

Chapter 2

On the Foundations of the Rule of Law and the Principle of the Legal State/Rechtsstaat

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Abstract This chapter inquires into the foundations of the rule of law and the principle of the legal state/Rechtsstaat. This will be done in four steps: Firstly, it will be asked: What is involved in the obligation to use the specific means of law for political and administrative decisions? Secondly, an ethical grounding will be searched for both principles. After these two parts in which the common foundations of both principles are sought, a third step will consider more concrete applications, in which the two principles coincide. Finally, the fourth step inquires where the two concepts divide due to cultural particularities of the different national legal orders.

2.1 Introduction

The rule of law and the principle of the legal state/Rechtsstaat (État de droit, Stato di diritto, Estado de Derecho) are today widely accepted, both nationally and internationally.¹ The former is, for example, a core element of the British and American legal tradition, the latter is a fundamental principle of the German Constitution (Art. 20, 23 I 1, 28 I, 79 III Grundgesetz). The French and the Italian Constitutions only embody some main elements, but not the concept as such explicitly.² In international law, we find the rule of law and the principle of the legal state in the

¹ See in general: *The Rule of Law. History, Theory and Criticism*, Pietro Costa and Danilo Zolo eds (2007). Springer, Dordrecht. For a comprehensive survey on the literature on the legal state/Rechtsstaat, see also Grzeszick, in: *Maunz-Dürig, Grundgesetzkommentar* (2013), Art. 20, VII. C. H. Beck, München and Katharina Sobota, *Das Prinzip Rechtsstaat: verfassungs- und verwaltungsrechtliche Aspekte* (1997). Mohr Siebeck, Tübingen.

² See Preamble, Art. 1 I, 5 I, 34, 64 I of the French Constitution. Art 1 II of the Italian Constitution says: “La sovranità appartiene al popolo, che la esercita nelle forme e nei limiti della Costituzione.”

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Preamble and Art. 2 of the Treaty on the European Union, in the Preamble of the Charter of the United Nations and in the Preamble of the Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations.

Acceptance does not always mean realization, however. Because of ideological abuse and general overuse, the concepts/principles need some readjustment.³ In order to help widen the acceptance and to shape the core meaning of these concepts and principles, this chapter inquires into the foundations of these principles. This will be done in four steps: Firstly, it will be asked: What is involved in the obligation to use the specific means of law for political and administrative decisions? Secondly, an ethical grounding will be searched for both principles. After these two parts in which the common foundations of both principles are sought, a third step will consider more concrete applications, in which the two principles coincide. Finally, the fourth step inquires where the two concepts divide due to cultural peculiarities of the different national legal orders.

2.2 The Form of Law

Both the rule of law and the principle of the legal state/Rechtsstaat demand that political and administrative decisions should – at least in serious cases – be made in the form of law.⁴ But what is the implication of this requirement? What does the form of law add to the pure political or administrative decision? The answer depends on the philosophical question of what distinguishes law from pure politics and administration.

2.2.1 *What Do Politics, Administrative Decisions and Law Have in Common?*

To inquire into this distinction, it is necessary to first understand what politics, administrative decisions and law have in common. All three are not only natural but social facts, more precisely human actions and decisions in a wide sense which include individual and collective decisions and some intended consequences of

³Tom Bingham, *The Rule of Law* (2011), at 5ff. Allen Lane, London.

⁴Already Plato's shift from the wise but unbound philosopherking in the *Politeia* to the ruling of the laws in the *Nomoi* can be seen as an acknowledgement of the rule of law/legal state. See for a formulation of this demand also: Aristotle, *Politics* 1300b12ff.; John Locke, *Two Treatises of Government* II, § 3, at 137. See for a history of the rule of law and the Rechtsstaat: Pietro Costa, "The Rule of Law: A Historical Introduction", in *The Rule of Law. History, Theory and Criticism*, Pietro Costa and Danilo Zolo eds. (2007) at 73ff. Springer, Dordrecht. On p. 87 he shows that the concept of the Rechtsstaat emerged in Germany at the end of eighteenth century. France and Italy followed much later.

these decisions.⁵ All three are human actions in two respects: as a general phenomenon and in all their singular manifestations. When a judge decides, he always performs a human action. When a public official issues an administrative act, he performs a human action. When a parliament votes for a statute, it performs a collective human action. If politics, administrative decisions and law, by conceptual necessity, are a form of human actions, they can only be understood if one takes into consideration the necessary qualities of human actions. What are the necessary qualities of human actions? Human actions are comprised of at least two necessary elements⁶: an aim or an intention, and some means (broadly conceived) to realize this aim.

