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The *Rechtsstaat* in Germany: a political idea and a legal principle*

Key words: rule of law, *Rechtsstaat*, *Rechtsstaatsprinzip*, *Grundgesetz*, positivism

Abstract. Current discussions on the rule of law in the EU have at their heart the question of what rule of law means. In order to approach this conceptual question, it may be useful to distinguish the rule of law as a political idea from the requirements of the rule of law as a normative legal specification. This distinction is, at least, applicable for the German discussion on the *Rechtsstaat*. There is a political idea of the *Rechtsstaat* as an ideal of the state on the one hand, and a constitutionally specified legal principle, the *Rechtsstaatsprinzip*, in the German *Grundgesetz* on the other. The lines between the political and the legal concept are blurred, but they should be drawn with care.

Rechtsstaat w Niemczech: idea polityczna i zasada prawna

Słowa kluczowe: państwo prawa, *Rechtsstaat*, *Rechtsstaatsprinzip*, *Grundgesetz*, pozytywizm prawniczy

Streszczenie. U podstaw obecnych dyskusji na temat praworządności w UE leży pytanie o znaczenie pojęcia praworządności. W celu odpowiedzi na owo conceptualne pytanie użyteczne może być rozróżnienie między „praworządnością” jako ideą polityczną, a wymogami praworządności jako normatywnej specyfikacji prawnej. Różnica ta występuje w niemieckiej dyskusji na temat *Rechtsstaat*. Z jednej strony istnieje bowiem polityczna idea *Rechtsstaat* będąca ideałem państwa, z drugiej zaś – konstytucyjnie określona zasada prawna, czyli „*Rechtsstaatsprinzip*” funkcjonująca w niemieckiej konstytucji (*Grundgesetz*). Granice między nimi nie są wyraźne i należy je wyznaczać z rozwagą.

In the light of the German discussion¹ it becomes apparent that the prevailing conception of the constitutional principle in German legal dogmatics renders it almost impossible to distinguish between political and legal objectives. At least

* This article is a slightly revised version of previously published thoughts in Carsten Bäcker, *Gerechtigkeit im Rechtsstaat. Das Bundesverfassungsgericht an der Grenze des Grundgesetzes*, Tübingen 2015, chapter: *Rechtsstaatsprinzip und Rechtsstaatsideal* (pp. 181-193). – The author thanks Lukas Fest for his efforts to translate the text and given citations into English.

¹ It should be noted that rule of law and *Rechtsstaat* are not to be confused as conceptual twins. They are, however, conceptual siblings. The notion of rule of law defines the supremacy of law before and above any given power, whereas *Rechtsstaat* describes a somewhat weaker position of law: that a given power has subjected itself to obey the law it has given.

in the understanding of the *Rechtsstaatsprinzip* of the *Grundgesetz* as advocated by the German Federal Constitutional Court, a separation between political objectives or ideals and the positivised (constitutional) legal imperatives is not discernible. This lack of separation of the political from the legal dimension, however, blurs the dimensions of politics and law. If this confusion is to be avoided, an understanding of the *Rechtsstaatsprinzip* must be recognised which is limited to positivised constitutional specifications. Ultimately, this can only succeed if a constitutional *Rechtsstaatsprinzip* with an original normative claim of its own is completely abandoned, as will be shown.

This article is concerned with the pragmatics of avoiding an unwelcome conflation of politics and law. However, the dispute over the *Rechtsstaatsprinzip* in the *Grundgesetz* as a dispute over the conception of constitutional law leads to the limits of law. Thus, following a description of the varying conceptions of the *Rechtsstaat* as an ideal of law in the German discussion (1.), and of the *Rechtsstaatsprinzip* as a legal argument in the German legal discourse (2.), the debate is, albeit briefly, linked to the dispute on positivism (3.).

1. *Rechtsstaat* as ideal of the state

From a political perspective, *Rechtsstaat* describes one, perhaps even the ideal of the state. From a legal point of view, the *Rechtsstaatsprinzip* describes the class of normative specifications that the law sets for state power in the sense of *Rechtsstaat* as an ideal. This basic distinction, which is too seldom taken into account, is particularly vividly elaborated upon by Heinz Strack. He describes the basic idea of *Rechtsstaat* in his *Theorie des Rechtsstaats* as follows:²

If one now attempts to derive [...] the concept of *Rechtsstaat*, one happens upon a wealth of details. This inevitably leads to the question of which fundamental idea underlies these details. From the details that have become historical, we can discern the idea that in the *Rechtsstaat* the organs of public authority are subject to the applicable positive law in the same way as citizens are.

