

The “Rule of Law” as a Requirement for EU Accession

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**Dear Professor Giosan,
Esteemed colleagues,
Distinguished guests,
Ladies and Gentlemen!**

It is an honor and a privilege to have been asked to deliver an opening speech today, and I wish to express my sincere thanks to the organizers for having invited me.

“RULE OF LAW”: MEMBERSHIP CRITERIA FOR EU ACCESSION

The guarantee of the “rule of law” is – as I am sure all of you know – one of the criteria for accession to the European Union (EU). The EU defined the accession criteria at the Copenhagen European Council in 1993 where the Council stated that “accession will take place as soon as an associated country is able to assume the obligations of membership by satisfying the economic and political conditions required.”¹

At the same time, the European Council specifically defined the membership criteria (“Copenhagen Criteria”). The so-called “Copenhagen Criteria” require that the candidate country must have achieved, among other things, “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.”

Romania, in its current constitution, confesses to the “rule of law” as a “state principle”. Art. 1 Para. 3 of the Romanian Constitution states:

“Romania is a democratic and social State governed by the rule of law, in which human dignity, the citizens’ rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values and shall be guaranteed.”²

Last week, I attended a meeting of Romanian Magistrates here in Bucharest, during which one of the participants commented that in Romania, the “rule of law” or “stat de drept” did not exist yet.

The purpose of my speech is not to assess the validity of this statement. Rather, I would like to take you one step further back, and ask what “rule of law” or “stat de drept” actually means. What requirements does a state need to fulfill in order to be rightfully called a state based on the “rule of law”, or “stat de drept”? The Romanian Constitution, besides in Article 1, explicitly mentions “rule of law” in only one other article (i.e. Art. 37 Para. 2). Yet, it does not define “rule of law”.³ The answer must, therefore, be found somewhere else.

² <http://domino.kappa.ro/guvern/constitutia-e.html>.

³ Art. 37 Para. 2 of the Romanian Constitution reads: Any political parties or organizations which, by their aims or activity, militate against political pluralism, the principles of a

¹ See <http://ec.europa.eu/cgi-bin/etal.pl> - European Commission – Enlargement – Accession Criteria.

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A precise definition of the term “rule of law” does not exist. Rather, its meaning can vary between different nations and legal traditions. Generally speaking, “rule of law” can be understood as

- a legal-political regime
- under which the law restrains the state and its authorities – legislation, executive authority and judiciary – by promoting certain liberties and creating order and predictability regarding how a country functions.

In the most basic sense, the “rule of law” is a system that attempts to protect the rights of citizens from arbitrary and abusive use of government power. Over the next few minutes, I would like to try to provide you with a more thorough definition of the concept of the “rule of law”. It goes without saying that for reasons of time restraint, I can only touch upon some basic principles of the “rule of law”, and their implications for state practice.

TRADITIONAL UNDERSTANDING OF THE CONCEPT OF “RULE OF LAW”

The traditional understanding of the concept of “rule of law” is a formal understanding where the rule of law requirements are fulfilled if the administration, i.e. the executive, is bound by law, and acts in accordance with the positive law. According to this formalistic approach to “rule of law”, the substance of such law does not play a role. What is decisive is that the law and rules in force are observed and adhered to by the state powers. The formal understanding of the “rule of law” has to be seen in light of the context of its development: In the 19th Century, when the concept of “rule of law” was developed, the primary purpose was to subordinate the executive power of the King and the Executive to the Parliament, which is controlled by the people. The underlying assumption was that a formally

State governed by the rule of law, or against the sovereignty, integrity or independence of Romania shall be unconstitutional.

correct law passed by the Parliament, which is the democratically elected representative of the people, could not be void. History did, however, prove us wrong. Most obviously, the German history of the early 20th Century has shown that Acts of Parliament as well as administrative and judicial acts can be quite disadvantageous to the people, and they can, in some cases, constitute a grave breach of fundamental human rights. The lesson learned was that a purely positivist understanding of laws, and, therefore, a purely formalistic understanding of the concept of “rule of law”, was to be avoided. As a consequence, the concept of “rule of law” was given a substantive meaning in addition to the formal one: For a government action to be categorized as being in accordance with the “rule of law”, the laws in place must fulfill certain minimum requirements. These requirements are first and foremost the respect for fundamental rights enshrined in the Constitution.

BASIC ELEMENTS AND PREREQUISITES OF A “RECHTSSTAAT”

Furthermore, for a state to be called a “rule of law” state, basic elements and institutions must be in place. These can be summarized as follows:

- Separation of Powers
- Legality of Administration, in particular the principle of legal certainty and unity, part of which are: the Principle of Certainty and Clarity of legal rules, the Principle of Reliability, the Prohibition of Retroactive Acts, and the Principle of Proportionality and last, but not least,
- the Guarantee of Fundamental Rights and Freedoms and Equality before the Law: Legal protection, Independence of the Judiciary, and a legally determined judge.

Allow me to go into further detail with regard to some of these principles which are most relevant for Romanians EU-integration process.

