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RECHTSSTAAT AND IT'S LEGAL ORDER ACCORDING TO ROBERT VON MOHL

Introduction

Robert von Mohl, German 19th century lawyer and politician is considered to be one of the creators and popularizers of the *Rechtsstaat* concept[1]. It is obvious that rule of law (*Rechtsstaat*) cannot function without legal norms. "The sanctity of all laws"[2] is the supreme principle of the rule of law state in von Mohl's thought. Maintaining legal order covers at least half the scope of its activity[3]. This article is an attempt to answer the question of what this order should look like, and on what principles it should be based on, according to von Mohl. The article proves that the main source of law for von Mohl is the written (positive) law. In addition to this type, the sources of law will also include customary law and court activities. There is no doubt, however, that in rule of law the main role will be played by legal norms arranged in three large groups[4]. Throughout the

[1] For the purposes of this article the term *Rechtsstaat* will be translated as "rule of law" but also: "legal state".

[2] R. v. Mohl, *Encyklopädie der Staatswissenschaften*, Tübingen 1872, pp. 325–326; K. Sobota, *Das Prinzip Rechtsstaat*, Tübingen 1997, pp. 313–314.

[3] The second scope of state's activity, fulfilled by the "Police" (*Polizei)*, was supporting the individuals in achieving the objects of their life. More about the concepts of the „Police" in 19th century: G. Zimmermann, *Die Deutsche Polizei im neunzehnten Jahrhundert*, Bd. 1, Hannover 1845; W. Szwarc, *Zarys ewolucji pojęcia „policji" w monarchii pruskiej w XVIII i XIX w.* [in:] *Wybrane problemy teorii i praktyki państwa i prawa*, eds. H. Groszyk, L. Dubel, Lublin 1986, pp. 117–133. On the notion of „Police" also: K. Dąbrowski, *Ewolucja pojęcia policji w kontekście genezy żandarmerii w Niemczech*, „Annales Universitatis Mariae Curie-Sklodowska, Sectio G (IUS)" 2016, Vol. XXV, 3, pp. 205–208.

[4] Despite the fact that the aforementioned nomenclature (constitutional act, act, ordinance) is appropriate for the rule of law in von Mohl, he still believes that the distinguished types of laws or rights in the state may also appear in other types of states. Therefore, regulations corresponding to

entire period of his scientific activity, the German liberal was attached to his three-level classification of normative acts in the state. This classification was based on the division into laws that can be called "state" or "constitutional" (*Verfassungsgesetze*), "ordinary acts" (laws, statutes) (*einfache Gesetze*), which are issued by the political authority in the state (primarily a monarch in von Mohl) in consultation with a representative body, and ordinances (*Verordnungen*), issued by the authorities unilaterally and autonomously[5]. The aforesaid division is based on the prominence that each type of source of law has in the state. In von Mohl the highest-level statutes, all kinds of constitutional acts, will contain the basis for all further legal institutions. "Ordinary" acts will regulate individual legal issues in a manner consistent with higher-order norms. Ordinances, which are the third type of legal act, will not contain new laws, but only provisions leading to the enforcement of norms contained in higher-order acts[6].

Written law versus customary law

As already indicated at the beginning of this article, according to von Mohl there may be also other sources of legal norms, extending the sources of law based on the above-mentioned triad. Therefore, before analyzing the above-mentioned triad, which is undoubtedly of paramount importance, it is worth devoting a moment to von Mohl's perception of the role of customary law and it's relation to written law. This is important because it will prove that German scholar was not an implacable supporter of exclusively written law. As an empiricist above all, he recognized customary law and, moreover, he also accepted its existence.

For von Mohl, there was no doubt that written law is not the sole source of law in state. There was also the customary, "people's" law (*Volksrecht*)[7]. Customary law manifested itself as a system that grew out of all sorts of historical, political, but also religious experience, of a given community, and what was of utmost importance. It also related to the most common problems of everyday life. The impulse for the creation of a norm of customary law is the need to regulate a given state or actual relationship in a given community. On the other hand, its validity is sanctioned by "community of beliefs" (*Vereinigung der Ueberzeugungen*)

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constitutional and ordinary statutes or ordinances will be found not only in the rule of law. For example, a holy scripture may play the role of constitutional act in theocracy. R. v. Mohl, *Encyklopädie der Staatswissenschaften*, p. 155; Ch.H. Schmidt, *Vorrang der Verfassung und konstituionelle Monarchie: eine dogmengeschichtliche Untersuchung zum Problem der Normenhierarchie in den deutschen Staatsordnungen im frühen und mittleren 19. Jahrhundert (1818–1866)*, Berlin 2000, p. 160.

[5] R. v. Mohl, *Encyklopädie der Staatswissenschaften*, pp. 145–146.

[6] R. v. Mohl, *Staatsrecht, Völkerrecht, Politik*, Bd. 2, *Politik*, Bd. 1, Tübingen 1862, pp. 404, 405, 417.

[7] R. v. Mohl, *Encyklopädie der Staatswissenschaften*, p. 144.

concerning the validity of the norm of customary law thus created. Von Mohl does not appear to be an opponent of such norms. Moreover, in his teaching we find a statement about a kind of "eternity" of customary law. He is characterized by the belief that as long as there are specific communities of people (including nations), they will produce custom-based norms (despite the fact that as written law develops, customary law will lose its significance)[8].

Speaking of customary law as a source of rights and obligations in a state, one cannot fail to address the issue of the relationship between this source of law and written law. Von Mohl described this relationship in an unclear manner. As a supporter and promoter of the *Rechtsstaat* idea he, at the same time, also stated: "There is no relationship that would not be able to obtain its right both by statute and by the consciousness of the nation"[9]. Therefore, it should be stated that he holds written law and customary law as two equivalent and, what is more, also legal orders in the state. One cannot resist the impression that von Mohl, based on empirical analysis of reality (in which customary law functioned), was not able to ignore customary norms as a source of law, but on the other hand was well aware of the enormity of problems that the existence of the two, parallel legal orders can introduce in the functioning of the state. Seeking a way out of a possible collision of customary and written norms, von Mohl did not seem to give priority to the latter. He stated that in the event that in the interpretation process it is not possible to resolve the collision between these two types of laws, it is the time of their creation that should decide, with priority given to this norm that appeared later[10]. Unfortunately, von Mohl did not exhaustively develop his ideas regarding the relationship between customary law and statutory law. It can be assumed, however, that the concept presented above resulted from the scholar's overarching belief that the state and all its institutions should correspond to the "level of civilization" (*Gesittigung*) of the nation. The scientist was convinced that the law, and especially the constitution of a state, should always reflect the level of development of the nation, as well as its customs.