2.2.2 *What Is the Aim of Politics, Administrative Decisions and Law?*

From the beginning of philosophy in ancient times up to the late Middle Ages, great emphasis was laid on quite specific and demanding aims in order to distinguish politics, and especially law, from other phenomena. For Plato and Aristotle, the aim of law and politics was the good, explained as justice, and, specifically for Aristotle, eudaimonia and the common good.⁷ The means played no great role. Cicero, too, stressed justice as the aim of the law.⁸ Thomas Aquinas then defined law as “an ordinance of reason for the common good, made by him who has care of the community, and promulgated”.⁹ So the necessary aim is the common good. Aquinas still mentions justice though, especially in respect of the positive law.¹⁰

In the seventeenth century, this emphasis on the specific aim of law and politics vanished. The good, justice, eudaimonia and common welfare were no longer considered to be the main aim of law and politics. The means became a primary consideration. Thomas Hobbes proposed a reduced but still quite specific aim of law and politics: self-preservation.¹¹ Furthermore, he stated that law in general consists

⁵Gustav Radbruch, *Rechtsphilosophie*, ed. Ralf Dreier and Stanley Paulson, (2nd edn. 2003): “Recht ist Menschenwerk.” at 11, C. F. Müller, Heidelberg. See for the following: Dietmar von der Pfordten, “What is Law? Aims and Means” in: *Archives for Philosophy of Law and Social Philosophy (ARSP)* (2011) 97, at 151–168.

⁶For the necessity of an aim in every action see e.g. Aristoteles, *Nicomachean Ethics* 1094a1; John Searle, *Intentionality. An Essay in the Philosophy of Mind* (1983), at 107. Cambridge University Press, Cambridge, New York. Not all actions have the same aim, but specific types of actions like law can be specified by one uniform, albeit for obvious reasons quite abstract aim.

⁷Plato, *Politeia* 327a1, 433a; Aristotle, *Nicomachean Ethics* I 1, 1094a; V 1, 1129a; *Politics* 1328a36.

⁸Cicero, *De Legibus*, I, 29.

⁹Thomas Aquinas, *Summa Theologiae*, II-I, qu. 90. questioning the course of the questio, these four elements are developed. The final definition is at the end in the answer to article 4.

¹⁰Thomas Aquinas, *Summa Theologiae*, II-II, qu. 57ff.

¹¹Thomas Hobbes, *Leviathan* (1991), chap. 17, 1. Cambridge University Press, Cambridge.

of commands,¹² which were later interpreted by Austin as orders accompanied by sanctions for lack of compliance.¹³ Locke assumed the preservation of property – understood in a wide sense to include life, liberty and ownership in material goods – as the main aim of law and politics.¹⁴ The utilitarians still proposed a specific aim, but in a reduced form: maximizing happiness, understood as a collective effort to promote the individual and contingent states of pleasure and pain.¹⁵ Kant defined law with respect to a liberal and very limited aim: Law comprehends the whole of the conditions under which the voluntary actions of any one person can be harmonized with the voluntary action of every other person, according to a universal law of freedom.¹⁶ For Hegel, too, the aim of law is freedom.¹⁷

In the nineteenth and twentieth century, scepticism concerning necessary aims, value relativism, and a general positivism in the philosophy of science led to a nearly total dismissal of specific aims of law and politics and an almost exclusive reference to the means as the fundamental aspect of law. In England, John Austin characterized law as “sanctioned commands”.¹⁸ In Germany, Rudolf v. Jhering defined law in a purely formal way, namely, as the valid coercive norms of the state.¹⁹ For him, norms and coercion are the crucial means of law. However, Jhering also proposes an aim of law, if only a relative and rather unspecific one: securing the fundamental conditions for the existence of a society.²⁰

Hans Kelsen did not identify any specific aim of the law and the state. In his theory, law is distinguished from other social facts only by forming a hierarchical and dynamic system of coercive norms which confer validity on other inferior norms with a basic norm as the last necessary assumption and unifying ground of validity.²¹ Law is differentiated from other similar social systems like morals only by its specific means: by the necessary use of coercion to guarantee obedience, and by its quality of being a dynamic system, that is, by the fact that the hierarchy of validity is based not upon correspondence in content but upon formal authorization.²²

¹² Thomas Hobbes, *Leviathan*, chap 26, 1.

¹³ John Austin, *The Province of Jurisprudence Determined* (1995), at 12, 21–37. Cambridge University Press, Cambridge.

¹⁴ John Locke, *Second Treatise on Government* (1991), §§ 3, 6, 7, 123, 124. Cambridge University Press, Cambridge.

¹⁵ Jeremy Bentham, *The Principles of Morals and Legislation* (1988), chap. 1, I at 1.

¹⁶ Immanuel Kant, *Metaphysik der Sitten, Metaphysische Anfangsgründe der Rechtslehre*, § B.