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I begin with the “separation of powers”-principle.

I have said earlier that “rule of law” means the subordination of state authorities under the law. This requires that those state organs which are subordinate to the law do not, at the same time, make the law. If this scenario exists, then it would follow that a standard or measurement against which the legality of state action could be measured would no exist. Thus, the “rule of law” presupposes a separation of power, i.e. the legislative, executive, and judicial power need to be separated from each other.

Legislative and executive powers are, however, not entirely separated: In the real life of a Parliamentary Democracy as it has been developed in Great Britain and introduced in Germany, for example, the personal lines between executive and legislative power, i.e. between the Government and the Parliament, are not always entirely clear, for Members of the Government can at the same time be Members of Parliament. This is often the case in Germany. The Chancellor and the Ministers are at the same time Parliamentarians. But the personnel fusion ends at this point.

It is prohibited by law for a Member of Parliament to serve at the same time as a civil servant, i.e. as part of the administration: The status of civil servant is suspended as long as the person is a Member of Parliament. Another example which shows that there is no absolute separation between the executive and the legislative power is that the executive is able to introduce legislative initiatives and set executive orders, if it has been authorized by the legislature. Legislation by the executive should, however, in a Parliamentary Democracy, be the exception rather than the rule. The same holds true for legislative changes; the responsibility for which should primarily lie with the parliament which represents the people, rather than with the executive. (Example: Recent practice in Romania of changing legislation substantially through emergency ordinances in order to favor the government.)

The separation of powers is particularly strict with regard to the judiciary: Any personal and functional interaction is strictly forbidden. The independence of the judiciary is of fundamental importance for the guarantee of the “rule of law”.

Therefore, one of the primary accession and monitoring criteria in the countries of South East Europe was, and still remains, the guaranteeing of an independent and impartial judiciary.

The experience in the two new EU-member countries, Bulgaria and Romania, has shown that it can be rather difficult in former totalitarian or authoritarian states to guarantee an independent and impartial judiciary: The Romanian Ministry of Justice, for example, has for the past decade been criticized by the European Commission for disregarding the separation of powers and interfering with the Judiciary. In preparing for EU accession, much progress has been made in Romania with regard to assuring a strict separation of powers, and reducing the aforementioned interference.⁴

The effective protection of an independent judiciary does, however, remain as one of the benchmarks of the EU monitoring for Bulgaria and Romania even after accession. There are currently various challenges regarding effectively guaranteeing an independent judiciary. They stem both from the Executive and from the Judiciary itself. You read about them in the newspapers of the country almost every day. One often less mentioned challenge is how judges themselves understand the concept of “independence of the judiciary”: Independence is still often seen as a privilege of judges, rather than as a privilege and right of citizens in a democratic state based on the rule of the law: Courts and judges only administer this privilege for the society and its members.

⁴ One such reform measure was the amendment of the Romanian Constitution in 2003 through which the Superior Council of the Magistracy (Consiliul Superior al Magistraturii – CSM) has been officially declared as the body responsible for guaranteeing the independence of the judiciary.

Legality of Administration

The principle of "separation of powers" as far as the relationship between the legislative and executive power is concerned, has been manifested through various principles which more or less all belong to the principle of "Legality of Administration", in particular the Principle of Legal Certainty and Unity.

The Principle of Certainty and Clarity

The duty of the legislator to create laws in a way that are sufficiently clear and precise, is one of the fundamental principles of the "rule of law". On the one hand, this duty serves the principle of separation of powers, for the following reason: The less precise and clear a law is, the more freedom it gives to the law-implementing and law-applying executive and judiciary, respectively, to give the law a specific meaning (i.e. the meaning they, and not necessarily the law-making Parliament, wish to give to it). In this case, the executive and judiciary would exercise lawmaking functions which are contrary to the separation of powers prerequisite of the "rule of law", as the law-making Parliament is the representative of the people.

I would like to illustrate this with one example from Romania: Among the proposed amendments of the Criminal Procedure Code of Romania in 2006 was the introduction of the rights of prosecutors to intercept electronic mail and tap phones for 48 hours without a warrant issued by a judge. Moreover, the prosecutor was to enjoy another 48 hours before informing the judge about the interception made without a warrant. This means that the prosecutor, in fact, enjoyed 96 hours of freedom from any judicial scrutiny.

When this proposed amendment was made public, a group of Romanian NGOs (among which was Transparency International Romania and Open Society Foundation), issued a press release in which they criticized the proposed amendment for being in violation of the rule of law principle of certainty

and clarity. The press release says, and I quote:

"The new amendments do not mention how many times the prosecutor may use these provisions during the investigation which means that it will be the prosecutor's own option. An option that may lead to serious abuses."

Referring to the purpose of this amendment, i.e. the fight of corruption, organized crime and terrorism, the authors went on to write:

"We strongly state that these goals, never contesting their importance, should be approached without abdicating the rule of law principles and of a functional, human rights respected-based democracy."