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[8] R. v. Mohl, *Staatsrecht, Völkerrecht, Politik*, Bd. 2, *Politik*, Bd. 1, p. 385. It requires underlining that in von Mohl's classification of "state sciences" (*Staatswissenschaften*) constitutional law was divided into "philosophical" and "obligatory" (positive). *Idem*, *Encyklopädie der Staatswissenschaften*, p. 174. Philosophical law can be defined as a creation based on the principles of logic and common sense, and not resulting from any legal principles. *Ibidem*, p. 188, *idem*, *Das Staatsrecht des Königreiches Württemberg*, Bd 1*: Das Verfassungsrecht*, Tübingen 1840, p. 87. It is legitimate to conclude that in philosophical terms the law overlaps, in von Mohl's teaching, with the essence of natural law. More about the problem of natural law: M. Łuszczyńska, *Prawo natury a prawo stanowione – dwa antagonistyczne ujęcia filozofii prawa*, „Annales UMCS Sectio G (Ius)" 2005–2006, Vol. LII/LIII, pp. 87–108; R. Wojtyszyn, *Szkoła prawa natury od Hugona Grocjusza do Johna Locke'a*, „Studia Erasmiana Wratislaviensia Wrocławskie Studia Erazmiańskie. Zeszyt Naukowy Studentów, Doktorantów i Pracowników Naukowych Uniwersytetu Wrocławskiego" 2007, pp. 49–63.

[9] R. v. Mohl, *Staatsrecht, Völkerrecht, Politik*, Bd. 2, *Politik*, Bd. 1, p. 394.

[10] *Ibidem*, pp. 395–397.

The aforedescribed von Mohl's approach to customary law gains a kind of explanation, when we analyze the scholar's views on the concepts of the so-called German Historical School[11]. It should be noted that von Mohl's views coincide with those of the historical school, saying that customary laws, the ways of life of individual nations, their characteristics and legal awareness should be taken into account in the creation of law. The content of law cannot depend solely on the preferences and approval of the legislative authority[12]. It cannot be said, however, that von Mohl made a full reception of historical school's views on law. First of all, one should note his opposition to the view of comprehending the law as a phenomenon arising spontaneously in a given nation (similarly as e.g. language). Von Mohl regarded this understanding of law as superfluous "mysticism"[13].

Therefore, also the historical school's understanding of the legislative activity of the state, understood as describing and conferring the statutory form to standards independently created in the nation, did not find support of the German scholar[14]. One may conclude that he considered this understanding of the legislative activity of the state incomplete, and at least partly disagreed with such view[15]. On the one hand, because von Mohl did not completely dissociate himself from the so--called "spiritual factor" in relation to legislation, he argued that its task is to observe and give legal (statutory) dimension and the possibility of execution of customary laws functioning in a given nation (this may also indicate a desire to avoid collision between customary and written law). On the other hand, however, he was strongly convinced that the state cannot limit itself to merely reading legal norms encoded in the consciousness of the nation. Therefore, the state must also make laws independently, autonomously[16]. This approach is due to the belief that the faster and stronger development of states and societies (it is worth remembering that von Mohl worked during the industrial revolution in Germany at that time) causes that the legal awareness and customary norms functioning in them are no longer sufficient to regulate their relations in comprehensive way. This situation means that the state must create and introduce certain laws independently. Observing the trends prevailing in society and nation, and anticipating their development,

[11] The creator of this trend was Friedrich Carl von Savigny. The main assumptions of this thought were treating the law as a historical phenomenon, reflecting the history and spirit of a particular nation. The historical school opposed codification and the concepts of the law of nature. More about the views of the German historical school: R. Gmür, *Savigny und die Entwicklung der Rechtswissenschaft*, Münster 1962; K. Opałek, J. Wróblewski, *Niemiecka szkoła historyczna w teorii prawa*, „Przegląd Nauk Historycznych i Społecznych" 1954, Vol. 5, pp. 237–317.

[12] R. v. Mohl, *Staatsrecht, Völkerrecht, Politik*, Bd. 2, *Politik*, Bd. 1, p. 381.

[13] *Ibidem*.

[14] *Ibidem*, p. 382.

[15] On discrepancies between a conservative and a liberal approach to law: H. Uhlenbrock, *Der Staat als juristische Person: Dogmengeschichtliche Untersuchung zu einem Grundbegriff der deutschen Staatsrechtslehre*, Berlin 2000, p. 60.

[16] R. v. Mohl, *Staatsrecht, Völkerrecht, Politik*, Bd. 2, *Politik*, Bd. 1, p. 382.

the state through the law has the task of influencing the life of the community, so as to at least support its development or resolve conflicts. Von Mohl even granted the state the right to act against established beliefs in the nation, if a more important interest of the community would speak for that[17].

To sum up the above remarks, it should be stated that von Mohl (as in many cases, in fact) opted for the middle way. He not only allowed the existence of customary law in the state, but also was of the opinion that it should be taken into account in the legislative process, and that to the largest possible extent. Nevertheless, it should not form the basic reference point. On the other hand, such a reference point should be the maintenance of "unity and organic order" (*Einheit und organischen Ordnung*). In addition, according to von Mohl, the task of the state was to organize and change the unjust and improper customary laws functioning in the nation[18].

Verfassung and *Verfassungs-Urkunde*

There is no doubt that the main axis of the analysis of sources of law in von Mohl's doctrine will be the constitution-act-ordinance triad. Issues of applicability of customary law, although noteworthy, are side problems. Whereas the aforementioned triad appears in most of works by von Mohl, and what is also important – throughout the entire period of his work. Before we discuss von Mohl's perception of the constitution or, more specifically, the "basic law", we should look briefly at the history of the meaning of the concept of *Verfassung* in German legal science. While today the term *Verfassung* means the constitution

[17] *Ibidem*, pp. 382–384.

[18] *Ibidem*, p. 383. The less important sources of law, yet marked in the von Mohl's legal state, include the court activities. It should be noted that the German liberal presented the so-called "continental approach" to law and he is convinced that the courts are appointed primarily to apply the law to specific conditions, and not to settle disputes according to their own views. However, just like in many other areas of von Mohl's understanding of the state, there are specific exceptions to the rule. The most important, rational situation, where the court is able to create a legal norm that should be mentioned here, is a gap in applicable law. Von Mohl was convinced that every court is obliged to issue a judgment in the case submitted and it cannot justify its inactivity, e.g. by the lack of provisions relating to a specific case. Thus, the scholar came to the conclusion that, in a situation of a gap in law, the courts not only can, but are actually obliged to issue a ruling based on the legal norm they have created. What's more, von Mohl formulated something similar to a precedent, stating that a judgment issued in this way under the so-called "court habit" (*Gerichtsgebrauch*) becomes the norm for other courts of relevant jurisdiction. *Ibidem*, pp. 387–388. Also, Leon Petrażycki distinguished the so called "Law of court practice". More: L. Petrażycki, *Teoria prawa i państwa w związku z teorią moralności*, Vol. II, Warszawa 1960, pp. 387–398; S. Tkacz, *O „Pozytywności" i „Oficjalności" Prawa w Teorii Leona Petrażyckiego*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2005, No. 1, p. 83.

of the state in the strict sense, it was not always the case. Explanation of the history of this concept will thus allow us to avoid terminological ambiguities and will modernize the von Mohl's concept[19].

