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The Question of Civil Rights in the Views of Robert von Mohl

Problematyka praw obywatelskich w świetle poglądów Roberta von Mohla

ABSTRACT

The main object of the presented article is to prove that, according to Robert von Mohl's views on the idea of civil rights, he should be classified as the exponent of moderate early German liberalism. The first section of the study drafts a background for its next two parts. It presents the socio-political circumstances of the German states from the beginning of the 19th century to the developments of the Springtime of the Peoples. The analysis of the German scholar views on the citizenship's idea in the context of the *Rechtsstaat* and basic rights notion is undertaken in the second part of the article. In the third part, it is proved, that von Mohl was a thinker who chose the path of the "golden mean". Regarding the citizen's position in state, on the one hand, he proposed a substantial catalogue of civil rights. On the other hand, he didn't support the idea of universal political rights.

Keywords: Robert von Mohl; early German liberalism; legal state; civil rights; Springtime of the Peoples

INTRODUCTION

The article aims to demonstrate the thesis that the perception of the concept of civil rights by German scholar Robert von Mohl may classify him as a representative of moderate German liberalism of the first half of the 19th century. To this end,

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the legal and political situation of the German lands from the early 19th century until the developments of the Springtime of the Peoples was presented.[1] Von Mohl's understanding of the concept of citizen was then analysed in the context of the idea of *Rechtsstaat* formulated by him. In conclusions, there is the analysis of the catalogue of civil rights typical of the idea of the rule of law presented by von Mohl.[2]

LEGAL AND POLITICAL CIRCUMSTANCES OF THE GERMAN LANDS IN THE FIRST HALF OF THE 19TH CENTURY

The first half of the 19th century (referred to as *Vormärz* in the German scientific discourse) was a turbulent period in the history of Germany. The fall of the First Reich, the Napoleonic wars, the restoration process after the Congress of Vienna, and finally the industrial revolution are just the most important factors affecting every aspect of the development of the situation in German lands. Individual German states entered into the 19th century as enlightened absolutist monarchies in which the whole authority was vested in the monarch and his bureaucratic apparatus. Thus, the structure of most states of the German cultural circle was based on the idea of *Polizeistat*. It was rooted in the postulate of the monarch providing his subjects with the widest possible care, but in circumstances of their limited freedom.[3] In comparison with England and neighbouring France, Germany was backward not only in economic, but also in socio-political terms. Aristocracy and peasants were characterised by conservatism and reluctance to change.[4] Seditious tendencies, if any, were effectively suppressed by the fear of the negative effects of the revolution known from France.[5] Nonetheless, liberal ideas carried by the

[1] For the purposes of the article, "German lands", as well as "German territories" and "German area" are understood to mean all the countries of the German cultural circle in the first half of the 19th century.

[2] All translations of quotations and phrases from German were made by the author of the article. The author used the Polish edition of *Encyklopedia umiejętności politycznych* (*Encyclopedia of Political Sciences and Political Economics*) the translation of which was modernised by Adam Bosiacki who also wrote an introduction thereto. See R. von Mohl, *Encyklopedia umiejętności politycznych*, vol. 1–2, Warszawa 2003.

[3] *Polizeistaat* – literally "police state".

[4] The article defines as "conservative" the currents of socio-political thought aimed at defending traditional values, reluctant towards change and showing allegiance to the then *status quo*, while the adjective "liberal" denotes worldview attitudes striving to change the then socio-political system, and affirming personal freedom and individualism as a foundation of the state. See A. Heywood, *Klucz do politologii*, Warszawa 2008, p. 58, 61.

[5] Z. Zieliński, *Niemcy. Zarys dziejów*, Katowice 2003, p. 113. This refers to the so-called *Le Grand Terreur*. See M. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, München 1992, p. 43.

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crowd that conquered the Bastille became more and more popular in Germany. With the development of the industrial revolution and the capitalist economy, the bourgeoisie grew strong. Over time, its representatives increasingly advocated the liberalisation of the rules of political and social life. Thanks to Immanuel Kant and Wilhelm von Humboldt, the idea of *Rechtsstaat* was also gaining popularity.[6] At the early stage of its development, it did not include the postulate for the state to act on the basis and within the law. This was so because it expressed opposition to the absolutist *Polizeistat*, carrying the burden of a specific system of values.[7] It assumed the liberalisation of political and social life in absolutist police monarchies.