¹⁷ Georg Wilhelm Friedrich Hegel, *Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundrisse* (1970), works 7, § 40, p. 98, § 4, at 46. Suhrkamp, Frankfurt am Main.

¹⁸ John Austin, *The Province of Jurisprudence Determined* (1995), at 12, 21–37. Cambridge University Press, Cambridge.

¹⁹ Rudolf v. Jhering, *Der Zweck im Recht* (3rd ed. 1893), vol. 1, at 320.

²⁰ *Id.* at 443. At 446, Jhering stresses the relativity of aims. At 511, both conditions are put together.

²¹ Hans Kelsen, *Reine Rechtslehre* (1967), at 3, 196. Deuticke, Wien.

²² Hans Kelsen, *Reine Rechtslehre* (1967), at 34. Deuticke, Wien.

H. L. A. Hart, too, finds the distinguishing feature of modern, developed law, “the heart of a legal system”, only in means, namely, in a system of primary and secondary rules.²³ He identifies three forms of secondary rules: rules of change, rules of adjudication and a rule of recognition. The rule of recognition is in particular the necessary means to identify the other rules of law.²⁴ An aim of law is mentioned by him only in passing, and it is only a very unspecific aim, which holds for many other social facts. Hart says: “I think it quite vain to seek any more specific purpose which law as such serves beyond providing guides to human conduct and standards of criticisms of such conduct.”²⁵ Joseph Raz, in his definition of law, omits the two-level requirement and adds “authority” as the decisive feature.²⁶ But “authority” is still another means – like norms, sanctions, and second-order rules. No one accepts authority as a final aim of law.

One of the few philosophers of law in the twentieth century who identified a specific and decisive aim of law (and, because of this, deserves of careful attention) was Gustav Radbruch. In a return to pre-modern roots, Radbruch proposed justice as the necessary aim or “idea” of law.²⁷ For him, justice (in a wider sense) encompasses three sub-aims²⁸: justice as formal equality (formale Gleichheit), expediency (Zweckmäßigkeit), and the certainty of law (Rechtssicherheit).

What is the outcome of this brief history of attempts to identify a specific aim of politics and law? We have to look for aims of law and politics which satisfy two requirements: they must not be too abstract, for otherwise they would be worthless to distinguish politics and law from other human actions. Hart’s proposal that law “governs human conduct” may be true, but it is much too abstract to serve as a specific aim of politics and law. Human conduct is governed by all kinds of things, including age, location, friendship, and the weather. At the same time, the proposed aims of politics and law must not be too specific if they are to hold for all kinds of politics and law, that is, if they are to serve as necessary conditions of the concepts of politics and law. For that reason, the good, justice, or equality, understood in a substantial way, could not be the conceptually necessary aim of politics and law. For, on the one hand, the good, justice, and equality have been, and still are, understood in very different ways. On the other hand, we assume that bad or unjust politics or law is still politics and law.

²³ H. L. A. Hart, *The Concept of Law* (2nd ed. 1997), at 98. Oxford University Press, Oxford.

²⁴ H. L. A. Hart, *The Concept of Law* (2nd ed. 1997), at 79. Oxford University Press, Oxford.

²⁵ H. L. A. Hart, *The Concept of Law* (2nd ed. 1997), at 249. Oxford University Press, Oxford.

²⁶ Joseph Raz, “Legal Positivism and the Sources of Law”, in Raz, *The Authority of Law. Essays on Law and Morality* (1979). Oxford University Press, Oxford.

²⁷ Gustav Radbruch, *Rechtsphilosophie* (2nd ed. 2003), at 34. C. F. Müller, Heidelberg.

²⁸ Gustav Radbruch, *Rechtsphilosophie* (2nd ed. 2003), at 54, 73. C. F. Müller, Heidelberg.

2.2.3 *What Is the Necessary Aim of Politics?*

The necessary aim of politics is to act in representation of a community.²⁹ Even a dictator can be said to represent his people in a purely formal sense. This does not mean that this representation takes into account the interests of the represented. It requires only the general factual acceptance that somebody acts in the name of the people or the state. In distinction to other non-political communities the representation of political communities requires that the decisions of this representative can successfully claim to be the ultimate decision. That does not mean that the ultimate decision is always factually made by the representative of the political community. However, the representative of the political community claims effectively to decide who decides.

