The Rule of Law in the Case Law of the Strasbourg Court*

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1 Introduction

Our subject is the rule of law (*l'Etat de droit ou la prééminence du droit*, *die Rechtsstaatlichkeit*) in the case law of the European Court of Human Rights (ECtHR) in Strasbourg. But why this particular Court and not the Court of Justice of the European Union in Luxembourg? The answer is that the Strasbourg Court established by the European Convention on Human Rights and Fundamental Freedoms (ECHR) of 1950 is a European Constitutional Court, the jurisprudence of which is of importance not only for the 47 Member States of the Council of Europe but also for the European Union (EU) with 27 Member States. All EU Member States are also members of the Council of Europe and all Member States of the Council are also Contracting Parties to the Human Rights Convention. Indeed the EU was in comparison late in the field of protection of human rights, understandable because it had other aims. The Council of Europe was established earlier and the Union refers to the Convention in its basic Treaties. That was done in Art. F.2 TEU-Maastricht where the Treaty as amended declared that the Convention rights are "general principles of community law".

The EU Treaty as amended by the Lisbon Treaty goes further and stipulates in Art. 6.2 TEU that the Union shall accede to the ECHR. The EU Charter of Fundamental Rights (EUCFR), now legally binding (Art. 6.1 TEU), refers in its Preamble (recital 5) to the Human Rights Convention and the case law of the Strasbourg Court as does Art. 52.3 EUCFR. And that is why it is right to begin with the Strasbourg case law.

*This contribution deals exclusively with the case law of the ECtHR.

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H.-J. Blanke and S. Mangiameli (eds.), *The European Union after Lisbon*,
DOI 10.1007/978-3-642-19507-5_8,

2 The Rule of Law in International Documents

It is necessary to look at international documents which refer to the rule of law and are the basis for the jurisprudence of international courts. It would not be very helpful for our purpose to go far back into history, but it seems appropriate to make a few remarks. From the beginning of the seventeenth and eighteenth centuries the rule of law was a weapon against voluntary and arbitrary acts of sovereigns; it later became and still is important as a weapon against dictatorship. Its core remains to protect individuals against interferences by the State, to protect their liberties, their human rights. For this reason the rule of law is always mentioned together with human rights, democracy and liberty. This aim of protection was the background of the activities in the United Nations (UN) and the Council of Europe after World War II: the objective was that atrocities of the kind that happened during the time of the Nazi regime should never happen again. That was restated after the fall of the Berlin Wall with regard to the violations of human rights under the Communist regimes. Thus, the rule of law is of particular importance for States in transition on their way from dictatorship to democracy.

The Universal Declaration of Human Rights of 10 December 1948 was the first important step. The Declaration refers to the rule of law in recital 3 of the Preamble and makes clear that this principle has not only formal but also substantive aspects: the inherent aim of protecting human rights. The Declaration was a milestone: it had enormous influence on national constitutions, including the German Basic Law, but it was only a declaration and as such not legally binding. The Council of Europe on a regional basis went further in its Convention on Human Rights and created a catalogue of human rights, established the obligation of the Contracting Parties to ensure them as well as a very effective system of judicial protection. The basis of that Convention was the rule of law. The Statute of the Council of Europe of 5 May 1949 reaffirms in recital 2 of the Preamble the spiritual and moral values which are the common heritage and "the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy." In Art. 3 the Statute obliges the Member States to "accept the principles of the rule of law" and of human rights and fundamental freedoms. The ECHR of 1950 repeats in the last recital of its Preamble the idea of the "common heritage of political traditions, ideals, freedom and the rule of law" and sets out the aim of the Convention to "take the first steps for the collective enforcement of certain rights stated in the Universal Declaration". In proceeding along these lines and the rule of law the Convention created its judicial control mechanism which was constantly improved and achieved its perfection with Protocol No. 11 of 1994. Since the entry into force of Protocol No. 11 each person may without any special declaration by the defendant State claim in an application to the Court that his or her human rights were violated. The Court then decides after a judicial procedure whether the defendant State has violated the Convention and if so awards just satisfaction (Art. 41 ECHR). The judgments are legally binding (Art. 46 ECHR).

As mentioned above, the European Community came late into this field. The ECtHR has described developments in the EU in its *Bosphorus*[1] judgment. The original Treaties did not mention the protection of human rights at all. Later, however, came the above-mentioned reference in the former EU Treaty to the rule of law and to the Convention. The EU Treaty as amended by the Lisbon Treaty now lists the rule of law in Art. 2 TEU among the fundamental values on which the Union is founded. So does the EUCFR in recital 2 of its Preamble. The relevance of the Strasbourg Convention and case law for the Union will be enhanced when the Union accedes to the Convention as Art. 6.2 TEU stipulates.

