The Rule of Law in the Global Development of Constitutionalism

Thomas Schmitz

Introduction: a Heterogeneous Legal Terminology

The legal terminology applicable to our topic is heterogeneous. The German law uses the term "Rechtsstaat" [state based on the rule of law] for a concept with a long tradition that nowadays emanates from the Constitution.[1] The French doctrine has adopted the corresponding term "État de droit" for a rather new concept, which is based, however, on long-known unwritten "general principles of law".[2] European Union law uses the analogous term "communauté de droit".[3] Meanwhile, in the Common Law tradition, the term "rule of law" is prevalent. It also prevails in the international and comparative legal discourse. This term is preferable in our context because it describes more accurately what is meant. However, the rule of law in the more vague and open sense of the international discourse should not be confused with the well-defined concept of rule of law in English or American law.

The fundamental idea of the rule of law is to overcome arbitrariness by moderating public power and reliably adjusting it to legal rules. "Rechtsstaat" or "rule of law" basically means that the law governs all activities in the state.

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[1] Schmidt-Aßmann (2004), § 26 no. 10 ff.

[2] Chevallier (2014); Schmitz (1989), 27 ff. (in particular 37 ff.).

[3] European Court of Justice, case 294/83, Les Verts, no. 23 (German translation: "Rechtsgemeinschaft"; English translation: "community based on the rule of law").

Everyone, including every institution and power in the state is subject to the law. No one stands above the law; no cause is more important than the law. Thus, the rule of law is an antithesis to totalitarianism.

Originally, the concept was limited to this formal understanding. However, in the second half of the 20th century, it evolved from the narrow formal to a comprehensive material concept that includes numerous material (substantial) principles of law.[4] All these principles serve the implementation of the rule of law and ensure a fair balancing of conflicting interests within the law.

The rule of law is only one of several basic elements of the model of the "freiheitlich-demokratischer Rechtsstaat" [free and democratic state based on the rule of law], which is the prevalent model in contemporary Europe. It must not be confused with other basic elements, such as democracy and the protection of human rights, which are not part of it but complementing it. They are interlinked and mutually reinforcing but still separate principles. Unfortunately, in Hanoi this is not always the case, even not within the German-Vietnamese Rule of Law Dialogue. This sometimes causes misunderstandings.

Different Manifestations of the Same Fundamental Idea in Europe

"Rechtsstaat", "État de droit" and "rule of law" are different manifestations of the same fundamental idea. The German concept emerged in the 18th and 19th centuries as a liberal antonym to the absolutist concept of the "Polizeistaat" [police state] but also roots in the pre-liberal German public law doctrine. It was accomplished under the rule of the Basic Law after 1949.[5] In France, the term "État de droit" was not regularly employed until the eighties of the 20th century but many elements were developed since the 19th century in the form of unwritten "general principles of law" discovered in a long tradition of jurisprudence by the French Conseil d'État.[6] Some of them had already influenced the development of German administrative law via the famous scholar Otto

[4] See, for illustration, my overview on the many elements of the "Rechtsstaatsprinzip" in German constitutional law, www.thomas-schmitz-hanoi.vn/Downloads/Schmitz-_Rechtsstaatsprinzip-en.pdf.

[5] See on the development of this concept Tiedemann (2014), 171 ff.

[6] Schmitz (1989), 29 ff.

Mayer[7] at the end of the 19th century. In the late 20th century, the German concept was more developed and more comprehensive. However, this was partly because corresponding elements existing in the French law were not always linked to the concept of "État de droit". Concerning the "rule of law" in English law, there was a more substantial difference. The English concept focused on formal aspects and procedural fairness and was more reluctant to recognize material (substantial) principles, which would lead to a judicial review not just of the making but also of the contents of the decisions of public authorities.

