Rule of Law Notions in Human Rights Law

Ursula Kriebaum*

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A. Introduction

Unfortunately, there is no uniform understanding among lawyers of what the *rule of law* means. It can be defined in different ways, and the term is not used in a uniform way in legal documents, as well as in the legal literature, not even within human rights law or the European Convention on Human Rights (ECHR). Matters get further complicated when the concept is translated from English into other languages.

Furthermore, in the context of human rights, the *rule of law* concept is used simultaneously as standard for the international legal system and as standard for national legal systems.

B. The relation between human rights and the rule of law

On the one hand, "human rights should be protected by the rule of law" as the Universal Declaration of Human Rights states it in its preamble. This would suggest that human rights, in general, should be protected through law.[1] On the other hand, the content of the law should conform to basic standards of human rights.

* Ursula Kriebaum is Professor of International Law at the University of Vienna and member of the ILA Committee on 'Rule of Law and International Investment Law'.

1 *Fitschen*, Max Planck UNYB 2008/12(1), p. 356, available at: http://www.mpil.de/files/pdf3/mpunyb_10_fitschen_12.pdf (27/04/2019).

Outside the context of the European Convention on Human Rights, especially in the context of the UN, the *rule of law* concept is used, on the one hand, as standard for the international legal system and, on the other, as a standard for national legal systems. It is used as a conceptual framework for the United Nations Human Rights Program, and the Secretary-General periodically reports on it.[2] After the 1993 UN World Conference on Human Rights in Vienna, the General Assembly passed a number of resolutions entitled "strengthening the rule of law" where it expressed its conviction that "the rule of law is an essential factor in the protection of human rights".[3] That practice was, however, discontinued in 2004.

What we can witness in the international, as well as in the regional human rights protection systems, are different approaches to the *rule of law* concept. The first one is a narrower approach, sometimes referred to as a "thin" approach. It focusses on the element of legality. This implies that governments respect the law and govern through law.[4] The consequence is a limitation of governmental powers through law. On the other hand, it also has a positive component, namely that laws have to be adopted in implementing human rights to make sure that the latter are respected whenever and wherever the State exercises jurisdiction.

The second approach, which focusses on the content of laws, is referred to as substantive, also called the "thick" approach.[5]

The first approach requires a functioning state and law as the appropriate form to govern, i.e., respect for the law by those who govern and those who are governed. The second approach requires more, namely that there is also agreement on the content of laws. These requirements have to be fulfilled inside the State and if the concept is to be included into a multilateral human rights treaty also by the State parties to that treaty.

This twofold approach to the rule of law can also be found in the UN Secretary General's 2012 Report, Delivering Justice: Programme of Action to Strengthen the Rule of Law at the National and International Levels. It defines the *rule of law* as follows:

> 2. The United Nations defines the rule of law as a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision making, legal certainty, avoidance of arbitrariness and procedural and legal transparency (see S/2004/616).[6]

2 Strengthening of the Rule of Law, Report of the Secretary-General, Dec. A/57/275 of 5 August 2002.
3 A/RES/48/132 of December 1993, para. 1.
4 See *Lautenbach*, p. 20.
5 Ibid., at p. 21.
6 Delivering Justice: Programme of Action to Strengthen the Rule of Law at the National and International Levels, Report of the Secretary General, UN Doc A/66/749 (2012) at para. 2.

Within the Council of Europe, the *rule of law* and human rights are referred to as distinct, albeit closely connected concepts. In this sense, the Parliamentary Assembly has pointed out:

> The notion of "rule of law", conceived by European nations as a common value and fundamental principle for greater unity, was recognised in the Statute of the Council of Europe of 1949 (ETS No. 1). This principle, together with those of democracy and human rights, plays a significant role today in the Council of Europe and the case law of the European Court of Human Rights in particular.[7]

C. The different aspects of rule of law in the case law of the European Court of Human Rights

Because its case law is by far the most developed in this respect this paper will focus on the European Court of Human Rights (ECtHR) and the Council of Europe.

