

Rezensionsaufsatz

Measuring The Rule of Law in Germany

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I. Introducing the *German* Rule of Law

In his ironic masterpiece *Measuring the World*, Daniel Kehlmann sympathetically depicts the crisis of the German soul.¹ We encounter Alexander von Humboldt obsessively, and absurdly, measuring everything on a perilous ascent of the Andean peak Chimborazo: altitude, air pressure, temperature.² Yet, that compulsive scientific work is being carried out even while the data reflects conditions that threaten the great scientist's life. It is a comic scene. The dream that science and system can capture, or even stand in for, reality is harshly repudiated by Humboldt's circumstances. His measurements might be precise, but he seems unable to understand what they mean in the world. After all, they mostly suggest that he should stop collecting data because he is succumbing to hypothermia and altitude sickness. In Kehlmann's telling, Humboldt's scientific conviction was thwarted everywhere he turned. The Amazonian jungle also resisted Humboldt's empiricism. Everything was connected. The plants, the animals, the air, the temperature. Humboldt believed that it was all one system susceptible to measurement. But the project was

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Review of Dana Burchardt and Hannah Birkenkötter, *The Rule of Law in Germany – Bringing the Rechtsstaat Into the 21st Century* (Hart Publishing 2025).

¹ Daniel Kehlmann, *Measuring the World* (Carol Brown Janeway trans. 2006).

² Kehlmann (n. 1), 138-153.

undone by the jungle's magic and chaos. There were too many plants. They grew into one another, over one another, everything at once. 'In case no one had noticed, this was a primeval forest.'³

German *Rechtswissenschaft* (legal science) is similarly bedeviled by the conflict between the marvel of systematisation and conceptual integrity, on the one hand, and the insolent elusiveness of reality and justice, on the other hand. Gustav Radbruch, warning against the 'conflict between apparent and real justice', famously acknowledged that the systematisation of law, however well-ordered, however magnificently codified, cannot anticipate or justly resolve every case.⁴ Like Humboldt's measurements, the law might be 'correct' but produce meaningless (or worse) results.

Naturally, the 'dazzling' German legal doctrine of the *Rechtsstaat* (we can translate this as the 'rule of law') has not avoided this most German of burdens.⁵ Can the principle be coherently defined and systematised, or are German attempts to do that with conceptual certainty merely another futile foray into Humboldt's disordered and defiant jungle? That would seem to be the case, at least for any universal framing of the rule of law. David Bingham acknowledged that 'differing concepts of the rule of law' have been advanced 'until a time came when respected commentators were doubtful whether the expression was meaningful at all'.⁶ Judith Shklar is one of the sceptics, complaining that the rule of law is 'just another one of those self-congratulatory rhetorical devices that grace public utterances of Anglo-American politicians. No intellectual effort need be wasted on this bit of ruling class chatter.'⁷ Brian Tamanaha also notes the definitional drift afflicting this 'essentially contested concept',⁸ characterising it as 'an exceedingly elusive notion giving rise to a rampant divergence of misunderstandings'.⁹ Aziz Hug also concedes the noise occluding the principle, suggesting that 'books and papers on the

³ Kehlmann (n. 1), 94.

⁴ Gustav Radbruch, *Statutory Lawlessness and Supra-Statutory Law* (1946), Oxford Journal of Legal Studies 26 (2006), 1-11 (1, 7), (Bonnie Litschewski Paulson and Stanley L. Paulson trans., 2006).

⁵ Dana Burchardt and Hannah Birkenkötter, *The Rule of Law in Germany – Bringing the Rechtsstaat Into the 21st Century* 21 (Hart 2025) (citing Till Patrick Holterhus, *Der Rechtsstaat* 4 (2022)) [hereinafter Burchardt and Birkenkötter].

⁶ Tom Bingham, *The Rule of Law* (Allen Lane 2010). Citing, among others, Raz, Finnis, Carouthers, and Waldron.

⁷ Judith Shklar, 'Political Theory and the Rule of Law', in: Allan C. Hutchinson and Patrick Monahan (eds), *The Rule of Law: Ideal or Ideology*, (Carswell 1987).

⁸ Brian Z. Tamanaha, 'The History and Elements of the Rule of Law', *SJLS* (2012), 232-247 (quoting Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?', *Law and Philosophy* 21 (2002), 137-164).