One of the dimensions of liberal trends in Germany during the *Vormärz* period was also the emergence of the concepts of the so-called "fundamental rights" (*Grundrechten*), "human rights" (*Menschenrechten*) and "civil rights" (*Staatsbürgerlichen Rechten*).[8] However, it should be remembered that German liberalism was a weaker current than its English and French counterparts. Thus, its representatives did not strive to openly break with the absolutist tradition and the outdated social order (as was the case in France). So all kinds of fundamental freedoms and rights were not introduced in the early 19th century in a revolutionary manner, but in a slow process of reforming absolutist states. It took place through concessions of the rulers for their subjects.[9]

[6] A. Bosiacki, *Z zagadnień koncepcji państwa prawnego w myśli niemieckiej XIX w.*, [in:] *Pro bono Reipublicae, Księga jubileuszowa Profesora Michała Pietrzaka*, eds. P. Borecki, A. Czohara, T.J. Zieliński, Warszawa 2009, p. 44; M. Chmieliński, *Polityczna wizja społeczeństwa w poglądach Wilhelma Humboldta*, [in:] *Przez tysiąclecia: państwo – prawo – jednostka*, eds. A. Lityński, M. Mikołajczyk, vol. 3, Katowice 2001, p. 143; T. Paluszyński, *Historia Niemiec i państw niemieckich. Zarys dziejów politycznych*, Poznań 2006, p. 173.

[7] M. Zmierczak, *Kształtowanie się koncepcji państwa prawnego (na przykładzie niemieckiej myśli polityczno-prawnej)*, [in:] *Demokratyczne państwo prawne*, ed. H. Rot, Wrocław 1994, p. 3; A. Dziadzio, *Koncepcja państwa prawa w XIX wieku – idea i rzeczywistość*, „Czasopismo Prawno-Historyczne" 2005, no. 1, p. 178.

[8] A. Haratsch, *Die Geschichte der Menschenrechte*, Potsdam 2010, p. 46. For the purposes of this paper, the entirety of rights of individuals in a state is referred to as "fundamental rights". For more detail on the development of "fundamental rights" in the German area in the 19th century and their relationship with the idea of *Rechtsstaat*, see R. Wahl, *Rechtliche Wirkungen und Funktionen der Grundrechte im Deutschen Konstitutionalismus des 19. Jahrhunderts*, „Der Staat" 1979, vol. 18(3), pp. 321–348; U. Karpen, *Die geschichtliche Entwicklung des liberalen Rechtsstaates: vom Vormärz bis zum Grundgesetz*, Mainz 1985, pp. 35–36. More on the idea of human rights, its significance and development in the historical context in: M. Maciejewski, *Początki koncepcji oraz regulacji praw i wolności człowieka do czasów oświecenia*, [in:] *Współczesne koncepcje ochrony wolności i praw podstawowych*, eds. A. Bator, M. Jabłoński, M. Maciejewski, K. Wójtowicz, Wrocław 2013, pp. 9–21; M. Merkwa, *U źródeł idei praw człowieka. Kształtowanie prawnych i filozoficznych podstaw koncepcji praw człowieka*, Lublin 2018.

[9] A. Haratsch, *op. cit.*, p. 50.

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The multifacetedness of German liberalism is also demonstrated by the fact that its followers are divided into two currents in terms of how they understood the rights and freedoms of individuals. The first one was dominated by the "natural-law" approach and the second by the "positive-law" approach to fundamental rights.[10] The representative of the first current was Karl von Rotteck, influenced by Kant's ideas. He derived the existence of fundamental rights from the norms of natural law, trying to link them with the reality of a state based on the idea of *Rechtsstaat*. According to von Rotteck, the fundamental rights of individuals in a state did not derive from the fact of having the citizenship of a particular state. Instead, they were vested in human individuals as such, were independent of the state's authority and stemmed from the very essence of humanity.[11] The most important of these rights was inalienable freedom. According to the representatives of the second current (including von Mohl), the source of fundamental rights should be the norms of written ("positive") law related to citizenship. Therefore, they supported the idea of precise definition of citizens' fundamental rights in normative acts.[12]

Despite fundamental rights being derived from different ideological sources, their content was essentially similar. In early German liberalism, both these trends were also linked to the idea of the *Rechtsstaat*.[13] The rule of law was understood as a State embodying and guaranteeing individual freedom.[14] This was embodied as postulates for civil freedom (*bürgerliche Freiheit*), personal freedom, freedom of religion, freedom of thought and freedom of movement (*Freizügigkeit*). The bourgeois origin of the idea of *Rechtsstaat* is also evidenced by the reference to freedom of contract and business, equality before the law and guarantee and freedom of ownership.[15]

As showed by the analysis of the political practice of the German states, it was the latter that won in the process of introducing fundamental rights into their legal and political systems. In the first half of the 19th century, the so-called "process of positivisation" of fundamental rights led to their clear separation from abstract

[10] G. Gozzi, *Rechtsstaat and individual rights in german constitutional theory*, [in:] *The Rule of Law History, Theory and Criticism*, eds. P. Costa, D. Zolo, Dordrecht 2007, p. 241. For more about the relationship between natural law and positive law, see M. Łuszczyńska, *Prawo natury a prawo stanowione – dwa antagonistyczne ujęcia filozofii prawa*, „Annales UMCS sectio G (Ius)" 2005–2006, vol. 62–63, pp. 87–108.

[11] G. Gozzi, *op. cit.*, p. 241.

[12] *Ibidem*. The entirety of von Mohl's views is addressed also in: L. Dubel, *Robert von Mohl*, [in:] idem, *Historia doktryn politycznych i prawnych do schyłku XX wieku*, Warszawa 2012, pp. 353–357.

