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The principle of the Rule of Law

Report
Committee on Legal Affairs and Human Rights
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Summary

The notion of Rule of Law (*prééminence du droit),* together with those of pluralistic democracy and human rights, represents a fundamental principle and a common European value recognised in, *inter alia,* in the Statute of the Council of Europe and the case law of the European Court of Human Rights.

The meaning of this notion, especially in certain states of the former Soviet Union, has been deformed and inappropriately understood to mean "state based on the principle of the supremacy of the laws" (written rules), in French "*prééminence des lois"* (i.e., not *"du droit"*). Such a formalistic interpretation of the term *"Etat de droit"* runs contrary to the essence of Rule of Law/*prééminence du droit.*

The terms *Rule of Law* and *"prééminence du droit"* should be used consistently by the Assembly in order to avoid confusion. This subject merits further reflection with the Venice Commission.

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A. Draft resolution

1. The notion of Rule of Law, which has been conceived by European nations as a common value and fundamental principle for greater unity, has been recognised in the Statute of the Council of Europe of 1949. 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.

2. The European Union, the OSCE and their member states are also committed to the principles of the Rule of Law, democracy and human rights. Explicit reference to the Rule of Law can be found, *inter alia*, in EU/EC treaties, the case law of the European Court of Justice, as well as in the Copenhagen criteria of 1993 for accession to the European Union.

3. Despite a general commitment to this principle, the variability in terminology and understanding of the term both within the Council of Europe and in its member states, has elicited confusion. In particular, the French expression "*Etat de droit*" (being perhaps the translation of the term "*Rechtsstaat*" known in the German legal tradition and in many others) has often been used but does not always reflect the English language notion of Rule of Law as adequately as the expression "*prééminence du droit*", the latter which is reflected in the French version of the Statute of the Council of Europe, in the preamble to the European Convention on Human Rights and in the Strasbourg Court's case-law.

4. The Parliamentary Assembly draws attention to the fact that in some recent democracies in eastern Europe, the main trends in legal thinking foster an understanding of the Rule of Law as "supremacy of statute Law", in Russian "*verkhovensto zakona*", and of "*Etat de droit*" as a "State based on the principle of the supremacy of the laws" (written rules), in French "*prééminence des lois*" (i.e. not "*du droit*"). This gives rise to great concern, since in some of these countries certain traditions of the totalitarian state, contrary to the Rule of Law, are still present both in theory and in practice. Such a formalistic interpretation of the terms of Rule of Law and of "*Etat de droit*" (as well as of *Rechtsstaat*) runs contrary to the essence of both Rule of Law/*prééminence du droit*. Certainly in these cases there is an inappropriate lack of consistency and clarity when translating into the legal terms used in member states.

5. The Assembly emphasises the need to ensure the unification that encompasses the principles of legality and of due process, which has the same basic elements, found in particular in the case law of the European Court of Human Rights, by whatever name this concept is now used in the Council of Europe.

6. Consequently, the Assembly:

6.1. stresses that the terms *Rule of Law* and "*prééminence du droit*" are substantive legal concepts which are synonymous, and which should be considered as such in all English and French language versions of documents issued by the Assembly as well as in the member states in their official translations;

6.2. believes that the subject merits further reflection with the assistance of the European Commission for Democracy through Law (Venice Commission).

B. Explanatory memorandum by Mr Erik Jurgens, Rapporteur

Harmonisation of the use of the concept of "Rule of Law" and "*prééminence du droit*" within the Council of Europe

1. The founders of the Council of Europe decided to make French and English the two official languages. That, of course, had consequences for the use of words for legal concepts expressed in those two languages, each of which at that time were being used within very different legal traditions. It also had consequences for the translation from these two languages into the languages, and legal traditions, of the other Council of Europe member states, which have themselves, in their own legal tradition, terms for what can be understood under Rule of Law.

2. After the accession of states from Central and Eastern Europe, especially those that formerly where part of, or within the sphere of, the Soviet Union - but already before that accession - it has not been clear if the concept of Rule of Law was being used in a comparable way by the Council of Europe itself and within individual member states. The aim of this report is to define the concept in such a way that, whatever the exact words which are used to translate the concept, it has basically the same meaning.

3. This is of some importance, because the Statute of the Council of Europe in 1949 defined its core business as promoting "democracy, rule of law and human rights". Rule of Law (in the French text of the Statute "*prééminence du droit*" was used) was therefore regarded by the founders as being a concept distinct from democracy and human rights, albeit that the three concepts were considered to be strongly interrelated. Sometimes in Council of Europe texts it seems, however, as if Rule of Law has assumed all the characteristics of democracy and human rights, and has therefore lost its distinct connotation. It is, in fact, in the history of European constitutional law, the oldest of the three.

4. The concept of "*État de droit*" (best known in the German tradition of the "*Rechtsstaat*"), a state based on (the rule of) law has – as a concept – much more following in continental European legal usage than Rule of Law. Most of the terms used for the concept are translations of "*Rechtsstaat*" ("*estado de derecho*", "*stato di diritto*", "*pravovoye gosudarstvo*", "*rättstat*, *rechtsstaat*"). In Slav languages there is an extra problem. The important difference in English between "law" and "a law" cannot be rendered literally, because the definite and indefinite articles do not exist, like is the case in Latin. But Latin, other than modern English, has two separate words ("*ius*" and "*lex*"), like French ("*droit*" and "*loi*"). The use, in 1949, of the new term "*prééminence du droit*" where the English text uses Rule of Law, (instead of possibly "*État de droit*") could have helped add to the confusion. The fact is that, in Western Europe, variations of "*Rechtsstaat*"/ "*État de droit*" have already for a long time been used to refer to a concept akin to Rule of Law, although this is not an exact translation. In these translations it is possible that a national legal term is used, the interpretation of which does not incorporate all the elements of Rule of Law, as are generally accepted and are expounded by the European Court of Human Rights.

5. It is important that the Council of Europe continues to stress its trinity of three concepts, and that the concept of Rule of Law retains its own position, if only because the elements of Rule of Law have only been partially absorbed into certain human rights, such as that of Article 6 of the European Convention of Human Rights (fair trial). The concept of Rule of Law (by whatever name) was developed since the Middle Ages to oppose arbitrary rule and to limit the use of power by those governing.

6. The first step was the claim that all use of power must be derived from the law, that law being equally applicable both to rulers and to citizens (the principle of legality and of equality before the law). The second step was the claim that against decisions by authorities, made on the basis of the law, there should be a right of access to review by an independent judiciary (the most important element in the *trias politica* described by Montesquieu, called "due process" in the Vth and XIVth amendments to the US Constitution).

7. As an example how important Rule of Law still is as a distinct concept, it is of interest to refer to the decision of the Court of First Instance of the EU/EC of 12 December 2006, nr T228/02.

8. In this case the court upheld the right of an organisation to an effective remedy, and its right to be able defend itself in law, when its funds were frozen because it was put (in this case by the EU/EC, and as a consequence of a binding decision of the UN Security Council after 9/11) on a list of organisations suspected of association with terrorist activities. The EU regulation governing this competence, however, says nothing about the necessity to motivate such a decision, or about a possibility of defending oneself or about an effective remedy. In this decision the Court effectively found a way to quash the placing on the list because of these violations of basic precepts of the Rule of Law, even though the applicable European law did not give it clear guidance in this matter.

9. Next to the Rule of Law, democracy - as a distinct value - stresses that laws must, because they are the basis of all governmental power, of itself have the backing of the citizens. Human rights, on the other hand - being the other value distinct from Rule of Law - stresses that the contents of this law should also conform to basic standards of human rights.

