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‘Staatsrechtslehre’ Between Tradition and Change. West-German University Teachers of Public Law in the Process of Westernization, 1949-70

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1. Westernization in the Context of the West-German ‘Staatsrechtslehre’?[2]

Considering the difference between the law systems in Anglo-Saxon countries and Germany, a mutual influence in this context seems quite unlikely. Above all, national law systems are usually regarded as national peculiarities developing different topics and structures of law. In particular, as to the legal scholarship, a dogmatic tradition has survived in Germany up to the present which mainly focuses on systems of theory. On the other hand, a more empirical, pragmatic, and flexible tradition in Anglo-Saxon countries exists which is based upon the case law system. Thus, to presume a transfer of western ideas onto the West-German scholarship of public law seems doubtful.

Nevertheless, this article suggests that the general process of westernization had such an extensive effect concerning the West-German society that it also had fundamental consequences for the West-German Staatsrechtslehre. Surely, due to its conservative and traditional character the Staatsrechtslehre did not function as a group of protagonists in the process of westernization but as an academic network that reacted in large parts late and reluctantly to the western ideal offer. On the other hand, there are, at least, some hints of a partial integration of the Staatsrechtslehre into the western constitutional consensus already in the early 1950s.

Generally, the idea of the state can serve in this context as a central criterion for determining the degree of westernization of the Staatsrechtslehre during the 1950s and 1960s. In German society before 1950, a strong étatisme dominated, which construed the nature of the state as an absolute and sovereign force and as an abstract notion. The state was thought to be an end in itself, and was thus seen as dissociated from the individual and from society. This traditional understanding of the state contrasts sharply with the democratic and pluralistic attitude of the western world, which implies that, primarily, the state exists for the individual and that the will of the state cannot be regarded in distance from the development of a concrete political opinion. Therefore, in order to determine the

extent of westernization it must be found out to what degree this western understanding of the state, gradually, was adopted by the Staatsrechtslehre.

In general, this article will present the first results of a study on the reception of western ideas by the West-German Staatsrechtslehre after the enactment of the Basic Law as the new constitution in 1949. The article will be restricted to describing the adaptation toward the western ideal offer, whereas the question for the specific origin of some of its components in the western context itself will be more or less excluded. In any case, it can be assumed that the western influence on Germany was largely dominated by US-American concepts because of the hegemonic role of the USA in the western world after World War II both in a political and an ideal sense. In order to obtain a closed group to examine, the Staatsrechtslehre, as a body of academics, is defined here by the membership in Die Vereinigung der Deutschen Staatsrechtslehrer (the Association of German University Teachers of State Law)[3]. This article generally distinguishes three phases of development of the Staatsrechtslehre, which are closely connected with each other: a phase of reconstruction at the end of the 1940s, a phase of adaptation toward the new constitutional system of the Basic Law in the 1950s which is accompanied by the reception of parts of the western constitutional thinking, and a phase of movement toward a substantial westernization during the 1960s.

2. The Reconstruction of the 'Staatsrechtslehre' After 1945

After a practically not existent Staatsrechtslehre - at least where its scientific claims were concerned - in the period from 1938, the West-German Staatsrechtslehre had to reestablish itself under a new constitutional system following the year 1945. Although some members took over political functions and took part in the enactment of the new constitutions, the Staatsrechtslehre, in general, reacted reservedly to the change of the political system in 1945 to 1949, and, therefore, its scientific contribution to the new political system was of minor importance. The first publications from the Staatsrechtslehre were largely reduced to neutral commentaries on the new legal position. As Hans Mommsen has shown, a return to the presidential system of the 1930 to 1933 era with its aversion to political parties was largely popular in the German society before 1949.[4] This result can be confirmed with respect to the

Staatsrechtslehre. In addition, religiously founded statements about the fundamental principles of the new democratic system were widespread.

Concerning the personnel aspect of the reconstruction of the Staatsrechtslehre, the university teachers of public law, who, during the Nazi régime, had suffered professional exclusion or whose professional promotion had been inhibited because of political or racial reasons, reestablished themselves as professors of public law at West-German universities. Thus, some returned from their exile in West-European countries[5], some others regained their previous professorships[6], and again others obtained a new professorship in the early period after war[7]. On the other hand, just a few professors of public law lost their post because they were considered as too deeply incriminated by their national-socialist past.[8] However, all except for Carl Schmitt, Otto Koellreutter, and Reinhard Höhn did regain a professorship soon after 1949. Consequently, a strong continuity in personnel appears in 1945 and after. Most of the teachers of public law who had published works more or less in accordance with the Nazi doctrine retained their jobs and constituted the majority of the Staatsrechtslehre after the complete constitutional break of 1945. In particular, many professors[9] who had replaced their dismissed or retired colleagues after 1933 also represented the young and ambitious generation of teachers of public law after 1945.

The passing of the Basic Law as the new constitution of the western part of Germany in 1949 marked a far-reaching turning point for the Staatsrechtslehre. It was now forced to reform traditional constitutional concepts or to develop innovative concepts in order to be adequate to the new constitutional system. Here it turned out that the Basic Law contained many norms which were standard components of western democratic and parliamentary constitutions and which broke decisively with the German constitutional tradition. So - in opposition to the traditional formalization of the Rechtsstaat (state of law) - the new constitution created a Rechtsstaat which is based on material components, such as political liberty. Aiming at the increase in value of the Basic Law with respect to other laws, article 79 strengthened the content of the constitution against amendments both in a formal and material way. Also it was planned that the Federal Constitutional Court (Bundesverfassungsgericht) should control the political process in order to conform it with the text and the spirit of the constitution. Consequently, in the domain of the Staatsrechtslehre the Basic Law was explicitly regarded as a western constitutional system, which had to be respected by interpreting it properly.

