CONCEPT OF THE RULE OF LAW IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

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The concept of "*prééminence du droit*" or "rule of law" first appeared in the Court's case-law in the *Golder v. United Kingdom* judgment of 21 February 1975[2]. The Court based its broad interpretation of Article 6 § 1 of the Convention (right to a fair trial), from which it inferred the inherent right of access to the courts, on the reference to the "*rule of law*" made in the Preamble of the Convention. According to the Court, it would be a mistake to see the principle of "*prééminence du droit*" as "*a merely 'more or less rhetorical reference', devoid of relevance for those interpreting the Convention. One reason why the signatory Governments decided to 'take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration' was their profound belief in the rule of law*".[3] Since then, the rule of law has become a guiding principle for the Court, it "*inspires the whole Convention*"[4] and is "*inherent in all the Articles of the Convention*".[5] It is defined as "*one of the fundamental principles of a democratic society*".[6] The close relationship between the rule of law and the democratic society has been underlined by the Court through different expressions:

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[2] It is interesting to note, however, that the European Commission of Human Rights made a reference to the rule of law in the *Lawless v. Ireland* case, in order to reject the interpretation of Article 17 of the Convention invoked by the Government. The Court, in its judgment of 1 July 1961, followed the Commission without using the notion of the rule of law.

[3] *Golder v. United Kingdom* judgment of 21 February 1975, § 34.

[4] *Engel v. the Netherlands,* 8 June 1976, § 69.

[5] *Amuur v. France,* 25 June 1996, § 50.

[6] *Klass v. Germany*, 8 September 1978, § 55.

"*democratic society subscribing to the rule of law*"[7], "*democratic society based on the rule of law*"[8] and more systematically "*rule of law in a democratic society*".[9] Being linked to the notion of "*democratic society*", the rule of law is also related to the broader concept of "*European public order*".[10]

Although there is no abstract definition of the rule of law in the Court's case-law, European judges, by using this concept in the context of interpretation of different Articles of the Convention, have developed various substantive guarantees which may be inferred from or linked to this notion. These include the principle of legality or foreseeability, the principle of legal certainty, the principle of equality of individuals before the law, the principle of control of the executive whenever a public freedom is at stake, the principle of the possibility of a remedy before a court and the right to a fair trial. Some of these principles are closely interrelated and can be included in the categories of legality and due process. They all aim at protecting the individual from arbitrariness, especially in the relations between the individual and the State. The equivalence between the rule of law and the protection from arbitrariness is clearly stated in the *Winterwerp* (as regards Article 5 of the Convention) and *Malone* (as regards Article 8) judgments.

On the other hand, the Court does sometimes refer to the principle of the rule of law using the French term "*Etat de droit*" and not "*prééminence du droit*", which is the expression used by the Preamble of the Convention. In its report[11], the Parliamentary Assembly distinguishes the notion of rule of law/*Etat de droit* used in these cases from the traditional meaning of the term rule of law/*prééminence du droit* referred above. According to the Parliamentary Assembly report, the expression "*Etat de droit*"

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[7] *Winterwerp v. Netherlands,* 24 October 1979, § 39.
[8] *Vereiniging Weekblad Bluf! v. Netherlands*, 9 February 1995, § 35.
[9] *Malone v. United Kingdom*, 2 August 1984, § 79
[10] *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 45.
[11] Doc. 11343, 6 July 2007, "The principle of the Rule of Law", Committee on Legal Affairs and Human Rights (rapporteur: Mr Erik Jurgens). Resolution 1594 (2007) of the Parliamentary Assembly.

appears to be used in a more rhetorical way and in cases concerning the courts and administration of justice. In effect, the Court refers in this context to the following expressions: "*State based on the rule of law*", "*law-governed State*", "*State subject to the rule of law*". Whether there is a difference in meaning between both notions of the "rule of law" is not clearly stated in the case-law. However, it appears that this second conception is more related to the institutional framework and the organisation of a democratic State.

