.org/publication/icc-guidelines-on-gifts-and-hospitality. Thereto *Sidhu/Eckstein*, CCZ 2015, 34 et seq.

[104] *Dieners*, Handbuch Compliance im Gesundheitswesen, 3rd edn. 2010, Chapter 4 no. 15.

tion of Construction Industry),[105] to name but two examples. As well as the business federations there are also rules from organisations of civil society, such as the internationally developed guidelines in the Business Principles for Countering Bribery by Transparency International.[106] The most far-reaching rules to date, however, do not emanate from lawyers at all, rather from financial auditors, who enable companies to organise their business according to certain principles, and in some instances even provide corresponding certification.[107]

With the rise of compliance, the monitoring of adherence to commercial criminal law has de facto transferred from state to corporation, i.e. been privatized. Under this arrangement, businesses hope that if they follow best practices they can obtain some leniency, should violations of the law nevertheless occur. At least they can demonstrate with the measures that they have made all objectively required efforts to avoid such violations. However, as to the extent to which courts and enforcement authorities will in practice be prepared to limit or exclude liability on the basis of compliance measures taken, the jury is still out.[108]

An even younger area of the law than compliance is Corporate Social Responsibility (CSR).[109] Because of the international structure of supply chains, it is difficult as a matter of jurisdiction for individual national legislators to hold their corporations liable for violations of the law committed by their suppliers overseas.[110] Further, even with extra-territorial application of national laws, different national standards could potentially interfere with fair competition between the corporations; accordingly, there is a need for an international level playing field with the same rules for all. The European legislator has made a first regulatory proposal with the CSR directive.[111] This places a duty on certain large businesses to report on the measures it has taken to ensure sustainable production.[112] The appropriate measures themselves are not provided by hard law, but rather left to the businesses, which can avail themselves of the soft law

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[105] *Hess*, in: FS Franke, 2009, 139 et seq.

[106] https://www.transparency.org/files/content/publication/2015_BusinessPrinciples Commentary_EN.pdf (last accessed January 2022).

[107] Cf. the certification standard PS 980 „Grundsätze ordnungsmäßiger Prüfung von Compliance Management Systemen" ("Principles for the orderly auditing of compliance management systems") of the Institute of financial auditors (Institut der Wirtschaftsprüfer (IDW)) as well as at international level the Standards of the International Standardization Organization (ISO), in particular ISO standard 37001 for Anti-Bribery Management Systems, published in 2016.

[108] On possible further developments *Hauschka/Moosmayer/Lösler* (fn. 100), § 1 no. 44 et seq.

[109] *Beckers*, Enforcing Corporate Social Responsibility Codes, 2015; BeckOGK/*Fleischer*, 1.9.2021, AktG § 76 no. 42 et seq.

[110] *Krisch*, in: Reinisch/Hobe/Kieninger/Peters (eds.), Unternehmensverantwortung und Internationales Recht, 2020, 11 et seq.

[111] Directive 2014/95/EU of 22.10.2014.

[112] Transposed in Germany in §§ 289a et seq. German Commercial Code (Handelsgesetzbuch, HGB).

bodies of rules. Some of these are listed in Recital 9 of the CSR directive, including the UN Guiding Principles on Business and Human Rights (Ruggie Principles), the OECD Guidelines for Multinational Enterprises and the ISO standard 26000. Other nascent regulatory works include the Global Standards for Sustainability Reporting of the International Sustainability Standards Board.[113]

The significance of privately made soft law has thus also overtaken state law in the area of CSR. The organisations involved in making the law even display a tendency to slowly extend the scope of their activity ("mission creep").[114] Soft standards of conduct cannot simply be ignored. They play an important role in filling the gaps in all kinds of legal situations, such as for civil liability for negligence of a company for violations of human rights. To this extent they have been called "soft law with hard sanctions".[115] The significance of the new area of the law in this respect is not limited to the articulation of rules of conduct; there are even separate legal enforcement mechanisms for them emerging outside of the state court system. These are, firstly, the OECD complaint procedure before the national contact points. In Germany a department in the business ministry has been constituted for this purpose, offering a neutral forum for the settlement of disputes arising from complaints of violations of the OECD principles.[116] Further, since the end of 2019 there are the Hague Rules on Business and Human Rights Arbitration, an independent set of arbitration rules based on the Uncitral rules, but which concern the particularities of human rights proceedings.[117] With such own fora for the enforcement of the soft bodies of rules one may prophecy that the whole area of CSR will further emancipate itself from state made hard law and establish itself as a powerfully effective area of privately set standards.

V. Conclusion

Soft law already plays a large role in German law; its significance in coming years will likely increase further. This follows from globalisation, which makes a regulation of its social consequences through states – whether acting alone or through international law treaties – increasingly difficult. International commerce in goods only made a first step in this respect with the establishment of privately made rules (lex mercatoria). Since then, there have been private rules without direct statutory force in ever more areas of life.

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113 *Sellhorn/Wagner*, DB 2022, 1 et seq.
114 *Spießhofer*, NZG 2018, 441, 443.
115 *Spießhofer*, AnwBl 2019, 408, 410; *Huck/Kurkin*, ZaöRV 2018, 375, 383.
116 *Krajewski/Bozorgzad/Heß*, ZaöRV 2016, 309, 317 et seq.
117 *Gläßer/Kück*, SchiedsVZ 2020, 124 et seq.

The relationship of these soft rules to state law is very different across all these areas. At times it is a struggle for complete autonomy like with the lex mercatoria, whose proponents specifically seek to create an order of contract law outside of any state law. In other areas we find more of a happy coexistence, such as with the UCP and other model contracts, which regulate aspects of a contractual relationship for which there is otherwise barely any statutory provision, and which in this sense fit well in the national legal order. In recent times we can even observe an increasing trend towards a smart mix of hard and soft rules, whereby the legislator consciously leaves the fleshing out of the mandatory framework it provides to private actors.