10. All three concepts in the West-European legal tradition are based on concepts of natural rights, concepts argued from individual human dignity. Thus the phrase "*sotsialisticheskoie pravovoie gosudarstvo*" ("socialist law-based state") in the Soviet Union was to secure the supremacy of the Soviet statute laws, in the interest of "socialist legality". The argument from individual rights did not exist. It is therefore of special importance that, if – as now is the case - "*pravovoie gosudarstvo*" (a translation of "*Rechtsstaat*") is used in Russian, in the interpretation of that word no conceptual reference to the Soviet term and its formalistic legality is present, and that it does in fact convey the concept of Rule of Law as it is defined by the Council of Europe. This last point applies, of course, to all other European legal traditions based on translations of the term "*Rechtsstaat*" / "*État de droit*".

11. In an appendix to a draft report I prepared on this subject (See Appendix I of document AS/Jur (2007) 28 rev), Professor Nikolas Roos provided an historic background, and an analysis of how Rule of Law and "*Rechtsstaat*" should now be interpreted as laying down the principle of the equal human dignity of each individual before the law. In Appendix I to the present explanatory memorandum, a background paper supplied by the secretariat gives a comparative approach to the meaning of the terms Rule of Law (and its French translation: "*prééminence du droit*"), and also of "*Rechtsstaat*" and "*État de droit*", at the national level in member states, followed by such a comparative approach at the European level. Appendix II cites use of these terms in the case law of the Strasbourg, of the Luxembourg Court and in documents issued by the Assembly.

12. From the comparative approach at the European level we can learn that, in the case law of the European Court of Human Right, "*prééminence du droit*" (Rule of Law) occupies a key position. It is used as a substantive concept, encompassing such elements as legality, legal certainty, equality of individuals before the law, effective remedy if basic freedoms are at stake and extension of the guarantees afforded by the right to a fair trial. The Court links Rule of Law to the principle of a democratic society and to that of human rights in general.

13. On the other hand the European Court of Human Rights does sometimes refer to the concept "*État de droit*" ("*Rechtsstaat*") as a separate concept. In some decisions it formulates guarantees based on the concept of "*État de droit*" as guarantees given by Article 6 of the European Convention on Human Rights. We see that in most languages the term used in this context is a translation of "*État de droit*", but that the Court follows a concept based on the term Rule of Law. This could mean that the substantive concept of Rule of Law as developed by the Court is not sufficiently incorporated into the law on a national level, at least in those countries where the term being used in the national legal tradition is based on the concept underlying the term "*État de droit*" / "*Rechtsstaat*", and this concept is being misused in a formalistic sense.

14. It is therefore important that the Council of Europe develops and uses a concept encompassing the principles of legality and of due process, which has the same basic elements, by whatever name this concept is now used in the Council of Europe and is then translated into the national legal systems, be that system a variation of the Rule of Law/ "*prééminence du droit*" tradition, or of the "*État de droit*" / "*Rechtsstaat*" tradition.

15. In the motion for a resolution[1] the signatories ask for special attention for the way the term Rule of Law is translated into French, among other reasons because French is also an official language in the European Union. They refer especially to the problems created by translating Rule of Law as "*État de droit*" in many countries, as this concept is not always interpreted in the same way that Rule of Law / "*prééminence du droit*" is now understood.

16. Our colleague in the Assembly, Mr Serhiy Holovaty, member of the parliament of the Ukraine, and first signatory to the motion, has just published a three volume book on "The Rule of Law" in Ukraine (for a summary, see Appendix IV of document AS/Jur (2007) 28 rev). The author describes how states, formerly belonging to the sphere of the Soviet Union, much of the legal-positivist tradition of the Soviet era is still prevailing. This tradition interprets the tradition of legality within a "*Rechtsstaat*" as saying that "the principle of the Rule of Law can be realized only through the supremacy of statute law".

17. The book was written to defend the thesis that the modern understanding of the Rule of Law is the antithesis of Soviet legal thinking. This is just an example of how imperative it is that the Council of Europe, including the European Court of Human Rights, follow a clear concept of Rule of Law/ "*prééminence du droit*" that is also consonant with the modern concept of "*État de droit*" / "*Rechtsstaat*" as used in Western European tradition. And that the substance of these concepts is translated consistently and authoritatively into the legal practice of one and every member state.

18. To arrive at the goal described in paragraph 14 above, the Assembly should take the initiative of organising a conference of experts from the institutions of the Council of Europe, where a short paper should be discussed and decided upon. This paper could describe and list the basic and essential elements of the principles of legality and of due process, as they are understood by the institutions of the Council of Europe when they use such terms as Rule of Law, "*prééminence du droit*", but also "*État de droit*", a state governed by the Rule of Law, "*Rechtsstaat*" e tutti quanti. All institutions of the Council of Europe would then bind themselves to follow the definition and terminology thus decided upon. This definition could serve as a common definition for the Council of Europe. This does, of course, not exclude that in law and practice, in the Council of Europe or in member states, broader guarantees of legality and due process are evolved than those contained in the basic definition.

19. In an addendum a list should be made of the way in which at this moment interpreters and translators transcribe these concepts into the legal terms of the member states, thereby analysing if, in those languages, these terms are in fact used and understood in conformity with the accepted Council of Europe-usage. Member states should be asked to see to it that this Council of Europe concept of the Rule of Law is consistently applied in constitutional practice.

20. The assistance of the European Commission for Democracy through Law (Venice Commission) to prepare such a meeting would be essential.

21. A first draft of this text should then be discussed with the EU before being decided upon. The cooperation with the EU is especially important, because the documents of the EU are translated into all the 23 languages of the member states, including some states formerly in the sphere of the Soviet Union. The EU therefore has special experience with the problem referred to in paragraph 18.

[1] See Doc 10180.

Appendix I

Background paper

The expression "principle of the Rule of Law"

Just after the Second World War, there was a significant renewal of interest in the expression *"rule of law"*, especially in the context of plans for the founding of European organisations. This revival became particularly marked in the early 1990s under the influence of the process of Europeanisation of legal systems, as shown by the widespread use of the term *"rule of law"* in official international instruments[2].

The growing number of references to such terms raises considerable semantic difficulties, however, particularly when it comes to their translation. The expression *"rule of law"*, which literally means *"règle de droit"* in French, may be translated variously as *"prééminence du droit", "Etat de droit ", "primauté du droit", "principe de droit", "régime de droit", "règne du droit", "respect de la loi", "principe de légalité"* or "*Communauté de droit*". This gives rise to a number of questions: are all these French terms really identical? Are they all found in positive law? Do they all hold equal significance for a judge? Does a judge infer similar principles from them?

These numerous translations of the expression *"rule of law"* consequently raise theoretical issues of a lexical nature, which, if unresolved, are likely to perpetuate a degree of confusion in positive-law terminology at a time when, with European countries increasingly working to harmonise their legal systems, it is essential for the common benchmarks fundamental to that process to mean the same thing for everyone. In having such a variety of translations, a term like *"rule of law"*, found in most of the basic human rights texts, confronts us with a crucial issue of terminological rigour.

There now appears to be a general consensus that the expressions *"rule of law"* and *"Etat de droit"* are equivalent, in that they emphasise the need to prevent arbitrary interference by public authorities by instituting a legally based relationship between such authorities and individuals. Yet is the expression *"Etat de droit"* an appropriate translation of the term *"rule of law"*? While the latter term can be transposed from domestic legal systems to regional or international legal systems without too many conceptual difficulties, this does not appear to apply to the expression *"Etat de droit"*, insofar as its semantic structure and conceptual construction refer to the very idea of a State as well its domestic legal system. Moreover, how does one explain the fact that, in 1950, the European Convention on Human Rights opted for the term *"prééminence du droit"*? Is the latter term identical to *"Etat de droit"*?