[13] R.-J. Grahe, *Meinungsfreicheit und Freizügigkeit. Eine Untersuchung zum Grundrechtsdenken bei Robert von Mohl*, Münster 1981, p. 53.

[14] H. Zoepfl, *Grunsaetze des allgemeinen und des constitionell-monarchischen Staatsrechts*, Heidelberg 1846, p. 56.

[15] E.-W. Böckenförde, *Staat, Gesellschaft, Freiheit, Studien zur Staatstheorie und zum Verfassungsrecht*, Frankfurt am Main 1976, p. 67.

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human rights ideas. Fundamental rights were therefore not included in general declarations based on natural-law ideas. They did not refer to being a human as such, but to the fact of being a citizen, and thus to the individual's legal bond with the State. Nevertheless, the process of positivisation of fundamental rights can be seen as the first attempt to introduce safeguards for citizens against abuse by the authority (the ruler) in the German states of the *Vormärz* period.[16]

As a result of the process of positivisation of fundamental rights, legal regulations of this kind appeared in the constitutions of southern German states as part of the so-called "first wave" of 1818–1820. These were Bavaria, Baden, Württemberg and Hesse. These legal acts contained no references to abstract and broadly defined "human rights" (*Menschenrechte*). They functioned on the basis of determining the so-called "civil and political rights" (*bürgerliche und politische Rechte*).[17]

The second wave is constitutions of the countries farther east, such as Saxony (1831), Braunschweig (1832) and Hannover (1833). Each of them contained a list of fundamental rights vested in citizens.[18] However, it should be kept in mind that the above-mentioned fundamental rights were granted by a self-restricting monarch. The risk that they could also be taken away or limited by him was real.[19] Although these rights depended on the ruler's decision, they were a step forward in the process of institutionalisation of rights, which defined the basic spheres of civil freedom. A division of fundamental rights into political rights (referring to participation in governing the state), and civil rights constituting the subject of this article (referring to broadly understood freedoms and freedoms of citizens) emerged. The exercise of political rights was limited and was not vested *ex lege* in all citizens, while all enjoyed their civil rights.[20] In fact, equality of political rights was at that time put

[16] R.-J. Grahe, *op. cit.*, p. 95. It is worth noting that Anna Tarnowska refers to this process as "constitutionalisation". The meaning is the same. It was about defining fundamental rights and freedoms in clear and precise legal norms. See A. Tarnowska, *Spory doktryny wokół procesu konstytucjonalizacji praw podstawowych w Niemczech w II połowie XIX wieku*, „Krakowskie Studia z Historii Państwa i Prawa" 2015, vol. 8(2), pp. 160–161.

[17] The term *Staatsbürgerrechte* was devised by the German constitutional movement, a counterpart of *droits des Francais* or *droits des Belges*, contained in French *Charte* of 1814 and the Belgian constitution of 1831. See R. Suppé, *Die Grund- und Menschenrechte in der deutschen Staatslehre des 19. Jahrhunderts*, Berlin 2004, p. 22; G. Gozzi, *op. cit.*, pp. 240–241; M. Bożek, *Władza ustrojodawcza w niemieckim konstytucjonalizmie monarchicznym*, [in:] *Tendencje rozwojowe myśli politycznej i prawnej*, eds. M. Maciejewski, M. Marszał, M. Sadowski, Wrocław 2014, p. 289. On the contemporary understanding fundamental rights, see M. Borowski, *Grundrechte als Prinzipien*, Baden-Baden 2007, pp. 68–134.

[18] A. Haratsch, *op. cit.*, p. 51.

[19] It should be kept in mind that the constitution of Württemberg was a result of a settlement between the King and the Estates. More on the topic in: M. Bożek, *op. cit.*, p. 296.

[20] R.-J. Grahe, *op. cit.*, p. 41, 95. An excellent example of the limitation of political rights in von Mohl's views is his disagreement with the idea of universal suffrage. See more in R. von Mohl, *Das deutsche Reichsstaatsrecht. Rechtliche und politische Eröterungen*, Tübingen 1873, p. 342. For more

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forward only by leftist movements. Liberalism pointed to the need for a citizen to prove the so-called "self-reliance" (*Selbständigkeit*). It is primarily about self-reliance in the economic sense.[21]

The process of positivisation of fundamental rights in Germany symbolically ended with the enactment of the Constitution of the German Empire by the so-called Frankfurt Parliament. The catalogue of the "Rights of the German Nation" contained in §§ 130–189, referred to as an "epochal event", was the first time that fundamental rights were proclaimed for the entire area of the state of all Germans which was about to be established. This list put an emphasis on the protection of individual freedoms and rights in relations with the State. These rights never entered into force, like the entire Frankfurt Constitution.[22] The defeat of the processes collectively called the Springtime of the Peoples also meant a retreat from liberal ideas in Germany. The next comparatively liberal catalogue of civil rights and freedoms was included in the Constitution of the Weimar Republic.[23]