3 Legal Basis

The main source for the Strasbourg Court is the Convention on Human Rights, including its Preamble. That is of importance since the notion of the rule of law appears in the Preamble but in none of the following articles. So the Strasbourg Court in its judgments draws inspiration from the Preamble when dealing with the principle of the rule of law, and it also refers to the Statute of the Council of Europe as an organisation of which every Contracting State of the Convention is a member. It has done so on many occasions. The leading case in this respect is that of *Golder v United Kingdom* of 1975,[2] where the Court found that Art. 6 ECHR guarantees the right of access to a court. The Court quotes Art. 31.2 of the Vienna Convention on the Law of Treaties (VCLT), which makes clear that the Preamble to a treaty forms an integral part of it. The Court found it both natural and in conformity with the principle of good faith – the fundamental principle of interpretation of treaties laid down in Art. 31.1 VCLT – to bear in mind the profound belief in the rule of law when interpreting Art. 6 ECHR.

4 Aspects of the Rule of Law in the Strasbourg Case Law

4.1 The Rule of Law as Leitmotiv

It is – or it should be – a good practice of all courts to strictly limit its reasons to the specific case to be decided and to refrain from making observations *obiter*. The Strasbourg Court follows this line. The result is that the ECtHR does not give a general definition of the rule of law but decides whether – in a specific case – this principle gives guidelines for the interpretation of an Article in the Convention.

[1]Case 45036/98 *Bosphorus v Ireland* (ECtHR 30 June 2005), German translation NJW 2006, 197.
[2]Case 4451/70 *Golder v United Kingdom* (ECtHR 21 February 1975) para 34.

This can apply to all Articles of the Convention with guarantees of human rights, because, as the Court has stressed several times, the rule of law is inherent in all Articles of the Convention.[3] So we find judgments regarding all Convention provisions with human rights guarantees in which the Court refers to the rule of law. And we shall see that the Court bases its judgments on different aspects of the principle of the rule of law. The case law is founded on this principle. It is the concept inherent throughout the Convention, the basis of the protection of human rights – it is the leitmotiv.

4.2 Rule of Law and Democracy

Article 2 TEU and recital 2 of the Preamble of the EUCFR both mention the rule of law together with democracy. The Court has stressed the connection between these notions several times. In the above-mentioned judgment of *former King of Greece v Greece*[4] the Court speaks of "the rule of law, one of the fundamental principles of democratic society". The same words are used in the *Carbonara and Ventura* judgment.[5] In judgments against Turkey regarding the prohibition of political parties[6] the Court was more explicit and mentions that the Preamble to the Convention "establishes a very clear connection between the Convention and democracy", and "in that common heritage are to be found the underlying values of the Convention".

The second paragraphs in Arts. 8 through 11 ECHR allow for interferences in the rights guaranteed under certain conditions, one being that the interference is "necessary in a democratic society". The Court has repeatedly stressed the importance of that yardstick and made clear that "the only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may claim to spring from 'democratic society'. Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it."[7]

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[3]Case 19776/92 *Amuur v France* (ECtHR 25 June 1996) para 50; Case 25701/94 *The former King of Greece et al. v Greece* (ECtHR 23 November 2000) para 79, German translation NJW 2002, 45; Case 5410/03 *Tysiac v Poland* (ECtHR 20 March 2007) para 112; Case 24638/94 *Carbonara and Ventura v Italy* (ECtHR 30 May 2000) para 63; Case 49429/99 *Capital Bank AD v Bulgaria* (ECtHR 24 November 2005) paras 133–134.

[4]Case 25701/94 *The former King of Greece et al. v Greece* (ECtHR 23 November 2000) para 79.

[5]Case 24638/94 *Carbonara and Ventura v Italy* (ECtHR 30 May 2000) para 63; see also Case 22860/02 *Wos v Poland* (ECtHR 8 June 2006) paras 92, 97.

[6]Case 133/1996/752/951 *United Communist Party of Turkey et al. v Turkey* (ECtHR 30 January 1998) para 45; in Case 41340/98 *Refah Partisi v Turkey* (ECtHR 13 February 2002) para 86, German translation NVwZ 2003, 1489, the Court quoted these reasons.

[7]Case 133/1996/752/951 *United Communist Party of Turkey et al. v Turkey* (ECtHR 30 January 1998) para 45; Case 72881/00 *Moccow branch of the Salvation Army v Russia* (ECtHR 5 October 2006) para 60.

4.3 The Principle of Legitimacy

4.3.1 Law in the Formal Sense

The principle of legitimacy means that authorities need a legal basis for measures which interfere with a right of an individual, and that the executive and the judiciary are bound by law. The Court has frequently addressed this principle as one of the aspects of the rule of law. One example is the *Carbonara and Ventura* judgment of 2000,[8] where the Court has reasoned that "the first and most important requirement of Art. 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful." Lawfulness means under the case law of the Court "the obligation to conform to the substantive and procedural rules of national law".[9] In the *McKay* judgment of 2006[10] the Court mentions with regard to Art. 5 ECHR the "repeated emphasis on the lawfulness of the detention, procedurally and substantively, requiring scrupulous adherence to the rule of law."