In order to pinpoint what is covered by the expression *"principle of the rule of law"*, a comparative approach seems appropriate in a number of respects. Firstly, it means the analytical framework can be extended to foreign legal systems, thereby making it possible to see how this term has been interpreted in different legal cultures. It consequently seems appropriate to focus on countries with distinct philosophical traditions, representing the three major European legal families (German, English and French). Secondly, a comparative approach provides scope for moving from national legal systems to the European level, since it offers a more comprehensive view of the domestic level, which then makes it easier to identify any differences from the regional level. It also operates at this second level, affording an opportunity to compare the Council of Europe's interpretation of the term *"rule of law"* with that of the European Union.

I. COMPARATIVE APPROACH AT THE NATIONAL LEVEL

a) Rechtsstaat

1) Document: two references to the term *Rechtsstaat* may be found in the German Basic Law. Since 1949, it has appeared in Article 28 para. 1, which states that *"the constitutional order in the Länder shall conform to the principles of the republican, democratic and social state governed by the rule of law within the meaning of this Basic Law"*. Since the revision of 21 December 1992, the

[2] This is confirmed, for example, by resolutions of the United Nations General Assembly concerning the "*reinforcement of the rule of law*" ("*renforcement de l'état de droit*") and the Charter of Paris for a New Europe adopted on 21 November 1990, along with the various European texts discussed below (see II/ b/ "Comparative approach at the European level").

expression has also appeared in paragraph 1 of the new Article 23 dealing with the European Union, which states that *"with a view to establishing a united Europe the FRG shall participate in the development of the European Union, which is committed to democratic, rule-of-law, social and federal principles as well as to the principle of subsidiarity, and ensures protection of basic rights comparable in substance to that afforded by this Basic Law. […]"*

2) Case-law: The Federal Constitutional Court has never supplied a comprehensive, overall definition of the general principle of the *Rechtsstaat*. It adopts a cautious approach, setting forth the requirements deriving from it on a case-by-case basis.[3] The principle of the *Rechtsstaat* consequently needs *"to be given concrete expression according to the specific circumstances"*[4].

Nevertheless, in the Court's view it appears to comprise two key elements: the idea of substantive justice (through the protection of fundamental human rights: Articles 1 to 20) and the idea of legal certainty (bindingness of the law, the requirement of legislative precision, compliance with the principle of the hierarchy of legal rules, compliance with the principle of proportionality, judicial protection of rights).

3) Following the dark days of the Third Reich, the *Rechtsstaat* established in 1949 is wholly concerned with upholding humanist, liberal values, the protection of which is assigned primarily to the courts. The term *Rechtsstaat* tends, therefore, towards the ideal of a just state, while establishing a state governed by judges[5]. The provisions of the German Basic Law and the case-law of the Constitutional Court in Karlsruhe unquestionably reflect their attachment to a substantive interpretation of *Rechtsstaat*, thereby abandoning a formal approach that, for the laying down of legal rules, confined itself to mere compliance with jurisdictional and procedural rules.

b) Etat de droit

1) Document: no article in the 1958 Constitution mentions the term *Etat de droit* at present. An indirect reference to it may be found in Article 88-2, however; by mentioning the Maastricht and Amsterdam treaties, which expressly contain the expression[6], this article leaves the way open for introducing the expression into French positive law.

2) Case-law: likewise, the Constitutional Council has also always refrained from referring to *Etat de droit* in its case-law. Even where MPs have used it in lodging an application[7], French judges have always avoided commenting on this expression. The term *Etat de droit* is consequently not a rule of constitutional positive law, but simply a doctrinal concept.

3) Doctrine: writers unanimously agree, however, that the expression has been somewhat topical in France since:

- the decision of 16 July 1971 in which the Constitutional Council included the Preamble to the 1958 Constitution[8] among the rules against which it reviews the constitutionality of laws.
- the speech by the then President of the Republic, Valéry Giscard d'Estaing, on 8 November 1977: *"When every authority, from the lowest to the highest level, is subject to supervision by the courts, which ensure it complies with all the jurisdictional and substantive rules applying to it, we have an* Etat de droit*".*

4) Substance: Robert Badinter, for example, considers that an *Etat de droit* must, at the very least, ensure the holding of free elections, a Constitution complying with the principle of separation of powers, an independent judiciary, a declaration of fundamental rights and pluralism of the press[9].

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[3] In a fundamental judgment of 15 December 1970, for instance, it stated that Article 20 of the Constitution, setting out the basis of the German system of government (democratic, social federal state, sovereignty of the people, legislature bound by the Constitution, executive and judiciary bound by statutes and the law, right to resist), simply guaranteed **some aspects** of the *Rechtsstaat*, BverfGE 30, 1 (telephone tapping).

[4] BverGE, 7, 89 (92).

[5] L. HEUSCHLING, *Etat de droit, Rechtsstaat, Rule of law*, Thesis, Dalloz, 2001.

[6] See below, sources of expression at the European level.

[7] See, for example, decisions no. 89-261 DC of 28 July 1989 and no. 93-335 of 21 January 1994

[8] *Inter alia*, the Preamble contains the Declaration of the Rights of Man and of the Citizen (DRMC) and the Preamble to the 1946 Constitution.

5) *Etat de droit* no longer refers solely to the existence of a hierarchical legal system, but also to a set of provisions guaranteeing individual freedoms[10].

c) Rule of Law

1) **Distinctive feature**: unlike the previous two expressions, *rule of law* does not refer expressly to the concept of the State. The word *State* is missing from the expression *rule of law*, and there is no literal equivalent of the term *Etat de droit* in English law and English legal terminology. However, given that the English term *law* covers both *common law* and *statute law*, the most general meaning of the concept of *rule of law* appears to be that of *"règne du droit"*: both legislature-made and judge-made law[11].

2) **Substance**: To English legal experts, the principle of *rule of law* expresses a concern to limit political power. They identify it with the fundamental principles of liberalism and democracy, citing, as constituent elements, the principle of separation of powers, legality, recognition of individual freedom and equality, judicial review and the relationship between law and morality[12].

3) **Application**: In the absence of a written constitution (and of review of the constitutionality of laws by a constitutional court), the English concept of *rule of law* has recently made use of the possibilities offered by international law in order to limit arbitrary interference by the legislature. It is also attracting renewed interest as a result of the contemporary expansion of human rights. This is reflected in the incorporation into English law of the European Convention on Human Rights (ECHR) by the 1998 *Human Rights Act*.
It is possible to observe:

- a translation of the *rule of law* into practical form: the emphasis is on fundamental human rights, particularly the principle of human dignity and autonomy of the individual[13].
- a judicialisation of the *rule of law*: underlying the concept is the idea of judicial protection of human rights, which consequently gives rise to a considerably increased role for the courts.

This being so, the concept of *rule of law* has now called in question the absolute discretionary power of the Westminster Parliament, which is being challenged in the name of protection of rights and freedoms. The British conception of the principles of the *rule of law* is at variance with a purely formal or quantitative interpretation of the concept, favouring a more substantive, qualitative approach to democracy.

d) Conclusions of the comparative approach at the national level

1) The combination of the two words *Recht* and *Staat*, *Etat* and *Droit*, is missing from the English term *rule of law*. Continental legal experts are therefore expected to handle the concepts of both State and law, while English legal experts work without either of these terms.

2) Only the term *Rechtsstaat*, contained in the German constitutional text, is a rule of positive law.