To this formal element of the *Rechtsstaat* as a state governed by law, Strack adds the material element of the idea of law:³

Through the establishment of fundamental rights of all legal persons, which has become customary in modern constitutions [...] state power in all its manifestations, i.e. as legislative, executive and judicial power, is bound to the legal idea expressed within the fundamental rights. According to this, the *Rechtsstaat* is not

² H. Strack, *Theorie des Rechtsstaats*, Hamburg 1970, p. 49; emphasis his.

³ Strack (fn. 1), S. 50 f.; emphasis his.

only a state governed by laws, but also a *state governed by the material principles of the idea of law*. [...] Thus, the *Rechtsstaat* is an institute not only of positive law, but also of correct law.

However, the “positive law oriented according to the idea of law” could not result in an ideal law:⁴

A *Rechtsstaat in the sense of ideal law* cannot be realised, since ideal law can neither be formulated nor, in view of the imperfection of all human institutions, actually implemented. [...] The *Rechtsstaat* can therefore only be *approximately translated into reality*, and it requires the constant strenuous work of all well-meaning people if the existing state is to be brought ever closer to the ideal of *Rechtsstaat*.

Apart from a few questions that could be addressed to the reconstruction of the concept of *Rechtsstaat*, especially to that of the idea of law, Strack has succeeded here in getting to the heart of an elementary circumstance: The *Rechtsstaat* is a political idea that can only be approximately realised in law.⁵ This implies that the idea of *Rechtsstaat* can only be realised in positive law. Accordingly, positive law may strive for the material ideal of *Rechtsstaat*, but it always remains an incomplete attempt to realise it as far as possible – it can never reach the ideal.⁶ According to this conception, the ideal of *Rechtsstaat*⁷ is necessarily external to (positive) law.

2. *Rechtsstaat* as legal principle

In the German constitutional law literature, *Rechtsstaat* as the “central concept of recent German constitutional history”⁸ has inspired quite a number of monograph-

⁴ Strack (fn. 1), S. 51 f.; emphasis his.

⁵ This raises the question of whether the idea of the *Rechtsstaat* encompasses an ideal in the sense of an absolute concept, or whether the idea is rather to be understood as an ideal in the sense of a more relativised conception. Regarding the structurally analogous distinction in discourse theory between *ideal discourse* and *discourse ideal* see C. Bäcker, *Begründen und Entscheiden. Kritik und Rekonstruktion der Alexyschen Diskurstheorie des Rechts*, 2nd ed. Baden-Baden 2012, pp. 128–131.

⁶ The degree of a formal *Rechtsstaat* is potentially determinable. It is always achieved to the extent that the law is binding. The degree of a substantive *Rechtsstaat*, on the other hand, is more difficult to measure. Insofar as the substantive reading includes substantive justice, its graduation requires a graduation of substantive justice. But this presupposes a concept of substantive justice that has probably to date not yet been conceived.

⁷ Against the background of principles theory, what is to be described as the actual *Rechtsstaatsprinzip* is the political concept of the *Rechtsstaat*, as an ideal. It would be interesting to ask whether the principle should then be understood as an optimisation or maximisation imperative. As long as there were no opposing principles for the design of a legal system, the *Rechtsstaatsprinzip* would remain a maximisation imperative.

⁸ U. Scheuner, *Die neuere Entwicklung des Rechtsstaats in Deutschland*, in: *Hundert Jahre deutsches Rechtsleben*, ed. by E. v. Caemmerer, E. Friesenhahn, R. Lange, Vol. II, Karlsruhe 1960, p. 229 (229).

ic studies,⁹ anthologies¹⁰ and fundamental essays.¹¹ The results of these studies are remarkably heterogeneous.¹² They range from the highly praised material understanding of *Rechtsstaat* “as an ideal conception of German constitutional development imbued with lively emotional values”¹³, as Ulrich Scheuner recognises it, to the more formal definition of a polity under the “primacy of law”¹⁴, as Konrad Hesse puts it, to the completely sober and dismissive description of the concept as one of “empty formulas, conceptual shells, which in their content and thus as a norm are dependent on other norms and are virtually model cases for the well-known ‘relativity of concepts of law’”, as Dietrich Jesch considers.¹⁵

This wide spectrum of assessing the concept of *Rechtsstaat* is reflected in a broad, sometimes diffuse understanding of its legal content. The crucial but rarely (conclusively) answered question here is what the term “*Recht*” in “*Rechtsstaat*” means. It is therefore not surprising that, as Hasso Hofmann states, “the word *Rechtsstaat* always aims at a more or less extensive ensemble of legal principles with no clear centre and sharp boundaries”¹⁶. Supporting this, Katharina Sobota was able to impressively list no less than one hundred and forty-two different substantive elements¹⁷ of the *Rechtsstaatsprinzip* as constitutional requirement of the German *Rechtsstaat*,

⁹ The work *Der Rechtsstaat* (1864) by Otto Bahr is still considered foundational today. For more recent works, see the post-doctoral theses by P. Kunig, *Das Rechtsstaatsprinzip. Uberlegungen zu seiner Bedeutung fur das Verfassungsrecht der Bundesrepublik Deutschland*, Tubingen 1986, and K. Sobota, *Das Prinzip Rechtsstaat. Verfassungs- und verwaltungsrechtliche Aspekte*, Tubingen 1997; see also K. A. Schachtschneider, *Prinzipien des Rechtsstaates*, Berlin 2006.

