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REMARKS ON THE CONCEPT OF THE RULE OF LAW AND CONSTITUTIONALISM

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I. The English concept of the rule of law

1. Dicey about the rule of law

Whatever may be the advantages of a so-called „unwritten constitution, its existence imposes special difficulties on theachers bound to expound its provision. Anyone will see that this is so who compares for a moment the position of writers, such as Kent or Story, who commented on the Constitution of America, with the situation of any person who undertakes to give instruction in the constitutional law of England.[1]

Among the constitutional historians we can find a lot of eminent instructors, such as Hallam, or Freeman. Freeman's *„Growth of the English Constitution"* is an excellent example of historical constitutionalism.

Political theorists, such as Bagenhot[2] and Hearn deal and mean to deal mainly with political understandings or conventions and not with rules of law.

Dicey asks the question: is constitutional law really „law" at all? Can it be that a dark saying of Tocqueville's, „the English constitution has no real existence"[3], contains the truth of the whole matter?

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[1] A. V. Dicey, *Introduction to the study of the Law of Connstitution,* (8th ed. 1931)
[2] Bagenhot's *„English Constitution"* is so full of brightness and originality. Bagenhot was the first author who explained in accordance with actual fact the true nature of the Cabinet and its real relation to the Crown and to Parliament.
[3] Tocqueville, *Oeuvres Complétes,* I. 166, 167.

In Dicey's opinion constitutional law as the term is used in England, consists of two different kinds of rules. The one set of rules are in the strictest sense „laws," since they are rules which (whether written or unwritten, whether enacted by statute or derived from the mass of custom, tradition, or judge-made maxims known as the Common Law) are enforced by the Courts. These rules are called collectively by Dicey „the law of the constitution"[4] The other set of rules which are not laws consists of conventions, understandings, habits, or practices. This portion of constitutional law may, for the sake of distinction, be termed the „conventions of the constitution,"[5] or constitutional morality. Distinction between laws and conventions not the same as difference between written and unwritten law. There are laws of the constitution, as for examle the Bill of Rights or the Act of Settlement, which are written law, found in the statute books. There are other most important laws of the constitution which are unwritten laws, that is, not statutory enactments. The conventions of the constitution, cannot be recorded in the statute-book, though they may be formally reduced to writing. It is further a difference which may exist in countries which have a written or statutory constitution.[6]

Constitutional law as subject of strictly legal study means solely the law of constitution. The true constitutional law is the lawyer's only real concern. His proper function is to show what are the legal rules which are to be found in the several parts of the constitution. The true law of the constitution is in short to be gathered from the sources whence we collect the law of England in respect to any other topic.[7]

Two features have according to Dicey at all times since the Norman Conquest characterised the political institutions of England.[8]

The first of this features is the undisputed supremacy throughout the whole country of the central government. This authority of the state was during the earlier periods of England's history represented by the power of the Crown. This royal supremacy was later passed into the sovereignty of Parliament.

The second of these features is the rule or supremacy of law. This supremacy of the law given under the English constitution to the rights of

[4] Dicey, *Law of the Constitution,* 23. pp.

[5] Dicey, *Law of the Constitution,* 23. pp.

[6] The conventional element in the constitution of the United States is far larger than most Englishmen suppose. See on this subject Wilson, *Congressional Government,* and Bryce (3rd ed.), *American Commonwealth,* chaps. xxxiv. and xxxv.

[7] Since this subject was written by Dicey in 1883, William Anson's admirable *Law and Custom of the Constitution* has gone far to provide a complete scheme of English constitutional law.

[8] Dicey, *Law of the Constitution,* 1931 8th ed. Part two, Chap. IV. 179. pp.

individuals looked at from various points of view, forms the subject of this part of this treatise.

Foreign observers of English manners, such for example as Voltaire, De Lolme, Tocqueville, or Gneist, have been far more struck that have Englishmen themselves with the fact that England is a country governed, as is scarcely any other part of Europe, under the rule of law. Tocqueville compared the Switzerland and the England of 1836 in respect of the spirit which pervades their laws and manners. „England seems to be much more republican than the Helvetic Republic In the United States and in England there seems to be more liberty in the customs than in the laws of the people. In Switzerland there seems to be more liberty in the laws than in the customs of the country."[9]

In theory of Dicey the supremacy or the rule of law is a characteristic of the English constitution, which generally include under one expression at least three distinct though kindred conceptions.

Dicey means, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods expect for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of England. In almost every continental community the executive exercised far wider discretionary authority in the matter of arrest...and the like, than is either legally claimed or in fact exerted by the government in England. Wherever there is discretion there is room for arbitrariness.

Dicey means in the second place the rule of law as a characteristic of England, not only that no man is above the law, but – what is a different thing – that 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. In England the idea of legal equality has been pushed to its utmost limit. Every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. But for example the soldiers or clergymen of the Established Church, are in England as elsewhere subject to laws which do not affect the rest of the nation, for though a soldier or a clergyman incurs from his position legal liabilities from which other men are exempt, he does not escape thereby from the duties of an ordinary citizen.

Third, the rule of law or the predominance of the legal spirit may be described as a special attribute of English institutions. „General rules of constitutional law are result of ordinary law of the land."[10] This means that the constitution is pervaded by the rule of law on the ground that the general

[9] See Tocqueville, *Oeuvres complétes,* VIII. pp. 455-457.
[10] Dicey, *supra note* pp. 191

principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are in England the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts.[11] Under many foreign constitutions the security given to the rights of individuals results, from the general principle of the constitution. The English constitution has not been made but has grown. English constitution is a judge-made constitution and it bears on its face all the features, good and bad, of judge-made law.

There is a contrast between the English constitution and Foreign constitutions. In Belgium, for example which may be taken as a type of countries possessing a constitution formed by a deliberate act of legislation, the rights of individuals to personal liberty flow from or are secured by the constitution.