2.2.4 *What Is Then the Necessary Aim of Law?*

Law has the same basic necessary aim as politics and administration: to act in representation of a community. But beyond this first basic necessary aim, law has a second distinctive necessary aim (and, thus, necessary feature of its concept), namely the mediation between possibly contrary, conflicting concerns.³⁰ For instance, statutes mediate between various general concerns of people; judges' holdings mediate between interests in particular conflicts; administrative acts mediate between the specific wishes of individual citizens and/or the interests of the general public. Four elements of the necessary aim of law can be devised: (1) at least two concerns or interests, (2) which are contrary, (3) the possibility that these concerns may conflict and, (4) a form of mediation. What does this mean? There must be a weighing or considered decision between these possibly contrary concerns. That does not mean that law must be good or just in a perfectionist sense. The necessary condition is only that the entities which are of concern have to be taken into consideration in some way. If persons are murdered or if their homicide is ordered – that is, they are killed without a criminal inquiry or fair trial –, this cannot be law, because it does not mediate between actual or possible contrary concerns at all.

In this sense, killings in war are not law, though, of course, they may be allowed from the point of view of international law or ethics, for instance, as a means of self-defense. Similarly, for conceptual reasons the total disfranchisement of certain social groups cannot be law. Whether, for example, ancient slavery-“law” qualifies

²⁹ See Dietmar von der Pfordten, “Politik und Recht als Repräsentation”, in *Recht und Politik*, Jan C. Joerden and Roland Wittmann eds., (2004), at 51–73. Steiner, Stuttgart.

³⁰ See Dietmar von der Pfordten, “What is Law? Aims and Means”, in *Archives for Philosophy of Law and Social Philosophy (ARSP)* (2011) 97, at 151ff.

as law depends upon whether the concerns of the slaves were taken into account, even if only to a minimal degree. The conditions of law proposed here are relatively abstract and weak. Law cannot fulfill all or even the main demands of morality or ethics as its necessary aim. But it does have a conceptually necessary aim, without which it is impossible to identify a social fact as law. We may call this aim “justice” in some weak sense.

Now we can see what the form of law adds to politics and administrative decisions: Politics and administrative decisions can be reduced to a mere representation of the citizens by the rulers. So also the decisions of a dictator are both political and administrative decisions. These decisions can factually take into consideration all persons concerned with their interests. But this is contingent and not conceptually necessary. Here lies the main difference between politics/administration and law: When the form of law is used it is conceptually necessary that all persons concerned with their interests are taken into account. This does not guarantee a just or equal decision in a substantial sense. But it provides a first requisite for the chance of such a just and equal decision. It is therefore a crucial improvement for the individuals concerned.

So both the rule of law and the principle of legal state demand that politics and administrative decisions are made in the form of law. And this demand implies that all persons concerned with their interests are taken into account.

2.2.5 What Distinguishes Law from Other Social Facts?

By reference to this aim of mediation between possibly contrary concerns, we can distinguish law from many other social facts. But some social facts have the same or at least a similar aim or can at least have such an aim. This holds in particular for morals, politics, religion and non-moral conventions. Also these social facts will in reality often mediate between possible contrary concerns. Law can be distinguished from these social facts which have or can have the same or a similar aim by reference to its necessary and distinguishing means. What distinguishes law as a means from politics?

Law, in all its manifestations, is marked by a certain formality in its making, promulgation, or application, which simple political acts, for example, a decision in foreign politics, even in the form of a rule like the Monroe Doctrine or the Breschnev Doctrine, do not have.³¹ So the distinctive feature of law in comparison to politics is its formality in all its singular instantiations (e. g. fixation in a document, certain procedures etc.). This formality lends support to legal certainty.

³¹ See for a comprehensive study of the formality of law: Robert Summers, *Form and Function in a Legal System* (2006). Cambridge University Press, Cambridge. Summer's concept of formality is in many respects wider than necessary to distinguish law from politics.

The rule of law and the principle of the legal state demand therefore not only a mediation between possible contrary interests. They demand also that this mediation and decision is done in a formal and therefore more secure way. This is another crucial improvement by the rule of law and the principle of the legal state. But these requirements are hitherto purely conceptual. They explain only what takes place necessarily if we frame a political or administrative decision in legal form.

2.3 The Ethical Grounding of the Rule of Law

Having examined what it means to frame a political or administrative decision in legal form, it remains to be determined what justifies the demand for this form. So we do not yet know what justifies the demand to realize the rule of law or the principle of the legal state. In order to answer this question, the ethics of law must be considered.

Many theories are proposed within the realm of normative ethics. At least four competing groups of theories are especially prominent in the discussion: virtue ethics, utilitarianism or consequentialism, deontological ethics as represented most notably by Kantianism, and contractualism/discourse ethics. How should one orient oneself within this plurality of different approaches to normative ethics? There is one promising way to deal with the plurality of ethical theories. This possibility may be characterized as an “analytic-synthetic” method. The various theories can be analyzed into their elements and then assessed by comparing them with each other. If necessary, additional or modified elements may be added. Finally, they can be brought together by a synthesis. (I have tried to apply this method elsewhere and will here only present the core result).³² All these theories embody what might be called the principle of normative individualism.³³ This principle has three parts:

1. Only individuals can be the ultimate point of reference of any justification of obligations and hence the justificatory source of law, morals and ethics. Collective entities such as nations, peoples, societies, communities, clans, families, or eco-systems, etc. cannot fulfill this function of last justification.
2. In the last instance, justifications of actions or decisions have to take into account all individuals affected by an action or decision, i.e., all “moral patients”. We may call this the “all-principle” of normative individualism.
3. All individuals have to be taken into account *prima-facie* equally.

