

# The "Rule of Law" as a Requirement for Accession to the European Union

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## I. Introduction

In discussing the European integration of the countries of South East Europe the concept of "rule of law" is all too often mentioned, but hardly ever explained. The guarantee of the "rule of law" is one of the criteria for accession to the European Union (EU) which the EU defined at the Copenhagen European Council in 1993. There, 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.<sup>2</sup>

At Copenhagen, the European Council specifically defined the obligations of membership and in particular the political conditions that need to be satisfied. These "Copenhagen Criteria" require that the candidate country must achieve, among other things,

stability of *institutions guaranteeing* democracy, *the rule of law*, human rights and respect for and protection of minorities.<sup>3</sup>

In their Constitutions today, all the countries of South East Europe confess to the "rule of law" as either a fundamental prerequisite or one of the highest values/a fundamental value of the constitutional order (Croatia, Macedonia, Serbia),<sup>4</sup> by declaring their country

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<sup>2</sup> See [http://ec.europa.eu/enlargement/enlargement\\_process/accession\\_process/criteria/index\\_en.htm](http://ec.europa.eu/enlargement/enlargement_process/accession_process/criteria/index_en.htm) - European Commission – Enlargement – Accession Criteria.

<sup>3</sup> Emphasis by the author.

<sup>4</sup> See Art. 3 of the Constitution of the Republic of Croatia from 2001: "Freedom, equal rights, national equality and equality of genders, love of peace, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, *the rule of law*, and a democratic multiparty system are *the highest values of the constitutional order* of the Republic of Croatia." Art. 8 of the Constitution of the Republic of Macedonia of 2006 reads: "The *fundamental values of the constitutional order* of the Republic of Macedonia are: [...] *the rule of law*." Art. 3 (1) of the Constitution of the Republic of Serbia of 2006 states: "*Rule of law* is a fundamental prerequisite for the Constitution which is based on inalienable human rights." (Emphasis by the author)

operates under or is based on the "rule of law" (Bosnia and Herzegovina; Montenegro)<sup>5</sup>, or that it is a "law-governed state" (Bulgaria; Romania).<sup>6</sup> In doing so, the countries confess to the "rule of law" at least in its formalistic understanding. The crucial question is what the "rule of law" as referred to by the EU in the Copenhagen Criteria and by the Constitutions of the countries of South East Europe actually means. What requirements does a state need to fulfill, both *de jure* and *de facto*, in order to be rightfully called a state based on the "rule of law" (or "*Rechtsstaat*" which is the term used in German legal and political terminology)?

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, the "rule of law" can be understood as a legal-political regime under which the law restrains the state and its authorities – legislative, executive and judicial – by promoting certain liberties and creating order and predictability in 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. According to this understanding, the "rule of law" is considered a basic prerequisite and core constituent of any democratic system. This article describes the concept of the "rule of law" from a Continental, in particular German, legal point of view. It examines the basic elements and prerequisites of a state based on the "rule of law". It will also illustrate the implications which the "rule of law" has for state practice and use some examples from Romania in particular, as one of the two European countries which have most recently joined the EU.

## II. The Traditional Understanding of the "Rule of Law"

The traditional understanding of the concept of "rule of law" is a formal understanding in which the "rule of law" requirements are fulfilled if the Administration (i.e. the Executive) is bound by law, and acts in correspondence with the positive law. According to this formalistic-positivistic approach to the "rule of law", the substance of the law does not play a role. What is decisive is that the law and rules in force are observed and adhered to by

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<sup>5</sup> See Art. 1 (2) of the Constitution of Bosnia and Herzegovina which states that "Bosnia and Herzegovina shall be a democratic state, *which shall operate under the rule of law* and with free and democratic elections." ([http://www.ccbh.ba/public/down/USTAV\\_BOSNE\\_I\\_HERCEGOVINE\\_engl.pdf](http://www.ccbh.ba/public/down/USTAV_BOSNE_I_HERCEGOVINE_engl.pdf)) Similarly, the 2007 Constitution of Montenegro places the "rule of law" within the preamble as a fundamental commitment of the citizens, and characterizes the state in Art. 1 (2) as being "civil, democratic, ecological, social, and *based on the rule of law.*" See <http://www.legislationline.org/upload/legislations/01/9c/b4b8702679c8b42794267c691488.htm> (Emphasis by the author).