Initially, the concept of *Verfassung* in the German lands was broadly understood as a specific shape or condition of the state, which was composed of and influenced by various factors of historical development, as well as natural, nation-specific circumstances and laws. In this sense, therefore, the concept of *Verfassung* did not describe a specific, superior legal act of the state, but rather the overall system and conditions in which it operates. This understanding of the concept of *Verfassung* was in line with the old so-called "pre-constitutional" German science, for which it was not a normative term, but rather empirical, denoting a specific factual condition of a given state[20]. The term "constitution", in the end of the 17th century, was understood as an act issued by the emperor, regardless of its meaning and content. This historical understanding of the word constitution as the superior law was supplanted in the German area in the process of reception of modern constitutional concepts. At the turn of the seventeenth and eighteenth centuries, the word "constitution" began to approach its present understanding of the word *Verfassung*, meaning primarily a constitutional act, but also the form of the government of a given state. In this sense, therefore, each state had its own *Verfassung*, also understood as the state system, form or organization[21]. With the development and spread of postulates of the democratic Enlightenment movements, the notion of *Verfassung* – a constitution as a legal act has been consolidated. This legal act will make the power in the state no longer be based on largely unclear laws of nature or divine order, but instead will be limited on the basis of set and clear constitutional norms. The so-called "constitutionalization" of the rules functioning in the states of the German area falls in the 19th century. It was particularly in the first half of that century, when establishment of state constitutions (especially in the south of Germany) was perceived as a bourgeoisie's way to introduce rules that would limit the absolute power of kings and princes[22].

It is not surprising, therefore, that the concept of *Verfassung* is often present in the von Mohl's doctrine and it is given significant importance. It should be noted that he belongs to these of the German authors, who (by looking at Ameri-

[19] Translator of the Polish edition of the *Encyklopädie der Staatswissenschaften* translated the von Mohl's *Verfassung* as "organization". Aware of the ambiguity of this term (also meaning the then written constitutional act), A. Białecki decided to use the word "constitution" only when von Mohl spoke about the written act or group of constitutional acts. This view should be considered right and should be adopted: R. v. Mohl, *Encyklopedia Umiejętności Politycznych*, Vol. I–II, Warszawa 2003, p. 120.

[20] Ch.H. Schmidt, *Vorrang der Verfassung*…, p. 94.

[21] *Ibidem*, pp. 94, 95.

[22] A. Benz, *Der moderne Staat: Grundlagen der politologischen Analyse*, München 2008, pp. 135–136.

can and Western European models) not only postulated the hierarchical order of sources of law, but also were the precursors of understanding the term *Verfassung* (the constitution) as a source of law standing above others[23]. The concept of *Verfassung* that A. Białecki translated using the word "organization", appears in von Mohl already in the early *Constitutional Law of the Kingdom of Württemberg* of 1829 and 1831[24]. However, we find its most elaborate definition on the pages of the *Encyclopaedia*…:

"The organization is the sum of institutions and provisions defining a certain specific objective of the state, organizing and maintaining the main body intended for this purpose, describing in terms of form, boundaries and holders the state authority required for it, and finally regulating, in a fundamental way, the relations between participants of the state (both individuals and social circles) and the public"[25].

The analysis of the above definition allows us to conclude, that von Mohl perfectly fits the German trend of understanding the concept of *Verfassung* described above. *Verfassung* is not the today's written constitution, but a much broader concept, concisely speaking, meaning the fundamental nature of a given state. Under this concept, the scholar will understand the form to which the states will belong, and what their purpose will be[26]. Organization by von Mohl was in principle something general as well as permanent, defining the directions, which the state should follow[27]. Importantly, the above understanding of the concept of the Organization will not change throughout the entire period of his work[28]. May it be in the *Constitutional Law, International law, and Politics* or the last edition of the *Encyclopaedia*…, the Organization was always understood by von Mohl as the general principles and "content" of the state, determining its purpose, power relations and the position of citizens[29]. It is also worth noting that the Organization as a concept defining the essence and general principles of the system

[23] Ch.H. Schmidt, *Vorrang der Verfassung*…, p. 122.

[24] As Georg Jellinek later states, the *Constitutional law of the Kingdom of Württemberg* was a groundbreaking work, with extreme importance for the progress of the study of constitutional law in Germany: G. Jellinek, *Gesetz und Verordnung, Staatsrechtliche Untersuchungen auf Rechtsgeschichtlicher und Rechtsvergleichender Grundlage*, Freiburg I.B. 1887, p. 115. In this article, Erich Angermann noticed a turn to positive law in von Mohl: E. Angermann, *Robert von Mohl 1799–1875 Leben und Werk eines altliberalen Staatsgelehrten*, Neuwied 1962, p. 35.

[25] R. v. Mohl, *Encyklopädie der Staatswissenschaften*, p. 136; B. Granzow, *Robert von Mohls Gedanken zu einem parlamentarischen Regime auf berufsständischer Grundlage*, Heidelberg 1959, p. 88.

[26] R. v. Mohl, *Das Staatsrecht des Königreichs Württemberg*, Tübingen 1846, p. 3. The concept of „Organization" was used in the work to distinguish between its meaning and what von Mohl understood as a written constitution of the state.

[27] R. v. Mohl, *Encyklopädie der Staatswissenschaften*, p. 137.

[28] For the purposes of this article, the concept of "Organization" highlighted by von Mohl will always be capitalized to distinguish the usual understanding of the word.

[29] R. v. Mohl, *Staatsrecht, Völkerrecht, Politik*, Bd. 2, *Politik*, Bd. 1, p. 408.

of a given state was, according to von Mohl, not reserved exclusively for the legal state. In fact, according to von Mohl, each state has an Organization, although it is expressed in various forms. According to the scholar, it was not necessary for the constitutional provisions to be included in one document (constitution) or even to be written down at all. Therefore, political principles can be found in various, larger numbers of legal acts or even in customary law[30].

