

concerning § 5 In particular: the principle of the rule of law

### Diagram 3

## The principle of the rule of law in the modern constitutional state - with special regard to the example of Germany -

### A. Fundamental idea and historical foundations

- the fundamental idea: overcoming arbitrariness by moderating public power and reliably adjusting it to legal rules
- the concept of the *Rechtsstaat* [state based on the rule of law] emerged in Germany in the 18<sup>th</sup> and 19<sup>th</sup> centuries as a liberal antonym to the absolutist concept of the *Polizeistaat* [police state]; in the 20<sup>th</sup> century it served as *antithesis to totalitarianism*

### B. 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*"
- the French comprehensive concept of "*État de droit*"
  - generally recognised since the 1980s but based on elements partially developed already in the 19<sup>th</sup> and early 20<sup>th</sup> century
- the British concept of "*rule of law*"
  - restricted for a long time 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; the Court uses the common legal traditions of the EU member states, the European Convention on Human Rights and other intern. treaties as sources of inspiration
  - nowadays the most comprehensive and up-to-date repository of rule of law elements
- the *convergence* of the different concepts *in the course of European integration*
- the common use of the term "rule of law" (in a broad sense) in the international discourse

### C. The spreading of the idea in the wake of globalisation and development

#### I. *A first triumph of the rule of law in the wake of democratisation in Europe*

- the successful adoption of the rule of law in Spain and Portugal in the 1970s
- the adoption of the rule of law in the East European former socialist states in the 1990s
  - supported by the West European countries, the Council of Europe and its Venice Commission
  - fostered by the introduction of constitutional courts and their jurisprudence

#### II. *The rising popularity of the idea in countries with emerging economies*

- promoted by development partners, NGOs, intellectuals, economic actors and even government think tanks and senior officials
- the rule of law as an - ideologically neutral - way to secure sustainable development
- example: the commitment of ASEAN and its member states to the rule of law (cf. art. 1 no. 7, 2(2) lit. h ASEAN Charter)
- example: Kazakhstan as a *Rechtsstaat* (art. 1(1) of the [Constit. of 1995](#))
- economic background: rule of law as a key requirement for sustainable economic globalisation

#### III. *Recent threats to the rule of law by populism and extremism*

- serious regressions in the rule of law in EU member states (Hungary, Poland) and accession candidates (Turkey)
  - failure of the European Union to intervene with appropriate measures to secure the rule of law
- unpunished ignorance of the rule of law in the U.S.A. by the Trump administration
- challenge of the rule of law by religious fundamentalists and authoritarian regimes (Russia, China)
- outlook: does the concept of the rule of law lose its attraction?

### D. Formal and material concept of the rule of law

- the German concept of "*Rechtsstaat*" evolved in a long process *from a narrow formal concept* consisting of 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
- the general principles of European Union law included formal and material elements from the outset
- 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 powers and human rights and can even be realised without them

## E. The constitutional basis of the rule of law

- some constitutions refer explicitly to the concept of "Rechtsstaat"/"État de droit" or "rule of law" as a fundamental constitutional principle (e.g. in Kazakhstan (art. 1(1)), Indonesia (art. 1(3)), Portugal (art. 2), Spain (art. 1(1)), Poland (art. 2); see also art. 2 EU Treaty)
- The Basic Law for the Federal Republic of Germany of 1949 [= BL] does not explicitly postulate a principle of the rule of law but anchors important elements in various provisions, and refers to the concept of "Rechtsstaat" in art. 28(1). The Federal Constitutional Court derives a "**Rechtsstaatsprinzip**" from art. 20(3). Some elements are regulated separately as constit. principles or fund. rights (cf. art. 1(3), 19(4), 20(2) phrase 2, 101, 103, 104 BL).
- 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 constit. courts and the European Court of Human Rights. There is an abundance of jurisprudence of the Federal Constitutional Court on the requirements of the "Rechtsstaatsprinzip".