3) Notwithstanding considerable semantic differences and differences in legal status, the principles of *Rechtsstaat*, *Etat de droit* and rule of law are essentially based on the idea of limiting power, via the

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[9] R. BADINTER, 4th round table, Quel Etat de droit pour garantir les libertés fondamentales, Les pays de l'Est, Libération.
[10] J.CHEVALLIER, *L'Etat de droit*, Montchrestien, Clef, 3rd edition, 1999.
[11] E. PICARD, *Les droits de l'homme et " l'activisme judiciaire"*, Pouvoirs, no. 93, 2000, p.119.
[12] I.JENNINGS, *The Law and the Constitution*, 4th edn., London, University of London Press, 1948, p.xi and p.53 note 1; G.MARCHALL, *The Rule of Law. Its Meaning, Scope and Problems*, Cahier de philosophie politique et juridique de l'Université de Caen, no. 24, 1993, p.43.
[13] See the UNESCO international conference held in Chicago in 1957, the International Commission of Jurists conference in New Delhi in 1959 and the proceedings of the conference *The Rule of Law as Understood in the West*, Annals of the Istanbul Faculty of Law, v.IX, 1959, pp. 1-349 and International Commission of Jurists, *The Rule of Law in a Free Society*, Geneva, 1960.

threefold process of assigning the State a limited set of powers, making it subject to the sovereign people and protecting individual freedoms[14].

II. COMPARATIVE APPROACH AT THE EUROPEAN LEVEL

a) Council of Europe

1) Document: Article 3 of the Statute of London provides: *"Every member of the Council of Europe must accept the principles of the* ***rule of law*** *and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms" ("Tout Membre du Conseil de l'Europe reconnaît le principe de* ***la prééminence du Droit*** *et le principe en vertu duquel toute personne placée sous sa juridiction doit jouir des droits de l'homme et des libertés fondamentales*"). The last paragraph of the preamble to the European Convention on Human Rights (ECHR) mentions the same principle: *"Being 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****" ("Résolus, en tant que gouvernements d'Etats européens animés d'un même esprit et possédant un patrimoine commun d'idéal et de traditions politiques, de respect de la liberté et de* ***prééminence du droit*** *[…]*").

2) The term *Etat de droit* as such is therefore not found in the Statute of the Council of Europe or the ECHR, but reference is made to a similar concept, *prééminence du droit*. Both terms are used in the case-law of the European Court of Human Rights (ECtHR), although *prééminence du droit* is much more common.

3) Case-law: It seems appropriate to draw a distinction between the terms *Etat de droit* and *prééminence du droit*, the better to grasp their significance in case-law.

i) "*Etat de droit*" in the case-law of the ECourtHR ("*State based on the rule of law*" / "*law-governed State*" / "*State subject to the rule of law*")

The case-law search stopped on 24 August 2005. Thirteen judgments containing the expression *"Etat de droit"* were found. Only those judgments in which the expression appears in the (legal) grounds were included[15].

The concept of *Etat de droit* is found to play a minor role in the reasoning behind decisions, and is thus rather more rhetorical than prescriptive in nature[16]. The term appears to be used systematically in support of doctrine concerning the courts and the administration of justice. In the *Prager and Oberschlick v. Austria judgment (§34)* of 22 March 1995, for example, the Court held: "*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" ("il convient de tenir compte de la mission particulière du pouvoir judiciaire dans la société. Comme garant de la justice, valeur fondamentale dans un* ***Etat de droit****, son action a besoin de la nécessaire confiance des citoyens pour prospérer"*). Similarly, in the *De Haes and Gijsels v. Belgium judgment (§37)* of 27 January 1997, the Court stated: *"the courts – the guarantors of justice, whose role is fundamental in a* ***State based on the rule of law*** *– must enjoy public confidence*" (*"l'action des tribunaux, qui sont garants de la justice et dont la mission est fondamentale dans un Etat de droit, a besoin de la confiance du public"*). In July 2000, in the *Antonetto v. Italy judgment (§28),* the Court held that *"the administrative authorities form one element of a State subject to the rule of law* [Etat de droit] *and their interests accordingly coincide with the need for the proper administration of justice".*

It seems, therefore, that the idea of an *Etat de droit* implicitly underlies the Court's case-law, but it is striking that it is virtually absent from the principles applied by judges in their judicial work. If we look at the Court's usage, we find that *Etat de droit* is never referred to as a fundamental value in itself. The Court simply states, for example, that *"the justice system plays a fundamental role in a State governed by the rule of law* [Etat de droit]*".* Moreover, when the concept is used, it never appears to be a deciding factor. For instance, in the *Hornsby v. Greece judgment (§41)* of 25 February 1997, the

[14] J.CHEVALLIER, *Ibidem*.
[15] This excludes judgments where the expression is used by the parties in their conclusions.
[16] See the concurring studies by Luc HEUSCHLING, *Etat de droit, Rechtsstaat, Rule of law*, Thesis, Dalloz, 2001, p. 309 and E. CARPANO, *Etat de droit et droits européens*, Thesis, L'Harmattan, Logiques juridiques, p. 266 ff.

applicants alleged that the Greek government had not complied with decisions of the Supreme Administrative Court in their favour, and consequently held that their right to effective judicial protection as upheld by Article 6§1 of the ECHR had been infringed. In this case, the Court held that *"the effective protection of a party to such proceedings and the restoration of legality presuppose an obligation on the administrative authorities' part to comply with a judgment of that court"*. It added that *"the Court observes in this connection 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" ("l'administration constitue un élément de* ***l'Etat de droit*** *et que son intérêt s'identifie donc avec celui d'une bonne administration de la justice")*. Consequently, *"where administrative authorities refuse or fail to comply, or even delay doing so, the guarantees under Article 6 enjoyed by a litigant during the judicial phase of the proceedings are rendered devoid of purpose".* This is a good example of the European Court's attitude to *Etat de droit* in that, in this instance, it does not comment directly on compliance or otherwise with *Etat de droit*, but rather on compliance with the guarantees under Article 6.

The principle of the *Etat de droit* is not, therefore, established as a fundamental principle of the ECHR system and cannot be the source of new rights. This does not appear to be the case with *"prééminence du droit"*.

ii) "*La prééminence du droit*" ("*the rule of law*") in the case-law of the ECourtHR

About a hundred Court judgments containing the term *"prééminence du droit"* were found. Only those establishing a principle will be mentioned here.

1) The concept of *"prééminence du droit"* first appears in the case-law of the ECourtHR in the *Golder v. United Kingdom* judgment of 21 February 1975. This concept is an accepted principle of interpretation of the ECHR. 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***" (*"un simple rappel plus ou moins rhétorique dépourvu d'intérêt pour l'interprète de la Convention*. *Si les gouvernements signataires ont décidé de prendre les premières mesures propres à assurer la garantie collective de certains des droits énoncés dans la Déclaration universelle, c'est en raison notamment de leur attachement sincère à* ***la prééminence du droit***")*(Golder, 21 February 1975, § 34).

The principle is clearly a guiding one: the judges subsequently say that *"the fundamental principle of* ***the rule of law***" (*"le principe fondamental de* ***la prééminence du droit***") (Salabiaku, 7 October 1988, §28) inspires *"the whole Convention"* (Engel, 8 June 1976, §69) and is *"inherent in all the Articles of the Convention"* (Amuur, 25 June 1996, §50). The principle consequently occupies a key position in the case-law of the ECourtHR, as a powerful tool that plays a part in development of the Convention system[17]. It is true that such a principle implicitly refers to the idea of the law-based state (*Etat de droit*), and, moreover, possesses the main attributes of the latter in that it affords protection against arbitrary interference. The Court does not confine itself to the formal conception of *Etat de droit*, however. It goes a stage further in its use of the concept of *"prééminence du droit"*, linking it to that of democratic society ("*the rule of law, one of the fundamental principles of a democratic society" / "la prééminence du droit, l'un des principes fondamentaux d'une société démocratique"*, to give a recent example, Colacrai, 15 July 2005, §58) and expressly relating it to various principles infringements of which it treats as violations of the Convention.

