

## ***Review Essay* - Ernst Forsthoff and the Intellectual History of German Administrative Law**

*By Florian Meinel\**

[Christian Schütte, *Progressive Verwaltungsrechtswissenschaft auf konservativer Grundlage: Zur Verwaltungsrechtslehre Ernst Forsthoffs*; Dunker & Humblot: Berlin (2006); ISBN-10 3-428-11913-4; 199 pp.; € 66.00]

### **A. Introduction**

For a long time an outstanding preoccupation with constitutional affairs has been one of the most remarkable characteristics of the study of administrative law in Germany. The pioneering works of Dietrich Jesch<sup>1</sup> and Hans-Heinrich Rupp<sup>2</sup> in the 1960's set up the long-term academic programme for public law in the Federal Republic.<sup>3</sup> The solutions for most of the key questions were believed to come from concepts of constitutional doctrine. Administrative law was being "constitutionalised", as it has been called.<sup>4</sup> This early development in the second decade of the Bonn Republic was enforced not only by the reduction of administrative discretion in favour of democratic legislation, but an ever more sophisticated theory and doctrine of basic rights turned out to be even more important as it provided the basic structures of administrative law.

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<sup>1</sup> DIETRICH JESCH, *GESETZ UND VERWALTUNG* (1961).

<sup>2</sup> HANS-HEINRICH RUPP, *GRUNDFRAGEN DER HEUTIGEN VERWALTUNGSRECHTSLEHRE* (1st ed., 1965, 2nd ed., 1991).

<sup>3</sup> FRIEDER GÜNTHER, *DENKEN VOM STAAT HER* 257-264 (2004).

<sup>4</sup> RAINER WAHL, *HERAUSFORDERUNGEN UND ANTWORTEN* (2006); Christoph Schönberger, „*Verwaltungsrecht als konkretisiertes Verfassungsrecht*“, in: *DAS BONNER GRUNDGESETZ*, 53-84 (Michael Stolleis ed., 2006). GUNNAR FOLKE SCHUPPERT/CHRISTIAN BUMKE, *DIE KONSTITUTIONALISIERUNG DER RECHTSORDNUNG* (2000).

However, times have since changed. Genuine questions of administration have re-entered the field of debate in public law. In the 1990's a broad academic movement has evolved under the common objective of the "reform of administrative law."<sup>5</sup> This research initiative focuses on a fundamental modernisation of administrative practice and of administrative law, with an emphasis on the political function and tasks of administration (*Verwaltungsaufgaben* became one of the key terms of the jargon). This approach constitutes a significant shift away from a more formal concern with legal instruments and rules, which has hitherto been methodically based on empirical criticism of traditional "normativism."<sup>6</sup> Not surprisingly, this advance lead to considerable controversy among public law scholars. The controversy around the so-called *Neue Verwaltungsrechtswissenschaft*<sup>7</sup> (New Administrative Law) by far exceeds the normal excitement over periodically emerging 'hot topics' in academic debate: this is reflected in the recent association of the contemporary debate with the famous *Richtungsstreit* between Hermann Heller, Carl Schmitt, Rudolf Smend and Hans Kelsen in the 1920's.<sup>8</sup> The principal achievements of the present debate are collected in the new handbook on the "Foundations of Administrative Law"<sup>9</sup> which constitutes the interim summary of more than a decade of interdisciplinary inquiry into the field, begun in 1993 with the fore-mentioned collection of essays "*Reform des Allgemeinen Verwaltungsrechts*." This collaborative research initiative in the 1990's and early 2000's has inspired a host of new monographical works exploring the theoretical basis of public law in general jurisprudence<sup>10</sup> as well as from a comparative<sup>11</sup>, methodological<sup>12</sup> and

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<sup>5</sup> REFORM DES VERWALTUNGSRECHTS (Eberhard Schmidt-Aßmann, Wolfgang Hoffmann-Riem, Gunnar Folke Schuppert ed., 1993); the main subjects and concepts are outlined in Andreas Voßkuhle, *Die Reform des Verwaltungsrechts als Projekt der Wissenschaft*, 32 DIE VERWALTUNG 45-54 (1999) and in Andreas Voßkuhle, "Schlüsselbegriffe" der Verwaltungsrechtsreform, 92 VERWALTUNGSARCHIV 184 (2001).

<sup>6</sup> See only Andreas Voßkuhle, *The Reform Approach in the German Science of Administrative Law*, in: THE TRANSFORMATION OF ADMINISTRATIVE LAW IN EUROPE 89 (Matthias Ruffert ed., 2007).

<sup>7</sup> Andreas Voßkuhle, § 1. *Neue Verwaltungsrechtswissenschaft*, in: GRUNDLAGEN DES VERWALTUNGSRECHTS, Vol. I, 1 (Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann, Andreas Voßkuhle eds., 2006).

<sup>8</sup> Christoph Möllers, *Braucht das öffentliche Recht einen neuen Methoden- und Richtungsstreit?*, 90 VERWALTUNGSARCHIV 187 (1999).

<sup>9</sup> GRUNDLAGEN (*supra* note 7).

<sup>10</sup> CHRISTIAN BUMKE, RELATIVE RECHTSWIDRIGKEIT (2004).

