

# The Quality of Law

How the European Court of Human Rights gradually became a European Constitutional Court for privacy cases

by **Bart van der Sloot\***

**Abstract:** Until very recently, the European Court of Human Rights was willing to assess whether Member States' executive branch had operated on a legal basis, whether national courts had struck a fair balance when adjudicating cases, and whether Member States had a positive obligation to ensure adequate protection of citizens' human rights. One thing it did not assess however, was whether Member States' legislative branch had respected the principles of the rule of law and the minimum requirements of

good law-making. That is, until recently. Propelled by cases revolving around mass surveillance activities, in just a small number of years, the Court has undergone a revolutionary transformation and now formally assesses the quality of Member States' laws and even advises Member States' legislative branch on how to amend its legal system in order to be Convention-compliant. Doing so, it has gradually turned into a European Constitutional Court, in particular for privacy cases.

Keywords: ECtHR; Article 8 ECHR; Rule of Law; Quality of Law; Minimum Requirements of Law

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## A. Introduction

1 Although initially, both states and individuals (natural persons, groups and legal persons) could submit a complaint under the European Convention on Human Rights (ECHR), the latter category could do so only with the former European Commission on Human Rights (ECmHR). The Commission could declare a case admissible or inadmissible but could not judge on the substance of the matter, a task which was left to the European Court of Human Rights (ECtHR). Even if a case brought by an individual was declared admissible, it could only be put before the Court by the Commission or by one of the Member States, not by the individual herself. This ensured that not every case in which an individual's private interest had been harmed would be assessed by the Court, but only those cases that the Member States

or the Commission felt had a broader significance, transcending the mere particularities of the claimant's case, therewith also addressing the fear of 'shoals of applications being made by individuals who imagine that they have a complaint of one kind or another against the country.'<sup>1</sup> However, over time, the Convention has been altered so that individuals can also bring cases directly before the Court when they have been declared admissible.<sup>2</sup> In addition,

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1 A. H. Robertson, *Collected edition of the "Travaux préparatoires" of the European Convention on Human Rights / Council of Europe* (vol II, Martinus Nijhoff, 1975-1985) 188.

2 Protocol No. 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 6.XI.1990.

inter-state complaints play no role of significance<sup>3</sup> and although the Convention formally allows groups and legal persons to issue a complaint, in practice, groups are denied that right by the Court<sup>4</sup> and it is very hesitant to allow legal persons to rely on certain human rights, such as the right to privacy.

- 2 Importantly, the Court has made clear that in principle, natural persons can do so only when their claim concerns the protection of their own, private interests. So-called *in abstracto* claims, which revolve around the legitimacy of a law or policy as such, are as a rule inadmissible; *a priori* claims are rejected as well, because the Court will only receive complaints about injury which has already materialized; and the ECtHR will also not receive an *actio popularis*, a case brought by a claimant, not to protect its own interests, but those of others or of society as a whole. As an effect, by far most cases before the Court concern the executive and the judicial branch of Member States and how they have acted in concrete cases. Although the Court has also been willing to find that a state is under a positive obligation to provide protection to the human rights of a claimant, it is important to note that even in these types of cases, the ECtHR will not hold that the Member State should change its laws, but only that in the specific case of the applicant, the state should have done more to provide adequate protection of her human rights or should have made an exception to the prevailing laws and policies in her specific case.
- 3 Even where, for example, a Member State's law allowed prison authorities to structurally monitor the correspondence of prisoners, the Court would not hold that the law or policy should be altered or revoked, but merely stress that in the specific case of the applicant, her human rights were violated by the unlawful actions of the executive branch.<sup>5</sup>

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Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby. Strasbourg, 11.V.1994.

- 3 Which is significant because inter-state complaints typically regard general matters such as whether Hungary is undermining the rule of law, whether Turkey was justified in invoking the state of emergency or whether Russia systematically discriminates against LGBTQ people.
- 4 Only individuals who claim to have been harmed by the same fact can bundle their complaints.
- 5 See e.g.: ECtHR, *Drozdowski v. Poland*, application no. 20841/02, 06 December 2005.