⁹ Brian Z. Tamanaha, *On the Rule of Law* (Cambridge University Press 2000).

rule of law, many proposing their own novel versions of it, could fill a library wing'.¹⁰

Now Dana Burchardt's and Hannah Birkenkötter's excellent book *The Rule of Law in Germany* has joined this sprawling section of the library. It is a very welcome addition because it gives non-German legal scholars a thorough survey of Germany's unique conceptualisation of the principle of the rule of law. The reader is carefully guided onto the ramparts of that tradition and exposed to its breadth and complexity, to the 'thickness' or the 'material dimensions' of the German rule of law. Burchardt and Birkenkötter do not hide the immeasurable quality of their subject even while making a heroic – a Humboldtian – effort at measuring the reality of the rule of law in Germany.

II. Translating and Grounding the *German* Rule of Law

The book's major achievement is that the authors show impressive discipline in treating the concept in its *German* context (befitting the Hart Publishing series in which the book appears: 'Rule of Law in Context'). They studiously avoid universalising their thoughtful study of the German *Rechtsstaat*. The book is not another attempt at a global theory of the rule of law. Instead, they intend to present the 'German conceptualization of the *Rechtsstaat* [...] [as it is] rooted in a specific [German] intellectual history and liberal tradition.'¹¹ This is the only sensible way to think about the rule of law. Its content, the elements and institutions that give it life, are drawn from the traditions, practices, and expectations of the community it is meant to serve. To their great merit, the authors embrace this insight. As the book's title insists, this is truly an examination of the rule of law *in Germany*.

Because the book is written in perfectly accessible, often elegant, English, a first step in anchoring their project in its German context involves the choice of terminology. As natives of the German *Begriffsjurisprudenz* tradition, the authors might have had no other choice but to start with a definition (and a translation) of the principle? They explain that they use the German term '*Rechtsstaat*' throughout the book, accepting that they are studying a uniquely German variation of the principle commonly referred to in English as the

¹⁰ Aziz Z. Hug, *The Rule of Law – A Very Short Introduction*, (Oxford University Press 2023), 41.

¹¹ Burchardt and Birkenkötter (n. 5), 2-3.

‘rule of law’.¹² As scholars in comparative legal studies understand all too well, sometimes it is necessary to know when *not* to translate a term due to the risk of alienating it from the meaning it possesses in its tongue (and context) of origin. Yet, even while examining the way that the German *Rechtsstaat* has participated in the global development of the principle of the rule of law (Chapter 5), Burchardt and Birkenkötter hold to the commitment that their book is chiefly interested in examining how ‘for centuries the German *Rechtsstaat* has evolved in its own right’ with ‘considerable [localised] differences’¹³. This aim is admirably realised. The authors consistently qualify their work, writing about ‘Germany’s rule of law understanding’,¹⁴ ‘Germany’s *Rechtsstaat*’,¹⁵ ‘the rule of law in Germany’,¹⁶ ‘*Rechtsstaatlichkeit* as a legal notion and practice in Germany’,¹⁷ the ‘German notion of *Rechtsstaat*’,¹⁸ ‘the rule of law in Germany’,¹⁹ the ‘German understanding of the rule of law’,²⁰ the ‘German vision of the rule of law’,²¹ the ‘German rule of law discourse’,²² and the ‘rule of law experience in Germany’.²³

The authors’ ascent of this discrete jurisprudential peak begins with a consideration of the history of the *Rechtsstaat* in Germany (Chapter 1). Burchardt and Birkenkötter impressively map the development of the principle in Germany, from a formal understanding that drew on Idealism and Kantian reason in the 19th century, to a substantive understanding fashioned under the post-war *Grundgesetz* (Basic Law). The former is summed up by references to the work of Julius von Stahl who explained:

¹² The authors graciously reflect on the English language translation Donald Kommers and I adopted (‘principle of the constitutional state’ rather than ‘rule of law’) in our treatise Donald P. Kommers and Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edn, Duke University Press 2012). Burchardt and Birkenkötter accept that our translation ‘might be the most appropriate’ for discussions of the principle in contemporary German jurisprudence, but they lean towards the phrase ‘rule of law’ because that ‘broader term allows [them] to trace the variations in meaning across time’. Burchardt and Birkenkötter (n. 5), 3. This modest and constructive invitation to reflect on my translation of the term ‘*Rechtsstaat*’ was one of this fine book’s many valued insights.

¹³ Burchardt and Birkenkötter (n. 5), 39–40.

¹⁴ Burchardt and Birkenkötter (n. 5), 63.

¹⁵ Burchardt and Birkenkötter (n. 5), 33, 39, 57, 67.

¹⁶ Burchardt and Birkenkötter (n. 5), 105.