This is a former difference. But though this merely formal distinction is in itself of no moment the question whether the right to personal freedom or the right to freedom of worship is likely to be secure does depend a good deal upon the answer to the inquiry whether the persons who build up the constitution of their country begin with definitions or declarations of rights, or with the contrivance of remedies by which rights may be enforced or secured. Nor let it be supposed that this connection between rights and remedies is inconsistent with the exercise of a written constitution. The Constitution of the United States is embodied in written or printed documents document, and contains declaration of rights.

In Dicey's opinion, if we want to understand the influence of „rule of law" on leading provisions of constitution, we have to illustrate by contrast with the idea of *droit administratif*, or administrative law, which prevails in many continental countries.

In whole Chapter XII Dicey compares the rule of law with *droit administratif.* In many continental countries, there exists a scheme of „administrative law" by different names, for example in French as *droit administratif,* or in Germany as *Verwaltungsrecht.* Dicey says that „for the term *droit administratif* English legal phraseology supplies no proper equivalent."[12] In England states Dicey the system of administrative law and the very principles on which it rests are in truth unknown.

About the nature of *droit administratif* Aucoc describes the topic in very general language: „the body of rules which regulate therelations of

[11] Parlamentary declarations of the law such as Petition of Right and the Bill of Rights have a certain affinity to judicial decisions. Dicey, *supra note,* pp. 191 note: 2.

[12] Dicey, *supra note,* pp. 326.

administration or of the administrative authority towards private citizens."[13] In Dicey's opinion *droit dministratif* has two leading principles. The first principle is the „privileges of the State"[14] This idea means that the government, and every servant of the government possesses a whole body of special rights, privileges, or prerogatives as against private citizens. The second general idea is the necessity of maintaining the „separation of powers" *(séparation des pouvoirs.)*[15] This means the necessity of preventing the government, the legislature and the courts from encroaching upon one another's province.[16]

Dicey summarizes four distinguishing characteristics of French administrative law. These are the following:

Rights of the State determined by special rules.

Law Courts without jurisdiction in matters concerning the State and administrative litigation are determined by administrative courts.

Conflicts of jurisdiction between judicial Courts and administrative Courts.

Special position of officials.[17]

2. Wade and the Rule of Law

In 1931 Wade published his famous book „Constitutional Law" [18] In his opinion a constitution is normally meant a document having a special legal sanctity which sets out the framework and the principal functions of the organs of government of a State and declares the principles governing the operation of those organs.[19]

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[13] *„On le définit ordinairement l'ensemble des régles qui régissent les rapports de l'administration ou de l'autorité administrative avec les citoyens.* – Aucoc, *Droit Administratif,* i. s. 6.

[14] Dicey, *supra note,* pp. 332.

[15] Dicey, *supra note,* pp. 333.

[16] The separation of powers rests apparently upon Montesquieu's *Esprit des Lois,* Book XI. c. 6.

[17] This is the most despotic characteristic of *dorit administratif* – says Dicey. *Droit administratif* lies in its tendency to protect from the supervision or control of the ordinary law Courts any servant of the State who is guilty of an act. Dicey, *supra note,* pp. 341.

[18] E. C. S. Wade and G. Godfrey Philips, Constitutional Law, An outline of the law and practice of the constitution, including central and local government and the constitutional relations of the British commonwealth, Longmans, London 1960 6th ed.

[19] Wade, *supra note, PART I: General Constitutional Law, Introduction,* Chapter One, Definition and sources of Constitutional Law, A. What is Constitutional Law? 1 pp.

A documentary constitution will normally reflect theoretical beliefs. It is not suprising that in England, where progress has been achieved less by adherence to philosophical concepts than by the process of trial and error, no written formulae have been embodied in a code of rules for government.

An important consequence of the absence of a written constitution is that there is no part of the machinery of government, whether organs or functions, which is protected against change by the special requirements for altering a written constitution.[20]

In Wade's theory constitution means the rules which regulate the structure of the principal organs of government and their relationship to each other, and determine their principal functions.

Wade summarised the sources of constitutional law as follows:

(1) *Rules of law:*

(a) Legislation, i.e. Acts of Parliament.

(b) Judicial precedent, i.e. the decisions of the courts expounding the common law or interpreting statutes.

(c) Custom, i.e. the source of, for example, many of the usages of Parliament.

(2) *Conventional rules, i.e.* rules not having the force of law but which can nevertheless not be disregarded since they are sanctioned by public opinion, and perhaps indirectly by law proper.

(3) *Advisory, i.e.* the opinions of writers of authority.

The provision of a constitutional code is a *sine qua non* of every new State. Great Britain still has an unwritten constitution. Those statutes which are properly regarded as part of constitutional law are not sections of a code, but a large part of British constitutional law is based on statutes. (Magna Carta, Petition of Rights, Bill of Rights and Act of Settlement)

The other sources of rules of law are the decisions of courts of authority. In Wade's theory judge-made, or judiciary, law is derived from two sources.

The first is the common law proper. This consists of the laws and costums of the realm which have received judicial recognition in the reasons given from early years.

The second type of source is the interpretation of statute law. The task of the judge is in theory confined to an expositions of the meaning of the enacted law, and in the case of subordinarite legislation also to an inquiry into the validity of the enactment. In practice, however, judges make law by interpretation.[21]

[20] Wade, *supra note,* pp. 3.

[21] Wade, *supra note,* II. Case law, pp. 8-9.

The supremacy or rule of law has been in England, since the Middle Ages a principle of the constitution. It means that the exercise of powers of government shall be conditioned by law and that the subject shall not be exposed to the arbitrary will of his ruler. The rule of law had a different interpretation under the previous century.[22]

Of all theories on the constitution since Blackstone and writes Wade the most influential has been the Dicey's exposition of the Rule of law. The constitutional law of 1960 differs from many respects from that of 1885, but the influence of Dicey remains a real force. Of those principles which Dicey expounded that which has had most influence and at the same time has received most modern criticism in his exposition of the rule of law.