In the context of the European Convention on Human Rights, the different aspects of the *rule of law* can be most easily understood in the French versions of the judgments. We find three different translations for the *rule of law* into French:

> État de droit, prééminence du droit and principe de légalité.

"*Prééminence du droit*" is the formula used in the preamble of the French version of the Convention, and it is also the formula that should be used according to the Resolution on the *Rule of Law* of the Parliamentary Assembly of the Council of Europe.

The resolution was adopted in reaction to concerns of the Parliamentary Assembly that *État de droit* was understood by some Member States as "State based on the principle of supremacy of the laws". This would equal *rule by law* and not adequately reflect the notion of the *Rule of Law*.[8] Therefore, this would be a too formalistic approach that captures only some aspects of the formula of the *Rule of Law* as it does not concern the content of the law.[9]

7 The principle of the Rule of Law, Parliamentary Assembly, Resolution 1594 (2007).

8 The concern of such an understanding is shared by the Secretary General of the Council of Europe in its report on "State of Democracy, Human Rights and the Rule of Law, A security imperative for Europe 2016". The report states in its chapter on functioning of democratic institutions that: "Governments should respect the rule of law, and not rule by law." (p. 74).

9 See Report of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe Doc. 11343, 6 July 2007, para. 4.

The European Court of Human Rights, in its case law, uses all three notions in different contexts. With regard to the third notion, its use overlaps with the other two.[10] The focus of this paper is on the first two notions.

I. État de droit

État de droit (a State governed by the *rule of law*)[11] is used far less often by the Court than *Prééminence du droit.*[12] It is not used by the Court as a guiding principle for the interpretation of the rights guaranteed by the Convention. It is rather used to stress the fundamental importance of courts and the administration of justice in a democratic society.

In *Morice v France*, for example, the Court held:

> 132. The specific status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. They therefore play a key role in ensuring that the courts, whose mission is fundamental in a State based on the rule of law, enjoy public confidence (…)

10 The principle of legality ("principe de légalité") implies that all executive acts have to be based on previously established rules. This includes that "*a governmental body must (1) be created by law; (2) act within the limits of the powers attributed or delegated to it by law, i.e. act intra vires; and (3) act in conformity with higher laws". In addition, the law itself must display certain characteristics in order to fulfil one of the objectives that the rule of law seeks to serve, namely to guide human or state behavior, being "(4) prospective, (5) open and clear," but also "(6) stable in order to guide behavior in the long term*", *Manusama*, pp. 9-10. The principle of legality therefore overlaps with the principle of *État de droit* (courts and administrative bodies as important instruments to uphold the *rule of law* within the society) and with the notion of *Prééminence du droit* especially concerning the substantive requirements for legal norms (accessibility, foreseeability, certainty); see e.g. ECtHR, App. no. 60642/08, *Alisic ao v Bosnia and Herzegovina, Croatia, Serbia, Slovenia and "The Former Yugoslav Republic of Macedonia"* [GC], para. 103, where the Court held: "The principle of lawfulness also presupposes that the applicable provisions of domestic law are sufficiently accessible, precise and foreseeable in their application".

11 See e.g.: ECtHR, App. no. 38450/12, *Prager and Oberschlick v. Austria*, para. 34; ECtHR, App. no. 19983/92, *De Haes and Gijsels v. Belgium*, para. 37; ECtHR, App. no. 18357/91, *Hornsby v. Greece*, para. 41; ECtHR, App. no. 15918/89, *Antonetto v. Italy*, para. 28; ECtHR, App. no. 58442/00, *Lavents v. Latvia*, para. 81; ECtHR, App. no. 33348/96, *Cumpănă and Mazăre v. Romania*, para. 54; ECtHR, App. no. 74025/01, *Hirst v. the United Kingdom* (no. 2), para. 36; ECtHR, App. no. 71503/01, *Assanidze v. Georgia* [GC], paras 173-175; ECtHR, App. no. 48995/99, *Surugiu v. Romania*, para. 65; ECtHR, App. nos 78028/01 and 78030/01, *Pini and Others v. Romania*, paras 183 and 187; ECtHR, App. no. 31443/96, *Broniowski v. Poland* [GC], paras 173 and 184; ECtHR, App. no. 46117/99, *Taşkın and Others v. Turkey*, para. 144; ECtHR, App. no. 30951/96, *Ay v. Turkey,* para. 62; ECtHR, App. no. 39630/09, *El-Masri v. The Former Yugoslav Republic of Macedonia* [GC], para. 192; ECtHR, App. no. 20261/12, *Baka v. Hungary*, para. 154; ECtHR, App. no. 29369/10, *Morice v. France* [GC], para. 132.