4.3.2 Quality Requirements for the Law

The Court does not limit itself to making sure that interference is formally in conformity with a legal provision. It requires "firstly, that the impugned measure should have some basis in domestic law" but refers also "to the quality of the law in question". The law must in particular be "compatible with the rule of law."[11] But what does that mean?

Accessibility, Foreseeability, Legal Certainty

With regard to the formalities it means that the law must be adequately accessible, and that the citizen must have the possibility to acquire knowledge of the law without difficulties. In the field of statute law this requirement is normally fulfilled when the law is published in an official gazette. The law must in addition be adequately foreseeable, it must be "formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct" accordingly,[12] that is "to foresee, to a degree that is reasonable in the circumstances,

[8]Case 24638/94 *Carbonara and Ventura v Italy* (ECtHR 30 May 2000) para 63.

[9]Regarding Art. 5 ECHR see Case 22414/93 *Chahal v United Kingdom* (ECtHR 15 November 1996) para 118, German translation NVwZ 1997, 1093.

[10]Case 543/03 *McKay v United Kingdom* (ECtHR 3 October 2006) para 30.

[11]Case 19776/92 *Amuur v France* (ECtHR 15 June 1996) para 50.

[12]Case 30985/96 *Hasan a. Chaush v Bulgaria* (ECtHR 26 October 2000) para 84.

the consequences which a given action may entail,"[13] compatible with the rule of law.[14] Legal certainty as a special aspect of the rule of law is of particular importance in penal matters with the principle of *nulla poena sine lege* (laid down in Art. 7 ECHR). This principle is "not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage; it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty".[15] The consequence is that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. Nevertheless, the Court is aware of the fact that "however clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation" and that "there will always be a need for elucidation of doubtful points and for adaptation to changing circumstances."[16] In matters other than criminal the law may also confer a discretion which is not in itself inconsistent with these requirements "provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question to give the individual adequate protection against arbitrary interference."[17]

In the context of substantive requirements for a law it is worthwhile to look at a judgment concerning the killing of fugitives at the Berlin Wall by the border police of the former German Democratic Republic (GDR), the *Streletz, Kessler and Krenz* judgment.[18] The applicants had complained that Art. 7 ECHR had been violated by their conviction for killing of fugitives because the GDR state practice had allowed these measures to protect the border. The Court did not accept their arguments. It reasoned that GDR state practice had flagrantly violated human rights and above all the right to life and therefore cannot be covered by the protection of Art. 7 ECHR and cannot be described as "national law" within the meaning of the article.[19]

Legal certainty has been relevant in the Strasbourg case law in a very different context. The Court mentioned that in its *Christine Goodwin* judgment[20] when discussing the choice between sticking to its former case law and taking a dynamic and evolutionary approach. The response to changing conditions is a problem often arising in cases concerning moral convictions. In the *Goodwin* case the Court had to decide on the legal recognition of transsexuals. The Court reasoned: "While the Court is not formally bound to follow its previous judgments it is in the interest of

[13]Case 12963/87 *Margareta and Roger Andersson v Sweden* (ECtHR 25 February 1992) para 75.

[14]Case 54934/00 *Weber and Saravia v Germa*ny (ECtHR 29 June 2006) para 84.

[15]Case 20166/92 *S.W. v United Kingdom* (ECtHR 22 November 1995) para 35.

[16]Case 20166/92 *S.W. v United Kingdom* (ECtHR 22 November 1995) para 36.

[17]Case 20166/92 *S.W. v United Kingdom* (ECtHR 22 November 1995) para 35.

[18]Case 34044/96 *Streletz, Kessler and Krenz v Germany* (ECtHR 22 March 2001), German translation NJW 2001, 3035.

[19]Case 20166/92 *S.W. v United Kingdom* (ECtHR 22 November 1995) para 36.

[20]Case 28957/95 *Christine Goodwin v United Kingdom* (ECtHR 11 July 2002) para 74, German translation NJW-RR 2004, 289.

legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases [. . .]."

Legitimate Aim, No Arbitrariness

The substantive requirements for a law can be found in particular in the case law in paragraphs 2 of Arts. 8 through 11 ECHR which allow for interference or restrictions only if – inter alia – the measure has one or more "legitimate aims" which are listed in the provisions. In line with that the Court has developed the general quality criterion for the law on which the measure is based that it must be in keeping with the aims of the Convention and in particular with the purpose to protect the individual from arbitrariness. This can be seen with regard to Art. 5 ECHR (right to liberty),[21] but also regarding Art. 7 ECHR (no retroactive application of criminal law).[22] In a case concerning Art. 8 ECHR (right to respect for private and family life), the *Storck* judgment, the Court explains that it is usually the responsibility of national courts to interpret national law. "However" – the Court continues – "the Court is called upon to examine whether the effects of such an interpretation are compatible with the Convention" and that the national courts are obliged to apply national law in the spirit of its rights.[23]

Proportionality

One of the most important principles is that of proportionality and – closely related to that – the search for a fair balance of the interests involved. Both are essential elements of the rule of law as the case law clearly demonstrates. The Court often reiterates and did so in the famous *Öcalan* judgment that "inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights".[24] In following this approach the Court underlines the obligation to respect the principle of proportionality. The Court holds interferences only justified under paragraphs 2 of Arts. 8 through 11 ECHR when there is a "pressing social need" for them; the authorities must give pertinent reasons which show that.