<sup>6</sup> See Art. 4 of the Constitution of the Republic of Bulgaria of 1991 (amended in 2006): "The Republic of Bulgaria is a *law-governed state*. It is governed by the Constitution and the laws of the country." Art. 1 (3) of the Romanian Constitution of 2003 reads: "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." See: [http://www.cdep.ro/pls/dic/site.page?den=act2\\_2&par1=1#t1c0s0a1](http://www.cdep.ro/pls/dic/site.page?den=act2_2&par1=1#t1c0s0a1) (Emphasis by the author).

the state powers. This 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” evolved, the primary purpose was to subordinate the executive power of the King and the Executive to the Parliament.<sup>7</sup> The underlying assumption was that a formally correct law passed by the Parliament could not be void since the Parliament was the democratically elected representative of the people.

History, however, proved the purely formalistic-positivistic “rule of law” approach wrong. Most obviously, the German history of the early 20<sup>th</sup> 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 individual cases, constitute a grave breach of fundamental human rights. The lesson learned was that a purely positivist understanding of laws and the “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 are, first and foremost, the respect for fundamental human rights enshrined in the Constitution.

### **III. Basic Elements and Prerequisites of a State Based on the “Rule of Law” (“*Rechtsstaat*”)**

For a state to be called a “rule of law state” (or “*Rechtsstaat*”), certain basic elements and institutions must be in place. Among these are:

- Separation of Powers;
- Legality of Administration, in particular the Principle of Legal Certainty and Unity, part of which are, *inter alia*, the Principle of Reliability, the Prohibition of Retroactive Acts, and the Principle of Proportionality; and
- The Guarantee of Fundamental Rights and Freedoms and Equality before the Law.

The Constitution of the Republic of Serbia of 2006 subscribes explicitly to this comprehensive understanding of the “rule of law”. In Article 3, the Serbian Constitution describes how “the rule of law” is to be put in practice. Article 3 reads:

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<sup>7</sup> One of the first persons to coin the German term for “rule of law”, *i.e.* “*Rechtsstaat*”, was the German jurist and political scientist *Robert von Mohl*. In one of his best known works entitled “*Die Polizeiwissenschaft nach den Grundsätzen des Rechtsstaats*” (“The Science of the Police According to the Principles of the Constitutional State”) he coined the term “*Rechtsstaat*” as opposed to the aristocratic police state in which the Executive exercised rigid and oppressive control over the social, economic and political life of the population. Thus, the traditional German understanding of “*Rechtsstaat*” was also a primarily formalistic one.

The rule of law shall be exercised through free and direct elections, constitutional guarantees of human and minority rights, separation of power, independent judiciary and observance of Constitution and Law by the authorities.

## **1. Separation of Powers**

The "Separation of Powers" is an obvious prerequisite for a state based on the "rule of law" for the following reason: If "rule of law" means, *inter alia*, the subordination of state authorities under the law, it follows logically that those state organs which are subordinated to the law cannot, at the same time, make the law as then a standard or yardstick against which the legality of state action could be measured is missing. The "rule of law", therefore, presupposes a separation of powers, *i.e.* the legislative, executive, and judicial power must be separate from each other.

However, the legislative and executive powers are, in many countries, neither *de jure* nor *de facto* 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 also be Members of Parliament (MPs). This is often the case in Germany where 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 an MP to serve at the same time as a civil servant, *i.e.* as part of the Administration and the status of civil servant is suspended as long as the person is an MP.

Another example which demonstrates 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. However, legislation by the Executive in a Parliamentary Democracy should 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.