When studying works of von Mohl we should be careful not to identify the above concept of the Organization, which is nonetheless considered to be something immaterial, one can say transcendent and more difficult to grasp, with a written constitutional act having a legal dimension. It is worth noting that differences also occur in terminology. Von Mohl never used the word Organization (*Verfassung*) to denote a constitutional act, always using the terms "constitutional act" (*Verfassungs-Urkunde*) or "written basic law" (*geschriebene Grundgesetz*) instead. Moreover, not all norms contained in the written constitutional act must belong to the Organization of the state and *vice versa*: "Not everything that is contained in a specific constitutional law belongs to the organization of the state, just as not the whole organization of the state is reflected in the constitutional act"[31].

The above view is reflected in von Mohl's belief that it is not a *sine qua non* condition for the written constitution to be contained in only one legal act. It can be said that the scholar presented a peculiar, approach, close to the Anglo-Saxon one, stating that there could be many constitutional acts "scattered throughout the entire legal order"[32]. Von Mohl concludes that the essence of rule of law includes the statement, that its institutions may only be established by common agreement. Von Mohl was in favour of establishing a constitution on the basis of a contract between the ruler and the people, but he also allowed a situation in which the constitution would be put in force (promulgated) without participation of representation. In both cases, however, it must define and protect the rights and obligations of both parties[33].

According to von Mohl, the objective of constitutional provisions contained in one or many acts of law was to resolve the most important political issues, i.e. a specific concretization of the ideas contained in the Organization of the state (and in no case may they contain legal norms reserved for its administration)[34].

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[30] R. v. Mohl, *Encyklopädie der Staatswissenschaften*, p. 137.

[31] R. v. Mohl, *Das Staatsrecht des Königreichs Württemberg*, Tübingen 1831, pp. 6, 9.

[32] R. v. Mohl, *Encyklopädie der Staatswissenschaften*, p. 145.

[33] R. v. Mohl, *Das Staatsrecht des Königreiches Württemberg*, Tübingen 1829, p. 86; J. Hähnle, *Die politischen Ideen Robert von Mohls. Ein Beitrag zur Geschichte des älteren süddeutschen Liberalismus*, Tübingen 1921, pp. 23–24.

[34] R. v. Mohl, *Das Staatsrecht des Königreichs Württemberg*, Tübingen 1831, pp. 6–7. Von Mohl himself, speaking of the "constitutional state" (*Das constitutionelle Staat*) distinguished four of its main features: first, exercise of power in accordance with the principles and objectives of the idea of the rule of law (of course, in the meaning of this concept by von Mohl), secondly, the exact

The provisions of constitutional acts refer, in von Mohl, to the objectives of the state, the form of its rule, the general obligations and rights of state power, as well as the civil and political rights of the state's residents, and their protection[35]. It may happen, however, that due to their great importance for the state, particular norms are introduced into such acts (e.g. relating to more specific issues, such as the judiciary)[36]. The most important assertion concerning the constitutional norms is that, in von Mohl, they gain the supreme position and the priority over all the remaining norms. The provisions of governmental (constitutional) acts are thus, in his works, characterized in that they include "higher order norms"[37]. The "constitutional act" is therefore the "first act of the state" (*das erste Gesetz des Staates*) and no "ordinary" act can contradict it[38].

It should not come as a surprise that von Mohl, as a representative of the liberal-constitutional wing of German science of the state, saw many advantages in adopting constitutional acts in states. First of all, it was about establishing higher, somewhat inviolable norms to protect citizens against the omnipotence of authorities. It is symptomatic, therefore, that it is the concept of constitution that connects, in von Mohl, as well as in all German liberalism, with the issues of fundamental and civil rights[39]. The adoption of a constitution in a state has many advantages, above all relating to the legal and political awareness of its citizens. Simple and general norms are easier to comprehend and assimilate than complicated and casuistic regulations (the postulate of generality and "simplicity" of law will be manifested in von Mohl with all power, when discussing the so-called "ordinary laws"). Nevertheless, it should not be forgotten, that German scholar, rational as always, also noticed the disadvantages and dangers potentially linked with the functioning of constitutional acts in a rule of law. This is, first and foremost, the abuse of general principles of systemic rank. Von Mohl was afraid that, by their nature the capacious and general constitutional norms could be abused and misinterpreted in accordance with a particular immediate interest (e.g. political). The conviction that the Organization of the state must correspond to the degree of development of the nation resulted in von Mohl's view that constitutional norms must also do so. According to von Mohl, imposing a constitution on

definition of the laws relating to the exercise power by constitutional act or acts, thirdly, the exact specification of the residents' demands in relation to the state authority, and finally, the introduction of institutions in the state that will protect citizens against violation of their rights by the state authority (establishment of a representative body). Furthermore, a constitutional state cannot be characterized by exceptional legal favoritism, e.g. of certain social groups. R. v. Mohl, *Die Geschichte und Literatur der Staatswissenschaften in Monographieen dargestellt*, Erlangen 1855, p. 268.

[35] R. v. Mohl, *Staatsrecht, Völkerrecht, Politik*, Bd. 2, *Politik*, Bd. 1, p. 410.

[36] R. v. Mohl, *Encyklopädie der Staatswissenschaften*, p. 142.

[37] Ch.H. Schmidt, *Vorrang der Verfassung*…, pp. 158–161.

[38] R. v. Mohl, *Das Staatsrecht des Königreiches Württemberg*, Tübingen 1829, p. 81.

[39] R. v. Mohl, *Encyklopädie der Staatswissenschaften*, p. 142.

certain nations that would not stand in the relationship or not even result from their internal aspirations and conditions, would be unacceptable and would lead to detrimental results[40].

In view of the above, von Mohl's opinion is that the constitutional provisions must be altered in a situation, where they no longer meet the objectives of the state. The scholar is characterized by the belief that what seems intentional at a given moment may not always be appropriate after a given time interval and under different conditions. So, he reserved the right to amend the basic norms, although of course he was not in favour of frequent and rapid changes, which would prevent citizens from establishing strong ties with constitutional norms[41]. It is also worth mentioning that von Mohl foresaw the existence of a "constitutional court" (*Staatsgerichtshof*) in the state. Due to the fact that it is not possible to avoid constitutional disputes, collisions between the government and the representative body, there must be an institution in the state that will resolve these disputes[42]. Von Mohl saw the existence of such an institution as a "triumph of political education" and a harmonious embodiment of the idea of *Rechtsstaat*[43]. On the other hand, he believed that the best guarantee of observing and maintaining the constitutional order seemed to rest in the appropriately high character and level of political development of the nation, which should identify with its supreme constitutional act[44].

Acts, ordinances and their features

Ordinary acts of law (*einfache Gesetze*, *Gesetze*) are the second most important source of law in the state. When analyzing the issue of the role of an act in a legal state, one should first refer to determining the difference between the act and constitutional norms in von Mohl's thought. As already stated, the goal of organizational norms is to lay "general foundations", rules for the legal order. As part of these principles, the goals and limits of the state's operation are defined. The act, on the other hand, has the objective of developing and "filling in legal content" in those areas defined by the constitution. In addition, if something does not find a place in it, then the act may regulate it, but even then, it must comply with the "spirit" of higher-order norms[45]. From the above, the von Mohl's

[40] *Ibidem*, pp. 142–143.