Under the influence of the emerging European Community/Union law, which had its own, autonomous concept of "communauté de droit", and with the feedback from new modern constitutional states which had adopted and merged the three different concepts, these concepts converged. This is one aspect of the so-called "Europeanisation of law". EU law enjoys primacy over national law. Whenever implementing or applying EU law or encroaching on the rights of EU citizen, the member states must comply with the rule of law requirements of this legal order. Thus, the law of all member states came under pressure to conform with the numerous "general principles of European Union law", which have been discovered and developed by the European Court of Justice in Luxembourg in many decades of evaluative comparison of laws ["wertende Rechtsvergleichung"]. These principles are the most up-to-date incarnation of the rule of law in the 21st century.[8] They also represent the common legal heritage of the rule of law in Europe. The development of these principles and the harmonization of the different rule of law concepts in the European countries have also been stimulated by the jurisprudence of the European Court of Human Rights in Strasbourg when enforcing the European Convention of Human Rights.

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[7] See in particular Mayer (1886); Mayer (1895). Both publications transferring elements from French administrative law to German administrative law doctrine.

[8] For a comprehensive presentation and analysis see Tridimas (2007); see also Lenaerts/van Nuffel (2012), marginal numbers 22–039 ff.

The Triumph of the Rule of Law in Europe

The triumph of the rule of law started in the seventies when Greece, Portugal and Spain put an end to dictatorship and enacted free and democratic constitutions that stressed the commitment to the rule of law.[9] Portugal and Spain also established constitutional courts that developed the constitutional concept of "Estado de direito"/"Estado de Derecho" by the way of constitutional interpretation. A strong cooperation with West-European, in particular German constitutionalists facilitated this development.

The triumph of the rule of law was as its zenith in the nineties, when most East European states, after the end of Soviet rule, established and developed their up-to-date free, democratic and rule of law based constitutional orders. This process was one of the greatest success stories in modern constitutionalism, since these states changed from law-negating totalitarianism to state of the art rule of law and constitutionalism within a decade. 15 years after the fall of the Berlin Wall, eight East European states, three of them former Soviet Republics, were able to join the European Union, which requires its member states to meet the most modern standards of the rule of law. This process was encouraged and promoted by the Council of Europe via a high-profile expert commission, the Venice Commission (European Commission for Democracy through Law).

One of the purposes of the Council of Europe is to promote the rule of law. The Venice Commission was established in 1990. It is supported by the member states of the Council of Europe and a number of other interested states. It consists of university professors of constitutional and public international law, judges of supreme and constitutional courts, experienced members of parliaments and some civil servants. Its members are designated for four years by the states, but act in their individual capacity. The Commission has a permanent secretariat in Strasbourg and is holding plenary sessions four times a year in Venice (Italy).[10]

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[9] See Art. 25 of the Constitution of Greece of 1975, Art. 2 of the Constitution of the Portuguese Republic of 1976, Art. 1 of the Spanish Constitution of 1978.

[10] See on the contribution of the Venice Commission to the development of constitutionalism in East Europe Rülke (2003); Hoffmann-Riem (2014). For detailed information www.venice.coe.int/webforms/events. See also the list of articles on the Commission, www.venice.coe.int/WebForms/pages/?p=01_01_Articles.

The Venice Commission is the Council of Europe's advisory body and the most prominent think tank on constitutional matters in Europe. It shares and promotes the standards and best practices adopted within the member states of the Council of Europe. In 500 expert opinions on issues in more than 50 countries, 80 scientific studies and reports on topical issues, 250 seminars and conferences with dozens of courts and universities and the training of 3.000 civil servants in human rights and administrative law, the Commission has provided an impressive amount of sophisticated advice and training to its member states. In particular, it cooperates with the national constitutional courts. The European Court of Human Rights in Strasbourg has referred to Venice Commission opinions in more than 50 cases.[11] The Venice Commission also cooperates with interested non-European partners, for example within the EU-Central Asia Rule of Law Initiative.[12]