### ***Independence of the Judiciary***

The "Separation of Powers" is particularly strict with regard to the Judiciary: Any personal and functional interaction between the Judiciary and the other two branches is strictly forbidden. The independence of the Judiciary is of fundamental importance for the guarantee of the "rule of law": The right of each person to a trial by an independent and

impartial tribunal is a fundamental human right which all countries of South East Europe by becoming a State Party to the European Convention on Human Rights and Fundamental Freedoms have recognized.<sup>8</sup> Its guaranteeing was and remains to be one of the primary accession and monitoring criteria in the countries of South East Europe.

The experience of the two new EU-member countries, Bulgaria and Romania, who joined the EU on 1 January 2007, has shown that it can be rather difficult in former totalitarian or authoritarian states to guarantee an independent and impartial Judiciary. The Romanian government, for example, for the past decade before EU accession has been criticized by the European Commission for disregarding the separation of powers by interfering with the Judiciary. In preparing for EU accession much progress has been made in Romania (and its neighbouring countries) to help ensure a strict separation of powers, and reduce the aforementioned interference. One such reform measure was the amendment of the Romanian Constitution in 2003 which established the so-called "Superior Council of Magistracy" (*Consiliul Superior al Magistraturii* – CSM) as the body responsible for guaranteeing the independence of the Judiciary.

However, effective protection of an independent judiciary remains one of the benchmarks of the EU monitoring for Bulgaria and Romania even after accession. There are still various challenges regarding the effective guaranteeing of an independent Judiciary. They stem from the Executive, the Legislative, and from the Judiciary itself. You read about them in the newspapers of the countries almost every day.

One less often mentioned challenge is how judges themselves perceive their independence: Independence is 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 law", which it correctly is [cf. Art. 6 (1) European Convention on Human Rights]. Courts and judges shall only administer this privilege for the society and its members.

An independent and effective justice system cannot develop overnight. There are various tools, institutions and opportunities that help safeguard the independence of the Judiciary. Among those are institutional measures (we are mainly speaking here about institutions such as the above mentioned CSM which have been established in all countries in South East Europe in the past several years, and the laws accompanying these institutions), as well as measures that make the actors in the justice system aware of the need to maintain their independence. Ultimately, an independent justice system can only be successfully guaranteed if all the actors involved co-operate and develop a professional way in which

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<sup>8</sup> Art. 6 (1) of the Convention states: "[E]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

they see themselves as judges, prosecutors, lawyers etc. who serve those for whom they have been entrusted their respective offices, *i.e.* the people.

## **2. The Legality of Administration**

The prerequisite 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 Clarity".

### **a. The Principle of Legal Certainty and Clarity**

The duty of the Legislator to create laws in a way that they are sufficiently clear and precise is another 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 Executive and the law-applying Judiciary to give the law a specific meaning (*i.e.* the meaning they and not necessarily the law-making Parliament wished to give to it). In this case, the Executive and Judiciary could exercise law-making functions which are contrary to the separation of powers-prerequisite of the "rule of law".

The second, and equally, if not more important, rationale behind the "Principle of Legal Certainty and Clarity" is that the citizen toward whom a law is directed needs to have legal certainty and clarity to know what behavior is required of him or her. 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 which apply to him/her say.

### **b. The Requirement of a Unified Legislation**

Part of the "Principle of Legal Certainty" is the requirement of a unified legislation. This "rule of law" requirement poses quite a challenge to many countries under transformation in the region since, in order to fulfill the EU-accession criteria and to adopt the *Acquis Communautaire*, they are required to pass and modify a large number of laws within a comparatively short period of time. In Romania, one of the biggest pre- and post-accession challenges was and is the lack of unity of jurisprudence, which again is, *inter alia*, due to

this rapidly changing legislation. The first post-accession EU-Monitoring Report on Romania, issued in June 2007, acknowledged this challenge:

