

concerning § 9 II.4 Germany as a state based on the rule of law

### Diagram 3

#### Brief introduction to the principle of the rule of law - with special regard to the example of Germany -

#### 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 18<sup>th</sup> and 19<sup>th</sup> centuries as a liberal antonym to the absolutist concept of *Polizeistaat* [police state]; in the 20<sup>th</sup> 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 separation of powers*
    - philosophical foundations: ARISTOTELES, LOCKE, MONTESQUIEU
    - division of state activity into three blocks (legislature, executive, judiciary) and allocation to different institutions
    - objectives: securing freedom and *moderating state power by separation and interlocking of powers*; rational and functional organisation of state power
    - constitutional *principle of separation of powers* (art. 20(2) phrase 2 BL)
      - requires functional, organisational and (partly) personal separation
      - protects the balance of powers as provided by the Constitution
      - protects absolutely the *core area* of each power
  - IV. *The principle of proportionality*
    - categorical rejection of any claim of absoluteness for any objectives of the state!
    - strict requirements for all 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*)

V. *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

VI. *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

VII. *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

VIII. *Principles of fair administrative procedure*

- 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

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

**D. Further reading**

- *Thomas Schmitz*, The rule of law - an often underestimated core principle of the modern constitutional state, guest lecture at UNDIP, Semarang, 18.03.2022
- *Pietro Costa; Danilo 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](http://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).