Globalisation et pluralisme juridique – Globalisation and Legal Pluralism

Orders of Pluralism and Rights

Stefan Grundmann

I. Introduction – Topic

Diversity in the international sphere is a fact, legal pluralism is a normative order – and the latter holds true as well for global legal pluralism.

In this respect, the delineation "in the international sphere" can refer to regional and to global contexts. Both are international and raise similar questions and issues, with the difference that regional contexts are typically regulated more densely and with more certainty. On the other hand, the holding that legal pluralism – also global legal pluralism – *is* a normative order can be seen both as a positive statement (*is* indeed) and as a normative statement (*should* be).[1] Moreover, while this double statement may not exhaust the concept of "legal pluralism", it is so core and already so complex that focusing on it exclusively seems legitimate and as well advisable.

When legal pluralism as a normative order is therefore the core topic of this contribution, two issues should be highlighted from the beginning that are important for how the topic is approached. These are the points that determine the architecture of the contribution. The first point adds some detail to the question why the dichotomy of global vs. regional is important (it will play a role both at the conceptual level and at the level of examples). While legal pluralism at the level of globalisation forms the more far-reaching dimension, and while it may indeed be that (only) globalisation has transferred the concept of legal pluralism from a status of "slum-dwelling" to one of mainstream and core importance,[2] the regional dimension is important for this topic as well. Examples from the

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[1] From the large array of literature on global legal pluralism, see in the first sense (*is* a normative order): *Teubner*, in: Teubner (ed.), Global Law without a State, 1997, 3–28; rather in the second sense (should still *become* a normative order): *Schiff Berman*, in: Schiff Berman (ed.), The Oxford Handbook of Global Legal Pluralism, 2020, 1–35.

[2] In this sense, see namely: *Michaels*, 5 Annual Review of Law and Social Science (2009), 243, 243 et passim; *von Benda-Beckmann/Turner*, 50 The Journal of Legal Pluralism and Unofficial Law (2018), 255, 265.

international, but regional level are more intense in substance, and therefore this article strongly refers to them as well.

The second point is about which normative instruments are seen as being key for legal pluralism – also global legal pluralism. These are two, which are discussed in some detail. The first one is a constitutional framework for a sound development of pluralism (of values mainly), and this is seen as being key, but also as existing *in nuce* at the global level as well. The second instrument is seen in a pluralist methodology and law theory. While the first instrument has been discussed intensively over the last two decades, the second much less and only very scarcely in the context of global legal pluralism. This does not imply, of course, that there is not a much larger multitude of questions raised by the concept of 'legal pluralism', such as pluralism of legal orders and sources, pluralism of legal values, pluralism of legal actors, and many more. However, the ultimate (constitutional) values and the shape of the overall methodology by which all thinking on pluralism should be approached would still seem to stand out among all questions on (global) legal pluralism.

A third point needs to be addressed. The two dimensions – regional *vs./and* global and constitutional *and* methodological – are discussed in more depth. The overall thrust is, however, that the findings are necessary as foundations for any discussion of the topic of "rights of nature" (and probably of any topic of similar revolutionary and foundational shape in the international sphere). "Rights of nature" are approached in a much more sketchy way in the conclusions. Thus the article is designed primarily as one about the question to know which arguably are the most important pillars of a legal pluralism, in particular a global legal pluralism (see II. and III.), and only then as well about potential repercussions of such view for innovative questions such as that of "rights of nature" (see IV.).

II. Global Legal Pluralism – Constitutionalization as its First Pillar

1. Constitutionalization as Order for Global Legal Pluralism

The development over the last two decades, both on the level of theory and on that of legislative tools and (some) adjudicative trends can be summarized in this way. Constitutionalization at the regional and global (international) level has paved its way – despite the fact that a global rule setter can only partially be found.

At the level of theory, it would indeed seem as if two major trends had evolved as the two dominant ones for the conceptualisation of "law" in the transnational arena. This arena is characterized by the fact that law of state origin – includ-

ing public international law treatises and ratification processes – clearly forms only a part, in a number of fields or cases even the less significant part, of the applicable rule material.[3] The two dominant trends (in legal theory and as well doctrinal thinking) would seem to be the *new law merchant* approach and the *constitutionalization* approach.[4] These are, of course, poles and extremes, characterized in a number of ways, certainly with many grades and shades of transition between them. However, they mark the two opposite views on the perceived desirability of state influence and namely of influence of democratic decision processes (as in a large number of market economies).[5] In the new law merchant mainstream, party autonomy, trade practices and perceived social norms, namely social norms within certain circles such as specific industries, form the constitutive elements.[6]

Conversely, the constitutionalization approach would see more room for a solid regime of values that can be traced back primarily to state authority. It may well be that the constitutionalization approach also acknowledges that rule-setting from state source, including constitutional norms, is less intense in the transnational sphere and that law created by private parties, namely the business world where multinational enterprises act as rule-setters, plays a (still) more dominant role in this sphere.[7] This, however, is perceived as not represent-

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[3] For the scarcity of input from state (public authority) sources as the most prominent and characteristic feature for "transnational law" (as opposed to national, international and European law), see namely *Zumbansen*, 1 Transnational Legal Theory (2010), 141.

[4] For the *new law merchant* approach *Schmitthoff*, 2 Current Law and Social Problems (1961), 129; *Trakman*, 48 American Business Law Journal (2011), 775; *Berger*, The Creeping Codification of the New Lex Mercatoria, 2nd Ed. 2010; *G.-P. Calliess*, in: J. Basedow et al. (eds.), Encyclopedia of Private International Law, 2017, 1119–1129. For a *transnational constitutional law Teubner*, Constitutional Fragments: Societal Constitutionalism in Globalization, 2012, 172. For the new constitutionalism *Gill*, 10 Global Change, Peace & Security (1998), 23–38; affirming even a *global constitutionalism Kumm*, in: Suami/Peters/Venoverbeke/Kumm (eds.), Global Constitutionalism from European and East Asian Perspectives, 2018, 168–199.