For instance, the Court has linked the principle of *prééminence du droit* to the principles of foreseeability of the law and legal certainty (Malone, 2 August 1984, §68) and the principle of equality of individuals before the law (Prosperity Party, 31 July 2001, §43). It has inferred from it the need to subject the administrative authorities to control whenever a public freedom is at stake (Silver, 25 March 1983, §90) and to set a framework for exercise of judicial powers (Huvig, 24 April 1990, §29), and, above all, it has considerably extended the guarantees afforded by Article 6§1 (right to a fair

[17] P. WACHSMANN, *La prééminence du droit dans la jurisprudence de la Cour européenne des droits de l'homme*, in "Le droit des organisations internationales", Recueil d'études à la mémoire de J. Schwob, Bruylant, Brussels, 1997, pp. 241-285.

trial). Lastly, the principle of *prééminence du droit*, together with that of democratic society, has also been used to consolidate, over time and in different places, the European public order in the field of human rights.

2) Use of the principle of *prééminence du droit* in the case-law of the ECourtHR is extremely significant. It is a fundamental, guiding principle, used by the judges to develop the European public order in the field of human rights[18]. The Court has made this principle consubstantial with that of democratic society.

3) The Strasbourg judges are thereby resisting the current tendency to systematically translate *"principle of the rule of law"* as *"le principe de l'Etat de droit"*, by drawing a distinction between this and *"prééminence du droit"*, with the latter appearing to signify the substantive conception of human rights the Court is endeavouring to develop.

b) European Community

1) **Doctrine**: The expression *Etat de droit* was used for the first time only in 1992. It appears twice in the Treaty on European Union (TEU) signed in Maastricht. The third paragraph of the Preamble provides that the States *"[confirm] their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of* ***the rule of law***" ("confirment leur attachement aux principes de la liberté, de la démocratie et du respect des droits de l'homme et des libertés fondamentales et de **l'Etat de droit**"). Secondly, Article J.1, para. 2, states that an objective for the common foreign and security policy is *"to develop and consolidate democracy and* ***the rule of law****, and respect for human rights and fundamental freedoms"* ("le développement et le renforcement de la démocratie et de l'Etat de droit, ainsi que le respect des droits de l'homme et des libertés fondamentales"). *Inter alia*, it mentions the Paris Charter adopted on 21 November 1990, which is wholly concerned with the doctrine of the rule of law (*Etat de droit)*. The third reference appeared in 1997, with the Treaty of Amsterdam. The latter modified Article F, making it into Article 6 of the Treaty on European Union. The first paragraph of this Article provides that *"the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and* ***the rule of law****, principles which are common to the Member States"* (*"l'Union est fondée sur les principes de la liberté, de la démocratie, du respect des droits de l'homme et des libertés fondamentales, ainsi que de* ***l'Etat de droit****, principes qui sont communs aux Etats members"*). The term is also found in the Charter of Fundamental Rights of the European Union. The second paragraph of its preamble states that, *"conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and* ***the rule of law***" (*"consciente de son patrimoine spirituel et moral, l'Union se fonde sur les valeurs indivisibles et universelles de dignité humaine, de liberté, d'égalité et de solidarité : elle repose sur le principe de la démocratie et le principe de* ***l'Etat de droit***"). Lastly, the draft treaty establishing a Constitution for Europe also echoes this reference to *Etat de droit*; Part I, Title I, Article 2 states that *"the Union is founded on the values of respect for human dignity, freedom, democracy, equality,* ***the rule of law*** *and respect for human rights"* (*"l'Union est fondée sur les valeurs de respect de la dignité humaine, de liberté, de démocratie, d'égalité, de* ***l'Etat de droit****, ainsi que de respect des droits de l'homme"*).

2) **Case-law**: The term appears fairly rarely, however, in judgments of the Court of Justice and the Court of First Instance. A study of the case-law[19] shows that it is primarily the parties who refer to the *Etat de droit*. The Community judges, however, invoke more specific principles in determining the cases before them; while they do sometimes use the term, it refers not to the Community, but rather to the institutions of the member states.

However, the Court does use the expression *Community based on the rule of law* (*Communauté de droit*) to describe the Union – it could scarcely describe the Union as an *Etat de droit* (*State based on the rule of law*). Once again, this illustrates the semantic difficulties: while in the French versions the Court appears to have transposed the concept of *Etat de droit* into Community law by using the

[18] E. CARPANO, *Etat de droit et droits européens*, Thesis, L'Harmattan, Logiques juridiques.
[19] For details of these judgments, see Luc HEUSCHLING, *Etat de droit, Rechtsstaat, Rule of law*, Thesis, Dalloz, 2001, p. 303.

concept of *Communauté de droit*, the expression contained in the English versions is *Community based on the rule of law*. In any case, the Community courts make little use of this concept either.

The doctrine of *Communauté de droit* is part of a doctrine connected with the development of the guarantees afforded by the Community legal system. The expression *Communauté de droit* appeared for the first time in the judgment *Parti écologiste les Verts v. Parliament* of 23 April 1986. The Court of Justice does not give any definition of this expression, which it uses to refer to established Community principles, such as that of the legal personality of the Community, recognition of the principle of legality, the hierarchy of legal rules and the right to a judge[20]. A development should be noted, however, in the wake of the *Union de los pequeños agricultores* (UPA) judgment of 25 July 2002, in which, for the first time, the Court linked the issue of protection of fundamental rights to the principle of *Communauté de droit*, adopting a substantive conception of *Communauté de droit* in place of the previous formal conception.

Conclusions: Analysis of the *"principle of the rule of law"* via various national legal families, and at the European level, appears to call for a distinction between:

on the one hand, a formal prescriptive concept encompassing theories establishing institutional or procedural requirements, such as judicial review of the constitutionality of laws, as a prescriptive ideal that any State wishing to be governed by the rule of law (*Etat de droit*) must achieve, and,

on the other hand, a substantive prescriptive concept which requires that the substance of the positive legal rules applied to individuals conform to a certain substantive ideal, defined, for instance, with reference to the concept of human rights.

Having initially emphasised the first conception, the *"principle of rule of law"* has gradually widened in scope, and now seems to incorporate the second conception.

[20] D. SIMON, *Le système juridique communautaire*, 3rd edition, Paris, PUF, 2001.

Appendix II

Extracts from Case-Law of the European Court of Human Rights and Court of Justice of the European Communities (CJEC) and selected texts of the Assembly

I. ECHR CASE-LAW

1) *Etat de droit*[21] (State governed by the rule of law)

- **ECHR, 22 March 1995, Prager and Oberschlick v/ Austria, § 34.**

The Court holds 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."*

- **ECHR, 27 January 1997, De Haes and Gijsels v/ Belgium, §37.**

The Court emphasises the importance of *"the courts – the guarantors of justice, whose role is fundamental in a* ***State based on the rule of law****"*, which consequently *"must enjoy public confidence"*.

- **ECHR, 25 February 1997, Hornsby v/ Greece, §41.**

According to the Court, *"the effective protection of a party to such proceedings and the restoration of legality presuppose an obligation on the administrative authorities' part to comply with a judgment of that court"* (in this case, the Greek Supreme Administrative Court). It can therefore subsequently affirm 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".*

- **ECHR, 20 July 2000, Antonetto v/ Italy, §28.**

The Court reiterates the foregoing statement that *"the administrative parties 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"*.