- 4 For more than 50 years, this has been the standard interpretation of the Convention. This makes it all the more remarkable that a fundamental revolution has materialised in just a small number of years. This article will discuss how that revolution has unfolded. First, it will discuss the choices made by the authors of the Convention on this point and the discussions over the role and position of the ECtHR when drafting the ECHR (section B). Subsequently, this article will show how a rather old doctrine, namely that laws should be accessible and foreseeable, was gradually turned into a tool that allows the ECtHR to assess the quality of laws and policies of Member States, especially in privacy-related matters (section C). This article will explain that this doctrine was developed in cases in which applicants could substantiate having been harmed individually and directly, not by the existence of a law or policy as such, but by its application in their specific case. Late 2015, however, the ECtHR made a next step by accepting an *in abstracto* complaint, and it has done so two more instances since.

These cases concern mass surveillance activities by national states. Because in these cases, the ECtHR cannot assess whether in the concrete matter of the case, the executive or judicial branch has struck a fair balance between different competing interests, it accepts that the only relevant test it can deploy is to evaluate the quality of laws and policies as such. Although it is still very hesitant in doing so, it is willing to assess in detail whether national laws abide by a long list of minimum requirements of law (section D). This radical shift is supported by a number of developments, such as that the Rules of the Court have been altered so as to allow the Court, when it has established a violation of the Convention, not only to grant compensation to the victims directly affected, but also to order the legislative branch of a Member State to alter its laws (section E). Finally, the analysis will reflect on the significance of this revolution and what it may mean in time for both the position of the ECtHR and the protection of human rights (section F).

## B. Drafting the Convention, or how the authors of the ECHR eventually favoured democracy over the rule of law

- 5 To understand the significance of the willingness of the European Court of Human Rights to scrutinise the legislative branch of the Member States of the Council of Europe, it is important to go back to the time when the European Convention on Human Rights was drafted. It was in the wake of the Second World War, in which regimes that had disregarded

human rights on a large scale had just been defeated and in which both communist and fascist totalitarian regimes still existed. The rule of law virtually did not exist under those administrations; laws were applied retroactively and arbitrarily and there was no real separation of power. Relying on the state of emergency, many regimes either passed aside the legislative power or turned it into a puppet of the executive branch. Laws and policies were designed not to serve the general interest but those of selected groups, and constitutions were revised to legitimise these administrations rather than to provide legal certainty to minorities. This sparked the creation of a number of human rights documents, such as the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and the European Convention on Human Rights.

- 6 The original draft of the ECHR laid down a list of rights in the first article, enumerating the various freedoms per indent, and a general limitation clause in article 6, specifying that ‘no limitations shall be imposed except those established by the law, with the sole object of ensuring the recognition and respect for the rights and freedoms of others, or with the purpose of satisfying the just requirements of public morality, order and security in a democratic society.’<sup>6</sup> Later, an alternative proposal emerged, which was closer to the final text of the ECHR, which contained one right per article and laid down a limitation clause specific to each freedom. Especially with the so-called qualified rights (Arts 8-11 ECHR), the elements for legitimately imposing restrictions have remained essentially the same as in the original proposal: an interference should have a legal basis, serve a public interest, and be necessary in a democratic society. These conditions provide important safeguards in various ways. They not only require the executive power to act on a legal basis when interfering with a human right (adhering to the limits set by the legislative power), they also speak of a democratic society, in which laws are made directly or indirectly by its citizens; in addition, they make clear that the interference of a human right can never be considered legitimate when it serves to protect the interests of a particular group in society, instead of the general interest.
- 7 But when the representatives of the various countries that would later join the Convention drafted the text, it became clear that there was considerable discussion over the question of to what extent the ECtHR should scrutinise the legislative branch of Member States. One group stressed that the ultimate power in constitutional democracies was with the legislative branch, while the other group underlined that even the democratic legislator was bound by constitutional principles and the rule of law.