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.<sup>9</sup>

The criticism continued in the latest Monitoring Report on Romania, issued in July, 2008. Although some improvement was pointed out, the Report observed:

[...] Uniform and consistent application of law has been hampered further by the frequent resort to emergency ordinances. This practice creates overlaps and contradictions and results in procedural flaws in implementation. Inconsistent jurisprudence by higher courts in turn leads to legal uncertainty. All these factors weaken the judicial system, often resulting in lenient court decisions and frequent suspensions of sentences. This is particularly problematic in corruption cases.<sup>10</sup>

The EU Commission criticized the same points for Bulgaria, where problems also persist with regard to coherent jurisprudence. They are, however, more difficult to track since few courts comply with the requirement to publish judgments:

Ensuring coherence of jurisprudence is particularly important, since in recent years there have been many controversial decisions, in particular of the Supreme Court – partly because of entirely new procedural legislation, partly as a result of different interpretations of the law (information provided by practicing judges).<sup>11</sup>

This shows that it takes time to establish a legal system in which legal unity, certainty, and clarity exists. For the other countries in the region this precise “rule of law” requirement also poses a challenge,<sup>12</sup> and the experiences of the two countries which have entered the EU in 2007 (i.e. Bulgaria and Romania) can be relevant in this respect.

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<sup>9</sup> Report on Romania's progress on accompanying measures following Accession 27 June 2007, p. 8; See [http://www.infoeuropa.ro/iweb/imgupload/romania\\_report\\_en\\_00002.pdf](http://www.infoeuropa.ro/iweb/imgupload/romania_report_en_00002.pdf) .

<sup>10</sup> Report on Romania's progress under the Co-operation and Verification Mechanism, COM(2008) 494 final, p. 4; See [http://ec.europa.eu/dgs/secretariat\\_general/cvm/docs/romania\\_report\\_20080723\\_en.pdf](http://ec.europa.eu/dgs/secretariat_general/cvm/docs/romania_report_20080723_en.pdf) .

<sup>11</sup> Report on Progress in Bulgaria under the Co-operation and Verification Mechanism, COM(2008) 495 final, p. 5; See: [http://ec.europa.eu/dgs/secretariat\\_general/cvm/progress\\_reports\\_en.htm](http://ec.europa.eu/dgs/secretariat_general/cvm/progress_reports_en.htm) .

<sup>12</sup> The same situation applies to Serbia, a potential candidate for accession, but for slightly different reasons: „The courts and administrative bodies lack the technical capacity and personnel to perform their activities properly and promptly. This has led to inconsistent implementation (...),” Serbia 2008 Progress Report, SEC(2008) 2698 final,

### **c. The Principle of Proportionality**

Another “rule of law” principle which is of particular importance for the effective protection and guarantee of human rights and liberties is the “Principle of Proportionality”. This principle, generally speaking, means that the negative impacts stemming from state measures or public acts must be proportional to the intended purpose of the public act. The implications of this principle can be illustrated with the following examples:

The first example is from Romania. It concerns the proposed amendments of the Romanian Criminal Procedure Code in 2006 which would have allowed prosecutors to intercept electronic mail and tap phones for 48 hours without a warrant issued by a judge. Such public acts constitute a severe infringement on human rights, in particular on one’s right to private life or privacy. For such an infringement to be acceptable in a democratic state based on the “rule of 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 to the Criminal Procedure Code, this purpose was to fight against corruption, organized crime and terrorism – a purpose which, generally speaking, is in the public interest.

What is less clear is whether such extensive rights of prosecutors are necessary in order to effectively fight corruption, organized crime and terrorism. When the proposed amendment was made public, a group of Romanian NGOs (among which were Transparency International Romania and the Open Society Foundation Romania), issued a press release in which they criticized the proposed amendment for being in violation with the rule of law principle of proportionality. The authors of the press release denied that the proposed measures were necessary and argued the contrary:

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.<sup>13</sup>

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p. 9; See: [http://ec.europa.eu/enlargement/pdf/press\\_corner/key\\_documents/reports\\_nov\\_2008/serbia\\_progress\\_report\\_en.pdf](http://ec.europa.eu/enlargement/pdf/press_corner/key_documents/reports_nov_2008/serbia_progress_report_en.pdf).