¹⁰ See the second edition of a collection of some of Ernst Forsthoff’s essays, published post-mortem in 1976 under the title *Rechtsstaat im Wandel*. Subsequently, the Festschriften for Werner Maihofer, *Rechtsstaat und Menschenwurde* (1988), and for Detlef Merten, *Rechtsstaat und Grundrechte* (2007), for example, brought together a comprehensive selection of papers on the subject from leading constitutional law scholars. German philosophy of law scholars addressed the *Rechtsstaat* in 1996 with an anthology on *Der Universalitatsanspruch des demokratischen Rechtsstaates* (The democratic *Rechtsstaat*’s claim to universality).

¹¹ An example: At the 1991 conference of German-speaking constitutional law scholars, Christian Starck, Wilfried Berg and Bodo Pieroth devoted themselves to the topic of *The Rechtsstaat and coming to terms with the pre-Rechtsstaat past*.

¹² For an overview of the views in the scholarly literature, see C. Callies, *Rechtsstaat und Umweltstaat. Zugleich ein Beitrag zur Grundrechtsdogmatik im Rahmen mehrpoliger Verfassungsrechtsverhaltnisse*, Tubingen 2001, pp. 41–50.

¹³ Scheuner (fn. 7), p. 231.

¹⁴ K. Hesse, *Der Rechtsstaat im Verfassungssystem des Grundgesetzes*, in: *Staatsverfassung und Kirchenordnung*, FS Smend, ed. by K. Hesse, S. Reicke, U. Scheuner, Tubingen 1962, p. 71 (75).

¹⁵ D. Jesch, *Gesetz und Verwaltung. Eine Problemstudie zum Wandel des Gesetzmaigkeitsprinzips*, Tubingen 1961, p. 66.

¹⁶ H. Hofmann, *Geschichtlichkeit und Universalitatsanspruch des Rechtsstaates*, in: *Der Universalitatsanspruch des demokratischen Rechtsstaates*, ed. by H.-M. Pawlowski, G. Roellecke, Stuttgart 1996, p. 9 (10).

¹⁷ See Sobota (fn. 8), pp. 254–257.

which were “attributed to the *Rechtsstaatsprinzip* in judicial decisions and by literature [...]”¹⁸. The question lurking behind these different characterisations is, however, not so much which or even how many elements the *Rechtsstaatsprinzip* of the *Grundgesetz* contains, but whether there even is an independent legal principle of *Rechtsstaatlichkeit* at all.

However, German scholars disagree on whether the *Rechtsstaatsprinzip* is merely a collective term for the sum of those substantive requirements of *Rechtsstaatlichkeit* that result from the text of the *Grundgesetz* (see a), or whether it has a legal meaning that exceeds the sum of these requirements (see b). In the first understanding, it should be noted at the outset, the *Rechtsstaatsprinzip* can still be oriented towards the ideal of *Rechtsstaat*; however, it remains a real quantity, the scope of which is derived (solely) from constitutional law. In the second understanding, on the other hand, the *Rechtsstaat* as an ideal of the state itself becomes part of the law. This leads to an implosion of the limits of law, as I will argue.

a. The *Rechtsstaatsprinzip* as abbreviation

The core statement of the *Rechtsstaatsprinzip* as a legal imperative can be summarised as follows:

RP: All acts of government are subject to the *Rechtsstaatsprinzip*.

If RP were a tautological abbreviation, then all normative elements would be united under the collective term of the constitutional *Rechtsstaatsprinzip* that (1) are standardised in the *Grundgesetz* and (2) are to be understood as being *rechtsstaatlich*. The most important of these elements have been compiled for instance by Klaus Stern, whose list¹⁹ includes

the obligations of the legislature to the constitutional order in Article 20 (3) GG, especially to the fundamental rights in Article 1 (3) GG, their formal protection in Article 19 (1) GG and the inviolability of their essential content in Article 19 (2) GG, finally the ‘eternity guarantee’ of Article 79 (3) GG and the elevation of the judiciary, in particular due to the constitutional control of the legislature also, in addition to the linking of ‘law and justice’ in Article 20 (3) GG

as essential elements of *Rechtsstaatlichkeit* under the *Grundgesetz*.

With this list, there can be no reasonable doubt that the *Grundgesetz* constitutes a *Rechtsstaat*. Whether the *Grundgesetz* is therefore, as Roman Herzog believes, to be regarded as a “keystone” that was “inserted [...], as it were, into the

¹⁸ Sobota (fn. 8), p. 13.