[5] Of course, state input into international rule setting not necessarily is based on democratic decision processes alone. Given, however, the dominant economic power of the US – also with long-arm statutes and the like – and given the Brussels effect (*Bradford*, The Brussels Effect – How the European Union Rules The World, 2020), democratic decision processes at least play a dominant role in the transnational scene whenever state input is in fact shaping the regimes.

[6] For the dominance of these features in the new law merchant approach, see *Schmitthoff*, 2 Current Law and Social Problems (1961), 129, 151; *Dalhuisen*, 24 Berkeley Journal of International Law (2006), 129, 180.

[7] See *Backer*, 39 Connecticut Law Review (2007), 1739–1784; building on the – not primarily transnational law related – seminal works of *Bernstein*, 21 Journal of Legal Studies (1992), 115; *Ellickson*, Order Without Law: How Neighbors Settle Disputes, 1991, 123–136; in German literature see as well *Bachmann*, Private Ordnung. Grundlagen ziviler Regelsetzung, 2006; *Wielsch*, 60 American Journal of Comparative Law (2012), 1075–1104. On transnational value chains and their social sciences conceptualisation and legal construction, see recently *Eller*, Rechtsverfassung globaler Produktion, forthcoming 2022. Good summary in *Renner*,

ing the total picture. The other side stressed in the constitutionalization approach is a web of constitutional values for whose formulation state sources have the dominant say and that is equally shaping law in the transnational sphere. All this does not refer only to those pockets of international economy – less so of other parts of society – that are highly regulated. This means where indeed rather detailed regulation exists world-wide, at least in the form of guidelines implemented in binding state law (also EU law) in most of the dominant public economies.[8] What has been said about constitutionalization rather refers to transnational law in general, not only regulated industries, but *any* business or activities in the transnational sphere. The main line of thinking can be characterised as building on sociological models of internalisation of key norms and also of embeddedness.[9] The main argument could be summarized in this way. When in free market economies under the rule of law and with democratic decision making processes it is clear that legislatures, decision-takers, courts etc. have to respect the framework of constitutions – guiding and taking precedence over any rule-setting –, leaving the well-defined domestic realm of law should not lead to complete abandon of such framework philosophy. It is too foundational not to follow actors (thus socialised) also into the transnational sphere. Rather, a transnational law practice established and exercised by state bodies, non-state bodies or private parties, that all nevertheless have agreed in a social contract in their respective contexts to the binding force of a constitutional framework and constitutional values, must be seen under this perspective. Their social contract – similar to all in their respective contexts – does not lapse.

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in: Grundmann/Micklitz/Renner, New Private Law Theory – A Pluralist Approach, 2021, § 26.

[8] There are indeed such highly regulated industries where *de facto world-wide detailed* regulation does exist, the financial sector constituting one example – where the Basel Core Principles regulate Banking Supervision, the International Organization of Securities Commissions' (IOSCO) Objectives and Principles the disclosure duties, namely in prospectuses, on capital markets and the Financial Action Task Force's (FATF) Recommendations the anti-money-laundering framework (albeit all only as recommendations). See, for a survey *Wymeersch*, 1 Global Policy (2010), 202–208; more recent *Jones/Knaack*, 10 Global Policy (2019), 193; see also *Newman/Posner*, 23 Review of International Political Economy (2016), 123; the broad survey in *Quaglia*, The European Union & Global Financial Regulation, 2014. There are several of these "high-risk" or "key-resources" industries that are regulated in this way and that, because of the so called impact theory in private international law, are regulated in this way consistently at least for the US and for the EU market (thereby also for the bulk of global consumption). In these cases, however, the transnational world is similarly state-rule regulated as is any national context. These are *not* the areas for which the constitutionalization approach needed to be developed.

[9] On internalisation of norms as a core idea of the sociological perception of the evolution and power of law, see *McAdams*, 96 Michigan Law Review (1997), 338, 378 et seqq.; also, *Cooter*, 144 University of Pennsylvania Law Review (1996), 1643. On embeddedness, see the seminal work by *Granovetter*, 91 American Journal of Sociology (1985), 481. For an explanation of the context and the repercussions, see *Grundmann*, in: Grundmann/Micklitz/Renner, New Private Law Theory (note 7), § 27.

It may be altered, be less sharply and concisely applicable, but does not vanish completely and remains binding at least in its essence.[10] The actors have internalised it, they and the contexts in which they are anchored feel embedded in it.

If one wants to look for the still deeper underpinning of this approach, the *Habermasian idea* of two equally strong basic orders and sources of a society under the rule of law comes to mind. Habermas sees individual autonomy and collective/public autonomy as equally legitimate axiomatic starting points for such societies. Neither is the one "granted" by the other (public autonomy / state not the ultimate foundation of law such as in the *Kelsenian tradition*) nor is the other (individual autonomy) given by nature of man (natural law philosophy) – but both are equally strong as a starting point and always to be brought into an equilibrium.[11] Whether the latter is left to a balancing exercise or to discursive discussion in a state of freedom, constitutes a further issue that, however, is not of prime relevance in our context.

If then constitutionalization is soundly theorised also at the transnational-global level, thus giving strong foundations to a genuinely *legal* order also in the transnational, *global* sphere, how does this translate into global legal *pluralism* as the third element of global legal pluralism? For answering this question, one may first remember from where this article started out. "Diversity in the international sphere is a fact, legal pluralism is a normative order – and the latter holds true as well for global legal *pluralism*." As a tentative first answer, it can be held at least that via constitutionalization – i.e., embedding the transnational sphere into a legal order grounded in fundamental values – the diversity in the international sphere which is a fact has a foundational legal underpinning. Whether the latter itself also enhances values of pluralism, can then better be answered after looking into the concrete examples – the question and interim answer therefore will be taken up once they have been discussed.