6 Travaux Préparatoires, Vol I, p. 230.

Although neither group was glaringly victorious, it is clear that the idea that the democratic legislator should not be scrutinised by the European Court of Human Rights eventually took the upper hand.

- 8 For example, Article 7 of the original proposal of the ECHR laid down: ‘The object of this collective guarantee shall be to ensure that the laws of each state in which are embodied the guaranteed rights and freedoms as well as the application of these laws are in accordance with “the general principles of law as recognised by civilised nations” and referred to in Article 38c of the Statute of the International Court of Justice.’<sup>7</sup> This provision essentially rejects the positivist view that there are no legal principles outside those that have been formally agreed upon and accepts that there are unwritten legal principles which laws set out by the democratic legislator must adhere to. Even if a regime would adopt laws that adhered to all formal legal principles, it could still conflict with unwritten principles of natural law, that are prior to and take precedence over man-made laws.<sup>8</sup> But the article was rejected<sup>9</sup> from the final text of the Convention; instead, Article 7 ECHR only contains one ‘general principle of law’, namely the prohibition of retroactive legislation. In addition, a reference to the rule of law was moved to the non-operative part of the Convention, the preamble, holding: ‘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, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration’.
- 9 To provide another example, a proposal was made to annex a special Convention to the ECHR, to lay down principles of the rule of law. ‘In my opinion, what we must fear to-day is not the seizure of power by totalitarianism by means of violence, but rather that totalitarianism will attempt to put itself in power by pseudo-legitimate means. [] For example, the Italian constitution was never repealed, all constitutional principles remained in theory, but the special laws approved by the Chambers, elected in one misdirected campaign, robbed the constitution little by little of all its substance, especially of its substance of freedom. The battle against totalitarianism should rather be modified and should become a battle

7 *ibid*, p. 230. Statute of the International Court of Justice <<https://www.icj-cij.org/en/statute>>.

8 R. Lesaffer, “Argument from Roman law in current international law” (2005), 16(1), *European Journal of International Law*, 25-58. See also: Travaux Préparatoires Vol IV, p. 56.

9 Travaux Préparatoires Vol IV, p. 30. It was proposed and rejected again, Vol VI, p. 12 and p. 56.

against abuse of legislative power, rather than abuse of executive power.<sup>10</sup> It was suggested that the ECtHR should have the power to hold any law contrary to the ECHR unconstitutional *ipso jure*.<sup>11</sup> That proposal, however, was also rejected as well.

- 10 To provide a final example, a discussion emerged over Article 50 of the original Convention, which held that in case of a violation of the Convention, the Court could, if necessary, afford just satisfaction to the injured party.<sup>12</sup> The focus on relief for applicants was felt to be too limited to some authors of the Convention: 'It seems to suggest that the only form of reparation will be compensation. It seems to suggest that the European Court will be able to grant indemnities to victims, damages and interest, or reparation of this kind. It does not say that the European Court will be able to pronounce the nullity or invalidity of the rule, or the law, or the decree which constitutes a violation of the Convention. That, Ladies and Gentlemen, is something very grave. True, reparation in kind may be advisable where the victim is a specified individual. In case of an action *ultra vires* of this sort on the part of the local police, a mayor, a prefect, or even a minister, satisfaction may be given in the form of reparation in cash or the awarding of an indemnity. But can the graver form of violation which consists in removing a fundamental law guaranteeing a specific freedom for the whole nation, from the laws of a country in virtue of some law or decree, can such a violation be redressed by awarding a symbolic farthing damages to the citizens of the country? If, tomorrow, France were to sink into a dictatorship, and if her dictator were to suppress the freedom of the Press, would the European Court award a franc damages to all Frenchmen so as to compensate for the injury which the suppression of this fundamental freedom had caused them? Such a proceeding would not make sense. If we really want an European Court to succeed in guaranteeing the rights which we have placed under its protection, we must grant jurisdiction to declare void, if need be, the laws and decrees which violate the Convention.'<sup>13</sup>
- 11 Not only was this proposal rejected, it is this example that illustrates perfectly the sharp contrast between how one group had hoped the Convention-system would work and how it turned out in practice. While the hope of the 'constitutionalists' was that the Court would focus especially on questions over whether laws and the legal regime as such were in