<sup>11</sup> Matthias Ruffert, *Die Methodik der Verwaltungsrechtswissenschaft in anderen Ländern der Europäischen Union*, in: METHODEN DER VERWALTUNGSRECHTSWISSENSCHAFT 165 (Eberhard Schmidt-Aßmann et al. eds., 2004).

<sup>12</sup> Andreas Voßkuhle, *Methode und Pragmatik im Öffentlichen Recht*, in: UMWELT, WIRTSCHAFT UND RECHT 171 (Hartmut Bauer et al. eds., 2002); METHODEN (*supra* note 11).

historical angle.<sup>13</sup> The great need for scientific self-assurance beyond ordinary doctrinal work illustrates the complexity of the questions recently raised.

## B. Why Ernst Forsthoff?

It is hence not surprising that one of the first historical works on administrative law in the Federal Republic is dedicated to a scholar who was not one of the architects of public law as was typical for post-war Germany, but was one of its prominent critics.<sup>14</sup> Ernst Forsthoff (1902-1974),<sup>15</sup> to whom the doctoral dissertation here under review is dedicated, strictly refused the fixation on the Constitution, since he was convinced that within in the modern state all core political questions are questions of administration. Together with the constitutional law historian Ernst Rudolf Huber<sup>16</sup>, Forsthoff can be considered the most important adept of Carl Schmitt, which earned him the label of Schmitt's "model pupil."<sup>17</sup> There is much in Forsthoff's work that confirms the strong influence that Schmitt's thinking had on Forsthoff.<sup>18</sup> In contrast, little work has been published which would undertake to explore the non-Schmittian elements in Forsthoff's administrative law theory. It appears that filling this gap has been one of the prime goals of Christian Schütte's dissertation.

Ernst Forsthoff, born towards the end of the long Nineteenth Century<sup>19</sup> can in many ways be seen as a representative intellectual of the "lost" generation of WW I.<sup>20</sup> In

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<sup>13</sup> Christoph Möllers, *Historisches Wissen in der Verwaltungsrechtswissenschaft*, in: *METHODEN* (supra note 11), 133-164.

<sup>14</sup> CHRISTIAN SCHÜTTE, *PROGRESSIVE VERWALTUNGSRECHTSWISSENSCHAFT AUF KONSERVATIVER GRUNDLAGE* (2006). It is remarkable that the book grew out of a doctoral dissertation written under the supervision of one of the main figures of the "New Approach" in administrative law, Andreas Voßkuhle, Professor of Public Law at the University of Freiburg

<sup>15</sup> For an English biography see JERRY Z. MULLER, *THE OTHER GOD THAT FAILED 392-395* (1987); on the personality, see also the account by Karl Doehring, *Ernst Forsthoff*, in: *FESTSCHRIFT RUPRECHT-KARLS-UNIVERSITÄT HEIDELBERG*, Vol. III 437-463 (Wilhelm Doerr ed., 1985); Karl Doehring, *Ernst Forsthoff*, in: *JURISTEN IM PORTRAIT* 341-349 (C. H. Beck ed., 1988); Karl Doehring, *Ernst Forsthoff als Hochschullehrer, Kollege und Freund*, in: *ERNST FORSTHOFF 9-20* (Willi Blümel ed., 2003).

<sup>16</sup> On Huber see RALF WALKENHAUS, *KONSERVATIVES STAATSDENKEN* (1997).

<sup>17</sup> Peer Zumbansen, *Carl Schmitt und die Suche nach politischer Einheit*, in: *KRITISCHE JUSTIZ* 71 (1997).

<sup>18</sup> On the continuity see Horst Firsching, *Am Ausgang der Epoche der Staatlichkeit?*, in: *METAMORPHOSEN DES POLITISCHEN* 203-218 (Andreas Göbel ed., 1995) and Reinhard Mehring, *Carl Schmitt und die Verfassungslehre unserer Tage*, in: *120 ARCHIV DES ÖFFENTLICHEN RECHTS* 177-204 (1995).

<sup>19</sup> JÜRGEN KOCKA, *DAS LANGE 19. JAHRHUNDERT. ARBEIT, NATION UND BÜRGERLICHE GESELLSCHAFT* (10<sup>th</sup> ed., 2002).

this simple fact his profile contrasts Schmitt's, whose intellectual starting point is the crisis of constitutional law of the turn of the century. Forsthoff's university career started in Frankfurt in 1933 by following the chair of the already mentioned Hermann Heller, a social democrat who prevented his demise by the Nazi government by emigrating to Spain. After three years of enthusiastic support for National Socialism, Forsthoff withdrew to a careful critical distance by the mid 1930s.<sup>21</sup> Forsthoff pursued, mainly in his 1938 study on *Die Verwaltung als Leistungsträger* (Administration as Provider of Services)<sup>22</sup> the idea of a post-liberal authoritarian administrative law of industrial high modernity, in sharp opposition to the "bourgeois" thinking of pre-war times. Perhaps more than other public lawyers of his age Forsthoff was aware of fundamental break the events of 1914 and 1918 imposed on state theory and public law, after the monarchy's traditional legitimacy had imploded.<sup>23</sup> Forsthoff painted a picture of a world devastated by war with all social and political institutions collapsing. In this world, the administration and its law had to assume the task of supplying the basic functions of political order – especially by using the powerful means of public services. Forsthoff condensed these observations in the famous notion of *Daseinsvorsorge* (provision for existence), a term that would remain crucial to the understanding of German administrative law until today.<sup>24</sup>

Due to serious conflicts with the Nazi government Forsthoff was banned from university teaching in 1941, as well as dismissed by American military administration in 1945, due to his pro-Nazi writings in the early 1930s, including the highly polemic and openly fascist brochure "*Der totale Staat*"<sup>25</sup> which brought the most personal damage to the author. It was only in 1951 that Forsthoff was reappointed at Heidelberg University.<sup>26</sup> During the previous ten or fifteen years in

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<sup>20</sup> See DETLEF J.K. PEUKERT, *DIE WEIMARER REPUBLIK* 94-100 (1987).