2. Examples, Regional and Global, for a Constitutionalization of Society at Large

Examples from legislation and from case law are suitable to demonstrate that the constitutional approach sketched out in the previous section is not theory alone – consistent theory today –, but that it is supported by core pieces of practice with a very high degree of visibility. These examples stem both from the regional international and from the global international level, in a number of instances

[10] Path-breaking *Teubner*, in: Teubner (ed.), Global Law without a State, 1997, 3–28; moreover, the quotes above note 4.

[11] Path-breaking in Habermas' work, see *Habermas*, Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy, 1996, esp. 84–104. The German original of 1992 as „Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats". For an explanation of the context and the repercussions, see *Renner*, in: Grundmann/Micklitz/Renner, New Private Law Theory (note 7), § 4.

from a combination of both. Their typical thrust would seem to be that constitutional values are seen to govern society more broadly, as an overarching value basis – even in realms for which they have not been designed originally or not with the same binding force, for instance in the global sphere.

a) Corporate Social Responsibility

If one takes the core player of a new law merchant, the multinational enterprise, one of the most striking developments of the last decade – many authors would say even *the* most striking development – would seem to be the evolution of a concept of corporate social responsibility. As has been explained, core industries that are considered key for the risks they carry and even more for the centrality of assets the exchange of which they administer, are often regulated densely already at the global level (with guidelines and recommendations). Capital (i.e. the financial sector) constitutes the example mentioned and exemplified in a few words.[12]

For corporate social responsibility, it is meaningful that a similar development can be observed with the setting of a regulatory framework both at the UN level and at the OECD level over the last one or two decades.[13] While it is true that enterprises are typically covered only above a certain threshold (size), it is equally true that these recommendations and guidelines are not sector-specific (even though this does not exclude that certain fields, like critical minerals, are regulated in a more substantive and in a stricter way). This is remarkable in its general thrust. If one considers that encompassing all fields of the economy in global regulatory instruments is unusual and that rather only a few key sectors are regulated so densely, it is plausible that it was the importance of the values protected that lead to such a broad coverage in the UN and/or OECD guidelines, recommendations and standards. This holds irrespective of whether the guidelines etc. rather advise for disclosure rules, substantive rules of best practice or others. Asking the question in this way, indeed makes exceptionality plausible. The values are so exceptional that constitutionalizing them for all multinational enterprises (at least of a certain size) was seen as being necessary. Indeed those two dimensions stand out from a constitutional values perspective that are the prime focus of corporate social responsibility. These are environmental issues – the stronger the more global the impact may be – and massive and systematic infringements of human rights – again, the stronger the more the infringements are related to essential personal rights and the more they are mas-

[12] See above note 8.

[13] See UN, Guiding Principles on Business and Human Rights – Implementing the United Nations "Protect, Respect and Remedy" Framework (New York – United Nations 2011); OECD, Guidelines for Multinational Enterprises (Paris – OECD, 2011); OECD, Due Diligence Guidance for Responsible Business Conduct (Paris – OECD, 2018).

sive.[14] Human rights stand out because of their rank in any constitutional value system committed to the rule of law and because of their universal recognition, in universal declarations and in regional binding conventions.[15] Environmental issues stand out, namely if the amount to which the impact is global, irreversible and severe is a key facture for the intensity of corporate social responsibility, because they have incalculable general effects on third parties (external effects) that can all translate again into severe human rights problems.

At the global level, regulation comes by guidelines and recommendations. They are taken up in regional, still international contexts, such as the European Union, in more stringent regimes. The EU Corporate Social Responsibility Directive of 2014 is characterised by stating a stringent disclosure duty – designed to clarify the issue which measures are taken with respect to a list of human rights and environmental issues, when they occur down the supplier chain, also beyond borders, indeed globally.[16] This duty has indeed its lacunae (too short a coverage in the chain, no clear liability for incorrect statements and no clear view of how the information will influence behaviour).[17] Nevertheless it would seem to constitute a (laudable) first step, has ostensibly been designed only as a

[14] For these two dimensions as the focus of corporate social responsibility legislation, practice and philosophy see, for instance, *Hart*, 20 The Academy of Management Review (1995), 986; *Johns*, 22 A Journal of Policy Analysis and Reform (2005), 369, 370; *Garriga/Melé*, 53 Journal of Business Ethics (2004), 51; *Humbert*, 71 Schmalenbach Business Review (2019), 279. Also see the European Commission's latest proposal for amending the CSR-directive, 2021/0104 (COD), especially recital 25.

[15] For universal acts, see fundamentally the United Nations (UN) Universal Declaration of Human Rights (UDHR) of 10th December 1948, which is, however, a legally non-binding resolution (see in detail on this for instance *Schabas*, The Universal Declaration of Human Rights, 2013, et passim). On this basis, the UN has adopted a series of further human rights conventions since 1966, which, in contrast to the UDHR, constitute legally binding treaties under international law. Specifically, these are the Civil Covenant (ICCPR), the Social Covenant (ICESCR), the Convention against Racism (ICERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture (CAT), the Convention on the Rights of the Child (CRC), the Convention on Migrant Workers (ICMW), the Convention on the Rights of Persons with Disabilities (CRPD) and the Convention against Enforced Disappearances (CPED) (for a survey see for instance *O'Flaherty*, Human Rights and the UN-Practice before the Treaty Bodies, 2002. On human rights obligations of companies and their implementation in corporate law see most recently (from a German law perspective) *Brunk*, Menschenrechtscompliance, forthcoming 2022. For regional examples, see below notes 27 and 28.

[16] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, *OJ* 2014, L 330/1; on the directive, see, for instance, Accountability Europe, Member State Implementation of Directive 2014/95/EU – A comprehensive overview of how Member States are implementin the EU Directive on Non-financial and Diversity Information, (2017); *Szabó/Sørensen*, 12 European Company and Financial Law Review (2015), 307.

