

The Principle of the Rule of Law as a Constitutional Principle - the Example of Germany -

• Introduction:

- the rule of law as a fundamental constitutional principle in many modern constitutional states (see for Indonesia art. 1(3) Constit. 1945)
- the rise of the idea of rule of law in the wake of globalisation and development
- the commitment of ASEAN and its member states to the rule of law (see the principle of adherence to the rule of law in art. 2(2) lit. h ASEAN Charter)

A. Foundations

- the fundamental idea: overcoming arbitrariness by moderating public power and reliably adjusting it to legal rules
- the concept of the *Rechtsstaat* emerged in the 18th and 19th centuries as a liberal antonym to the absolutist concept of the *Polizei-staat* (police state); in the 20th century it served as *antithesis to totalitarianism*
- the concept evolved from a narrow *formal* to a comprehensive *material concept of Rechtsstaat* that includes numerous material (substantial) principles of law
- different manifestations of the same fundamental idea in Europe: Rechtsstaatsprinzip (Germany), État de droit (France), rule of law (Britain), general principles of law (European Union law); convergence in the course of European integration

B. Constitutional basis

- The Basic Law for the Federal Republic of Germany of 1949 [= BL] anchors important elements in special provisions but does not postulate explicitly a principle of the rule of law. The Federal Constitutional Court derives the *Rechtsstaatsprinzip* from art. 20(3). Its contents have been worked out thoroughly and developed in the *rich constitutional jurisprudence* of the Court.

C. Elements

I. *All activity of public institutions is bound to the law* (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) Subjection of the legislator to the Constitution
 - the *primacy of the constitution*, even over statutory law
- 2) Subjection of the executive and judiciary to the law
 - the *primacy of the law*
 - the "law" ["Gesetz und Recht"] includes constitutional law, supranational law (European Union law) and the general rules of public international law (international treaties must first be implemented into national law)

II. *Principle of statutory reservation*

- derived from the Rechtsstaatsprinzip or from this principle combined with the principle of democracy
- complemented by special statutory reservations in the limitation clauses for the individual fundamental rights
- requires a *legal basis* ["Ermächtigungsgrundlage"] for the following measures:
 - 1) For encroachments on fundamental rights
 - 2) For any other decisions that are 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*

- 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

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IV. The principle of proportionality

- 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)
- derived from fundamental rights and Rechtsstaatsprinzip
- the legislator is bound by the principle but enjoys a *margin of appreciation and evaluation*
- four fundamental requirements for 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
 - 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
 - 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* of the concerned public interests and the rights (in particular fundamental rights) of the citizen

V. Legal certainty and protection of legitimate expectations

- 1) The principle of definiteness
 - legal norms must be formulated *clearly and precisely*, allowing the citizen to anticipate and to adapt himself
 - conferred powers must be defined and limited clearly; this does not exclude but limits the use of general clauses and indefinite legal concepts
- 2) The prohibition of inconsistencies within the law
- 3) The limitation of legislation with retroactive effect
 - 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 where it happened) is only admitted in very exceptional cases
 - legislation with *pseudo-retroactive effect* (referring to present, on-going facts or relationships and affecting them for the future, e.g. setting higher preconditions for pension claims) may be excluded by the right of the citizen to the protection of his legitimate expectations; often, the problem can be solved by *transitional provisions*
- 4) Protection of the trust in the finality of administrative decisions and court judgements
 - *collides with the obligation* of the state to *enforce the law* (requires → balancing)

VI. Guarantee of effective legal protection

- 1) Effective legal protection in civil law matters (art. 2(1) read together with 20(3) BL)
- 2) Effective legal protection against public authority (art. 19(4) BL)
 - including interim relief
- 3) Right to the lawful judge (art. 101 BL)
- 4) Right to be heard at the court (art. 103(1) BL)

VII. Constitutional principles of criminal and criminal procedure law

- 1) Nulla poena sine lege (art. 103(2) BL)
- 2) Ne bis in idem (art. 103(3) BL)
 - no one may be punished more than once for the same act under criminal law
- 3) Presumption of innocence until conviction
- 4) In dubio pro reo

VIII. State liability for illegal acts of public authorities

D. Further reading

- *Matthias Koetter*, Rechtsstaat and Rechtsstaatlichkeit in Germany, 2010, <http://wikis.fu-berlin.de/display/SBprojectrol/Germany>
- *Werner Heun*, The Constitution of Germany. A Contextual Analysis, 2011, p. 35 ff.
- 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; see in particular the Venice Commission's "*Rule of Law Checklist*", 2016, www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf; 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>.

E. Excerpt from the Basic Law for the Federal Republic of Germany of May 23, 1949

Art. 1(3)

The following fundamental rights shall bind the legislature, the executive and the judiciary as directly applicable law.

Art. 19(4)

Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts. ...

Art. 20

...

(2) All state authority is derived from the people. It shall be exercised by the people through elections and voting and through specific organs of the legislature, the executive power, and the judiciary.

(3) *The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.*

...

Art. 101(1)

Extraordinary courts are not allowed. No one may be removed from the jurisdiction of his lawful judge.

Art. 103

(1) In the courts everyone is entitled to a hearing in accordance with law.

(2) An act can be punished only where it was defined by the law as a criminal offence before the act was committed.

(3) No one may be punished for the same act more than once under the general criminal laws.

More information on German and European law at my websites www.thomas-schmitz-yogyakarta.id (Yogyakarta), www.jura.uni-goettingen.de/schmitz (Göttingen), www.thomas-schmitz-hanoi.vn (Hanoi) and <http://home.lu.lv/~tschmit1> (Riga). For any questions you are always welcome to contact me in my office at the Faculty of Law of Universitas Gadjah Mada (Building IV, room IV.1.17) or via e-mail at tschmit1@gwdg.de.