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[21]See Case 19776/92 *Amuur v France* (ECtHR 15 June 1996) para 50; Case 22414/93 *Chahal v United Kingdom* (ECtHR 15 November 1996) para 118.

[22]Case 20166/92 *S.W. v United Kingdom* (ECtHR 22 November 1995) para 34.

[23]Case 61603/00 *Storck v Germany* (ECtHR 16 June 2006) para 93; in the same sense Case 69498/01 *Pla and Puncernau v Andorra* (ECtHR 13 July 2004) para 46, German translation NJW 2005, 875 – violation of Art. 8 in connection with Art. 14 ECHR by a judicial decision interpreting a testament.

[24]Case 46221/99 *Öcalan v Turkey* (ECtHR 12 May 2005) para 88, German translation NVwZ 2006, 1267.

"The Court will [then] assess whether the reasons adduced to justify such measures were relevant and sufficient and whether the aforementioned proportionality principle has been adhered to [...]",[25] which means that there must be a "reasonable relationship of proportionality between the means employed and the aim pursued."[26]

When dealing with terrorism, fair balance of interests and the principle of proportionality are also a topical problem in connection with the rule of law. Europe has had experience of terrorism and organized crime for a long time – for instance with the Northern Ireland conflict, the Mafia in Italy, the Bader-Meinhof gang in Germany, the *brigati rossi* in Italy, the Basque region in Spain, the Kurdish problems in Turkey and the Russian problems in Chechnya. So the Court has dealt often and over a very long period with terrorist crimes. In its judgments it has often stressed its understanding of the difficulty for the authorities in efficiently investigating such crimes. In the leading case of *Brogan*[27] the applicant had been arrested under suspicion of involvement of terrorism. The Court had to decide whether the fact that the applicant was brought before a judge more than four days after his arrest – which was allowed by special legislation in Ireland – was a breach of Art. 5.3 ECHR. In its judgment the Court acknowledged the difficult situation in Northern Ireland resulting from the threat posed by organized terrorism. It stressed the need to find a proper balance between the defence of institutions of democracy and the protection of individual rights. Judicial control – so the Court reasoned – is implied by the rule of law referred to in the Preamble "from which the whole Convention draws its inspiration". More than four days and six hours – so the Court concluded – is not prompt in the sense of Art. 5.3 ECHR and is therefore a violation of this judicial right.

4.4 Protection Against Violations of Human Rights

The protection of individuals against arbitrary interferences with their fundamental rights and freedoms has been a key aspect of the rule of law from the very beginning.

4.4.1 By Legislative Measures

The Contracting States can choose by which means they want to efficiently protect human rights. Such protection is required through legislative measures. For example, Art. 2 ECHR (right to life) enjoins the State to refrain from unlawful taking of

[25]Case 41604/98 *Buck v Germany* (ECtHR 28 April 2005) para 45, German translation NJW 2006, 1495.

[26]Case 19133/91 *Scollo v Italy* (ECtHR 28 September 1975) para 32; see also Case 7525/76 *Dudgeon v United Kingdom* (ECtHR 22 October 1981) para 53.

[27]Case 11209/84 *Brogan et al. v United Kingdom* (ECtHR 29 November 1988) paras 48, 58–62.

life. The Court has found that Art. 2 ECHR read in conjunction with Art. 1 ECHR obliges the States also to "take appropriate steps to safeguard the lives of those within its jurisdiction", in particular by "putting in place effective criminal law provisions to deter the commission of offences against a person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches" of this provision. Prompt response by the authorities – according to the Court – in such investigations "may generally be regarded as essential in maintaining public confidence in their maintenance of the rule of law [...]."[28] Under certain conditions the authorities are obliged to take preventive measures to protect an individual whose life is at risk from criminal acts of others.

4.4.2 By Administrative Measures, Investigations

Protection is also required through administrative measures. As regards the duty of States to protect individuals against violations of their rights the Court accepts the need for international cooperation and has found that the arrest of a criminal as a result of an extradition arrangement does not make the arrest unlawful because it "is in the interest of all nations that offenders who flee abroad should be brought to justice."[29] But extradition or expulsion can be a violation of Convention rights, for instance of Art. 3 ECHR (prohibition of torture) when the offender runs the risk of torture in the State to which he is to be surrendered. The key judgment is that of *Soering v United Kingdom* of 1989[30] in which the Court referred to the rule of law: "It would hardly be compatible with the underlying values of the Convention, that 'common heritage of political traditions, ideals, freedom and the rule of law' to which the preamble refers, were a Contracting State knowingly to surrender a fugitive to another state where there were substantial grounds for believing that he would be in danger of being subjected to torture [...]." The judgment endorsed the argument put forward by the agent of the German Government – entitled to make submissions in a case against the United Kingdom because *Soering* is a German national.