[17] For these different lines of criticism of the directive, see, for instance, *Spießhofer*, Neue Zeitschrift für Gesellschaftsrecht 2014, 1281; *Szabó/Sørensen*, 12 European Company and Financial Law Review (2015), 307; *Quinn/Connolly*, 14 European Company Law (2017), 15.

starting point, triggering societal development, in a perspective of unleashing a dynamic learning process, mobilizing society or giving it tools for doing so. Therefore, it does not come as a surprise that already after five years amendments are strongly discussed –[18] an area high on the political agenda, a core piece of constitutionalization of the international sphere.

b) Constitutional Pluralism Embedded in Human Rights Discourses

If one wants to step from the specific sphere of enterprises to the general terrain of norms and rules in the transnational sphere, it is again examples of high visibility that come to mind, strongly invigorated or even developed over the last one or two, perhaps three decades and that have again both a global and a regional dimension. For a regional example, the EU is particularly illustrative here (beyond the example already given of Corporate Social Responsibility). As a starting point, it is worth highlighting the fact that the European Union has once been created as a genuine public international law treaty, but – via van Gend & Loos and Costa ENEL and others – has soon adopted the shape of a regime that is *sui generis* – between public international law treaty and federal state. Still, the multi-level design is similar to genuinely global contexts, and with Article 2 para 2 of the EU Treaty, the Union has defined the legal regime of this international sphere *sui generis* as "pluralist", it has indeed specified this as a normative order –[19] the EU has to foster pluralism and keep it intact, among others by a principle of subsidiarity. This new rule in the Treaty of Lisbon does, however, not constitute the piece of the EU regime for which this regime is of primordial interest here – how foundational Article 2 of the EU Treaty may indeed be!

Still more pervasive and indeed primordial would seem to be the example of human rights seen as overarching value basis and governing all spheres of public life, including between private parties. Indeed, what has been the main root for the theory of constitutionalization of the transnational sphere, has a longer his-

[18] See the European Commission's Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting COM/2021/189 final; on the reform proposal, see, for instance, *Müller/Scheid/Baumüller*, 76 Betriebs Berater (2021), 1323; *Hummel/Jobst*, The Current State and Future of Corporate Sustainability Reporting Regulations in the European Union (February 28, 2022), https://ssrn.com/abstract=3978478; for a nice survey of the challenges and opportunities of a CSR-reform (with many references to further literature) see *Venturelli/Fasan/Pizzi*, Rethinking non-financial reporting in Europe: challenges and opportunities in revising Directive 2014/95/EU, 23 Journal of Applied Accounting Research (2022), 1.

[19] On the foundations of this provision, constitutional for the EU, see *Verschraegen*, 29 Journal of Law and Society (2002), 258 (fundamental rights as basis of societal differentiation); on the repercussions of legal pluralism vested in the EU Fundamental Rights Charter on private law, namely contract law, see *Wielsch*, 10 European Review of Contract Law (2014), 365, 370 et seqq.

tory, of three decades, if going back to the very roots in the *Lüth case* decided by the German Constitutional Court in 1958, of even many decades. As seen, it actually started at the global level with the (non-binding) Universal (UN) declaration of Human Rights of 1948,[20] but did not stop developing. It is this further development that is of interest in our context. When the German Constitutional Court applied fundamental rights of the German Constitution to resolve a dispute between private parties (freedom of speech vs. freedom to conduct business), it justified this move by stating that these rights were not only directed against state action, but contained as well an overarching value basis for all spheres to which law applied.[21] The true boom of this case law came only in the 1990ies when it was applied to contract law, and when this caused an upheaval in private law academia more generally.[22] Looking back, there is hardly any doubt that the development and clarification of this issue (the interdependency between the two) was one, if not *the* most important step for the development of Private Law in total in Germany in the second half of the century.[23] The real potential – and potentiation! – of this case / these cases lies, however, in the repercussions for Europe in whole,[24] flanked, of course, by similar national devel-

[20] See above note 15.

[21] BVerfGE (Constitutional Court Reports) 7, 198 (*Lüth*). See beautiful description of overall context and development in *Kübler*, 83 Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft (2000), 313.

[22] Most disputed where the sales agent and the surety cases: BVerfGE 81, 242–263; 89, 214–236; more recently and seminal as well BVerfG, Neue Juristische Wochenschrift 2018, 1667 (Stadionverbot – Stadium Ban). See in particular *Canaris*, 184 Archiv für civilistische Praxis (1984), 201; *id*., Grundrechte und Privatrecht – eine Zwischenbilanz, 1999; on historical roots see *Grimm*, Verfassung und Privatrecht im 19. Jahrhundert. Die Formationsphase, 2017; for the dispute about this development, see, on the one hand *Zöllner*, 196 Archiv für civilistische Praxis (1996), 1 and *Diederichsen*, 198 Archiv für die civilistische Praxis (1998), 171; and on the other hand *Kübler*, 83 Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft (2000), 313; comprehensive survey by *Ruffert*, Vorrang der Verfassung und Eigenständigkeit des Privatrechts, 2001; on the process of balancing fundamental rights of all affected parties, see *Hager*, 49 Juristenzeitung (1994), 373; conceptualizing such impact as a clash between different societal rationalities *Teubner*, 83 Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft (2000), 388. On the different theories about the private law impact of fundamental rights, see *Neuner*, Privatrecht und Sozialstaat , 1999, 158–161, 170–173; *Wielsch*, 213 Archiv für die civilistische Praxis (2013), 718–759; as well as *Grundmann*, Constitutional Values and European Contract Law, 2008, 3–17 and *Maultzsch*, 67 Juristenzeitung (2012), 1040–1050 (both as well with comparative law survey); and on *direct* application of fundamental rights in private law, at least in certain situations, as advocated in the case of bans from stadia, see *Hellgardt*, 73 Juristenzeitung (2018), 901; *Michl*, 73 Juristenzeitung (2018), 910. Similar namely the development in Italy see below note 25.