If normative individualistic ethics demands that all individuals have to be taken into account *prima-facie* equally as ultimate source of justification, then this holds true also for political and administrative decisions. Therefore, political and

³²Dietmar von der Pfordten, “Five Elements of Normative Ethics – A General Theory of Normative Individualism”, in: *Ethical Theory and Moral Practice* (2012) 15, at 449–471. deGruyter, Berlin, New York; Dietmar von der Pfordten, *Normative Ethik* (2010).

³³See for a mentioning of individualism: Norberto Bobbio, L’Età dei Diritti, in: *L’Età dei Diritti* Norberto Bobbio ed. (1997), at 59. Einaudi, Torino.

administrative decisions have to be framed in a form which secures that all individuals are considered *prima-facie* equally with their interests. The best form we know that is able to realize and secure this is law, because law is by definition, as stated above, the form of human action which mediates between possibly conflicting interests and secures this mediation by its specific formality. Thus, normative individualistic ethics demands that political and administrative bodies use the form of law. So the rule of law and the principle of the legal state are justified by the ethical principle of normative individualism.

2.4 The Core in Which the Rule of Law and the Legal State/Rechtsstaat Coincide

Beyond this basic justification of the rule of law and the principle of the legal state, the principle of normative individualism can be used to specify the core in which the rule of law and the principle of the legal state coincide.

If individuals are the ultimate source of justification according to the first part of the principle of normative individualism, then these individuals should be assigned the highest value by the law: This justifies the first and most important part of the rule of law. It is already included in a personally limited form in the Magna Charta from 1215:

39. No free man shall be seized or imprisoned or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land. 40. To no one will we sell, to no one deny or delay right or justice.³⁴

This important part of the rule of law was famously identified by A. V. Dicey in the following formulation: “We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.”³⁵ Normative individualism also explains why Dicey states the right to personal freedom as the first and foremost application of the rule of law that is the core of the individual human rights.³⁶ Similarly, the principle of the legal state/Rechtsstaat contains the individual human rights.³⁷ One has to admit that this was

³⁴ See Tom Bingham, *The Rule of Law* (2011), at 10. Allen Lane, London.

³⁵ A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed. 1959), at 188. Macmillan, London.

³⁶ A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (1959), at 206. Macmillan, London. See Tom Bingham, *The Rule of Law* (2011), at 66ff. Allen Lane, London. See also Danilo Zolo, “The Rule of Law: A critical reappraisal”, in *The Rule of Law: History, Theory and Criticism*, Pietro Costa and Danilo Zolo eds., (2007) at 8. Springer, Dordrecht.

³⁷ BVerfGE 33, 367 (383); 34, 269 (286); 84, 90 (121); 111, 307; Christoph Degenhart, *Staatsrecht I. Staatsorganisationsrecht*, (29th. ed. 2013), at 60. C. F. Müller, Heidelberg; Grzeszick, in: *Maunz-Dürig*,

not the case in the nineteenth century, that is, at the beginning of the development of the principle of the legal state/Rechtsstaat. However, it was a development in the Weimar Republic and especially after World War II. Previously, the Rechtsstaat was only understood formally, now it is also materially understood.³⁸ To this corresponds a “thin” or a “thick” definition of the rule of law. Like the Rechtsstaat, the rule of law is now not only thin but thick.³⁹ That means it also includes such human rights as the right to life, the prohibition of torture, the prohibition of slavery and forced labor, the right to liberty and security, the right to a fair trial, the right to respect for private and family life, the freedom of thought, conscience and religion, the freedom of expression, the freedom of assembly and association, the right to marry and the protection of property etc.

If, according to the third part of the principle of normative individualism, all individuals shall be taken into account equally, this justifies Dicey’s second part of the rule of law: “We mean in the second place, when we speak of the rule of law as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.”⁴⁰ The principle of the legal state/Rechtsstaat embraces the general principle/right that nobody is above the law and everybody is subject to the ordinary law.⁴¹

Dicey’s reference to the Magna Charta and other historical documents of the British constitution as well as the historical process of the enactment of the constitution in the USA show another implicit demand of the rule of law which is also a demand of the principle of the legal state: the principle of constitutionalism. Both the rule of law and the principle of legal state require that the most important decisions of the political community are made in the form of a legal constitution which is superior to every other legal, political and administrative act.⁴²

Law can fulfill its aim to mediate between possible conflicting interests and its function as a mean to be formal better if it does not only consist of singular case solutions, that is, singular contracts, singular judicial judgments or singular municipal

Grundgesetzkommentar, Art. 20, VII, nr. 37; Schnapp, in: *Grundgesetzkommentar* Bd. 1, v. Münch und Kunig eds. (6th ed.2012), Art. 20, Nr. 37.

