

## The rule of law in times of globalisation

### I. Foundations: The concept of the rule of law

- 1) A heterogeneous terminology for the same fundamental idea
  - "Rechtsstaat", "État de droit", "rule of law", "communauté de droit"
  - an antithesis to totalitarianism and despotism: overcoming arbitrariness by moderating public power and reliably adjusting it to legal rules
  - origins in German and French administrative law doctrine
  - concept evolved from a narrow *formal* to a comprehensive *material concept of rule of law* that includes numerous material (substantial) principles of law (see infra, III.)
  - do not confuse with democracy, human rights protection or other elements of the free and democratic constitutional state!
- 2) Different manifestations of the same fundamental idea in Europe
  - "*Rechtsstaat*" (Germany): antonym to the absolutist concept of "Polizeistaat" ["police state"]
  - "*État de droit*" (France): rather new concept but based on old "general principles of law"
  - "*rule of law*" (in Common Law): long-time reluctance to recognise material legal principles
  - "*general principles of European Union law*": most up-to-date incarnation of the idea
  - *tendency of convergence* in the course of European integration
  - in the international discourse the term "rule of law" is used - but in the comprehensive sense

### II. The late and volatile rise of the concept of the rule of law

- 1) Little interest in the rule of law in times of cold war and decolonisation
  - rejection by the communist doctrine: "socialist legality" instead of rule of law
  - little efforts to implement the rule of law in the new, decolonised states and other developing countries
- 2) The triumph of the rule of law in Europe
  - started in the seventies in Greece, Portugal and Spain
  - reached its zenith in the nineties with the transformation of most East European states to free and democratic, rule of law based modern constitutional states
    - promoted by the Council of Europe via the *Venice Commission* (European Commission for Democracy through Law)
  - process accelerated and deepened by the introduction of *constitutional courts* and by the participation of the East European states in the process of *European integration*
  - important role of comparison of laws and international legal cooperation
  - *not an irreversible process*: the rule of law under fire by
    - attempts of Russia to undermine democracy and rule of law in Europe
    - threats by new authoritarian, oligarch and populist regimes (→ Ukraine, Moldova, Hungary, Poland etc.)
    - the rise of populist parties openly challenging essential elements of the rule of law
    - insufficient response of the European Union and its member states to the new threats
    - the end of the support of the rule of law in Europe by the U.S. Government
- 3) The spreading of the idea of rule of law in the wake of globalisation and development
  - enhanced interest in the rule of law in countries with emerging economies
  - enhanced awareness of the necessity and advantages of the rule of law:
    - international trade and WTO system depending on rule of law
    - rule of law a precondition to long-term sustainable economic development
    - rule of law a precondition to the realization of the ambitious project of the ASEAN Economic Community
    - rule of law essential for effective protection of human rights - but also for rebutting unjustified allegations of h.r. violations
    - rule of law may lead to higher degree of rationality in the political process
  - commitment to the rule of law (or to certain elements) in East and Southeast Asian constitutions
    - art. 1(3) of the Constitution of the Republic of Indonesia of 1945
    - sect. 3 of the Constitution of the Kingdom of Thailand of 2017
    - art. 5 of the Constitution of the People's Republic of China of 1982
    - art. 6 and 10 of the Constitution of the Lao People's Democratic Republic of 2003
  - rule of law *one of the fundamental values of ASEAN* (cf. art. 1 no. 7 ASEAN Charter)
    - *binding also to the member states* (cf. art. 2(2) lit. h ASEAN Charter)
  - however, no common awareness of the various formal and material requirements of the rule of law

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- 4) Challenges to the rule of law brought by globalisation and geo-regionalisation
  - the problem of the *effective protection of fundamental rights against supranational powers*
    - see my contribution at IC-GLOW 2017, part III
  - the problem of the *final arbiter of the limits of the competences* of international and supranational institutions
    - an ultra vires review of the European Union's legal acts by the national constitutional courts despite the jurisdiction of the European Court of Justice?
    - threats by the German Federal Constitutional Court (see the Maastricht and Lisbon judgements of 1993 and 2009, BVerfGE 89,155 and 123, 267)
  - the problem of the *weakening of the judicial power* by allowing *investor-state dispute settlements by arbitration panels* who are no courts and no institutions of the state
    - this allows big companies to escape from the jurisdiction of the courts and affects the protection of the rights of the citizen by the state
    - OWN OPINION: in all cases where the rights of other citizens may be concerned, directly or indirectly, the rule of law requires the jurisdiction of a real - national or international - court