<sup>21</sup> Peter Caldwell, *Ernst Forsthoff and the Legacy of Radical Conservative State Theory in the Federal Republic of Germany*, in: XV HISTORY OF POLITICAL THOUGHT 621-627 (1994).

<sup>22</sup> ERNST FORSTHOFF, *DIE VERWALTUNG ALS LEISTUNGSTRÄGER* (1938). An English translation of some parts is given in WEIMAR. A JURISPRUDENCE OF CRISIS 326-7 (Arthur J. Jacobson et al, eds., 2000).

<sup>23</sup> Florian Meinel, *Der Verfassungsumbruch bei Kriegsende in der Staatsrechtslehre 1918-1939*, in: EUROPÄISCHE VERFASSUNGSENTWICKLUNGEN DER ZWISCHENKRIEGSZEIT (Christoph Gusy ed., 2007, forthcoming).

<sup>24</sup> Helmuth Schulze-Fielitz, § 12. *Grundmodi der Aufgabenwahrnehmung*, in: GRUNDLAGEN (*supra* note 7), 779-781.

<sup>25</sup> ERNST FORSTHOFF, *DER TOTALE STAAT* (1933); ERNST FORSTHOFF, *DER TOTALE STAAT* (2<sup>nd</sup> ed., 1934). An English translation of some parts is given in Jacobson et al (*supra* note 22), 320-3.

<sup>26</sup> STEVEN P. REMY, *THE HEIDELBERG MYTH* 193-4 (2002).

the political 'middle of nowhere' Forsthoff wrote his famous *Lehrbuch des Verwaltungsrechts* (Textbook of Administrative Law),<sup>27</sup> which gained a considerable importance in the early years of the Federal Republic of Germany.<sup>28</sup>

### C. A Fresh Look on Administration and Administrative Law in Forsthoff's work?

Christian Schütte sets the stage for his particular interpretation of Forsthoff's work with the title of his book characterising Forsthoff's legal thinking as "progressive administrative law on conservative foundations." In his introduction, he identifies one of his goals as being the assessment of Forsthoff's work "in a broader overview"<sup>29</sup> in order to show the correlations and differences between Forsthoff's concept of administrative law and his understanding of the state.<sup>30</sup> Yet, Schütte explicitly excludes the works on matters of constitutional law and state theory<sup>31</sup> from his analysis and also chooses to leave aside Forsthoff's writings on the constitutional and the general history of ideas. Arguably, it is from these restrictions that the book gains its systematic strength. At the same time, this strategic move gives way to doubts as to whether a broader inquiry into the context of administrative law in Forsthoff's work couldn't have changed his point of view on the topic significantly.

Merely as an introduction Schütte gives an outline of Forsthoff's theory of state and constitution,<sup>32</sup> which closely follows the usual understanding. The state is, as mainly has been argued in the early interpretation by Ulrich Storost,<sup>33</sup> characterised

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<sup>27</sup> ERNST FORSTHOFF, *LEHRBUCH DES VERWALTUNGSRECHTS*. Vol. I (10<sup>th</sup> ed., 1973). Though often announced, he never completed a second volume.

<sup>28</sup> Fritz Ossenbühl, *Die Weiterentwicklung der Verwaltungswissenschaft*, in: *DEUTSCHE VERWALTUNGSGESCHICHTE*, Bd. V, 1145 (Kurt G.A. Jeserich et al. eds., 1985); Michael Stolleis, *Verwaltungsrechtswissenschaft in der Bundesrepublik Deutschland*, in: *RECHTSWISSENSCHAFT IN DER BONNER REPUBLIK* 227-258, 235 (Dieter Simon ed., 1994); Michael Stolleis, §2. Entwicklungsstufen der Verwaltungsrechtswissenschaft, in: *GRUNDLAGEN* (*supra* note 7), 104; Andreas Voßkuhle, *Allgemeines Verwaltungs- und Verwaltungsprozeßrecht*, in: *RECHTSWISSENSCHAFT UND RECHTSLITERATUR IM 20. JAHRHUNDERT* 883 (Dietmar Willoweit ed., 2007); Christian Bumke, *Die Entwicklung der verwaltungsrechtlichen Methodik in der Bundesrepublik Deutschland*, in: *METHODEN* (*supra* note 11), 91-93.

<sup>29</sup> Schütte (*supra* note 14), 14.

<sup>30</sup> *Id.*, 15.

<sup>31</sup> Which are collected in ERNST FORSTHOFF, *RECHTSSTAAT IM WANDEL* (Klaus Frey ed., 2<sup>nd</sup> ed., 1976).

<sup>32</sup> Schütte (*supra* note 14), 18-35.