A CITIZEN, NOT SUBJECT, AND HIS FUNDAMENTAL RIGHTS

The discussion of the catalogue of civil rights in Robert von Mohl's thought should be preceded by an analysis of his views on the very concept of "citizen". In von Mohl's approach, it combines with his original idea of state governed by the rule of law (*Rechtsstaat*). This article is not intended to discuss it in detail. It should only be stated that, according to von Mohl, a state according to the idea of *Rechtsstaat* was a state based on particular axiology (it also acquired a substantive dimension in addition to the formal one). For von Mohl, *Rechtsstaat* was one of the forms of the state he distinguished (alongside the patriarchal, patrimonial, theocratic, classical and despotic models). According to him, it characterised na-

on the issue of electoral law in the German territories in the 19th century, see A.S. Kahan, *Liberalism in Nineteenth-Century Europe: The Political Culture of Limited Suffrage*, New York 2003, pp. 50–65, 67–77, 93–101, 141–152.

[21] R. Hachtmann, *„Demokratische Anarchie" oder „neue Lebensform der menschlichen Geschichte"? Der Konflikt um die Grundrechte während der Revolution von 1848*, [in:] *Jahrbuch Menschenrechte 1999*, eds. G. von Arnim, V. Delle, F.-J. Huttner, S. Kurtenbach, C. Tessmer, Frankfurt am Main 1999, p. 238.

[22] A. Haratsch, *op. cit.*, p. 54; G. Birtsch, *Gemäßigter Liberalismus und Grundrechte. Zur Traditionsbestimmtheit des deutschen Liberalismus von 1848/49*, „Geschichte und Gesellschaft. Sonderheft" 1983, vol. 9, p. 30.

[23] J. Franke, *Das Wesen der Frankfurter Grundrechte von 1848/1849 im System der Entwicklung der Menschen- und Grundrechte*, Diss. Bonn 1970, p. 19; N.M. Tończyk, *Konstytucja Republiki Weimarskiej z 11 sierpnia 1919 roku jako demokratyczna podstawa prawna totalitarnego państwa*, „Studia Iuridica Toruniensia" 2014, vol. 14, pp. 379–397. For more on the political system in the German Reich, see J. Kostrubiec, *Nauka o państwie w myśli Georga Jellinka*, Lublin 2015, pp. 20–23.

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tions at the highest level of civilisational development. It was therefore a form of "modern" State, corresponding to the needs and spirit of the time. One aspect of the substantive dimension of the idea of state governed by the rule of law in von Mohl's view will be the concepts relating to the broadly understood position of the individual in this form of State. They materialise when discussing his views on the idea of fundamental rights.[24]

Turning to the question of the concept of citizen in von Mohl's thought, it must be emphasised, first, that he has introduced a distinction between, on the one hand, the concept of "subject" (*Unterthan*) and "citizen" (*Bürger*, *Staatsbürger*) on the other.[25] The concept of subject was primarily linked to less developed forms of statehood than *Rechtsstaat* (e.g. the patrimonial state). According to von Mohl, a subject was everyone obliged to obey the authority and render services to the community.[26] This does not mean, however, that von Mohl perceived the concept of subject unequivocally negatively. Moreover, he also noted that an individual is often in that position even in a State governed by the rule of law, except that the State's obligations in this form are determined by generally applicable law.[27] On the other hand, "citizen" is a concept attributed to the rule of law, which is well illustrated by the quote: "Every state has subjects, but only that governed by the rule of law has citizens".[28] Contrary to the subject, the concept of citizen is combined with the rights classified by von Mohl has defined by dividing them into "civil rights" (*staatsbürgerliche Rechte*) discussed herein and "political rights".[29]

It is worth stating that the individual in Mohl's rule-of-law State was perceived in a two-fold manner. The scholar, who formulated his views even in the era of late monarchical absolutism, was not able to break away from perceiving the individual as the subject, having primarily responsibilities towards the State (supposedly the monarch). However, the concept of citizen also appears in his thought, corresponding to the then "modern" idea of *Rechtsstaat*, which assumes that the individual has certain freedoms and rights in the State.

Robert von Mohl should also be considered one of those thinkers who advocated the above-mentioned "positivist" understanding of the concept of fundamental

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[24] A. Bosiacki, *Robert von Mohl i początki koncepcji państwa prawnego*, [in:] *Idee jako źródło instytucji politycznych i prawnych*, ed. L. Dubel, Lublin 2003, pp. 319–329.

[25] It should be remembered that von Mohl was not consistent in this distinction between the citizen and the subject. See Z.A. Maciąg, *Kształtowanie zasad państwa demokratycznego, prawnego i socjalnego w Niemczech (do 1949 r.)*, Białystok 1998, p. 88.

[26] R. von Mohl, *Encyklopädie der Staatswissenschaften*, Zweite Auflage, Tübingen 1872, pp. 122–123.

[27] *Ibidem*, p. 123.

[28] Idem, *Das Staatsrecht des Königreiches Württemberg*, Zweite Auflage, Erster Band das Verfassungsrecht, Tübingen 1840, p. 316.

[29] R. Suppé, *op. cit.*, p. 117; R. von Mohl, *Encyklopädie…*, Zweite Auflage, pp. 123–125; idem, *Das Staatsrecht…*, p. 316.