12 See Report of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe Doc. 11343, 6 July 2007, p. 9 and my own counting on later judgements.

In *El-Masri v "The Former Yugoslav Republic of Macedonia"* it stated with regard to the justice system:

> As the Council of Europe stated in its Guidelines of 30 March 2011 on eradicating impunity for serious human rights violations (…), "impunity must be fought as a matter of justice for the victims, as a deterrent to prevent new violations, and to uphold the rule of law and public trust in the justice system".

In a very old case, *Prager and Oberschlick v Austria*,[13] the Court used the expression twice: first with regard to the role of the press "in a State governed by the rule of law" and second concerning the role of the judiciary in a "law-governed" State.[14] This displays two different translations of "État de droit" which is used in the French version of the judgment.

II. Prééminence du droit – the substantive rule of law approach of the ECtHR

The *Rule of Law* translated as *Prééminence du droit* has had much more influence on the interpretation of the Convention than *État de droit*. The *Rule of law* in this understanding is also used much more frequently by the Court and clearly serves a guiding principle of interpretation for the Court. This became evident when the Court used it for the first time in its famous *Golder* judgment, where it pointed out its relevance for the interpretation of the Convention. It held that

> (…) 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. … And in civil matters one can scarcely

13 ECtHR, App. no. 15974/90, *Prager and Oberschlick v. Austria*.

14 Ibid., para. 34: "The Court reiterates that the press plays a pre-eminent role in a State governed by the rule of law. … Regard must, however, be had to the special role of the judiciary in society. 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. …".

> conceive of the rule of law without there being a possibility of having access to the courts. [15]

Thus, the Court established by referring to the *rule of law* that the right to a fair trial in Art. 6 ECHR comprises: The **right of access to courts**.[16]

With regard to access to courts, the Court used the notion of the *rule of law* also to ensure that State parties to the Convention could not arbitrarily restrict the right of access to a court by classifying an individual as a civil servant. This case law is part of a trend whereby the Court uses the concept of the *rule of law* to bring requirements for administrative review increasingly within the scope of application of Art. 6 (right to a fair trial).[17]

15 ECtHR, App. no. 4451/70, *Golder v. United Kingdom,* para 34. The complete passage reads:
"34. As stated in Art. 31 (2) of the Vienna Convention, the preamble to a treaty forms an integral part of the context. Furthermore, the preamble is generally very useful for the determination of the 'object' and 'purpose' of the instrument to be construed.
In the present case, the most significant passage in the Preamble to the European Convention is the signatory Governments declaring that they are 'resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration' of 10 December 1948.
…
The Commission, for their part, attaches great importance to the expression 'rule of law' which, in their view, elucidates Article 6 para. 1 (art. 6-1).
The 'selective' nature of the Convention cannot be put in question. It may also be accepted, as the Government have submitted, that the Preamble does not include the rule of law in the object and purpose of the Convention, but points to it as being one of the features of the common spiritual heritage of the member States of the Council of Europe. The Court however considers, like the Commission, that it would be a mistake to see in this reference 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. It seems both natural and in conformity with the principle of good faith (Article 31 (1) of the Vienna Convention) to bear in mind this widely proclaimed consideration when interpreting the terms of Article 6 (1) (art. 6-1) according to their context and in the light of the object and purpose of the Convention.
This is all the more so since the Statute of the Council of Europe, an organisation of which each of the States Parties to the Convention is a Member (Article 66 of the Convention) (art. 66), refers in two places to the rule of law: first in the Preamble, where the signatory Governments affirm their devotion to this principle, and secondly in Article 3 (art. 3) which provides that 'every Member of the Council of Europe must accept the principle of the rule of law...'
And in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts".