Dicey contrasted the rule of law with the *droit administratif* of France. He was at pains to contrast the disadvantages involved by a system of administrative law and administrative court to judge disputes between officials citizens with the advantages enjoyed by Englishmen through the absence of such a system. He did not properly appriate the working of the French system *contentieux administratif* by the *Conseil d' État.*[23] This was indeed the chief part of *droit administratif* with which he dealt. Nor did he pay much attention to the wide powers of the Executive which existed in England even in his days. The law which regulates the powers and duties of public authorities and officials in England is as much administrative law as the *droit administratif* of France even though its enforcement or supervision may be controlled by the same courts as the rest of English law.

The principle of the rule of law has since the end of the Second World War been a matter of universal discussion and endeavour to formulate the basic elements of the rule. The modern conception of the rule of law is being now considered as a basic idea which can serve to unite lawyers of many differing systems, all of which aim at protecting individual from arbitrary government. If justice is to be done in the process of harmonising the opposing notions of individual liberty and public order, that is achieved ultimately but not exclusively by the ordinary courts. There are, however, other methods of making a government submit to the law, such as adjudication by administrative tribunals and action in the legislature at the instance of private members, and even in the case of action by subordinate authoruty, by higher administrative control. As Wade summarizes his view „The rule of law has come to be regarded as the mark of a free society. Admittendly its content is different in different countries,

[22] See in details: Jennings, *The Law and the Constitution,* 5th ed., p. 314.

[23] For the *Conseil d'État,* see Hamson, *Executive Discretion and Judicial Control* (Stevens), 1954.

nor is it to be secured exclusively through the ordinary courts....It seeks to maintain a balance between the opposing notions of individual liberty and public order."[24]

II. The Theory of the Rechtsstaat

At the beginning of the 1970 Gottfried Dietze published a book entitled „Two Concepts of the Rule of Law"[25] Dietze presents in this book two essays on the rule of law in Germany, a nation where the degeneration of that rule to the arbitrary government was the most obvious, and which had faced by serious problems of law and order during the nazi rule. These essays emphasize the need of freedom from the government, as well as the necessity of authority for the sake of freedom, by showing the relationship between two German version of the rule of law, namely, Rechtsstaat and Staatsrecht._Literal translation of these terms are „Law State" and „State Law"[26]

The term „Rechtsstaat" was coined in the beginning of German constitutionalism, early in the nineteenth century. It basically denotes constitutionalism or constitutional government. „Staatsrecht" is the law concerned with the organization of a state and its government, and the relationship between the individual and the public power. According to Dietze, linguistically „Staatsrecht" appears to be an inversion of „Rechtsstaat." From the point of view of content, the Law State came into existence as a reaction to the State Law of the police state and was later disorted by the State Law.

The Law State and State Law belong to different categories which cannot be compared. The Law State can at best distuinguished from the unjust state, or from the power state; and State law, from such species of law as private law or criminal law.[27]

Carl Schmitt questioned the meaning of the Law State.[28] He did not oppose the Law State against the unjust state, nor was he particularly in favor of the former. Dietze and his contemporaries[29] agree with Schmitt in many ways.

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[24] Wade, *supra note,* pp. 73.

[25] G. Dietze, *Two concepts of the rule of law,* Liberty Fund, INC. Indianapolis 1973.

[26] Gottfried Dietze, *Two concepts of the rule of law,* Liberty Fund, INC. Indianapolis 1973. pp. 5.

[27] Dietze, *supra note,* pp. 11.

[28] Carl. Schmitt, Was bedeutet der Streit um den „Rechtsstaat"?, *Zeitschrift für die gesamte Staatswissenschaft* XCV (1935)

[29] Hayek, *Constitution of Liberty*? (1960)

The Law State has been considered „the opposite of two kinds of state, namely, the Christian state, a state determined by religion, and the moral state. Truly, constitutionalism was a reaction against Prussian officialdom and its state.

Constitutional government can be explained from the historical situation in nineteenth-century Germany, if we consider the infuence of intellectual currents coming to Germany from the West. Among those currents, the most important originating from Locke, Montesquieu, Rousseau, and Burke, was the idea of the „empire of laws, not of men," as it had developed mainly in England and America. Of great importance were the writings of Kant, which have often been considered (until recently) the source of the ideas about constitutional government.[30]

In the beginning of the nineteenth century, people saw in the writings of Kant a criticism against the police state and an advocacy of the rights of the individual. Kant saw the purpose of the state in „The greatest harmony of the constitution with the principles of law *(Rechtsprinzipen)*"[31]

Robert von Mohl has been considered the father of the Law State.[32] Mohl, the scholar first divided the State Law into constitutional and administrative law, also introduced the concept of the Law State into the science of law. To Mohl, that state was a constitutional government which weakened, and perhaps replaced, the law of the police state. The reason of state was replaced by the „rational" state *(Verstandes-Staat)* for which Mohl, after some hesitation, chose the term „Rechtsstaat."[33] Mohl in the beginning had favored the term „Law State" over „Rational state" and had left no doubt about the material content of the Just State. Later on he appeared less individualistic, and more sympathy with concerns of the group, society and the state, although he never really repudiated the ideas of his early manhood.

F. S. Stahl a follower of Mohl, defined the Law State as following: „The state must be a Law State,..It must exactly detrmine and definitely secure the scope and limits of its activity and the free sphere of its citizens according to the law, and must realize moral ideas directly only in so far as it is absolutely

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[30] Referred to Kant as the „Philosopher of the Rechtsstaat", Hayek, *Constitution of Liberty* (1960), Schmitt, „Nationalsocialismus und Rechtsstaat" *Juristische Wochenschrift* LXIII (1934)

[31] Immanuel Kant, *Rechtslehre,* in *Gesammelte Schriften* (ed. by the Prussian Academy of Sciences), Sec. 1, VI (1911) 318.