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rights. He advocated both codification and positivisation processes. He also linked the existence of fundamental rights in the State to his own idea of *Rechtsstaat*. This is so because those rights are linked to the goal of the State ruled by law in the thought of von Mohl. They are therefore correlated with the State's fulfilment of its task of protecting the law and the supplementary support of citizens in achieving their life goals.[30]

Von Mohl encountered the issue of fundamental rights at the beginning of his scientific career, analysing this type of regulation in the political system of his homeland, Württemberg.[31] When examining the legal norms of the country's Constitution, he also synthesized his own views in this aspect for the first time.[32] Then, by developing them, he introduced a division compliant with the then current trend of German early liberalism.[33] Firstly, he identified first the "civil rights" (*staatsbürgerliche Rechte*) relating to the freedom of citizens vis-à-vis the State. Secondly, he distinguished political rights (*politische Rechte*) relating to participation in governance, not vested in any citizen (he paid less attention to them).[34] Combined, they constituted the concept of fundamental rights (*Grundrechte*).[35] As regards civil rights, von Mohl defined them as "all the rights of citizens of the State towards this State which are vested in them as such, without any specific acquisition".[36] Those rights are therefore vested in everyone, resulting from the very fact of citizenship of a given State and their existence is characteristic of a State organised according to the idea of *Rechtsstaat*.[37] They should be defined as a set of basic principles determining the rules of state-citizen relations[38].

CATALOGUE OF CIVIL RIGHTS

The idea of civil rights related to von Mohl's concept of *Rechtsstaat* is referred to in a number of his works. These are mainly *Das Staatsrecht des Königreiches Württemberg*, *Encyklopädie der Staatswissenschaften* and *Staatsrecht*, *Völkerrecht und Politik*. By analysing all of von Mohl's written statements on the matter, it is

[30] E. Angermann, *Robert von Mohl 1799–1875 Leben und Werk eines altliberalen Staatsgelehrten*, Neuwied 1962, pp. 121–122.

[31] R. Suppé, *op. cit.*, pp. 113, 121–122.

[32] *Ibidem*, pp. 114–115 ; G. Gozzi, *op. cit.*, p. 242.

[33] R.-J. Grahe, *op. cit.*, p. 89.

[34] R. von Mohl, *Encyklopädie…*, Zweite Auflage, p. 233; idem, *Das Staatsrecht…*, p. 313; R. Suppé, *op. cit.*, p. 118.

[35] R. von Mohl, *Encyklopädie…*, Zweite Auflage, pp. 222–223.

[36] Idem, *Das Staatsrecht…*, p. 312.

[37] *Ibidem*, p. 316; R. Suppé, *op. cit.*, p. 119.

[38] R.-J. Grahe, *op. cit.*, p. 87.

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possible to recreate his own catalogue of civil rights in a state compliant with the idea of *Rechtsstaat*.

A kind of primary and first right in relation to subsequent rights and freedoms was the citizen's right to "permanent participation in the state" (*bleibende Theilnahme am Staat*). It includes the right of every citizen to "be a citizen", reside in the country and enjoy the benefits of this residence.[39] However, contrary to current constitutional regulations, von Mohl allowed for the possibility of expelling a citizen from the state for the sake of protection of the public good. This could be justified by a situation in which a citizen proved that the life goals set for himself were contrary to the aspirations or views of the majority of the population.[40] The above principle is also linked to the postulate of equality before the law. However, von Mohl understood it as the equality of all citizens in the process of taking into account by the state the fulfilment of life aspirations permitted by this state.[41] The above-mentioned principle of equality of citizens is also related to the principle of "equality of civil rights and burdens (obligations)" (*Gleichheit der bürgerlichen Rechte und Lasten*). Von Mohl supported the view that both the rights and obligations of citizens should be distributed equally among citizens. So he objected to a situation where one citizen (or a group of them) would only gain benefits and the other would only incur losses.[42]

Another right distinguished by von Mohl included personal freedom of citizens and the principle of "protection of the individual" (*Schutz der Person*). These particularly concerned such situations as arrest or house search.[43] Such actions by the state should always be based on law and be proportionate. The protection of the individual is also manifested in the postulate that all rights acquired properly by citizens should be protected against illegal interference by the state. Such interferences must also be justified in universally binding law.[44] To the formal dimension of the idea of *Rechtsstaat* refers the view that the citizen is obliged "only to the obedience in accordance with the constitution" (*blos verfassungsmässiger Gehorsam*).[45] Therefore, if the lower-tier norms (laws and regulations) are not compliant with the highest systemic act, namely the constitution, then, according to von Mohl, the citizen has no obligation to submit to them.[46]

[39] R. von Mohl, *Encyklopädie…*, Zweite Auflage, p. 223; R.-J. Grahe, *op. cit.*, p. 90.

[40] R. von Mohl, *Encyklopädie…*, Zweite Auflage, p. 224.