There are other examples of the obligation to take measures regarding Art. 2 ECHR (right to life) and Art. 3 ECHR (prohibition of torture). Following the case law of the Court the obligation under Art. 1 ECHR to secure to every person the Convention rights "requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force." Prompt response by the authorities – as the Court stressed – in such

[28]Case 35072/97 *Simsek et al. v Turkey* (ECtHR 26 July 2005) paras 114–116; Case 34056/02 *Gongadze v Ukraine* (ECtHR 8 November 2005) para 177, German translation NJW 2007, 895.

[29]Case 46221/99 *Öcalan v Turkey* (ECtHR 12 May 2005) para 88, German translation NVwZ 2006, 1267.

[30]Case 14038/88 *Soering v United Kingdom* (ECtHR 7 July 1989) para 88, German translation NJW 1990, 2183.

investigations "may generally be regarded as essential in maintaining public confidence in their maintenance of the rule of law [...]."[31]

The same is said in the *Gongadze* judgment[32] regarding the celebrated case of the killing of a journalist with the alleged involvement of the Ukrainian President. Again it is emphasized that this is an essential element of the rule of law – protection of the individual and guaranteeing his/her security.

Connected with that is the concern that in some cases prosecution and justice are not organized properly. There is again emphasis on the duty to take administrative measures. The main obligation in this regard flows from Art. 6 ECHR (right to a fair trial). The Court has in many judgments and so in the *Scordino* judgment found that this article "imposes on the Contracting States the duty to organize their judicial system in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time [...]."[33] The first judgment to that effect was that of *König v Germany* of 1978 (the first judgment incidentally which found a violation of the Convention by Germany and that 26 years after Germany's ratification) which concerned the length of proceedings before administrative courts. The Court reasoned in this judgment that the State whose judicial system is too complex so as to result in a procedural maze must "draw the conclusions and if need be [...] simplify the system with a view to complying with Art. 6.1 of the Convention."[34]

4.4.3 By a Court

The protection of human rights by the judiciary certainly is a core aspect of the rule of law. A State governed by the rule of law has to ensure an effective court system and a proper administration of justice. Here again the principle of separation of powers comes into play and requires that the judiciary is independent in particular from the executive. The consequence is that the Court has to deal with problems connected with judicial protection very often – in fact, in most of its judgments.

In Arts. 5.3 and 4 ECHR and above all in Art. 6 ECHR, the Convention sets out the provisions with paramount importance for assessing control by a court and that with regard both to quantum and to importance.

[31]Case 35072/97 *Simsek et al. v Turkey* (ECtHR 26 July 2005) paras 114–116.

[32]Case 340056/02 *Gongadze v Ukraine* (ECtHR 8 November 2005) para 177.

[33]Case 36813/97 *Scordino v Italy* (ECtHR 29 March 2006) para 183, German translation NJW 2007, 1259.

[34]Case 6232/73 *König v Germany* (ECtHR 28 June 1978) para 100.

(a) Right to a Court, Right of Access to Justice, Fair Trial

Article 6 ECHR guarantees the right to a hearing before an independent and impartial tribunal and to a fair trial before the court. The leading case with regard to Art. 6.1 ECHR is *Golder v United Kingdom*,[35] which is worthy of close study. Citing references to the rule of law in the Preamble to the Convention and in the Preamble and Art. 3 of the Statute of the Council of Europe the Court reasons: "And in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts." The Court concluded that Art. 6 ECHR "embodies 'the right to a court', of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only." "To this is added" – said the Court – "the guarantees laid down by Art. 6.1 as regards both the organisation and composition of the court, and the conduct of proceedings. In sum the whole makes up the right to a fair hearing." In a nutshell that means: The principle of rule of law requires that there must be courts to decide on disputes, that the individual has the right of access to them and that the courts decide after a fair trial.

The *Golder* judgment mentions civil disputes. It has to be kept in mind that the Court interprets the notion "civil rights" in Art. 6.1 ECHR in an autonomous way so that nearly all administrative and social matters are covered, but not financial matters. The right to a court is also guaranteed for criminal matters.

(b) A Court Established by Law, Independent and Impartial

As guaranteed by Art. 6 ECHR the court must be established by law, independent and impartial. That it must be established by law again reflects the rule of law. The notion of "law" comprises in particular the legislation on the establishment but also on the competence of judicial organs. The consequence for instance is that a court having no jurisdiction under domestic law to decide a specific dispute is not established by law. The same is true when the composition of the chamber does not respect domestic legislation. That means that the Strasbourg Court examines whether national law has been complied with in this respect.[36]

The Court has defined a tribunal in the sense of Art. 6.1 ECHR as "characterized [. . .] by its judicial function , that is to say determining matters within its competence on the basis of the rule of law and after proceedings conducted in a prescribed manner". The court must also satisfy other conditions as the independence of its members and the length of their term of office, impartiality and the existence of procedural safeguards.[37]

[35]Case 4451/70 *Golder v United Kingdom* (ECtHR 21 February 1975) paras 34–36.