The term *Etat de droit* is used in cases concerning the administration of justice in the State. The role of the judiciary is essential in a State based on the rule of law. In this regard, its role in the prevention and repression of crimes, in particular those committed by State agents, is linked to the notion of the rule of law when procedural obligations under Articles 2 and 3 of the Convention are at stake. As the Court stated in *Hugh Jordan v. United Kingdom*, 4 May 2001, "*a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts*".[12]

The procedural obligations are not limited to the obligation of the authorities to open an investigation; they can also encompass the outcome of the criminal proceedings and the obligation to punish the unlawful acts committed by the State agents. According to the Court, "*judicial authorities must on no account be prepared to let the physical or psychological suffering inflicted go unpunished. This is essential for maintaining the public's confidence in, and support for, the rule of law and for preventing any appearance of the authorities' tolerance of or collusion in unlawful acts".*[13] The Court is ready to find a procedural violation of these Articles when the outcome of the domestic proceedings is not satisfactory, for instance when the sentence imposed on the State agents involved is too lenient or has

[12] *Hugh Jordan v. United Kingdom*, 4 May 2001, § 108.
[13] *Okkali v. Turkey*, 17 October 2006, § 65, as regards Article 3.

been suspended[14], when the criminal proceedings are time-barred because of the delays imputable to the authorities or even in the event of granting an amnesty or a pardon. This means that impunity *de facto* or *de jure* for violations of Articles 2 and 3 is incompatible with the principle of the rule of law. Procedural obligations are not limited to these two provisions and can apply in the context of other articles of the Convention.[15]

The Court has recently considered that the existence of conflicting decisions within a supreme court is in itself contrary to the principle of legal certainty, which constitutes one of the basic elements of the rule of law.[16] It is therefore required that the courts, especially the highest courts within the domestic legal order, establish mechanisms to avoid conflicts and ensure the coherence of their case-law. This is also necessary to strengthen the public confidence in the judiciary. The principle of legal certainty is essential to the public's confidence in the judicial system and the rule of law.

The importance of the role of the judiciary in a society governed by the rule of law makes it necessary to protect it in the context of freedom of expression. The Court reiterated many times that, under Article 10 of the Convention, the criminal sanctions imposed on the applicants for criticizing the judiciary in the press. The Court held that "*regard [...] must be had to the special role of the judiciary in society".* Indeed, as the "*guarantor of justice, a fundamental value in a law-governed State, it must enjoy public confidence if it is to be successful in carrying out its duties*".[17]

The Court has further pointed out the *"key role of lawyers in this field*" considering that it is legitimate to expect them to maintain the public confidence in the judiciary.[18] This means that the State can adopt certain measures to protect judges from excessive criticism by

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[14] *Nikolova and Velichkova v. Bulgaria*, 20 December 2007, as regards Article 2.
[15] Article 1 of Protocol No. 1 in *Novosseletskiy v. Ukraine,* 22 May 2005, § 111.
[16] *Beian v. Romania,* 6 December 2007, § 39.
[17] *Prager and Oberschlick v. Austria* of 22 March 1995, § 34 and *De Haes and Gijsels v. Belgium* of 27 January 1997, § 37.
[18] *Nikula v. Finland,* 21 March 2002, § 45.

lawyers, although restrictions of defence counsel's freedom of expression can be accepted only in exceptional circumstances.[19]

The independence of the judiciary is not usually examined in connection with the principle of the rule of law. However, the Court has pointed out that a tribunal must satisfy the requirements of independence from the executive and also from the parties. The notion of separation of powers between the political organs of government and the judiciary has assumed growing importance in the Court's case-law.[20] For instance, the Court has considered that the referral by a tribunal to a representative of the executive for a solution to the legal problem at issue was not in conformity with the requirements of an independent tribunal with full jurisdiction under Article 6 § 1 of the Convention.[21] It has consistently held that certain aspects of the status of military judges sitting as members of the national security courts rendered their independence from the executive questionable.[22] As regards the simultaneous exercise of advisory and judicial functions of a judicial organ, the Court examines whether the tribunal in question has been involved in "*the same case*" or "*the same decision*", without imposing any theoretical concept regarding the permissible limits of the executive and judicial powers' interaction.[23] However, the requirement of independence is not breached for the only reason that the members of the tribunal are appointed by the executive[24] or by the legislative power.[25] The Court, where the administrative authorities have failed to comply with a domestic judgment, affirms that "*the administrative authorities form one element of a State subject to the rule of law and their interests accordingly coincide with the need for the proper administration of justice*".[26] It also notes that bailiffs "*work to ensure the proper administration of justice and thus represent a vital component of the*