## F. The elements of the rule of law

- Note that there is no homogeneous terminology or systematics! Some elements may not be known in some countries, not associated with the rule of law or labeled differently. The following compilation includes all important elements, with special regard to the German law, but is not exhaustive.

### I. *The subjection of all activity of public institutions to the law* (cf. for Germany art. 20(3) BL)

- the essence of "Rechtsstaatlichkeit"/"rule of law"
- includes the *obligation to enforce the law*, in favor of but also *against* the citizen
- 1) **The primacy of the constitution**
  - subjection of all public institutions, including the legislator, to the constitution
  - in particular direct binding effect of fundamental rights (see for Germany art. 1(3) BL)
- 2) **The primacy of the law**
  - the subjection of the executive and the judiciary to the law
  - the "law" includes in the European Union the subjection to the supranational European Union law
  - **problem**: direct subjection to public international law? The controversy between *monism* and *dualism*
    - for international treaties, German follows dualism: they must first be implemented into national law

### II. *The principle of statutory reservation*

- in some countries regulated explicitly (e.g. in France (art. 34))
- in Germany derived from the "Rechtsstaatsprinzip" or from this principle combined with the principle of democracy, and complemented by special statutory reservations in the limitation clauses for the individual fundamental rights
- 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
  - in Germany also for decisions that are somehow essential for the exercise or the realisation of fundamental rights (so-called THEORY OF ESSENTIALITY ["WESENTLICHKEITSTHEORIE"] of the Federal Constitutional Court)

### III. *The separation of powers*

- usually considered a distinct, complementary feature of the free and democratic constitutional state, but in Germany considered an element of the rule of law
- 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
- 1) **Constitutional principle of separation of powers** (art. 20(2) phrase 2 BL)
  - requires functional, organisational and (partly) personal separation of powers
  - safeguard of the balance of powers as provided by the Constitution
  - absolute protection of the *core area* of each power
- 2) **Realisation of the separation of powers by the arrangement of the state institutions in the Constitution**
- 3) **Complementation of the horizontal by a vertical separation of powers in the German federal state**

### IV. *The principle of proportionality* [Verhältnismäßigkeitsprinzip]

- the most important legal principle at all
- can apply in states with different political-philosophical orientation (democratic, socialist, islamic states etc.), but:
- the most radical challenge to totalitarianism: categorical rejection of any claim of absoluteness for any objectives of the state!
- philosophical foundations in the Bible (Old Testament)
- can be derived from both, fundamental rights and Rechtsstaatsprinzip/principle of the rule of law
- legislator is bound but enjoys a *margin of appreciation and evaluation*
- applies to all measures imposing a burden on the citizen
- the structure of examination varies in different legal orders; see the *sophisticated German approach* with four requirements:
- 1) **The measure must pursue a *legitimate aim***
  - the measure must pursue a public, not private interest
  - the aim must not be excluded by the constitution or other law
    - e.g. no public enforcement of private morality in a state committed to human rights
  - the aim must be intended in the relevant legal basis

- 2) The measure must be *suitable* to pursue that aim
  - the measure must be conducive to its purpose
  - caution: measures might be harsh but nevertheless suitable!
- 3) The measure must be *necessary* to achieve the pursued aim
  - the measure must be the least intrusive act of intervention that is equally conducive
  - often the crucial point in the examination of a practical case
  - the lawyer must consider possible alternatives to the measure - this usually requires phantasy...
- 4) The measure must be *proportional* (in the strict sense)
  - the burden imposed must be in reasonable proportion (not excessive, not out of proportion) to the aim in view
  - requires thorough *balancing* of the concerned public interests and the rights (in particular fundamental rights) of the citizen