[32] Comp. Lorenz von Stein, *Die Verwaltungslehre* I, 1 (2d ed. 1869) 297., Rudolf Gneist, *Der Rechtsstaat* (1872) 184.

[33] Mohl, *Das Staatsrecht des Königreiches Württemberg* I (1829) p. 11.

necessary. This is the concept of the Law State" [34] This definition of the Law State is considered classic.

Mohl's concept is primarily a material, and only secondarily a formal one; Stahl's, is on the contrary primarily formal and only secondarily material.

For some time after Stahl's conception, the Law State was very popular. In 1864 Otto Bahr published *Der Rechtsstaat.*, eight years later, Rudolf Gneist produced a book with the same title. In 1878 Maurus published a book on the modern Law State as a constitutional state, and a year later there appeared Lorenz von Stein's „Rechtsstaat und Verwaltungsrechtspflege"[35] was published. In the same year, the second edition of Gneist's work on the Law State and administrative courts in Germany came out. All these authors professed a formal concept of constitutionalism.

Stein and Gneist attempted to replace liberalism by a national ideology. They see in the word „Rechsstaat" only positive law, not law in general or in the sence of Justice.

Liberal ideology was prevalent in the nineteenth century, it became less popular as the century advanced. The Law State became a mere positivistic statute state (Gesetzesstaat).[36]

The Weimar Republic (since after 1919) further enhanced nationalism and socialism. The Weimar constitution created a „decentralized unitary state" whose federal remnants were soon attacked by movement for centralization („Reichsreform").[37] By 1933 the Weimar Republic had become a national-socialist state.[38] The Hitler regime became a national Law State of Adolf Hitler.

The Bonn Basic Law providing for a „republican, democratic and social Law State" did not succeed in establishing genuine constitutionalism. As distinguised from the constitutions of the Empire and the Weimar Republic, the Basic Law mentions the word „Law State" Provisions of the Basic Law, securing freedom in a larger measure than previous constitutions, support this

[34] Friedrich Julius Stahl, *Philosophie des Rechts* II, part 2 (3rd ed. 1856) pp. 137.

[35] Stein, *Grünhuts Zeitschrift für das private und öffentliche Recht der Gegenwart* VI (1879) 27 pp., and also Stahl, *Die vollziehende Gewalt* I (2d ed. 1869) 296. pp.

[36] Hans Kelsen wrote: „from the point of view of legal positivism, every state must be a Law State, because and in so far as they realize an orde which can be qualified as a legal order". *Allgemeine Staatslehre,* (1925) pp. 44.

[37] G. Anschütz, *Drei Leitgedanken der Weimarer Reichsverfassung* (1925) 12. pp.

[38] Walter Jellinek wrote: „Already voices could be heard claiming that the days of the Law State were numbered, that as a liberal institution it was a thing of the past and that is must make room for a new strengthening of state power". Walter Jellinek, *Verwaltungsrecht,* (2d ed. 1929) 91. pp.

opinion.[39] The substantives „federal state" and „Law State" constituted higher values in the Basic Law than the adjectives „democratic" and „social" [40]

The conclusion can thus be drawn that the Basic law provides for a type of constitutionalism only and leaves it up to government to substantiate that type with its respective program, i.e., to determine it by means of State law. Within the framework of the Basic Law, this makes possible a liberal or social, Christian-democratic, Christian-social, liberal-democratic, or social-democratic Law State, or one based upon combinations of these idea for parties in small and great coalitions, one which is influenced by their values, values which can neutralize each other and thus nullify the Law State.[41] There will probably always be trends toward constitutionalism as a reaction against trends toward the police state. Just as there is a fluctuation between natural and positive law,[42] such a movement probably also exist between the major variations of the rule of law – the Law State and State law.[43]

Democracy has two bad aspects. First, the despotism of the majority, second, the improper permissiveness that drifts toward anarchy under the pluralistic „government" [44] It may collide with the ideal Just State, the law of any given state always will stand for certain values. As a result everybody can use his own standard of values even if this leads to lawlessness.[45] Basic Law contains provosions which from the point of view of constitutionalism are not without risk.

Liberalism, having come about as a reaction against temporal absolutism, finds little support in authority, be it monarchical, nationalist, or socialist. For the liberal, the measure of all things is not God, king, fatherland, or class, but man.[46]

On June 30 1934 Hitler did not, as Schmitt asserted, protect the law,[47] but only the law in the sense of the formal national-socialist Law State. The

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[39] Dietze, *supra note,* 40. pp.

[40] „Although it would have been possible to make it such by arguing that the law is wiser than its creator, people failed to do so." Gustav Radbruch, *Rechtsphilosophie* (6th ed. 1963) 210. pp.

[41] Dietze, *supra note,* 45. pp.

[42] Comp. Heinrich Rommen, *Die ewige Wiederkehr des naturrechts* (2d ed. 1947.)

[43] Dietze, *supra note,* 51-51. pp.

[44] Comp. Friedrich A. Hayek, *The Road to serfdom* (1944)

[45] Friedrich, „The Issue of Judicial Review in Germany", *Political Science Quarterly* XLIII. (1928) 188. pp.

[46] Comp. Federico Federici, *Der deutsche Liberalismus* (1946)

[47] Carl Schmitt, „Der Führer schützt das Recht," *Deutsche Juristen-Zeitung* XLIX (1934) 945.

national-socialist terror was postponed in order to become evident in an even more terrible way after the „chrystal-night" and the beginning of the war.