³⁸ Christoph Degenhart, *Staatsrecht I. Staatsorganisationsrecht* (2013), at 60. C. F. Müller, Heidelberg.

³⁹ Tom Bingham, *The Rule of Law* (2011), at 66ff. Allen Lane, London.

⁴⁰ A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (1959), at 193. Macmillan, London. See Tom Bingham, *The Rule of Law* (2011), at 55ff. Allen Lane, London. See also Danilo Zelo, “The Rule of law. A critical reappraisal”, in *The Rule of Law. History, Theory and Criticism*, Pietro Costa and Danilo Zelo eds., (2007) at 7. Springer, Dordrecht.

⁴¹ See Art. 20 II Grundgesetz and § 1 BGB. BVerfG NJW 1993, at 997 (998).

⁴² See Tom Bingham, *The Rule of Law* (2011), at 25ff. Allen Lane, London; Klaus Stern, *Das Staatsrecht der Bundesrepublik Deutschland, Band 1, Grundbegriffe und Grundlagen des Staatsrechts, Strukturprinzipien der Verfassung* (2nd ed. 1984), § 20 III 4, at 784, 787f. C. H. Beck, München.

orders. There have to be general legal norms that is rules/laws, too.⁴³ So, both the rule of law and the principle of the legal state/Rechtsstaat embrace the demand to frame at least important legal decisions in a general form. Legal systems have developed different ways to attain this form of generality. One of the oldest ways is the system of precedents where several judgments form a general legal solution in the common law. Another way is the development of customary law which is realized, for example, by several singular contracts. A third way are statutes which are issued by a parliament or the executive. Written constitutions are a fourth modern form to attain this aim of generality of the law.

A mediation between possibly conflicting interests by the law takes into account the concerns of the individuals which are at stake only if it is not retrospective. This holds strictly for all forms of criminal trial. Nobody is able to obey duties and prohibitions if these do not exist before the action. So, there shall be no punishment without law (*nullum crimen sine lege, nulla poena sine lege*). This rule is both part of the rule of law and part of the legal state/Rechtsstaat (see Art. 103 II Grundgesetz).⁴⁴

In order to mediate between possibly conflicting interests well and so take into account all individuals concerned, the formality of the law must include some additional requirements, such as accessibility/publication, consistency, clarity, definiteness. This is true for both the rule of law and the legal state/Rechtsstaat.⁴⁵

While Dicey largely neglected the separation of powers and saw all sovereignty vested in parliament, nearly all modern interpreters have emphasized that the rule of law includes the principle of the separation of powers.⁴⁶ If politics and law are two different social forms, they have to be also distinguished institutionally. And, if law has to include general norms, one should distinguish the production of these general norms and their application. So we get the classical trias of executive, legislative and judiciary. Within English history, the distinction is between executive and judiciary. The legislative emerges later. The principle of the legal state/Rechtsstaat includes as an initial core element this separation of powers.⁴⁷

If the existence of an independent judiciary is required, it must be accessible to the citizens and must give the citizens effective and fair legal protection. This is stated both by the rule of law and the principle of the legal state (see Art. 19 IV of

⁴³ See Friedrich Carl v. Savigny, *System des heutigen Römischen Rechts*, Bd. I, (1840), at 9f.; H. L. A. Hart, *The Concept of Law* (2nd ed. 1997), at 21ff. Oxford University Press, Oxford; Lon Fuller, *The Morality of Law* (2nd ed. 1969), at 46ff. Yale University Press, New Haven.

⁴⁴ See for the rule of law: Tom Bingham, *The Rule of Law* (2011), at 73ff. Allen Lane, London.

⁴⁵ See for accessibility Tom Bingham, *The Rule of Law* (2011), at 37ff. Allen Lane, London; see for clarity, definiteness and consistency: Christoph Degenhart, *Staatsrecht I. Staatsorganisationsrecht* (2013), at 142. C. F. Müller, Heidelberg.

⁴⁶ T. R. S. Allan, *Law, Liberty, and Justice. The Legal Foundations of British Constitutionalism* (1993), at 3, 48ff. Clarendon Press, Oxford.