As a formal sign of the new role and the growing self-consciousness of the Staatsrechtslehre, Die Vereinigung der Deutschen Staatsrechtslehrer was refounded in 1949 as a central forum for academic discussion. Here the strong continuity in personnel with the Staatsrechtslehre of the 'Third Reich' again becomes obvious. After the initially controversial debates about the circle of people who should be invited to the first conference, the members of the managing board agreed to invite all teachers of constitutional and administrative law who had taught in the past or were now teaching this subject at a German speaking university. Only Reinhard Höhn, Carl Schmitt, Ernst Rudolf Huber, and Otto Koellreutter were not admitted because of their compromising publications in the past. Between 1949 and 1951 a controversial discussion developed in the association about the membership of Huber and Koellreutter. Most colleagues with a basically clean record argued that the membership of these two persons was not compatible with the prestige of working for the new democratic system. Here it appears that, as far as the Staatsrechtslehre is concerned, the national-socialist past was not completely left behind but dominated the discussion about some people apparently having played an outstanding role during that former period. The composition of the managing board, voted in the first conference, also reflects the deep traditional orientation of the Staatsrechtslehre. With Erich Kaufmann (1888-1972) and Walter Jellinek (1885-1955) two older teachers of law were elected who had already dominated the legal thinking during the Weimar Republic. As they had lost their professorship after 1933, they were considered not to have compromised themselves, but they rarely developed new scientific impulses in national law after 1949. Werner Weber (1904-76) on the other hand, a former student of Carl Schmitt, was an outstanding young lawyer who had published in the various fields of public law. He had begun his career as professor in 1934, regained a professorship at Göttingen in 1949, and was reputed as a sceptic with regards to the new constitutional system of 1949.

Soon a process of coalition building took place in the Staatsrechtslehre. There was a small group of social democratic teachers of public law, who explicitly tried to resume the ideas of Hermann Heller.[10] Having been more or less absent in the Staatsrechtslehre until 1945, a relatively homogeneous group of Catholics arose, which, in particular, tried to integrate the ideas of the Catholic social theory and the Catholic theory of the state into the interpretation of public law.[11] On the other hand, there were two opposing schools, the one formed by Carl Schmitt[12] and the other by Rudolf Smend[13]. While the Schmitt-school, in

general, remained attached to traditional German ideas, the Smend-school proved to be more flexible and adaptable to the new constitutional position.

The creation of the Federal Constitutional Court at Karlsruhe in 1951 caused a considerable loss of importance of the Staatsrechtslehre in the constitutional system. Being equipped with a maximum of competence, the Court from now on dominated the development of new constitutional ideas and concepts, binding the other constitutional organs and the remaining judiciary directly to its decisions. Following Schlink's theory, the West-German Staatsrechtslehre restricted itself to a new positivism by systematizing the decisions of the Federal Constitutional Court into a dogmatic system.[14] Unlike the Staatsrechtslehre in general, only lawyers who were reputed to be opponents to the Nazi régime were voted into the Court. While – due to the far-reaching continuity in personnel in 1945 and after - a continuity in traditional mental attitudes was widespread in the Staatsrechtslehre, it is probable that innovative and especially western influences met a more favorable response at the Federal Constitutional Court. At any rate, because of the new outstanding importance of the Court it is necessary to include its decisions in the investigation of the westernization of the Staatsrechtslehre.

3. The Adaptation Toward the Constitutional System of the Basic Law in the 1950s

Soon after the Basic Law had entered into force, a far-reaching consensus regarding the new constitutional system developed in the Staatsrechtslehre. The new constitutional situation was not put into question in a fundamental way. In comparison to the Staatsrechtslehre of the Weimar Republic, this constitutional consensus was an important innovation in the mental attitude of the Staatsrechtslehre toward a republican form of government. Ernst Friesenhahn, in particular, pleaded for this constitutional consensus in 1950. He deduced from article 5 paragraph 3 of the Basic Law, which demands from academic teaching to be loyal to the constitution, an interdiction to the Staatsrechtslehre to criticize the norms of the constitution in a fundamental way.[15] This statement was largely symptomatic of the Staatsrechtslehre, which wanted to develop a cooperative attitude toward the new form of government and to assume a responsibility for the new state. This movement can be regarded, in practice, as an analogy to the US-American constitutional theory which

emphasizes the importance of a far-reaching consensus in agreement with the legal position in order to facilitate a political process in accordance to the constitution.

As a consequence of this newly developed consensus, the Staatsrechtslehre committed itself to the complete reestablishment of the Rechtsstaat, which was a contrast to the feigned rule of law during the Nazi régime. Rechtsstaat was the term of agreement in the Staatsrechtslehre, which was nearly generally agreed upon. Deducing the principle of the Rechtsstaat mainly from article 20 and from article 28 paragraph 1 of the Basic Law, it demanded the primacy of law at all levels in the government and the state in general. In accordance with the US-American understanding of the rule of law, Rechtsstaat meant in practice that all acts of the executive and legislative power had to be in accordance with the written law and could therefore be controlled by the judiciary. As a parallel to the discussion about the 'political question-doctrine' in US-American constitutional law, after the creation of the Federal Constitutional Court it was largely discussed whether or not there still existed a level of sovereign acts which may not be reviewed by the Court. At the beginning of the 1950s there was a large number of university teachers of public law who argued that the Court may not interfere with the largely unrestrained competence of the executive and legislative power to take political decisions. It was criticized that this was the way to create a Justizstaat (state of judiciary) with a judiciary acting as the supreme institution within the government. But after the Federal Constitutional Court had set to work and expanded its competence extensively by using methods of interpretation in a comprehensive way, these critics were increasingly refuted. The Court prevailed in the political process by deciding the central questions of the political situation in West-Germany in a balanced manner without clarifying its role definitely. Thus, its unspecified formula, that political lawsuits would have to be decided by means of norms[16], was largely accepted by the Staatsrechtslehre at the end of the 1950s. By this, the doctrine of a fundamentally limited government and of a strict constitutionalism was adopted which forms a central component of the western constitutional thinking.

