

## Observations on the Role of the Rule of Law in Times of Globalisation and Populism

### I. Outline of the problem

1. The universal concept of the rule of law
  - a western-rooted but universal fundamental idea: to overcome arbitrariness by moderating public power and reliably adjusting it to legal rules
  - different but converging manifestations of the same fundamental idea: ("Rechtsstaat", "État de droit", "rule of law", "general principles of law"); numerous well-established sub-principles
2. The rise of this concept in the last 30 years
  - triumph in Europe after the end of totalitarianism and in the process of European integration
  - growing interest in the concept in the newly industrialised countries
  - a fundamental principle in ASEAN (art. 1 no. 7, 2(2) lit. h ASEAN Charter) and Indonesia (art. 1(3) Constit. 1945)
  - the reason: the rule of law as a prerequisite to sustainable development
3. Globalisation as a factor supporting - and sometimes challenging - the rule of law
  - a key factor for the development of the newly industrialised countries
  - presupposes predictability, planning security and legal certainty; this requires sophisticated and effectively implemented law
  - supports - and demands - in particular *multilateralism and strong international institutions*
  - can also endanger the rule of law (see the attempts to replace the judicial power on a large scale by arbitration panels for the binding settlement of investor-state disputes)
4. Globalisation as a catalyst for populism
  - a two-sided medal: winners and losers in all countries
    - the neglected impact on low-qualified people in highly developed countries
    - the neglected impact on people working in less efficient or obsolete economic sectors
    - the neglected impact on local cultures, law and traditions
  - typical human: the prevalent one-sided view of globalisation everywhere in the world
    - taking the benefits for granted but refusing to accept any disadvantages in return
    - ignoring the dimension of the national macroeconomic benefits
    - the *widespread perception that one's own country is unfairly fleeced* by the other parts of the world - similar reasoning in Indonesia, Europe and the U.S.
  - a perfect breeding ground for populism
    - the globalisation debate has shifted from (constructive) scientific to (destructive) populist criticism
    - politicians are tempted to blame globalisation for real or alleged problems of the country
    - individuals are tempted to blame globalisation for their personal problems or dissatisfaction
    - a rise of conspiracy theories and fake news and a decline of rational debates
  - the reason: *globalisation means change*
    - the deepening socio-cultural conflict between dynamic cosmopolitan elites and conservative, locally rooted traditionalists in many countries

### II. Populism as a threat to the rule of law

1. On the domestic level
  - a) Populist attempts to convert the free and democratic system into an authoritarian system
    - western examples: Hungary, Poland, Turkey - U.S.?
  - b) Strategies employed by populists to fight freedom, democracy and the rule of law
    - the neutralisation of the constitutional court
    - the gaining of control over the judiciary
    - the manipulation of the media
      - conversion of public television and radio into instruments of government propaganda
      - denial of access of private media to government information
      - restriction of the freedom of the press for private media
      - undermining of the citizen's trust in the media by constant lying (→ "alternative facts")
    - the restriction of democratic freedoms, in particular of the freedom to assembly and of the rights of NGOs
    - the restriction of the freedom of science and academic teaching
      - update 25/10/2018: latest attack: the ban of gender study courses in Hungary (see → [report](#))

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## 2. On the international level

- a) Populist aversions against limitations of national sovereignty by international standards
  - the euroscepticism of the governments of some EU member states
  - the U.S. President's scepticism against restrictive international standards
- b) Strategies employed by populists to undermine the international legal order
  - sanctions against foreign enterprises not supporting a unilateral boycott against a third country
  - constant open violation of EU refugee law or international humanitarian law
  - the abuse of Interpol for the political persecution of government critics
  - threats against the International Criminal Court and its judges
- c) In particular: the *systematic fight against multilateralism*
  - the refusal to ratify important multilateral treaties
  - the launching or threat of trade wars in violation of WTO law
  - the withdrawal from international institutions
  - the sabotage of international institutions
  - the attempt to replace elaborated multilateral free trade systems by imposed bilateral agreements
    - "divide et impera" - an old strategy already employed by the Roman emperor Caesar
    - an open step towards a *fundamental change from globalisation to imperialism*

### III. Conclusions on the rule of law in times of globalisation and populism

1. The need of a world-wide fight to preserve and strengthen the role of the rule of law
  - in particular mutual support against attacks from in- and outside
2. Necessary steps and precautions
  - to secure effectively the power and independence of the national constitutional courts
  - to ensure the integrity and well-functioning of and, thus, the trust in the constitutional courts
  - to secure effectively the independence of the judiciary
  - to reform and strengthen international institutions
  - to institutionalise international forums and procedures allowing to discuss and eliminate present flaws and injustices in world trade and other international matters by a fair development of the legal framework
  - to *jointly protect and enforce multilateralism* against the resistance of powerful players with a hegemonistic bilateral approach
  - to insist on a mandatory link between economic cooperation and essential other intern. cooperation
    - the proposal of the French President to make the ratification of the Paris Agreement on climate change a condition for the conclusion of free trade agreements