⁴⁷ See Art. 20 II 2, III Grundgesetz; BVerfGE 3, 225 = BVerfG NJW 1954, 65 (66); Grzeszick, in: Maunz-Dürig, *Grundgesetzkommentar*, Art. 20, V, at nr. 2; Klaus Stern, *Das Staatsrecht der Bundesrepublik Deutschland, Band 1, Grundbegriffe und Grundlagen des Staatsrechts, Strukturprinzipien der Verfassung*, § 20 III 4, at 784, 792ff.

the German Grundgesetz).⁴⁸ A fair legal procedure includes several elements: the freedom from political or other external influence on the judges, the equal hearing of all parties (*audiatur et altera pars*), the search for comprehensive evidence, the application of the law via the acknowledged methods, the openness of the trial for the public, no inordinate delay of the trial, the principle of the “natural judge” (a judge predetermined by law), and no *ad hoc* courts etc.

While Dicey’s original explications of the rule of law can be linked to the principle of normative individualism very easily and clearly, some modern definitions of the rule of law lost this clear linkage to normative individualism. This holds, for example, for the proposal of Lord Bingham: “The core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.”⁴⁹ Here, the individual is not any longer emphasized as a last resort for justification and the highest value of the law. On the contrary, individuals and authorities, that is collectives, seem to be placed on a somewhat equal level. This seems to be a very dangerous and unjustified modification compared to the initial formulation of Dicey.

2.5 Concrete Applications in Which the Rule of Law and the Principle of the Legal State Divide

Some more concrete applications of the rule of law and the principle of the legal state can neither be derived from the aim and mean that is the form of law (mediation of possibly conflicting interests, formality) nor – with one notable exception referred to below – from the ethical principal of normative individualism. Consequently, they are peculiar to specific legal orders and cannot be assumed as implications of a unified transnational rule of law/principle of the legal state. They are part of specific historic developments in different legal orders, different cultures and different times as demonstrated in the following examples.

The tying to a specific legal order holds for the third part of Dicey’s understanding of the rule of law as it is applied in the United Kingdom. That is, the general principles of the constitution are the result of judicial decisions and not a result of a constitutional assembly.⁵⁰ Dicey states immediately that this judge-centeredness is peculiar to English constitutional law because of the common law tradition. This is different under many other constitutions and cannot be assumed to apply universally.

The principle of the legal state/*Rechtsstaat* is, by contrast, more centered on the formal constitution and the formal statute. It contains the requirement of a formal

⁴⁸ See Tom Bingham, *The Rule of Law* (2011), at 37ff., 90ff. Allen Lane, London. Christoph Degenhart, *Staatsrecht I. Staatsorganisationsrecht* (2013), at 164ff. C. F. Müller, Heidelberg.

⁴⁹ Tom Bingham, *The Rule of Law* (2011), at. 8. Allen Lane, London.

⁵⁰ A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (1959), at 196. Macmillan, London.

that is written constitution.⁵¹ And it contains the two doctrines of the necessity of the statute (*Vorbehalt des Gesetzes*) and the primacy of the statute (*Vorrang des Gesetzes*).⁵² The doctrine of the necessity of the statute (*Vorbehalt des Gesetzes*) holds that every administrative act with negative consequences for human rights needs to be justified by a formal statute of a parliament.⁵³ The Bundesverfassungsgericht has stated, that essential decisions have to be made by a parliament (*Wesentlichkeitstheorie*).⁵⁴ The doctrine of the primacy of the statute (*Vorrang des Gesetzes*) holds that every statute of a parliament is primary to all judgments and administrative acts. It is clear that these doctrines are the consequences of a statute-centered legal system like the German system and the French and Italian ones but not of a common/case law system like the American and the British system.

This centeredness on the formal statute has in the legal state/*Rechtsstaat* also some consequences for the relationship to administrative rules (*Verordnungen*) and municipal and other public rules (*Satzungen*). According to Art. 80 of the German Grundgesetz, all administrative norms (*Verordnungen*) need some formal authorization by formal statutes. As a consequence of the bad experiences with Art. 48 of the Weimarian Constitution where blank authorizations lead to an avoiding of the parliament by the Nazis in the so called “enabling act” (*Ermächtigungsgesetz*), Art. 80 I S. 2 of the Grundgesetz strictly limits this authorization of the executive and administration. The scope of the authorization must be precisely determined in content (*Inhalt*), purpose (*Zweck*) and extent (*Ausmass*). Municipal norms (*Satzungen*) by cities and counties are limited to municipal matters which are part of the local autonomy. If they collide with human rights, they need some authorization by formal statutes, for example, in the case of local taxes. The same holds for other public norms, e. g. the norms (*Satzungen*) of public professional corporations.⁵⁵

The principle of the legal state/*Rechtsstaat* also contains the principle of proportionality (*Verhältnismäßigkeit*). It holds that legal norms must be effective (*Geeignetheit*), they must use the most modest means (*Erforderlichkeit*) and purpose and means must be proportional (*Angemessenheit*, *Verhältnismäßigkeit im engeren Sinn*).⁵⁶ These are quite universal principles of rationality which are in principle also applicable in the systems of the rule of law. But they have to be implemented by political or legal decisions because they are not mere logical or conceptual requirements.⁵⁷ If individuals are the ultimate source of justification according to the principle of normative

⁵¹ Grzeszick, in: *Maunz-Dürig, Grundgesetzkommentar*, Art. 20, VII, at nr. 30.

