

Contribution to the course
HUKUM KELEMBAGAAN NEGARA

concerning § 3 V The principle of the rule of law

Diagram 2 Introduction to the principle of the rule of law

A. Fundamental idea and historical foundations

- the idea to overcome arbitrariness by moderating public power and reliably adjusting it to legal rules
- the concept of *Rechtsstaat* [negara hukum] emerged in Germany in the 18th and 19th centuries as a liberal antonym to the absolutist concept of *Polizeistaat* [police state]; in the 20th century it served as *antithesis to totalitarianism*
- the concept evolved to a broad concept that includes numerous *formal and material (substantial) principles of law*

B. "Rechtsstaat", "État de droit", "rule of law" and "general principles of law"

- different manifestations of the same fundamental idea in Europe
 - the German concept of "*Rechtsstaat*"
 - the French concept of "*État de droit*"
 - the British concept of "*rule of law*"
 - the unwritten *general principles of European Union law*
- the *convergence* of the different concepts in the course of European integration
- the common use of the term "rule of law" (in the broad sense) in the international discourse

C. The elements of the rule of law (overview)

- usually worked out in a rich constitutional jurisprudence
- terminology and systematics can vary from country to country

I. *The subjection of all activity of public institutions to the law*

- includes obligation to enforce the law (also against the citizen)
 - 1) The primacy of the constitution
 - 2) The primacy of the law

II. *The principle of statutory reservation*

- requires a legal basis for encroachments on fundamental rights

III. *The principle of proportionality*

- categorical rejection of any claim of absoluteness for any objectives of the state!
- strict requirements for all measures imposing a burden on the citizen:
 - 1) The measure must pursue a *legitimate aim*
 - 2) The measure must be *suitable* to pursue that aim
 - 3) The measure must be *necessary* to achieve the pursued aim
 - 4) 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*)

IV. *The principles of legal certainty and protection of legitimate expectations*

- the citizen must know what he can expect and what he is expected to do so that he can adapt and prepare himself
 - 1) The principle of definiteness
 - legal norms must be formulated clearly and precisely
 - 2) The prohibition of inconsistencies within the law
 - 3) The limitation of legislation with retroactive effect
 - in particular protection of *acquired rights*
 - differentiation between legislation with true and pseudo-retroactive effect
 - 4) The protection of the trust in the finality of administrative decisions and court judgements

V. *The guarantee of effective legal protection*

- 1) Effective legal protection in civil law matters
- 2) Effective legal protection against public authority
- 3) The right to a fair trial
 - especially to an independent and impartial court, to the lawful judge and to be heard at the court

VI. *Principles in the fields of criminal and criminal procedure law*

- 1) Nulla poena sine lege
- 2) Ne bis in idem
- 3) Special rights of the defendant in the criminal procedure
- 4) Guarantees in case of deprivation of liberty
- 5) Presumption of innocence until conviction
- 6) In dubio pro reo

VII. *Principles of fair administrative procedure* (→ likewise principles of good governance)

- 1) The right of the citizen to be heard
- 2) The right of the citizen of access to his file
- 3) The duty of the authority to examine carefully and impartially all relevant aspects of the case
- 4) The duty of the authority to decide within a reasonable time
- 5) The obligation to state the reasons for the administrative decision

VIII. *State liability for illegal acts of public authorities*

G. Further reading

- *Thomas Schmitz*, The rule of law - an often underestimated core principle of the modern constitutional state, guest lecture at UNDIP, 18.03.2022, www.thomas-schmitz-yogyakarta.id/Downloads/Schmitz_Underestimated-rule-of-law_UNDIP2022.pdf.
- *Pietro Costa*; *Daniilo Zolo* (editors), *The Rule of Law. History, Theory and Criticism*, 2007, <http://books.google.de/books?id=qOrWShp0nzMC&printsec=frontcover&hl=de>.
- Concerning the German concept of "Rechtsstaat" see *Thomas Schmitz*, *The Principle of the Rule of Law as a Constitutional Principle - the Example of Germany*, guest lecture at Universitas Janabadra, 2019, www.thomas-schmitz-yogyakarta.id/Downloads/Schmitz_rule-of-law-Germany_Studium-Generale.pdf; *Matthias Koetter*, *Rechtsstaat and Rechtsstaatlichkeit in Germany*, 2010, <http://wikis.fu-berlin.de/display/SBprojectrol/Germany> (in English).
- Concerning the current rule of law standards in modern constitutional states see the comprehensive guide of the *Venice Commission*, *Rule of Law Checklist*, 2016, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e).