<sup>13</sup> See the press release „Amendments to the Penal Procedure Code: new threats against human rights“ by Open Society Institute, Transparency International Romania and Centre for the Legal Resources.



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

Another recent example, in which the proportionality principle came into play, was 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 for being disproportional. The stipulations at question concerned the powers which were given to intelligence officers, including their right to enter a person's home, and related measures. This 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, but also in European states, such as Germany, 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 of other people in society who are in a responsible decision-making position, to find a solution to this challenge without abdicating the "rule of law".

#### **d. The Prohibition of Retroactive Application of the Law**

As stated above, the "rule of law" requirement of legal certainty encompasses yet another principle or rather a "rule of law" prohibition which became particularly relevant in Germany with regard to the criminal sentencing of officials from former Eastern Germany who shot refugees at the East German–West German border during the Communist regime. What is meant is the prohibition of retroactive legislation, and of retroactively applying sanctioning laws which did not exist at the time a certain act was committed. This "rule of law" principle and its implications are of particular importance for a country dealing with a former wrongful regime by legal and, in particular, criminal law means. It is not only of importance for Germany, but also for the countries of South East Europe with a totalitarian/authoritarian past (for example, Romania) or those with a civil war in their

recent history such as in the countries of the Former Yugoslavia. By stressing this aspect of the "rule of law" attention should be drawn in particular to the limits the "rule of law" and its principles set for the process of creating and consolidating a democratic state based on the "rule of law".

The prohibition of retroactive legislation means that laws or norms which imply negative consequences for a situation that has taken place in the past are prohibited. If, for example, the legislator passes a law in January 2008 which prohibits smoking in public places, and orders that any breach of this rule will be punished by a fine, a law is in breach of the prohibition of retroactive legislation if it makes smoking in public places punishable before January 2008. The prohibition can only be valid as of the time the law has been passed.

Generally speaking, the prohibition of retroactive legislation applies without any exception to the area of criminal law. The German Basic Law (Constitution), for example, explicitly says so in Article 103 (2) in which the culpability for a certain act or crime must have been regulated or legislated before the criminal act takes place. The reasoning behind this provision is the following: Criminal sentences are one of the most drastic interference of the state in the rights and liberties of an individual. Thus, rules regarding the application of criminal law, more so than with other legislative acts, must be in accordance with fundamental "rule of law" principles. The prohibition of retroactive criminal legislation is also explicitly enshrined in Article 7 of the European Convention on Human Rights applicable to all countries in South East Europe:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according the general principles of law recognized by civilized nations.

After reunification in Germany, despite the prohibition of retroactive criminal legislation, various imprisonment sentences and other judgments have been passed in the so-called "Mauerschützen-Prozessen" ("Wall Guard-Proceedings") with regard to the shootings at the East German-West German border. The sentences, and the legal and political debate which followed thereafter, shed light on the fundamental question how far the "rule of law" prohibition of retroactive laws poses a limit to reconciling with the past, in particular by means of criminal law.

The legal proceedings against the lethal shootings at the German border may serve as an example to illustrate this. Following German re-unification, a law was passed in Germany where criminal acts committed in former Eastern Germany had been judged on the basis of the criminal law of former Eastern Germany. An exception should only be made, and the criminal law of Western Germany to be applied, in cases where the law of Western Germany was softer. The Criminal Code of former Eastern Germany did contain a provision which declared purposeful killing (murder), as prohibited and a crime. However, further legislation with regard to the use of weapons at the East German-West German border existed which justified the shooting and killing of refugees at the boarder.