The principle of the Rechtsstaat also served the Staatsrechtslehre for a juridical category for definitely overcoming the traditional statutory positivism as a method of interpretation which is just based upon the written legal text. Following the main opinion, in conscious contrast to the formalization of the Rechtsstaat before 1918, this principle was supplemented by a social and a material component. On the one hand, this meant that the principle of the Rechtsstaat had to be brought into line with the principle of the Sozialstaat (social state),

which obliged the government to be active in the sense of social welfare. On the other hand, the acts of the government and of the administration had to be measured with principles of justice. Here the interpretation of written law was influenced by Christian and ethical considerations, which ultimately represented elements of natural law. The debate in this context was largely formed and dominated by Catholic or Protestant university teachers, regarding this as a possibility to integrate their religious opinion into the discussion about constitutional law. In general, natural law experienced a renaissance throughout the field of law during the first half of the 1950s, searching for securing mechanisms against the state of injustice experienced in the totalitarian régimes. Apart from the differing philosophical derivation of natural law, it is, nevertheless, possible to conclude that by this debate the West-German Staatsrechtslehre came to an anti-positivistic and more pragmatic constitutional understanding, which had a long tradition in other western countries. The period of the renaissance of natural law in West-Germany was ended in the mid-fifties, marking a more rational phase in the understanding of law. But this did, in fact, not imply a return to traditional positivism.

As a consequence of the dismissal of statutory positivism, the Staatsrechtslehre had to look after methods to incorporate critically the extra-legal political reality in order to have a point of reference for the interpretation of legal norms. In this context political science was regarded more and more as an auxiliary science for the Staatsrechtslehre so that many university teachers of public law committed themselves to the foundation and the promotion of institutes of political science.[17] Some members even turned to teaching political science after 1945 and gave up their original subject completely.[18] In addition, there was a tendency in the Staatsrechtslehre to strengthen the fundamental consent of the population with regard to the new constitution, aiming to establish democracy as a form of life. Apart from this, the Allgemeine Staatslehre (General Theory of the State) - as a traditional subject near to public law, which dealt with the state as an entity in the concrete political process and which tried to employ methods of social science - developed a close proximity to political science, after the Catholic influence within the Allgemeine Staatslehre had decreased during the 1950s. So from now on, political science and its objective of promoting the democratization of German society – which, in particular, had been promoted by the US-occupying power in the immediate postwar period – also received fundamental support by parts of the Staatsrechtslehre.

Breaking with the German constitutional tradition, the Basic Law established a constitutional system which strengthened the legislative power in opposition to the executive power and upgraded the status of political parties as central organs for the formation of a political will. The majority of the Staatsrechtslehre, nevertheless, immediately after 1949 regarded the executive power as the focal point of the leadership of the state. Looking for an elitist and effective organ which represents the public interest in distance from the political disputes in parliament, this fixation on the executive power was an expression for the continuing traditional étatisme in the Staatsrechtslehre. Having additionally experienced the crisis of parliament at the end of the Weimar Republic, the majority of the Staatsrechtslehre reduced the legislative power mainly to its traditional function of passing laws. After 1949 though, it was no longer the president but the chancellor and his government who were regarded as guarantors of a stable political process and, in an emergency, as guardians to prevent a dictatorship. On the other hand, since the second half of the 1950s the idea of a more balanced relationship between the executive and the legislative power succeeded in the Staatsrechtslehre, emphasizing the extensive competence of the Bundestag because of its direct mandate of the people. So Friesenhahn's theory, that the leadership of the state belongs jointly to the executive and the legislative power, was generally accepted.[19] In contrast to the traditional, pre-1949 reservations toward political parties - as organs which divide the homogeneously imagined people's will - they were gradually regarded as important constituents of a modern democratic system. In this context Gerhard Leibholz' concept of a party-state, which was particularly promoted by the Federal Constitutional Court, played an important role, arguing that the political parties had the role of a 'partial constitutional organ'. As a result of the smooth running of the parliamentary system, the Staatsrechtslehre adapted itself to the specific democratic character of the western constitutional system by the increase in value of the parliament and the political parties.

Soon Rudolf Smend's Theory of Integration (Integrationslehre) was accepted as the dominant theory of the constitutional system in the West-German Staatsrechtslehre. This theory was formulated in 1928 as an anti-positivistic statement to the 'debate of methods', arguing that the state was not an equivalent to its system of laws but was constituted by a daily and automatic process of political integration of the individual. Consequently, the constitution of Weimar, as "order of the process of integration", had to be related and largely subordinated to this process, which meant in practice that the constitutional text had

to be adapted to the constitutional reality.[20] After 1945 Smend disengaged his theory from its anti-normative orientation and considered the unity of the state as a result of a process of a conscious political activity. According to Smend, the constitution can contribute to the process of integration by regulating the political process. As a result, the Theory of Integration brought with it a functional idea of the state and the constitution, which was in accordance with the anti-positivistic tendency after 1945. On the one hand, the theory associated the state with the individual and by this weakened the traditional understanding of the state as an absolute and abstract notion, but, on the other hand, it remained attached to a strong fixation on the state as a fundamental category for interpretation.

Apart from this, the Theory of Integration contained a positive mission for the Federal Constitutional Court and for the Staatsrechtslehre, which should both contribute to the unity of the state. The constitution appeared not as an inflexible system to determine the political process but rather as an assignment that had to be put into practice by the Staatsrechtslehre and the Federal Constitutional Court from day to day. This mandate to develop a consensus in the interpretation of constitutional law can be regarded as an analogy to the general harmonizing mental attitude of the 1950s.

The Theory of Integration had special implications which had a great influence on the Staatsrechtslehre. Following Smend's theory, the interpretation of the constitution had to be determined by taking values into consideration. Consequently, the Basic Law was regarded to constitute a system of hierarchical norms which were valued according to their contribution to the process of integration. So the status of the fundamental constitutional rights (Grundrechte) - and especially such fundamental constitutional rights which had an effect on the free political process - was upgraded, regarding them as central norms of the Basic Law. Furthermore, another consequence was that the constitution was considered to be a framework of values which influenced the whole system of laws, for example, having an effect on the field of private law (so called "effect on third party of fundamental constitutional rights"). Thus, the Basic Law advanced to the status of the fundamental order of the whole community.

