3 *État de droit*: The Gallicization of the *Rechtsstaat*

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Introduction

This chapter will analyse the discourse in France on the relatively new French expression *État de droit*.[1] After an unsuccessful first rise in its use at the beginning of the twentieth century (1907–1930s), the term has since 1977 progressively informed the language of French constitutional law scholars and even penetrated the language of specialists of other legal disciplines, politicians, journalists, and, to some extent, of ordinary citizens.

1 The International Success Story of a German Term

In French, the term *État de droit* (generally written with a capital "E"), was originally coined in the second half of the nineteenth century (with the first documented use in 1868) as a direct translation of the German term *Rechtsstaat*, coined by Placidus in 1798. When capitalized, *État* means "State" (in German, "*Staat*"), and "*droit*" (in German, "*Recht*") signifies "law." In English, the term *Rechtsstaat* and its various foreign replicas are translated either as "rule of law" (for example, in the EU Treaties), which is quite a broad translation, or, more literally, by "Law State," "Legal State," or "Rule of Law State." I would also propose "Lawful State," having regard to Locke's classic expression of "Lawful Government." It should be noted, however, that some French scholars, such as Maurice Hauriou and Mireille Delmas-Marty, and some international law experts prefer to write *État de droit* with a small "e," especially in the context of international law. Thus, they delete any reference to the "State," a complex term that is central in the

[1] Due to space constraints, the use of the *État de droit* term in other French-speaking places (Belgium, Switzerland, Luxembourg, Canada, Africa, etc.) or in international law cannot be analyzed. For a more comprehensive treatment, including an exhaustive bibliography, see especially Luc Heuschling, *État de droit, Rechtsstaat, Rule of Law* (Paris: Dalloz, 2002).

classic legal scholarship of continental Europe but ignored in the English tradition. Using the term *état* with a small "e," which simply signifies "situation" or "status," suggests that the expression "*état de droit*" can be applied to any situation, to States, of course, but also to polities that do not qualify as such (for example, international organizations).

Although centered on France, this chapter has a broader scope: it raises some general questions regarding the globalization or, to put it more cautiously, the internationalization of the German *Rechtsstaat* discourse. Since the 1990s, that discourse has taken a strong lead – at least in the Western debate – on matters of "nomocracy", an expression here used as a culturally neutral, generic term. Often, the western debate tends to be reduced to two models: on the one side, the *Rechtsstaat* intellectual tradition and its current implementation in German positive law and, on the other, the so-called rule of law model, in which, notwithstanding some fundamental differences, especially regarding judicial review of statutes and the very concept of Constitution, the English and US traditions are merged. Other (Western or non-Western) traditions are neglected or marginalized.

The term *Rechtsstaat* is one of the most successfully exported items of German legal scholarship: since the end of the nineteenth century, it has been adopted in almost all European languages and even outside Europe. It gave birth, for example, to "*Stato di diritto*" in Italian, "*Rättsstat*" in Swedish, "*Państwo prawne*" in Polish, "*pravovoe gosudarstvo* (правовое государство)" in Russian, "*shteti i të drejtës*" in Albanian, "*hukuk devleti*" in Turkish, "*Estado de derecho*" in Spanish, "*dawlet al-qanoun*" in Arabic, and "*Hôchikokka*" or "*Hôchikoku*" in Japanese. Each discourse was inspired either directly by the German model or by the use of a literal replica by some other system; the use of *État de droit* in French-speaking African countries, for example, has been strongly influenced by the approach of France and such international organizations as the EU and the World Bank. In some jurisdictions, the impact of this "global" diffusion of German legal terms – another illustrative example is the success of the term "*Grundrechte*" (fundamental rights), instead of "*droits de l'homme*" – and German solutions (for example, the institution of the *Bundesverfassungsgericht*, its case law on human dignity or on "*Solange*," the eternity clause of Article 79(3) *Grundgesetz*, militant democracy)[2] is such that scholars start to, for example, speak

[2] For a first insight into this vast field: Ulrich Battis et al., eds., *Das Grundgesetz im internationalen Wirkungszusammenhang der Verfassungen: 40 Jahre Grundgesetz* (Berlin: Duncker und

about the "Germanization" of constitutional law and of constitutional law scholarship.[3] Certainly, an increasing number of jurists around the world use the expression *Rechtsstaat* or, more frequently, its local translation. Their *language* may be Germanized, but has their *mindset* as legal practitioner or scientific scholar also been influenced by German ideas?

One would expect so, as words – unless they are synonyms or lies – are not neutral (i.e., not interchangeable): they convey certain specific meanings. Law is expressed by language: to change the former, the easiest and most direct way is to change the latter; one rewrites the text, for example, by inserting the domestic translation of the term *Rechtsstaat* at the fore-front of the Constitution.[4] By changing the words people use when thinking about, or interpreting, legal texts, one may change their preconceptions thereof and, thus, indirectly, change the law. Yet, however reasonable it might appear, the working hypothesis that equates the Germanization of juridical language with the Germanization of the local legal mentality and/or legal norms is not always valid. This is obvious in the French *État de droit* discussion initiated by Léon Duguit: While the phrase, as he used it, stemmed from the German word, none of its meaning did. One may wonder whether part of the current international success of the term *Rechtsstaat* is just a fashion or a new buzzword.

