

The European approach –

Are there minimum standards for the rule of law in Europe?

by

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Meine sehr Geehrten Damen und Herren
Ladies and Gentlemen
Lieber President Filges
Dear Colleagues

I thank the Bundesrechtsanwaltskammer very much for the kind invitation to attend the its 50th Anniversary and for the opportunity to provide some views on the topic of the rule of law on behalf of the CCBE, The Council of Bars and Law Societies of Europe.

It is a great honour for me to speak at this important European conference organised by the Bundesrechtsanwaltskammer in the celebration of its 50th year's anniversary here in the fantastic city of Berlin in the soon 20th years following the fall of the Berlin wall and the reunification where Willy Brandt said the famous words: "Jetzt wächst zusammen was zusammengehört."

First of all, I would like just to take a few minutes of your time to introduce briefly the CCBE, as perhaps not everybody here knows the organization so well. The CCBE, which was established in 1960 with Germany as one of its founding members, is today an organisation which represents more than 700,000 European lawyers through its member bars and law societies from 31 full member countries and 10 further observer and associated countries. The CCBE has its office in Bruxelles and is recognised as the voice of the European legal profession not only by the national Bars and Law Societies but also by the EU institutions.

The CCBE is therefore not quite as old as the Bundesrechtsanwaltskammer as we will first turn 50 next year.

Now let me return to the subject of my speech. **Are there minimum standards for the rule of law in Europe?**

The answer to this question can be very short. The answer is at first sight no and I could therefore close my speech here.

This is however not my intention. Instead I have chosen to concentrate on whether it is possible to find a definition of the rule of law, which is so often referred to and then touch on some of the concerns and recommendations of the CCBE concerning how justice is currently addressed at European level.

Let me begin with the CCBE Charter of Core Principles of the European Legal Profession, which contains a list of ten principles common to the whole European legal profession and in which the CCBE states that: *“in a society founded on the respect for the rule of law the lawyer fulfills a special role. The lawyers’ duties do not begin and end with the faithful performance of what he or she is instructed to do so far as the law permits. A lawyer must serve the interests of justice as well as those whose rights and liberties he or she is trusted to assert and defend and it is the lawyer’s duty not only to plead the client’s case but to be the client’s adviser. Respect for the lawyer’s professional function is an essential condition for the rule of law and democracy in Society.”*

Our Charter however does not give a definition of the rule of law nor does it set minimum standards. It assumes that rule of law exists and can be defined. However, as you will see from the following it is not easy to provide a definition of the rule of law.

In the Treaty on the European Union it is stated in Article 6 that: *“The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the **rule of law**, principles that are common to the Member States.”*

Article 49 of the Treaty further stipulates that any European state may apply to become a member of the European Union. Prospective candidates must meet the criteria for membership: democracy, the rule of law, human rights, respect for minorities; a functioning market economy, and the capacity to cope with competitive pressures; the ability to take on the obligations of membership (meaning to apply effectively the EU’s rules and policies).

Just like in the CCBE Charter there is no attempt in the Treaty to try to define rule of law and thereby set applicable standards.

In a joint declaration on cooperation and partnership between the Council of Europe and the European Commission from 3 April 2001 it is stated that the Council of Europe and the European Community share the same values and pursue common aims with regard to the protection of democracy, respect for human rights and fundamental freedoms and the rule of law. These common aims have led the Council of Europe and the European Commission to develop a number of joint programmes for co-operation with countries, which have joined the Council of Europe since 1989, or have applied for membership.

However again there is no attempt in the declaration to define the rule of law or set the applicable standards.