This example shows that violations of fundamental rule of law and human rights principles no longer go uncontested and unnoticed in Romania, and that a rule of law culture has developed.

(The second, and equally if not more important, rationale behind the principle of certainty and clarity is that the citizen toward whom a law is directed needs to have legal certainty and clarity in that he knows what behavior is required of him. This, too, follows logically from the purpose of the rule of law as explained earlier, which is to guarantee a legally protected sphere of the individual against arbitrary state interference. The individual citizen can only protect himself/herself against such state interference if there is clarity about what the norms are which apply to him/her.)

Requirement of a unified legislation

Part of the principle of certainty is the requirement of a unified legislation. This poses quite a challenge to many transformation countries in the region which – in order to fulfill the EU accession criteria and to adopt the *acquis communautaire* – are required to pass and modify a large number of (new) laws within a comparatively short period of time. In Romania, one of the biggest pre-accession challenges was the lack

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of unity of jurisprudence, which again was, inter alia, due to the rapidly changing legislation. The most recent EU-Monitoring Report on Romania which was issued in June of this year acknowledged this challenge, and I quote out of the report which stated:

"Finally, it has to be mentioned that achieving a unified practice is sometimes hampered by the frequent changes in the legislation, some of which are linked to the consolidation of the justice system."

This shows, that it takes time to establish a legal system in which legal unity, certainty, and clarity exists.

The Principle of Proportionality

One last "rule of law" principle I would like to discuss is of particular importance for the effective protection and guarantee of human rights and liberties. It is the "principle of proportionality". The "principle of proportionality", generally speaking, means that the negative impacts which sometimes stem from state measures or public acts must be proportional to the intended purpose of the public act.

Let me illustrate what I mean by this with several examples:

The first example is the one I have already made reference to earlier, i.e. the proposed amendments of the Romanian Criminal Procedure Code which would allow prosecutors to intercept electronic mail and tap phones for 48 hours without a warrant issued by a judge. Such a public act constitutes a severe infringement on human rights, in particular on one's right to a private life or privacy. For such an infringement to be acceptable in a democratic state based on the rule of the law, there must be a public justification which, according to the proportionality principle, must meet the following criteria:

The measure which infringes on human rights must serve a legitimate purpose, and it must be necessary in order to serve this purpose. In the case of the proposed amendment of the Criminal Procedure Code,

this purpose was the fight against corruption, organized crime and terrorism, which is, of course, generally in the public's interest.

What is less clear is whether such extensive rights of prosecutors are necessary in order to effectively fight corruption, organized crime and terrorism. The authors of the abovementioned press release disagreed with this and argued to the contrary. They asserted:

"The Ministry of Justice did not provide any solid argument for this restriction of one's right to private life... The sole official justification resides in the eternal excuse regarding the fight on corruption, organized crime and terrorism. We strongly state that these goals, never contesting their importance, should be approached without abdicating the rule of law principles."

The decisive question in this context is, of course, whether there are any alternative measures which are equally suitable and appropriate to serve the public purpose of fighting corruption, but which constitute a lesser infringement on human rights. If this question can be answered in the affirmative, then the proposed amendment is definitely in breach of the rule of law principle of proportionality. To answer this question is the duty of the legislature, i.e. the Parliament. The Parliament has to balance in each respective case whether the declared public purpose of a certain state measure is important enough to justify the infringement on human rights.

Let me give you a second recent example in which the proportionality principle came into play, the amendment of the Romanian national security law:

The proposed amendments were criticized for including stipulations which were in "flagrant violation of civil rights", and which were disproportional. The stipulations in question concerned the powers given to intelligence officers, including their right to enter one's home, and other such related measures. This much criticized law package has not been passed. Instead, a new

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amendment has been introduced to the Parliament which was in accordance with human rights and fundamental "rule of law" principles.

The last example poses a challenge to any country world-wide, in particular after September 11, and the new threat of terrorism. It is the challenge to balance the public interest of effectively fighting terrorism and guaranteeing security to a people against a state's responsibility to guarantee fundamental human rights and "rule of law" principles. There is no one such "balance", and recent developments in the area of security law and measures, in particular in the United States, have shown how difficult and, as a consequence, controversial such new reactions towards the global phenomenon of terrorism can be. It will be the primary responsibility of the Parliamentarians, i.e. the public representatives, but also the other people in society who are in a responsible/ decision-making position, to find a solution to this challenge.

CONCLUDING REMARKS

In the past twenty minutes, I could only touch upon some fundamental "rule of law" principles, and the challenges they can pose for society.

Let me conclude my presentation with a final remark on the "rule of law" as it relates to European integration: The "rule of law" in the described sense is a core element of the European political identity. It is, simultaneously with the general validity of fundamental human rights and liberties, and the democratic order, fundamental for the European value system. There are, as I have shown, various challenges to up-holding this core element in both, the legal and political practice of a state. To do so is the responsibility of society at large, which also includes the academic sector. I hope that today's international symposium will contribute to a better understanding of the "rule of law", and how it relates to the European Integration of Romania.

Thank you very much for your attention!