¹⁹ K. Stern, Das rechtsstaatliche Prinzip, in: id., Das Staatsrecht der Bundesrepublik Deutschland, Vol. I, 2nd ed. Munich 1984, 759 (777).

hitherto still incomplete edifice of the *Rechtsstaat*²⁰, may be more cautiously assessed. In retrospect, however, it may be said that the *Grundgesetz* constituted and realised a *Rechtsstaat* such as one could not have dreamed of at the beginning of its history in the context of constitutional liberalism.

In an abbreviatory understanding, the *Rechtsstaatsprinzip* does not have its own normativity beyond its elements regulated in the constitution. It merely represents a catalogue of all the individual constitutional elements that can be assigned to the idea of *Rechtsstaat*.²¹ This abbreviated speech derives its justification from a linguistic simplification, and to a large extent also from a factually required categorisation. RP could be concretised in this sense as follows:

RPA: All acts of government are subject to the constitutional *Rechtsstaatsprinzip*, which summarises the individual constitutional provisions of the *Rechtsstaat*.

The use of this principle as a legal argument in the sense of the abbreviatory understanding harbours danger, however. The *Rechtsstaatsprinzip* could become normatively independent and grow from a mere abbreviation to a norm that has its own meaning. As early as 1986, this danger prompted Philipp Kunig to consider,²² as an emergency brake, so to speak, that “an independent constitutional norm ‘*Rechtsstaatsprinzip*’ [is] not in force”.²³ With Kunig, the abbreviatory understanding can therefore be radicalised as follows:

RPA': The *Rechtsstaatsprinzip*, as an abbreviation for individual provisions of the *Grundgesetz*, does not exist normatively.

²⁰ R. Herzog, Art. 20. VII: Art. 20 und die Frage der Rechtsstaatlichkeit, in: *Grundgesetz. Kommentar*, begr. v. T. Maunz, G. Dürig, 18th ed. Munich 1980, marginal no. 12.

²¹ For previous opinions in favour of this abbreviative or summative understanding, see D. Merten, *Rechtsstaat und Gewaltmonopol*, Tübingen 1975, p. 12; then in particular Kunig (fn. 8), p. 457 ff.; approvingly K.-E. Hain, Art. 79, in: *Grundgesetz. Kommentar*, begr. v. I. v. Münch, 6th ed. Munich 2012, para. 88 ff; K. F. Gärditz, Art. 20 (6th part). *Rechtsstaatsprinzip*, in: *Berliner Kommentar zum Grundgesetz*, ed. by K. H. Friauf, W. Höfling, 31st ed. Berlin 2011, marginal no. 40; in the same vein also A. v. Arnould, *Rechtssicherheit. Perspektivische Annäherungen an eine idée directrice des Rechts*, Tübingen 2006, p. 673; S. Huster/J. Rux, Art. 20, in: *Grundgesetz. Kommentar*, ed. by V. Epping, C. Hillgruber, 3rd ed. Munich 2021, marginal no. 142.1.

²² The *Rechtsstaat* is not thereby dispensed with, but rather sharpened, see Kunig (fn. 8), p. 484: “These tasks, too, can only be accomplished if reflection on the sharp contours that the *Rechtsstaat* has received in norms that are accessible to legal observation and provide information on unconstitutionality and constitutionality prevents the idea of the *Rechtsstaat* from sinking into the bottomless, sometimes sanctionless, sometimes sanction-laden general clause of the *Rechtsstaatsprinzip*”.

²³ Kunig (fn. 8), p. 482.

b. The *Rechtsstaatsprinzip* as transcendence

This summative understanding is opposed, in spite of²⁴ Kunig's determined plea, by the supra-summative²⁵ view prevailing in Germany.²⁶ According to this understanding, the *Rechtsstaatsprinzip* has a meaning that not only bundles the individual constitutional provisions of the *Grundgesetz* but exceeds or transcends them. This understanding can be summarised as follows:

RPT: All acts of government are subject to the constitutional *Rechtsstaatsprinzip*, which is to be derived from the ideal of *Rechtsstaat* itself and, thus, cannot be limited to individual requirements of the *Grundgesetz*.

Through the transcendent understanding, the analytical separation, proposed earlier, between a political, extra- or pre-legal ideal of *Rechtsstaat* for the development of states can be reunited with a legal *Rechtsstaatsprinzip* as a guideline for state-institutional action. Nevertheless, consequently classifying the supra-summative *Rechtsstaatsprinzip* as a supra-positive requirement has remained an isolated position.²⁷

The transcendent understanding, represented in particular by the German Federal Constitutional Court,²⁸ is not met with criticism by prevailing constitu-

²⁴ P. Kunig, *Der Rechtsstaat*, in: Festschrift 50 Jahre Bundesverfassungsgericht, 2. Band, ed. by P. Badura, H. Dreier, Tübingen 2001, p. 421 (423), noted in 2001 that regarding the "judicial ruling practice on the 'principle' of the *Rechtsstaat*" the argument he had brought forth had "not really been echoed". This has not changed to this day.