[41] R. v. Mohl, *Das Staatsrecht des Königreiches Württemberg*, Tübingen 1829, p. 87; J. Hähnle, *Die politischen*…, p. 25.

[42] R. v. Mohl, *Das Staatsrecht des Königreiches Württemberg*, Bd. 1: *Das Verfassungsrecht*, Tübingen 1840, pp. 761–764.

[43] R. v. Mohl, *Die Verantwortlichkeit der Minister in Einherrschaften mit Volksvertretung*, Tübingen 1837, p. 25; J. Hähnle, *Die politischen*…, p. 26.

[44] *Ibidem*.

[45] R. v. Mohl, *Staatsrecht, Völkerrecht, Politik*, Bd. 2, *Politik*, Bd. 1, p. 413.

postulate appears, stating that the laws must correspond to the "spirit and positive content of constitutional and fundamental laws", and their amendment may only take place in accordance with higher-order norms[46]. Thus, the first requirement regarding the act appears, i.e. its compliance with higher-order norms (systemic, constitutional). Therefore, in order to be legally binding act must comply with them, if it is not so, it is not binding[47].

Referring to the very definition of the term "Act" (*Gesetz*), it should be stated that despite the fact that it appears in many of von Mohl's works, its material dimension is always essentially similar. The act was understood by him first as a permanent, "imperative norm" (*eine befehlende Norm*), referring to specific issues of the life of the state and its citizens, issued by the relevant authority, and being its formally expressed will[48]. By means of acts, the rule of law state regulates those relations between residents that either do not create specific rights or obligations between them (for example, of a civil law nature) or when certain relations or factual conditions require legal clarification. In addition, the state uses acts to introduce and safeguard its own interests and aspirations[49]. Nevertheless, the act in von Mohl does not assume solely a formal nature, i.e. it is not merely a "formally expressed will of state authority"[50]. The scholar stated that the most important subject of the regulations of state legislation are all the orders and prohibitions of power, which refer to the rights of citizens, either by extending, or by limiting them. For this reason, he also demands that the act should be adopted in consultation with the representation of the nation (which, as will be demonstrated later, will distinguish an act from an ordinance)[51].

Turning to the discussion of the features that should characterize an act in the von Mohl's rule of law, we should remind the rational view of the scholar, referring to the very reason why the new act can be issued. The sole reason for that is the so called "real necessity"[52]. According to von Mohl, there is no place for any whims, anxiety or conceit in the legislation, also of those in power. Any law introduced without real necessity will not only be superfluous, but also harmful to the state[53]. Therefore, the law cannot be an abstract phenomenon created to satisfy unjustified

[46] *Ibidem*, pp. 145–146; Ch.H. Schmidt, *Vorrang der Verfassung*…, p. 161. On the issues of legislation in von Mohl: L. Łustacz, *Ustawa i rozporządzenie w klasycznej doktrynie francuskiej i niemieckiej*, Warszawa 1968, pp. 171–173.

[47] R. v. Mohl, *Staatsrecht, Völkerrecht, Politik*, Bd. 2, *Politik*, Bd. 1, p. 386. Ch.H. Schmidt, *Vorrang der Verfassung*…, p. 123.

[48] R. v. Mohl, *Encyklopädie der Staatswissenschaften*, p. 144.

[49] *Ibidem*, pp. 144–145.

[50] I. Maus, *Entwicklung und Funktionswandel der Theorie des bürgerlichen Rechtsstaats* [in:] *Der bürgerliche Rechtsstaat*, ed. M. Tohipidur, Frankfurt am Main 1978, p. 21.

[51] R. v. Mohl, *Das Staatsrecht des Königreiches Württemberg*, Bd. 1: *Das Verfassungsrecht* (1840), pp. 67–68.

[52] R. v. Mohl, *Staatsrecht, Völkerrecht, Politik*, Bd. 2, *Politik*, Bd. 1, pp. 419–420.

[53] *Ibidem*.

aspirations, or to regulate factual conditions that do not require it. Von Mohl is characterized by a logical and liberal view that if the state is to support the life goals of a particular nation, then its law (as an instrument for this) is to serve it. Therefore, certain rights must result from the main task of the state, which is to support the life goals of a particular nation[54]. Therefore, it should be stated that since for von Mohl the state is not a creation for itself, its law does not exist for itself either.

It is worth noting that in terms of determining the rules for introducing new laws, von Mohl did not stop at the inexplicable statement about the need for the so--called "real necessity". On the contrary, he made a fairly detailed analysis of when it appears in the state. The obvious postulate is that the new law should be introduced when applicable regulations are not sufficient, contain gaps, or other formal and material errors. It seems that much more important, also from the point of view of goals of the rule of law, is von Mohl's conviction that the generally understood development of society (or the economy, etc.) requires the introduction of a new law. One can see the scholar's conviction about the servant role of the state, which should follow the development of the nation, also by adopting appropriate regulations[55].

Referring to the features which, according to von Mohl, should characterize "good laws" we should note that it seems that the most important one (also from the point of view of historical context) is the feature of generality. According to him, the act must be a general rule. Both the subjective and the objective scope of the act should include as many as possible specific relations regulated by its respective provisions[56]. The conviction about the generality of the act is also revealed in the postulate that its content should be limited to "basic principles" (*Grundsätze*) while avoiding unnecessary casuistry. In other words, legislation should be as abstract as possible[57]. Thus, von Mohl should be considered an opponent of all casuistic approaches to law. He is characterized, above all, by the belief that it is not possible to regulate all possible factual conditions with law. In addition, he also states that the need for the most general provisions is also an improvement in the process of applying the law (especially on the side of the judge)[58]. It is the general nature that will distinguish von Mohl's act from decisions made in individual cases, be it by courts or by administrative bodies[59].

Further features of "good acts" distinguished by von Mohl include the postulate of appropriate time during which the new law will be introduced[60]. The postulate

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[54] R. v. Mohl, *Encyklopädie der Staatswissenschaften*, p. 151.

[55] R. v. Mohl, *Staatsrecht, Völkerrecht, Politik*, Bd. 2, *Politik*, Bd. 1, p. 421.

[56] *Ibidem*, p. 428.

[57] R. v. Mohl, *Encyklopädie der Staatswissenschaften*, p. 153. Similarly: *idem*, *Staatsrecht, Völkerrecht, Politik*, Bd. 2, *Politik*, Bd. 1, p. 429.

[58] *Ibidem*, p. 430.