conformity with the rule of law and whether they served the general interest, the Convention turned out to be a system providing relief to individuals who are harmed specifically by an action or inaction of the executive or judicial branch, such as when the police unlawfully enters a person's home. In one of its first decisions, the former European Commission on Human Rights delivered a final blow to the hope of this group by making clear that under the Convention-system, laws and policies will not be evaluated as such; only their application and effect in the concrete case of the claimant would.<sup>14</sup>

### C. The ECtHR's early case law, or how the notion of the Quality of Law emerged

- 12 For a long time, the requirement that an interference with a human right should have a legal basis was applied to the executive power only and focussed on the question of whether the executive power stayed within the limits set out by the law. This requires of the Court not so much a substantive analysis of the case, but a procedural one. When a violation is found on this point, this will usually result in a short judgment, a typical example being: 'The Court notes that the envelope in which the applicant's first letter of 21 May 2003 was sent to the Court from the Chelm Prison bears two stamps that read: "censored" and "the Chelm District Court". [] The Court observes that, according to Article 214 of the Code of Execution of Criminal Sentences, persons detained on remand should enjoy the same rights as those convicted by a final judgment. Accordingly, the prohibition of censorship of correspondence with the European Court of Human Rights contained in Article 103 of the same Code, which expressly relates to convicted persons, was also applicable to detained persons. Thus, censorship of the applicant's two letters to the Court was contrary to the domestic law. It follows that the interference in the present case was not "in accordance with the law".'<sup>15</sup>
- 13 But around the 1980s, a new doctrine started to emerge, namely that laws should be accessible and foreseeable. One of the first cases in which the Court evaluated these elements was in the well-known case of *Sunday Times* (1979), in which the applicants argued, *inter alia*, that the law of

10 Travaux Préparatoires, Vol II, p. 136-138.

11 Travaux Préparatoires Vol II, p. 140.

12 Article 50 original ECHR.

13 Travaux Préparatoires, Vol V, p. 300-302.

14 ECmHR, *Habitants D'Alsemberg, de Beersel, de Kraainem, d'Anvers et Environs, de Grand et Environs v. Belgiums*, application nos. 1474/62, 1677/62, 1691/62 and 1769/63, 05 March 1964.

15 ECtHR, *Lewak v. Poland*, application no. 21890/03, 06 September 2007.

contempt of court was so vague and uncertain and the principles enunciated in a decision at national level so novel that the restraint imposed on them could not be regarded as “prescribed by law”. The Court stressed that the word “law” in the expression “prescribed by law” covered not only statute but also unwritten law, including established doctrines in common law. It recognised the slightly different formulations used throughout the Convention, such as “in accordance with the law” (Art. 8 ECHR) and “provided for by law” (Arts. 9-11 ECHR), and stressed that two requirements followed from the latter formulation (but not from the formulation used in Art. 8 ECHR). ‘Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances.’<sup>16</sup>

- 14 Although the Court did not find a violation on this point in *Sunday Times*, it did set out the contours of what would become a new doctrine. In its judgement, the ECtHR shifts the attention from the question of whether the executive power has abided by the boundaries set out by the legislative power, to the question of whether laws and legal doctrines as such are sufficiently clear to citizens. Citizens should be able to foresee to a reasonable extent what repercussions certain actions or inactions will have. If citizens don’t know which actions are forbidden or not, they won’t be able to follow the rules. In this sense, it is a matter of legal effectiveness that citizens who generally want to follow the prevailing legal standards are able to do so.<sup>17</sup> Although in *Sunday Times*, the Court had made explicit that the principles of accessibility and foreseeability derived from the term ‘prescribed by law’, used in Articles 9, 10 and 11 ECHR, and not from ‘in accordance with the law’, used in Article 8 ECHR, just a number of years later, in the case of *Silver and others* (1983), this distinction was absolved.<sup>18</sup>