²⁵ S. E. Schulz, *Änderungsfeste Grundrechte. Die grundrechtsrelevante Ausstrahlungswirkung des Art. 79 Abs. 3 GG i.V.m. der Menschenwürdegarantie, dem Menschenrechtsbekenntnis und den Staatsstrukturprinzipien des Art. 20 GG*, Frankfurt a.M. 2008, p. 198 f., speaks of the "Übersummenprinzip" [supra-summative principle].

²⁶ For the supra-summative – or inductive, transcendental, integral – understanding, see *Stern* (fn. 18), pp. 778–780; *Sobota* (fn. 8), p. 399 ff.; E. Schmidt-Aßmann, *Der Rechtsstaat*, in: *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. II, ed. by P. Badura, J. Isensee, P. Kirchhof, 3rd ed. Heidelberg 2004, p. 541–612, marginal no. 7 ff; B. Grzeszick, *Art. 20 VII. Art. 20 und die allgemeine Rechtsstaatlichkeit*, in: *Grundgesetz. Kommentar*, est. by T. Maunz, G. Dürig, 48. suppl. München 2006, marginal no. 44–46; D. Buchwald, *Prinzipien des Rechtsstaats. Zur Kritik der gegenwärtigen Dogmatik des Staatsrechts anhand des allgemeinen Rechtsstaatsprinzips nach dem Grundgesetz der Bundesrepublik Deutschland*, Berlin 1996, p. 173 ff.; M. Sachs, *Art. 20*, in: *Grundgesetz. Kommentar*, ed. by M. Sachs, 9th. ed. München 2021, marginal no. 76; H. Schulze-Fielitz, *Art. 20 (Rechtsstaat)*, in: *Grundgesetz. Kommentar*, hrsg. v. H. Dreier, Vol. II, 3rd ed. Tübingen 2018, marginal no. 38; and others.

²⁷ See A. Hamann/H. Lenz, *Einführung*, in: *Das Grundgesetz für die Bundesrepublik Deutschland vom 23. Mai 1949*, 3rd ed. Neuwied 1970, p. 55: "[...] it is a pre-constitutional supra-positive clause which does not require positivisation".

²⁸ For evidence, see C. Bäcker, *Gerechtigkeit im Rechtsstaat. Das Bundesverfassungsgericht an der Grenze des Grundgesetzes*, Tübingen 2015, pp. 193–236.

tional law theorists, but rather with approval. As a representative example, Konrad Hesse sums up the agreement with it that is still widespread today:²⁹

The court [...] rightly refrained from an overall definition [...]. It understands the *Rechtsstaatsprinzip* as a ‘basic decision’ or as a ‘guiding principle’ which, beyond the requirements of foreseeability, legal certainty and substantive correctness or justice, does not contain any requirements or prohibitions of constitutional rank that are fully and clearly determined and which requires ‘concretisation depending on the factual circumstances’. It answers the question of its specific content in a carefully continuous progression only to the extent necessary to decide the given case. In this way, it has further developed the *Rechtsstaatsprinzip* and given it concrete form in numerous directions. Of essential importance in this context are the requirement of the protection of legitimate expectations, the principle of proportionality as well as the right to a fair trial, which are derived from the *Rechtsstaatsprinzip* and thus gain constitutional status.

The transcendent understanding encompasses all positivised requirements of the *Rechtsstaat* that are bundled in the abbreviatory understanding, but expands this understanding to include supra-positive components.³⁰ Since a supra-positive component, as has been shown in the Federal Constitutional Court’s decision on East German border guards (*Mauerschutzen*),³¹ can take precedence even in conflict with the highest positive requirements, legal certainty in the form of the prohibition of retroactivity (Article 103 II GG), the transcendent concept of the *Rechtsstaatsprinzip* of law is not merely a *maior* of the abbreviatory one, but an *aliud*.

The transcendent reading faces at least two serious problems, one being of a more doctrinal nature and the other more philosophical. The latter problem, rooted in philosophy of law, relates to the question of where the elements that transcend the written constitution derive their normativity from. In any case, they transcend the written constitutional law’s claim to validity. The more doctrinal problem can be described as a dilemma of subsumption. It concerns the question of how the transcendent *Rechtsstaatsprinzip* can be legally applied, being a legal specification which, by definition, is not conclusively determined and determinable in its meaning or scope.³² Neither of these problems will be addressed in detail here.

²⁹ Hesse (fn. 13), p. 84.