R. Thoma wanted to see the science of administrative law oriented by the constitutionalist idea, and the administration, the state, and its law by constitutionalist principles, he presupposed for all of this a sanction by the law of the state.[48] According to von Sarwey – who called law State „constitution state" – the state was based upon a liberal constitution made by men, left no doubt about „the statepower in the form of legislation, execution and administration.[49] Hugo Preuss saw in the Law State an institution in which the „band of the law" that keeps together the „cell-texture" of the state is protected through the realization of positive laws.[50] In Rosin's opinion the realization of the law made by the state is one of the chief tasks of constitutionalism.[51] For Otto Mayer, the Just State shall *„in the manner of the law* exactly determine and limit the scope of its activity and the free sphere of its citizens."[52] Later on, he wrote: „The Law State is the state of the well-ordered *administrative law"* [53] Georg Jellinek had published a book on statute-law and decrees with a view of „permanently transforming state law from the fluid element of a story of the state which it is hard to circumscribe, into the solid state of aggregation of a juristic discipline."[54] His theory of the state shows that constitutionalism is based upon the lawful execution of the law. For Lorenz von Stein, the Law State presupposed not only a constitutional legislation and administration, but also administrative legal procedures with their inherent obedience to, and execution of, the laws.[55] To Gneist, it was clear that constitutionalism, just as the rule of law, could not exist without State Law.[56] Stahl established that the Law State precludes every contact with individual morals. It permits him total freedom of religious and political convictions and their demonstration. No less it grants definite rights and status within the state to corporations, institutions and the church. It possesses a legal, non-transgressible order for the activities of courts and agencies, a constitutional firmness concerning the power of the sovereign and the rights of the representative body.[57] Mohl also favored the law that made

[48] Thoma, *Rechtsstaatsidee und Verwaltungswissenschaft,* (1910) 201. pp.
[49] O. von Sarwey, Das öffentliche recht und die Verwaltungsrechtspflege (1880) 44. pp.
[50] Hugo Preuss, *Gemeinde, Staat, Reich als Gebietskörperperschaften* (1889) 213. pp.
[51] Heinrich Rosin, *Das Polizeiverordnungsrecht in Preussen* (2d ed. 1895) 18. pp.
[52] Otto Mayer, *Deutsches Verwaltungsrecht* I (1895) 62. pp.
[53] Otto Mayer, *Deutches verwaltungsrechts* I (3 rd ed. 1924) 58.
[54] Georg Jellinek, *Gesetz und Verordnung* (1887) vii.
[55] Von Stein, „Rechtsstaat und Verwaltungsrechtspflege" (1864) 321. pp.
[56] Gneist, *Der Rechtsstaat* (1873) 28, 34. pp.
[57] Friedrich Julius Stahl, *Der christliche Staat* (1847, 2d ed. 1858) 73. pp.

it viable. However, he was a teacher of State Law who, while in his later years he tended toward the formal Law State, never forgot the material Law State that for him always remained the core of the constitutionalist idea. In all the editions of his work on police science, Mohl emphasized „that the citizen under a constitutional government must, above all, be in a position to claim the safety of his rights and that the fulfillment of this claim is more important than the advantages of a more consequential formal sanction of state authority and of a faster administration" [58] Mohl himself found the term „Law State" for the constitutional state he desired „not quite fitting, since *law* is only one half of the activity of that type of state, it would be better to call it „law and police state"

As followers of Kantian school, scholars left no doubt about the value of the law for constitutional government. Being even more liberal than Mohl, they saw the task of the state in the realization of the idea of the law.[59] Although Kant' theory has an individualistic point of departure, it hardly paves the way for anarchism. On the contrary, it sees the purpose of the state in „the greatest agreement of the constitution with principles of law"[60] For the sake of the legal security of the individual and the maintenance of the legal community, Kant rejects a right of resistance and gives far-reaching powers to the ruler.

The Hanoverian scholars as students of the English constitution, helped to pave the way for constitutional government in Germany. Von Berg influenced by Kant, and probably by Adam Smith, without doubt was interested in the restriction of state administration. Nevertheless, he considered the safety of society the main purpose of the state and assigned important functions to the police.[61] Dahlmann, one of the Göttingen Seven, regretted the democratization of the English constitution, which he considered an example for a German constitution so long as the legal order of constitutional monarchy guaranteed the rights of Englishmen.[62]

The inception of the Law State in the beginning of the nineteenth century, that state presupposed a sanction by State Law. The liberal state, which in view of its emphasis upon law before power probably approaches the constutionalist ideal more closely than any other state, in which the existing liberal order was strictly guarded. The liberal state was not a non-state, but a

[58] Robert von Mohl, *Die Polizei-Wissenschaft nach den Grundsatzen des Rechtsstaates* I (1832) 32, (2d ed. 1844) 42, (3rd ed. 1866) 60. pp.

[59] Dietze, *supra note,* 90. pp.

[60] Kant, *Rechtslehre,* in *Gesammelte Schriften,* edited by the Royal Prussian Academy of Sciences, Abteilung 1, VI (1911) 318. pp.

[61] G. H. von Berg, *Handbuch des deutschenPpolizeirechts* II (1799)

[62] Friedrich Christoph Dahlmann, *Ein Wort über Verfassung* (1815)., D*ie Politik* (1835., 2d ed. 1847).

Law State. The word „Law State" which, with all its symbolic emphasis upon the primacy of the law, does not forget the state.

In the English-speaking world, „Law State" and „State Law" fall under the concept of the rule of law. The concept „rule of law" also implies the conscientious and strict execution (empire, rule) of the law which serves the interest of the individual in a community and which even in the form of statutes largely corresponds to justice. The law of the power state inverted and pushed aside constitutionalism, it would be wrong now to fall into the opposite extreme and ignore the importance of State Law for the law State.

Dietze points out that a symmetrical arrangement clearly shows the relationship of the two versions of the rule of law: the Law State is the ideal, the State Law the real.[63] The Just State must be starting point as well the end of the constitutional efforts, that it must furnish the framework of legal and political thinking.

„State Law," appears compact and powerful, symbolizing the threat of a state's conception of justice to the Just State. It indicates how difficult is may be for constitutionalist ideas to penetrate the fortress of State Law and to conquer it. To Voltaire, as much as Montesquieu, the English constitution, dominated as it was by the common law, was more legitimate than the *ancien régime.* On the other hand, upon Dicey's death there came about a legality which increasingly challenged legitimate constitutionalism and through statutes and decrees brought about severe restrictions of the freedom of the individual.

