FROM CODIFICATION TO CONSTITUTION: ON THE CHANGES OF PARADIGM IN GERMAN LEGAL HISTORY OF THE TWENTIETH CENTURY

by

KNUT WOLFGANG NÖRR (Tübingen)*

My paper consists of three parts. In the first part, I shall deal with the question of how the legal development in Germany since 1900 should be divided up into periods. I shall examine this question from the point of view of the rule of law or the idea of the Rechtsstaat. The second part is an attempt to explain what we mean by a legal paradigm or model or Leitbild; this part then will analyze the change of model in the Weimar Republic. The third part is concerned with the early Federal Republic and with a series of events which indicate how quickly and fundamentally the Bonn Constitution has become the model for the Federal Republic's legal system. In a brief final passage the question shall be raised as to whether European law, that is the law of the European Community, has or some day will have the function of a Leitbild.

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The topic of our discussion is the changes of paradigm in German legal history of the twentieth century. In order to approach this topic we have to consider the general problem of how to divide legal history into periods, and in particular recent German legal history covering roughly the last 120 years, that is from 1870 to the present. A brief glance at the historical events that have taken place during this time shows that we can divide these 120 years into very distinct periods. If we follow political history and its periodisation we arrive at five or six clear historical periods. First, there is the Empire from 1871 to 1918, covering almost fifty years. It was followed by the fifteen years of the Weimar Republic from 1918 to 1933, the twelve years of the Nazi era from 1933 to 1945, and the Occupation from 1945 to 1949. After 1949 it is not only a matter of temporal but also of spatial differentiation since we have to take into account that after 1949 the legal development in the Federal Republic and in the GDR took entirely separate courses. It is only in 1990 that this separate development has come to an end. Hence, we are dealing with six periods of German history since 1871.

It seems reasonable, then, for the legal historian to adopt this division from political history and apply it to his subject. However, this should not be a case

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of simply copying political historiography and political periodisation. The legal historian has rather to accentuate the specific content, the special principle which distinguishes legal history from general history. He has to bring out what is characteristic about legal history. What characterizes legal history and distinguishes it from all other history is, of course, the idea of law. What would be more natural than to take the idea of law as a criterion in terms of which legal history is to be viewed? Curiously enough, no legal or constitutional historian, at least not in Germany, has yet examined the problem of the periodisation of legal history from the point of view of how near or how far a period stood in relation to the idea of law. Of course, the idea of law is not a static phenomenon. Through the millennia and in different cultures it changes in shape and appearance. The idea of law may also go through various stages from general to specific. In some periods it may coincide with a general and diffuse idea of justice. In other periods it will relate to certain conditions, certain datas, thus gaining more concrete, specific features. In the latter case, the idea of law may express itself in a definite concept. This is the case when we look at recent German history. In the legal development since the 18th century we see the idea of law embodied in the concept of the *Rechtsstaat*. The concept of the *Rechtsstaat*, however, is not only an expression of the idea of law, but it mingles with another idea, the idea of State. It may be said that in the concept of the *Rechtsstaat* two ideas meet: on the one hand the concept of the *rule of law*, which appeared in Europe in the 17th century as the opposite to the *rule of men*, and on the other hand the concept of the State as an entity embracing the people who live in it and transcending them at the same time. In other words, the concept of the *Rechtsstaat* always involves the question of the relationship between state and law, a question which has not left us since the time Hegel unfolded the idea of State in his philosophy of history and of law. The concept of the *Rechtsstaat*, of course, has gone through various changes, too; for our purpose, however, let it be enough to say that the idea of the *Rechtsstaat* aims at orientating the state's actions towards norms and institutions in order to protect the freedom of the state's citizens.

If we examine the periods and chapters of recent German history from the point of view of the idea of the *Rechtsstaat* the fundamental differences become immediately clear, the wheat separates from the chaff, and the incurable breaks in the continuity of German history become obvious. From the aspect of the *Rechtsstaat*, the periods of recent history could not turn out to be more opposed. We find periods with the concept of the *Rechtsstaat* shining brightly, but there are also times when it was suppressed and extinguished. The last remark is aimed, of course, at the Nazi era. Rule of law is a touchstone first and foremost for the Nazi state. We need not go into further details as to how the Nazi regime and the Nazi jurists — I only recall Carl Schmitt — from the very beginning mocked the idea of the *Rechtsstaat*, how very soon the *Rechtsstaat*'s protection of institutions and forms was attacked, eroded and disintegrated, how any definition, without which the concept of the *Rechtsstaat* cannot survive, was completely at the *Führer*'s and his apparatus' mercy be it in the *Partei* or in the bureaucracy. Certainly there were also in the NS-state some enclaves of the idea of law, but these enclaves were not secure, they were exposed to political intervention at any time and they could be destroyed at any time. Everything bearing the name of law was subject to arbitrary exceptions, was in parts and as a whole at the mercy