

Seminars 5 & 6: Rule of Law and Development

- Keynote: The rule of law - a key to development?
 - Is sustainable development possible without rule of law?
 - Is rule of law as important for development as the market economy?
 - Why do many states claim to be committed to the "rule of law" but not many people know what it actually means?

I. The concept of the rule of law

1) The fundamental idea of the rule of law

- to overcome arbitrariness
 - by *moderating public power*
 - by *reliably adjusting public power to legal rules*
- to *prevent elites* in democracies *from abusing* their positions and powers

2) Historical foundations of the rule of law

- the concept of the *Rechtsstaat* [negara hukum/state based on the rule of law] emerged in Germany in the 18th century (→ JOHANN STEPHAN PÜTTER) and 19th century as a liberal antonym to the common absolutist concept of the police state [Polizeistaat]
- in the 20th century, it served as the antithesis to totalitarianism (fascism, communism, religious fundamentalism), which knows no restraint

3) Formal and material concept of the rule of law

- the German concept of "Rechtsstaat" evolved from a narrow formal concept, which was limited to the primacy of the law and a few formal principles, to a comprehensive material concept that includes *numerous material (substantive) principles of law*
- the same applies to the French general principles of law which were later summarised under the term "État de droit"
- the British concept of "rule of law" focused for a long period on the primacy of the law, the equality before the law (no one stands above the law) and some formal principles, but followed the continental way later under the influence of European integration

II. The different historical manifestations of the concept of the rule of law

1) The German comprehensive concept of "Rechtsstaat" [negara hukum]

- a growing collection of fundamental formal and material (substantive) principles of law
- perfectionised in the jurisprudence of the Federal Constitutional Court and in German administrative law in the decades after the end of World War II

2) The French comprehensive concept of "État de droit" [negara hukum]

- a collection of numerous formal and material principles of law that developed already in the form of unwritten general principles of law in the 19th and early 20th century
- the term "État de droit" was only generally recognised since the 1980s

3) The British concept of "rule of law"

- limited for a long time to the primacy of the law, the equality before the law and apart from that a predominantly formal understanding
- this more narrow concept still prevails in some common law countries

4) The "general principles of European Union law"

- unwritten principles of law that are considered to be inherent in any legal order which is based on the rule of law
- "discovered" by the European Court of Justice in Luxembourg in the way of judicial further development of law by way of evaluative comparison of laws, inspired by
 - the legal traditions of the EU member states
 - the European Convention of Human Rights (as interpreted by the European Court of Human Rights)
 - other international treaties, esp. human rights treaties
- nowadays the most comprehensive and up-to-date repository of rule of law elements on the planet, inspiring jurisprudence and legislation in many countries

5) The convergence of the different concepts in the course of European integration

- under the mutual influence of European and national jurisprudence and legislation, the understanding of the rule of law within the European Union has become increasingly harmonised in the process of European integration
- there are still differences in the details, but there is a broad general consensus on the various elements that constitute the rule of law
 - differences relate primarily to the balancing of the individual elements of the rule of law in the event of conflict.

6) The general understanding of "rule of law" in the broader sense in the international discourse

- in the international discourse, esp. in human rights and development cooperation, the concept is understood in the broader sense, including all formal and material elements of the modern rule of law understanding

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

1) The first triumph of the rule of law in the wake of democratisation in Europe

- successful adoption in Greece, Spain and Portugal in the 1970s
 - supported in Spain and Portugal by the newly established constitutional courts
- successful adoption in most East European former socialist states in the 1990s
 - supported by the West European countries
 - supported by the Council of Europe, a European international organisation for the promotion of human rights, democracy and the rule of law,
 - supported by the Council of Europe's Venice Commission (European Commission for Democracy through Law),
 - a high-profile advisory body on constitutional matters, established in 1990
 - has published numerous expert opinions, scientific studies and reports on topical issues
 - cooperates with national constitutional courts and also with non-European partners
 - fostered by the introduction of constitutional courts and their jurisprudence in the East European states

2) The growing interest in the rule of law in countries with emerging economies

- promoted by UN, WTO and OECD, development cooperation partners and other international partners, civil society organisations, scholars, intellectuals and economic actors
- supported by government think tanks and senior officials across the ideological spectrum who recognised the importance of rule of law for development
- the rule of law as an - ideologically neutral - way to secure sustainable development without jeopardising national sovereignty

3) The commitment of ASEAN to the rule of law

- the ASEAN purpose to strengthen the rule of law (art. 1 no. 7 ASEAN Charter)
- the *ASEAN principle* to adhere to the rule of law (art. 2(2) lit. h ASEAN Charter)
 - a legal principle, binding to the organisation and the member states
- the confirmation of this commitment in a formal statement to the UN in 2025
- the explicit commitment to the rule of law in the constitutions of Indonesia (art. 1(3)), Thailand (sect. 3, 26), Vietnam (art. 2(1)), Laos (art. 6, 10) and the Philippines (preamble)