[23] Similar *Canaris*, Grundrechte und Privatrecht (last note), 9 et seqq.; *Fezer*, 53 Juristenzeitung (1998), 265, 267 sees the impact of constitutional values on private law as the „century's main question" and opines that it is legal pluralism that may overcome the often evoked crisis of liberal legal thought – by appeasing legitimacy concerns.

[24] See broadly the early monograph by *Starke*, EU-Grundrechte und Vertragsrecht, 2016; and (however primarily targeted on fundamental freedoms) *Cherednyschenko*, Fundamental Rights, Contract Law and the Protection of the Weaker Party – a Comparative Analysis of the

opments already in other Member States, namely Italy, but also worldwide, for instance in Brazil that has a particularly rich and intensive case law in this respect.[25] Thus, from a model in a few national constitutional discussions, the idea of constitutional values as overarching values in all areas arguably subject to law, developed progressively. From a national view and standard, it was carried into a regionally transnational (supranational) one and had an overspill worldwide, also well beyond Europe. While the examples in this case are "only" of regional international kind or "only" consist in transplants to other national regimes, they are still linked to the global scene via the UN Declaration and the wave of human rights acts it triggered.

With these two examples, it is easier to answer the question of whether constitutionalization at the transnational level gives diversity in the international sphere (which is a fact) not only a strong and even foundational *global legal underpinning and order* (thus our interim answer above 1.), but in its content also contributes to a *pluralist* order. Pointing to the EU, which states openness to a pluralist order to be a constitutional principle of the Union (Art. 2 TEU), gives a first hint, because, of course, the European Union does unify and harmonize a lot of the legal order within the EU and its Member States. In a similar way, constitutionalization at the global sphere would seem in its content to empower pluralism – different legal and economic systems to live side by side – by making it possible that they tolerate each other, not just ignore each other, but state what

Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions, 2007; *id*., 2 European Review of Contract Law (2006), 489; *id*., 14 European Review of Private Law (2006), 23; *Alpa*, 19 European Business Law Review (2019), 301; *Rosaria Marella*, 3 European Review of Contract Law (2006), 257; see also for this context *Grundmann* (ed.), Constitutional Values and European Contract Law, 2008 (seeing through all main fundamental rights, but as well fundamental constitutional principles issues, for instance the Social State principle, and also the EU Citizenship debate, §§ 5–12). More recent the judgments by the ECJ on (probably) direct horizontal application of certain fundamental rights enshrined in the EU Charter in: ECJ of 17.4.2018 – case C-414/16 (*Egenberger*) – para. 76; ECJ of 6.11.2018 – joined cases C 569/16 and C 570/16 (*Bauer and Willmeroth*); ECJ of 6.11.2018 – case C-684/16 (*Max-Planck-Gesellschaft*) – para. 78–81; ECJ of 22.1.2019 – case C-193/17 (*Cresco Investigation*) – para. 79 et seq.; seminal ECJ of 26.2.2013 – case C-617/10 (*Åkerberg Fransson)*.

[25] See broadly *Comandé* (ed.), Diritto Privato Europeo e Diritti Fondamentali – Saggi a ricerche, 2004; *Laghi*, L'Incidenza dei Diritti Fondamentali Sull'Autonomia Negoziale, 2012; *Vettori*, Diritto dei contratti e 'Costituzione' Europea: Regole e principi ordinanti, 2005; *id*. (ed.), Contratto e Costituzione in Europa, 2005 – also in Italy with extensive case law, namely for the so-called "danno morale" (broad array of non-pecuniary damages); for Brazil, see Constitutional Court (Suprêmo Tribunal Federal), RE (Recurso Extraordinário) 201.819-8 (2nd senate) (reporter Gilmar Mendes), of 11.10.2005 (‚due process'); RE 161.243-6 (2nd senate) (reporter Carlos Veloso), of 29.10.1996 (non-discrimination of Brazilian nationals); ADI (Ação Direta de Inconstitucionalidade) 4815 (grand chamber) (reporter Carmen Lucia) of 10.06.2015 (privacy and personality) – all available at www.stf.gov.br.; on the impact of fundamental rights on private law, today broadly to be found in national law regimes, see the comparative survey by: *Beale/Fauvarque-Cosson/Rutgers/Vogenauer*, Cases, Materials and Text on Contract Law: Ius Commune Casebooks for the Common Law of Europe, 3rd. Ed. 2019, section 1.1.D.

is a unity of values needed and how far it goes. The very rationale of fundamental rights as basic protection and minorities rights is indeed to allow for diversity and pluralism to develop in a society that is of a rich array of ideas and convictions and that still needs to take (majority) decisions.[26]

A nice final example of the interplay between different layers, the combination of diversity/pluralism and basic unity and namely the dominance of a constitutionalization perspective can be seen in one concrete case and development. This is the broad application of the so-called Engel test developed by the European Court of Human Rights (adjudicating on the basis of the European Convention of Human Rights, pan-European indeed, including Russia).[27] This broad application, as recently advocated, would extend to such areas as EU financial sanctions regimes (with a transfer of the ECHR case law to the European Charter of Fundamental Rights case law for which European Court of Justice is called upon).[28] In this case, the criteria developed for a sanction being characterized as being criminal (and hence subject to strong constitutional protective devices) are seen as the following three. They can be characterized like this because national law does (diversity), but as well on the basis of how they and their prerequisites are shaped and namely on the basis of how deeply they impact (unitary, yet open-textured criterion). Indeed, the European Charter, coming into force in 2009, shows a last large step in the progression of constitutionalization beyond borders.