16 A large number of cases deal with this aspect. See e.g.: ECtHR, App. no. 17101/90, *Fayed v. United Kingdom*; ECtHR, App. no. 23805/94, *Bellet v. France*.

17 *Lautenbach*, at p. 135.

With regard to the **right to a fair trial** in civil and criminal matters, the Court has stated that the right as such is enshrined in the *rule of law* concept.[18] It did not stop there but also found that many of its components are required by the principle of the *rule of law*. These are the **finality of judgments**,[19] the requirement of the **publication of judgments**[20] and, their **enforcement**.[21] It also held that there is a duty to **state reasons** in judgments[22] and that the State has to **prevent unlimited discretion** of the judiciary and the executive [23] and must **protect the judiciary** against undue interferences by the legislature. [24] For these findings, the Court relied on the *rule of law*.

Although the right to a fair trial is certainly an important provision in the context of the *rule of law*, the Court held that *rule of law* in the sense of *prééminence du droit* "from which the whole Convention draws its inspiration"[25] is "inherent in all the Articles of the Convention".[26]

The Court did not limit the requirement of enforcement of national decisions to the execution of judgments but also applied it to remedies in the sense of Art. 13 of the Convention. Such was, for example, the case in *Öneryildiz v Turkey* where it stated:

18 ECtHR, App. no. 13427/87, *Stran Greek Refineries and Stratis Andreadis v. Greece,* para. 46; ECtHR, App. no. 4451/70, *Golder v. United Kingdom*, para. 35; ECtHR, App. no. 10519/83, *Salabiaku v. France*, para. 28; ECtHR, App. no. 22714/93 *Worm v. Austria*, para. 94.

19 See e.g. ECtHR, App. no. 28342/95, *Brumărescu, v. Romania* [GC], para. 61; ECtHR, App. no. 52854/99, *Ryabykh v. Russia*, para. 51.

20 For a summary of the publication requirements of judgments under Art. 6 (1) ECHR see: ECtHR, App. no. 14810/02, *Ryakib Biryukov v. Russia*, paras 30- 37 where the Court based its findings on Art. 6 (1) and the maintenance of confidence in the courts but not explicitly on the rule of law.

21 See e.g.: ECtHR, App. no. 18357/91, *Hornsby v. Greece*, para. 40; ECtHR, App. no. 31107/96, *Iatridis v. Greece* [GC], para. 58; ECtHR, App. no. 22774/93, *Immobiliare Saffi v. Italy* [GC], para. 66; ECtHR, App. no. 30985/96, *Hasan and Chaush v. Bulgaria* [GC], para. 87.

22 ECtHR, App. no. 12945/87, *Hadjianastassiou v. Greece*, para. 33.

23 ECtHR, App. no. 8691/79, *Malone v. United Kingdom*, para. 68: "… Since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, 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... to give the individual adequate protection against arbitrary interference".

24 ECtHR, App. no. 13427/87, *Stran Greek Refineries and Stratis Andreadis v Greece,* para. 49: The Court held that "the principle of the rule of law and the notion of fair trial enshrined in Art. 6 preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute".

25 ECtHR, App. nos 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, *Engel a.o. v. Netherlands*, para. 69.

26 See e.g., ECtHR, App. no. 19776/92, *Amuur v France,* para. 50; ECtHR, App. no. 20261/12, *Baka v. Hungary* [GC], para. 117; ECtHR, App. no. 21906/04, *Kafkaris v. Cyprus* [GC], para. 116; ECtHR, App. no. 19359/04, *M. v. Germany*, para. 90.