[36]Case 74613/01 *Jorgic v Germany* (ECtHR 12 July 2007) paras 64, 65.

[37]Case 32492/96 *Coeme et al. v Belgium* (ECtHR 22 June 2000) para 99.

The court must be independent notably of the executive – that is required by the principle of separation of powers – but independent also from the parties to the case: it must be impartial. According to the Strasbourg Court a judicial body must also give the appearance of independence.[38]

The independence of courts and the confidence in their impartiality are precious *acquis Européen* which need to be protected and maintained by all means. That may be self-evident for many States but we cannot take it for granted in all European States. In some States of east and central Europe in particular one can still see problems in this respect with the consequence that in public opinion confidence in the impartiality of judges is lacking. This has again and again been a matter of concern for the Council of Europe and for the European Union. As an example one may have to cite the *Sovtransauto* judgment[39] as a really extraordinary case. During court procedures in Ukraine between a Russian and a Ukrainian company the Ukrainian company wrote a letter to the Ukrainian President asking him to ensure that Ukrainian interests were safeguarded. And – astonishing as that may seem – the Ukrainian President in a letter urged the President of the Court to defend the interests of Ukrainian nationals. Regarding this problem the Strasbourg Court in its *Öcalan* judgment[40] stated very pertinently: "What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused." In the *Nikula* judgment[41] domestic courts are described as "guarantors of justice, whose role is fundamental in a State based on the rule of law" and which "must enjoy public confidence".

(c) Right of Access to a Court

The right of access to a court is – as the ECtHR has reasoned in the *Golder* judgment[42] – "an element which is inherent in the right stated by Art. 6 para. 1" and fundamental to the rule of law.

In civil matters this right means that every individual has the right to bring a dispute before a court for decision – that is to institute proceedings before a court.[43] When in administrative matters an administrative act is performed or reviewed on appeal by an administrative authority or a body which does not satisfy the requirements for a court, Art. 6 ECHR obliges the Member States to give the person concerned the possibility to bring the matter before a court which can decide on it

[38]Case 7819/77 *Campbell and Fell v United Kingdom* (ECtHR 28 June 1984) para 78.

[39]Case 48553/99 *Sovtransauto v Ukraine* (ECtHR 25 July 2002).

[40]Case 46221/99 *Öcalan v Turkey* (ECtHR 12 May 2005) para 88.

[41]Case 31611/96 *Nikula v Finland* (ECtHR 21 March 2002) para 45.

[42]Case 4451/70 *Golder v United Kingdom* (ECtHR 21 February 1975) para 34.

[43]Case 21987/93 *Akzoy v Turkey* (ECtHR 18 December 1996) para 92; Case 22860/02 *Wos v Poland* (ECtHR 8 June 2006) para 97.

with full jurisdiction,[44] that is on the facts and the law without being bound in any way by the administrative decision. The same is true when in minor criminal offences, for instance violation of traffic rules, the police fines a person. That creates no problem under Art. 6 ECHR so long as the person concerned can appeal to a court.

Article 13 ECHR with its right to an effective remedy is of importance in this context. It "guarantees the availability at national level of a remedy to enforce the substance of the Convention rights. . .", which means that there must be "a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief [. . .]."[45] Articles 6 and 13 together with Art. 35 ECHR, which requires as admissibility criterion that all domestic remedies have been exhausted, make clear that the Convention system is subsidiary – the Court has again and again underlined that it is in the first instance the responsibility of the Member States, in particular the responsibility of domestic courts, to prevent violations of the Convention or to give relief if they have happened.

As mentioned above the ECtHR interprets the notions of "civil rights" and "criminal charge" in Art. 6 ECHR in an autonomous way. Their meaning in the relevant national law is of interest but not decisive. The reason for that approach is that the concepts are understood in a different way among the Contracting Parties, and also to avoid the possibility of the State itself deciding on the extent of its obligations under the Convention. This idea is repeated often in the case law also with regard to immunity from jurisdiction. In the *Wos* judgment the Court has reasoned: "[I]t would not be consistent with the rule of law [. . .] if a State could, without restraint or control by the Convention enforcements bodies remove from the jurisdiction of the Courts a whole range of civil claims or confer immunities from civil liability on large groups [. . .] of persons."[46] The Court accepts the immunities that are given under public international law to foreign governments and diplomats (though in the case of state immunity there have been significant challenges).

(d) Influence on Court Procedures by Legislation

An interesting problem is that of influence on court procedures by legislation and this again relates to the rule of law and the separation of powers. This may be illustrated by the following situation. A citizen initiates court proceedings against a state body claiming a right based on a certain legal provision. During the court

[44]Case 12235/86 *Zumtobel v Austria* (ECtHR 21 September 1993) para 29; Case 22860/02 *Wos v Poland* (ECtHR 8 June 2006) para 92.