III. Global Legal Pluralism – New Pluralist Law Theory as its Second Pillar

Less obvious than the increasing strength of constitutionalization as a strong normative basis for (global or international) legal pluralism is the view that a systematic use of a pluralism of disciplines may serve as an equally important pillar. At least, not many have advanced this holding so far. Such pluralism of

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[26] For this view of fundamental rights, see already quotes in Fn. 19; see moreover *Besselink*, 35 Common Market Law Review (1998), 629; specifically on media pluralism see Commissioner for human rights, Media Pluralism and Human Rights, 2011, 43; fundamental for political thought: *Arendt*, Elemente und Ursprünge totaler Herrschaft, 1955.

[27] Council of Europe: European Convention on Human Rights of 4 Nov. 1950 as amended by Protocols Nos. 11, 14 and 15, and supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16. European Court of Human Rights, namely ECtHR of 23.11.1976 – case *Engel and Others v. the Netherlands*, Appl. Nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72.

[28] See Art. 50 of the Charter of Fundamental Rights of the European Union of 7.12.2000, *OJ* 2000 C 364/1; ECJ of 26.2.2013 – case C-617/10 – *Åkerberg Fransson;* ECJ of 5.6.2012 – C-489/10 – *Łukasz Marcin Bonda*; see, on the transfer of the Engel test to EU financial sanctions regimes *Sand-Henriksen*, The Concept of Sanctions – Constitutional Challenges and Multilevel Governance of EU Financial Sanctions and Sanctions Regimes, EUI thesis, forthcoming.

disciplines, balanced against each other and thus brought into a meaningful societal equilibrium with each other, may prove just as important for a normative order of pluralism at the global level because, as a tool, it systematically invites to draw on the most profound sources of knowledge on a pluralist value base in society. There is a theoretical side to this holding (below 1.), It can, however, also well be exemplified, and particularly well so for areas where traditionally only one discipline was dominant and influenced the thinking in this area accordingly.

1. New Pluralist Law Theory as Genuine Method for Global Legal Pluralism

(New) pluralist legal theory has held over the last years that legal scholarship should not only be informed by adjoining disciplines (interdisciplinary shaping of legal scholarship), but that a broadly pluralist inclusion of relevant disciplines constitutes the most legitimate approach.[29] Most legitimate for constitutional reasons. While such a pluralist legal theory is also heuristically much richer than any monist referral to one adjoining discipline can be (for instance in Law & Economics), the main reason for the statement made is different and twofold. The first reason is this. If constitutions in democracies under the rule of law are seen to all carry a pluralist regime of values[30] and if this is explicitly stated, at least for the European Union, also in the fundamental positive specification of ultimate goals (Art. 2 TEU), this is seen as imposing as well a methodological necessity. As an overspill from the pluralist orientation of such constitutions, legal scholarship increasingly has to get informed of all relevant explanation bases (theories) in other disciplines on a footing of equal chances for them. Otherwise, legal scholarship would not be shaped in a way to optimally account for the pluralism of values enshrined in constitutions. In other words: Legal schol-

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[29] *Grundmann/Micklitz/Renner*, New Private Law Theory (note 7) (first formulated in: *id*., Privatrechtstheorie, 2015); on the normative superiority (from a constitutional perspective), more specifically: *Grundmann*, Pluralistische Privatrechtstheorie – Prolegomena zu einer pluralistisch-gesellschaftswissenschaftlichen Rechtstheorie als normativem Desiderat („normativer Pluralismus"), 86 The Rabel Journal of Comparative and International Private Law (RabelsZ) (2022) 364–420 (forthcoming also in English). Discussion by *Alpa/Dagan/Deakin/Hesselink/Mak/Markovits/Maugeri/Michaels/Niglia/Resta,* in: German Law Journal, Special Issue 3/2022; similar *Auer*, Zum Erkenntnisziel der Rechtstheorie – Philosophische Grundlagen multidisziplinärer Rechtswissenschaft, 2018; *Teubner*, 1 Asian Journal of Law and Society (2014), 235.

[30] For the (broadly shared) understanding of Western Constitutions as *pluralistic* canons of constitutional values, see, for instance: *Di Fabio*, 59 Juristenzeitung 2004, 1; *Fraenkel*, Deutschland und die westlichen Demokratien, 6th ed. 1974, 197 et seqq.; *Tierney*, Constitutional Law and National Pluralism, 2005; *Walker*, 65 Modern Law Review (2002), 317–359; also *Ovádek*, Constitutional Pluralism between Normative Theory and Empirical Fact' (23.10.2018), https://verfassungsblog.de/constitutional-pluralism-between-normative-theory-and-empirical-fact/ (10.2.2022); broader *Marmor*, Law in the Age of Pluralism, 2007; on implications for jurisprudential methodology *Lepsius*, 52 Der Staat (2013), 157.

arship would have to give diverging values enshrined in constitutions equal chances in the scholarly approach chosen – and indeed not only when taking stock of and assessing those theories from other disciplines, but as well when establishing order between them (see next paragraph). The second reason has to do with the *proprium* of law and legal scholarship. If they are meant to serve society as a whole, it would seem obvious that weighing all interests and their conceptualization in several disciplines constitutes the *proprium* and not giving one perspective on society precedence over the others – unless there is a clear constitutional (or constitutionally founded) command into this direction, albeit also for certain fields. Legal scholarship would thus as well gain autonomy from other disciplines that formulate their ultimate goal and benchmark according to which they then assess legal norms and solutions.