If, however, the Germanization of the terminology amounts to a substantial change inspired by German views – as has happened in France in several cases – *why*, *how*, and to what *extent* did this change take

Humblot, 1990); Christian Starck, ed., *Grundgesetz und deutsche Verfassungsrechtsprechung im Spiegel ausländischer Verfassungsentwicklung* (Nomos: Baden-Baden, 1990); Klaus Stern, ed., *60 Jahre Grundgesetz* (München: C. H. Beck, 2010); Uwe Kischel, ed., *Der Einfluss des deutschen Verfassungsrechtsdenkens in der Welt. Bedeutung, Grenzen, Zukunftsperspektiven* (Tübingen: Mohr Siebeck, 2014); Constance Grewe, "Les influences du droit allemand des droits fondamentaux sur le droit français: le rôle médiateur de la jurisprudence de la Cour européenne des droits de l'homme," *Revue universelle des droits de l'homme*, 16 (2004), 26–32.

[3] Regarding Spain, see, for example, Pedro Cruz Villalón, "Das Grundgesetz im internationalen Wirkungszusammenhang der Verfassungen: Bericht Spanien," in Ulrich Battis, Ernst Gottfried Mahrenholz, and Dimitris Tsatsos, eds., *Das Grundgesetz im internationalen Wirkungszusammenhang der Verfassungen: 40 Jahre Grundgesetz* (Berlin: Duncker und Humblot, 1990), p. 93.

[4] Begun in Bavaria after World War II (Constitution of 1946, art. 3; on federal level: art. 28 *Grundgesetz* 1949), the constitutionalization of the term *Rechtsstaat* has occurred in Turkey (Constitution of 1961, art. 2), then in Portugal and Spain in the 1970s, and then in Brazil in 1988, before becoming an international trend after the fall of the Berlin Wall (see, among others, Romania, Bulgaria, Slovenia, Poland, Estonia, Russia, Switzerland, Finland, Benin, Togo, Burkina Faso, Madagascar, and the Democratic Republic of Congo. For a recent European example, see also the 1814 Constitution of Norway, as amended in 2012.

place? Is it possible to induce a change of law – even a paradigmatic one – by simply adding to a given legal system a new, catchy phrase taken from abroad, such as *Rechtsstaat*? What is the power of this particular term? In France, as in some other countries, scholars, not legislators, were the driving force behind the transplantation of the *Rechtsstaat* term, which, at least at the beginning, was totally external to positive law, as the term was not part of the latter's official terminology. What was the function of this scholarly notion? Was it merely descriptive, serving, for scientific investigators, as an external analytical tool in order to screen, identify, and classify the given content of one or all legal systems? Or was it prescriptive, serving politicians, judges, citizens, and scholars in their endeavor to conserve the status quo, to re-read open-textured provisions in light thereof, or to radically re-write the law? Or was it both descriptive *and* prescriptive?

Through the emblematic, albeit not totally representative, example of France – France stands here for the type of countries with a long-standing, liberal and democratic nomocratic tradition, as opposed to new democracies evolving from a dictatorial past – this chapter provides a first, necessarily incomplete insight into the "shadow side" (i.e., the often-overlooked side that some may even call the "inglorious" side) of the internationalization of the German *Rechtsstaat* discourse. Yet, this shadow side matters, for various reasons. Although the two "global" models mentioned above largely outshine the French *État de droit* (specifically, its system of judicial review that lags behind),[5] French public law still serves as a source of inspiration to certain regimes, be they former colonies or not, that are not necessarily looking for the most liberal solution.[6] France has also contributed to the worldwide diffusion of the term *Rechtsstaat*, by conditioning, since the Conference of La Baule (1990), its support to African countries, *inter alia*, on their *État de droit*. Furthermore, speaking of models and their diffusion presupposes an understanding not only of how, but also to what extent the German discourse has been adopted abroad. From this perspective, this chapter analyses both the

[5] Michel Fromont, "Les mythes du droit public français: séparation des pouvoirs et État de droit," in Patrick Charlot, ed., *Utopies: Études en hommages à Claude Courvoisier* (Dijon: Éditions universitaires, 2005), pp. 293–302; Olivier Jouanjan, "Le Conseil constitutionnel est-il une institution libérale?" *Droits*, 43 (2006), 73–90.