Despite those regulations, the District Court of Berlin (*Landgericht Berlin*), the German Supreme Court (*Bundesgerichtshof*), the German Federal Constitutional Court (*Bundesverfassungsgericht*), and later, the European Court of Human Rights in Strasbourg all held that a *post facto* criminal law punishment of those who shot refugees to death at the East German-West German border was possible, and that their sentencing did not counteract the "rule of law" principle which prohibits retroactive legislation or punishment. The question that arises is how such a conclusion was possible given the meaning and interpretation of this principle. All four courts used slightly different explanations which can only be roughly summarized:

The German Supreme Court argued by making reference to the natural law that the perpetrators could not be justified by and could not have relied on the law on the use of weapons at the German border as this legislation was in flagrant violation with the fundamental idea of justice and humanity. The Supreme Court made reference to the so-called "Radbruchsche Formular" of 1946 which holds that in the case where there is an unbearable contradiction between positive law and justice, the positive law, being erroneous law, must give way to justice. The German Federal Constitutional Court argued against retroactive legislation and acts. The Court found that retroactive legislation is prohibited by the "rule of law" principle because criminal legislation creates a specific basis of confidence if passed by a legislator which is bound by the rules of a democratic state based on the "rule of law". However, this basis of confidence ceases to exist in the case where a state creates norms making the gravest crimes punishable, but at the same time exempting the culpability in certain justified cases. The European Court of Human Rights tried to explain why those in charge of the shootings at the East German-West German border could be punished retroactively, by interpreting the law of former Eastern Germany in light of the "rule of law" and the Criminal Law of former Eastern Germany itself. The Court came to the conclusion that the conviction of the petitioner for the border shooting was not in violation with Article 7 of the European Convention of Human Rights.

The jurisprudence of both the German courts and the European Court of Human Rights has been harshly criticized both within and outside of Germany for neglecting fundamental "rule of law" principles themselves. One author argued, for example, that in a state based on the "rule of law", it suits judges better to always use as their point of orientation the positive law instead of making reference to natural law. He recommended that instead of using criminal law to reconcile with the past, it would be more advisable to use human rights verification missions, as has been the case in Guatemala or South Africa, for example.

### **3. The Guarantee of Fundamental Rights and Liberties**

According to the substantive understanding of the "rule of law", the latter does not only give priority to the law, it also establishes security measures in the form of guaranteed legal protection against the institutions of the state. The guarantee of legal protection, which manifests itself in the right to legal recourse, serves the individual because it affirms his/her legally protected sphere against the state.

Related to the right to legal recourse is the equally important human right to have his or her case be heard in front of an impartial, independent court, as has already been mentioned. The independence of the Judiciary, as previously explained, is a privilege and a right of citizens. It includes, *inter alia*, the independence of judges to protect them against being easily discharged or displaced against their will.

Finally, the guarantee of basic fundamental rights and liberties can be considered the decisive element or cornerstone of the substantive aspect of the "rule of law" and of constitutionalism as a whole. The basic functions of fundamental rights can be divided into a subjective and an objective dimension. Fundamental rights are to protect the individual from state interference by serving as a defense against governmental or administrative activities which affect protected freedoms without being legitimated (subjective element). Fundamental rights are, however, not only defensive rights protecting the individual against the state, but also objective principles creating an objective value system and influencing the relationship among and between the individuals themselves. Therefore, the state generally has to protect the fundamental rights against interferences by a third party and is obligated to protect and promote the created values.

### **IV. Conclusion**

This lecture only touches upon some fundamental "rule of law" principles and their implications for state practice. It goes without saying that each of them deserves more attention than the author could give to them in this paper. In conclusion, a final remark on

the “rule of law” as it relates to European integration is appropriate: The “rule of law” as described is a core element of the European political identity. Along with the general validity of fundamental human rights and liberties, and the democratic order, it is fundamental for the European value system. There are various challenges to upholding 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. May this lecture contribute to a better understanding of the “rule of law” and how it relates to the European integration of the countries of South East Europe.