<sup>33</sup> ULRICH STOROST, *STAAT UND VERFASSUNG BEI ERNST FORSTHOFF* (1979).

by its authoritarian sovereignty, by its exclusive separation from society and by its precedence over all "law." Forsthoff saw the constitution as a formal structure comprised of "technical" elements of the rule of law which remained cut off from its historical and socio-economic roots. Following a concise logic, Forsthoff could argue that, all social - read: "socialist" - contents of constitutional law could effectively be neutralised by means of critical interpretation, since such 'weak' guarantees were "logic contradictions" to the concept of the constitution itself. Consequently, the constitution does not contain any normative directives for administrative action as long as the latter does not intervene in the fundamental rights of liberty and property. With this point of view Forsthoff became the most important opponent of the dominant "school" of thought lead by Rudolf Smend<sup>34</sup> whose more comprehensive approach to constitutional interpretation extended the concept of the constitution towards a legal order not only of the state but of social life based on "values."

Schütte declares Forsthoff's concept of the constitution an 'utter anachronism,'<sup>35</sup> without any relevance for today's constitutional law discourse.<sup>36</sup> This would be reasonable if and only if his outline of Forsthoff's view of state and constitution was accurate. Yet, the problem with this demarcation between state theory there and administrative science here is more fundamental. Schütte has not only little to say about Forsthoff's constitutional theory, but he also argues that the interesting part of Forsthoff himself is to a large degree independent from his own statist ideology. Schütte claims that mainly in the field of administrative science and theory Forsthoff had come to a more dynamic understanding of the administration, in the intellectual tradition of Max Weber's account of the administration as the "everyday life of power."<sup>37</sup>

By drawing a clear line between these two levels of Forsthoff's work, Schütte puts forward a reasonable restriction on his research subject, but at the same time raises a thick wallpaper over what otherwise could have been a more comprehensive exploration of the connections between constitutional and administrative law theory in Forsthoff's work. Interestingly, Schütte never goes out of his way to seriously give an answer to the obvious question, whether such a separation can really work.

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<sup>34</sup> See Günther (*supra* note 3), 159.

<sup>35</sup> Schütte (*supra* note 14), 35.

<sup>36</sup> *Id.*, 166.

<sup>37</sup> MAX WEBER, WIRTSCHAFT UND GESELLSCHAFT 141 (5<sup>th</sup> ed., 1972).

### *I. The 'new perspective': Forsthoff's case for Daseinsvorsorge*

Schütte's enquiry is divided into four parts. The first part looks for an approach to administrative law based on *Verwaltungsaufgaben* (administrative functions and tasks) rather than upon *Rechtsformen* (legal forms).<sup>38</sup> Schütte therefore presents Forsthoff's case for *Daseinsvorsorge* as *the* primary function of modern administration. Regrettably he only refers to the historical introduction of the *Lehrbuch*.<sup>39</sup> Other texts, such as the early monograph on the "public corporation in the federal state"<sup>40</sup> and his *Verfassungsgeschichte*,<sup>41</sup> an introduction to constitutional history written during the war and re-edited three times until 1972, could have made the picture slightly more colourful. As Forsthoff first argued in the early 1930s, the transformation of the contemporary nation state in Europe towards the welfare state was driven by the social transformations brought about by industrialisation<sup>42</sup> which made modern man "dependent," "needing," and "socially sensitive." Forsthoff sought to compensate the specifically "modern," fragile human constitution by administrative *Daseinsvorsorge*. State administration thereby seizes the most intense power over the social order and dominates the scheme of separation of powers.<sup>43</sup>

Schütte presents this argument as paradigmatic for the deduction of a "new administrative task" from sociological analysis,<sup>44</sup> although he objects that Forsthoff's model of social structure is empirically insufficient<sup>45</sup> and accuses Forsthoff "of not referring to sociological research to back up his thesis."<sup>46</sup> Yet, Schütte's criticism is unhistorical in two ways: firstly, he fails to show whether any "empirical research" at the time had been available which could have supported the rather large-scale argument. Secondly, Forsthoff has sociological sources, even

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<sup>38</sup> Schütte (*supra* note 14), 36-59.

<sup>39</sup> Forsthoff (*supra* note 27), 18-40, 59-60.

<sup>40</sup> ERNST FORSTHOFF, DIE ÖFFENTLICHE KÖRPERSCHAFT IM BUNDESSTAAT (1931).

<sup>41</sup> ERNST FORSTHOFF, DEUTSCHE VERFASSUNGSGESCHICHTE DER NEUZEIT (1<sup>st</sup> ed., 1940); ERNST FORSTHOFF, DEUTSCHE VERFASSUNGSGESCHICHTE DER NEUZEIT (2<sup>nd</sup> ed., 1961). The second edition for the first time contained the important chapter on the constitutional development between 1871 and 1933.

<sup>42</sup> Schütte (*supra* note 14), 40.

<sup>43</sup> *Id.*, 45-7, 50-2, 80.

<sup>44</sup> *Id.*, 45-6.

<sup>45</sup> *Id.*, 45.