### III. Annex: The most important elements of the rule of law (overview)

- 1) Principle of legality
  - a) Primacy of the law
    - the essence of the rule of law
    - all activity of public institutions is bound to the law
      - this includes the *obligation to enforce the law*, in favour of but also *against* the citizen
  - b) Principle of statutory reservation
    - any encroachment on the fundamental rights of the citizens requires a *legal basis*
- 2) Principle of proportionality
  - radical challenge to totalitarianism: categorical rejection of any claim of absoluteness for any objectives of the state!
  - philosophical foundations in the Bible (Old Testament)
  - four fundamental requirements for measures imposing a burden on the citizen:
    - a) The measure must pursue a *legitimate aim*
    - a) The measure must be *suitable* to pursue that aim
      - it must be conducive to its purpose
    - c) The measure must be *necessary* to achieve the pursued aim
      - it must be the least intrusive act of intervention that is equally conducive
    - d) The measure must be *proportional* (in the strict sense)
      - the burden imposed must not be out of proportion to the aim in view
      - requires thorough *balancing* of the concerned public interests and the rights of the citizen
- 3) Legal certainty and protection of legitimate expectations
  - a) Clarity and definiteness of legal norms
  - b) Prohibition of inconsistencies within the law
  - c) Limitation of legislation with retroactive effect
    - legislation with *true retroactive effect* (referring to facts in the past) only admitted in exceptional cases
    - legislation with *pseudo-retroactive effect* (referring to on-going facts or relationships and affecting them for the future) may be excluded by the protection of the citizen's legitimate expectations
    - in particular *respect for acquired rights*
  - d) Protection of the trust in the finality of administrative decisions and court judgements
- 4) Effective legal protection
  - a) Right to the lawful judge
  - b) Right to be heard at the court
  - c) Effective legal protection against public authority
    - including interim relief
  - d) Effective legal protection in civil law matters
- 5) Special principles of criminal and criminal procedure law
  - a) Nulla poena sine lege
  - b) Ne bis in idem
  - c) In dubio pro reo
  - d) Presumption of innocence until conviction

- 6) Special principles of a fair administrative procedure
  - a) Careful and impartial examination of all the relevant aspects of the individual case; duty to state the reasons for the decision
  - b) Decision within a reasonable time
  - c) Decision without arbitrary action, unjustified preferential treatment or conflict of interest
  - d) Rights of defence of the citizen
    - in particular right to be heard, right to access to one's file
  - e) Protection of legitimate interests of confidentiality and the professional and business secrecy
- 7) State liability for illegal acts of public authorities

### **Further Reading**

*Costa, Pietro; Zolo, Danilo (editors)*, The Rule of Law. History, Theory and Criticism, 2007, <http://books.google.de/books?id=qOrWShp0nzMC&printsec=frontcover&hl=de>.

*Koetter, Matthias*: Rechtsstaat and Rechtsstaatlichkeit in Germany, 2010, <http://wikis.fu-berlin.de/display/SBprojectrol/Germany>

*Schmitz, Thomas*: The general principles of European Union law - a source of inspiration for the development of a modern administrative law in the Republic of Moldova, *Administrarea Publică* 01/2017, p. 26 ff., [http://aap.gov.md/files/publicatii/revista/17/AP\\_1\\_17.pdf](http://aap.gov.md/files/publicatii/revista/17/AP_1_17.pdf)

Concerning the concepts of Rechtsstaat, État de droit and rule of law in general, see the reports, studies and other documents of the *Venice Commission*, [www.venice.coe.int/webforms/documents/?topic=34&year=all](http://www.venice.coe.int/webforms/documents/?topic=34&year=all)

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- 2) Different manifestations of the same fundamental idea in Europe

## II. The late and volatile rise of the concept of the rule of law

- 1) Little interest in the rule of law in times of cold war and decolonisation
- 2) The triumph of the rule of law in Europe
  - not irreversible
- 3) The spreading of the idea of rule of law in the wake of globalisation and development
  - fundamental values of ASEAN (cf. art. 1 no. 7 ASEAN Charter)
- 4) Challenges to the rule of law brought by globalisation and geo-regionalisation
  - effective protection of fundamental rights against supranational powers
  - the final arbiter of the limits of the competences of inter- and supranational organisations
  - weakening of the judicial power by investor-state dispute settlements by arbitration panels

## III. Annex: The most important elements of the rule of law (overview)

- 1) Principle of legality
  - a) Primacy of the law
  - b) Principle of statutory reservation
- 2) Principle of proportionality
  - the most important legal principle in the world!
  - legitimate aim, suitability, necessity, proportionality (in the strict sense)
- 3) Legal certainty and protection of legitimate expectations
  - legal clarity, no inconsistencies within the law, limitation of retroactive legislation, protection in the finality of administrative decisions and court judgements
- 4) Effective legal protection
  - right to the lawful judge, right to be heard at the court, effective legal protection against public authority, effective legal protection in civil law matters
- 5) Special principles of criminal and criminal procedure law
  - nulla poena sine lege, ne bis in idem, in dubio pro reo, presumption of innocence
- 6) Special principles of a fair administrative procedure
  - in particular rights to defence
- 7) State liability for illegal acts of public authorities