[45]Case 21987/93 *Akzoy v Turkey* (ECtHR 18 December 1996) para 95.

[46]Case 22860/02 *Wos v Poland* (ECtHR 8 June 2006) para 99; in the same sense Case 1398/03 *Markovic et al. v Italy* (ECtHR 14 December 2006) para 97.

proceedings parliament deletes the provision that was the basis of the citizens' claim with the consequence that the proceedings necessarily fail. An example is the judgment of *Stran Greek Refineries* of 1994[47] in which the ECtHR found a violation of the Convention. In the case of *Scordino*[48] mentioned above the Court reasoned that "although, in theory, the legislature is not prejudiced in civil matters from adopting new retrospective provisions to regulate rights arising under existing law, the principle of the rule of law and the notion of fair trial enshrined in Art. 6 of the Convention preclude any interference by the legislature – other than on compelling grounds of general interest – with the administration of justice designed to influence the judicial determination of a dispute." Budgetary considerations and the intention to implement a political programme are not such required "obvious and compelling general interests".

(e) Respect for Judgments

In the *Assanidze* judgment of 2004[49] the ECtHR stated that "the principle of legal certainty – one of the fundamental aspects of the rule of law – precludes any attempt by a non-judicial authority to call the judgment into question or to prevent its execution."[50] So the legal situation is clear: the judgment has to be respected when it is final and no administrative action or legislation can call it into question or quash it. That is particularly true when the judgment has been rendered against the State.

It seems indeed to be a compelling consequence of the rule of law and the separation of powers that a final judgment has to be respected. A very practical result is that the Court recognizes a right to execution of a judgment. The Court reasoned for instance in the *Hornsby* judgment that the right to a court as guaranteed in Art. 6 ECHR "would be illusory if [. . .] legislation allowed a final, binding judicial decision to remain inoperative to the detriment of one party." That would lead "to situations incompatible with the rule of law which the Contracting States undertook to respect when they ratified the Convention."[51] In recent years the Court has found a violation of Art. 6 ECHR and of Art. 1 of Protocol No. 1 in very many cases in judgments against eastern and central European States Parties because a final judgment had not been executed in due time.

A special problem is that of revision proceedings leading to reopening of proceedings and quashing the final judgment. In this case it is the judiciary itself that interferes with the final and binding judgment. The ECtHR again draws inspiration from the rule of law and the principle of legal certainty and concludes

[47]Case 13427/87 *Stran Greek Refineries v Greece* (ECtHR 9 December 1994) para 49.

[48]Case 36813/97 *Scordino v Italy* (ECtHR 29 March 2006) para 126.

[49]Case 71503/01 *Assanidze v Georgia* (ECtHR 8 April 2004), German translation NJW 2005, 2207.

[50]Case 68050/01 *Ekholm v Finland* (ECtHR 24 July 2007) para 72.

[51]Among many judgments see Case 18357/91 *Hornsby v Greece* (ECtHR 19 March 1997) para 40.

that a final judgment should also in this way in principle not be called into question. The Court underlines that "no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case [. . .]. A departure from this principle is" – according to the Court – "justified only when made necessary by circumstances of a substantial and compelling character."[52] Such circumstances may be the need to correct judicial errors and miscarriages of justice but not an appeal in disguise.[53] The Court has had to deal in many cases with supervision or objection procedures in new States Parties in which a final judgment was set aside on appeal by the Prosecutor or on the initiative of the President of a higher court. The leading case is that of *Brumarescu v Romania*,[54] in which on appeal of the Prosecutor-General the Supreme Court set aside a final and binding judgment which was in favour of the applicant. The ECtHR found a violation of Art. 6 ECHR and of Art. 1 of Protocol No. 1. In its judgment, following decisions on similar issues,[55] the Court reasoned that such a procedure violates the principle of legal certainty, one of the fundamental aspects of the rule of law.

(f) Right to Fair Trial

In the *Golder* judgment[56] in particular the Strasbourg Court has stressed the close connection between the rule of law and the right to a fair trial. The Court understands the notion of fair trial as very extensive and has elaborated it in many judgments. It is impossible to go into details here, so only a few aspects can be mentioned.

One of the main elements of fair trial is that of the right to adversarial proceedings. It gives a party the right to present his or her case to the court and to have the possibility to take part in the proceedings in an active manner. Part of this right is the right to be heard and to have knowledge of and be able to comment on observations filed or evidence adduced by the other party.[57] Another important aspect is the principle of equality of arms.

Of immense practical importance is the right to a court decision within a reasonable time. Article 6 ECHR speaks of a "hearing within a reasonable time" but this is understood to include the final court decision. In German cases this in principle means the decision of the Federal Constitutional Court. The violation of

[52]Case 560/02 *Nikolay Zhukov v Russia* (ECtHR 5 July 2007) para 36.