[6] See, for example, the Constitutional Council of Kazakhstan (Const. 1995, art. 71 ff). In the Democracy Index established by *The Economist* (2017), Kazakhstan is ranked 141 out of a total of 167 countries; it is qualified as an "authoritarian regime." On the reception of the *Rechtsstaat* term in Italy, see Eric Carpano, *État de droit et droits européens* (Paris: L'Harmattan, 2006).

displacement and resistance (be it micro- or macro-resistance) of the former French nomocracy tradition, a tradition that some English-speaking scholars would call "political constitutionalism" as opposed to "legal constitutionalism." Indeed, most of the pre-*État de droit* theories in France conveyed, at least since 1789, a strong distrust of the power and independence of courts; it favored non-judicial (political) organs to be the guardians of the supremacy of the Constitution – an idea that, now, appears rather strange to many people around the world because courts are frequently considered the "natural" bulwark of the law, including the Constitution. The most influential definition of the new *État de droit* phrase, that is, the concept that emerged in the 1920s and was later unearthed after 1977, established precisely this strong link between the existence of a legal norm and its protection by a court. It paved the way for a radically new vision of the judges' role in democracy, an issue that was – and still is – particularly sensitive in Montesquieu's home country. From this historical angle, this chapter also offers a broader picture of the diversity of (Western) understandings of nomocracy.

2 An Analytical Framework

Legal transfers are highly complex phenomena. When applied to such an elusive object as *Rechtsstaat* and its many meanings, the complexity is even greater.

First, even when freely chosen (as was the case with France's and with most other countries' importation of *Rechtsstaat*), legal transfers are rarely complete. That limitation applies where the object at stake is a small set of technical provisions of some code (i.e., some "rules") and even more so when the transfer concerns a multifaceted and elusive intellectual construct such as the *Rechtsstaat* discourse, a "principle" or even "meta and macro-principle" with several series of components and subcomponents. In the transfer, some elements or nuances may be deleted, transformed, or added; its scope (or target) may be reduced, expanded or reconfigured. The translation is creative or partial. It seems highly difficult – Pierre Legrand even considers it impossible – to transplant (or, more precisely, to recreate) the cultural and social background of the transferred object.[7] Thus, how far

[7] Pierre Legrand, "The Impossibility of 'Legal Transplants,'" *Maastricht Journal of European and Comparative Law*, 4 (1997), 111–124. For an assessment of this debate, see Günter Frankenberg, ed., *Order from Transfer: Comparative Constitutional Design and Legal Culture* (Cheltenham: Edward Elgar, 2013).

does the French *État de droit* discourse, and similar discussions in other countries, diverge from its German origin? As already mentioned, some French scholars chose to change the French version's spelling (and, thus, its sense/scope), by using a small "e." However, even when the term was exactly the same (*État de droit* with a capital E), its content has always been transformed and adapted. The most extreme example is the enucleation process operated by Duguit, the first to use the French phrase *État de droit* as a notion applicable to French law: he stripped the German term *Rechtsstaat* of all its German content, keeping just the (attractive) shell. Carré de Malberg and Hauriou imported certain German reasoning along with the term, but, at the same time, gave it a more radical turn.

Secondly, a transfer may consist in an almost immediate break (i.e., the legislature copies some specific foreign rules and ensures their implementation) or be the result of a more-or-less long "infiltration" process. If the object at stake has many facets and is, itself, evolving over time, as is the case with the German discourse surrounding the term *Rechtsstaat*, a first part of this larger set of ideas may be introduced, at some point, by some German-speaking law professors who diffuse it amongst colleagues and, later, practitioners. Once this first transfer has taken root, the transplantation either stops there (a one-shot Germanization) or acts as a cultural bridge that opens the way for future transfers from Germany. Such latter transfers may be either: (a) sporadic (enrichments and evolutions of the new key term, once transplanted from Germany, are mainly home grown or are influenced by some other foreign system); (b) frequent; or (c) structural (Germanization amounts to an exclusive reorientation of national scholars and practitioners toward German legal thinking). France's *État de droit* discourse is currently somewhere between hypotheses (a) and (b), with hypothesis (c) definitely not being applicable.[8]

Thirdly, as botanists well know, grafts may be rejected. The success of a transfer, especially one that concerns a change to a fundamental issue (as one would expect to be the case here), depends on various parameters.

[8] See Olivier Beaud and Erk Volkmar Heyen, eds., *Eine deutsch-französische Rechtswissenschaft? Une science juridique franco-allemande?* (Baden-Baden: Nomos, 1999); my book review thereof in *Revue internationale de droit comparé*, 55 (2003), 995–1000; Constance Grewe, "Das deutsche Grundgesetz aus französischer Sicht," *Jahrbuch des öffentlichen Rechts der Gegenwart*, 58 (2010), 1–14.

Roughly, supply and demand must meet. What is offered by the German side, under the heading of *Rechtsstaat*, and what a certain country is looking for, given its own needs and constraints, must more or less correspond. The *Rechtsstaat* package must be attractive, not necessarily *in se*, but for that country's elite at that particular moment. The probability of a transfer decreases if the country in need of a solution (the potential "importer") has, in general, an ethnocentric attitude and if the authority of the potential "exporter" is low. After the fall of the Berlin wall, the countries of Central and Eastern Europe were keen to abandon their (communist) tradition and to look towards the West. German Constitutional law was, then, a highly esteemed model of how to overcome a dictatorial experience. In comparison, the conditions for Germanization in France were much more difficult. From 1789 until at least the end of the nineteenth century, France was at the forefront of modern progress in matters of nomocracy; France was proud of its own genius and tradition, and often saw itself not as an importer, but as an exporter, of its law and legal scholarship. When, during the Third Republic (1870–1940), some elements of the various German *Rechtsstaat* theories found their way into parts of the French constitutional scholarship, the conditions for such a transfer were seemingly the worst possible: at crucial moments during this long infiltration process (in 1870, 1914, and 1939), Germany was France's military and civilizational arch-enemy. Yet, one aim of the Gallicization of the *Rechtsstaat* discourse was to subvert a central and long-standing feature of France's Constitution and legal system.

