I. Foundations: The concept of the rule of law

1) A heterogeneous terminology for the same fundamental idea
   - "Rechtsstaat", "État de droit", "rule of law", "communauté de droit"
   - an antithesis to totalitarianism and despotism: overcoming arbitrariness by moderating public power and reliably adjusting it to legal rules
   - origins in German and French administrative law doctrine
   - concept evolved from a narrow formal to a comprehensive material concept of rule of law that includes numerous material (substantial) principles of law (see infra, III.)
   - do not confuse with democracy, human rights protection or other elements of the free and democratic constitutional state!

2) Different manifestations of the same fundamental idea in Europe
   - "Rechtsstaat" (Germany): antonym to the absolutist concept of "Polizeistaat" ["police state"]
   - "État de droit" (France): rather new concept but based on old "general principles of law"
   - "rule of law" (in Common Law): long-time reluctance to recognise material legal principles
   - "general principles of European Union law": most up-to-date incarnation of the idea
   - tendency of convergence in the course of European integration
   - in the international discourse the term "rule of law" is used - but in the comprehensive sense

II. The late and volatile rise of the concept of the rule of law

1) Little interest in the rule of law in times of cold war and decolonisation
   - rejection by the communist doctrine: "socialist legality" instead of rule of law
   - little efforts to implement the rule of law in the new, decolonised states and other developing countries

2) The triumph of the rule of law in Europe
   - started in the seventies in Greece, Portugal and Spain
   - reached its zenith in the nineties with the transformation of most East European states to free and democratic, rule of law based modern constitutional states
     - promoted by the Council of Europe via the Venice Commission (European Commission for Democracy through Law)
   - process accelerated and deepened by the introduction of constitutional courts and by the participation of the East European states in the process of European integration
   - important role of comparison of laws and international legal cooperation
   - not an irreversible process: the rule of law under fire by
     - attempts of Russia to undermine democracy and rule of law in Europe
     - threats by new authoritarian, oligarch and populist regimes (→ Ukraine, Moldova, Hungary, Poland etc.)
     - the rise of populist parties openly challenging essential elements of the rule of law
     - insufficient response of the European Union and its member states to the new threats
     - the end of the support of the rule of law in Europe by the U.S. Government

3) The spreading of the idea of rule of law in the wake of globalisation and development
   - enhanced interest in the rule of law in countries with emerging economies
   - enhanced awareness of the necessity and advantages of the rule of law:
     - international trade and WTO system depending on rule of law
     - rule of law a precondition to long-term sustainable economic development
     - rule of law a precondition to the realization of the ambitious project of the ASEAN Economic Community
     - rule of law essential for effective protection of human rights - but also for rebutting unjustified allegations of h.r. violations
     - rule of law may lead to higher degree of rationality in the political process
   - commitment to the rule of law (or to certain elements) in East and Southeast Asian constitutions
     - art. 1(3) of the Constitution of the Republic of Indonesia of 1945
     - sect. 3 of the Constitution of the Kingdom of Thailand of 2017
     - art. 5 of the Constitution of the People's Republic of China of 1982
     - art. 6 and 10 of the Constitution of the Lao People's Democratic Republic of 2003
   - rule of law one of the fundamental values of ASEAN (cf. art. 1 no. 7 ASEAN Charter)
     - binding also to the member states (cf. art. 2(2) lit. h ASEAN Charter)
   - however, no common awareness of the various formal and material requirements of the rule of law
4) Challenges to the rule of law brought by globalisation and geo-regionalisation
   - the problem of the effective protection of fundamental rights against supranational powers
     - see my contribution at IC-GLOW 2017, part III
   - the problem of the final arbiter of the limits of the competences of international and supranational institutions
     - an ultra vires review of the European Union’s legal acts by the national constitutional courts despite the jurisdiction of the European Court of Justice?
     - threats by the German Federal Constitutional Court (see the Maastricht and Lisbon judgements of 1993 and 2009, BVerfGE 89,155 and 123, 267)
   - the problem of the weakening of the judicial power by allowing investor-state dispute settlements by arbitration panels who are no courts and no institutions of the state
     - this allows big companies to escape from the jurisdiction of the courts and affects the protection of the rights of the citizen by the state
     - OWN OPINION: in all cases where the rights of other citizens may be concerned, directly or indirectly, the rule of law requires the jurisdiction of a real - national or international - court