In Germany where, due to historical factors, constitutional legitimacy stood on weaker ground than in England, the legality inherent in the rule of legislation was questioned already in the Weimar Republic. Doubts about that legality reached their climax in the Hitler regime, which demonstrated the tension between the Just State and the state's justice faster and more clearly than any other Western nation. Despite these facts the Law State is not a non-state. It needs State law for its realization. Law's legality is_very important for the preservation of constitutionalist legitimacy.

III. The connection between two terms: „Just State" and the „Rule of Law"

N. W. Barber published an essay in 2003, with the title „The Rechtsstaat and the rule of law"[64] It is a review of the book *Weimar: A Jurisprudence of Crisis,*

[63] Dietze, *supra note,* 99. pp.

[64] N. W. Barber, The Rechtsstaat and the rule of law, University of Toronto Law Journal, (2003) pp. 53.

where Arthur Jacobson and Bernhard Schlink have collected some of the most important writings on constitutional theory from the Weimar period.

Barber's review focuses on the issue of translation: the term *„Rechtsstaat"* has been translated as „rule of law."

Barber suggested that the assumption that the two labels signify the same concept, or group of conceptions, is mistaken and that there is an important and interesting difference between the two. In essence, while *Rechtsstaat* rests on some sort of connection between the legal system and the state, the rule of law is a qualify of, or theory about, a legal order.

By translating *Rechtsstaat* as „rule of law", the tranlators have shifted the meaning of some of their subjects, making them seem less removed from Anglo-American writing than in actually the case. Second, there is something to be learned from the focus of the *Weimar* theorists on the state as an important concept within constitutional theory.

First, Barber examined the sameness between „Rechtsstaat" and „rule of law" Conceptions of the *Rechtsstaat* resemble conceptions of the rule of law: both concepts provide similar answers to similar questions. The starting point for each is an investigation of what it means for a person be governed by law, as opposed to being subject to the dictates of the powerful. In both concepts the answer to this question is determined. First, the extent to which the question can be seen as a matter of legal, as opposed to political philosophy. Modern theorists would be likely to see this division as a matter of degree, a question of focus rather than two completely separate projects.[65]

Kelsen, in contrast, considered the difference profound and unbridgeable: the teorist had to choose from the outset whether a particular piece of analysis was a matter of legal or political theory.

In writings on both the the rule of law and the *Rechtsstaat*, a distinction is frequently drawn between those who advocate legalistic conceptions and those who place political or social rights at the heart of their doctrines. This divide has been variously desribed as a division between formal and substantive conceptions.[66] It is perhaps better to characterize it as divining legalistic and non-legalistic concoptions of the doctrines.

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[65] J. Finnis, „Natural Law: The classical tradition" in J. Coleman & S. Shapiro, eds., *The oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: oxford University Press, 2002) 1 at 18-22; J. Waldron, „Legal and Political Philosophy" in J. Coleman & S. Shapiro, eds., *The oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: oxford University Press, 2002) 352.

[66] P. Craig, „Formal and Substantive Conceptions of the Rule of Law: An Analytic Framework" (1997) Publ. I., 476; „The *Rechtsstaat* Idea Compared with the Rule of Law as a Paradigm for Protecting Rights" (1990) 107 So. Afr. L. J. 76 at 78-9; F.

Legalistic models of these concepts may contain substantive demands, but these demands relate to the legal process and to the form that rules ought to take. Non-legalistic conceptions also include claims that are not directly related to the legal process, such as for example, rights to freedom of expression and autonomy.

The division between legalistic and non-legalistic conceptions of the *Rechtsstaat* can be clearly seen in a comparison of the models articulated by Richard Thoma and Herman Heller. Thoma's conception had an explicitly political basis: it was a normative call for restrictions on the way that the state exercised its power („The *Reich* as a democracy,") For Thoma the Rechtsstaat made a series of procedural demands over the exercise of power. In the *Rechtsstaat,* statute constituted the highest source of law, binding administrators. Thoma's conception of the *Rechtsstaat* clearly resembles the legalistic conception of the rule of law, reflecting that of A. V Dicey[67] and even more strongly, that of Jeffrey Jowell.[68] All three writers focus on the virtues of the legal procedure and the need for the state to show a legal basis for its actions.

Herman Heller, in contrast, insisted on a far richer conception of the *Rechtsstaat.*[69] Heller's *Rechtsstaat* formed a subcategory within his conception of the state: all *Rechtsstaaten* were states, but not all states were *Rechtsstaaten.* Heller claimed that the purpose of the state was to provide a mechanism for coordination between its citizens in an increasingly complex society. For Heller the *Rechtsstaat* was a subset of the broader category of state: a state in which democracy could function and coordination was obtained („The Essence and Structure of the State,"). *Rechtsstaat* require some level of social homogenity („Political Democracy and Social Homogenity"). Consequently, the state has a unifying task to perform, building social solidarity through material and cultural strategies.[70]

T. R. S. Allan has fashioned a very rich understanding of the requirements of the rule of law, incorporating, among other things, freedom of speech and association, along with broader considerations of equal dignity, fair

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[67] A. V Dicey, *Introduction to the Law of Constitution,* 10th ed. (London: Macmillan, 1959) at c. 4.

[68] J. Jowell, „The Rule of Law Today" in. J. Jowell &D. Oliver. Eds., *The Changing Constitution,* 4 th ed. (Oxford: Oxford University Press, 2000) 3.

[69] This account of Heller draws strongly on Dyzenhaus, *Legality and Legitimary* (Oxford: Oxford University Press, 1997.) C. 5.