> The timely payment of a final award of compensation for anguish suffered must be considered an essential element of a remedy under Article 13 for a bereaved spouse and parent (…).[27]

In its case law on numerous articles that contain the notion "law" in their text,[28] the Court has held that they all allude to the same concept of law, a concept which comprises written and unwritten law and which implies **qualitative requirements**, notably those of accessibility and foreseeability[29] as well as legal certainty.[30] It explicitly links the requirement of the quality of the law to the compatibility with the *rule of law*.[31]

Foreseeability requires that a norm is sufficiently precise to enable citizens to adapt their conduct accordingly. They have to be able to foresee to a reasonable degree the legal consequences of a given action if need be with appropriate legal advice. However, it is neither possible nor required to achieve absolute certainty.[32] The level of precision required of domestic legislation depends on the content of the law in question and the number and status of those to whom it is addressed.[33] Also, it must be possible to adapt the law to changing circumstances. Therefore, legal norms have to be couched to a certain extent in terms that are vague and whose interpretation and application are questions of practice.[34]

27 ECtHR, App. no. 48939/99, *Öneryildiz v Turkey* [GC], para. 152.

28 Arts 2, 5, 6, 7, 8, 9, 10, Art. 1 Protocol No. 1, Art. 2 Protocol No. 4, Art. 1 Protocol No. 7.

29 See e.g.: ECtHR, App. no. 36376/04, *Kononov v. Latvia* [GC], para. 185; ECtHR, App. no. 38433/09, *Centro Europa 7 S. R.L. and Di Stefano v Italy*, para. 156.

30 See e.g.: ECtHR, App. no. 8691/79, *Malone v. United Kingdom*, para. 68; ECtHR, App. no. 28342/95, *Brumărescu v. Romania* [GC], para. 61; ECtHR, App. no. 48553/99, *Sovtransavto Holding v. Ukraine*, para. 72; ECtHR, App. no. 52854/99, *Riabykh v. Russia*, para. 51; ECtHR, App. no. 71503/01, *Assanidzé v. Georgia* [GC], para. 130; ECtHR, App. no. 54062/00, *Androne v. Romania,* para. 50; ECtHR, App. no. 20261/12, *Baka v. Hungary* [GC], para. 89.
ECtHR, App. no. 42750/09, *Del Rio Prada v. Spain* [GC], para. 125: "This primarily requires any arrest or detention to have a legal basis in domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention (see *Kafkaris*, cited above, para. 116, and *M. v. Germany*, cited above, para. 90). The "quality of the law" implies that where a national law authorises a deprivation of liberty, it must be sufficiently accessible, precise and foreseeable in its application to avoid all risk of arbitrariness (see *Amuur v. France*, 25 June 1996, para. 50)".

31 See e.g.: ECtHR, App. no. 42750/09, *Del Rio Prada v. Spain* [GC], para. 125.

32 ECtHR, App. no. 38433/09, *Centro Europa 7 S. R.L. and Di Stefano v. Italy*, para. 141; ECtHR, App. no. 6538/74, *Sunday Times v. the United Kingdom (no. 1),* para. 49; ECtHR, App. no. 14307/88, *Kokkinakis v. Greece*, para. 40; ECtHR, App. no. 25390/94, *Rekvényi v. Hungary* [GC], para. 34.

33 ECtHR, App. no. 50084/06, *RTBF v. Belgium*, para. 104; ECtHR, App. no. 25390/94, *Rekvényi v. Hungary* [GC], para. 34 and ECtHR, App. no. 17851/91, *Vogt v. Germany*, para. 48.

34 ECtHR, App. no. 38433/09, *Centro Europa 7 S. R.L. and Di Stefano v. Italy*, para. 141; ECtHR, App. no. 6538/74, *Sunday Times v. the United Kingdom (no. 1),* para. 49; ECtHR, App. no. 14307/88, *Kokkinakis v. Greece*, para. 40; ECtHR, App. no. 25390/94, *Rekvényi v. Hungary* [GC], para. 34.

In addition, legal certainty requires respect for the principle of *res judicata*. Therefore, no party is entitled to seek a review of a final and binding judgment.[35]

Not only does the State have to prevent unlimited discretion in legal provisions, but it also has to provide for **control of the executive** whenever convention rights could be at stake.[36]

The Court uses the concept of the *rule of law* as a classical **protection against arbitrary interferences** by States in the context of many different rights protected by the Convention. A prominent example in this context is the case law on the *nullum crimen sine lege* provision in Art. 7. In this context, the Court reiterated that:

> the guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, …. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (…).[37]

The Court also justified the requirement of **legal protection** in domestic law **against arbitrary interferences** referring to the *rule of law* inherent in all the Articles of the Convention.