¹⁷ Burchardt and Birkenkötter (n. 5), 130.

¹⁸ Burchardt and Birkenkötter (n. 5), 130.

¹⁹ Burchardt and Birkenkötter (n. 5), 133.

²⁰ Burchardt and Birkenkötter (n. 5), 161.

²¹ Burchardt and Birkenkötter (n. 5), 162.

²² Burchardt and Birkenkötter (n. 5), 163.

²³ Burchardt and Birkenkötter (n. 5), 170.

‘By the character of the *Rechtsstaat* I mean solely the steadfastness of the statutory legal order, not its content.’²⁴ We are told that, in this understanding, law would be based on reason and the state would be based on law. These commitments fostered the principle of legality and the robust role for judicial review that came to characterise German administrative law in the latter part of the 19th century. Otto Mayer, writing in the Weimar era, explained: ‘The *Rechtsstaat* is the state of *well-ordered* administrative law.’²⁵

The authors then document the substantive approach to the *Rechtsstaat* that emerged following World War II with the implementation of the new West German constitution in 1949. It is a thick (maybe the thickest?) version of the rule of law, an approach that involves the intersection of the old formal commitments while incorporating the material values secured by the Basic Law: the principle of democracy; the social state principle; and fundamental rights protection, especially including human dignity. Anyone familiar with Germany’s post-war legal system is deeply aware of the sophistication with which the new, thicker conception of the *Rechtsstaat* has carried forward the old formal elements (legality; legal certainty; proceduralism; proportionality). The dramatic development, however, is the way in which the principle now also integrates a number of substantive values, such as the separation of powers, democracy, the social state, and fundamental rights. Putting particular emphasis on the last of these values, Burchardt and Birkenkötter conclude that ‘today’s understanding of the *Rechtsstaat* in Germany is a substantive understanding that comprises fundamental rights protection’.²⁶

I know that this is the way German jurists instinctively think about the rule of law. When I teach the subject to German students or discuss it with German colleagues, they express curiosity about (if not mild concern for) my reliance on the work of Joseph Raz or Brian Tamanaha. The treatment those theorists give to the principle is mystifyingly, maybe even problematically, thin for the Germans. That consternation builds from Germans’ entrenched acceptance of a thicker conception of the rule of law. Burchardt’s and Birkenkötter’s depiction of the history of the German *Rechtsstaat* reinforces that understanding.

²⁴ Burchardt and Birkenkötter (n. 5), 10 (quoting Friedrich Julius von Stahl, *Die Philosophie des Rechts* (2nd edn, J. C. B. Mohr 1847).

²⁵ Burchardt and Birkenkötter (n. 5), 14 (quoting Otto Mayer, *Deutsches Verwaltungsrecht* Vol. 1 (1895)).

²⁶ Burchardt and Birkenkötter (n. 5), 34.

III. Applying the *German* Rule of Law

Chapter 2 documents the problematic distance between ‘Germany’s [substantive] rule of law aspiration’ and ‘legal reality’ by examining rule of law ‘controversies and deficiencies’ that have resisted reform, at least absent nudges from European law and European institutions.²⁷ Burchardt and Birkenkötter identify independent and impartial courts as a core component of the rule of law (particularly the formal or thin understanding of the principle).²⁸ Judged by that standard, the authors describe the limited self-governance exercised by German courts as one of the country’s rule of law deficiencies.²⁹ Reform on this point, the authors note, has been confounded by diverging understandings of democratic legitimacy, on the one hand, and rule of law enforced separation of powers, on the other hand. ‘Those who oppose judicial self-governance’, Burchardt and Birkenkötter explain, ‘generally refer to the limited and indirect democratic legitimacy of the judiciary’.³⁰ Similarly, German prosecutors’ close relations with political institutions, consistently highlighted as a rule of law problem by the European Union (EU), are justified by the desire to bestow ‘democratic legitimacy’ on powerful prosecutors.³¹ The authors lay the problem of long delays in judicial proceedings, another rule of law deficiency plaguing Germany, at the feet of policymakers who have been unwilling to adopt the necessary procedural reforms or provide the necessary budgetary resources.³²

Burchardt and Birkenkötter also consider the risk that some judicial decisions might go unenforced in Germany.³³ It is a major credit to the authors that they identify a number of episodes in which there has been resistance to the implementation of judicial decisions in Germany.³⁴ The problem may be very rare, but it can occur. Judgments of the esteemed Federal Constitutional Court are met with popular and political resistance. And even the Constitutional Court itself is not immune to the impulse. In rare cases it has qualified its duty to conform with – or integrate into German law – the rulings of the European Court of Human Rights or the Court of Justice of the European Union. The unavoidability (if not regularity) of this particular symptom of a breakdown in the rule of law – the potential disregard for judicial decisions –

²⁷ Burchardt and Birkenkötter (n. 5), 70.