[70] Echoes of the social *Rechtsstaat,* similar to that advanced by Heller, can be detected in the text and interpretation of the modern German Constitution: see D. Kommers, „German Constitutionalism: A Prolegomenon" (1991) 40 Emory L. J. 837. esp. At 846-8 and 864-70.

treatment, respect, and so forth. In his earlier the rationale behind the rule of law came close to that advanced by Heller: the concept formed a bridge between the soveregnity of the people and the soveregnity of Parliament.[71]
Perhaps, it might weekly be suggested, legalistic conceptions focus on what it means to be free from the rule of the powerful – a distinction reflected in the two clauses of the call for a „rule of law and not of men"

It is questioable how significant Thoma and Heller would have thought the division between political and legal philosophy was, but for one of the foremost critics of the *Rechtsstaat* the distinction was crucial. The attack on the *Rechtsstaat* mounted by Hans Kelsen demonstrates the gulf between the *Rechtsstaat* and the rule of law. His critique focused on the presumption of a non-legal conception of the state that is required by any conception of the state, Kelsen removed the relationship at the heart of the *Rechtsstaat* and sought to remove the concept from constitutional thought. For Kelsen, the proper focus of legal scholarship was the better comprehension of legal norms: the legal theorist should adopt a legal point of view („On the Borders between Legal and Sociological Method,").[72] Legal scholarship, said Kelsen, simply lacked the intellectual resources to profitably undertake such enquiries.[73]

Kelsen identified three possible definitional elements of the state its people, its territory, and its actions – and claimed that whichever element was adopted, all required juristic definition.[74] The people of the state, and its territorial limits were determined by the application of legal norms. Further, state power could be exercised only throught the law: the expression of the state's will could be manifested only through legal acts.

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[71] T. R. S. Allan, „Legislative Supremacy and the Rule of Law" (1985) 44 Camb. L. J. 111. esp. At 129-30. This reasoning is not relied upon in his more recent work, but see T. R. S. Allan, *Constitutional Justice* (Oxford: Oxford University Press, 2001) at 221-2. 261-6. Contrast his spectical discussion of „popular morality" in T. R. S. Allan, *Law, Liberty and Justice* (Oxford: Oxford University Press, 1993) at 102-5.

[72] See also Schmitt's critique of this view, pointing out that Kelsen's legal conception of the state is the inevitable and obvious consequence of his adoption of such a narrow methodology. C. Schmitt, *Political Theology: Four Chapters on the Concept of Soveregnty,* trans. G. Schwab (Cambridge, MA: MIT Press, 1985) at c. 2.

[73] It shold be noted that, contrary to what is occasionally claimed, Kelsen was happy to engage in normative political debate, provided a clear distinction was made between this activity and the study of law. See H. Kelsen, „On the Essence and Value of Democracy" in *Weimar* 76 {hereinafter „Essence and Value"}; H. Kelsen, „Legal Formalism and the Pure Theory of Law" in *Weimar* 80.

[74] Kelsen, *Pure Theory of Law,* trans. M. Knight (Berkley: University of California Press, 1967) 16.

Kelsen's attack on the *Rechtsstaat* is instructive because it emphasizes the relation at the heart of the concept of the *Rechtsstaat:* an attempt to bind state and law together. Kelsen's focus on the legal system led him towards a test of effectiveness as a bridge between the pure theory and reality. It contains, perhaps, a hint of impurity, showing that even Kelsen was forced to incorporate some elements of political sociological analysis within his theory of law.[75]

Kelsen had no space within his legal theory for the *Rechtsstaat.* By insisting on a sharp division between political and legal philosophy, and sticking resolutely to the legal side, his methodological assumptions prevented his theory from accommodating a model of the *Rechtsstaat,* though it could possibly have included a conception of the rule of law. Much of Anglo-American jurisprudence has taken its lead from Kelsen: both Raz and Hart owe much to his work. Because it does not require a non legal conception of the state, the rule of law can pass over one of the core concerns of the *Rechtsstaat:* how to achive harmony between the state and the law.

Until quite recently, Anglo-American constitutional scholarship had little time for, or need of, a non-legal conception of the state. During most of the last century there was little disjunction in Britain or America between the legal system and the state, and this was reflected in writings on jurisprudence. The work of H. L. A. Hart provides a good example of this. While hart identifed the question of the state as a key issue for jurisprudence, the task quickly disappeared, overshadowed by his enquiry into of the concept of law.[76] So far as Hart had a conception of the state, it was identical to that of Kelsen: the state was a legal construct formed by the rules of a legal order.[77] While Hart aspired to articulate a concept of law that was true for all legal systems, some aspects of his model were influenced by his experiences of the British Constitution. The rise of legal pluralism, as a way of looking at legal systems should cause constitutional theorists to think again about the legal conception of the state advanced by Kelsen and endorsed by Hart.

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[75] J. Waldron, „legal and Political Philosophy" in J. Coleman & S. Shapiro, eds. *The oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: oxford University Press, 2002) 364-6.

[76] H. L. A. Hart, „Definition and Theory in Jurisprudence" in H. L. A. Hart, *Essays in Jurisprudence and Philosophy"* (Oxford: Oxford University Press, 1971) at c. 2.

[77] N. MacCormick, „The Benthamite Constitution: Decline and Fall?" in N. MacCormick, *Questioning Soveregnity* (Oxford: Oxford University Press, 1999) 69, reporting that Hart endorsed Kelsen's view of the state in an unpublished lecture series.

Pluralism presents a model of the legal universe in which legal systems and institutions can conflict and overlap.[78] The classic model of the legal order, advanced by Hart and Kelsen, resembled a pyramid. At the top of the structure was the *Grundnorm,* or rule of recognition, which served to both legally validate and identify the remaining rules of the system. The pluralist view, in contrast, suggests that there can be several legal orders in a given territory, each of which asserts its supremacy over the others.

The unitary models advanced by Kelsen and Hart may have constituted persuasive templates of the way legal systems operate only for a brief period of history: H. W. Arthurs has demonstrated the considerable fragmentation of law that existed before 1900.[79]

Pluralism therefore needs a conception of the state that is, at least in part, a political entity, one that is able to interact with, and is distinguishable from, these different legal systems. Separating the state from the legal system shows the differing merits of the concepts of the *Rechtsstaat* and the rule of law. Both may have useful roles to play in modern constitutional thought.