³⁰ See R. Ullerich, *Rechtsstaat und Rechtsbegriffe im Europarecht*, Baden-Baden 2011, p. 213 f: “It results in [...] case law in the truest sense, because then new positive norms are created out of the pre-positive-material realm”.

³¹ Thus in the Federal Constitutional Court in the *Mauerschutzen* decision (BVerfGE 95, 96); for more details see Backer (fn. 28), pp. 102–112.

³² In legal usage, the concept of the *Rechtsstaat* as a seemingly almost boundless “ensemble of various – written and unwritten – principles” is thought to have the function of serving as “a norm that claims to be subsumable”, for both citations see Kunig (footnote 8), p. 1. For more on the *Rechtsstaatsprinzip* as a subsumable concept, see for example R. Scholz, Art. 23, in: Grundgesetz. Kommentar, begr. v. T. Maunz, G. Durig, 92nd ed. Munich 2020, marginal no. 76, who speaks of “factual elements of the *Rechtsstaatsprinzip*”. This peculiar combination, emphasised by Kunig, of subsumability and the highest degree of indeterminacy with the highest degree of significance, is also repeatedly expressed in the case law of the Federal Constitutional Court. For example, BVerfGE 65,

The transcendent principle, like the summative one, can also be linked to Kunig's reduction proposal. Eberhard Schmidt-Aßmann, examining Kunig's position, explains that:³³

Insofar as results can be obtained from constitutional statements that are closer to the problem, this path must be followed. In this respect, the reference to the *Rechtsstaatsprinzip* is only an abbreviation, which is not in itself inadmissible, but must be broken down in a more detailed argumentation.

At the same time, however, the transcendent understanding remains alive in Schmidt-Aßmann's work. Not all "questions that arise" can be "dealt with in this way".³⁴ For this reason, the supra-summative principle comes to the fore again for those questions relevant to the *Rechtsstaat* that cannot be solved directly with the text of the *Grundgesetz*, namely those of constitutional rights. This is obviously based on the idea that every legal question that arises can – or at least should be –

283, 290 states: "The *Rechtsstaatsprinzip*, only partially elaborated in the Constitution, does not contain any clearly detailed requirements and prohibitions; it requires concretisation depending on the factual circumstances; in doing so, however, fundamental elements of the *Rechtsstaat* and the *Rechtsstaatlichkeit* as a whole must be preserved". In this description, the greatest problem of the dogmatic handling of the concept openly emerges: the *Rechtsstaat*, as one of the highest constitutional principles, must be observed without fail. Legal principles can only be observed if they can be applied by subsumption. Subsumption presupposes knowledge of the normative content of the *Rechtsstaat* which is to be applied. According to the Federal Constitutional Court, the content of the fundamental elements of the *Rechtsstaat* or the *Rechtsstaatlichkeit* – which, in the court's own view, necessarily guide its interpretation – is not defined in the *Grundgesetz*. This ultimately means that it is up to the Federal Constitutional Court to determine the fundamental guidelines of its own interpretation. The Federal Constitutional Court is thus faced with a dilemma of subsumption. – However, the dilemma of subsumption can be overcome. According to Herzog, the "necessary concretisation of the *Rechtsstaatsprinzip* [...] does not have to proceed from an abstract definition of the term that equally answers all issues in detail, but rather from the concretisation of the elements conventionally attributable to the *Rechtsstaatsprinzip* in the applicable legal and constitutional order, above all in the *Grundgesetz* itself", Herzog (fn. 19), end of para. 3. For this principle is "not a principle that is eternally fixed, whose content one could define by relying on a fixed canon of individual elements and sub-concepts for specification", Herzog (ibid.), para. 21. For this reason, the *Grundgesetz* would not form a supra-positive concept of the *Rechtsstaat*, but rather, as in the terms used in Article 28 (1) of the Basic Law, establish a *Rechtsstaat* "in the sense of this *Grundgesetz*", see Herzog (ibid.), para. 21. Herzog's observation is correct that all material content that is read into the concept of the *Rechtsstaat* in today's constitutional law debate must first be placed within it. This leaves the concept of *Rechtsstaat* as the magic hat of constitutional doctrine, as it were. Seen in this way, the concept would be merely an empty phrase whose content derives from the respective legal system. However, the concept of *Rechtsstaat* is not exhausted in this purely formal character. It analytically presupposes one characteristic – and is in this respect supra-positive: the binding of all state power to the law it has given. But what the law is, who sets it, what its content must be; these questions are not answered by the concept of *Rechtsstaat*. Therefore, the supra-summative *Rechtsstaatsprinzip* at least is not subsumable.

³³ Schmidt-Aßmann (fn. 26), marginal no. 7 f. – Similarly *I. v. Münch*, *Rechtsstaat versus Gleichheit?*, in: *Der Staat* 33 (1994), p. 165 (170).