²⁸ Burchardt and Birkenkötter (n. 5), 42–43.

²⁹ Burchardt and Birkenkötter (n. 5), 43–47.

³⁰ Burchardt and Birkenkötter (n. 5), 45.

³¹ Burchardt and Birkenkötter (n. 5), 47.

³² Burchardt and Birkenkötter (n. 5), 52–53.

³³ Burchardt and Birkenkötter (n. 5), 55–57.

³⁴ Burchardt and Birkenkötter (n. 5), 55–57.

raises the question whether the perfect (or even nearly perfect) enforcement of court rulings should be a key measure of the vitality of the rule of law in any system.

Finally, Burchardt and Birkenkötter concede the difficulty in securing a substantive rule of law that delivers equal rights protection and social guarantees.³⁵ ‘Realizing the social state principle’, the authors grudgingly admit, ‘has long been considered a prerogative of the legislative [sic] with a considerable measure of discretion.’³⁶ The authors do not note that it has been the strategic choice of Germany’s post-war governing elites (both political and legal) to expand the principle to include substantive values that has produced this rule of law dissonance. A thinner version of the principle might suffer from problems with judicial independence and impartiality. But it wouldn’t be exposed to the risk of failing to deliver on material, or justice-oriented claims.

IV. Contextualising and Complexifying the *German* Rule of Law

Deepening their contextual treatment of the subject, Burchardt and Birkenkötter present an impressive series of German case studies in the book’s second half. This includes ‘The Rule of Law Experience in the GDR and after the Reunification’ (Chapter 3); ‘The Rule of Law Experience in Times of Crisis’ (Chapter 4); ‘The German *Rechtsstaat* in the European and International Context’ (Chapter 5); and ‘The *Rechtsstaat* in the Digital World’ (Chapter 6). This is terrific work that treats the application of the rule of law in specific developments in German history and politics. The authors tell very distinct German stories across these case studies, and that allows them to add colour and complexity to their survey of the German rule of law. Repeatedly, these case studies show how Germany’s thick approach to the rule of law drifts into ambiguity, unrealised ambitions, or tensions with other values such as democracy, the separation of powers, and appeals for justice.

One of the most sensitive case studies involves the rule of law issues implicated by the 2015-2016 ‘Refugee Crisis’ (Chapter 4).³⁷ Even if much of the book strongly advances a confident German understanding of the rule of law, the authors acknowledge that this episode exposed the principle’s ambi-

³⁵ Burchardt and Birkenkötter (n. 5), 57.

³⁶ Burchardt and Birkenkötter (n. 5), 60.

³⁷ Burchardt and Birkenkötter (n. 5), 117-124.

guity, at least as a matter of public discourse.³⁸ Commentators and advocates on both sides of the issue demanded respect for the rule of law. Opponents of Germany's reception of a large number of refugees argued that the 'welcome' policy violated the law. Advocates for the open border had their own rule of law arguments, many of which implicitly encompassed substantive rights concerns for the dignity and humanity of the refugees. The authors also resort to detailed doctrinal arguments as a way of dismissing the claims of those who were opposed to the refugee policy, characterising their views as 'discursive (mis)uses of the *Rechtsstaat*'.³⁹ The analysis needed to credit one rule of law discourse, while discrediting another, leads the reader into the intricacies of the law and politics involved in the episode. Burchardt and Birkenkötter recognise that the large number of refugee arrivals negatively implicated the rule of law in very practical ways. It placed an immense strain on the orderly and effective functioning of the administrative law regime, including the administrative courts' management of their dockets.⁴⁰ The authors also concede that the episode exposed the dysfunction of the European Dublin system, and characterised this as a 'challenge for the rule of law'.⁴¹

But the authors are determined to dispute the claim that domestic law had been disregarded during the episode. Ultimately, they try to dispose of that claim through a doctrinal argument that suggests that German authorities had no obligation to close, and no obligation to leave open, the border. For this reason, the authors conclude, no law was broken and no pressure was exerted on the rule of law. The delicacy of all of this is captured by the authors' strained explanation: 'The doctrinal principle of the *Rechtsstaat* does not, however, contain a general obligation to abide by the law – this is contained in the very notion of the law and would mean that any violation of the law by the state would amount to a violation of the constitution.'⁴² I'm not sure what this means. And, in any case, legality – an obligation to abide by the law – *is* one of the core elements of the rule of law. Even if the absence of a legal obligation might rebut claims that the law had been broken, and thereby deflect rule of law critiques, it nevertheless suggests that the German state enjoyed unguided discretion in that moment. That portrayal of the situation betrays one of the chief purposes of the rule of law. The principle of legality, as the centrepiece of any conception of the rule of law, aims to place public power under the mandate of law. 'Dicey', Bingham explained, 'was

³⁸ Burchardt and Birkenkötter (n. 5), 117.

