§ 2 The rule of law as a core principle of good governance

I. The vague concept of principles of good governance

1) A vague and heterogeneous concept

- originally developed by the World Bank in the 1990s
- used by many actors in different legal and political contexts
  - in particular in development cooperation and for orientation in developing political and admin. systems
- different sets of principles proposed, which, however, usually include
  - participation and responsiveness
    - sometimes also consensus orientated governance
    - sometimes also equity, diversity and inclusiveness
  - transparency and accountability
  - effectiveness and efficiency
  - rule of law
    - in particular no corruption
    - in particular impartially enforced fair legal frameworks
    - in particular full protection of human rights, including minority rights

2) A political or a legal concept?

- in principle a *basic political concept* (from political and administrative science), which, however, is *enriched by legal principles*
- many principles are suitable to serve as a political guideline but not as a principle of law because they cannot be applied objectively and precisely by the courts
  - a court is functionally legitimised to apply legal, not political criteria
- but the principle of rule of law and its many sub-principles are classical legal principles, which can be applied by the courts without problems
  - some sub-principles even serve to implement other principles of good governance

3) Attempts to implement the concept into binding law

- in development cooperation
  - e.g. as binding standards referred to in cooperation agreements
- in constitutional and human rights law
  - e.g. the fundamental right to good administration under art. 41 of the EU Charter of Fundamental Rights
- in special legislation in the field of administrative law
  - e.g. in Indonesia

II. The concept of rule of law

1) Fundamental idea and historical foundations

- overcoming arbitrariness by moderating public power and reliably adjusting it to legal rules
- *Rechtsstaat* as antonym to Polizeistaat [police state]; antithesis to totalitarianism

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

- comprehensive German and French concepts of *"Rechtsstaat"* and *"État de droit"* [negara hukum]
- long time restricted British concept of *"rule of law"*
- jurisprudential *general principles of European Union law*
- *convergence* of the concepts in the course of European integration
- use of term "rule of law" (in a broad sense) in the international discourse

3) The spreading of the idea in the wake of globalisation and development

- a first triumph in the wake of democratisation in Europe
  - supported by the Council of Europe and its Venice Commission
- rising popularity in countries with emerging economies
  - rule of law commitment of ASEAN (art. 1 no. 7, 2(2) lit. h ASEAN Charter)
- recent threats to the rule of law by populism and extremism
  - latest: total rejection by the new US Government in 2025:
    - President DONALD TRUMP: "He who saves his Country does not violate any law." (15.02.2025)
    - Vice-President J.D. VANCE: "Judges aren't allowed to control the executive's legitimate power." (09.02.2025)

4) Formal and material concept of the rule of law

- development from a narrow formal to a comprehensive (formal and also material) concept that includes numerous substantial principles of law

III. The constitutional basis of the rule of law

1) The common anchoring of the rule of law as a fundamental constitutional principle

- e.g. art. 1(3) of the Indonesian Constitution of 1945

2) The common additional separate regulation of individual elements of the rule of law

- e.g. art. 1(3), 19(4), 20(2), 103 of the German Basic Law

3) The mission of the Constitutional Court to work out and contour the elements of the rule of law

- in a long process of judicial further development of law, by frequent abstract or concrete constitutional review or when deciding about individual constitutional complaints
- no need to reinvent the wheel: *inspiration from comparison of laws*
  - from the research of scholars (e.g. doctoral theses, intern. handbooks)
  - from the jurisprudence of foreign constitutional courts (e.g. the German Bundesverfassungsgericht)
  - from the jurisprudence of intern. human rights courts (e.g. the European Court of Human Rights)
  - from the valuable reference documents of the Council of Europe's Venice Commission (European Commission for Democracy through Law; cooperates also with non-European const. courts)

IV. Excursus: Universal or specific Indonesian concept of "negara hukum"?

- Art. 1(3) Const. 1945 (introduced 2001 by the Third Amendment) defines Indonesia as *"negara hukum"*.
- It is evident that with this new clause, after decades of dictatorship, Indonesia wanted to *catch up with the universal values*.
  - The deliberate use of the *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.
  - See for a different, specific national understanding ARIEF HIDAYAT, Rule of Law under The Pancasila, 14.11.2019, with a more ideological than legal reasoning
- Nevertheless, "negara hukum" and Pancasila are related to each other:
  - The *rule of law* can *only* be implemented *within the limits set by the Pancasila*.
  - The *Pancasila* must be *taken into account in the balancing*, when implementing the rule of law.
  - With the new art. 1(3) and also Chapter XA on Human Rights, the Pancasila now must be interpreted themselves in line with these universal ideas.