The Federal Constitutional Court largely followed the Theory of Integration in its decisions during the 1950s and 1960s. For example, it considered elections, political parties, and its proper judicature as functions that must contribute to the process of integration. In addition, it dissociated itself from the statutory positivism that is free of value judgements and pronounced itself in favor of the understanding of the constitution in the sense of a

system of values, also using this understanding to expand its competence in the political process. Here it turns out that Martin Drath and Gerhard Leibholz as teachers of public law who were largely influenced by the ideas of Smend had their seats in the first and the second senate of the Federal Constitutional Court and used this position excessively in order to promote Smend‘s principles. Additionally, the majority of the Staatsrechtslehre adopted the Theory of Integration in an universal sense, also agreeing to its further implications. Thus, the Theory of Integration became the dominating basis of interpretation and a functional and harmonizing constitutional theory supported by a widespread consensus of the Staatsrechtslehre. In this way the Theory filled the methodological whole which was caused by the dismissal of statutory positivism.

The only university teachers of public law who were frankly opposed to the forming of a consensus in the Staatsrechtslehre belonged, in general, to the group around Carl Schmitt. Thus, Schmitt and his followers can be regarded as holders of a remaining stock of traditional political and legal thinking in the early phase of the Federal Republic. First of all, the shaping of the Basic Law did not correspond with their traditional understanding of a sovereign and strong state and of an effective executive power. So directly after the enactment of the new constitution they frankly expressed their reservations about the new constitutional system. Werner Weber, in particular, in a considerably noticed text in 1949, criticized the Basic Law because of the lack of participation of the people in the deliberation and the passing of the constitution, the weakening of the status of the civil servants, the mediatization of the people by the political parties, and the deprivation of executive power.[21] Ernst Forsthoff[22] turned against the direct legal effect of the constitutional principle of the Sozialstaat. Instead, he considered the parliament and the administration as unrestricted agencies acting in accordance or in disaccordance with social aims. In addition, Heinrich Herrfahrdt, who was not a student of Carl Schmitt but who distinguished himself as a reactionary outsider in the Staatsrechtslehre, criticized in general the shaping of the new constitution according to the model of western democracies. In his opinion it was necessary to create a constitutional system in accordance with the monarchist and Christian tradition of Germany.[23] In general, Forsthoff, Weber, and Herrfahrdt remained attached to a traditional understanding of the state, being in distance from the individual and from society. In accordance with the German traditional idealism, they regarded the state as an absolute and sovereign abstract notion, which had to be preserved at all costs.

Additionally, the Theory of Integration and its implications fundamentally conflicted with the ideas of Carl Schmitt and his former students. Above all, the tendency to include considerations of values in the interpretation of the Basic Law provoked protests from the Schmitt-school. Such intensification of the importance of the constitution stood in contrast to their liberal conception of the constitution, particularly deduced from the principle of the Rechtsstaat. Following this conception, the main function of the constitution was still to preserve the freedom of the individual in a formal way. Ultimately, the expansion of the jurisdictional dogmatic system was not to harmonize with Schmitt's Dezisionismus and his concept of an effective executive power that should not be restricted by an overactive Federal Constitutional Court. So, in particular, Ernst Forsthoff, Roman Schnur, and Carl Schmitt himself were opposed to the Smend-school and the consensus of the Staatsrechtslehre in general, arguing that it deviated from the normativeness of the constitution and from its traditional doctrines. They again referred to the image of the Justizstaat and indicated that such "transformation of the constitutional law" was in opposition to the Rechtsstaat. In the opinion of the Schmitt-school the predictability of a court decision - as an important component of the Rechtsstaat - seemed to be rendered dubious by the Theory of Integration. As an alternative, they called for a new positivism which had to include not only considerations about reality but which also had to be made to conform more closely to the constitutional text.[24]

This criticism of the Theory of Integration again provoked the vehement protest from the majority in the Staatsrechtslehre against the "conspiracy versus the values". In reply to Forsthoff's article from 1959 they confirmed the relationship of all norms to values and argued that free decisions made by the government were still possible. Above all, they turned against Forsthoff's formalistic and non-political understanding of the constitution. Generally, the Staatsrechtslehre showed an extreme alertness regarding all manifestations of the Schmitt-school, always suspecting it of making the general consensus appear dubious out of a reactionary viewpoint. For example the publication in honour of Carl Schmitt's 70th birthday provoked the emotional protest of some teachers of public law, demanding the general dissociation from this publication in the name of the democratic Rechtsstaat.[25] Also Werner Weber was severely attacked by his colleagues during a discussion at Die Vereinigung der Deutschen Staatsrechtslehrer because he used the analogy of a Ständestaat (state of estates) to show that the Federal Republic was weakened by the influence of

syndicates and pressure groups.[26] Here it turns out that he was attacked not just because of what he said but also because of what he represented as mental attitude.

The vehement conflict between the Schmitt-school and the Smend-school clearly demonstrates their opposing approaches to constitutional understanding. Still it is not possible to relate them directly to a common western constitutional understanding because both schools represented German peculiarities of legal thinking: While the Schmitt-school was more traditionally orientated but appealed to a liberal constitutional thinking, the Smend-school differed partly from the traditional German understanding of the state but strengthened the traditional constitutional dogmatic system by its orientation on values.

Therefore, can this development of the Staatsrechtslehre toward a conformism - uniting Christian-conservative, liberal, and social-democratic opinions and largely following Smend's Theory of Integration as well as distancing the Schmitt-school – generally be interpreted as westernization? If westernization were to be defined as the integration into the universal western community of values, which, at least, had to be accompanied by a pluralistic and democratic understanding of the state, this question clearly has to be answered in the negative. However, the 1950s were characterized by a process of adaptation toward the constitutional system of the Basic Law, which was necessary to develop an interpretation that did justice to the new constitutional text, partly containing standard ideas of the western constitutional thinking. To illustrate the superficial character of westernization, it is necessary to give three examples of university teachers of public law, regarding their traditional conceptual orientation in general and their traditional understanding of the state in particular during the 1950s. Gerhard Leibholz', Ulrich Scheuner's, and Hans Peters' mental attitude in this context can be regarded as largely representative. These three strongly dominated the Staatsrechtslehre in the 1950s because of their age, their personality, and their outstanding position in the field of the scholarship of public law.