<sup>46</sup> *Id.*, 45-6.

if he does not quote them, which in the late 1930s is little astonishing: the correlation between spatial densification of social life, urbanisation, and technical progress on the one hand and structural transformations of political power on the other is one of the basic experiences of European thought in the interwar years and was already a topos of early 20<sup>th</sup> century sociology, for example in the works of Georg Simmel or Werner Sombart.<sup>47</sup>

Due to the book's narrow concentration on administrative law Schütte does not only fail to show the contemporary context of *Daseinsvorsorge*, but he also does not sufficiently reflect on the political ambivalence of the implicit social philosophy. It is mainly Jens Kersten who has recently pointed out the strong correlation between personal provision and social control Forsthoff establishes,<sup>48</sup> and has shown how Forsthoff conceptualises *Daseinsvorsorge* as a basic element of stable political order in post-traditional societies.<sup>49</sup> *Daseinsvorsorge* is not only a primary function and duty of administration, as Schütte treats it exclusively, but in the first place the state's entitlement to power over the weak, dependent modern man.<sup>50</sup>

Nevertheless, Schütte is right in arguing that the discovery of *Daseinsvorsorge* was groundbreaking for the study of administrative law.<sup>51</sup> It has contributed considerably to the evolution of the law of public services in Germany, which for a long time was based upon extremely statist positions in the alleged tradition of Ernst Forsthoff. In this sense indeed Forsthoff was a "progressive" writer. But there are other questions raised by the concept of *Daseinsvorsorge* in a historical perspective, to which Schütte does not have a satisfying answer. Beyond the narrow field of public services it is worth asking whether Forsthoff's understanding of the political function and dimension of administration and administrative law was pioneering for the later understanding of public law in general after WW II and for the post-fascist transformations of state theory in Germany. Forsthoff not only gave one of the earliest and most fascinating interpretations of the "seizure of power of public law"<sup>52</sup> in the 20<sup>th</sup> century, but the preoccupation of conservative social philosophers such as Arnold Gehlen or Niklas Luhmann with welfare state

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<sup>47</sup> The two classical texts are GEORG SIMMEL, *SOZIOLOGIE DES RAUMES* (1903) and WERNER SOMBART, *WARUM GIBT ES IN DEN VEREINIGTEN STAATEN KEINEN SOZIALISMUS?* (1906).

<sup>48</sup> Jens Kersten, *Die Entwicklung des Konzepts der Daseinsvorsorge im Werk von Ernst Forsthoff*, in: 44 *DER STAAT* 547 (2005).

<sup>49</sup> *Id.*, 553.

<sup>50</sup> See further PEER ZUMBANSEN, *ORDNUNGSMUSTER IM MODERNEN WOHLFAHRTSSTAAT* 102-3 (2000).

<sup>51</sup> Schütte (*supra* note 14), 166.

<sup>52</sup> FRANZ WIEACKER, *INDUSTRIEGESELLSCHAFT UND PRIVATRECHTSORDNUNG* 39 (1974).



theory is also strongly influenced by Forsthoff's view of the administrative 'system.'

Furthermore, the need for a closer look at the theoretical foundations and implicit presumptions of *Daseinsvorsorge* could only become recognized when the German tradition of public services was eventually confronted with other models and legal concepts of public services in the process of European integration.<sup>53</sup> The long-term intellectual achievement of Forsthoff will thus only be visible from a comparative perspective of different legal models designed to reflect social transformation under the conditions of authoritarian high modernity and their respective contribution to what is currently discussed as the "European Social Model."

## II. Methodological Consequences

What were the methodological consequences of Forsthoff's shifting of paradigms towards *Daseinsvorsorge*? According to Schütte, Forsthoff's declared "overcoming"<sup>54</sup> of legal positivism should have had a "fundamental impact on the method of administrative law."<sup>55</sup> Forsthoff himself called for methodical change at least since 1935 – in explicit reference to Nazi criticism of "liberal" theory of administrative law.<sup>56</sup> Seemingly contradicting his own proclamation, Forsthoff's famous and influential *Lehrbuch* did not follow the "new" approach. It would have been logical for Forsthoff to declare a shift in administrative doctrine from 'forms' to 'functions.' Instead, his *Lehrbuch* keeps the faith and sticks to the tradition of the classics, notably the administrative law understandings of scholars like Otto Mayer,<sup>57</sup> Fritz Fleiner,<sup>58</sup> and Walter Jellinek.<sup>59</sup> As Schütte puts it: "Regarding the extremely progressive writings on the social implications of administrative law and on its methodical consequences, Forsthoff's systematic presentation in the *Lehrbuch* is remarkably traditional."<sup>60</sup> Schütte investigates the difficulties of Forsthoff's claim to

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<sup>53</sup> See further, Martin Bullinger, *Französischer service public und deutsche Daseinsvorsorge*, in: JURISTENZEITUNG 597 (2003).

<sup>54</sup> Forsthoff (*supra* note 27), 164.

<sup>55</sup> Schütte (*supra* note 14), 59.

<sup>56</sup> *Id.*, 72, 77, 79-80.

<sup>57</sup> OTTO MAYER, DEUTSCHES VERWALTUNGSRECHT, 2 Vols. (3<sup>rd</sup> ed., 1924).

<sup>58</sup> FRITZ FLEINER, INSTITUTIONEN DES DEUTSCHEN VERWALTUNGSRECHTS (8<sup>th</sup> ed., 1928).

<sup>59</sup> WALTER JELLINEK, DEUTSCHES VERWALTUNGSRECHT (3<sup>rd</sup> ed., 1931).