- **ECHR, 28 November 2002, Lavents v/ Latvia, § 81.**

Here the Court indicates that the principle of the rule of law (*Etat de* droit) underlies ECHR law: *"in the light of the principle of the* ***rule of law*** *inherent in the Convention system, the Court holds that a 'tribunal' must always be 'established by law', failing which it would lack the necessary legitimacy in a democratic society to hear the cases of individuals".* Further on, it reiterates *"that, under Article 6 § 1, a 'tribunal' must always be 'established by law'. This expression reflects the principle of the* ***rule of law*** *inherent in the whole system of the Convention and its protocols".*

- **ECHR, 10 June 2003, Cumpana and Mazare v/ Romania, § 54.**

In what is now a standard phrasing, the Court holds that *"while the press has the right to communicate information and ideas, including those concerning the functioning of the judiciary, the fact remains that the courts – the guarantors of justice, whose role is fundamental in a* ***State based on the rule of law*** *– must enjoy public confidence, and that it is consequently incumbent upon the authorities to protect them from unfounded attacks"*.

[21] Insofar as the main judgments mentioning the term *Etat de droit* relate to the same topic, that of the justice system, only those passages of the judgments containing the expression are quoted here, without going into the facts of the cases.

- **ECHR, 30 March 2004, Hirst v/ United Kingdom, § 36**.

In this case, the rule of law is mentioned in relation to the political rights of the individual: *"While Article 3 of Protocol No. 1 is phrased in terms of the obligation of the High Contracting Party to hold elections which ensure the free expression of the opinion of the people, the Court's case-law establishes that it guarantees individual rights, including the right to vote and to stand for election. Although those rights are central to democracy and the **rule of law**, they are not absolute and may be subject to limitations."*

- **ECHR, 8 April 2004, Assanidzé v/ Georgia, §§ 173 and 175.**

Once again, it is the enforcement of court decisions that is at issue: *"the Court observes that it is inconceivable that in a **State subject to the rule of law** a person should continue to be deprived of his liberty despite the existence of a court order for his release".* Further on, the Court states that, in its view, *"to detain a person for an indefinite and unforeseeable period, without such detention being based on a specific statutory provision or judicial decision, is incompatible with the principle of legal certainty and arbitrary, and runs counter to the fundamental aspects of the **rule of law**".*

- **ECHR, 20 April 2004, Surugiu v/ Romania, § 65.**

In the instant case, the Court reiterates 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, and that, where administrative authorities refuse or fail to comply, or even delay doing so, the guarantees enjoyed by a litigant during the judicial phase of the proceedings are rendered devoid of purpose".*

- **ECHR, 22 June 2004, Pini and Bertani and Manera and Atripaldi v/ Romania, §§ 183 and 187.**

The Court notes that bailiffs *"work to ensure the proper administration of justice and thus represent a vital component of the **rule of law**".* In the instant case, however, decisions that had become final but had not been enforced *"have been deprived of their binding force and have remained mere recommendations. Such a situation contravenes the principles of the **rule of law** and of legal certainty."*

- **ECHR, 22 June 2004, Broniowski v/ Poland, § 173 and 184.**

In this case, a judicial decision cancelling the award of a permit had not been enforced, *"in violation of the fundamental principles of a **State governed by the rule of law**".* Consequently, *"the conduct of the authorities was incompatible with the constitutional principle of maintaining citizens' confidence in the State and the law made by it, ensuing from the **rule of law**".* For *"the **rule of law** underlying the Convention, and the principle of lawfulness in Article 1 of Protocol No. 1, require States not only to respect and apply, in a foreseeable and consistent manner, the laws they have enacted, but also, as a corollary of this duty, to ensure the legal and practical conditions for their implementation".*

- **ECHR, 30 March 2005, Taskin and others v/ Turkey, § 144.**

*"The judicial decision cancelling the award of a permit was not enforced, in violation of the fundamental principles of a **State governed by the rule of law**."*

- **ECHR, 22 March 2005, Ay. v/ Turkey, § 62.**

Here, the fact that a criminal investigation had promptly been launched into the applicant's allegations *"constitutes an essential requirement in order to maintain public confidence in, and adherence to, the **rule of law**, and prevent any appearance of collusion in or tolerance of unlawful acts".*

***2) Prééminence du droit* (rule of law)**

Principles connected with the rule of law (*prééminence du droit*), the effectiveness of which is ensured by the Court:

- Principle of foresee ability of the law and legal certainty

- **ECHR, Malone v/ United Kingdom, 2 August 1984, § 68.**

A British citizen complained that he had been subject to illegal telephone tapping contrary to Articles 8 and 13 of the Convention. The Court does not prohibit the use of telephone tapping, but it must come within a very strict legal framework. According to the judges*, "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".* It notes that the domestic law on this point is somewhat obscure and open to different interpretations, such that the minimum degree of legal protection required by the principle of the rule of law (*prééminence du droit*) is lacking. The law must therefore possess certain "qualities" in order to prevent any arbitrary interference. In relation to this principle, we may simply draw attention to the case of *Metropolitan Church of Bessarabia and others v/ Moldova* of 13 December 2001, in which the Court recalls that the expression "prescribed by law" refers, *inter alia*, to *"the quality of the law in question, which must be sufficiently accessible and foreseeable as to its effects, that is formulated with sufficient precision to enable the individual […] to regulate his conduct".*

- **ECHR, Brumarescu v/ Romania, 28 October 1999, § 61.**

Under Article 330 of the Romanian Code of Civil Procedure, the Procurator-General (who was not a party to the proceedings) had the power to apply for a final judgment to be quashed. Such a power to challenge the authority of judgments was criticised by the Court, which held that *"one of the fundamental aspects of the rule of law is the principle of legal certainty, which requires,* inter alia*, that where the courts have finally determined an issue, their ruling should not be called into question".*
For identical application and wording, see the following judgments: **Sovtransavto Holding v/ Ukraine, 25 July 2002; Riabykh v/ Russia, 24 July 2003; Assanidzé v/ Georgia, 8 April 2004; Androne v/ Romania, 22 December 2004**.

- Principle of equality of individuals before the law

- **ECHR, Prosperity Party v/ Turkey, 31 July 2001, § 43.**

The Turkish Constitutional Court having 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 Article 11 against such a decision before the ECourtHR, relying on the freedom of assembly and association enshrined therein. The Strasbourg judges stated that *"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*."

- Principle of control of the executive whenever a public freedom is at stake

- **ECHR, Klass and others v/ Germany, 6 September 1978, § 55.**

The applicants complained that Article 10§ 2 of the Basic Law and a statute enacted in pursuance of that provision, the Act of 13 August 1968 on Restrictions on the Secrecy of the Mail, Post and Telecommunications, were contrary to the Convention. They did not dispute that the State had the right to have recourse to the surveillance measures provided for by the legislation, but challenged the latter in that it permitted those measures without obliging the authorities in every case to notify the persons concerned after the event, and in that it ruled out any remedy before the courts against the ordering and execution of such measures. The Court then emphasised the need for an **effective concrete remedy**, holding that *"one of the fundamental principles of a democratic society is the rule of law, which […] implies, inter alia, that an interference by the executive authorities with an*

individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure".

- **ECHR, Silver and others v/ United Kingdom, 25 March 1983, § 90.**

This judgment also holds that, whenever a public freedom is at stake, the administrative authorities must lose all discretionary power and be subject to close scrutiny. The Court holds that the principle of the rule of law *"implies that an interference by the authorities with an individual's rights should be subject to effective control"*, especially where, as in the instant case, the law granted the executive considerable discretionary powers to monitor prison inmates' correspondence.