(New) pluralist law theory also admits that there are problems to such approach and sees them in two directions mainly. The first problem is taking stock of such enormously increased pool of theories and knowledge – and the answer to this problem can only be systemic, in the sense, that this is a task not for single scholars, but for legal scholarship as a whole. For this, legal scholarship would not need always to take stock of all details and be cutting-edge in research in one adjoining discipline, but rather solidly understand rationale and results reached, but on the other hand, always be capable of seeing such rationales and results reached by one adjoining discipline in conjunction and comparison with others. The second problem is that of establishing order between different theories and disciplines. This problem, first discussions about it and an approach in which the constitutional values form the benchmark for hierarchies and the balancing process ('value tracking theory') have been discussed elsewhere and need not be repeated here.[31]

(New) pluralist law theory, despite the problems named and because of its constitutional legitimacy and superiority, has obvious links to global legal pluralism as well. If arguably diversity is even higher, certainly, the problems raised are also exacerbated by higher diversity, sometimes even unsurmountable "*différend*" in the sense of Lyotard.[32] Namely the caveat formulated so far in pluralist law theory that it still conceptualizes a law in (typically Western and some East-Asian) democracies under the rule of law will have to be approached. Reality and Theory of the Global South and more radically critical theories will have to make their impact more prominently.[33] As such, however, the rationale formulated applies as well, even if the constitutional value basis may be more vague and characterized by still a stronger and more radical diversity. As has

[31] See above note 29, namely the contribution in The Rabel Journal of Comparative and International Private Law (RabelsZ).

[32] *Lyotard*, Le différend, 1986; see before as well *Derrida*, L'Écriture et la différence, 1967.

[33] See contributions to the above-mentioned Special Issue in German Law Journal by: *Michaels*, GLJ (2022); *Resta*, GLJ (2022).

been argued in the last section (above II.) and as increasingly would seem to become a majority view, such a constitutional background of values exists as well at the global level.

2. Examples – Regional and Global

Rights of Nature – to which this contribution reverts in its last section – typically involve one clash already researched as well in core areas of economic activities. This is the clash between an economic rationale based primarily on individual utility functions – even though overall welfare is advocated as ultimate benchmark in mainstream models – and the awareness of other values and preferences that are typically formulated and researched more profoundly in other disciplines than economics. These alternative preferences are often less concisely defined, but the more they are, the more they typically can influence results as well in concrete cases and questions. From the perspective of normative pluralism, such precision does not even constitute a precondition for having them included in a societal balance. The examples, for simplicity sake, are, however, of a kind that alternative values and approaches have gained already a certain precision and clearer impact on mainstream models primarily shaped according to economic theory. They stem from the core of economic activities, but involve values not or only weakly formulated in economic theory. One setting is characterized by a strongly asymmetrical information and power arrangement, the other by a scheme between business enterprises.

The first example involves what is seen as a third type of business organization – alternative to market and firm. This is the long-term network organization of business, this form is dominant in all supply and distribution chains, hence in the largest parts of all production and marketing, in all payment systems, and in many large research and development conglomerates.[34] This constitutes hence a mega-field in practical (and conceptual) importance. W. Powell who first has researched so profoundly networks even states that it constitutes the most important form of business organization.[35] This author is, however, even more important for first conceptualizing so profoundly networks of contracts – theoretically, but on a large empirical basis, namely in the Silicon Valley. He gives an alternative explanation to reciprocity and self-interest, maximizing own return as the driving force behind these networks. He rather sees an arrangement of responsibility for the own business combined with trust relation-

[34] See Grundmann/Cafaggi/Vettori (eds.), The Organizational Contract – From Exchange to Long-Term Network Cooperation in European Contract Law, 2013; and therein *id.*, The Contractual Basis of Long-Term Organization – The Overall Architecture, 1; *Grundmann*, in: Grundmann/Micklitz/Renner, New Private Law Theory – A Pluralist Approach, 2021, § 17; *Teubner*, in: Amstutz/Teubner (eds.), Networks: Legal Issues of Multilateral Cooperation, 2009, 3; *Gilson/Sabel/Scott*, 109 Columbia Law Review 431 (2009).

[35] *Powell*, 12 Research in Organizational Behaviour 295 (1990).

ships, interest in the success of the common network (also for self-interest, but via community), sharing of information not necessarily on the basis of '*do ut des*'. If this is the case, remedies in law have to be thought differently, furthering this image of collaboration, certainly not strict and immediate reciprocity. The second example involves the very pressing need of more household investment. It is expressed in the so-called investment gap paradox, which says that household investment is astonishingly much lower than a utility function of households (rational private investors) would suggest.[36] Trust seems to be too low (as returns and increase in value in capital markets is higher than in virtually any other fields). This is not only a concern for capitalization of capital markets, but just as much and probably even more a mega-concern socially. It would be such namely if by the shape of regulation and investment instruments trust-building is not taken into account sufficiently and thereby large parts of society are de facto excluded from the most rewarding investment possibilities (at least statistics would suggest this strongly). Hence, the perspective to think trust in a way conceptualized in sociology rather than in economics, not relying on understanding, processing and controlling information as the basis of investment decision, but (as well) investment made possible on the basis of trust (also personalized trust) is of prime importance.[37]

IV. Conclusions – for Rights of Nature

1. Conclusions …

The two core holdings of this article are the following. Firstly, a lot of attention has already been paid to the constitutionalization of the global order. This article both sees a sound theoretical foundation for this – even in (partial) absence of global rule setters – and a clear development into this direction in rule setting and adjudicative practice over the last two decades. If one takes the parallel movement at the international, yet regional level as a meaningful laboratory for the global perspective, this holding becomes even immensely stronger. Secondly, another dimension of (global) legal pluralism has been much less discussed. This is the dimension that a pluralism in methodology, namely a pluralism of disciplines used and balanced against each other and thus brought into a meaningful societal equilibrium with each other, may prove just as important for a normative order of pluralism at the global level. It constitutes the main source

[36] *Bertaut/Haliassos,* 105 Economic Journal 1110 (1995); *Campbell,* 61 The Journal of Finance 1553 (2006). For statistical insight, see *Chater/Huck/Inderst,* Consumer Decision-Making in Retail Investment Services: A Behavioural Economics Perspective, (November 2010) Final report 1-480 ("non-participation puzzle").

[37] For the following, see *Grundmann,* Festschrift [Essays in Honour of] Windbichler 2020, 67; *id.*, Festschrift [Essays in Honour of] Grunewald 2021, 227.