The lack of a necessary connection with a concept of the state may prove a source of strength for conceptions of the rule of law. The rule of law possesses two areas of flexibility that are denied to, or more constrained within, conceptions of the *Rechtsstaat.* First, as Michel Rosenfeld has commented, the rule of law's focus on the legal system may be become increasingly attractive as globalization draws legal orders away from states.[80] Unlike the *rechtsstaat,* the rule of law contains no implicit ambition to find a harmonious relationship between law and the state. The rule of law can be presented as a set of qualities that ought to be present in all legal orders.[81]

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[78] MacCormick has advanced a pluralist model of the European Union, but his is a more modest variety in which a hierarchy exists between the differing legal orders. It might be questioned whether this is defensible, or whether the existence of a hierarchy would serve to merge the legal orders into a single system – thus eliminating the pluralist nature of the model. See N. Mac Cornick, „Juridical Pluralism and the Risk of Constitutional Conflict" in N. MacCornick, *Questioning Sovereignty* (Oxford: Oxford University Press, 1999) 97.

[79] H. W. Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985).

[80] M. Rosenfeld, „Rule of Law Versus *Rechtsstaat"* in P. Haberle & J. P. Müller, eds., *Menschenrechte und Bürgerrechte in einer vielgestaltigen Welt* (Basel: Helbing & Lichtenhahn, 2000)

[81] Not all conceptions of the rule of law possess this flexibility; both Dicey's and Allan's theories are confined to specific systems. See Dicey, *Introduction to the law of the Constitution,* 10th ed. (London: Macmillan, 1959)

Second, conceptions of the rule of law may direct attention beyond the normal confines of state power. Governence by law and not by men may not require constraint only on the power of the state.

In contrast, it is a virtue of the concept of the *Rechtsstaat* that it compels us to consider the relationship of, and the difference between, the state and the legal system. While the idea of the *Rechtsstaat* brings with it an aspiration to harmony, it also raises the possibility of conflict. One of the difficulties faced by those who adopt a legal conception of the state, or who avoid engaging with the concept of the state, is understanding state liability. Kelsen argued that the state could commit delicts in domestic law, but only through the attribution of wrongful actions of officials to the state.

In some situations, where European Law is not directly effective, damages may be awarded even if the statute that violates European Law remains legally valid. To claim, as Kelsen must, that is such a situation the conduct of Members of Parliament is passing the statute is an action *attributable* to the state rather than an act of the state appears counterintuitive.

Second, Kelsen's rationalization differs from the way which many legal systems understand the state. It is common for legal systems to treat the state as an actor that can commit legal wrongs, sometimes making the state pay damages for conduct where officials would not be directly liable.[82]

Once a non-legal conception of the state is adopted, the *Rechtsstaat*'s force as a normative concept is restored. The concept expresses a hope that the state will be governed by the law, but also embodies a recognition that this is not always the case: the harmony that the *Rechtsstaat* aspires towards may always be just beyond our reach.

Unlike the confident equation of the state and legal order that was so easy to make during the latter half of the twentieth century, legal pluralism suggests the need for a more flexible, and broader, approach to constitutional theory that can encompass the political as well as the legal elements.

[82] As in the case of state liability under European Law.

Paulovics Anita–Stipta Zsuzsa

Megjegyzések a „Rechtstaat" és a „rule of law" fogalmáról

Rezümé

A tanulmány a jogállam fogalmával foglalkozik alkotmányjogi szempontból. Először azt vizsgálja, miképpen fogta fel a jogállamot a common law jogrendszerek gondolkodását követő, és az angol konstitucionalizmust kritika nélkül elfogadó Dicey, illetve hogyan határozta meg a „rule of law" fogalmát és lényegét. Dicey a jogállamban elsősorban az egyéni szabadság angol felfogásának megtestesülését látja, és ezen alapon bírálja a szerinte etatista francia közigazgatási jogot. Dicey szerint a brit viszonyok között nincs is szükség közigazgatási jogra, ami azt jelenit, hogy nem tesz különbséget az alkotmányjog és a közigazgatási jog között – mivel szerinte igazából nincs is pozitív alkotmányjog, csak alkotmányos konvenciók.

A dolgozat második része Dicey felfogásának elvetését mutatja be, Wade klasszikus, számos kiadást megért alkotmányjogi műve kapcsán. Wade már világosan látja a különbséget a közigazgatási jog és alkotmányjog között és elismeri az önálló, a franciához sokban hasonló közigazgatási jog indokoltságát. Wade és az őt követő mai brit jogtudomány sokkal megértőbb a francia jogállam-felfogás iránt, és elismeri, hogy Dicey nem látta át világosan a francia közigazgatási bíráskodás jogvédelmi, illetve alkotmányos szerepét.

A dolgozat a továbbiakban a német Rechstaat felfogást állítja szembe a brit rule of law-val. Dietze nyomán bemutatja a jogállam eszméjének kialakulását a korai német konstitucionalizmusban, elsősorban annak alkotmány-helyettesítő szerepét. A német jogállam-felfogás fő tulajdonsága, Dietze szerint, hogy formális, azaz az állam joghoz kötöttségének biztosítását kívánja biztosítani – és nem a jog tartalmi alkotmányosságát. Ez a jogállam felfogás később, a weimari időszak nagy elméleti és gyakorlati államjogi vitáiban is továbbélt, különösen a konzervatív és a liberális-demokrata alkotmányfelfogás hívei közötti küzdelemben, amely a mai Németországban az utóbbi javára dőlt el. Ennek tanulsága a mai alkotmányjog számára, abban áll, hogy a jog és az állam konfliktusára, esetleg, az európai integráció és a globalizáció hatására, szétválásának lehetőségére hívja fel a figyelmet.