- **ECHR, Brogan and others v/ United Kingdom, 29 November 1988, § 58.**

The same applies to this case, in which the Court holds that the rule of law requires prompt intervention by a judge whenever the executive infringes a right as fundamental as that of freedom. Thus, *"judicial control of interferences by the executive […] is an essential feature of the guarantee embodied in Article 5§3, which is intended to minimise the risk of arbitrariness. Judicial control is implied by the rule of law, 'one of the fundamental principles of a democratic society […], which is expressly referred to in the Preamble to the Convention' […] and from which the whole Convention draws its inspiration."* In order to ensure the effectiveness of this principle of control of the executive and the right to an effective concrete remedy, the Court has developed the following principles, which, moreover, are closely interrelated.

- Principle of the possibility of a remedy before a court

A large number of cases (more than half the judgments referring to the principle of *prééminence du droit*) deal with the right to a judge.

- **ECHR, Fayed v/ United Kingdom, 21 September 1994:**

The Court recalls that the right of access to the courts derives from the rule-of-law (*prééminence du droit*) requirement.

- **ECHR, Bellet v/ France, 4 December 1995:**

Similarly, this judgment states that the principle of the rule of law (*pré-éminence du droit*) makes it necessary to ensure to a sufficient degree the right of access to a court.

- **ECHR, Kurt v/ Turkey, 25 May 1998, § 123.**

The Court held that *"the requirements of Article 5 §§ 3 and 4 with their emphasis on promptitude and judicial control assume particular importance in this context. Prompt judicial intervention may lead to the detection and prevention of life-threatening measures or serious ill-treatment which violate the fundamental guarantees contained in Articles 2 and 3 of the Convention. What is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection."*

- **ECHR, Golder v/ United Kingdom, 21 February 1975, § 34.**

It was in this fundamental judgment that the judges emphasised for the first time that *"one can scarcely conceive of the rule of law without there being a possibility of having access to the courts"*. On the basis of this case, they also developed a broad interpretation of Article 6§1, which establishes **the right to a fair trial**, a principle that is crucial to the rule of law *(prééminence du droit*).

- Principle of the right to a fair trial

- **ECHR, Golder v/ United Kingdom, 21 February 1975, §35.**

In the instant case, the judges adopt, on the basis of the principle of the rule of law (*prééminence du droit*), a broad interpretation of Article 6§1. A British prisoner (Mr Golder) sentenced to fifteen years' imprisonment had been identified by a prison officer as one of the ringleaders of a prison revolt. Having been cleared by another prison officer two days later, Mr Golder wished to sue the first prison officer for libel, and asked to consult a lawyer. This was refused. He then lodged an application with the European Commission of Human Rights on the grounds that the refusal to allow him to consult a lawyer had prevented him from instituting a hearing, and thus violated Article 6§1 of the ECHR, which guaranteed a right of access to the courts in civil matters. According to the Court, there was no doubt that *"were Article 6 para. 1 (art. 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 on the Government. Such assumptions, indissociable from a danger of arbitrary power, would have serious consequences […]."* On the basis of the principle of the rule of law (*prééminence du droit*), the Court held that Article 6§1 should be given a broader interpretation, so that the Convention could not be interpreted in such a way as to enable a State to determine at will the extent to which it was bound by the obligations stipulated.

The principle of the right to a fair trial occupies a key position within the case-law of the Strasbourg judges. For example, in the case

- **ECHR, Salabiaku v/ France, 7 October 1988, § 28.**

The Court holds that the principle of the rule of law **is enshrined in Article 6**, the purpose of which is to protect *"the right to a fair trial and in particular the right to be presumed innocent"*. It has constantly reiterated this point, for instance in the judgment

- **ECHR, Worm v/ Austria, 29 October 1997, § 94.**

"the central position occupied (…) by Article 6, which reflects the fundamental principle of the rule of law".

- Protection and supervision of the judiciary

The principle of the rule of law (*prééminence du droit)* does not mean that judges constitute the only protection against arbitrariness. Judges themselves can make bad decisions:

- **ECHR, Huvig v/ France, 24 April 1990, § 29 and 35.**

The principle of the rule of law (*prééminence du droit*) consequently requires the judicial role to be supervised and judges' legal discretion to be confined within certain limits. This necessitates a *"minimum degree of protection […] it would be contrary to the rule of law for the legal discretion granted to the executive – or to a judge – to be expressed in terms of unfettered power."*

The judicial office must also be protected from any interference by the public authorities:

- **ECHR, Stran Greek Refineries and Stratis Andradis v/ Greece, 9 December 1994, §**

The Court held that *"the principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute"*. See also the case **ECHR, 22 March 1995, Prager and Oberschlick v/ Austria**.

Lastly, in order to ensure respect for the principle of the rule of law, court decisions must be made public, and applied.

- **ECHR, Hadjianastassiou v/ Greece, 16 December 1992, § 33.**

The courts must indicate with sufficient clarity *"the grounds on which they based their decision".*

- **ECHR, Hornsby v/ Greece, 25 February 1997, § 40.**

Just as the guarantees under Article 6 protect access to the courts, the Court holds, on the basis of the principle of the rule of law (*prééminence du droit*), that Article 6 also covers the enforcement of judgments. The right to a fair trial would be illusory *"if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 para. 1 should describe in detail procedural guarantees afforded to litigants - proceedings that are fair, public and expeditious - without protecting the implementation of judicial decisions; to construe Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention."* In the same connection, see **ECHR, Antonakopoulos, Vortsela and Antonakopoulou v/ Greece, 14 December 1999**.

- Consolidation over time of the European public order in the field of human rights

- **ECHR, K.-H.W. v/ Germany, 22 March 2001, § 37 and 38:**

This case raised the following issue: can the principles of the rule of law (*Etat de droit*) be relied upon in order to clear oneself of a crime against a State governed by the rule of law? In the instant case, a former ex-GDR border guard was convicted by the courts of the reunified Germany of killing a fugitive attempting to cross the border between the GDR and the FRG in accordance with the military orders in force at the time of the events. The applicant maintained that such a conviction was not foreseeable in the legal and political context of the time. The question here was the extent to which the applicant, as a mere soldier, knew or ought to have known that firing at people who simply wanted to cross the border was an offence under the law of the GDR. Having clearly demonstrated that the law in force at the time definitively and unequivocally prohibited life-endangering acts of any kind, the Court held that it *"is legitimate for a State governed by the rule of law to bring criminal proceedings against persons who have committed crimes under a former regime; similarly, the courts of such a State, having taken the place of those which existed previously, cannot be criticised for applying and interpreting the legal provisions in force at the material time in the light of the principles governing a State subject to the rule of law."* The judges therefore appear to rely on the fundamental principles of the Convention in all circumstances and at all times, including those of democracy and the rule of law. The term *Etat de droit* is used here. It appears, however, that, in this highly symbolic case, the Court chose this wording in order to echo the decision of the German Constitutional Court, which had based its decision on the *Rechsstaat*, rather than to equate the terms *"Etat de droit"* and *"prééminence du droit"*.

II. CJEC CASE-LAW

***Communauté de droit* (Community based on the rule of law)**

- **Judgment of 23 April 1986, case 294/83, *Parti écologiste Les Verts v/ Parliament*, § 23, Rec., p.1365.**

In this case, the Court of Justice extended its jurisdiction to acts of the European Parliament, notwithstanding the fact that, at the time, Article 173 of the Treaty of Rome referred only to acts of the Council and the Commission as being subject to applications for judicial review. The Court held that excluding acts of the Parliament would lead to an outcome contrary to the spirit and system of the treaty, which it summarised by introducing the concept of a *Community based on the rule of law* (*Communauté de droit*) for the first time: "*it must first be emphasized in this regard that the European Economic Community is a* ***community based on the rule of law****, in as much as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter*" (*"Il y a lieu de souligner d'abord […] que la Communauté économique européenne est une* ***communauté de droit*** *en ce que ni ses Etats membres ni ses institutions n'échappent au contrôle de la conformité de leurs actes à la charte constitutionnelle de base qu'est le traité"*.)