#### 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*, allowing the citizen to anticipate the acting of the authorities
    - conferred powers must be defined and limited clearly; this does not exclude but limits the use of general clauses and indefinite legal concepts (usually one of the great topics in administrative law)
  - 2) The prohibition of inconsistencies within the law
    - since the citizen cannot adapt to contradictory laws with contrary requirements
    - often a problem in developing countries when different ministries supported by different foreign development partners prepare different laws that may in some cases interfere with each other
    - inconsistencies can be avoided by a thorough scrutiny of all bills in all fields of law by a central unit in the government
  - 3) 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, e.g. criminalising a behaviour that was allowed at the time when it happened) should only be admitted in extremely exceptional cases and if required by imperative public interests
    - legislation with *pseudo-retroactive effect* (referring to present, on-going facts or relationships and affecting them for the future, e.g. setting higher standards for the final exams during the studies or higher preconditions for pension claims) may be excluded by the *right of the citizen to the protection of his legitimate expectations*; often, however, the problem can be solved by *transitional provisions*
  - 4) The protection of the trust in the finality of administrative decisions and court judgements
    - the citizen must be able to trust that the case is settled after the proceedings are finished and the decision/judgement is final
    - *can collide with the obligation of the state to enforce the law*; this requires a thorough → *balancing* that can lead in different legal orders to different results (the German balancing needed to be readjusted under the pressure of European Union law after focusing too strongly on the protection of the trust of the citizen and neglecting the enforcement of the law)

#### VI. *The guarantee of effective legal protection*

- in Europe particularly developed in the rich jurisprudence of the European Court of Human Rights
- 1) Effective legal protection in civil law matters (in Germany derived from art. 2(1) read together with art. 20(3) BL)
  - 2) Effective legal protection against public authority (see for Germany art. 19(4) BL)
    - the citizen must be able to defend and enforce his rights effectively against any measures of public institutions
    - includes interim relief
  - 3) The right to a fair trial
    - in particular the right to an independent and impartial court
    - in particular the right to the lawful judge (see for Germany art. 101(1) phrase 1 BL)
    - in particular the right to be heard at the court (see for Germany art. 103(1) BL)

#### VII. *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
- 1) Nulla poena sine lege (see for Germany art. 103(2) BL)
    - a special concretisation of the principle of definiteness and the prohibition of legislation with retroactive effect in the field of criminal law
  - 2) Ne bis in idem (see for Germany art. 103(3) BL)
    - no one may be punished more than once for the same act under criminal law
  - 3) Special rights of the defendant in the criminal procedure
  - 4) Guarantees in case of deprivation of liberty (see for Germany art. 104 BL)
  - 5) Presumption of innocence until conviction
  - 6) In dubio pro reo

### VIII. Principles of fair administrative procedure

- in the European Union anchored as a right to good administration in the Charter of Fundamental Rights
- in Germany not explicitly regulated in the Basic Law but codified in an Administrative Procedure Act
- 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

### IX. State 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 Germany for illegal acts of the legislator (recognized for violations of European Union law)

## G. Further reading

- 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); see also 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>; Thomas Schmitz, The rule of law - an often underestimated core principle of the modern constitutional state, guest lecture at UNDIP, 2021, [www.thomas-schmitz-yogyakarta.id/Downloads/Schmitz\\_Underestimated-rule-of-law\\_UNDIP2022.pdf](http://www.thomas-schmitz-yogyakarta.id/Downloads/Schmitz_Underestimated-rule-of-law_UNDIP2022.pdf).
- Concerning the German concept of "Rechtsstaat" see Thomas Schmitz, The Principle of the Rule of Law as a Constitutional Principle - the Example of Germany, special 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); Werner Heun, The Constitution of Germany. A Contextual Analysis, 2011, p. 35 ff [available at the lecturer].
- Concerning the general principles of European Union law as an up-to-date repository of the elements of the rule of law see Thomas Schmitz, The general principles of European Union law - a source of inspiration for the development of a modern administrative law in the Republic of Moldova, in: Administrarea Publică 2017, no. 1 (93), 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 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).

(Datei: Diagram 2 (CompConstLaw))