³⁴ Schmidt-Aßmann (fn. 26), marginal no. 7 f.

solved based on the constitution. This most likely represents an excessive demand and overestimation not only of the *Grundgesetz*, but of all constitutions.

The reduced transcendent understanding of the *Rechtsstaatsprinzip* as advocated by Schmidt-Aßmann can be summarised as follows:

RPT': All acts of government are subject to the constitutional *Rechtsstaatsprinzip*, which is to be derived from the very ideal of the *Rechtsstaat* itself, insofar as it cannot be traced back to individual requirements of the *Grundgesetz*.

As in the transcendent understanding (RPT), the at least partial independence of the *Rechtsstaatsprinzip* from written constitutional law is also inherent to the reduced transcendent understanding (RPT').

c. Three problems of a transcendent *Rechtsstaatsprinzip*

In addition to the aforementioned dilemma of subsumption and the problem of normativity, the transcendent principle faces at least three other problems. They, too, will only be briefly mentioned here.

The first is the problem of induction. It concerns the methodological level. A general *Rechtsstaatsprinzip* in the sense of RPT would have to be obtained inductively from the totality of the relevant written constitutional norms on the basis of supra- or pre-positive ideas of the constitutional legislator. The question related to this problem is whether induction is methodologically possible in constitutional law. One answer to this is that it is not permissible, as it would have to be carried out by the constitutional court and there is no possibility of legal control for its acts – unlike in ordinary law. Following this view, constitutional law would be hostile to induction.

The second problem is one of interpretation. Should a general *Rechtsstaatsprinzip* in the sense of the transcendent reading exist in constitutional law, it has not been clarified, at least not yet, what this principle dictates – rather, it actually eludes conclusive clarification by nature of its purpose. Therefore, there is still no clarity on how the normative meaning of the transcendent principle is to be interpreted. The question connected with the problem of interpretation is whether the content of the *Rechtsstaatsprinzip* would first have to be conclusively clarified in order to be considered a normative principle, or whether a conclusive clarification is unnecessary considering that some elements of the principle are agreed upon. One answer would be that the danger of ambiguity about the elements of the principle, considering their importance for deciding the unconstitutionality of otherwise constitutional acts, forbids the applicability of the *Rechtsstaatsprinzip*. It should be added that those elements on which there is sufficient agreement may well be positively incorporated into the constitution already.

The third problem is that of infiltration. If the transcendent principle existed in the constitution and there were clarity about its elements in at least some cases not otherwise governed by constitutional law, it could, for instance in a relationship of subsidiarity in the sense of the reduced transcendent understanding (RPT), serve as a legal argument in relevant cases for deciding over otherwise undecidable constitutional questions. The question related to this problem is whether the existence or enshrinement of a transcendent *Rechtsstaatsprinzip* in the constitution is a gift to democracy and human rights. The answer is that the gift of the transcendent principle is a poisoned one. Gaining decidability over questions not explicitly regulated by constitutional law leads to an openness of legal interpretation. The extent of this openness depends on the understanding of the *Rechtsstaatsprinzip*, which is neither conclusively determined nor even conclusively determinable. Thus, the *Rechtsstaatsprinzip* becomes a gateway for political considerations that can hardly be closed – a purpose it has previously fulfilled in German history.³⁵ The fact that this has formally continued in the decision-making practice of the German Federal Constitutional Court, albeit in a way that is incomparable in terms of content, is somewhat alarming.

d. Formal and material understandings

In addition to the two paradigms described above, there exists another, orthogonal distinction: that of a formal and a material *Rechtsstaatsprinzip*. This juxtaposition, as developed historically, between a formal concept and a material understanding of *Rechtsstaat* also ultimately revolves around the question of what elements it encompasses.³⁶ However, the distinction between formal and material elements – which is, at any rate, disputed³⁷ – is merely of secondary importance for the question of

³⁵ On the conceptual transformation under National Socialism, see *Bäcker* (fn. 28), pp. 147–160; see also *id.*, *Rechtsstaat*, in *Sellers/Kirste* (eds.), *Encyclopedia of the Philosophy of Law and Social Philosophy*, Springer 2020.

³⁶ For an overview of the conceptual history of the distinction between a formal and a material *Rechtsstaat*, especially during the Weimar period, see *Stern* (fn. 18), pp. 772–774; *Bäcker* (fn. 28), pp. 145–147. – For a clear demarcation based on the history of ideas, see *P. Badura*, *Staatsrecht*, 7th ed. Munich 2018, p. 363, for whom the formal *Rechtsstaat* of political liberalism essentially provided for the lawfulness of administration. In the Weimar period, this was contrasted with the material *Rechtsstaat*, “namely, a *Rechtsstaat* in which there are also certain factual requirements for the tasks of the state and legislation”; similarly, on the distinction between formal/material, *W. Heun*, *Die Verfassungsordnung der Bundesrepublik Deutschland*, Tübingen 2012, p. 47, who speaks of the omnipotence of the legislature “under the reign of the formal *Rechtsstaatsprinzip*”, while referring to the material *Rechtsstaat* of the *Grundgesetz* as “subordination of the legislative power to the constitution” qua primacy of the constitution.