- **Opinion of 14 December 1991, No 1/91, *European Economic Area*, § 21, Rec., p.1663.**

This opinion concerned the draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, establishing the European Economic Area. The Court took the opportunity to emphasise the difference between the "conventional" international treaty on which the European Economic Area was to be based (an international treaty that simply created rights and obligations among the Contracting Parties and did not provide for any transfer of sovereign rights to the intergovernmental bodies it set up), and the EEC treaty, which was intended to achieve economic integration leading to the establishment of an internal market and economic and monetary union. The Court highlighted the distinctive nature of the Community and of Community law, in terms of the objective pursued by the organisation, and expressed this specific emphasis by saying that *"the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a **Community based on the rule of law**"* (*"le traité CEE, bien que conclu sous la forme d'un accord international, n'en constitue pas moins la charte constitutionnelle d'une **communauté de droit**"*).

- **Judgment of 23 March 1993, *Weber/Parliament*, C-314/91, Rec. p. I-1093, § 8.**

This judgment simply formulated wording that would subsequently be used invariably by the Court, indicating a purely formal conception of the *Community based on the rule of law*: *"the European Economic Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty, which established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions".*

- **Judgment of 25 July 2002, *Union de los pequeños agricultores* (UPA), case/ C-50/00, § 38.**

Prior to this case, the Court of Justice had never directly invoked the principle of the *Community based on the rule of law* (*Communauté de droit*) in order to justify the protection of fundamental rights or respect for the democratic principle. The principle of the *Community based on the rule of law* (*Communauté de droit*) was confined to the establishment of the principles of the hierarchy of legal rules and of judicial review making it possible to ensure compliance with them, that is, to a formal concept of the *Community based on the rule of law* (*Communauté de droit*). With this case-law, the Community judge now held that *"the European Community is, however, **a community based on the rule of law** in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights"* (*"la Communauté européenne est une **communauté de droit** dans laquelle ses institutions sont soumises au contrôle de la conformité de leurs actes avec le traité et les principes généraux du droit dont font partie les droits fondamentaux"*). The Community judge thus adopted a substantive conception of the *Community based on the rule of law* (*Communauté de droit*), which satisfies the contemporary requirements of the theory of the *rule of law* (*Etat de droit*) according to which fundamental rights are the basis of the *rule of law* (*Etat de droit*).

The term *Community based on the rule of law* (*Communauté de droit*) is also mentioned in the following cases:

- Order of 13 July 1990, *Zwartveld*, case C-2/88, Rec. I-3365.
- Judgment of 23 March 1993, *Beate Weber*, case C-314/91, Rec. I-1093.
- Judgment of 30 June 1993, *European Parliament v/ Council and Commission*, cases C-181/81 and C-248/91, Rec. I-3685.
- Judgment of the ICC of 2 October 2001, *Jean-Claude Martinez, Charles de Gaulle, Front National and Emma Bonino and others v/ European Parliament*, joined cases T-222/99, T-329/99.
- Judgment of the ICC of 3 May 2002, *Jégo-Quéré et Cie S.A* / *Commission*, case T-177/01, Rec. II-2365.
- Order of the ICC of 15 February 2005, PKK and KUK / Council, case T-229/02.
- Judgment of 15 March 2005, Spain / Eurojust, case C-160/03.
- Judgment of the ICC of 14 April 2005, Sniace / Commission, case T-141/03.

III. TEXTS OF THE PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE

- Order 572 (2001): Human rights and *rule of law* in Kosovo / Droits de l'homme et *Etat de droit* au Kosovo

- Recommendation 1509 (2001): Human rights and *rule of law* in Kosovo / Droits de l'homme et *Etat de droit* au Kosovo

- Recommendation 1604 (2003): Role of the public prosecutor in a democratic society governed by the rule of law / Rôle du ministère public dans une société démocratique régie par le principe de la *primauté du droit*

- Motion for a resolution, **Doc.10180**, The principle of *the rule of law* / L'expression "principle of *the rule of law*"

Reporting committee: Committee on Legal Affairs and Human Rights

Reference to committee: Doc 10180, Reference No 2998 of 7 September 2004

Draft resolution adopted unanimously by the Committee on 8 June 2007

Members of the Committee: Mr Dick **Marty** (Chairperson), Mr Erik **Jurgens**, Mr György Frunda, Mrs Herta Däubler-Gmelin (Vice-Chairpersons), Mr Athanasios **Alevras**, Mr Miguel Arias, Mr Birgir Ármannsson, Mrs Aneliya Atanasova, Mr Abdülkadir Ateş, Mr Jaume **Bartumeu Cassany**, Mrs Meritxell Batet, Mrs Soledad Becerril, Mrs Marie-Louise **Bemelmans-Videc**, Mr Erol Aslan Cebeci, Mrs Pia Christmas-Møller, Mrs Ingrīda Circene (alternate: Mr Boriss **Cilevičs**), Mrs Lydie Err, Mr Valeriy **Fedorov**, Mr Aniello Formisano, Mr Jean-Charles **Gardetto**, Mr József Gedei, Mr Stef Goris, Mr Valery Grebennikov, Mr Holger **Haibach**, Mrs Gultakin Hajiyeva, Mrs Karin Hakl, Mr Nick Harvey, Mr Andres **Herkel**, Mr Serhiy **Holovaty**, Mr Michel Hunault, Mr Rafael Huseynov, Mrs Fatme Ilyaz, Mr Kastriot Islami, Mr Željko **Ivanji**, Mrs Kateřina Jacques, Mr Karol Karski, Mr Hans Kaufmann (alternate: Mr Andreas **Gross**), Mr András Kelemen, Mrs Kateřina Konečná, Mr Nikolay Kovalev (alternate: Mr Yuri **Sharandin**), Mr Jean-Pierre Kucheida, Mr Eduard Kukan, Mrs Darja Lavtižar-Bebler, Mr Andrzej Lepper, Mrs Sabine **Leutheusser-Schnarrenberger**, Mr Tony Lloyd, Mr Humfrey Malins, Mr Pietro **Marcenaro**, Mr Alberto Martins, Mr Andrew McIntosh, Mr Murat Mercan, Mrs Ilinka Mitreva, Mr Philippe Monfils, Mr João Bosco **Mota Amaral**, Mr Philippe Nachbar, Mrs Nino Nakashidzé, Mr Tomislav Nikolić, Mrs Carina Ohlsson, Ms Ann Ormonde (alternate: Mr Patrick **Breen**), Mr Claudio Podeschi, Mr Ivan **Popescu**, Mrs Maria Postoico, Mrs Marietta de Pourbaix-Lundin, Mr Christos **Pourgourides**, Mr Jeffrey Pullicino Orlando, Mr Valeriy Pysarenko, Mr François Rochebloine, Mr Francesco Saverio Romano, Mr Armen Rustamyan, Mr Kimmo **Sasi**, Mr Christoph **Strässer**, Mr Mihai Tudose, Mr Vasile Ioan Dănuț **Ungureanu**, Mr Øyvind **Vaksdal**, Mr Egidijus **Vareikis**, Mr Miltiadis Varvitsiotis (alternate: Mrs Elsa **Papadimitriou**), Mrs Renate Wohlwend, Mr Marco Zacchera, Mr Krysztof **Zaremba**, Mr Vladimir Zhirinovsky, Mr Miomir Žužul

N.B.: The names of the members who took part in the meeting are printed in **bold**

Secretariat of the Committee: Mr Drzemczewski, Mr Schirmer, Mrs Maffucci-Hugel, Ms Heurtin, Ms Schuetze-Reymann