[59] R. v. Mohl, *Encyklopädie der Staatswissenschaften*, p. 146.

[60] R. v. Mohl, *Staatsrecht, Völkerrecht, Politik*, Bd. 2, *Politik*, Bd. 1, p. 425. On the desirable characteristics of legislation in von Mohl: Z.A. Maciąg, *Kształtowanie zasad państwa demokratycznego, prawnego i socjalnego w Niemczech (do 1949 r.)*, Białystok 1998, pp. 95–97.

that the law should not contain orders or bans that the addressee of the norm will find impossible to meet (*Ad impossibilia non datur obligatio*) also appears in many passages of his works[61]. Importantly, these provisions cannot oblige to impossible things in a legal sense (incompatibility with higher-order norms), but also in factual one (according to von Mohl this constitutes the incompatibility of the provision with human nature)[62]. Therefore, an act may also contain only such norms that are enforceable (also by coercion)[63]. In addition, it is very important for the legislator to take into account customary law and customs, as well as the level of civilization of a given nation, in the lawmaking process[64].

The demand for equality of all residents of the state before the law, is connected with the demand that the act should be equally binding for all residents of the state. It should be remembered that equality before the law forms one of the basic features of "modern rule of law" in von Mohl[65]. However, what is very important for the scholar, i.e. the postulate of equality before the law does not mean that one cannot create (when the need arises) particular provisions, referring, for example, to specific branches of the state economy. The principle of equality says that all who are under the rule of a given law are to be treated equally[66].

Extremely important, this time from the point of view of the state, is von Mohl's belief that all legislation should be consistent, and comply with the principles arising from the general idea on which it is based. Therefore, acts must "go in the same direction", that is, not only they must not introduce contradictory regulations, but they are also to reflect the most important goals and the idea of a given state[67]. The scholar believed that when individual parts of the legislation in the state "move in other directions" (they are not consistent), it will result in disputes regarding its role and responsibilities[68]. Therefore, the above also implies the postulate that all laws should be in line with the spirit of the system, which will also ensure the homogeneity of all state activities[69].

The law should be stable and function as long as possible. This does not mean, however, that von Mohl was an opponent of introducing changes in legislation. He accepted them, but argued for the widest possible impediment to their introduction, which would protect the state against recklessness, *ad hoc* and careless-

[61] R. v. Mohl, *Encyklopädie der Staatswissenschaften*, pp. 155, 148. Similarly: *idem*, *Staatsrecht, Völkerrecht, Politik*, Bd. 2, *Politik*, Bd. 1, p. 431.

[62] *Ibidem*, p. 433.

[63] R. v. Mohl, *Encyklopädie der Staatswissenschaften*, p. 145.

[64] R. v. Mohl, *Staatsrecht, Völkerrecht, Politik*, Bd. 2, *Politik*, Bd. 1, p. 386; *idem*, *Encyklopädie der Staatswissenschaften*, p. 153.

[65] R. v. Mohl, *Staatsrecht, Völkerrecht, Politik*, Bd. 2, *Politik*, Bd. 1, p. 434.

[66] *Ibidem*, p. 435. K.S. Zachariae believed similarly. More: K.S. Zachariae, *Vierzig Bücher vom Staate*, Bd. 4, Heidelberg 1840, pp. 23–25.

[67] R. v. Mohl, *Staatsrecht, Völkerrecht, Politik*, Bd. 2, *Politik*, Bd. 1, p. 436.

[68] *Ibidem*, p. 437.

[69] R. v. Mohl, *Encyklopädie der Staatswissenschaften*, p. 151.

ness in the introduction of a new law[70]. Von Mohl's objection to the simple process of reception of foreign law should also be raised here (even if certain regulations proved successful in another state). The law must comply with the factual conditions in the state, where it is to operate. Due to the fact that it rarely happens that identical factual conditions occur, a simple reception may be, according to von Mohl, a mistake[71].

A liberal, but also rational view is the requirement that acts should not violate the rightly and justly acquired private rights (e.g. property). Otherwise, the certainty and reliability of the entire legal order would be destroyed. On the other hand, the scholar allowed certain exceptions in which, in the name of a higher interest (e.g. that of a community or entire state), individual rights could be limited. The violation of private law by the state can therefore only occur if there is a legitimate and important social interest, which not implemented, would cause great harm to the community, and secondly, if the violation of private law is covered by compensation. Acts of law should also be characterized by "appropriateness of measures". Under this concept von Mohl understood the desire to ensure that in every single case the actions of the state, and the means applied, corresponded to the benefits that can be achieved. He therefore advocated that acts should not regulate subordinate issues by multiplying the costs of introducing the institutions they set up. Therefore, the implementation of an act may not generate costs exceeding the expected benefits thereof[72].

Many interesting postulates that demonstrate the liberalism of von Mohl relate to the formal dimension of acts. He listed five conditions for the formal correctness of an act, stating that it should be understandable and not giving raise to any doubt. The act should reflect the actual will of the legislator and be concise, and its content should be specified and divided in a way that facilitates its use. It should also utilize an appropriate language[73].

Referring to the first postulate, it should be pointed out that, according to von Mohl, it would be unfair to demand that citizens obey an act that is incomprehensible to them and raises doubts (although of course we are talking about citizens with general education enabling them to read specific legal norms)[74]. Undoubtedness of the act means that its provisions must be explicit and devoid of double meaning. One word should always mean one thing, and sentences should be simple, also in grammatical terms[75]. The above postulate is connected with von Mohl's liberal belief relating to the language of the act. The scholar is

[70] *Ibidem*, p. 148.

[71] *Ibidem*, p. 151.

[72] *Ibidem*, pp. 149, 153.

[73] R. v. Mohl, *Staatsrecht, Völkerrecht, Politik*, Bd. 2, *Politik*, Bd. 1, p. 438.

[74] *Ibidem*.

[75] R. v. Mohl, *Encyklopädie der Staatswissenschaften*, p. 153; *idem*, *Staatsrecht, Völkerrecht, Politik*, Bd. 2, *Politik*, Bd. 1, pp. 441–442.

strongly convinced that the act is not only intended for judges, but also for "ordinary" citizens. Therefore, its language must be as understandable as possible for them, and not for just those, who have relevant education in this field. Hence the acts should use, to the greatest possible extent, utilize commonly used vocabulary, and all specialist terms should be explained[76].

As already noted, the act should determine the actual will of the legislator. It is primarily about avoiding situations in which, through the messy or unprofessional coining of law, norms establishing goals other than its intentions are introduced into the legal order. Therefore, both the subjective and objective scope of the act must be appropriate. This means that it cannot regulate too much or too little, and it cannot contain provisions relating to other factual conditions, functioning within different subjective and objective scopes[77]. Therefore, an act may not express less than the legislator wanted to regulate. On the other hand, its scope cannot be too wide.