In a Commission communication to the Council and Parliament *“Democratisation, the rule of law, respect for human rights and good governance: the challenges of the partnership between the European Union and the ACP”*, the Commission explains the

rule of law principle, which is also enshrined in the Lomé Convention between the EU and the ACP countries in the following way:

“The primacy of the law is a fundamental principle of any democratic system seeking to foster and promote rights, whether civil and political or economic, social and cultural. This entails means of recourse enabling individual citizens to defend their rights and the principle of placing limitations on the power of the State. It implies, for example:

- *a legislature respecting and giving full effect to human rights and fundamental freedoms;*
- *an independent judiciary;*
- *effective and accessible means of legal recourse;*
- *a legal system guaranteeing equality before the law;*
- *a prison system respecting the human person;*
- *a police force at the service of the law;*
- *an effective executive enforcing the law and capable of establishing the social and economic conditions necessary for life in society.”*

Once again there is no definition of the rule of law. Instead we are here provided with a list of the elements, which are useful as they are within the focus areas of the EU. I will revert to some of these elements later.

Based on the examples I have mentioned it might be concluded that according to article 6 of the Treaty all Member States of the EU have principles of the rule of law, that are common. But that the EU does not set publicly minimum standards for the rule of law in Europe.

We could also ask how rule of law is defined by various international organizations.

In 2005 the IBA adopted a “Rule of Law Resolution”, which states the following about fundamental principles of the rule of law:

“ An independent, impartial judiciary; the presumption of innocence; the right to a fair and public trial without undue delay; a rational and proportionate approach to punishment; a strong and independent legal profession; strict protection of confidential communications between lawyer and client; equality of all before the law; these are all fundamental principles of the Rule of Law. Accordingly, arbitrary arrests; secret trials; indefinite detention without trial; cruel or degrading treatment or punishment; intimidation or corruption in the electoral process; are all unacceptable”.

Again there is no definition, but a list of very useful elements or principles of the rule of law.

In the IBA commentary on this resolution it is further added, that the two pillars upon which the rule of law rest are;

(1) Submission of all to the law/Supremacy of law

The “Rule of Law” means exactly that: the law is the ruler, the supreme authority. No-one is above or beyond the law. Everyone is subject to and governed by the law.

This hinges upon widespread acceptance of the Rule of Law and the consent of the organs of state power (executive, army, police, security services, legislature, judiciary) to being subject to the law. The law is unlikely to receive widespread acceptance unless it is widely regarded as reasonable, proportionate and fair.

(2) The separation of powers

Unfortunately this definition does not in my opinion help in answering the question on minimum standards.

If we then look at the American Bar Association’s definition of the rule of law it includes:

“judicial independence and effective judicial ethics regimes; adjudicating war crimes cases and increasing application of human rights norms; increasing access to justice; reforming legislation and legal institutions in countries striving for European Union accession; reforming law schools to better prepare tomorrow’s legal professionals; combating corruption by adopting public integrity measures; building a “rule of law culture” by educating the public about legal rights and responsibilities; and revising procedural and substantive criminal codes to attack trafficking, money laundering, cybercrime, and other domestic and transnational crimes”.

Again this is a list of very good principles, tasks and actions but not a definition.

The World Justice Project which started in the auspices of the ABA some years ago has proposed a good working definition of the rule of law that comprises four principles:

1. A system of self-government in which all persons, including the government, are accountable under the law
2. A system based on fair, publicized, broadly understood and stable laws
3. A fair, robust, and accessible legal process in which rights and responsibilities based in law are evenly enforced
4. Diverse, competent, and independent lawyers and judge

Based on these four principles the World Justice Project has created a Rule of Law Index to assess compliance with the rule of law based on detailed factors and sub-factors drawn from the Universal Declaration on Human Rights and other international instruments. The World Justice Project uses both a general population poll and a qualified respondent’s questionnaire in order to obtain its data.

Finally we may look at a few of the other international organizations such as the United Nations and the World Bank to see if they have provided a definition.

As to be expected the UN has provided a definition. It is wide and emphasizes on human rights and elements of democracy. But again it is not a perfect tool, if we are to establish whether there are minimum standards for the rule of law. The definition states that:

“... a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws, that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards’.

‘...measures to insure adherence to principles of supremacy of law, equality before the law, accountability to the law, fairness to the application of the law, separation of powers, participation in decision making, legal certainty, avoidance of arbitrariness and procedural and legal transparency’.