<sup>60</sup> Schütte (*supra* note 14), 140.

transform “Daseinsvorsorge,” initially a heuristic concept, into a useful and applicable *legal* concept. It is thoroughly convincing how Schütte demonstrates the missing links between the theoretical and the more detailed parts of the *Lehrbuch*, the latter increasingly lacking to keep in touch with academic discussion and jurisdiction. Schütte’s principal criticism of Forsthoff aims at the fact that splitting administrative law into two parts, intervention and public services, must fail to provide any systematic structure of the matter.<sup>61</sup> While this may be true, it is not a relevant objection to Forsthoff. Obviously, the concept of “system” and “systematisation” had for a long time been the pride of the fairly young discipline of Administrative Law in Germany.<sup>62</sup> Forsthoff however was sceptical on the possibility of any such “system,” since he considered its premises to be exclusively valid under the conditions and political functions of administrative law in the “liberal age.”

The scepticism went even further and finally the situation of jurisprudence itself was concerned: Forsthoff admired the 19<sup>th</sup> century’s academic ‘systems’, but did not trust them to guarantee the “unity” of administrative law and law in general. Instead, Forsthoff was increasingly convinced that the coherence of law depended on the rational, mechanical, and “undisturbed” functioning of state “institutions.” For this reason Forsthoff’s method has often been characterised<sup>63</sup> by himself and others – as “institutional.”<sup>64</sup> It is crucial to be quite sure about the meaning of this self-classification, because the concept of “institutions” in German 20<sup>th</sup> century jurisprudence is frequent but nevertheless utterly shapeless. Scholars as dissimilar as Erich Kaufmann,<sup>65</sup> Carl Schmitt,<sup>66</sup> Peter Häberle,<sup>67</sup> or Ernst Forsthoff<sup>68</sup> have made

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<sup>61</sup> *Id.*, 106.

<sup>62</sup> See MICHAEL STOLLEIS, *GESCHICHTE DES ÖFFENTLICHEN RECHTS IN DEUTSCHLAND*, VOL. II 394-410 (1992), EBERHARD SCHMIDT-ARMANN, *DAS ALLGEMEINE VERWALTUNGSRECHT ALS ORDNUNGSIDEE* 2 (2<sup>nd</sup> ed., 2004).

<sup>63</sup> Forsthoff (*supra* note 27), 164.

<sup>64</sup> DIRK PAUST, *DIE INSTITUTIONELLE METHODE IM VERWALTUNGSRECHT* (1997); WOLFGANG MEYER-HESEMANN, *METHODENWANDEL IN DER VERWALTUNGSRECHTSWISSENSCHAFT* 82 (1981).

<sup>65</sup> Erich Kaufmann, *Die Gleichheit vor dem Gesetz im Sinne des Art. 109 der Reichsverfassung*, in 3 *VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER* 2 (1926).

<sup>66</sup> CARL SCHMITT, *ÜBER DIE DREI ARTEN DES RECHTSWISSENSCHAFTLICHEN DENKENS* (1934).

<sup>67</sup> PETER HÄBERLE, *DIE WESENSGEHALTSGARANTIE DES ARTIKEL 19 ABS. 2 GRUNDGESETZ* (3<sup>rd</sup> ed., 1983).

<sup>68</sup> Forsthoff (*supra* note 27), 164-7.

claims to it.<sup>69</sup> The interpretation of Schütte, who establishes a link between Forsthoff's institutional theory of law and Carl Schmitt's theory of "concrete orders,"<sup>70</sup> hints at a major problem of the intellectual history of German jurisprudence.

However, the simple identification of these two concepts fails to show the substantial differences. In fact, Forsthoff's position – in this point at least – can hardly be understood as anything but a contradiction to Carl Schmitt. After having promoted an "institutional understanding" of the civil liberties of the Weimar Constitution as late as 1932,<sup>71</sup> it was Schmitt who had turned the concept of institutions into an "institutional jurisprudence" of "concrete orders"<sup>72</sup> making advances to national-socialist metaphysics as well as natural right terminology, to which he stuck after 1945. In contrast, Forsthoff began to spend much time with studies on methodology after Schmitt's about-turn of 1933,<sup>73</sup> a work finally resulting in an explicit criticism of "concrete order" theory as early as 1940.<sup>74</sup>

Schütte's conclusion is also ambiguous in a second regard: as he points out, there is a notable discrepancy between Forsthoff's "progressive" theoretical approach in administrative law and the striking absence of the same innovation in terms of legal doctrine and conceptualisation.<sup>75</sup> In looking for explanations, one will not find them in Schütte's book, though he briefly considers this "lack of consequence" could be due to Forsthoff's concept of *Rechtsstaat* (Rule of Law).<sup>76</sup> "One has the impression that the antagonism between the Rule of Law and the welfare state Forsthoff insists on sometimes blocks a more open-minded view."<sup>77</sup> Peter Häberle, in his obituary for Forsthoff already pointed to this alleged "self-contradiction." Häberle argued

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<sup>69</sup> If there is anything at all these scholars have in common it is their interest in French Jurisprudence of fin de siècle, especially in Maurice Hauriou and Léon Duguit.

<sup>70</sup> Schütte (*supra* note 14), 96.

<sup>71</sup> Carl Schmitt, *Inhalt und Bedeutung des zweiten Hauptteils der Reichsverfassung*, in HANDBUCH DES DEUTSCHEN STAATSRECHTS, Vol. II 572 (Gerhard Anschütz/Richard Thoma eds., 1932).

<sup>72</sup> Schmitt (*supra* note 66).