As a dominating personality of the Staatsrechtslehre after 1949, Gerhard Leibholz (1901-82), who had to emigrate in 1938 to England due to his Jewish origin, had, at the beginning of the 1940s, already developed the idea that after the war at least the western part of Germany had to be orientated toward the western world in both the political and ideological field in reaction to the acute Soviet threat. As a consequence, after remigrating back to Germany he committed himself to reeducating German society in western ideology. Thus, he became first a guest and later a permanent professor of political science at Göttingen and

simultaneously a justice at the Federal Constitutional Court in 1951. However, if his understanding of the constitution is focused on, the fact that he remained traditionally orientated becomes evident. In particular, his concept of 'identitarian democracy' was partly influenced by the ideas of Carl Schmitt: On the one hand, his theory corresponds to Schmitt's negation of the liberal elements of the representative constitutional system and, on the other hand, he tries to balance out Schmitt's negative judgement concerning parliamentarianism. Due to his view on the political parties nowadays substituting parliament as a representative organ, Leibholz considered them to be identical to the people. Thus, the public interest can be identified with the party which holds the majority in the parliament, simply because this party symbolizes the volonté générale. Using one of Leibholz' terms, the party-state of today has to be considered as a rationalized phenomenon of the plebiscitary democracy.[27] Due to his theory about the party-state he was not able to integrate syndicates and pressure groups into his constitutional system and was, consequently, generally forced to ignore their contribution to the formation of the political will and the public interest. Here it turns out that Leibholz' basic opinion and his understanding of the state – although he was the leading promoter of the western orientation of the Staatsrechtslehre - were rather traditional in a German sense, and that his constitutional ideas had not changed during the period of his emigration.

Ulrich Scheuner (1903-81), who became a professor in 1933 and turned finally to the University of Bonn in 1950, was another well respected authority in the Staatsrechtslehre. He had already shown himself in 1927 as open to the idea of English parliamentarianism and concluded from his analysis that the political parties must be considered as protagonists of the parliamentary system.[28] On the other hand, he so much relied on the Lutheran tradition that his concepts of the constitution were strongly influenced by a general fixation on the state. Although he condemned the traditional understanding of the state as a given fact or a corporality with its own will, he also did not agree with a liberal conception. Instead, he considered the state as a timeless and everlasting necessity and determination for men. Due to this, he developed an institutional understanding of human rights, which were, in his opinion, not guaranteed to be inviolable liberties at the forefront of the creation of the state but which were just granted, for ethical considerations, by the state itself. Also, in contrast to his mentor Smend, he did not consider the constitutional system but the state and its institutions as qualified to ensure the unity of the political community.

As a popular Catholic member of the Staatsrechtslehre, Hans Peters (1896-1966)[29] preserved a traditional Catholic understanding of the state as a natural organism. He regarded the orientation of the state toward the public interest as an important factor in securing the prevention of the predominance of the individual liberty in a West-European and US-American sense. Although he supported the constitutional system of the Basic Law in a fundamental way, he saw the actual form of the government in accordance with the Catholic church in relative terms by arguing that democracy was not the absolute best but at present it has to be regarded as the best to avoid a dictatorship in modern society.

Due to these remaining representative stocks of traditional German thinking, the Staatsrechtslehre cannot be considered as being substantially westernized until circa 1960. Nevertheless, it would be wrong to deny that a partial westernization had taken place as a limited reception of western ideas did in fact occur. The emphasis of a constitutional consensus, the implementing of the concept of a completely limited government, the supplementing of the traditional methodology of interpretation by an orientation toward extra-legal categories, the increase in value of the parliament and of political parties, or the increase in value of the constitution in contrast to other laws have to be interpreted as important components of a universal western constitutional consensus. The Staatsrechtslehre partially joined this consensus in the 1950s, thereby forming important constitutional components of a West-German raison d'Etat. This development has to be interpreted as a contribution or as a preliminary step which was a crucial precondition for the second step, a move toward a substantial westernization.

4. The Movement Toward a Substantial Westernization in the 'Staatsrechtslehre' During the 1960s

In the 1960s the exchange programs with western countries - as the most effective way to encourage an acculturation of German law students and practicing lawyers as well as law teachers - increasingly affected the mental attitude of the Staatsrechtslehre. A growing part of new members of the Staatsrechtslehre had spent a longer period abroad, especially in the USA, during their studies. So the knowledge of western constitutional systems spread gradually. It was particularly supported by publications by the returning students about special juridical aspects of the foreign country. In general, in the discussions in Die

Vereinigung der Deutschen Staatsrechtslehrer well-considered comparisons with the constitutional position or constitutional jurisdiction in the western foreign countries played a fundamental role. This demonstrates that there generally existed a solid knowledge of the western constitutional systems.

Otto Kirchheimer (1905-1965) and Karl Loewenstein (1891-1973), two teachers of constitutional law, who emigrated in the 1930s from Germany because of their Jewish origin and became professors in the USA, increasingly influenced the West-German Staatsrechtslehre in the sense of an US-American, respectively western, understanding of the constitution. Both criticized continuously the Staatsrechtslehre of the 1950s for their relativistic and authoritarian traditionalism and demanded an absolute fidelity to the Basic Law in order to defend the legality of the constitutional system. Being largely influenced by the ideas of the New Deal-policy of Franklin D. Roosevelt, Loewenstein and Kirchheimer tried to strengthen the responsibility of the Staatsrechtslehre toward the social elements of the constitutional system.