[19] *Kyprianou v. Cyprus,* 15 December 2005, § 174.
[20] *Stafford v. the United Kingdom* [GC], 28 May 2002, § 78.
[21] *Beaumartin v. France,* 24 November 1994, § 38.
[22] *Öcalan v. Turkey,* 12 May 2005, §§ 112 and 114.
[23] *Kleyn and others v. Netherlands,* 6 May 2003, §§ 193 and 200.
[24] *Campbell and Fell v. United Kingdom,* 28 June 1984, § 79.
[25] *Filippini v. San Marino* (dec.), 6 August 2003.
[26] *Hornsby v. Greece,* judgment of 24 February 1997, § 41; *Antonetto v. Italy,* 20 July 2000, § 28; *Surugiu v. Romania*, 20 April 2004, § 65.

rule of law”.[27] It follows that the obligation to execute final judgments by the administration is an essential characteristic of the State subject to the rule of law. The violation of this obligation may be sanctioned in the context of different types of proceedings (property claims, family matters or environmental issues) and under different provisions of the Convention (Article 6, Article 8 or Article 1 of Protocol No. 1). For instance, in the *Taskin and others v. Turkey* judgment of 30 March 2005, the Court found that the authorization by the authorities to continue production at a gold mine, notwithstanding the final judicial decisions ordering termination of the production, breached Articles 6 and 8 (procedural aspect) of the Convention. It went on to hold that such a situation adversely affected “*the principle of a law-based State, founded on the rule of law and the principle of legal certainty*”.[28] This principle also applies within a decentralized State, since the higher authorities of this State are strictly liable under the Convention for the conduct of their subordinates. The Court assesses the responsibility of the Contracting State itself, not that of the decentralized entity. In this regard, in the *Assanidzé v. Georgia* judgment, of 8 April 2004, the Court considered that the non-enforcement by the Ajarian authorities of a final judgment of acquittal rendered by the Supreme Court was in breach of Articles 5 §§ 1 and 6 of the Convention, and that the deprivation of liberty, despite the existence of a court order for release, was inconceivable in a “*State subject to the rule of law*”.[29]

In the *Lelièvre v. Belgium* judgment, of 8 November 2007, the Court rejected the argument submitted by the Government to justify the length of a preventive detention, according to which the release would entail risks for the own security of the applicant.[30] Thus, the State governed by the rule of law has the duty to adopt all necessary measures to ensure the security of its citizens and the respect of human rights. This duty is indirectly linked to positive obligations of the State under Articles 2, 3, 4, 5 and 8 of the Convention.

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[27] *Pini and Bertani and Manera and Atripaldi v. Romania,* 22 June 2004, § 183.
[28] *Taskin and others v. Turkey* judgment of 30 March 2005, § 136.
[29] *Assanidzé v. Georgia* judgment, of 8 April 2004, § 173.
[30] *Lelièvre v. Belgium* judgment, of 8 November 2007, § 104.

The State governed by the rule of law is founded on the rule of law and the principle of legal certainty. We will now examine how the Court has used the concept of the rule of law to develop various requirements of legality and due process.