The World Bank seems to focus on the rules. In a brief prepared by Matthew Stephenson of the Harvard University published by the World Bank it is concluded among other things that; *“... But overlooked in much of the dialogue about the rule of law is that the term has no fixed meaning...”* *“it belongs to the category of open-ended concepts which are subject to permanent debate”*... *...“Policymakers need to be clear about what they mean about the rule of law because answers to many of the questions they are interested in – whether “rule of law” facilitates economic development and whether democracy is a necessary precondition for rule of law, to cite just two examples – depend crucially on what definition of rule of law is being used.”.*

Based on my examination for this speech which is in no way meant to be conclusive we may be able to conclude that at least there are some key elements which may help define the rule of law such as

- supremacy of law / accountability before the law;
- equality before the law;
- exercise of human rights;
- separation of powers
- having fixed, stable laws that provide guidance to the individual.

However, the definitions of the rule of law provided by the organisations I have mentioned are not comprehensive and seem often as mentioned by Matthew Stephenson to be tailored to the purposes and functions of respective organisation. It seems that even though many organizations invoke the rule of law only a few try to give a definition. The phrase “rule of law” seems to be used to describe any positive aspects of a legal system and there is no clear separation between the rule of law, democracy and human rights. Indeed the rule of law is even sometimes invoked as a synonym for international law. Furthermore democracy and human rights are often the key notions accompanying the term ‘rule of law’.

For the CCBE I believe that the principles laid down in the Commission communication to the Council are probably the most relevant, when we have to look at the definition and perhaps try to answer the question.

I will therefore try to give a few CCBE remarks and proposals in respect of some of the principles.

In the opinion of the CCBE, we need EU legislation respecting and giving full effect to human rights and fundamental freedoms. This is also why the CCBE in our Manifesto from March 2009 has stated, that we favour the establishment of a separate Directorate General for Justice at the European level. It is in our opinion vital to maintain the separation of powers also on an EU level and furthermore to ensure a better co-ordination of legislation in the EU affecting the justice sector in order for the EU-legislation and its implementation nationally to be in compliance with the rule of law principles, which I have touched upon in my brief examination here today and which according to the Treaty is common to all EU Member States.

We need an independent judiciary; in which we must also include a strong and independent legal profession. It is a precondition for an independent and impartially judiciary, that all EU member states have a strong and independent legal profession. A state will only have a strong and independent legal profession which can guarantee the clients' rights and the administration of justice in general if among other things the protection of the client-lawyer relationship including the confidentiality relation between a lawyer and his or her client is not diluted through various reporting obligations imposed on the profession through legislation be it on national or EU level.

In order to ensure effective and accessible means of legal recourse and access to justice and the right to a fair trial the CCBE in our Recommendations to the Stockholm Programme (2010 to 2014) – which will replace the Haag-programme by the end of this year - have among other recommendations drawn the attention to our concerns in respect of moves to a greater use of mutual recognition and the use of cross border legal acts and asked that minimum standards of e.g. procedural safeguards are defined.

In our Manifesto and in the Recommendations the CCBE has called on the European Institutions to ensure that legislation adopted against terrorism and organised crime following 11th September 2001 and later tragic events comply with the European and international legal obligations to uphold human rights and we attaches great importance to the protection of the procedural rights of suspects and defendants in criminal proceedings in all Member States. This is also why the CCBE has urged the Commission and the Parliament to introduce minimum common procedural safeguards for the rights of the suspects and defendants in criminal proceedings. As it is today we do not have such common minimum rights which include but is not limited to (1) access to legal advice both before the trial and at trial, (2) access to free interpretation and translation so we can ensure that persons who are not capable of understanding or following the proceedings receive appropriate attention, (3) the right to communicate inter alia with consular authorities, and (4) notifying suspected persons of their rights through a Letter of Rights.

In conclusion to the question I fear that I have to say that there are still no minimum standards for the rule of law in Europe, but with the fulfilment of some of the recommendations of the CCBE, which I have mentioned, we might be on the right track and hopefully be able to see in a not to distant future the introduction on European level of some visible minimum principles for the rule of law if not a firm definition of the rule of law.

Thank you for your kind attention and on behalf of the CCBE I wish the Bundesrechtsanwaltskammer a Happy Anniversary.