As a center that was especially receptive for western and liberalistic influences in the context of the Staatsrechtslehre, the faculty of law at the University of Freiburg distinguished in the 1960s. With Konrad Hesse[30] and Horst Ehmke[31] as professors of public law and with Peter Häberle, Friedrich Müller, Winfried Brohm, and Alexander Hollerbach as their students, there existed an innovative and influential group of teachers of public law, forming the Freiburg-school. Hesse, Ehmke, and Häberle had been former students of Rudolf Smend and, therefore, harmonized in a fundamental way. Here Smend's Theory of Integration turned out to be flexible in such a way that it could be adapted to this innovative movement. Moreover, Ehmke's orientation toward US-American ideas during his studies in Berkeley in 1958 had a particularly important influence on the formation of a pro-western consensus in Freiburg. The Freiburg-school consented in its opposition to the Schmitt-school and in its open-mindedness to a social-democratic line of policy. In addition, Arnold Bergstraesser (1896-1964), who had emigrated to the USA in 1937 and became professor of political science and sociology at Freiburg in 1954, and Wilhelm Hennis, a younger professor of political science, had a continuous exchange with their colleagues of law. Also the close contact between the Freiburg-school and Otto Kirchheimer and Karl Loewenstein - Kirchheimer occupied a guest professorship in 1961 and Loewenstein repeatedly gave visiting lectures in Freiburg – particularly reflects the receptive atmosphere with respect to US-American ideas.

One of the Freiburg-school's central aims was to overcome the traditional distinction between state and society in the Staatsrechtslehre and, by this, to remove the traditional German étatisme conclusively. In their opinion this distinction of state and society was rooted in the antidemocratic structures of the German Obrigkeitsstaat (authoritarian state) because it expressed a distance between the individual and his political structures. Instead, they regarded the Anglo-American understanding of the constitution and the state as a model and referred to the term 'civil society' or 'political community' as a valid alternative. In their opinion the current issues of the Staatsrechtslehre were not solvable if it adhered to the segregation of state and society. In contrast to the Schmitt-school, for example, they denounced claims for a political neutrality of the state or the civil service as reactionary. They also criticized the inclusion of political parties just in the realm of society and, instead, demanded that they have a responsibility and obligation for the whole community.

Ehmke was especially opposed to such teachers of public law who deduced a fixed economic concept in the sense of a capitalistic system from the Basic Law. In his opinion here an understanding of the constitution was reflected which had its roots in the opposition between an unpolitical society – represented by the economy itself - and the state. In general, he demanded a restraint in the dogmatic system of the fundamental constitutional rights because he did not regard the society as a category which had to be protected against the state in an extensive way but one which formed a part of the free political community. By referring to the development of the US-Supreme Court following the New Deal-legislation in 1937, he finally opposed the consequences of the Theory of Integration - such as the interpretation of the whole constitutional system as a closed system of values or the effect on third party of fundamental constitutional rights - in order to give the opportunity to make a free political decision back to the democratically legitimated political organs. At the same time he criticized the Federal Constitutional Court for the extension of its competence, largely blocking an independent decision-making-process in parliament. Following Ehmke's argumentation, it was time now, at the beginning of the 1960s, to overcome the creation of a Justizstaat as a reaction to the barbarism of the national-socialist régime and to proceed to a real western conviction.[32]

The Freiburg-school also committed itself to the pluralization of the juridical methods used in the Staatsrechtslehre. In contrast to the traditional dogmatic and systematic methodology of the Federal Constitutional Court, which claimed to decide juridical questions in an objective way, it demanded a clarification of the pre-understanding of the

interpreter and emphasized the search for a far-reaching agreement in the Staatsrechtslehre. This opinion corresponded to the general discussion concerning a topical method of interpretation, which took place in the field of jurisprudence and judiciary at the end of the 1950s and in the 1960s and which was partly inspired by the movement of legal realism in the USA during the twenties. In analogy to the general emphasis on a consensus of society during the 1960s, Ehmke, in particular, asked for a "consensus of the reasonable and righteous minded"[33] which had to decide about the right pre-understanding. Following the development of the US-Supreme Court, he placed emphasis on the openness of the constitutional system and therefore demanded the acceptance of the 'political question-doctrine' and the 'preferred freedoms-doctrine' by the Federal Constitutional Court as a securing method for the restraint of the Court with regard to the parliament. In addition to Ehmke, Hesse and Müller also emphasized the harmonizing function of interpretation by proposing the interpretative principles 'unity of the constitution' and 'practical concordance'. In this commitment the general inspiration of the Freiburg-school by the constitutional development of the USA becomes evident.

A further discussion which reflected western influences was the Staatsrechtslehre's debate about the integration of syndicates and pressure groups into the constitutional system during the 1960s. In 1964 the political scientist Ernst Fraenkel gave a lecture at the German Law Congress (Deutscher Juristentag) about his theory on neo-pluralism. Here he accused the majority of the lawyers of sticking to an anti-pluralistic and anti-western opinion because they were incapable to accept an influence of syndicates and pressure groups on the sphere of the state. Following the Anglo-American concept of pluralism, in his opinion the public interest was not an abstract notion which already existed, but one which is established through a pluralistic process of agreement between the opposite individual interests, which were mainly represented by syndicates and pressure groups.[34] Subsequently, the younger members of the Staatsrechtslehre increasingly followed Fraenkel's conception of pluralism and ascribed a greater importance to syndicates and pressure groups in the constitutional system. As a consequence, syndicates were largely equated with political parties and, in particular, their contribution to the development of a political consensus was appreciated. On the other hand, the majority of the Staatsrechtslehre still stressed that the influence of powerful syndicates and pressure groups on the state may not exceed a certain level. Here the fear of the mainly conservative orientated members of the Staatsrechtslehre is reflected that the state could be deformed by the egoism of syndicates and pressure

groups. Nevertheless, this pluralistic change in opinion must be considered as rather fundamental. On the one hand, it reflects the conclusive dismissal of the understanding of an authoritarian and elitist all-party state, which is far from the interests and the political opinion of the pluralistic society. On the other hand, it shows the acceptance of conflict and compromise as the fundamental categories to form the common political will.

5. General Westernization of the 'Staatsrechtslehre' at the End of the 1960s?

Can the West-German Staatsrechtslehre, therefore, be considered as westernized at the end of the 1960s? Surely, this question cannot be answered definitely on the basis of the present studies. Nevertheless, some aspects shall be examined more closely here.