4) Indonesia's commitment to the universal (broad) concept of the rule of law

- Indonesia defines itself as a "*negara hukum*" [state based on the rule of law] (art. 1(3) Constit. 1945, introduced by the Third Amendment of 09.11.2001). This is an important constitutional principle.
- From the perspective of an international constitutionalist, it is evident that by introducing art. 1(3) after decades of dictatorship, Indonesia wanted to *catch up with universal values*.
 - The unambiguous wording - 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 a specific national way as a "negara hukum Indonesia" or "negara hukum Pancasila", but it has chosen not to do so.
 - So there is no room for a more narrow specific "Indonesian" understanding of the rule of law.
- 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, which form the basis of the Constitution and define its identity (cf. preamble, sect. 2).
 - The Pancasila must be taken into account in the balancing processes within the implementation of the rule of law.
 - However, the new art. 1(3) and Chapter XA on Human Rights make 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.

IV. Recent challenges to the rule of law

1) Problems brought by globalisation and geo-regionalisation

- effective fundamental rights protection against supranational powers
 - supranational organisations exercise public power on the territory of their member states but are not bound by the fundamental rights guaranteed in the national constitutions
 - for effective human rights protection, they must have their own fundamental rights regime
 - such as now the Charter of Fundamental Rights of the European Union
- the final arbiter of the limits of the competences of intern- and supranational institutions
 - a problem discussed heavily in the European Union for decades
 - an ultra vires review of the European Union's legal acts by the national constitutional courts despite the exclusive jurisdiction of the European Court of Justice?
 - the controversial jurisprudence of the German Federal Constitutional Court (Maastricht judgement of 1993, Lisbon judgement of 2009, ECB Public Sector Purchase Programme judgement of 2020)
- the weakening of the judicial power by the settlement of investor-state disputes by arbitration panels who are no courts or institutions of the state
 - allows global corporations to escape from the jurisdiction of the courts; this can affect the legal protection of the citizens in the state
 - where citizens' rights are affected, rule of law requires the jurisdiction of a real - national or international - court

2) The rejection of the concept of the rule of law by totalitarian political and religious extremists

- totalitarian regimes and their supporters cannot accept the idea of a limitation of power
- therefore no rule of law under genuinely fascist, communist or islamist regimes

3) The erosion of the rule of law by populist and authoritarian regimes

- serious setbacks in numerous states brought by populist and authoritarian governments
- outstanding examples:
 - Russia (under President VLADIMIR PUTIN)
 - Turkey (under Prime Minister/President RECEP TAYYIP ERDOĞAN)
 - Moldova (under the influence of oligarch VLADIMIR PLAHOTNIUC)
 - the Philippines (under President RODRIGO DUTERTE)
 - Venezuela (under Presidents HUGO CHÁVEZ and NICOLÁS MADURO)
 - USA (under President DONALD TRUMP)
 - especially during his second term (since 2025) under the influence of think tank PROJECT 2025
- setbacks even in the European Union
 - although European integration is based on law and r.o.l is one of the EU's fundamental values (cf. art. 2 EU Treaty)
 - examples: Hungary (under Prime Minister VIKTOR ORBAN), Poland (under the PIS government), Slovakia (under Prime Minister ROBERT FICO), threats in Romania
 - the EU's failure to intervene with appropriate measures to secure the rule of law (no expulsion of member states, no suspension of membership, no completed proceedings under art. 7 EU Treaty)
- apparently, it is *not that difficult to turn a rule of law-based democracy into dictatorship*
 - see my practical instruction "How to become a dictator" from the course General Theory of the State, 2022

4) The challenge to the rule-based international legal order posed by hegemonic global "bullies"

- serious attacks on the rule of law in international relations
- the Russian (PUTIN'S) attempt to restore the Soviet empire
 - the war of aggression on Ukraine
 - hybrid warfare operations against European states supporting Ukraine
- the American (TRUMP'S) assaults on public international law
 - threats against the International Criminal Court and measures against its judges
 - the kidnapping of the President of Venezuela
 - threats against Denmark (to annex Greenland) and Canada
 - the war of aggression on Iran
- the Chinese (XI JIPING'S) "bullying" of its neighbours
 - threats and preparations for a war of aggression on Taiwan
 - incursions into Philippine territory
 - unilateral occupation of disputed islands in the South China Sea
- Iran's attack on the freedom of the seas in the Strait of Hormuz
- the real problem: the *failure of the international community* to take decisive action to uphold public international law against the global "bullies"
 - the weak response of the West, esp. the European Union and its member states
 - the failure to react of the Global South, esp. ASEAN and its member states

5) Perspective: Towards a global decline or renaissance of the rule of law?