3 The Gallicization of the *Rechtsstaat*: Three Historical Stages

Looking at it from a certain historical perspective, the current international success of the *Rechtsstaat* term is astonishing. In the eighteenth and nineteenth centuries, the driving liberal models in constitutional law were, mainly, England, the United States, and France. What *liberal* politician, philosopher, or law professor would have been interested in German law or legal scholarship at that time, as both lagged behind the standards set by the others? In 1881, in a famous letter to the Prussian Minister Gustav von Gossler, Bismarck mocked the elusiveness of the "artificial term" ("*Kunstausdruck*") *Rechtsstaat* (not a particularly original criticism); more interestingly, he pointed out that the term had yet to be translated into any foreign language, which was quite true. What, then, made foreign jurists change their attitude? Regarding its reception in France, three crucial periods can be distinguished: the nineteenth century, the early twentieth century (the so-called golden era of classic public law scholarship during the Third Republic), and the period since 1977.

First stage

During most of nineteenth century, until the coming of the Third Republic (1870–1940), the various *Rechtsstaat* debates did not give rise to any transfers in France. Although the (normative) concept of *Rechtsstaat*, as defined by Rotteck, Welcker, and Mohl during the *Vormärz* Era (1815–1848), was known, at least to some extent, in France, it had not attracted any sufficient interest leading to its importation. Indeed, most of their books on the subject found their way to the shelves of public libraries in Paris. Even though French constitutional discussions were very often focused on national history (before and after 1789) and the English model, exchanges between French and German liberals and scholars took place. In 1844, Mohl's famous work *Die Polizeiwissenschaft nach den Grundsätzen des Rechtsstaats* was even reviewed in a prominent French legal journal, where the term *Rechtsstaat* was translated by *État légal* ("*légal*" in that case meaning "statutory"). What was missing was not so much the supply, but the demand: no French thinker was interested in transplanting the German term into French discourse on French law. Indeed, it is one thing to translate a German term into French and use that translation to present *German* debates about *German* law (this occurred in France in 1844, 1868, 1877, 1901, 1903, etc.); it is quite another to apply the newly coined French phrase to *French* law (this first happened in 1907, with Duguit). This second step enables that French phrase to be used to *rethink*, in light of some German (normative) concepts, *French* law, as was later to happen with Carré de Malberg and Hauriou. The German *Rechtsstaat* theory during the *Vormärz* period was clearly a normative, natural law construct. It was used by liberal forces to seek (liberal) changes to positive law and to legitimize them once they were achieved. Yet, its substantive content was inspired by, or was similar to, Western (especially French) ideals of modern constitutionalism, with one major qualification: German liberalism, as conveyed by the *Rechtsstaat* discourse, was less liberal (less "aggressive") than French liberalism with regard to: the right to resist, the principle of national sovereignty, and the parliament's power vis-à-vis the monarch. This explains the lack of interest, or silence, on the French side.

But if the French rejected the phrase *Rechtsstaat*, which key term(s) did they use to convey their own understanding of nomocracy? The question matters in order to identify the French intellectual landscape of the pre-*État de droit* period and to measure how far that terminology and mind-set has, or has not, changed after 1907. Theories about nomocracy are expressed not only by thousands of words, sentences, and texts – book shelves are full of them – but, very often, their essence, or even their entire message, is supposed to be encapsulated in a single word, a key term or a catchy phrase. The latter both informs and reflects people's reflection in the field: by changing the paradigmatic words, scholars may indirectly trigger a change in human reality on a paradigmatic issue; by looking at those words, especially when a new one pops up, an observer may also detect an incoming-yet-invisible tide.

An historical and comparative discourse study shows that, regarding the matter of nomocracy, the language of legal thinkers and practitioners in Europe has, since the Enlightenment, encompassed not fewer than four types of key terms.[9] Quite often, they were synonyms, or, if their content differed substantially, they served the same function: each type conveys a certain idea of a polity subject to, and regulated by, law (i.e., nomocracy, as a generic term). The first category of terms refers to a well-ordered polity in which the *res publica* matters and the common good is strongly linked to law, i.e., the key term "*République*" in French (Rousseau), "*Republik*" in German (Kant), and "Commonwealth" or "Republic" in English (for example, Locke, Coke). The second type of key term encompasses the term "*État*," "*Staat*," or "State" in the sense of a State defined as an artificial person (for example, Hobbes, Gerber, Jellinek, Esmein, and Carré de Malberg), and, as such, informed by law (positive law and, sometimes even on a higher level, the social contract, i.e. natural law). The third type is inspired by the classical Greek and Roman terminology: Aristotle's "*nomon archein*," Pindar's "*nomos basileus*," Titus Livius' "*imperia legum*," the Digest's "*lex est omnium regina*." It gave birth, inter alia, in English to "government of law(s)," "rule of law," "due process of law," "reign of law" (the alternative key term proposed by Ivor Jennings), "empire of laws," "nomocracy," and, more recently, "principle of legality." Equivalent terms are: in French, "*règne de la loi*," "*principe de légalité*," "*Loyaume*" (instead of "*Royaume*"), "*prééminence du droit*," in German "*Herrschaft der Gesetze*," "*Rechtszustand*," and some others. The fourth type is a combination of the terms "State/*Staat*/*État*" and "law/*Recht*/