³⁹ Burchardt and Birkenkötter (n. 5), 117.

⁴⁰ Burchardt and Birkenkötter (n. 5), 119.

⁴¹ Burchardt and Birkenkötter (n. 5), 120.

⁴² Burchardt and Birkenkötter (n. 5), 122.

adamantly opposed to the conferment of discretionary decision-making powers on officials'.⁴³ According to Bingham, discretion 'is the antithesis of the rule of law'.⁴⁴ This sentiment may have distinctly English origins. But it has been perfected in Germany's understanding of the *Rechtsstaat*, especially as it is expressed through the *Legalitätsprinzip* (legality principle).

V. Thickening the German Rule of Law

The case study of the 2015-2016 'Refugee Crisis', and the others that are given such thorough and thoughtful treatment in the book, do as much to complicate the notion of the rule of law in Germany as they do to clarify it. It's a distinctly Humboldtian challenge. In one scene, Kehlmann depicts Humboldt deliberately exposing himself to electric shock treatments in order to study their effect. Instead of treating those health risks as something to avoid, he embraces physical danger and pain and records the results as data.⁴⁵ In a similar manner, by pulling back the curtains to show the messy existence of the *Rechtsstaat* in Germany, Burchardt and Birkenkötter show the principle a great deal of respect. From this effort they reach one of the essential conclusions about the rule of law, worrying that:

'the term *Rechtsstaat* has been appropriated not only by right-wing populists, but also by respected members of public law scholarship to elevate purported violations of the law – decisions that were not unlawful and on some accounts even legally warranted – to fundamental challenges to the German legal order. This bears the risk of overextending the notion of the *Rechtsstaat*, rendering it meaningless.'⁴⁶

The authors' disciplined, contextual focus is a commendable achievement. Still, it means that their engagement with the 'German understanding of the rule of law' exhibits some uniquely German blind spots relating to the principle.

One of these revealing gaps involves the story Germans tell about the emergence of their substantive expectations for the *Rechtsstaat*. The theory explaining Germany's departure from the strictly formal approach to the rule of law is underdeveloped. Burchardt and Birkenkötter note that the formal approach to the *Rechtsstaat* operated all the way through the Weimar era.⁴⁷ Then there was the Third Reich. Out of the ashes, it is suggested, the new substantive under-

⁴³ Bingham (n. 6), 48.

⁴⁴ Bingham (n. 6).

⁴⁵ Kehlmann (n. 1), 23-25.

⁴⁶ Burchardt and Birkenkötter (n. 5), 129.

⁴⁷ Burchardt and Birkenkötter (n. 5), 17.

standing of the rule of law arose, more or less fully formed, ascending on the wings of the Basic Law. That tectonic transmogrification unfolds, and is explained, over a mere three pages of the book.⁴⁸ I do not have to dispute this narrative to wish for a more thorough consideration of the jurisprudential, social, and political developments, many extending deeper into German history than the National Socialist era, that fostered and informed this dramatic development. Is it really enough to simply (albeit accurately) note that ‘the Third Reich was marked by a high degree of arbitrariness and terror, which are generally seen as antipodes to any rule of law conception’.⁴⁹

In fact, the authors make the point that the Nazi tyranny and terror was as much a consequence of an abandonment of the formal approach to the rule of law as it was a product of the regime’s disregard for the principle’s material potential. A return to, a reaffirmation of, the formal approach to the rule of law would have been an equally reasonable response to the *Machtstaat* or the *Unrechtsstaat*. And, it would have been the move most aligned with the established German legal mentality, which the authors thoughtfully document across the 19th century and into the early 20th century. The long, stubborn shadow of that formalist legal mentality is actually what one finds in Radbruch’s seminal article ‘Gesetzliches Unrecht und übergesetzliches Recht’.⁵⁰ While clearly appealing for justice beyond mere positivism and formalism, Radbruch himself could not wholly shake Germans’ entrenched juristic *Weltanschauung*.⁵¹ In the eponymous ‘formula,’ Radbruch insisted: ‘The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people.’⁵² This approach should be abandoned, Radbruch explains, *only* in the most extreme cases.⁵³ Brian Bix, among others, sees as much (rule of law) formalism as (substantive) natural law in Radbruch’s post-war project.