16 ECtHR, *Sunday Times v. the United Kingdom*, application no. 6538/74, 26 April 1979, § 49.

17 See also: ECmHR, *X. Ltd. and Y. v. the United Kingdom*, application no. 8710/79, 07 May 1982.

18 ECtHR, *Silver and others v. the United Kingdom*, application nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75

- 15 Although the European Court of Human Rights was initially hesitant to apply the principles of accessibility and foreseeability to matters concerning the right to privacy, it was with cases on Article 8 ECHR that this doctrine gained significance, precisely because these principles are difficult to uphold in cases revolving around secret surveillance and special police investigations (secrecy and unforeseeability being essential to secret surveillance measures). Because the guarantees of accessibility and foreseeability are applied flexibly in those types of cases, the Court has stressed that the law must provide for other guarantees. In *Malone* (1984), the Court stressed that the notion of foreseeability, cannot be exactly the same in the special context of interception of communications for the purposes of police investigations, but it also stressed ‘that the phrase “in accordance with the law” does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention. The phrase thus implies - and this follows from the object and purpose of Article 8 - that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by paragraph 1. Especially where a power of the executive is exercised in secret, the risks of arbitrariness are evident. Undoubtedly, [] the requirements of the Convention, notably in regard to foreseeability, cannot be exactly the same in the special context of interception of communications for the purposes of police investigations as they are where the object of the relevant law is to place restrictions on the conduct of individuals. In particular, the requirement of foreseeability cannot mean that an individual should be enabled to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly. Nevertheless, the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence.’<sup>19</sup>

- 16 In addition, the Court emphasised that when the legislative branch transferred powers to the executive branch, especially in contexts where individuals are left in the dark when the executive has utilised its discretion to use its powers, there is an extra onus on the legislator to set tight conditions and restrictions on the use of power. The Court reiterated that in *Silver and Others*, it held that a law

and 7136/75, 25 March 1983, § 85.

19 ECtHR, *Malone v. the United Kingdom*, application no. 8691/79, 02 August 1984, § 67.

which confers a discretion must indicate the scope of that discretion, although the detailed procedures and conditions to be observed do not necessarily have to be incorporated in rules of substantive law. The degree of precision required of the law, the ECtHR went on to stress in *Malone*, however, 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 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.'<sup>20</sup> In *Leander* (1987), this line of interpretation was confirmed when the Court stressed that, while laws can normally be more open, because policies and actions by governmental organisations are generally disclosed to the public, 'where the implementation of the law consists of secret measures, not open to scrutiny by the individuals concerned or by the public at large, the law itself, as opposed to the accompanying administrative practice, must indicate the scope of any discretion conferred on the competent authority with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.'<sup>21</sup>

17 The case of *Malone* had a significant impact on the principles of accessibility and foreseeability. Although the Court still points to the importance of legal certainty for citizens, its main concern is not so much with abuse of power by the executive branch (using powers beyond the boundaries set by the legislator) but with the arbitrary use of power (where the executive stays within those boundaries, but the problem is that the boundaries are very broad or non-existent). In addition, an important alteration is that the principle of foreseeability is interpreted not so much as requiring that citizens should be able to know which actions are or are not prohibited (as secret surveillance by police units or intelligence agencies are generally introduced to uncover terrorist cells, organised crimes, etc., about which there is generally no doubt whether they are prohibited or not) but with the foreseeability of how the executive branch would use its powers, when and to whom. Consequently, while the original formulation of the notions of accessibility

and foreseeability concerned the relationship between the legislative branch and citizens, this interpretation of the principles focusses primarily on the relationship between the legislative branch and the executive branch, as the legislative power must set clear boundaries for the use of power the executive must respect.<sup>22</sup>