The Convention uses the term "law" in different Articles of the Convention or its protocols (2, 5, 6, 7, 8, 9, 10, 11, 1 of Protocol No. 1, 2 of Protocol No. 4, Protocol No. 7). Apart from the formal notion of law referred to above in the context of the right to a tribunal "established by law", the notion of law systematically used by the Court is a material or substantive one. This means that the word "law" in the expression "prescribed by law" covers not only statute but also unwritten law (case-law) and regulations. The Court's task is to assess whether the domestic law as a whole has been complied with in the context of the interferences with one of the rights set forth in the Convention. It may however take into account the fact that a constitutional court declared *ex post facto* the incompatibility with the Constitution of the legal provisions applied in the case.[31]

The compliance with the law is particularly important for the purposes of Article 5 of the Convention, which guarantees the right to liberty. In *Winterwerp v. the Netherlands*, judgment of 24 October 1979, the Court noted the importance of the "*lawfulness of the detention, procedurally and substantively, requiring scrupulous adherence to the rule of law*".[32] It is consequently ready to find a violation of Article 5 § 1 whenever the domestic law has not been respected.[33] Furthermore, the lawfulness of the detention means that the deprivation of liberty should be consistent with the purpose of Article 5, namely to protect individuals from arbitrariness. Therefore, in some cases, even though the law may have been

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[31] *Bączkowski and Others v. Poland*, 3 May 2007, in which the Court noted that the Polish Constitutional Court had declared the incompatibility with the Constitution of the provisions of the act which were applied for the interference with the Convention right.

[32] *Winterwerp v. the Netherlands*, judgment of 24 October 1979, § 39.

[33] *Bozano v. France,* 18 December 1986; *Wassink v. the Netherlands,* 27 September 1990.

formally respected, the Court finds a breach of the requirements of lawfulness on the grounds that the authorities have attempted to circumvent the applicable legislation.[34] However, the subsequent finding of higher courts that the first-instance court erred under domestic law in making the detention order will not necessarily retrospectively affect the validity of the intervening period of detention. According to the Court, "*for the assessment of compliance with Article 5 § 1 of the Convention the basic distinction has to be made between ex facie invalid detention orders – for example, given by a court in excess of jurisdiction or where the interested party did not have proper notice of the hearing – and detention orders which are prima facie valid and effective unless and until they have been overturned by a higher court*".[35] The terms "law" or "lawful" in the Convention do not merely refer back to domestic law but also relate to the quality of the law, requiring it to be compatible with the rule of law. This means that the "law" must be "*sufficiently accessible and foreseeable as to its effects, that is formulated with sufficient precision to enable the individual to regulate his conduct*" and that the individual "*must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail*".

As regards accessibility of the law, the Court takes into account the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed. For instance, technical regulations in the field of international telecommunications law, which were primarily intended for specialists and which could be easily obtained, were regarded as sufficiently accessible in the case of *Groppera Radio AG and others v. Switzerland,* judgment of 28 March 1990.

The requirements of foreseeability are much stricter in the Court's case-law. The realm of Article 8 is particularly rich in this regard. In *Silver v. United Kingdom,* 25 March 1983 (correspondence of detainees), the Court established that "*a law which confers a*

[34] *Karagöz v. Turkey,* 8 November 2005, § 59.
[35] *Liu and Liu v. Russia,* 6 December 2007 (not final), § 79.

discretion must indicate the scope of that discretion". In *Malone v. United Kingdom* (telephone tapping), it noted that "*it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference*".[36] In the circumstances of the case, the Court concluded that "*the minimum degree of legal protection to which citizens are entitled under the rule of law in a democratic society is lacking*".[37] Whenever the interference is authorized by the judiciary, the rule of law requires the judges' discretion to be confined within certain limits.[38] The Court has applied the qualitative requirements of the law in many cases concerning interferences with the right to private and family life.[39]

In the context of the principle of legality enshrined in Article 7 of the Convention, "*essential element of the rule of law*", the Court uses the same notion of substantive law. This means that the law also covers the progressive development of the criminal law through judicial law-making, "*provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen*".[40] Furthermore, the requirements of foreseeability do not preclude the courts from bringing criminal proceedings against persons who have committed crimes under a former regime, since they cannot be criticized for applying and interpreting the legal provisions in force at the material time "*in the light of the principles*