V. The elements of the rule of law

- see for a detailed presentation **Diagram 2** from the course Comparative Constitutional Law

1) The subjection of all activity of public institutions to the law
   a) *Primacy of the constitution*
   b) Primacy of the law
2) The principle of *statutory reservation*
3) The *principle of proportionality*
   - the most important legal principle at all!
   - legitimate aim, suitability, necessity, proportionality in the strict sense
4) The principles of *legal certainty* and protection of legitimate expectations
   a) Principle of definiteness
   b) Prohibition of inconsistencies within the law
   c) Limitation of legislation with retroactive effect
   d) Protection of the trust in the finality of admin. decisions and judgements
5) The guarantee of *effective legal protection*
   a) Effective legal protection in civil law matters
   b) Effective legal protection against public authority
   c) Right to a fair court trial
6) Principles in the fields of criminal and criminal procedure law
   - apply als to administrative sanctions

   a) *Nulla poena sine lege*
   b) *Ne bis in idem*
   c) *In dubio pro reo*
   d) *Presumption of innocence* until conviction
   e) Special rights of the defendant in the procedure
   f) Guarantees in case of deprivation of liberty
7) Principles of fair administrative procedure
   - anchored in European Union Law as a *right to good administration*

   a) Right to be heard
   b) Right of access to one's file
   c) Careful and impartial examination of all relevant aspects of the case
   d) Decision within reasonable time
   e) Statement of reasons for the admin. decision
8) The principle of *state liability* for illegal acts of public authorities

VI. The rule of law in the legality review of administrative decisions - the example of German administrative law

1) The importance of the legality of administrative decisions in a state based on the rule of law

- Under the rule of law, *any* activity of the public administration must be legal. The law is not only a vague guideline but an *absolute standard*, binding without exceptions *in every single case*: Any violation of a legal norm means a failure of the state.

- Often, administrative action consists of the public authority regulating issues in an administrative decision. The elements of the legality are the conditions for the legality of that decision. If only one of them is missing, the admin. decision is illegal and may be annuled by the administrative court after an action for annulment of the affected citizen.
- In a state based on the rule of law, the lawyer needs to be able to *examine the legality* of an administrative action thoroughly and *precisely* in a transparent, replicable way. This does not only require high knowledge and skills of the lawyer, but also a sophisticated, rational, differentiated and systemizing legal doctrine, as it is sometimes reflected in *complex examination schemes* ["Prüfungsschemata" or "tests", see **Diagram 1**]. The doctrine of the elements of the legality of the administrative decision is a centerpiece of a sophisticated admin. law doctrine - crucial to implement the rule of law and to overcome arbitrariness, unfairness and corruption in public administration.

2) Legality and expediency of administrative decisions

- a fundamental distinction in admin. law, required by the *separation of powers* and important for possible remedies
- The rule of law requires that an admin. decision is legal (complies with the law) but does not mind if it is inexpedient (stupid, unpractical, inefficient, uneconomic, politically not suitable etc.).
- In the course of *administrative review* (by public admin. itself, in objection proceedings), the admin. decision may *also* be abolished *for inexpedience*, since the case, and thus the responsibility, still lies within the administration.
- In the course of *judicial review*, the admin. decision can *only* be annulled *for illegality*. The judge (as a lawyer) is neither qualified (like the expert in the authorities) nor legitimised (like a politician) to examine whether the executive's decision is "good" or "appropriate".
- The distinction can be difficult, in particular for discretionary decisions and with regard to the principle of proportionality.

3) Elements of the rule of law as criteria for the legality of administrative decisions

a) The structure of the examination of the legality

- should be logically predetermined but actually varies from country to country, depending on its legal history and legal traditions
- in a rationally structured system (e.g. French or German admin. law), logically and dogmatically two groups of requirements can be distinguished:
  - those concerning the *making* of the decision (external or "formal" aspects = external legality or legality in form) and
  - those concerning the *contents* of the decision (internal or "material"/"substantial" aspects - internal legality or legality in substance)
- many requirements in both groups reflect indiv. elements or aspects of the rule of law
- elements of the rule of law are present in both groups:

b) Rule of law elements as elements of the legality in form

- see special **Diagram 1** (part A)

c) Rule of law elements as elements of the legality in substance

- see special **Diagram 1** (part B)

d) In particular: rule of law elements as requirements for the correct exercise of discretion

- see special **Diagram 1** (part B.IV)