[41] *Ibidem*, pp. 225, 328–329. For von Mohl, all activities that did not threaten third party rights, state institutions or their general goals were admissible. See idem, *Das Staatsrecht…*, pp. 335, 406–407.

[42] *Ibidem*, p. 335.

[43] Idem, *Encyklopädie…*, Zweite Auflage, pp. 226–227, 329.

[44] *Ibidem*, p. 227; idem, *Das Staatsrecht…*, p. 392.

[45] Idem, *Encyklopädie…*, Zweite Auflage, p. 323.

[46] *Ibidem*, p. 324.

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Discussion of civil rights relating to more detailed issues should start with a problem often discussed during *Vormärz*, i.e. "freedom of thought" (*Denk-Freiheit*, *Meinungsfreiheit*). It was related to the postulate of comprehensive, also spiritual, development of the individual.[47] In von Mohl's views on the rule of law, this right has two dimensions. It is both the freedom of research and the freedom to express one's views on anything.[48] However, in von Mohl's approach, these are subject to significant limitations. This is so because the use of them may not breach the rights of other citizens or the laws in force in the state.[49] Von Mohl also put forward the postulate of freedom of the press related to the right to express an opinion. Thus, the German scientist considered the freedom of free expression of thoughts in print and image as a civil right. However, this right may not infringe the rights of third parties and the laws applicable in the state.[50]

Religious freedom (*freie Religionsuebung*) is also a right linked to freedom of thought. As was the case with freedom of thought, also religious freedom has similar restrictions in the thought of the German liberal. To put it briefly, it can be concluded that beliefs and religious activities of a citizen in a state governed by the rule of law must not endanger the rights of other citizens, the general public and the State. Moreover, where legal norms in force in the State which are considered by the general public to be legitimate are contrary to the religious principles of the individual or a minority of them, they are not entitled to demand these norms be amended. Religious organizations of all kinds can only influence the state by making changes legally. Otherwise, they must comply with the rules of the state, even if they are contrary to their worldview.[51]

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[47] R.-J. Grahe, *op. cit.*, p. 118; R. von Mohl, *Encyklopädie der Staatswissenschaften*, Erste Auflage, Tübingen 1859, p. 330. This rule was reflected in the liberal constitution of Württemberg of 1819. Paragraph 24 stated as follows: "The State guarantees every citizen personal freedom, freedom of religion and thought, freedom of ownership and freedom to emigrate". See Verfassung des Königreichs Württemberg (25. Sep. 1819), www.jura.uni-wuerzburg.de/lehrstuehle/dreier/verfassungsdokumente-von-der-magna-carta-bis-ins-20-jahrhundert/verfassung-des-koenigreichs-wuerttemberg-25-sep-1819 [access: 20.01.2020].

[48] R.-J. Grahe, *op. cit.*, p. 119.

[49] R. von Mohl, *Encyklopädie…*, Zweite Auflage, p. 29. Similarly: idem, *Das Staatsrecht…*, pp. 352–353; R.-J. Grahe, *op. cit.*, p. 121.

[50] R. von Mohl, *Encyklopädie…*, Zweite Auflage, p. 40; idem, *Das Staatsrecht…*, p. 363. Interestingly, von Mohl, who had supported the limitation of freedom of press (to protect it from abuse), voted in the Frankkfurt Parliament for unlimited freedom of press. See J. Hähnle, *Die politischen Ideen Robert von Mohls. Ein Beitrag zur Geschichte des älteren süddeutschen Liberalismus*, Tübingen 1921, p. 114. The freedom of thought, conscience and press was also guaranteed in the Frankfurt Constitution. Its paragraph 143 stated that each German has the right to freely express his opinion, whether orally, in writing, print or image. See Verfassung des Deutschen Reiches vom 28. März 1849, www.documentarchiv.de/nzjh/verfdr1848.htm [access: 20.01.2020].

[51] R. von Mohl, *Encyklopädie…*, Zweite Auflage, pp. 329–330. It should be recalled that von Mohl advocated the separation of church institutions and state institutions. He himself (as a protestant)

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One of von Mohl's main views on the essence of the state was the postulate for the state to support its citizens in achieving "their life goals". However, it was supposed to do so in a subsidiary manner. The individual himself should first take care of the achievement of his own goal. If he is unable to do so, he should seek help in the communities (organizations) operating within society and then only afterwards demand state aid. In this context, of great importance is the right to association (*Associations-Recht*).[52] Citizens of the Mohl's *Rechtsstaat* were therefore entitled to establish associations. However, objectives of these associations could not be contrary to both the rights and objectives of other individuals and the general public.[53] The unity and smooth functioning of the state were of great value to von Mohl. Therefore, he used to give the State the power to control and observe the activities of associations.[54] It is worth remembering that German scholars of law of the time shared a view assuming strict regulation of associations by the state governed by the rule of law, including the prohibition of political associations.[55] With his views on the issue of association, even for political purposes, von Mohl undoubtedly was part of the liberal wing of German scholarly opinion.[56]