If the aims of the US-occupying power - regarding the jurisprudence and the judiciary during the immediate occupation time from 1945 to 1952 - are taken into consideration, a westernization of the Staatsrechtslehre seems to be questionable. In comparison with the Anglo-American system the German law system kept its peculiarities. The Staatsrechtslehre did not adopt the case law system but maintained its traditional technical and systematic method of interpretation. By reason of the complex graduated dogmatism developed by the Federal Constitutional Court and taken over by the Staatsrechtslehre, it would be exaggerated to talk of a turn to more pragmatic methods in the field of constitutional law in comparison to the Anglo-American tradition. Nevertheless, the traditional statutory positivism was dismissed after 1949, and, instead, the methodology was extended by extra-legal considerations for the political and social reality. In particular, the general norm of equality in article 3 paragraph 1 of the Basic Law as an interdiction of arbitrariness became the starting point for considerations concerning justice. The renaissance of natural law and - as a consequence of the Theory of Integration - the move toward a system of values derived from the constitution also basically corresponded with the original conception of the US-occupation power who wanted the lawyer to consider morality and material justice in his juridical decision-making-process. In the 1960s, the Freiburg-school demanded a new positivism in order to reduce the extreme consequences of a Rechtsstaat, which, in their opinion, restricted the possibility of a free decision-making-process in parliament. Altogether, this reflects the widespread development toward an omnipotent judiciary in this field.

On the other hand, the influence of the Freiburg-school in the 1960s mostly failed. The Staatsrechtslehre did not attempt, on a long run, to abolish the differentiation between state and society. The counter argument, that the understanding of the two categories has to be adapted to the actual situation and that their abolishment has a totalitarian character, obtained much agreement. Also the initiative to invent a topical method of interpretation definitely lost its attraction in the 1970s, above all, because the Federal Constitutional Court did not turn away from its traditional methodology. Nevertheless, the popular constitutional textbook of Hesse, published in 1967, spread the pluralistic and liberalistic democratic ideas of the Freiburg-school as a learning material for the students of public law.[35]

One criterion to prove the westernization of the Staatsrechtslehre is its understanding of the state and its opinion regarding syndicates and a pluralistic conception of democracy. Its way of adopting these ideas by still retaining the notion of the state as a slightly dissociated abstract hints at a process of amalgamation toward a mixed culture. Apparently, the adaptation to western ideas in the 1960s was associated with the conservation of important parts of the traditional orientation. Consequently, the missing foundation of democracy in the Staatsrechtslehre was a continuing topic of criticism for the years to come.

On the other hand, the fundamental consensus in the Staatsrechtslehre, which developed directly after the enactment of the Basic Law, outlived the fundamental Marxist critics of the period after 1968 and continues right up to the present. In general, the Staatsrechtslehre fundamentally supported the free democratic constitutional structure in accordance with the decisions of the Federal Constitutional Court. In this consensus the younger members of the Schmitt-school became increasingly integrated although they still preserved their special methods of interpretation.[36] As part of this consensus, the understanding that the Basic Law created a constitutional system which belonged to the western world became increasingly self-evident. In the debate of Die Vereinigung der Deutschen Staatrechtslehrer about the democratic principle in the Basic Law in 1970 it turned out to be common opinion that a democratic system in a western sense was created in 1949 and that the democratic principle, according to the Anglo-American understanding, had to be largely associated with the Rechtsstaat.[37] Thus - as an analogy to the change of mental attitudes at the end of the Adenauer-era - the process of adaptation toward the new constitutional system, which was accompanied by the reception of parts of the western constitutional thinking during the 1950s, was followed by a movement toward a substantial westernization in the 1960s.

[1] This article presents preliminary theses of a dissertation-project at an initial stage. The argumentation will be differentiated by further studies. For copyright reasons the footnotes are reduced to a minimum. If you need additional information or if you have any questions or comments please do not hesitate to contact "frieder.guenther@uni-tuebingen.de".

[2] Staatsrechtslehre literally translated means the scholarship of state law. In accordance with the German tradition the term Staatsrecht is a synonym for public law. Staatsrechtslehre in this article denotes the university teachers working in the field of public law, whereas the term public law refers to the academic matter itself. This article is mainly reduced to the constitutional aspects of public law, and the field of administrative law is excluded.

[3] In this association nearly all teachers of German constitutional and administrative law, teaching at a German speaking university, were members, including also Austrians and Swiss and excluding the majority of East-Germans. As a consequence, this article only focuses on the German members as object of examination. The association holds a conference every year and publishes its scientific discussions in the renowned periodical series Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDStRL). Here a list of members is published every year. The number of members increased from 82 in 1949 to 206 in 1970.

[4] See Hans Mommsen, "Von Weimar nach Bonn: Zum Demokratieverständnis der Deutschen," in Axel Schildt and Arnold Sywottek, eds., Modernisierung im Wiederaufbau. Die westdeutsche Gesellschaft der 50er Jahre (Bonn, 1993), 745-58, especially 745/6 and 753-5.

[5] Hans Nawiasky returned from Switzerland, Erich Kaufmann from the Netherlands, and Gerhard Leibholz from England.

[6] For example: Walter Jellinek, Willibald Apelt, and Gerhard Anschütz.

[7] For instance Ernst Friesenhahn got a professorship at Bonn, and Carlo Schmid obtained a professorship at Tübingen.

[8] For example Carl Schmitt, Otto Koellreutter, Reinhard Höhn, Ernst Forsthoff, Herbert Krüger, Heinrich Herrfahrdt, and Ernst Rudolf Huber were dismissed.

[9] For example: Ulrich Scheuner, Theodor Maunz, Friedrich Klein, and Hans Peter Ipsen.

[10] For instance Wolfgang Abendroth and Martin Drath belonged to this group.

[11] This group was put together for example by Hans Peters, Ernst Friesenhahn, Helmut Ridder, and Hans Nawiasky.