[9] Heuschling, *État de droit, Rechtsstaat, Rule of Law*, pp. 35ff, 49ff, 169ff, 323ff, 343ff.

droit": the most iconic example is, of course, *Rechtsstaat* together with some similar terms such as "*Verfassungsstaat*" (Constitutional State) and "*Gesetzesstaat*" (State bound by statutes). But, even in the past, before its translation into foreign languages, the German *Rechtsstaat* was not unique.[10] In France, Bodin, in his famous treaty *Les six livres de la République* (1576), defined "*Republique*" as a "*droit gouvernement*," "*gouvernement*" being understood not in a strict sense as it is usual today (meaning the cabinet), but in a larger sense (encompassing all public authorities, i.e., the State). Bodin's expression was translated by his English translator in 1600 as "lawful government," an expression that, later, was also put forward by Locke. Yet, Bodin's and Locke's attempts to introduce this potential key term into the lexicon failed, unlike the German (and now worldwide) success story of *Rechtsstaat*, which, in the context of the EEC and EU, gave rise to analogous terms like "*Rechtsgemeinschaft*/*Communauté de droit* (Lawful Community)" and "*Union de droit* (Lawful Union)."

In any given society, it may happen that, within this vast field, there exists only one consensual – even sacred – key word that is an absolute "Hurrah! Word."[11] Of course, many people may, for various reasons, understand this key term in different ways: referring to the same word does not imply a reference to the same concept or meaning. This situation may be observed, for example, in England, although with qualification, since Dicey popularized the term "rule of law" in the late nineteenth century. Similarly in Germany where, after 1945, the notion of the "*Rechtsstaat*" became the unrivalled iconic term, even though it had fallen into oblivion by the end of the preceding century. (It had, for example, been largely absent in the classic constitutional law writings of Laband, Gerber, and Jellinek, who focused on the term *Staat*, defined as a legal person, and,

[10] Cf. Ernst-Wolfgang Böckenförde, "The Origin and Development of the Concept of the Rechtsstaat," in his *State, Society and Liberty: Studies in Political Theory and Constitutional Law*, trans. J. A. Underwood (New York: Berg, 1991), p. 48: "Rechtsstaat is a term peculiar to the German-speaking world; it has no equivalent in any other language ... French legal terminology has no comparable words or concepts whatever."

[11] The term is borrowed from C. K. Ogden and I. A. Richards, *The Meaning of Meaning: A Study of the Influence of Language upon Thought and of the Science of Symbolism*, 2nd ed. (London: Kegan Paul, 1927), as quoted in Stéphane Beaulac, "The Rule of Law in International Law Today," in Gianluigi Palombella and Neil Walker, eds., *Relocating the Rule of Law* (Oxford: Hart, 2009), p. 222.

later, under the Weimar Republic, with respect to such prominent scholars as Smend or Kelsen.) Key terms may fall out of fashion; the conceptual framework legal scholars use in order to systemize and inform the study of legal materials may vary greatly. Therefore, the collective reflection on nomocracy may be split into different strains, each one fighting under its own flagship term. Competing terms are met with open skepticism or even harsh criticism as a "Boo! Word"; each key term only reflects the ideas of one segment of the discussants, even though some convergences may be observed.[12]

Indeed, in France, before 1907, there was not one, but several key terms: in administrative law, the case law of the famous *Conseil d'État* and the administrative law scholarship (which in France preexisted the academic discipline of constitutional law) turned on the phrase "*principe de légalité*." In French political thought and constitutional law scholarship, the central expressions used were, mainly, "*État*," defined as a legal person, and "*République*."

Second stage

The transplantation of *Rechtsstaat* took place during the Third Republic or, more precisely, in the period from 1907 to the 1930s. The conditions for that transfer were rather complex because, in some ways, they were easier and in others more difficult.

On the German side, the "supply" both decreased and changed. After 1870, the *Rechtsstaat* discourse disappeared almost entirely from the classic German constitutional law scholarship. As already mentioned, in the leading works of Gerber, Laband, and Jellinek, the term *Rechtsstaat* was overshadowed and marginalized by the key term *Staat*, defined as a state, required only to obey its own positive laws according to the self-limitation theory. Following the influential writings of Otto Bähr, Rudolf Gneist, and Otto Mayer, the *Rechtsstaat* term migrated to the then-nascent administrative law scholarship, where it operated to support a well-functioning system of administrative justice run by specialized courts and to protect the subjective rights of individuals.