Another right to safeguard and strengthen the individual position of the citizen in the state was the "right to bring action and of petition", distinguished by von Mohl (*Recht der Beschwerdeführung und der Petition*). The German thinker was convinced that it is in the nature of every authority to constantly expand its sphere of influence and to trespass the law.[57] Even the most precise statutory definition of civil rights does not, therefore, protect them against abuse and violation by

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voted in accordance with the postulate of religious freedom, voted against expelling the Jesuits from the area of the German Reich (see J. Hähnle, *op. cit.*, pp. 114–115). It is worth noting that the only country which successfully introduced the separation of Church and state in the broad sense (or the separation of religious matters and state matters) was, according to von Mohl, the USA. See Ch.A. Lerg, *Amerika als Argument: Die deutsche Amerika-Forschung im Vormärz und ihre politische Deutung in der Revolution von 1848/49*, Bielefeld 2011, p. 322. On relations between the state and the Catholic Church, based on the example of the doctrine of Leo XIII, see M. Sadowski, *Ze studiów nad państwem, władzą polityczną i stosunkami państwo – Kościół w doktrynie papieża Leona XIII*, [in:] *Przez tysiąclecia: państwo – prawo – jednostka*, eds. A. Lityński, M. Mikołajczyk, vol. 1, Katowice 2001, pp. 209–218.

[52] R. von Mohl, *Das Staatsrecht…*, p. 378.

[53] Idem, *Encyklopädie…*, Zweite Auflage, p. 330.

[54] *Ibidem*, pp. 226–227.

[55] J. Hähnle, *op. cit.*, p. 115. More on the association rights in von Mohl's thought, see R. von Mohl, *System der Präventiv-Justiz oder Rechts-Polizei*, Tübingen 1834, pp. 131–142. On the then understanding of the right of association, see also K. Welcker, *Association*, [in:] *Das Staats-Lexikon*, vol. 1: *Encyklopädie der sämmtlichen Staatswissenschaften für alle Stände*, ed. K. Welcker, Dritte Auflage, Leipzig 1856, pp. 758–787.

[56] R. von Mohl, *Das Staatsrecht…*, pp. 378–379; idem, *Encyklopädie…*, Zweite Auflage, p. 330.

[57] Idem, *Encyklopädie…*, Zweite Auflage, p. 640.

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the authorities.[58] The citizen must have the right to bring an action (*Beschwerde*) against the unlawful and unfair actions of the state. The petition was intended to enable citizens to react and demand that the state regulate the facts or solve the problem.[59] The state, on the other hand, has the obligation not only to respect this right, but also to set up institutions that would examine the actions and petitions in an appropriate manner.[60]

The catalogue of civil rights in Robert von Mohl's thought is closed by the right to free choice of residence and movement within the state, and the related right to emigration.[61] The liberalism of the German scholar is seen in his opposition to the introduction of any kind of "perpetual" ties between citizens and the state. In this respect, it is the interest of the individual that prevailed over the interest of the state (community). According to von Mohl, if a citizen is unable to meet his life goals in the state, he has not only the right, but even the moral obligation to leave this state. It is therefore always up to the citizen to decide. It does not matter whether the state can suffer a loss as a result of citizen's emigration.[62]

The characteristics of *Rechtsstaat* in von Mohl's views also include the right to private property and economic freedom.[63] It should be pointed out that the right to protection of ownership (*Schutz des Eigenthumes*) is present in the first edition of one of von Mohl's most important works, i.e. *Encyklopädie der Staatswissenschaften.* But in the second edition of this publication, published at the end of his life, the protection of ownership was no longer enumerated as a civil right (the scholar did not explain why). It would, however, be a mistake to say that von Mohl had withdrawn from advocating the need to protect private property. He continued to understand ownership (along with population and territory) as the "basis of life of the state".

[58] *Ibidem*, p. 639.

[59] Idem, *Das Staatsrecht…*, p. 414. The right of petition (*Petitionsrecht*) was addressed aslo by other German liberals, e.g. Johann Christoph von Aretin and Karl Theodor Welcker. More on the topic: J.Ch. von Aretin, *Staatsrecht der Konstitutionellen Monarchie*, vol. 1, Altenburg 1824, p. 160; K. Welcker, *Petition*, [in:] *Das Staats-Lexikon*, vol. 11: *Encyklopädie der sämmtlichen Staatswissenschaften für alle Stände*, ed. K. Welcker, Leipzig 1864, pp. 459–472.

[60] R. von Mohl, *Encyklopädie…*, Zweite Auflage, pp. 227–228.

[61] The question of the right to emigration appeared in the German area along with the advent of reformation and with adopting the rule *cuius regio, eius religio*. A corresponding right was the right of religious minorities to leave countries. However, it started to lose importance with diminishing influence of the Reich and strengthening absolutist and mercantilist trends in particular countries. Especially mercantilism, involving retaining goods and people, resulted in the prohibition of emigration. The revival of the tendency towards the freedom of movement came with Enlightenment ideas, but enjoyed only a partial acceptance among the rulers of German countries. See R.-J. Grahe, *op. cit.*, pp. 39–40.

