



Strasbourg, 24 September 2009

CDL-JD(2009)004*

Study No. 512/2009

Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

PRELIMINARY DRAFT OUTLINE
OF THE REPORT ON
THE RULE OF LAW AND THE RECHTSSTAAT

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

I. Introduction

Request from PACE

Purpose of the study

Concept which is often used, including in particular in CoE, but mostly without a very precise meaning

It should be used as a normative and not as a purely descriptive concept

Concern that it may be misunderstood in new democracies

II. General aspects

1. Historical origins

Rule of law: Greek origins and taken up by Dicey

Rechtsstaat: von Mohl, taken up in France by Carre de Malberg

Both notions pursued and pursue similar aims, in particular the prevention of arbitrary governmental power

Differences:

- Mainly due to the differences between Common law conceived as judge made law and Civil law based on statutes, respectively the inductive method of the Common Law in contrast with the deductive method of the Civil Law
- Rechtsstaat links law more closely to the state
- Rule of law in Dicey's original conception was driven by his campaign against administrative discretion (which he equated with arbitrariness) and a separate system of public law. (which he saw as giving special protection to public officials).

Today, in the UK, the rule of law contains a number of qualities on which civil law countries would agree are necessary elements of a democratic society. Both systems now converge in accepting the principle of administrative discretion but at the same time limiting this discretion which has to be distinguished from arbitrariness

2. Rule by law vs. rule of law/ Formal vs. substantive notion of Rechtsstaat

- This is the crucial issue for the understanding of both notions
- In the UK there are potential conflicts between the rule of law and parliamentary sovereignty but the rule of law also serves to mediate or restrain parliamentary sovereignty.
- Orientation of Rechtsstaat towards the state makes issue particularly acute (Jellinek: self limitation)
- Understanding has changed over time
- After the Second World War substantive understanding prevails both at national level in Western Europe (e.g. Germany) and at the international level, in particular CoE and the Commonwealth.
- Enshrined in national law (whether through the English 'common law' (i.e. judge-made) law, statutes or a written constitution) and thereby made part of positive law
- Legal-Constitutional culture ensuring that principle is respected (Tuori: sedimentation in legal culture)

► *To be discussed in the Sub-Commission: Should the following be kept as a separate section?*

3. *The notion of socialist legality in the communist countries*

- *Marxism in principle based on the idea of the withering of the state and therefore of law*

- *Practical need for law in the Soviet system*
- *Socialist legality developed as a very positivist concept, although ultimate teleology remains that of overcoming the state*
- *Concept therefore not applicable to the party*
- *Prokuratura established to ensure strict compliance with law, Art. 113 of the 1938 Constitution*
- *Was not an objective of its own but an instrument to ensure leadership of the party*
- *Strictly positivist approach remains as heritage of this concept*
- *In addition, in new democracies process of sedimentation of rule of law values not completed*

4. Rechtsstaat in positive law

- Preambles of CoE Statute and ECHR
- Special place of principle of legality in EU law
- References to rule of law in OSCE documents
- Used by the UN
- German Grundgesetz, UK Constitutional Reform Act, most Constitutions of CEE
- Is clearly part of positive law, has to be defined not opposed
- ECtHR case law
- Substantive understanding of the notion in the CoE

III. The principles forming part of the notions of rule of law and Rechtsstaat

1. General considerations

- Link with democracy and human rights – the three are partly overlapping and interdependent
- No need nowadays to differentiate between rule of law and Rechtsstaat
- Shared underlying values: legal certainty, fairness, accountability; need to hear and involve individual in decisions concerning him or her, and access to an impartial and independent judiciary.
- A number of concrete principles can be identified as belonging to the rule of law, forming a common core of the notion at European level
- Useful concept despite criticism (e.g. Laughlin)

2. Specific principles

These principles tend to overlap and cannot easily be separated. Different systematic approaches are possible

- Principle of legality – Executive action to be based on laws adopted by parliament – link with separation of powers – in criminal law *nullum crimen, nulla poena sine lege*. Laws must be enforced (*pacta sunt servanda* on international sphere) and obeyed.
- Discretionary powers conferred upon the executive by law have to be exercised in accordance with specific criteria
- Laws have to comply with certain requirements – (general), equal, intelligible, accessible, foreseeable. Legitimate expectations must be adhered to.
- Laws must be implemented equally
- Independent and impartial tribunals check compliance of executive with principle of legality on the basis of fair procedures; their decisions are respected and executed – includes right of access to a court and to an effective remedy and respect for *res iudicata*

- In the same way State puts at the disposal of the people independent and impartial tribunals deciding on disputes between individuals on the basis of the same principles
- ► *To be discussed in the sub-commission: State ensures adequate protection of a core of generally recognised human rights. Certain fundamental rights are clearly part of the rule of law, e.g. nulla poena; No person condemned unheard; fair hearings; equal application of law; access to courts. But should human rights in general or at least a core of generally recognised human rights be regarded as inherent in the rule of law?*
- State to take adequate measures to uphold the law on its territory and ensure the security of all
- ► *To be discussed in the sub-commission: Should compliance of the state with international law be regarded as a requirement of the rule of law as argued by Bingham? Or only to the extent that the principle pacta sunt servanda applies as a consequence of the principle of legality?*

3. Rechtsstaat and constitutional state

- Rechtsstaat and rule of law provide a link between Constitution and administrative law
- First of all as principle for the interpretation of laws but desirable also for control of laws
- Require that laws fulfil certain criteria and that state has to adequately protect human rights
- Mechanisms should therefore be established to ensure compliance of laws with these principles
- States may stick to different forms of reviewing bills prior to adoption, e.g. through independent parliamentary committees or other bodies, if they are confident that rule of law principles have sufficiently become part of constitutional culture; otherwise they can opt for a constitutional court which

IV. Conclusions

- Rule of law a useful concept despite some ambiguities
- Plays important role at national as well as at international level, recognised in positive law
- Substantive concept, cannot be reduced to rule by laws only
- Task of CoE to ensure that this the principle becomes part of constitutional culture everywhere in Europe