[36] *Malone v. United Kingdom*, 2 August 1984, § 68.
[37] *Malone v. United Kingdom*, § 79.
[38] *Kruslin and Huvig v. France,* 24 April 1990.
[39] *Antunes Rocha v. Portugal,* 31 May 2005; *Vetter v. France,* 31 May 2005; *Popescu v. Romania (n° 2),* 26 April 2007; *Hasan v. Bulgaria,* 14 June 2007.
[40] *S.W. v. United Kingdom,* 22 November 1995, where the Court found that the applicant could be convicted of attempted rape, although he was married to the victim.

governing a State subject to the rule of law".[41]

The qualitative requirements under the notion of law contained in Article 7 also apply to the penalties imposed.[42]

The principle of legal certainty is "*one of the fundamental aspects of the rule of law*".[43] On the one hand, this principle requires that final judgments must be enforced, and this obligation can be examined under different Articles of the Convention (Article 6 and 1 of Protocol No. 1 in *Immobiliare Saffi v. Italy,* 28 July 1999; Article 8 concerning family disputes in *Nuutinen v. Finland* of 27 June 2000 and *Mezl v. the Czech Republic* of 9 January 2007; Article 8 in environmental issues in *Giacomelli v. Italy,* 2 November 2006). The enforcement of final judgments in private disputes may require the assistance of the police, in order to avoid any risk of "private justice" contrary to the rule of law.[44] On the other hand, where the courts have finally determined an issue, "*their ruling should not be called into question*". This means that the systems which allow for the quashing of final judgments by the authorities for an indefinite period of time are incompatible with the principle of legal certainty. Legal certainty presupposes respect for the principle of *res judicata.*

With regard to the right to liberty and security, the authorities are also obliged to respect final decisions ordering the release of a person. According to the Court, the practice of detaining a person without the basis of a concrete legal provision or a judicial decision is itself contrary to the principle of legal certainty.[45]

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[41] *K.H.W. v. Germany,* 22 March 2001, § 38.

[42] See a recent example in the *Kafkaris v. Cyprus* judgment, 12 February 2008, in which the Grand Chamber considered that the domestic law taken as a whole was not formulated with sufficient precision as to enable to applicant to discern, even with appropriate advice, to a degree that was reasonable in the circumstances, the scope of the penalty of life imprisonment and the manner of its execution.

[43] *Brumarescu v. Romania,* 28 October 1999, § 61.

[44] *Matheus v. France,* 31 March 2005, § 70.

[45] *Baranowski v. Poland,* 28 March 2000, § 56; *Svipsta v. Latvia,* 9 March 2006, § 86, pre-trial detention based on a practice developed in response to statutory lacuna; *Riad and Idiab v. Belgium*, 24 January 2008, not final, § 79, detention in a transit zone while the State refused to proceed with the enforcement of repatriation

1Finally, the principle of legal certainty may imply the restriction or limitation of rights, especially when it is considered in relation to time-limits governing the filing of appeals or statutory limitations. As regards time-limits, they are aimed at "*ensuring a proper administration of justice and compliance, in particular, with the principle of legal certainty*".[46] However, the Court may find a violation of the Convention if there has been a particularly strict interpretation of a procedural rule (*Miragall Escolano*) or if the time-limits have been applied rigidly, regardless of the individual circumstances of the case (*Phinikaridou*).

The access to a court is one aspect of the principle of the rule of law established by the Court. It was established on the basis of the principle of the rule of law in the *Golder* case. According to the Court, there was no doubt that "*were Article 6 § 1 to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent of the Government*".[47] The right of access must be effective which means that the individual "*must have a clear, practical opportunity to challenge an act that is an interference with his rights*".[48] However, the right of access to court is not absolute and it may be subject to limitations. The Court examines in each case whether the limitation imposed has impaired the essence of the right and, in particular, whether it has pursued a legitimate aim and there has been a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

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[46] *Miragall Escolano v. Spain,* 25 January 2000, § 33.

[47] *Golder v. United Kingdom* judgment of 21 February 1975, § 35.

[48] *Bellet v. France,* 4 December 1995, § 36.