

The rule of law

- an often underestimated core principle of the modern constitutional state -

Introduction: Many states define themselves as a state based on the rule of law, but not many people know what "rule of law" actually means. According to a widespread misunderstanding, it essentially just requires to abide by the law. While this is still the most important aspect, in modern constitutionalism the rule of law has evolved to a much broader, coherent comprehensive concept.

I. Fundamental idea and historical foundations of the concept of the rule of law

- the fundamental idea: to overcome arbitrariness by *moderating public power and reliably adjusting it to legal rules*
 - thus, in democracies, it also serves to *prevent the elites from abusing their positions and powers*
- the concept of the *Rechtsstaat* [negara hukum/state based on the rule of law] emerged in Germany in the 18th and 19th centuries as a liberal antonym to the common absolutist concept of the *Polizeistaat* [police state]; in the 20th century it served as *antithesis to totalitarianism*

II. Different manifestations of the same fundamental idea in Europe: "Rechtsstaat", "État de droit", "rule of law" and "general principles of law"

- the German comprehensive concept of "*Rechtsstaat*" [negara hukum]
- the French comprehensive concept of "*État de droit*" [negara hukum]
 - generally recognised since the 1980s but based on elements partially developed already in the 19th and early 20th century
- the British concept of "*rule of law*"
 - for a long time limited to a predominantly formal understanding
- the *general principles of European Union law*
 - unwritten principles that are inherent in any legal order which is based on the rule of law
 - "discovered" by the European Court of Justice in the way of judicial further developing of law, inspired by the legal traditions of the EU member states, the European Convention on Human Rights and other intern. treaties
 - nowadays the most comprehensive and up-to-date repository of rule of law elements in the world
- 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

III. The spreading of the idea in the wake of globalisation and development

1. A first triumph of the rule of law in the wake of democratisation in Europe
 - successful adoption in Spain and Portugal in the 1970s and in the East European former socialist states in the 1990s
 - important role of the Council of Europe and its Venice Commission and of the newly introduced constitutional courts
2. The rising popularity of the idea in countries with emerging economies
 - promoted by development partners, NGOs, intellectuals, economic actors and also government think tanks
 - an ideologically neutral way to secure sustainable development and a key requirement for economic globalisation
 - the commitment of ASEAN and its member states to the rule of law (cf. art. 1 no. 7, art. 2(2) lit. h ASEAN Charter)
3. In particular: the commitment of Indonesia to the universal (broad) concept of the rule of law
 - Indonesia as a "*negara hukum*" (art. 1(3) Constit. 1945, introduced by Third Amendment of 09.11.2001)
 - From the perspective of an international scholar, it is evident that with the introduction of art. 1(3) after decades of dictatorship Indonesia wanted to *catch up with the universal values*. The unambiguous wording of the norm - the deliberate use of the *specific, well-established technical term* "negara hukum" from the German-Dutch legal tradition - clearly refers to the broad Western concept of "Rechtsstaat"/"État de droit". Indonesia could have chosen to go its own, national way as a "negara hukum Indonesia" or "negara hukum Pancasila", but it has not.
 - Nevertheless, "negara hukum" and Pancasila are related to each other. On one hand, the rule of law can only be implemented within the limits set by the Pancasila which form the basis of the Constitution and define its identity (cf. preamble, sect. 2). Besides, the Pancasila must be taken into account in the balancing processes within the implementation of the rule of law. On the other hand, the insertion of art. 1(3) (and also of Chapter XA on Human Rights) makes clear that in the new, democratic Indonesia the Pancasila must be interpreted differently than before under the dictatorship: in line with the universal ideas of rule of law and human rights.
4. Recent threats to the rule of law by populism and extremism
 - a continuous challenge, even in democratic states, by populist and authoritarian governments (Hungary, Poland, Turkey, USA under Donald Trump) and political and religious fundamentalists of all kinds
 - in some countries scholarly attempts to sabotage the rule of law by propagating a weaker specific national understanding
 - e.g. in Indonesia ARIEF HIDAYAT, Rule of Law under The Pancasila, 14.11.2019, with a more ideological than legal reasoning

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IV. Formal and material concept of the rule of law

- the German concept of "Rechtsstaat" evolved from a narrow formal concept limited to the primacy of the law and some formal principles to a comprehensive material concept that includes numerous material (substantial) principles of law; the British concept of "rule of law" followed this way later
- *in the global discourse, "rule of law" stands for a broad concept* that includes all formal and material principles but must be distinguished from the concepts of democracy, separation of powers² and human rights and can even be realised without them

V. The constitutional basis of the rule of law

- some constitutions refer explicitly to the concept of "Rechtsstaat" or "rule of law" as a *fundamental constitutional principle*, one of the core elements of the constitution that shape the constitutional identity of the state
- e.g. in Portugal (art. 2), Spain (art. 1(1)), Poland (art. 2); see also art. 2 of the Treaty on European Union
- others formulate the principle indirectly or parts of it but this is understood as a general reference (e.g. in Germany (art. 20(3)))
- often some elements are also regulated separately as constitutional principles or fundamental rights
- the elements of the rule of law are usually worked out in a *rich constitutional jurisprudence*, which is often inspired by the jurisprudence of other const. courts or human rights courts

VI. The various elements of the rule of law

- There is no homogeneous terminology or systematics. Some elements may not be shared in some countries, not associated with the rule of law or labeled differently. The following compilation includes all important elements but is not exhaustive.