35 ECtHR, App. no. 8691/79, *Malone v. United Kingdom*, para. 68; ECtHR, App. no. 28342/95, *Brumărescu v. Romania* [GC], para. 61; ECtHR, App. no. 48553/99, *Sovtransavto Holding v. Ukraine*, para. 72; ECtHR, App. no. 52854/99, *Riabykh v. Russia*, paras 51, 52.

36 ECtHR, App. no. 5947/72, *Silver a.o. v. United Kingdom*, paras 88-89: "The degree of precision required of the 'law' in this connection will depend upon the particular subject-matter... Since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive".

37 ECtHR, App. no. 35343/05, *Vasiliauskas v. Lithuania* [GC], para. 153 with references to
ECtHR, App. no. 36376/04, *Kononov v. Latvia* [GC], para. 185: "The guarantee enshrined in Art. 7, an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Art. 15 in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, so as to provide effective safeguards against arbitrary prosecution, conviction and punishment. Accordingly, Art. 7 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 (*nullum crimen*, *nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. It follows that an offence must be clearly defined in law. This requirement is satisfied where the individual can know from the wording of the relevant provision – and, if need be, with the assistance of the courts' interpretation of it and with informed legal advice – what acts and omissions will make him criminally liable.
When speaking of 'law', Art. 7 alludes to the same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written and unwritten law and which implies qualitative requirements, notably those of accessibility and foreseeability. As regards foreseeability in particular, the Court notes 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 ECtHR, App. no. 42750/09, *Del Rio Prada v. Spain* [GC], para. 77.

It did so, for example, in the context of the concept of legitimate expectations and retrospective invalidation of a legal act in a case concerning Art. 1 of Protocol No. 1, the protection of property.[38] Although only protecting "possessions", the Court found that certain "legitimate expectations" of obtaining an asset would also fall under the protective scope of Art. 1. The expectation must be based on a legal provision or judicial decision and not merely amount to a hope.[39] The applicant must have an assertable right which may not fall short of a sufficiently established, substantive proprietary interest under the national law.[40] It stressed that "legitimate expectation" may be based on a reasonably justified reliance on a legal act which had a sound legal basis and which bore on property rights.[41] The Court based the protection for such reliance on one aspect of the rule of law, which it found to be inherent in all the Articles of the Convention. This aspect implies that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by the Convention.[42]

Legitimate expectations and, hence, protection under Art. 1, of Protocol No. 1 will exist where the applicant has obtained an enforceable arbitral award or judgment.[43] Similarly, rights to restitution under national law are protected.[44] However, no legitimate expectation and, therefore, no protection exist where the restitution is subject to a condition which has not been fulfilled.[45]

Under the practice of the ECtHR, an arguable claim is not sufficient to establish a legitimate expectation. In *Kopecký*, a restitution case, the Court, after discussing its