There is another gap in the narrative that insists that Germany’s post-war shift to a material understanding of the rule of law was chiefly accomplished by the *Grundgesetz*. The Basic Law’s text doesn’t explicitly prioritise the *Rechtsstaat* principle. It barely uses the term, which is only invoked as a standard against which other polities (the European Union and its Member States; the German *Länder*) should be judged.⁵⁴ The Basic Law does not

⁴⁸ Burchardt and Birkenkötter (n. 5), 17–20.

⁴⁹ Burchardt and Birkenkötter (n. 5), 20.

⁵⁰ Radbruch (n. 4).

⁵¹ ‘But legal certainty is not the only value that law must effectuate, nor is it the decisive value. Alongside legal certainty, there are two other values: purposiveness and justice.’ Radbruch (n. 4), 6.

⁵² Radbruch (n. 4), 7.

⁵³ Radbruch (n. 4).

⁵⁴ Grundgesetz (GG) [Constitution], Arts 16, 23 and 28 (F. R. G.).

explicitly apply the principle to the new *Bundesrepublik*. Burchardt and Birkenkötter admit that there are ‘scant explicit references [to the *Rechtsstaat*] in the constitutional text’.⁵⁵ Instead, in Article 20(1), the Basic Law emphasises other values among the new regime’s core constitutional principles: ‘The Federal Republic of Germany is a *democratic* and *social* [and] *federal* state.’⁵⁶ Even if they were satisfied that the principle is implicitly established by related mandates and structures in the constitution, the framers of the Basic Law might have easily included the principle among the canon of values enshrined in Article 20(1).

The textual omission of the *Rechtsstaat* conforms with the Basic Law’s formative background. In the Frankfurt Documents, the Allies demanded that the new German constitution be ‘democratic’ and that it establish a government of a ‘federal type’ before remembering, almost as an afterthought, that it should also ‘guarantee individual rights and freedoms’.⁵⁷ Similarly, the term *Rechtsstaat* did not feature prominently in the Report from the Constitutional Convention at Herrenchiemsee, which included the draft constitution that was debated at the Bonn Parliamentary Council.⁵⁸ In the handful of instances in which the principle is mentioned in the Herrenchiemsee Report (it only appears in the notes and commentary accompanying the draft constitution), it refers to something closer to the formal or thin conception of the *Rechtsstaat*.⁵⁹ Burchardt and Birkenkötter acknowledge all of this, explaining that discussions surrounding the Basic Law (*Grundgesetz*), ‘[...] were marked by calls for a ‘return’ to the traditional [formal] elements of the *Rechtsstaat*: independence of justice, no extraordinary courts, no double punishment, protection from arbitrary deprivation of liberty.’⁶⁰

⁵⁵ Burchardt and Birkenkötter (n. 5), 22–23.

⁵⁶ Grundgesetz [GG] [Constitution], Art. 20 (F.R.G.).

⁵⁷ Frankfurt Documents, Handed Over by the Military Governors to the Eleven German Minister-Presidents in Frankfurt am Main, 1 July 1948, Document No. I.

⁵⁸ Prime Ministers’ Conference of the Western Occupation Zones, Report on the Constitutional Convention at Herrenchiemsee from 10 to 23 August 1948.

⁵⁹ For example, the commentary to the proposed Article 98, which establishes the jurisdiction of the (new) Federal Constitutional Court, remarks that the principle of the *Rechtsstaat* requires the review of the regime’s highest court when imposing the suspension of an individual’s basic rights. The notes to proposed Article 134 (which requires that court hearings be held in public) and Article 135 (guaranteeing the right to be heard in court with the assistance of defense counsel) similarly attribute these protections to the *Rechtsstaat*. The existence of well-functioning, independent and impartial, courts is one of the minimal components of a thin or formal understanding of the rule of law. Report from the Constitutional Convention at Herrenchiemsee (1948).

⁶⁰ Burchardt and Birkenkötter (n. 5), 20 (citing Michael Stolleis, *Öffentliches Recht in Deutschland: Eine Einführung in Seine Geschichte (16.–21. Jahrhundert)*, (C.H. Beck 2013), 144).