18 Gradually, the Court expanded this doctrine and laid down specific requirements for Member States' legal regime, to minimise the risk of arbitrary use of power. In *Olsson* (1988), the Court decided that these minimum principles of law are not restricted to cases revolving around surveillance activities, but should be upheld more generally by Member States, such as when laws grant governmental organisations the power to take a child into public care. The ECtHR stressed in *Olsson* that the Swedish law was rather general and conferred a wide measure of discretion; in particular, it allowed for intervention by the authorities where a child's health or development was jeopardised or in danger, without requiring proof of actual harm. The Court did not find a violation of Article 8 ECHR on this point because the Member State had embedded sufficient checks and balances in its legal system: 'safeguards against arbitrary interference are provided by the fact that the exercise of nearly all the statutory powers is either entrusted to or is subject to review by the administrative courts at several levels.'<sup>23</sup> In the two parallel judgements of *Kruslin* and *Huvig* (1990), the Court focussed almost entirely on the existence of adequate safeguards against the abuse of power. It stressed that only some of the safeguards were expressly provided for in law and concluded that the system did not afford adequate safeguards, citing a number of reasons such as, but not limited to:

- Unclarity with respect to the categories of people liable to have their telephones tapped;
- Unclarity with respect to the nature of the offences which may give rise to such an order;
- Absence of a limit on the duration of telephone tapping;
- No procedure for drawing up the summary reports containing intercepted conversations;

<sup>20</sup> *ibid*, § 68.

<sup>21</sup> ECtHR, *Leander v. Sweden*, application no. 9248/81, 26 March 1987.

<sup>22</sup> ECmHR, *Mersch and others v. Luxemburg*, application nos. 0439/83, 10440/83, 10441/83, 10452/83, 10512/83 and 10513/83, 10 May 1985.

<sup>23</sup> ECtHR, *Olsson v. Sweden*, application no. 10465/83, 24 March 1988, § 62.

- Unclearly on the point of the precautions to be taken in order to communicate the recordings for possible inspection by the judge and the defence;
- Unclearly about the circumstances in which recordings may or must be erased.<sup>24</sup>

19 Increasingly, the Court emphasised requirements such as oversight by an independent judge and whether the law indicates with sufficient clarity the scope and conditions of exercise of the authorities' discretionary power.<sup>25</sup> In *Weber and Saravia* (2006), the Court dedicated a separate part of its judgement to assessing the quality of law and recapitulated the minimum requirements<sup>26</sup> and an important step was made by the Court in *Liberty and others* (2008), where it underlined that although these requirements were first developed by the Court in connection to measures of surveillance targeted at specific individuals, the same rules should govern more general programmes of surveillance.<sup>27</sup>

24 ECtHR, *Kruslin v. France*, application no. 11801/85, 24 April 1990. ECtHR, *Huvig v. France*, application no. 11105/84, 24 April 1990.

25 ECtHR, *Kopp v. Switzerland*, application no. 23224/94, 25 March 1998. ECtHR, *Amann v. Switzerland*, application no. 27798/95, 16 February 2000. See also: ECtHR, *Valenzuela Contreras v. Spain*, application no. 27671/95, 30 July 1998. ECtHR, *Rotaru v. Romania*, application no. 28341/95, 04 May 2000. ECtHR, *Hasan and Chaush v. Bulgaria*, application no. 30985/96, 26 October 2000. ECtHR, *Gozelik and others v. Poland*, application no. 44158/98, 17 February 2004. ECtHR, *Bordovskiy v. Russia*, application no. 49491/99, 08 February 2005.

26 ECtHR, *Weber and Saravia v. Germany*, application no. 54934/00, 29 June 2006, §94-95. See also: ECtHR, *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, application no. 62540/00, 28 June 2007.