<sup>73</sup> Mainly with the works Ernst Forsthoff, *Über Gerechtigkeit*, in DEUTSCHES VOLKSTUM 969-974 (1934); Ernst Forsthoff, *Zur Rechtsfindungslehre im 19. Jahrhundert*, in 96 ZEITSCHRIFT FÜR DIE GESAMTE STAATSWISSENSCHAFT 49-70 (1936); Ernst Forsthoff, *Vom Zweck im Recht*, in ZAKDR 4 (1937), 174-177; ERNST FORSTHOFF, RECHT UND SPRACHE (1940); ERNST FORSTHOFF, GRENZEN DES RECHTS (1941).

<sup>74</sup> ERNST FORSTHOFF, RECHT UND SPRACHE 42 (1940).

<sup>75</sup> Schütte (*supra* note 14), 141.

<sup>76</sup> *Id.*, 140-1.

<sup>77</sup> *Id.*, 141.

that “if Forsthoff had made the concept of ‘Daseinsvorsorge’ an integral part of a constitution based on the rule of law *and* on the welfare state, some contradictions could have been avoided.”<sup>78</sup>

It is clear that the strict separation (and opposition) of constitution and administration marks the beginning of Forsthoff’s road to isolation in German public law. Most scholars methodically followed the programme of “constitutionalisation,” even though Forsthoff’s emphasis on administrative expertise and autonomy remained central to German public law.<sup>79</sup> What is less obvious than the result of the game is whether Forsthoff’s “hidden” argument in favour of the “contradiction” between constitution and administration is *the* actual key to Forsthoff’s jurisprudence.

#### D. State and Industrial Society in the 1970s

The concluding chapter of Schütte’s monograph is dedicated to the “functions of administration within the ‘state of industrial society.’”<sup>80</sup> Treating Forsthoff’s late writings on theory of state and administration, on the transformation of bureaucracy in the process of what Forsthoff called “technical realisation,”<sup>81</sup> and on the “state of industrial society,” Schütte inevitably ventures somewhat beyond the self-erected confines of his analysis, which he wanted to limit to administrative law.

In the 1950’s and 1960’s, Forsthoff became increasingly influenced by the social theory of the “Leipzig School,” mainly by Arnold Gehlen and his teacher Hans Freyer,<sup>82</sup> who in the early Nazi years had shared Forsthoff’s fascination for state ‘planning.’<sup>83</sup> The social philosophy of *Daseinsvorsorge*, Gehlen and Freyer now

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<sup>78</sup> Peter Häberle, *Lebende Verwaltung trotz überlebter Verfassung?*, in JURISTENZEITUNG 688 (1975).

<sup>79</sup> CHRISTOPH MÖLLERS, STAAT ALS ARGUMENT (2000).

<sup>80</sup> Schütte (*supra* note 14), 142, quoting Forsthoff’s last book: ERNST FORSTHOFF, DER STAAT DER INDUSTRIEGESELLSCHAFT (1971).

<sup>81</sup> Ernst Forsthoff, *Von der sozialen zur technischen Realisation*, in 9 DER STAAT 145 (1970).

<sup>82</sup> Muller (*supra* note 15), 339-41: What Forsthoff called “technical realisation” had close relations with Freyer’s famous notion of “secondary systems”. See also Dirk van Laak, *From the Conservative Revolution to Technocratic Conservatism*, in: GERMAN IDEOLOGIES SINCE 1945 150 (Jan Werner Müller ed. 2003).

<sup>83</sup> See HANS FREYER, HERRSCHAFT UND PLANUNG (1933) and Ernst Forsthoff, *Führung und Planung*, in: 7 DEUTSCHES RECHT 48 (1937).

frequently referred to under the new paradigm of 'industrial society',<sup>84</sup> had obviously been formed under the intellectual climate of the interwar years and was now becoming increasingly inadequate under the political conditions of the Federal Republic. Forsthoff went on to dissolve the ties between the function of *Daseinsvorsorge* and state administration and instead identified 'industrial society' as the central responsibility of the administration. Correspondingly, Forsthoff advocated a reconsideration of political powers along increasingly functionalist lines. This marked a dramatic shift in administrative theory: when Forsthoff declared that the "age of social realisations" was complete, with the "technical realisation" taking its place, for him the statist foundations of *Daseinsvorsorge* had become fragile. The social "densification," Forsthoff argued, by the use of social liberties had come to a stage at which the technical development, empowered by social transformations, reached substantial autonomy making it the "strongest domestic political force"<sup>85</sup> against the state. At the same time Gehlen argued with the same reasons as Forsthoff that the rise of the 'industrial society' was the last historical transformation at all bringing about the age of 'crystallisations'.<sup>86</sup> This turn to cold semantics of philosophy of history was typical for intellectual conservatives in the early post-war period<sup>87</sup> and within this shift Forsthoff's orientation towards a "technocratic conservatism" has always been considered paradigmatic.<sup>88</sup>

However, most of the scenario of crisis Forsthoff hints at with the concepts of "technical realisation" and the "state of industrial society" remains on the level of mere visions of decline, with poor analytical substance. Schütte's discussion of the role of the state within this scenario ultimately disappoints. It remains, he argues, "Forsthoff's achievement [...], to have introduced the problem of technology into debates on constitutional and administrative law and to have shown the need for state regulation of technological progress."<sup>89</sup> On the other hand, Schütte makes strong objections to Forsthoff's concept of technology.<sup>90</sup> Almost all protagonists of

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<sup>84</sup> On the term see GABRIELE METZLER, KONZEPTIONEN POLITISCHEN HANDELNS VON ADENAUER BIS BRANDT 34-80 (2005).