[62] R. von Mohl, *Encyklopädie…*, Zweite Auflage, p. 224, 233; R.-J. Grahe, *op. cit.*, p. 144; R. Suppé, *op. cit.*, p. 116. It is worth mentioning that this right was also regulated in paragraphs 133 and 136 of the Frankfurt Constitution. See Verfassung des Deutschen Reiches vom 28. März 1849.

[63] R. von Mohl, *Encyklopädie…*, Zweite Auflage, p. 226.

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He also supported the solution with the state providing support for various types of economic endeavours of individuals.[64] He also stated that every performance made from citizen' property towards the state should have a legal basis.[65]

CONCLUSIONS

Robert von Mohl used to refer to one of the main postulates of his scientific and public activities as "strengthening and extending the freedom of the people" (*Befestigung und Erweiterung der Volksfreiheit*).[66] Undoubtedly, the views of the German scholar presented above place him on the liberal side of the German legal scholarly opinion of his time. He advocated the idea of *Rechtsstaat* (he was one of its main authors). In his views, this idea also assumed an extensive catalogue of civil rights. They were linked by von Mohl to the objective of the rule of law, which according to him was the freest possible development of the human being (citizen).[67] These include the right to the undistorted development of individual's personality and social relationships, personal and economic freedom (property) and freedom of religion, opinion and association. It is also worth pointing out the right of action and petition as an important element of von Mohl's *Rechtsstaat*.[68]

It should be borne in mind that civil rights vested in every citizen in the State were only part of fundamental rights. They were most developed by von Mohl, but he also used the idea of political rights, limited by suffrage privileges.[69] On the one hand, the scholar thus put forward postulates for extending the freedom of individuals in the State, but on the other hand, he restricted the right to govern it. He can therefore be regarded as a supporter of the so-called "apolitical freedoms", unrelated to the concept of political rights and their exercise in the state.[70] The scholar's approach to political rights, the emphasis on their elitism, the need for a citizen to prove his "capability" to be able to participate in the governance of the state, reveals his inconsistency. He both advocated equality before the law and excluded all political activity from this sphere.[71]

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[64] *Ibidem*, p. 585.

[65] *Ibidem*, p. 228.

[66] Idem, *Lebenserinnerungen von Robert von Mohl 1799–1875*, vol. 1, Stuttgat–Leipzig 1902, p. 139; R.-J. Grahe, *op. cit.*, p. 86.

[67] *Ibidem*, pp. 90–91.

[68] *Ibidem*, p. 90, 93; R. Suppé, *op. cit.*, p. 119.

[69] R. Suppé, *op. cit.*, p. 121.

[70] *Ibidem*.

[71] B. Stöcker, *Die Gemeinwohltheorie Robert von Mohls ale ein früher Ansatz des sozialen Rechtsstaatsprinzips*, München 1992, p. 40.

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The above-presented arguments confirm the thesis that von Mohl's views on civil rights can be regarded as going in line with the mainstream of early German moderate liberalism in the period before and during the Springtime of the Peoples. They constituted an attempt to find a compromise between the conviction of the need for reform and liberalisation of absolutist *Polizeistaat*, and the aspirations of monarchs and conservatives to maintain the *status quo*. That is why von Mohl not only advocated the so-called "positivisation" of fundamental rights, but also divided them into civil and political rights. While the former were vested in all citizens (they were in line with the aspirations of the then bourgeoisie), the latter were limited by suffrage privileges (so as not to compromise the political position of the then elites). Robert von Mohl thus fits well into the tradition of the German liberal *juste milieu*, the so-called "golden mean" in thinking about reforms of the police state.[72]

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[72] See D.J. Mattheisen, *1848: Theory and Practice of the German juste milieu*, "Duquesne History Forum" 1971, p. 187.

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ABSTRAKT

Główny cel niniejszego artykułu polega na dowiedzeniu tezy stanowiącej, że rozumienie idei praw obywatelskich w poglądach Roberta von Mohla klasyfikuje go jako przedstawiciela umiarkowanego niemieckiego wczesnego liberalizmu. Pierwsza część opracowania obejmuje omówienie uwarunkowań społeczno-politycznych ziem niemieckich od początków XIX w. do wydarzeń Wiosny Ludów. Stanowi ona tło dla następnych dwóch części. Skupiono się w nich na analizie poglądów niemieckiego uczonego na pojęcie obywatela w kontekście idei *Rechtsstaat* oraz na prawa zasadnicze (w których zawierały się prawa obywatelskie i polityczne). W artykule dowiedziono, że von Mohl był myślicielem wybierającym drogę „złotego środka" w odniesieniu do pozycji obywateli w państwie. Z jednej strony, zgodnie z dominującym w ówczesnym niemieckim liberalizmie poglądem, przewidywał on szeroki katalog praw obywatelskich w państwie, z drugiej zaś obca mu była idea powszechnych praw politycznych, ich wykonywanie ograniczone było bowiem u von Mohla cenzusem.

Słowa kluczowe: Robert von Mohl; niemiecki wczesny liberalizm; państwo prawne; prawa obywatelskie; Wiosna Ludów