On the French side, reactions to German legal thought were ambivalent. After the military disaster of 1870, a crucial mission of the entirely reorganized French university system was to reinvigorate the nation's forces by

[12] Ogden and Richards, *The Meaning of Meaning*.

"learning from the enemy." Most of the influential scholars, who are still considered the founding fathers of French constitutional law scholarship (Duguit, Carré de Malberg, Hauriou; but not Esmein), focused on the German debates, albeit with mixed feelings. Like many public lawyers in continental Europe, they were fascinated by the depth and richness of the German *Staatsrechtslehre* and *Staatslehre*. Yet, at the same time, for epistemological and patriotic reasons, they often adopted a critical, if not hostile, stance. Value neutrality and legal positivism were rejected by most French public law scholars, who, until the 1930s, clung to various natural law doctrines. The moral values they cherished, especially in the context of the growing tensions with Wilhelmine Germany, were those of France; any scholar who was considered to have come too near to German ideas had to face harsh criticism, as happened to Duguit and Carré de Malberg.

In Italy, in the 1880s, scholars and politicians had transplanted the term *Rechtsstaat* into Italian in order to reimagine their own (inefficient) system of judicial review of administration in light of the German discourse developed in the field of administrative law by Gneist, Mayer, and others.[13] In France, the home of the famous and often copied *Conseil d'État*, whose judicial review of administration was based, conceptually, on the idea of the protection not of subjective rights (as in Germany), but of objective law, such a transplant was simply unthinkable. In France, something different was at stake in the Gallicization of the *Rechtsstaat* discourse. Two approaches can be distinguished.

Fascinated by, and yet fiercely critical of, the powerful intellectual system of German scholarship, Duguit was the first to introduce, in 1907, the term *État de droit* as a concept applicable to French law. Yet, if one looks at it closely, this transfer was rather peculiar because Duguit transplanted the German *term* but rejected *all the meanings* that, at that time or before, were attached to it in Germany. He rejected the positivist theory of self-limitation of the State (Jellinek, Ihering) and the definition of the State as a legal person (*personne morale*); he was not particularly interested in Gneist's ideas on administrative courts nor in any of the previous *Rechtsstaat* theories (such as those of Mohl and Stahl). So, why did Duguit transplant the German term? Two possible reasons may be advanced. First, the term *Rechtsstaat*/*État de droit* perfectly fit into

[13] On the reception of the *Rechtsstaat* term in Italy, see Eric Carpano, *État de droit et droits européens* (Paris: L'Harmattan, 2006).

Duguit's intellectual system, the latter being entirely focused on the subjection of the "*État*," defined as a pure phenomenon of might external to any law, to the "*droit*," the law, which Duguit defined by referring both to positive law and, on a higher level, to the ideal of social solidarity. To neatly summarize it in the language of mathematics: "*État*" + "*droit*" = "*État de droit*." Secondly, as Duguit stated explicitly, all his writings were geared to fight German scholarship. He saw himself competing with Georg Jellinek, one of the finest legal minds of the time, for intellectual leadership in Europe. Taking over the German term *Rechtsstaat* and redefining it entirely with ideas stemming from "France" (i.e., for Duguit with ideas of a more liberal, democratic, and, especially, social flavour) was a strategic masterstroke. Yet, although Duguit had many disciples, his use of *État de droit* had no lasting impact. After World War II, French administrative law scholars continued to refer to Duguit's doctrine of *service public*, but they totally rejected his key term *État de droit* as the all-encompassing fundamental concept of French public law. Instead, the idea of *service public* was nested within the alternative fundamental concepts of *État*, defined as a legal person – a concept totally rejected by Duguit – and, above all, "principle of legality," the key term in the case law of the French *Conseil d'État*.

Under the Third Republic, a second logic of transplantation of the *Rechtsstaat* discourse took place. This aimed to transplant not only the German term but also some of the underlying German ideas. Carré de Malberg, as one of the rare legal positivists amongst constitutional lawyers, associated the term *État de droit* with the famous German theory of self-limitation of the State. But that use of the French phrase was quite rare and had no lasting impact as, in both Carré de Malberg's and the German writings, the theory of self-limitation of the State was mainly encapsulated in the key term *État* (*Staat*), and not in *État de droit* or *Rechtsstaat*. More importantly, Carré de Malberg and some other scholars, such as Hauriou, used the term *État de droit*/*état de droit* in order to convey a much thinner, albeit highly incisive, normative concept related to the role of courts in the French democracy.

In the German debate on judicial review of administration, a new definition of the term *Rechtsstaat* term emerged, whose core idea depended on a certain definition of law: law was intrinsically linked to courts since a rule only qualified as a legal rule if it could be applied by a judge who was able to sanction its infringement (as was the case in private law, which

served as model for this definition). Strictly speaking, any rule lacking a judicial guarantee was not considered a legal rule, even though it may have been enacted in a formal legal text and could be protected by some nonjudicial organ; it was reduced to the status of a moral rule.