As the story goes (and as it is again told by Burchardt and Birkenkötter), the Basic Law elevated the principle of the rule of law (now also encompassing a new substantive dimension) as a ‘clear normative reaction to the atrocities of the Third Reich’.⁶¹ But the Basic Law itself does not explicitly require all of this, maybe because the concept remained disputed and uncertain in the founding period.⁶² And, to the degree that it attracted attention, engagement with the *Rechtsstaat* seemed mostly concerned with its formal understanding. Meanwhile, other principles were explicitly singled out for emphasis in the text of the Basic Law. These questions about the principle’s re-emergence and expansion after the War usually go unremarked. That’s true in this book, too. Germans, Burchardt and Birkenkötter included, could tell us more about the political and jurisprudential debates, the mid-century political developments, and the institutional struggles that fostered Germany’s shift towards a wholly new understanding of the *Rechtsstaat*. That would be especially incisive if the material rule of law is meant to enjoy the crowning, integrative role in the Basic Law that Burchardt and Birkenkötter – and many other Germans – attribute to it.⁶³

VI. Conflicting the *German* Rule of Law

The gaps in the narrative about the emergence of a material approach to the rule of law in post-war Germany seem particularly important because the expanded, thicker notion of the *Rechtsstaat* that developed under the Basic Law can be understood to be in conflict with democracy, which *is* one of the constitutional regime’s explicitly invoked core commitments.⁶⁴ Why the im-

⁶¹ Burchardt and Birkenkötter (n. 5), 20.

⁶² Burchardt and Birkenkötter, drawing confidence from Wolfgang Abendroth who was writing in 1954, conceded that ‘it is difficult to pin down the principle of the *Rechtsstaat* from a doctrinal point of view and there is agreement that there is no unequivocal definition of what precisely the *Rechtsstaat* entails’. Burchardt and Birkenkötter (n. 5), 23.

⁶³ The *Rechtsstaat* is said to consist of ‘guarantees that are specified elsewhere in the Basic Law’, while also serving ‘declaratory’ and ‘constitutive’ functions that allow it to be used ‘as an expression of a general and systematic principle that informs the Basic Law as a whole’. Burchardt and Birkenkötter (n. 5), 24.

⁶⁴ Martin Krygier summed up the conclusion of many theorists who see an inevitable tension between the two principles: ‘If this section began with allegedly joyful copulations of democracy and the rule of law (not to mention human rights), the, it might be thought to have ended with recommendations for divorce. On such a view, it is easier to choose between one or other partner than to join them. At best, the union seems fated to a life of dramatic tension, both partners living at the other’s expense. A sad story for partisans of them both.’ Martin Krygier, ‘Democracy and the Rule of Law’, in: Jens Meierhenrich and Martin Loughlin (eds), *The Cambridge Companion to the Rule of Law* (Cambridge University Press 2021), 406, 419.

plicit *Rechtsstaatprinzip* should prevail over the explicit *Demokratieprinzip*, should they find themselves in tension, is a conclusion that Burchardt and Birkenkötter (or Germans more broadly) don't really question. Instead, the unexamined, robust embrace of the most robust possible understanding of the rule of law might be the most German characteristic of the *Rechtsstaat*.

But democracy – expressed as respect for the will of the majority – is often seen as being in conflict with the mandates of the rule of law. In fact, democracy is a significant contributor to the complex stories the authors tell in the book's case studies. Law (and its rule) is positioned as being in tension with popular views on refugee policy, COVID policy, and anti-terrorism policy. A major line of debate in the theory of the rule of law seeks to resolve or diminish the potential tension between the two principles.

Burchardt and Birkenkötter engage this issue, insisting that one cannot operate in isolation of the other. 'Today', they explain, 'democracy and the rule of law are seen as interdependent and in need of a unifying interpretation'.⁶⁵ They consistently make the case for this claim as a distinct feature of Germany's material understanding of the rule of law. But Tamanaha strongly disagrees. Working from his formal, thin understanding of the rule of law, he explains that his 'definition of the rule of law focuses only on law – it does not include democracy'.⁶⁶ He insists that 'the rule of law is an ideal that relates to legality' while 'democracy is a system of governance'.⁶⁷ One of his chief concerns about including democracy as an element of a material approach to the rule of law is that doing so involves a problematic expression of cultural superiority. Liberal democracy, he says, is a 'contestable normative presupposition' that, through this manoeuvre, is imported into the principle of the rule of law so that it can be imposed 'by definitional fiat on anyone seeking the narrower benefits of legality'.⁶⁸ To make the point that there is an important conceptual separation between the rule of law and democracy, Tamanaha reminds us that 'a society and government may comply with the rule of law, yet still be seriously flawed or wanting in various respects', or that a society that possesses the rule of law, while rejecting democracy, may produce its own social goods that are valued by the community and should be credited.⁶⁹ One advantage with Tamanaha's thinner approach, of course, is that it eliminates any internal contradiction resulting from a substantive