A second factor contributing to the triumph of the rule of law was the introduction of constitutional courts in the new East European constitutional states. Most states adopted the German model of a separate and independent constitutional court with the status of a constitutional institution and the jurisdiction of constitutional review.[13] This model had been invented in Austria but first realized with great success in Germany. As before in Germany, Portugal and Spain, the constitutional courts in East Europe developed the national constitutional law by interpreting the new constitutions and their clauses on the rule of law. Often it would need a whole book to describe what the constitutional court extracted by the way of interpretation from a small number of short constitutional clauses with some indefinite constitutional terms. Supported by the work of the Venice Commission, they kept in mind the achievements of constitutional jurisprudence and theory in the most developed constitutional states. They often adopted – but sometimes also criticized – the doctrines developed by the German Federal Constitutional Court. In some cases, a minority of judges would criticize the majority of judges in a dissenting vote for misunderstanding some inspiring ideas of the German Court.

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[11] All data provided by the Venice Commission on its website, www.venice.coe.int/-WebForms/pages/?p=01_Presentation.

[12] See for details the website of the Venice Commission, www.venice.coe.int/WebForms/pages/?p=03_CARoLInitiative.

[13] See for details Starck (2007).

Without independent constitutional courts or supreme courts exercising their function, the rule of law can hardly be ensured in practice in a state, since without authoritative constitutional interpretation the constitutional dogmatic of the rule of law cannot unfold and there is a lack of orientation for the legislator and the ordinary courts. This is even more evident in the field of public international law where the rule of law is a binding principle too but usually cannot be enforced in practice. The current case of Russia, which has turned back to reject the rule of law in domestic as in international affairs, illustrates this problem. There are fears that China may follow this example. The idea of a "global constitutionalism"[14] is unrealistic as long as conflicts like in Ukraine or the Eastern Sea are not solved by legal experts in courts or arbitration panels but by the way of violence or confrontation.

The Spreading of the Idea of Rule of Law in the Wake of Globalization and Development

In the wake of globalization and development, the general idea of the rule of law has become popular in many countries with emerging economies.[15] In particular intellectuals and the emerging new middle classes but also government think tanks and highly qualified superior officials looking for a way to secure a sustainable development, are open-minded about it. A long-term sustainable growth of the national economy is impossible without the legal security and certainty provided by the rule of law – in particular in times of international economic integration.[16] The WTO necessarily promotes the rule of law because it is depending on it. The ambitious project of the ASEAN Economic Community cannot be realized without the rule of law. Furthermore, the contribution of the civil society to a sound development of the country, which is more and more accepted and appreciated by responsible governments, requires certain reliable legal conditions. Finally, the rule of law is essential for

[14] Peters (2009) with further references.

[15] For an overview see Konrad-Adenauer-Stiftung (2009): See in particular the analysis of Grote, 174 ff.

[16] See the special lecture on this topic at this conference. See also Ewing-Chow/Losari/Slade (2014).

an effective protection of human rights. At the same time it is helpful for the rebutting of unjustified allegations of human rights violations utilized as means of anti-government propaganda. Following strictly the rule of law may lead to a higher degree of rationality in the political process.

Thus, like many other countries in the world,[15] some East and Southeast Asian countries have anchored their commitment to the rule of law in their national constitutions (see Art. 1 (3) of the Constitution of the Republic of Indonesia of 1945, Art. 78 (6) of the Constitution of the Kingdom of Thailand of 2007, Art. 5 of the Constitution of the People's Republic of China of 1982). Some countries refer to certain elements of the rule of law in their constitution (see, for example, Art. 6 and 10 of the Constitution of the Lao People's Democratic Republic of 2003). Others have adopted the rule of law as an important concept of legal policy. They are supported by the United Nations Development Programme, NGOs, the EU and Western governments. Strengthening the rule of law is an integral element of modern development cooperation. For example, German institutions and NGOs are involved in a "Rule of Law Dialogue" with Vietnam.