27 ECtHR, *Liberty and others v. the United Kingdom*, application no. 58243/00, 01 July 2008. See also: ECtHR, *Iordachi and others v. Moldova*, application no. 25198/02, 10 February 2009. In 2010, the Court even applied the doctrine of quality of law to professional assistance with home births. ECtHR, *Ternovsky v. Hungary*, application no. 67545/09, 14 December 2010. But the Court also found limitations. For example, in the case of *Uzun*, the Court stressed that minimum requirements of law were developed by the Court in the context of applications concerning the interception of telecommunications. 'While the Court is not barred from gaining inspiration from these principles, it finds that these rather strict standards, set up and applied in the specific context of surveillance of telecommunications, are not applicable as such to cases such as the present one, concerning surveillance via GPS of movements in public places and thus a measure which must be considered to interfere less with the private life of

## D. The ECtHR's recent case law, or how the Minimum Requirements of Law are deployed to scrutinise mass surveillance regimes in *in abstracto* claims

20 An important next step was taken by the European Court of Human Rights in December 2015, in *Zakharov v. Russia*. That case was revolutionary for two reasons. First, after more than 60 years of rejecting in abstracto claims, in which the applicant complains about the law or policy of a Member State as such, without claiming to be harmed herself, the Court made explicit that in cases revolving around secret surveillance, where people generally do not know whether they have been the target of data gathering activities, this principle could no longer be upheld. 'In such circumstances the threat of surveillance can be claimed in itself to restrict free communication through the postal and telecommunication services, thereby constituting for all users, or potential users, a direct interference with the right guaranteed by Article 8. There is therefore a greater need for scrutiny by the Court, and an exception to the rule denying individuals the right to challenge a law in abstracto is justified. In such cases the individual does not need to demonstrate the existence of any risk that secret surveillance measures were applied to him. By contrast, if the national system provides for effective remedies, a widespread suspicion of abuse is more difficult to justify. In such cases, the individual may claim to be a victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures only if he is able to show that, due to his personal situation, he is potentially at risk of being subjected to such measures.' Second, because the Court cannot evaluate whether there was an interference with the right to privacy of the claimant, whether that interference was prescribed by law, whether that interference was in the public interests, and whether a fair balance was struck between the competing

the person concerned than the interception of his or her telephone conversations. It will therefore apply the more general principles on adequate protection against arbitrary interference with Article 8 [.]' ECtHR, *Uzun v. Germany*, application no. 35623/05, 02 September 2010. See also: ECtHR, *Del Rio Prada v. Spain*, application no. 42750/09, 21 October 2013. ECtHR, *Perincek v. Switzerland*, application no. 27510/08, 17 December 2013. ECtHR, *Szabó and Vissy v. Hungary*, application no. 37138/14, 12 January 2016. ECtHR, *Valenzuela Contreras v. Spain*, application no. 7671/95, 30 July 1998. ECtHR, *Craxi v. Italy*, application no. 25337/94, 17 July 2003. ECtHR, *Shimovolos v. Russia*, application no. 30194/09, 21 June 2011. ECtHR, *Sefilyan v. Armenia*, application no. 22491/08, 02 October 2012. ECtHR, *R.E. v. the United Kingdom*, application no. 62498/11, 27 October 2015.

interests at stake, the Court's only task is to assess whether the law of the Member State abides by the minimum principles of law.

- 21 It took a similar approach in two more cases since: *Centrum För Rättvisa v. Sweden* (2018)<sup>28</sup> and *Big Brother Watch and others v. the United Kingdom* (2019).<sup>29</sup> While *Zakharov* revolved around secret surveillance of selected persons or groups, the two others revolved around bulk interception regimes. While the claimant in *Zakharov* was a natural person, the Swedish case was brought by a legal person and the applicants in the *Big Brother Watch* case were both legal and natural persons. In the three cases, the minimum requirements are linked not only to the requirement of 'in accordance with the law', but in particular to the Preamble to the Convention. "The "quality of law" in this sense implies that the domestic law must not only be accessible and foreseeable in its application, it must also ensure that secret surveillance measures are applied only when "necessary in a democratic society", in particular by providing for adequate and effective safeguards and guarantees against abuse."<sup>30</sup> What is interesting, is that the minimum requirements of law almost seem to function as an instrument of privacy by design. Privacy by design usually refers to choices and limitations embedded in the technical infrastructure of an organisation, ensuring, for example, that employees within an organisation are unable to undermine important data protection principles. For example, the system can be programmed so that personal data will be automatically deleted after 1 year. In a similar vein, the European Court of Human Rights requires Member States to embed in their laws clear standard and limitations ensuring that processing (personal) data is kept to what is strictly necessary.