III. Annex: The most important elements of the rule of law (overview)

1) Principle of legality
   a) Primacy of the law
      • the essence of the rule of law
      • all activity of public institutions is bound to the law
        - this includes the obligation to enforce the law, in favour of but also against the citizen
   b) Principle of statutory reservation
      • any encroachment on the fundamental rights of the citizens requires a legal basis

2) Principle of proportionality
   • radical challenge to totalitarianism: categorical rejection of any claim of absoluteness for any objectives of the state!
   • philosophical foundations in the Bible (Old Testament)
   • four fundamental requirements for measures imposing a burden on the citizen:
     a) The measure must pursue a legitimate aim
        a) The measure must be suitable to pursue that aim
           • it must be conducive to its purpose
        c) The measure must be necessary to achieve the pursued aim
           • it must be the least intrusive act of intervention that is equally conducive
        d) 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 of the citizen

3) Legal certainty and protection of legitimate expectations
   a) Clarity and definiteness of legal norms
   b) Prohibition of inconsistencies within the law
   c) Limitation of legislation with retroactive effect
      • legislation with true retroactive effect (referring to facts in the past) only admitted in exceptional cases
      • legislation with pseudo-retroactive effect (referring to on-going facts or relationships and affecting them for the future) may be excluded by the protection of the citizen's legitimate expectations
      • in particular respect for acquired rights
   d) Protection of the trust in the finality of administrative decisions and court judgements

4) Effective legal protection
   a) Right to the lawful judge
   b) Right to be heard at the court
   c) Effective legal protection against public authority
      • including interim relief
   d) Effective legal protection in civil law matters

5) Special principles of criminal and criminal procedure law
   a) Nulla poena sine lege
   b) Ne bis in idem
   c) In dubio pro reo
   d) Presumption of innocence until conviction
6) Special principles of a fair administrative procedure
   a) Careful and impartial examination of all the relevant aspects of the individual case; duty to state the reasons for the decision
   b) Decision within a reasonable time
   c) Decision without arbitrary action, unjustified preferential treatment or conflict of interest
   d) Rights of defence of the citizen
      • in particular right to be heard, right to access to one's file
   e) Protection of legitimate interests of confidentiality and the professional and business secrecy

7) State liability for illegal acts of public authorities

Further Reading
Koetter, Matthias: Rechtsstaat and Rechtsstaatlichkeit in Germany, 2010, http://wikis.fu-berlin.de/display/SBprojectrol/Germany
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

(Date: Rule of law in times of globalisation (Indonesia 2017. Vortrag + Begleitmaterialien))
The rule of law in times of globalisation

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   1) Little interest in the rule of law in times of cold war and decolonisation
   2) The triumph of the rule of law in Europe
      • not irreversible
   3) The spreading of the idea of rule of law in the wake of globalisation and development
      • fundamental values of ASEAN (cf. art. 1 no. 7 ASEAN Charter)
   4) Challenges to the rule of law brought by globalisation and geo-regionalisation
      • effective protection of fundamental rights against supranational powers
      • the final arbiter of the limits of the competences of inter- and supranational organisations
      • weakening of the judicial power by investor-state dispute settlements by arbitration panels

III. Annex: The most important elements of the rule of law (overview)
   1) Principle of legality
      a) Primacy of the law
      b) Principle of statutory reservation
   2) Principle of proportionality
      • the most important legal principle in the world!
      • legitimate aim, suitability, necessity, proportionality (in the strict sense)
   3) Legal certainty and protection of legitimate expectations
      • legal clarity, no inconsistencies within the law, limitation of retroactive legislation, protection in the finality of administrative decisions and court judgements
   4) Effective legal protection
      • right to the lawful judge, right to be heard at the court, effective legal protection against public authority, effective legal protection in civil law matters
   5) Special principles of criminal and criminal procedure law
      • nulla poena sine lege, ne bis in idem, ib dubio pro reo, presumption of innocence
   6) Special principles of a fair administrative procedure
      • in particular rights to defence
   7) State liability for illegal acts of public authorities