The act should also be as concise as possible. Of course, the volume of the act is a relative value, because – according to von Mohl – its scope determines the scope of the subject to be regulated. What the scholar meant was not the unjustified shortening of content of acts, but rather the avoidance of excess repetitions. The act should properly regulate specific issues using as few concise sentences as possible[78]. The act formulated in this way is to be absorbed faster in the legal awareness of citizens and will be more readily understandable[79]. What is revealed again, is von Mohl's belief that a broad knowledge of law is indispensable.

The appropriate scope of the act is of great importance to von Mohl both for its proper understanding and in order to facilitate its application. Therefore, an act should relate only to facts of a given type[80]. It should regulate them comprehensively so that there is no need to search for relevant provisions in other acts of law. On the other hand, if there are different subjective regulations in the act, they should be clearly separated in it. The act should be edited in such a way that the most general issues appear in its beginning, to provide the basis for more specific issues, which are included in further parts of the legal act[81].

As already mentioned, the so-called "common ordinances and provisions" formed the lowest rank of Mohl's hierarchy of law. The essence of the ordinances is their content of orders implementing specific provisions for acts of higher order. Therefore, they perform strictly executive function in relation to the acts

[76] Von Mohl put it briefly, stating that a code cannot speak the language of philosophers. *Ibidem*, pp. 440, 449; R. v. Mohl, *Encyklopädie der Staatswissenschaften*, p. 154.

[77] R. v. Mohl, *Staatsrecht, Völkerrecht, Politik*, Bd. 2, *Politik*, Bd. 1, p. 443.

[78] R. v. Mohl, *Encyklopädie der Staatswissenschaften*, p. 154.

[79] R. v. Mohl, *Staatsrecht, Völkerrecht, Politik*, Bd. 2, *Politik*, Bd. 1, p. 444.

[80] R. v. Mohl, *Encyklopädie der Staatswissenschaften*, p. 154.

[81] R. v. Mohl, *Staatsrecht, Völkerrecht, Politik*, Bd. 2, *Politik*, Bd. 1, pp. 446–448.

with which they obviously cannot contradict. It should be emphasized that in von Mohl ordinances differ from acts in that they do not require the cooperation of citizens (as was the case with acts of law)[82]. This is primarily due to the subordinate function of the ordinances, which cannot introduce new norms, but only regulate their implementation. Therefore, their issue was, according to von Mohl, vested solely in the state authorities, and also – in certain cases – in their authorized bodies. Interestingly, the right to issue them can be both provided for in an act, and then it will have a specific scope, or it may arise as a logical necessity to comply with the provisions of an ordinary act[83].

It should be noted that the understanding of acts and ordinances by von Mohl is symptomatic for the entire so-called "early constitutional doctrine" of the rule of law in Germany. One of the main aspirations at the time was limiting executive (royal) power, connected with a relatively large margin of actions being reserved for the legislative branch. The above described trend is reflected in the analysis of differences between the act and the ordinance. While the scope of the former is virtually unlimited, an ordinance needs to be justified to be introduced. However, its task is only to comply with acts, while prohibiting the introduction of new legal norms (which shall be reserved for the act)[84]. The von Mohl's belief that the ordinance should only execute acts corresponds to the contemporary dominant trend in the liberal doctrine in form of the belief that government activity should be based only on compliance with acts[85]. It is worth noting, however, that von Mohl was not consistent in his views. While the above understanding of the ordinance is appropriate for him during the *Vormärz* period, it begins to change later. This is evidenced by the conviction, explained in the pages of the third edition of the *Polizeiwissenschaft nach den Grundsätzen des Rechtsstaates* of the need for the existence, within the legal system, of "statements" of state authorities that are unrelated to the legislative branch and the acts of law, relating to the police activities of the state (so called "police ordinances", *Polizeiverordnungen*)[86]. In special cases (and von Mohl did not mean periods, when the legislative body is not able to assemble here), the government is entitled to issue regulations that have the force of law, where the activities of legislative bodies in the field of police activity are not appropriate[87].

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[82] R.-J, Grahe, *Meinungsfreicheit und Freizügigkeit. Eine Untersuchung zum Grundrechtsdenken bei Robert von Mohl*, Münster 1981, p. 84.

[83] R. v. Mohl, *Encyklopädie der Staatswissenschaften*, p. 146.

[84] R. v. Mohl, *Das Staatsrecht des Königreiches Württemberg*, Bd. 1: *Das Verfassungsrecht* (1840), p. 199.

[85] E. Angermann, *Robert von Mohl*…, p. 147.

[86] R. v. Mohl, *Die Polizeiwissenschaft nach den Grundsätzen des Rechtsstaates*, Tübingen 1866, pp. 45–47.

[87] E. Angermann, *Robert von Mohl*…, pp. 149–150. L. Łustacz, *Ustawa i rozporządzenie*…, p. 173.

Conclusions

The analysis presented above necessitates that we state that Robert von Mohl represented many of the typical features of his era, when it comes to the legal order of the *Rechtstaat* state. Not only within the meaning of the constitution, but above all in the understanding of the concept of law by this scholar, we can observe the most important features of German liberalism, as well as the effects of tensions between the broadly understood state and society during the *Vormärz* period[88].

Organization (*Verfassung*) is located at the very top in hierarchy of sources of law, which, according to von Mohl, usually adopts the form of a written constitution or group of constitutional acts. The "modern rule of law" must be based on constitutional norms, which are higher-order norms, that are difficult to change, permanent and guaranteeing, above all, civil rights, and at the same time shape citizens' relations with the authorities. So, one can clearly see the liberal postulate to protect citizens (bourgeois) against the arbitrariness of German princes or kings. However, it should be noted that von Mohl did not explicitly postulate institutionalized protection against situations of violation of the constitution, but only an option for a citizen to refuse to obey such laws. Moreover, in a situation where acts violate legal principles not included in the constitution, the citizen has, according to von Mohl, either to comply with such laws or to break the law, having to bear of all possible consequences thereof[89].

We should agree with the view that the early liberal German understanding of the act (as presented by von Mohl) forms the apex of the understanding of this concept in accordance with the principles of the *Rechtsstaat*. An act established in cooperation with the people, was to be a general and universal norm (which according to von Mohl was particularly important in the rule of law)[90]. The complicity of the national representation was to protect the principle of freedom of the citizen, while the principle of generality and universality was to protect against particular state attacks on the sphere of civil and social liberties. The act in accordance with the *Rechtsstaat* principle is the result of the general will expressed in the state, and the rule of such act means the rule of civil liberties[91].