Such a definition of law, which might look rather obvious to English lawyers (cf. the dictum "no right without a remedy," Austin's theory of law, Dicey's distinction between "law" and "conventions"), was far less familiar on the continent, at least for public law specialists: many rules of international, constitutional, and even administrative law lacked any judicial guarantee at the time. In France, this restrictive definition of "law" had no major critical impact in the field of administrative law, due to the existence of its *Conseil d'État*, which became a true, independent court under the Third Republic. But, it was explosive with regard to the subjection of Parliament to the entrenched Constitution.

At the end of the nineteenth century, while German liberals mainly continued to worry about the dangers flowing from an executive that was still in the hands of the monarchical forces with no serious parliamentary checks, French liberal scholars started to fear the abuses, in their eyes, of an overly powerful Parliament. In this context, some scholars mobilized the newly coined phrase *État de droit*. They ascribed to it, as had Bähr and Mayer to the term *Rechtsstaat*, a conceptual link between law and judicial protection. But the French scholars applied it not to the administration, as in Germany, but to the Parliament. By Gallicizing a certain *Rechtsstaat* debate, they gave it a more radical turn for the purpose of adapting it to the practical needs of France. In the writings of Carré de Malberg, Hauriou, and some others, the term *État de droit* became a slogan intended to support judicial review of the constitutionality of Acts of Parliament. It was used to trigger a total break with French tradition that had, since 1789, rejected any judicial review thereof and, instead, promoted the idea of nonjudicial (political) guardians of the Constitution.

Yet, this graft, or cultural break, failed. Whereas Hauriou argued that, in light of this new concept of *état de droit*, the silence of the French Constitution of 1875 on the matter of judicial review of statutes ought to be interpreted as allowing all courts to undertake such review, the French *Cour de cassation* and the *Conseil d'état* read its silence in light of the French tradition hostile to judicial power. In Parliament, all proposals to introduce some type of judicial review of statutes, either by all courts or by

some special, constitutional court, were rejected. Significantly, whereas the discourse in favor of the *État de droit* all but died out by the end of the 1930s – it had no descriptive function and its main normative function failed – the polemical term *Gouvernement des juges* (government by the judiciary; translated today as "juristocracy"), having been imported in 1921 by Edouard Lambert from the United States, was definitely adopted into the French culture. From the 1930s on, especially during the so-called *Révolution Duverger* after World War II, a new generation of constitutional law scholars preferred to concentrate on empirical studies instead of studying the formal text of the Constitution that, anyway, being not judiciable, proved to be relatively ineffective. Political reality mattered more than legal rules. Thus, constitutional law studies were merged with, and dominated by, political science studies.

Third stage

At the end of the 1970s, under the Fifth Republic, the discourse on the *État de droit* took on new life. In the meantime, a major shift had taken place in positive law. In 1958, the *Conseil constitutionnel* was established. In 1971, in its seminal decision on *Liberté d'association*, that body intensified and enlarged its own role. The *État de droit* discourse of Carré de Malberg or Hauriou and, a fortiori, the new German post-1945 *Rechtsstaat* discourse centred on protection of fundamental rights by the Federal Constitutional Court had no influence at all, or only a marginal influence, on these ground-breaking changes. The 1958 caesura was due to, and informed by, President de Gaulle's political will to protect the executive against Parliament, whose power was considered to be the main cause of France's weakness.

In this context the *État de droit* discourse was reactivated and enriched for two main purposes. First, the discourse was mobilized to describe these radical transformations via a new analytical tool, even if the necessity and adequacy of this function was questioned by those who considered that these transformations could be perfectly reflected by the traditional scientific categories. Secondly, and more importantly, it was used to justify, enhance, and even reorient (in a more liberal sense) the ongoing, still-fragile, and malleable transformation process. In 1977, against the ongoing criticism of *gouvernement des juges*, President Valéry Giscard d'Estaing celebrated the function of the *Conseil constitutionnel* by referring

to the ideal of *État de droit*, a regime in which the hierarchy of norms would be implemented, at each level, by courts. The 1971 decision was hailed by the law professor Olivier Cayla in 1998, not as a "*coup d'État*," as some critics thought of it, but as a "*coup d'État de droit*" (the term *État de droit* referring, here, to the need for judicial protection of human rights).

Louis Favoreu, one of the first researchers on the *Conseil constitutionnel*, and founder of the influential "school of Aix," which specialized in the comparative study of constitutional adjudication, considered *État de droit* to be the new paradigm of the new constitutional law in France and in Europe. Thus, the phrase *État droit* was upgraded to the central concept in the writings of this school of thought. On the most abstract level, the term *État de droit* was equated with the hierarchy of norms, as developed by the Vienna School. More concisely, it was supposed to reflect (but also, as some would say, to inform) the new central role of the Constitution, which became, in 1958, a true legal norm due to the existence of judicial review, and even the highest and most important norm in the legal system (the so-called constitutionalization of the legal system). The term also served to convey a new, more favourable view of the constitutional courts, and, more generally, of all courts as guardians not only of statutory provisions (rules) but of a society's values, such as fundamental rights (principles). That, in turn, encouraged other scholars and activists to try to enlarge the scope of the *État de droit* discourse, by fighting for more independence and more financial means for the judiciary, a very sensitive issue in France given its long tradition of judicial dependence.[14]