³⁷ This debate has, in any case, repeatedly been classified as misguided. See, for example, *Sobota* (fn. 8), pp. 457–461, who considers and rejects this distinction from both a historical and a hermeneutical-critical perspective.

what the scope of the *Rechtsstaatsprinzip* is. After all, this question ultimately only arises if one presupposes the transcendent paradigm in the sense of RPT or RPT’.

If, on the other hand, one accepts the abbreviatory paradigm, it is of no significance from a legal perspective whether a particular element is of a formal or material nature. The only decisive factor here is that of which supposed elements are expressed in the constitution, i.e., which elements are legally binding due to having been laid down in the *Grundgesetz*. Therefore, to the abbreviatory understanding (RPA), the decisive question is which elements there are to the currently valid constitution’s *Rechtsstaatsprinzip*, regardless of whether they are formal or material. To the reduced abbreviatory understanding (RPA’), whether these are in fact elements of the *Rechtsstaat* that are subject to the *Rechtsstaatsprinzip* is in fact irrelevant. The only thing that matters is whether the legal principles in question are prescribed by law, usually by the constitution, and what effects they have in any specific case. According to RPA’, the abbreviatory principle thus turns into a rejection of the *Rechtsstaat* as a constitutional principle. Expressed in this way, it becomes clear that the abbreviatory understanding of the *Rechtsstaatsprinzip* is tantamount to a positivist one.

3. Positive and supra-positive understandings

If the transcendent paradigm is followed, one abandons, at the level of constitutional law, the realm of positive law. Labelling the transcendent *Rechtsstaatsprinzip* as non-positivist is therefore just as obvious as labelling the abbreviatory principle as positivist. It has been shown that the transcendent paradigm of the *Rechtsstaatsprinzip*, as advocated by the German Federal Constitutional Court, indeed leads to a non-positivist concept of law.³⁸ The essential distinction is therefore not between formal or material content, but between positive and supra-positive content. At any rate, differentiating between material and formal requirements may hardly be possible in the *Rechtsstaat* of the *Grundgesetz*,³⁹ even if this difference is found in justice – being the idea of the material as opposed to the formal idea, which boils down to legal certainty.⁴⁰

³⁸ See Backer (fn. 28), S. 283–286.

³⁹ This is explicitly stated by K.-E. Hain, *Die Grundsatze des Grundgesetzes*, Baden-Baden 1999, p. 346 f., for whom the “*Rechtsstaat* of the *Grundgesetz* is to be understood as a *Rechtsstaat* that combines material and formal elements, as one in which there [exists] a synthesis of form and content”. Hain refers here to Stern (fn. 18), p. 775, who states: “The *Rechtsstaatsprinzip* has as its prerequisite, its foundation, certain formal elements. However, these are not exhaustive. It can only be fulfilled through being linked to material elements”. Similarly Schmidt-Aßmann (fn. 26), marginal no. 19.

⁴⁰ See *v. Munch* (fn. 33), p. 175: “The link to justice is the essence of the material *Rechtsstaat* as opposed to the formal *Rechtsstaat*”.

Nevertheless, there are meaningful parallels between the differentiation into formal and material elements on the one hand and positive and supra-positive elements on the other:⁴¹ only representatives of a material understanding can conceive of justice as an element of the *Rechtsstaatsprinzip*,⁴² even if the *Grundgesetz* does not contain a requirement for material justice as a general principle of law.⁴³ But it is at least questionable whether a meta-legal ideal such as justice should be incorporated into law beyond provisions of positive law. By means of this incorporation, the boundaries between politics and law find themselves ultimately shattered.

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⁴¹ This can, for example, be seen in the study by M. Pawlik, *Rechtsstaat und Demokratie in der Perspektive der Reinen Rechtslehre. Zur Legitimation des Grundgesetzes bei Hans Kelsen*, in: *Legitimation des Grundgesetzes aus Sicht von Rechtsphilosophie und Gesellschaftstheorie*, ed. by W. Brugger, Baden-Baden 1996, p. 170, who asks whether the “Pure Theory of Law can be regarded as a theory of the formal *Rechtsstaat*”.

⁴² See Hain (fn. 39), pp. 343–347, who, despite all doubts regarding the conceptual separation, recognises an essential difference: the “core of the formal understanding of the *Rechtsstaat*” consists “in the separation of law and material justice”.

⁴³ On the explicit references to justice in the *Grundgesetz*, see Bäcker (fn. 28), pp. 115–130.

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