It is worth noting that von Mohl's postulate of the generality and universality of the act is also connected with the previously expressed equality before the law principle forming part of the rule of law. An act may contain only norms equal for

[88] R.-J. Grahe, *Meinungsfreicheit und Freizügigkeit. Eine Untersuchung zum Grundrechtsdenken bei Robert von Mohl*, Münster 1981, p. 81.

[89] R. v. Mohl, *Das Staatsrecht des Königreiches Württemberg*, Bd. 1: *Das Verfassungsrecht*, Tübingen 1840, pp. 392–393; I. Maus, *Entwicklung und Funktionswandel*…, p. 23.

[90] U. Karpen, *Die geschichtliche Entwicklung des liberalen Rechtsstaates, Vom Vormärz bis zum Grundgesetz*, Mainz 1985, pp. 66–67; E.-W. Böckenförde, *Staat. Staat, Gesellschaft, Freiheit, Studien zur Staatstheorie und zum Verfassungsrecht*, Frankfurt am Main 1976, pp. 69, 86.

[91] *Ibidem*, p. 70.

everyone, i.e. general and abstract norms, because equality before the law is only possible with acts of general and universal content[92]. As von Mohl stated: "These general norms gain great importance precisely in the rule of law, because it is in it that the participants of the state experience changes and determination of their legal relationship not through arbitrary orders of human or supernatural authority, but solely through general laws that bind everyone on an equal basis"[93].

The act is the basis for the further operation of the state administration. It is also worth remembering that, in von Mohl, the differences between an act and a regulation reflect the then functioning conflict between the authority (monarch) and the people (representative body). "Important" legal norms such as acts (as opposed to regulations) should only be established in consultation with the people, which was also to be the way to secure individual civil liberties[94].

It would seem that based on the study of the triad of sources of law in the state, it is the state that, for von Mohl, is the source of all law, so that apart from positive law there cannot be other norms. However, in addition to positive laws, von Mohl also lists the customary law as source of law[95]. One should also remember about the so-called "philosophical constitutional law" and its regulations, coexisting with positive law. However, we cannot resist the impression that the scholar's explanation of the relationship between these two legal orders and their possible collisions remains blurred and unclear, which only confirms von Mohl's statement that, in the end, "a rational reader is able to find the truth"[96]. However, agreeing with Erich Angermann, we cannot deny von Mohl that in his understanding of the sources of law, and their hierarchy, he was basing on the analysis of real conditions in a respective state, and not on abstract concepts[97].

We find further evidence of von Mohl's reliance on experience and empiricism in his belief that, in addition to written law, also the custom and activity of courts can be the source of law in the state. One should also remember about the philosophical constitutional law and about the fact that von Mohl has not quite clearly defined the relationship between the written order and the whole of the aforementioned rest. There is no doubt, however, that the basis of the rule of law's activity should be the written law, which is subject to extensive analysis of von Mohl. The rooting of the scholar in liberal doctrine is further proved by his conviction that constitutional norms should be at the top of the hierarchy of sources of law. Higher-order norms,

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[92] U. Karpen, *Die geschichtliche Entwicklung*…, p. 68.

[93] R. v. Mohl, *Das Staatsrecht des Königreiches Württemberg*, Bd. 1: *Das Verfassungsrecht*, Tübingen 1840, p. 193.

[94] R.-J. Grahe, *Meinungsfreicheit und Freizügigkeit*…, pp. 84–85.

[95] H. Schmitz, *Die Staatsauffassung Robert von Mohls unter Berücksichtigung der verfassungs-geschichtlichen Entwicklung und des positivistischen Staatsdenkens*, Köln 1965, pp. 97–98.

[96] R. v. Mohl, *Encyklopädie der Staatswissenschaften*, p. 192; P. v. Oertzen, *Die soziale Funktion des staatsrechtlichen Positivismus*, Frankfurt am Main 1974, pp. 104–105.

[97] E. Angermann, *Robert von Mohl*…, p. 116.

difficult to change and guaranteeing civil liberties, should protect citizens against arbitrary decisions of authorities. The "ordinary" act of law, standing lower in the hierarchy, should be an overall and general norm, and also a norm created in cooperation with the people. The postulate of the generality and universality of the act was also to fulfill the principle of equality before the law prevailing in the rule of law. In contrast, the relationship between an act and a ordinance well illustrates the conflict between the monarch and the people at that time. The act of law, comprehensively regulating certain obligations of citizens, had to be created in consultation with the representation of the people. The ordinance, being only an implementing act, could be issued by the monarch autonomously.

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Summary

Presented article is an attempt to analyze Robert von Mohl's views regarding the formal dimension of his rule of law idea (*Rechtsstaat*). In the first part, the article analyzes relations between the written law and customary law in the thought of discussed German scholar. Next it discusses the notion of constitution in state, also when it comes to its definitions. The article is finished by the issues of an act and an ordinance in von Mohl's thought. Firstly it discusses the very notions of these normative acts. Secondly it analyzes the features that, according to von Mohl, should be fulfilled by them. Presented article proves not only the cohesion of von Mohl's view in terms of rule of law's formal dimension. It also proves that his views reflect the aspirations of German 19th century bourgeoisie. However, the article emphasize that von Mohl didn't fully solve certain problems i.e. mutual relations between written and customary law.

Keywords: Rechtsstaat, rule of law, *Verfassung*, constitution, Robert von Mohl

IDEA PAŃSTWA PRAWNEGO (*RECHTSSTAAT*) WEDŁUG ROBERTA VON MOHLA

Streszczenie

Przedstawiony artykuł stanowi próbę analizy poglądów Roberta von Mohla dotyczących formalnego wymiaru jego idei państwa prawnego (*Rechtsstaat*). W części pierwszej dokonano analizy relacji między prawem stanowionym i prawem zwyczajowym w myśli tego niemieckiego uczonego.

Następnie przedstawiono jego postrzeganie problemu konstytucji w państwie, również w kontekście stosowanych przez niego na ustawę zasadniczą określeń. Rozważania kończy omówienie kwestii dotyczących ustawy i rozporządzenia w myśli von Mohla. Po pierwsze, odnosi się ono do samych pojęć tych aktów normatywnych. Po wtóre, analizie poddano wymogi, jakie według von Mohla winny one spełniać. W niniejszym artykule dowiedziono nie tylko spójności poglądów von Mohla na kwestie szeroko rozumianego prawa. Wskazano również, że jego poglądy były odzwierciedleniem dążeń tworzącej się w XIX w. niemieckiej burżuazji. Z drugiej strony zwrócono uwagę na problemy nierozwiązane do końca przez uczonego. Mowa tu przede wszystkim o wzajemnych relacjach między prawem zwyczajowym a pisanym.

Słowa kluczowe: Rechtsstaat, państwo prawne, *Verfassung*, konstytucja, Robert von Mohl