⁵² BVerfGE 58, 257 = BVerfG NJW 1982, 921 f.; Grzeszick, in: *Maunz-Dürig, Grundgesetzkommentar* (2012), Art. 20, VI, at nr. 72 ff., 99, VII, at nr. 26.

⁵³ Grzeszick, in: *Maunz-Dürig, Grundgesetzkommentar*, Art. 20, VI, at nr. 117. Christoph Degenhart, *Staatsrecht I. Staatsorganisationsrecht* (2013), at 329, 331. C. F. Müller, Heidelberg.

⁵⁴ BVerfGE 49, 89 (126).

⁵⁵ German Bundesverfassungsgericht, BVerfGE 33, 125 (158f.).

⁵⁶ Christoph Degenhart, *Staatsrecht I. Staatsorganisationsrecht* (2013), at 157ff. C. F. Müller, Heidelberg. See, *Verhältnismäßigkeit*, Oliver Lepsius ed. (2014), forthcoming.

⁵⁷ See for such an implementation in the European Union: Art. 52 of the Charter of Fundamental Rights of the European Union.

individualism, then these individuals should be protected by the necessity to take into consideration their interests, which is prescribed by the principle of proportionality.

Beside these differences in form, procedure and proportionality there also exists one very central material difference between the rule of law and the principle of the legal state/Rechtsstaat. This is the protection of human dignity. The Anglo-Saxon legal tradition does not explicitly include the protection of human dignity as such, but only some main applications of it: the prohibition of torture, slavery etc. Human dignity is neither found originally in the common law, nor in the American Declaration of Independence, including the Bill of Rights of the American Constitution. The European Convention of Human Rights from 1950 which was heavily influenced by the United Kingdom does not contain a protection of human dignity but only partial norms like the prohibition of torture, slavery and degrading treatment. And even in Lord Bingham's recent book, *The Rule of Law*, human dignity is not mentioned.⁵⁸

This is different for Continental Law. After the U.N.'s Universal Declaration of Human Rights put human dignity into prominence in 1948, many European Countries followed sooner or later, for example, the German Grundgesetz 1949 in Art. 1: "Human dignity is inviolable." (Die Würde des Menschen ist unantastbar). The protection of human dignity is also found in many other constitutions.⁵⁹ Finally, the Charter of Human Rights of the European Union articulated the protection of human dignity in the preamble and Art. 1: "Human dignity is inviolable. It must be respected and protected." This adoption has also consequences for the principle of the legal state. If the principle of the legal state is not only understood formally any more but also materially, as we saw above, then it includes all human rights. But if it includes all human rights, then it must contain also the first and most important of these human rights: the protection of human dignity.⁶⁰

Human dignity is not only a historical or cultural particularity. It is a main result of normative individualism because it expresses human autonomy that is the relationship between the second and first order concerns of human beings.⁶¹ So if the rule of law is not only thin but thick and does include all human rights, it must consequently be further developed to include also the protection of human dignity.

⁵⁸ One exception in legal philosophy is Lon L. Fuller who mentions human dignity: Lon Fuller, *The Morality of Law* (1969), at 162. Yale University Press, New Haven.

⁵⁹ See Paul Tiedemann, *Menschenwürde als Rechtsbegriff. Eine philosophische Klärung* (3rd ed. 2012), at 51. Berliner Wissenschafts-Verlag, Berlin.

⁶⁰ See also Klaus Stern, *Das Staatsrecht der Bundesrepublik Deutschland, Band 1, Grundbegriffe und Grundlagen des Staatsrechts, Strukturprinzipien der Verfassung* (2nd ed. 1984), § 20 III 1, at 781. C. H. Beck, München.

⁶¹ See Dietmar von der Pfordten, *Normative Ethik*, (2010) at 74ff. Steiner, Stuttgart; Dietmar von der Pfordten, "Some Remarks on Human Dignity", in *Human Dignity as a Foundation of Law*, Winfried Brugger and Stephan Kirste eds. (2013), at 13–23; Dietmar von der Pfordten, "On the Dignity of Man in Kant", in *Philosophy* (2009) 84, at 371–391.

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