- numerous states are at a crossroads - with an uncertain outcome
- the unclear consequences of the recent international developments: from law-based multi-lateral cooperation amongst equals towards hegemonic bilateral relations?

V. The fundamental importance of the rule of law for the sustainable development of the economy, society and the state

- countries committed to the rule of law or strengthening their commitment to it develop faster
 - examples: Germany after 1945, Singapore, South Korea, Taiwan, Chile, Botswana, Rwanda, Vietnam after Đổi mới
 - for this reason, also the People's Republic of China accepts the concept of rule of law
- most regimes without rule of law have failed economically in the long term
 - examples: communist regimes (Soviet Union, China under Mao, North Korea, German Democratic Republic), highly corrupt postcommunist regimes (Moldova & Ukraine in the 2010s), fascist regimes (in Germany, Italy, Spain)

- the rule of law has proved essential for sustainable development, because
 - international trade and the WTO system depend on it
 - it is necessary for providing sustainable livelihoods and combatting poverty
 - it matters for private sector growth
 - it is *vital for building trust and the willingness to invest sustainably in the future*
 - among investors, international partners, and within society

VI. Rule of law, development and the need for advanced legal education

- the need for lawyers to learn how to handle the law professionally
 - not just to read it but to understand it, also in context, interpret it in-depth and apply it correctly in the individual case
 - consequence: to study the law with a scientific approach
- the need for advanced training in legal methodology
 - to master its full range, from legal interpretation and subsumption to analogy, judicial further development of law, thorough and transparent balancing and comparison of laws
- in particular: the need for advanced training in practical legal case-solving, in order to guarantee the correct application of the law in each individual case
- the - limited - value of inter-disciplinary studies of the law
 - methodological side approaches rooting in other scientific disciplines, such as the economic analysis of law, socio-legal research or political-philosophical reasoning, are valuable as a *complement* to classical legal methodology, *but cannot replace* it and must not supersede it
 - problem in Indonesia: the strong position of the socio-legal approach, which is in principle useful for Indonesia but whose dominance results in the neglect of classical legal methodology

VII. Anchoring the rule of law in the law

1) The anchoring of the rule of law in the constitution

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

2) The implementation of the rule of law in ordinary law, particularly administrative law

- see Slide 3 (Seminar 8)
- numerous provisions in *administrative procedure and court procedure laws* implement and concretise rule of law principles and sub-principles in administrative law

3) The anchoring of the rule of law in international law

- in global human rights treaties (e.g. art. 9, 14, 15 ICCPR)
- in geo-regional human rights treaties (e.g. art. 5, 6, 13, Prot. 7 ECHR, art. 7, 8, 9, 25 ACHR, art. 6, 7 ACHPR)
- in other international treaties
 - e.g. art. 1 no. 7, art. 2(2) lit. h ASEAN Charter, art. 4 lit. m of the Constitutive Act of the African Union, art. 3 of the Statute of the Council of Europe
 - e.g. in European intern. treaties prepared by the Council of Europe
 - rule of law clauses in bilateral agreements (e.g. of the EU)

VIII. The various elements of the rule of law

- Note that 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. This 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 favour of but also *against* the citizen
- a) **The primacy of the constitution**
 - subjection of all public institutions (also the legislator) to the constitution
- b) **The primacy of the law**
 - subjection of the executive and the judiciary to the law
 - in the European Union also to the supranational European Union law
 - monitoring of compliance requires transparency
 - problem: direct subjection to public international law? The controversy between *monism* and *dualism*

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 that impose 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 Bible (→ Old Testament: "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***
 - 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
- 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
 - the lawyer must consider possible alternatives - this requires phantasy...
- d) **The measure must be *proportional* in the strict sense**
 - the burden imposed must be in reasonable proportion (not excessive) to the aim in view
 - this requires thorough *balancing* of the concerned public interests and citizen's rights

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*
 - allowing the citizen to anticipate the acting of the authorities
 - conferred powers must be defined and limited clearly
 - even when using general clauses and indefinite legal concepts in the law
- b) **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 by one central government unit
- 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, e.g. criminalising a behaviour that was allowed at the time when it happened) can only be 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, e.g. setting higher standards for the final exams during the studies) may be excluded by the citizen's right to the protection of his legitimate expectations
 - often the problem can be solved by *transitional provisions*
- d) **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 when the decision/judgement is final
 - 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 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 damage caused by illegal acting of public institutions
- **CONTROVERSIAL** in some countries for illegal acts of the legislator
 - recognised in European Union law

9) Transparency as an essential general element of the rule of law?

- rule of law requires transparency, because otherwise citizens cannot assess whether the acting of public institutions is lawful
- nevertheless, governments and public authorities tend to keep information to themselves
 - in particular under authoritarian regimes and in the USA, where information is excessively "classified"
- many states have enacted *freedom of information acts* to guarantee transparency, but there is a tendency to water them down and withhold more information from citizens