<sup>85</sup> Forsthoff (*supra* note 80), 33.

<sup>86</sup> JENS HACKE, EINE PHILOSOPHIE DER BÜRGERLICHKEIT 46 (2006).

<sup>87</sup> Hacke (*supra* note 86), 45-8; J. W. MÜLLER, A DANGEROUS MIND 104-115 (2003).

<sup>88</sup> van Laak (*supra* note 82), 147.

<sup>89</sup> Schütte (*supra* note 14), 152.

<sup>90</sup> *Id.*, 149. Schütte's evidence on this point is not always strong. An article of a pupil of Forsthoff spreading that "Carl Schmitt mentioned in conversations that Forsthoff had missed the essence of

the “Conservative Revolution” have thought of the “technical” in a mythical way – Hans Freyer<sup>91</sup> as well as Ernst and Friedrich Georg Jünger<sup>92</sup> or Martin Heidegger.<sup>93</sup> It would have been more interesting to know whether the late Forsthoff merely reformulates this “politics of cultural despair”<sup>94</sup> under changed conditions or whether Forsthoff comes to a new perspective on his old concern. Schütte fails to give real evidence that there is a bridge between Forsthoff’s claim human liberty could only be saved from the “technical process” by a strong states’s “real power” over industrial society on the one hand and a modern public law of environment and technology on the other.

### E. Conclusion

Forsthoff’s political thought reflects the transformations of public law in the 20<sup>th</sup> century, since it casts a bright light on the ambiguity of the “crisis of classical modernity.”<sup>95</sup> Yet, in what sense can the oeuvre be called “progressive” as Schütte does? The arguments used to support his view mainly aim at Forsthoff’s focus on the study of the “reality of administration.” But is this enough to call him and his work “progressive?” The German historian Reinhart Koselleck, another adept of Carl Schmitt and a friend of Forsthoff from their common Heidelberg days, has analysed in his classical study on Prussia in the aftermath of the French Revolution the role of a clever bureaucracy in preventing social revolt.<sup>96</sup> Koselleck focussed on the time after 1789, while Forsthoff’s moment of truth came in 1914. In a world devastated by war, the role and burden of the administration had to be reconsidered. For both scholars, it appeared that the administration was then expected to be the last resort of order against chaos.

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technology” (p. 149 Note 631), is not quite the right objection to Forsthoff’s notion of the “technical process”.

<sup>91</sup> Hans Freyer, *Über das Dominantwerden technischer Kategorien in der Lebenswelt der industriellen Gesellschaft*, in *GEDANKEN ZUR INDUSTRIEGESELLSCHAFT* 131 (Arnold Gehlen ed., 1970).

<sup>92</sup> Ernst Jünger, *Der Arbeiter*, in *SÄMTLICHE WERKE*, Vol. 7, 9 (1980); FRIEDRICH GEORG JÜNGER, *DIE PERFEKTION DER TECHNIK* (1946).

<sup>93</sup> MARTIN HEIDEGGER, *DIE TECHNIK UND DIE KEHRE* (1962).

<sup>94</sup> FRITZ STERN, *THE POLITICS OF CULTURAL DESPAIR* (1961).

<sup>95</sup> Peukert (*supra* note 20).

<sup>96</sup> REINHART KOSELLECK, *PREUSSEN ZWISCHEN REFORM UND REVOLUTION* (3<sup>rd</sup> ed., 1981), on “Daseinsvorsorge” p. 621, *see* Müller (*supra* note 87), 112.

It is this existential awareness of crisis that explains the fascination still radiating from Forsthoff. This consciousness is the demarcation line between Forsthoff's age and the time before and after, which becomes clear reading the remarkable work of Lorenz Jellinghaus published almost at the same time as Schütte's. Jellinghaus' aim is to defend the 19<sup>th</sup> century founding fathers of administrative law against Forsthoff's *Daseinsvorsorge*. Jellinghaus argues that with a "brilliant but basically totalitarian theory of administration"<sup>97</sup> Forsthoff had blocked the view on a different and liberal approach to the phenomenon of public services. The right answers to Forsthoff's questions, Jellinghaus concludes, had already been given by Otto Mayer and the tradition of self-government: "The more Forsthoff's model of '*Daseinsvorsorge*' is becoming historical, the easier it is to question its historical presumptions."<sup>98</sup> Jellinghaus' impressive monograph gives strong evidence particularly against the "realism" of Forsthoff, thereby shedding light on Schütte's contention of Forsthoff's allegedly progressive administrative law theory.

However, is it fair to simply accuse Forsthoff of his demarcation of what he conceived of as the 19<sup>th</sup> century liberalism and his intellectual origins in the political existentialism of European interwar times as Jellinghaus does? The question as to whose view on the role of administration in the modern industrialised state has been the most "realistic" is not a reasonable historical question. Carving out the implicit models of reality and the political reflection of their time in jurisprudence is.

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<sup>97</sup> LORENZ JELLINGHAUS, *ZWISCHEN DASEINSVORSORGE UND INFRASTRUKTUR* 15 (2006).

<sup>98</sup> *Id.*, 282.