⁶⁵ Burchardt and Birkenkötter (n. 5), 67 (citing Eberhard Schmidt-Aßmann, 'Der Rechtsstaat', in: Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts: Band 2, Verfassungsstaat* (3rd edn, C. F. Müller 2004), 541, 597).

⁶⁶ Tamanaha (n. 8), 233.

⁶⁷ Tamanaha (n. 8), 234.

⁶⁸ Tamanaha (n. 8).

⁶⁹ Tamanaha (n. 8), 236.

understanding of the rule of law that strives to harmonise the rule of law and democracy.

The interesting thing is that Burchardt and Birkenkötter, when appealing for a unifying interpretation between the *Rechtsstaat* and democracy, don't linger over the work of the German theorist seen as having done the most to conceptualise a reconciliation of these 'antagonistic' values.⁷⁰ As Gerstenberg explains, 'Habermas found the solution to the "paradox" of achieving legitimacy through legality in the very idea of a democratic procedure itself'.⁷¹ Habermas argued for the rigorous application of the rule of law (enforced through judicial review) chiefly for the protection of the limited slate of rights and interests that are essential for effective and legitimate democratic participation: 'The principle of popular sovereignty is expressed in rights of communication and participation that secure the public autonomy of citizens; the rule of law is expressed in those classical basic rights that guarantee the private autonomy of members of society.'⁷² Diminished in this way, the substantive dimension of the rule of law does not have to be in tension with democracy. Martin Krygier explains that, pursuant to this understanding, 'democracy is enabled by the rule of law, which in turn is supported by democracy'.⁷³ But, shrinking from the widest possible scope of the substantive approach to rule of law was one of Habermas' least German manoeuvres, and it doesn't fit neatly with the broad, material understanding that Burchardt and Birkenkötter correctly attribute to the Germans' *Rechtsstaat*.

VII. Concluding the *German* Rule of Law

The point in all of this is that Burchardt's and Birkenkötter's excellent book avoids the unmeasurable diffusion of the rule of law principle that would result from engaging with it as an abstract, universal concept. The book is a competent, critical, and creative treatment of the 'considerable differences' – the contradictions and conflicts – that characterise the German approach to the rule of law.⁷⁴ But, when focusing their microscope on the German *Rechtsstaat*, the authors reveal the many ambiguities and conflicts

⁷⁰ Oliver Gerstenberg, 'Radical Democracy and the Rule of Law: Reflections on J. Habermas' Legal Philosophy', I.CON 17 (2019), 1054-1058.

⁷¹ Gerstenberg (n. 70), 1055.

⁷² Jürgen Habermas, 'On the Internal Relation Between Rule of Law and Democracy', European Journal of Philosophy (1995), 3 (1995), 12-20 (15, 16).

⁷³ Krygier (n. 64), 422 (citing Stephen Holmes, *Passions and Constraint*, (University of Chicago Press 1995), 28-29.

⁷⁴ Burchardt and Birkenkötter (n. 5), 40.

that also operate with respect to the principle *in* Germany. What we are shown is that Germany's thick or material *Rechtsstaatlichkeit* is particularly ambiguous and harder to systematise or 'measure' in the Humboldtian fashion than thinner or formal understandings of the rule of law might be. That is a great credit to the book. It is a triumph that Burchardt and Birkenkötter have so thoroughly embraced and exposed the truth that 'the precise content and contours of the German *Rechtsstaat* are – as in any jurisdiction – anything but clear'.⁷⁵

As Kehlmann depicts it, Humboldt tried to believe that all his measuring of the world had 'brought the end in sight [...] the cosmos would be understood.'⁷⁶ But, as his days dwindled with his faculties, Humboldt understood that he had measured everything that could be measured, and yet it seemed to him that nothing was coherent or complete. In the end, Humboldt admits 'he knew nothing, but he had spent his whole life trying to change this, he had acquired some knowledge and travelled the world, but that was all'.⁷⁷

⁷⁵ Burchardt and Birkenkötter (n. 5), 1.

⁷⁶ Kehlmann (n. 1), 204.

⁷⁷ Kehlmann (n. 1), 245.