38 ECtHR, App. no. 53080/13, *Nagy v. Hungary,* para. 78.
39 Ibid., para. 75.
40 Ibid., para. 79.
41 Ibid., para. 78; ECtHR, App. no. 44912/98, *Kopecký v. Slovakia* [GC], para. 47.
42 ECtHR, App. no. 53080/13, *Nagy v. Hungary*, para. 78; see also ECtHR, App. no. 42461/13, *Karácsony and Others v. Hungary* [GC], para. 156.
43 ECtHR, App. no. 13427/87, *Stran Greek Refineries and Stratis Andreadis v. Greece*, para. 59; EctHR, App. no. 28342/95, *Brumarescu v. Romania*, para. 70; ECtHR, App. no. 35221/97, *O.N. v. Bulgaria*; ECtHR, App. no. 30127/96, *Sciortino v. Italy*; ECtHR, App. no. 59498/00, *Burdov v. Russia*, paras 9, 40; ECtHR, App. no. 52854/99, *Ryabykh v. Russia*, para. 61; ECtHR, App. no. 1887/02, *Bocancea et al v. Moldavia,* para. 36; ECtHR, App. no. 41510/98, *Jasiuniene v. Lithuania*, para. 44; ECtHR, App. no. 58263/00, *Timofeyev v. Russia*, paras 45, 46; ECtHR, App. no. 48102/992, *Sabin Popescu v. Romania*, para. 79; ECtHR, App. no. 49806/99, *Prodan v. Modova*, para. 59; ECtHR, App. no. 31443/96, *Broniowski v. Poland* [GC], paras 130-133; ECtHR, App. no. 56849/00, *Piven v. Ukraine*, para. 46; ECtHR, App. no. 54400/00, *Croitoriu v. Romania,* para. 34.
44 EurCommHR, App. no. 37912/97, *Gospodinova v. Bulgaria*; ECtHR, App. no. 39050/97, *Jantner v. Slovakia*, para. 34; ECtHR, App. no. 44912/98, *Kopecký v. Slowakia* [GC], para. 35; ECtHR, App. nos 71916/01, 71917/01, 10260/02, *von Maltzan et al v. Germany* [GC], para. 74; ECtHR, App. no. 31443/96, *Broniowski v. Poland* [GC], paras 125, 132.
45 ECtHR, App. no. 33071/96, *Malhous v. Czech Republic* [GC]. See also, ECtHR, App. no. 35671/97, *Lindner and Hammermayer v. Romania*; EurCommHR, App. no. 23131/93, *Brezny & Brezny v. Slovakia,* paras 65, 80; ECtHR, App. no. 39794/98, *Gratzinger and Gratzingerova v. Czech Republic* [GC], para. 69; ECtHR, App. no. 44142/98, *Bugarski and von Vuchetich v. Slovenia*; ECtHR, App. no. 42527/98, *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], para. 85; ECtHR, App. no. 38645/97, *Polacek and Polackova v. Czech Republic* [GC].

previous practice[46] in some detail, reached the conclusion that the decisive criterion was whether the conditions for the restitution were objectively established.[47]

Furthermore, the Court has derived from the *rule of law* concept the need for **procedural guarantees** in the context of articles of the Convention that do not explicitly provide for such guarantees. It found that adversarial proceedings before an independent body competent to review the reasons for the measures and the relevant evidence can be required even absent an explicit reference in a norm's text. It did so, for example, with regard to the right to the protection of property.[48] Also, with regard to Arts 2 (right to live) and 3 (prohibition of torture) the Court derived procedural obligations from the concept of the *rule of law*.

These obligations comprise the duty to open investigations but also an obligation to punish unlawful acts committed by State agents.

> 133. As the Court has emphasised on previous occasions, although there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating allegations of ill-treatment 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 (…).[49]

The lack of an effective investigation will lead to a violation of the procedural head of Art. 3.[50] The same is true for the procedural aspects developed with regard to Art. 2 of the Convention.[51]

46 ECtHR, App. no. 12742/87, *Pine Valley Developments Ltd. and Others v. Irland*, para. 51; ECtHR, App. no. 44277/98, *Stretch v. United Kingdom*, para. 35; ECtHR, App. no. 17849/91, *Pressos Compania Naviera P.A. and Others v. Belgium*, para. 31; ECtHR, App. no. 46356/99, *Smokovitis v. Greece,* para. 32.

47 ECtHR, App. no. 44912/98, *Kopecký v. Slowakia* [GC], para. 58. See also ECtHR, App. no. 39050/97, *Jantner v. Slovakia*; ECtHR, App. nos 71916/01, 71917/01, 10260/02, *von Maltzan et al v. Germany* [GC], paras 97 ff.