ASEAN, as an international organization, is also committed to the rule of law. The ASEAN Charter defines the strengthening of the rule of law as one of the purposes of ASEAN (Art. 1 no. 7). It obliges not only the organization but also its member states to act in accordance with the principle of adherence to the rule of law (Art. 2 (2) lit. h). The ASEAN Secretariat even describes the rule of law as a fundamental feature of ASEAN on its website.[17]

However, the adoption of the fundamental idea of the rule of law has also brought misunderstandings and distortions.[18] There is no common sense or awareness of the various formal and material requirements of the rule of law. Continental and Common Law doctrines are mingled. Furthermore, the mixing-up with complementing and interacting but separate elements of the modern constitutional state such as separation of powers, democracy and human rights threatens to dilute its contours and to relativize it. Therefore, it would be helpful to have a second, global "Venice Commission" in order to facilitate orientation, work out a clear distinction between the Western model of a "free and democratic constitutional state" and other types of constitutional states

[17] ASEAN Sectretariat (2013).

[18] See the country reports at the wiki of the Freie Universität Berlin (2013).

and to provide sophisticated advice to developing constitutional states that may want to adopt some but not all doctrines of European constitutionalism. In ASEAN, the judicial development of law by an ASEAN geo-regional court would be helpful to build up an ASEAN rule of law doctrine.

The Rule of Law in the Constitution of the Socialist Republic of Vietnam of 2013

The Constitution of the Socialist Republic of Vietnam of 2013 emphasizes in several articles the primacy of the Constitution and the law. Art. 2 (1) defines Vietnam as a "state ruled by law" or "law-governed state" ["nhà nuớc pháp quyền"]. According to Art. 8 (1), it shall be "organized and operate in accordance with the Constitution and law" and "manage society by the Constitution and law." This can be understood as a general commitment to constitutionalism (unlike in the Soviet Union, other former European socialist states and perhaps China, the constitution is taken seriously) and to the rule of law. This commitment is underlined when Art. 4 (3) emphasizes that even the "organizations and members of the Communist Party of Vietnam shall operate within the framework of the Constitution and the law." So even the Communist Party, although it is the "force leading the state and society" (Art. 4 (1) does not stand above the law. This was a very important issue in the broad public constitutional reform debate in 2013. Finally, Art. 14 stresses that the human and citizens' rights shall be respected and protected in accordance with the law and only subject to limitations prescribed by a law.

However, Art. 2 (1) defines Vietnam more precisely as a "socialist state ruled by law" ["nhà nuớc pháp quyền xã hội chủ nghĩa"]. This does not refer to the ancient communist principle of socialist legality, which limited the law to the function to serve the building-up of socialism[19] and is incompatible with the rule of law. However, it neither refers to the classical, European concepts of the rule of law. The Vietnamese constitution of 2013 is not a free and democratic constitution in the sense of European constitutional theory but a modern example of the socialist type of constitution. Its commitment to the rule of law must be understood in this sense. For example, with regard to the fundamental

[19] Kühn (2011), 118 ff. with further references.

constitutional principle of democratic centralism (Art. 8 (1), separation of powers cannot be part of the rule of law in Vietnam. Consequently, Art. 2 (3) provides that the state agencies "coordinate and control one another" but does not refer to the concept of separation of powers and instead stipulates that the "state power is unified."

It will be the task and challenge for the Vietnamese scholars of constitutional law, the courts and the lawmakers to elaborate the special "socialist" features of the Vietnamese "socialist rule of law" without compromising or diluting the general idea. For example, there may be a greater focus on social justice, social coherence and public interests, some limited differences in the protection of legitimate interests and a stronger acceptance of the state exercising influence on the society. There may also be some special material (substantial) principles of law. With regard to Art. 2 (3) a specific system of checks and balances must be developed, which ensures that the state institutions control one another effectively but which does not yet amount to a real separation of powers. Thus, the global development of constitutionalism may lead to the emergence of a new variant of the concept of the rule of law. We, the European constitutionalists, are looking forward to studying it.

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