1. The subjection of all activity of public institutions to the law

- the essence of "Rechtsstaatlichkeit"/"rule of law"
- includes the *obligation to enforce the law*, in favor of but also *against* the citizen
- a) The primacy of the constitution
 - subjection of all public institutions, including the legislator, to the constitution
- b) The primacy of the law
 - the subjection of the executive and the judiciary to the law
 - the monitoring of compliance requires *transparency*
 - **problem:** direct subjection to public international law? The controversy between *monism* and *dualism*

Topic problem: the rule of law and the German financing of the Russian war of aggression on Ukraine: The commitment to the rule of law includes the commitment to the *primacy of the law in international relations*. This prohibits any substantial support to the aggressor of a war of aggression, even through trade, and even if this causes economic disadvantages. In March 2022, the ongoing practice of Germany (and also Italy) to buy enormous amounts of gas, oil and coal from Russia contributes significantly to the financial stabilisation of the aggressor and undermines the effect of the sanctions taken by the international community (USA, EU, Japan, South Korea, Taiwan, Singapore, Canada, UK, Australia, New Zealand, Switzerland, global companies, civil society, sports and cultural organisations and others) to end this war.

2. The principle of statutory reservation

- regulated explicitly (e.g. in France (art. 34 Constit. 1958)) or derived from the principle of the rule of law (possibly combined with the principle of democracy) and/or fundamental rights provisions
- usually more comprehensive in parliamentary than in presidential democracies
- requires a *legal basis for all encroachments on fundamental rights* and other decisions imposing a burden on the citizen

3. The principle of proportionality

- the most important legal principle at all
- a radical challenge to totalitarianism: categorical rejection of any claim of absoluteness for any objectives of the state!
- philosophical foundations already in the Old Testament of the Bible (→ "eye for eye, tooth for tooth...")
- can be derived from both, fundamental rights and the concept of rule of law
- applies to all measures that impose a burden on the citizen
- legislator is bound but enjoys a *margin of appreciation and evaluation*
- the structure of examination varies in different legal orders; see here the sophisticated differentiated German approach:
- a) The measure must pursue a *legitimate aim*
 - a public, not private interest which is not excluded by the constitution or other law and intended in the legal basis
- b) The measure must be *suitable* to pursue that aim
 - it must be conducive to its purpose
 - caution: measures might be harsh but nevertheless suitable!
- c) The measure must be *necessary* to achieve the pursued aim
 - it must be the least intrusive act of intervention that is equally conducive
 - often the crucial point in the examination of a practical case (→ consider alternatives!)
 - the lawyer must consider possible alternatives - this requires phantasy...
- d) The measure must be *proportional* in the strict sense
 - the burden imposed must be proportionate (not out of proportion) to the aim in view; this requires a thorough *balancing* of the concerned public interests and the rights of the citizen

² In some countries, e.g. in Germany, the separation of powers is also considered an element of the rule of law.

4. 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
 - a) The principle of definiteness
 - legal norms must be formulated *clearly and precisely*
 - conferred powers must be defined and limited clearly, even when using general clauses and indefinite legal concepts
 - b) The prohibition of inconsistencies within the law
 - since the citizen cannot adapt to contradictory laws with contrary requirements
 - c) The limitation of legislation with retroactive effect
 - in particular protection of *acquired rights*
 - legislation with *true retroactive effect* (referring to facts in the past that cannot be changed anymore) are only admissible in extremely exceptional cases and if required by imperative public interests
 - legislation with *pseudo-retroactive effect* (affecting on-going facts or relationships for the future) may be excluded by the protection of the citizen's legitimate expectations or require *transitional provisions*
 - d) The protection of the trust in the finality of administrative decisions and court judgements
 - if this collides with the state's obligation to enforce the law, the rule of law requires a considerate balancing
5. The guarantee of effective legal protection
 - in Europe particularly developed in the rich jurisprudence of the European Court of Human Rights
 - a) Effective legal protection in civil law matters
 - b) Effective legal protection against public authority
 - the citizen must be able to defend and enforce his rights effectively against any measures of public institutions
 - includes interim relief
 - c) The right to a fair trial
 - in particular the right to an independent and impartial court
 - in particular the right to the lawful judge
 - in particular the right to be heard at the court
6. Principles in the fields of criminal and criminal procedure law
 - in Europe particularly developed in the rich jurisprudence of the European Court of Human Rights
 - a) Nulla poena sine lege
 - a special concretisation of the principle of definiteness and the prohibition of legislation with retroactive effect in the field of criminal law
 - b) Ne bis in idem
 - no one may be punished more than once for the same act under criminal law
 - c) Special rights of the defendant in the criminal procedure
 - d) Guarantees in case of deprivation of liberty
 - e) Presumption of innocence until conviction
 - f) In dubio pro reo
7. Principles of fair administrative procedure
 - in the European Union anchored as a *right to good administration* in the Charter of Fundamental Rights
 - in many constitutional states codified in administrative procedure acts
 - the *right* of the citizen *to be heard*
 - the right of the citizen of *access to his file*
 - the duty of the authority to *examine carefully and impartially* all relevant aspects of the case
 - the duty of the authority to *decide within a reasonable time*
 - the obligation to *state the reasons* for the administrative decision
8. State liability (public liability) for illegal acts of public authorities
 - the citizen must be compensated for the damage caused by any illegal acting of public institutions
 - CONTROVERSIAL in some countries for illegal acts of the legislator (recognised in European Union law)

Further Reading

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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) (comprehensive guide to the current rule of law standards in modern constitutional states)

See on the concepts of Rechtsstaat, État de droit and rule of law in general also the numerous other reports, studies and documents of the *Venice Commission*, www.venice.coe.int/webforms/documents/?topic=34&year=all.