[53]Case 52854/99 *Ryabykh v Russia* (ECtHR 24 July 2003) paras 51–53.

[54]Case 28342/95 *Brumarescu v Romania* (ECtHR 28 October 1999).

[55]Case 52854/99 *Ryabykh v Russia* (ECtHR 24 July 2003) paras 51–53; Case 48553/99 *Sovtransauto v Ukraine* (ECtHR 25 July 2002) para 77.

[56]Case 4451/70 *Golder v United Kingdom* (ECtHR 21 February 1975); see also Case 560/02 *Nikolay Zhukov v Russia* (ECtHR 5 July 2007).

[57]Case 12952/87 *Ruiz-Mateos v Spain* (ECtHR 23 June 1993) para 63.

this right has been and still is claimed in very many applications and mostly successfully. It was mentioned above that the States Parties of the Convention have the obligation under Art. 6 ECHR to organize their judicial system in such a way that the courts can meet all the requirements of Art. 6 ECHR including that of a decision within a reasonable time. The cases show that many States fail to do so. That is true all over Europe, not only in new Member States, but elsewhere as well. Most judgments in this regard have been rendered against Italy. The time element in the judicial protection of the rule of law – proper administration of justice – is still a reason for concern. In the *Sürmeli* judgment[58] the ECtHR mentions once again the continuing accumulation of applications in which the only or principal allegation is that of a failure to ensure a hearing in reasonable time. The Court draws attention to the important danger for the rule of law in national legal orders and repeats that Art. 13 ECHR requires a national remedy in these cases. In the case of Germany there has been a finding of a violation of Art. 13 ECHR because an effective remedy is lacking. As a consequence of that, draft legislation to make a special remedy available is under discussion in Germany.

Articles 6.2 and 6.3 ECHR make special provision for particular aspects of fairness in the context of criminal matters. The presumption of innocence required by Art. 6.2 ECHR is a key element of the rule of law[59] and of a fair trial. Also of importance is the right to remain silent and not to incriminate oneself, which is not mentioned in Art. 6 ECHR but covered by the notion of a fair trial and an important aspect of the rule of law.[60]

5 Conclusions

The principle of the rule of law is a leitmotiv for the Convention as a whole. When analysing the many judgments in which the ECtHR refers to it one may have doubts whether the results would have been different if the reasoning had not been based on this principle. But it is abundantly clear that the founding fathers of the Convention had the rule of law in mind when drafting the Convention. The same may will be true of human dignity, not mentioned in the Convention (except perhaps in Art. 3), but inherent in all of its guarantees. These two principles nevertheless offer guidelines for the interpretation of the entire Convention.

The ECHR when giving the rule of law substance in its provisions did so also in the provisions regarding human rights protection by the ECtHR in Strasbourg. The international protection of human rights by the Court is certainly an element of the rule of law. We have seen that domestic courts have to come to final decisions

[58]Case 75529/01 *Sürmeli v Germany* (ECtHR 8 June 2006), German translation NJW 2006, 2389.

[59]Case 37568/97 *Böhmer v Germany* (ECtHR 3 October 2002) para 67, German translation NJW 2004, 43.

[60]Case 18731/91 *John Murray v United Kingdom* (ECtHR 8 February 1996) para 45.

within a reasonable time and the Court is severe when assessing performance in that regard. Unfortunately the Court itself increasingly cannot meet the same requirement. The Court in an analysis of January 2010 reports that 26% of the applications allocated to a chamber were pending more than three years. The Court would normally conclude that there had been a violation of Art. 6 ECHR if a national court in any one instance were to take as long. From the applications allocated to a committee or a single judge, implying that they were easy cases, 33% were pending more than two years. That means that many cases did not meet the requirements of the Court regarding the length of domestic court proceedings. And most of these cases were petty cases which were not particularly difficult.

The Court cannot be blamed for this deplorable situation. The work load of the Court is enormous and it is growing steadily. There are now 47 Contracting States to the Convention, and the number has increased sharply since the fall of the Berlin Wall. Now more than 800 million persons are living within the jurisdiction of the ECtHR in an area stretching from the Atlantic to the Pacific. The number of new applications has been multiplied by six within eight years and is now running at 57,000 per year. The current number of pending cases is about 130,000. The Court has issued warnings for years and has predicted this situation. The Member States are obliged under the Convention to deliver a proper administration of justice – that obligation is also valid at the European level. They must – also at the European level – organise the justice in such a way that the Strasbourg Court can meet all the requirements of the Convention including that of coming to final decisions within a reasonable time. The remedy is not easy, and wise and experienced people have considered the possibilities. The first step has been taken with the ratification of Protocol No. 14 which provides for amendments of the Convention streamlining the procedure, in particular by giving jurisdiction to a single judge and also to committees of three judges. There is no doubt that further steps will be necessary. The Member States have confirmed that at their high-level Conference at Interlaken on the Future of the Court in February 2010.