48 ECtHR, App. no. 49429/99, *Capital Bank AD v. Bulgaria*, para. 134: "… Furthermore, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights be, in certain cases, subject to some form of adversarial proceedings before an independent body competent to review the reasons for the measures and the relevant evidence (see, mutatis mutandis, *Al-Nashif v. Bulgaria*, App. no. 50963/99, para. 123). It is true that Art. 1 of Protocol No. 1 contains no explicit procedural requirements and the absence of judicial review does not amount, in itself, to a violation of that provision (see *Fredin*, cited above, pp. 16-17, para. 50). Nevertheless, it implies that any interference with the peaceful enjoyment of possessions must be accompanied by procedural guarantees affording to the individual or entity concerned a reasonable opportunity of presenting their case to the responsible authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision. In ascertaining whether this condition has been satisfied, a comprehensive view must be taken of the applicable judicial and administrative procedures (see *AGOSI*, cited above, p. 19, para. 55; ECtHR, App. no. 13616/88, *Hentrich v. France*, para. 49; and ECtHR, App. no. 28856/95, *Jokela v. Finland*, para. 45)".

49 See e.g. ECtHR, App. no. 23380/09, *Bouyid v. Belgium* [GC], paras 121, 133 (rule of law = légalité).

50 Ibid., para. 134.

51 See e.g.: ECtHR, App. no. 11770/08, *Jeniţa Mocanu v. Romania*, para. 323 (rule of law = légalité).

As further protection against arbitrary interferences into human rights the Court required that any **interference** must be **based on an instrument of general application in order** to fulfil the requirements of the *rule of law*.[52]

The Court also derived from the concept of the *rule of law* that individuals have to enjoy **equality before the law**. It did so in the context of the dissolution of a political party and the right to assembly protected by Art. 11.[53]

III. Conclusions on the case law

Based on its function, the European Court of Human Rights has applied the concept of the *rule of law* only to national legal systems and not as a standard for the international legal system. It applied the concept to a variety of norms and legal issues, and it indicated that the rule of law would be inherent in all the rights enshrined in the Convention and its protocols.

The *rule of law* has added to the persuasive power of judgments but was also used to clarify the scope of the norms contained in the Convention.

The Court often referred to the *rule of law* as a European standard. However, it did not establish what the rule of law requires in Europe by comparing the different legal systems of the member States of the Council of Europe on a particular *rule of law* question.

The *rule of law* has been very influential with regard to judicial safeguards as well as concerning the quality of laws. The Court used it both in the context of compliance with domestic law but also with regard to the quality of domestic law (i.e. accessibility, foreseeability and legal certainty).

D. The dichotomy of the rule of law as a standard for the international legal system and as standard for national legal systems

If the human rights approaches to the *rule of law* are applied to investment law, they can be used as points of reference for the international, as well as for the national level

52 See e.g.: ECtHR, App. no. 71243/01, *Vistiņš and Perepjolkins v. Latvia*, para. 99.

53 See e.g.: ECtHR, App. no. 41340/98 and 3 others, *Refah Partisi (the Welfare Party) and Others v. Turkey*, para. 43 (the case was referred to the Grand Chamber).
The Turkish Constitutional Court had ordered the dissolution of a political party, the R.P., on the grounds that the latter was engaging in activities contrary to the principle of secularism. Its former leaders invoked Art. 11 and relied on the freedom of assembly and association enshrined therein. The Court (Chamber and not Grand Chamber) held "the rule of law means that all human beings are equal before the law, in their rights as in their duties. However, legislation must take account of differences, provided that distinctions between people and situations have an objective and reasonable justification, pursue a legitimate aim and are proportionate and consistent with the principles normally upheld by democratic societies. But the rule of law cannot be said to govern a secular society when groups of persons are discriminated against solely on the ground that they are of a different sex or have different political or religious beliefs. Nor is the rule of law upheld where entirely different legal systems are created for such groups".

of investment protection. In addition, human rights standards are useful for the assessment of the investment protection system itself. Here, adherence to the *rule of law* standards can be an argument in the legitimacy debate. This concerns both the substantive standards, as well as the dispute settlement procedure.

With regard to the dispute settlement procedure, one can inquire whether it itself lives up to the *rule of law* requirements. Concerning the substantive investment protection standards, they themselves contain requirements comparable to the ones developed in the context of human rights law. It would be useful to inquire which of the rule of law concepts developed in the context of human rights law could be fruitfully applied also to substantive investment protection standards. However, one has to keep in mind that the very differentiated approach to the *rule of law* developed in the context of the European Convention of Human Rights cannot be taken *tel quel* and applied to international investment law.

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