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The rule of law as a key element of good governance

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In its broader sense, good and responsible [1] governance involves more than the management of government transactions – it also focuses on transparency, accountability and social justice, as well as protection of the individual. Thus, the rule of law with its many content-related manifestations [2] is an integral part – a conditio sine qua non – of good governance[3]; it is a prerequisite for peaceful coexistence in freedom, as well as economic and sustainable development.

Virtually all aspects of complex international legal cooperation with a focus on strengthening the rule of law touch on the concept of good governance; they are interlinked and interrelated. While a new or reformed law may be good in isolation[4], it may also become a toothless tiger if not used in accordance with the rule of law. Even the best law can only be good if its legal application[5] is marked by a democratic and constitutional legal understanding. Legislative reform and the promotion of an efficient judiciary and practical application of law can only be considered in context. In combination, they offer citizens the best protection against state despotism, against governance based the on the establishment and maintenance of power and economic interests of individuals, and against the root of all evil in many countries still in the process of transformation – corruption. Thus, the rule of law as a core element of good governance makes a substantial contribution to greater stability, within a country or region, as well as across regions[6].

The basic principle of the rule of law is laid down as a fundamental constitutional principle in numerous Regulations, as well as in Articles 20 and 28(1) of the German Constitution. Due to its importance, this prin-

[1] See Rudolf Dolzer, "Good Governance: Neues transnationales Leitbild der Staatlichkeit?" (Good Governance: transnational model of statehood?) in Heidelberg Journal of International Law (HJIL) 64 (2004) 535 et seq. (535).
[2] In the formal and substantive sense.
[3] Gunnar Folke Schuppert refers to the rule of law as a governance resource in: "Ressource Rechtsstaatlichkeit" (The rule of law resource), Internationale Politik 09/2005, p. 24 et seq. (24), available at: https://zeitschrift-ip.dgap.org/de/article/getFullPDF/11708.
[4] This contribution assumes that laws must already satisfy constitutional requirements – e.g. the principle of legal certainty – in themselves as a matter of course, even though they may fall short of that standard in many transition states.
[5] Comp. Schuppert, op. cit. (fn. 4), p. 32.
[6] Comp. Matthias Kötter, "Die Förderung von Rechtsstaatlichkeit: Nachhaltige Krisenprävention im deutschen Interesse" (The rule of law: Sustainable crisis prevention in the interest of Germany), available at: http://www.peacelab2016.de/peacelab2016/debatte/stabilisierung/article/die-foerderung-von-rechtsstaatlichkeit-nachhaltige-krisenpraevention-im-deutschen-interesse/.

ciple cannot even be redressed by means of constitutional amendment[7]. A detailed illustration of all manifestations of the rule of law would far exceed the scope of this contribution. It therefore focuses on a select few.

The guarantee of basic rights and their enforceability: almost all transition states have now established a constitutional court. However, an effective instrument comparable to the German constitutional complaint that people can employ to enforce their subjective basic rights after successful legal action is rare[8]. Given that the constitution of many transition states contains an extensive catalogue of fundamental rights, the subjective content of these basic rights should be examined in the first instance. If a state is unable to keep the promises of its constitution, the credibility of the constitution is called into question. It is imperative that constitutional judges have true independence of mind and independence in appearance if real protection of basic rights is to be achieved.

The principle of separation of powers: Art. 20(2) clause 2 German Constitution[9] seeks to moderate the power of the state by means of a balanced system of checks and balances, and reciprocal control between the powers. This principle is included in virtually all constitutions of transition states. It is violated if all three powers are significantly influenced through either legislative manoeuvrings, or the actions of individuals or groups within or outside of the 'bodies of state power'. Such influences may serve to circumvent principles, or render them ineffective – including principles, such as the obligation to respect fundamental rights, the independence of the judiciary (which is equally stipulated in all constitutions), or the legitimacy of the administration. An increase in decisions by decree of the head of a state or its government, or increasing interweaving of individual interests and offices in parliament, the executive and the judiciary are often the first indicators for the above. This could be described as a trend towards enforced conformity of the powers, whereby reciprocal control is no longer functioning, and the constitutional state is paralysed.

The protection of citizens from state despotism: this includes, in particular, a guarantee that they enjoy effective legal protection against actions of the public authorities[10]. An independent, specialised administrative jurisdiction with special rules of procedure is a reliable instrument to this end which has now also been introduced in some transition states. As is the case in the constitutional courts, independence of the judges plays a particularly important role here, because citizens can defend themselves against an often-unassailable state by means of the judiciary. Moreover, administrative courts acting independently with their various instruments have an educational effect on the executive in the medium- to long-term. In order to facilitate effective control of administrative action by the judges a law with stipulations for the actions of public authorities[11] should be adopted in addition to relevant procedural law regulations[12].

Mandatory compliance: all state powers being bound by the obligation to respect basic rights, the legislative being bound by the constitution[13], and the executive and judiciary powers being bound by

[7] Art. 79(3) of the German Constitution – the 'eternity clause' – which is based on the experiences of injustice in the Third Reich.
[8] On 02 June 2016, Ukraine introduced an instrument along the lines of a constitutional complaint by means of constitutional amendment; however, initially only in terms of a complaint based on legal propositions; comp. Art. 151(1) of the Constitution of Ukraine.
[9] On a functional level, German law provides for transgressions of the separation of powers permissible under constitutional law which are not addressed here.
[10] see Art. 19(4) German Constitution.
[11] comp. in Germany: Administrative Procedure Act (VwVfG) – Ukraine has not yet adopted a law of this scope. In the Republic of Moldova, an administrative procedure act constitutes an integral part of this code of conduct.
[12] comp. in Germany: Administrative Procedure Code (VwGO). Ukraine already adopted a law on administrative procedure (similar to the German Administrative Procedure Code – VwGO), and established an administrative jurisdiction.
[13] On account of the eternity clause of Art, 70(3) German Constitution, the obligation to comply with the constitution pursuant to Art. 20(3) German Constitution must also remain unaffected by any laws amending the constitution.

statutory and case law is at least as important. This ensures that state power is organised and exercised on the basis of the law. It means that each judge and each civil servant must be guided by statutory and case law in the performance of its official duties, and not bow to other, external influences. The executive power may only act on the basis of the law (proviso of the law principle); this does not exclude the exercise of official discretion or a degree of judgement – however, the laws must specify criteria for such interpretation, and the authorities must transparently illustrate that they are manoeuvring within the assigned scope. Furthermore, the executive must comply with the principle of proportionality (prohibition of excessiveness).

Legal certainty: this is also an element of the rule of law. This includes clarity of the existence of norms[14], as well as their contents (principle of legal certainty). This legal certainty provides protection of legitimate expectation. This is why any retroactive application of laws[15] or administrative acts is only possible to a very limited extent.

In conclusion: The understanding of good governance is based on human rights and the effective protection of these rights. A state must respect, protect and guarantee the human rights – these are the three duties of a state. This understanding therefore includes the existence of a reliable legal system, an effective and independent judiciary, the state powers' obligation to observe basic rights, statutory and case law, as well as the commitment to preventing and combating corruption, as this would undermine all of the principles listed above. And good governance is simply impossible without the rule of law.

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[14] This is why the approach including a reference in a new law to other laws that are not yet adopted is impermissible, though often practiced in transition states.
[15] In particular, in criminal law: nullum crimen sine lege, nulla poena sine lege, comp. Art. 103 German Constitution.

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