As a normative, open-textured tool, the term *État de droit* may pop up in various debates, be it on judicial review of constitutional amendments, the status of prosecutors, the formal quality of legal norms, the state of emergency, etc. Even though the term's extension is, per se, virtually limitless and is effectively increasing – its precise topography is beyond the scope of this chapter – one should, however, note that not all scholars, practitioners, or other people use it. Some still prefer traditional references

[14] Luc Heuschling, "Why Should Judges Be Independent? Reflections on Coke, Montesquieu and the French Tradition of Judicial Dependence," in Katja Ziegler, Denis Baranger, and Anthony Bradley, eds., *Constitutionalism and the Role of Parliaments* (Oxford: Hart, 2007), pp. 199–223. For a historical account on French judiciary, see Jacques Krynen, *L'État de justice. France, XIIIe-XXe siècle*, 2 vols. (Paris: Gallimard, 2009 and 2012); Jean Pierre Royer et al., *Histoire de la justice en France du XVIIIe siècle à nos jours*, 5th ed. (Paris: PUF, 2016).

(*État, République*[15], *principe de légalité*). The academic sources of its content remain varied. Carré de Malberg served, at the beginning, as a strong (French!) reference point; but increasingly the term was fuelled by, and combined with, many other doctrines, starting with Kelsen's *Reine Rechtslehre* (notwithstanding Kelsen's well-known criticism of the term *Rechtsstaat*), the model of southern European Constitutional courts (Italy, Spain, Portugal) which were relatively open to German influences, European law, and, during the 1990s, the post-1945 German *Rechtsstaat* discourse. The last of these became influential as German *Staatsrechtslehre* was rediscovered in France by such prominent scholars as Michel Fromont, Constance Grewe, Olivier Beaud, and Olivier Jouanjan. Today, via the terms *État de droit* and similar *Rechtsstaat* replicas in other languages, the German understanding of nomocracy has become, at least to some extent, part of the intellectual landscape for many jurists outside Germany, including France.

Conclusion

Speaking of Germanization should not, however, mislead: there is no uniformity. Differences between the current French and German situations are numerous. The phrase *État de droit* is neither embedded in the French constitutional texts nor used in the constitutional case law as a legal norm. The French legal system did not, via the *État de droit* discourse, abandon its traditional doctrine of monism with regard to international law in favor of the traditional German approach of dualism. It is hardly conceivable that France will ever abandon the particular institutional model of its *Conseil d'État*, which, in sharp contrast to the German understanding of an administrative court, is both an adviser to the executive and a judicial body whose members have been trained at some *grandes écoles* rather than at law faculties. With regard to its *Conseil constitutionnel*, although some of its national, unorthodox peculiarities have already been "normalized" (for example, repealed in the 2008 reform), there are still some unique features. French constitutional scholars and judges have not adopted as the cultural background of their legal reasoning natural law theories that, in contrast,

[15] Although not frequently used in law, the iconic term *République* remains very popular among ordinary people and politicians, as it is identified with such "republican values" as *liberté, égalité, fraternité*, and *laïcité*.

played a crucial role in the establishment and life of the post-World War II German *Rechtsstaat*. The *Conseil constitutionnel* in Paris is much less activist than the *Bundesverfassungsgericht* in Karlsruhe. Even the way their decisions are written and justified remain opposites (for example, extensive vs short, dissenting opinions vs single statement of the majority). Their respective academic debates on constitutional interpretation take quite different lines with regard to both interpretation methods (a rich literature exists in Germany on this issue, while relative silence prevails in France) and its concept (to over-simplify it, Robert Alexy's natural law infused theory of principles vs Michel Troper's realist theory of interpretation). Last, but not least, whereas most other Western countries, especially Germany, subject general norms adopted by citizens themselves, via referendum, to judicial constitutional review, France still clings to its stance that ordinary statutes or even constitutional amendments adopted by the "*peuple*," based on Article 11 of the French Constitution, are nonjudiciable. According to the seminal 1962 decision of the *Conseil constitutionnel*, norms approved by electors are the "direct expression of national sovereignty."[16] The *État de droit* discourse here faces a major cultural obstacle: the tradition, going back to Napoleon[17] via de Gaulle, of a "dialogue" between the head of state (who raises a question) and the citizens (who deliver, hopefully, the expected answer), that escapes any judicial review, as the people are, according to de Gaulle, the "Supreme Court." By virtue of Article 11, and as happened in 1962, the Constitution can be openly violated if a majority of voters agree.

[16] This reasoning has been transplanted by some former French colonies. See Gabon, art. 110 of the Statute on the Constitutional Court of 1991. In the Democracy Index 2017, Gabon is qualified as authoritarian regime and is ranked 126.

[17] On the concept of "caesarian democracy (*démocratie césarienne*)" as developed and implemented under Napoleon III, see Pierre Rosanvallon, *La démocratie inachevée. Histoire de la souveraineté du people en France* (Paris: Gallimard, 2000), ch. 5, pp. 181ff.