[12] Schmitt (1888-1985), as an universally educated Catholic expert, did not hide his opposition to the republican constitutional system of the Weimar Republic. He advanced quickly to the position of chief lawyer in the Nazi régime, losing this position after denunciation in 1936. After 1945 he symbolized the 'crown jurist of the Third Reich'. Thus, he didn't recover his position as professor. For example Werner Weber, Ernst Forsthoff, Hans Schneider, and Roman Schnur appealed to Schmitt as their teacher.

[13] Smend (1882-1975) as a political conservative was one of the leading anti-positivists in the 'debate of methods' during the Weimar Republic. In 1935 he lost his professorship in Berlin and was transferred under coercion to Göttingen. After 1945 he devoted himself principally to the Protestant ecclesiastical law. For example Ulrich Scheuner, Gerhard Leibholz, Herbert Krüger, and Martin Drath were closely connected with Smend.

[14] See Bernhard Schlink, "Die Entthronung der Staatsrechtswissenschaft durch die Verfassungsgerichtsbarkeit," Der Staat 28 (1989), 161-72.

[15] See Ernst Friesenhahn, Staatsrechtslehrer und Verfassung. Rede zum Antritt des Rektorates der Rheinischen Friedrich-Wilhelms-Universität Bonn am 5. November 1950 (Krefeld, 1950). Friesenhahn (1901-84), as a deeply religious Catholic, had been a student of Carl Schmitt, but he rejected Schmitt's offer of a prestigious job in 1934 and, thus, dissociated himself from Schmitt in a fundamental way. Working first as an attorney of law he became professor of public law at Bonn in 1946. From 1951 until 1963 he was justice at the Federal Constitutional Court.

[16] See Hermann Höpker-Aschoff, "Denkschrift des Bundesverfassungsgerichts. Die Stellung des Bundesverfassungsgerichts," Jahrbuch des öffentlichen Rechts der Gegenwart 6 (1957), 144-8 (144/5).

[17] Above all, the professors of constitutional law at Munich have to be mentioned in this context: Erich Kaufmann, Hans Nawiasky, and Willibald Apelt.

[18] For example: Gerhard Leibholz, Martin Drath, Wolfgang Abendroth, Friedrich Glum, and Carlo Schmid.

[19] See Ernst Friesenhahn, "Parlament und Regierung im modernen Staat," VVDStRL 16 (1958), 9-73 (38).

[20] See Rudolf Smend, Verfassung und Verfassungsrecht (Munich and Leipzig, 1928), especially 18-88.

[21] See Werner Weber, Weimarer Verfassung und Bonner Grundgesetz (Göttingen, 1949).

[22] Forsthoff (1902-74), who returned to his professorship at Heidelberg in 1951 and maintained a close relationship to Carl Schmitt, was one of the most outstanding conservatives with a reformist attitude during the early phase of the Federal Republic.

[23] Herrfahrdt (1890-1969) was professor of public law at Marburg. After he had regained his professorship in 1949, he did not have any influence on the Staatsrechtslehre worth mentioning.

[24] See for instance Ernst Forsthoff, "Die Umbildung des Verfassungsgesetzes," in Hans Barion et al., eds., Festschrift für Carl Schmitt zum 70. Geburtstag, dargebracht von Freunden und Schülern (Berlin, 1959), 35-62, especially 50-62.

[25] See for instance Adolf Schüle, "Eine Festschrift," Juristenzeitung 14 (1959), 729-31.

[26] See "Die Gegenwartslage des Staatskirchenrechts," VVDStRL 11 (1954), 153-260 especially 225-9 (Ulrich Scheuner), 238-41 (Rudolf Smend), and 249-51 (Gerhard Leibholz).

[27] See for instance Gerhard Leibholz, "Der Strukturwandel der modernen Demokratie (1952)," in G. L., Strukturprobleme der modernen Demokratie (Karlsruhe, 1958), 78-131, especially 93/4.

[28] See Ulrich Scheuner, "Über die verschiedenen Gestaltungsformen des parlamentarischen Regierungssystems II. Zugleich eine Kritik der Lehre vom echten Parlamentarismus," Archiv des öffentlichen Rechts 52 (1927), 337-80 (349/50).

[29] Hans Peters was a member of the Zentrum-party from 1923 to 1933 and of the CDU (Christian Democratic Union) after 1945. He worked as professor of public law at Berlin from 1928 to 1949. After a short interlude at Humboldt-University after 1945 he turned to the University of Cologne in 1949. He was a member of the resistance group against the Nazi régime Kreisauer Kreis after its foundation in 1940.

[30] Hesse was born in 1919 in Königsberg and became professor at Freiburg in 1956. He had a close connection to Swiss university teachers of public law. Particularly, he committed himself to the constitutional status of political parties and the normative efficacy of the constitution. In 1975 he became justice at the Federal Constitutional Court.

[31] Ehmke was born in 1927 in Danzig. He became member of the SPD and took part in the foundation of the SDS (Socialist German Union of Students) at Göttingen. He worked as scientific assistant to Adolf Arndt at the legal committee of the Bundestag from 1952 to 1956 and became professor of public law at Freiburg in 1961. In 1967 he turned to politics and became member of the Federal Government in 1969. He was very committed to the preservation of a sphere of free decision in the political system.

[32] See Horst Ehmke, Wirtschaft und Verfassung. Die Verfassungsrechtsprechung des Supreme Court zur Wirtschaftsregulierung (Karlsruhe, 1961), especially 3-87 and 669-77.

[33] Horst Ehmke, "Prinzipien der Verfassungsinterpretation," VVDStRL 20 (1963), 53-102 (71).

[34] See Ernst Fraenkel, "Der Pluralismus als Strukturelement der freiheitlich-rechtsstaatlichen Demokratie," in E. F., Deutschland und die westlichen Demokratien, edited by Alexander von Brünneck, (Frankfurt/Main, 1990), 297-325.

[35] Konrad Hesse, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland (Heidelberg, 1967).

[36] Above all, Ernst-Wolfgang Böckenförde has to be mentioned in this context, who generally transferred the ideas of Carl Schmitt in a liberalistic and democratic way.

[37] See "Das demokratische Prinzip im Grundgesetz," VVDStRL 29 (1971), 3-135, especially 46-50 (Martin Kriele).