- 22 Before discussing the minimum requirements of law in detail, it is important to point out two things.

First, in *Big Brother Watch*, the Court discussed the scope of the minimum requirements. On the one hand, it stressed that it did not need to make a formal decision on the question of whether these principles should also apply to laws covering the processing of metadata, because in the case of *Big Brother Watch*, the same legal regime applied to both the processing of content data and the processing of

communications data.<sup>31</sup> On the other hand, however, it confirmed that these standards will not only apply to data collected by European intelligence agencies themselves, but also to data received from foreign counterparts, because Member States 'could use intelligence sharing to circumvent stronger domestic surveillance procedures and/or any legal limits which their agencies might be subject to as regards domestic intelligence operations, a suitable safeguard would be to provide that the bulk material transferred could only be searched if all the material requirements of a national search were fulfilled and this was duly authorised in the same way as a search of bulk material obtained by the signals intelligence agency using its own techniques.'<sup>32</sup>

Second, it is evident that the Court has 'learned' from national constitutional courts in Europe,<sup>33</sup> among others, because constitutional courts have traditionally been concerned with the reduction of arbitrariness. 'Arbitrariness is a specific and obnoxious vice when added to power. No one should have to live in circumstances where significant power can be exercised over them in an arbitrary manner. There are many other vices which depend on *the substance* of the law, but arbitrary power is vicious enough even without them and moreover can be vicious even were the substance to be fine. It is true that the more arbitrary the power, the less likely it is that the substance will be fine, but that is a different (and arguable) point. Arbitrary power is a free-standing vice, as it were, to be regarded with suspicion wherever it occurs.'<sup>34</sup>

- 23 One particular source of inspiration is the German Constitutional Court, that has focussed on the protection of the rule of law ever since its existence and expanded its understanding of the rule of law, or the *Rechtsstaat*: 'today's *Rechtsstaat* has become inextricably tied to constitutional democracy framed by fundamental substantive values, and its legality has become subjected to a set of substantive norms embodied in constitutional justice. Although today's *Rechtsstaat* in some sense incorporates elements of both its Kantian and positivistic counterparts, it is in key respects different from its predecessors and thus raises novel questions regarding law's legitimacy. Like its Kantian counterpart, today's *Rechtsstaat* enshrines fundamental rights above the realm of ordinary laws, although these rights are substantive

28 ECtHR, *Centrum för Rättvisa v. Sweden*, application no. 35252/08, 19 June 2018.

29 ECtHR, *Big Brother Watch and others v. the United Kingdom*, application nos. 58170/13, 62322/14 and 24960/15, 13 September 2018.

30 *Big Brother Watch*, § 236.

31 *Big Brother Watch*, § 352.

32 *Big Brother Watch*, § 423.

33 D. M. Beatty, *The ultimate rule of law* (Oxford University Press, 2004).

34 M. Krygier, 'What About the Rule of Law', (2014) *Constitutional Court Review* 5.



rather than formal and differ significantly in content from their Kantian predecessors. On the other hand, like its positivistic predecessor, today's *Rechtsstaat* institutionalizes legality, but it is a legality that is not merely dependent on consistency and predictability, but also contingent on constitutional conformity and on the realization of constitutionally recognized substantive goals. This, in turn, tends to constitutionalize all politics and to convert the *Rechtsstaat* into a *Verfassungsstaat* (i.e., a state rule through the constitution) as some German scholars have argued. Finally, even beyond constitutionalization as such, today's *Rechtsstaat* judicializes realms, such as the promotion of welfare, which were clearly relegated to politics by its nineteenth century predecessors. Thus, the Basic Law commands the German states to promote the *sozialer Rechtsstaat* or *sozialstaat* (i.e., the social welfare state through law) as well as democracy and republicanism.<sup>35</sup>

- 24 The fact that constitutional courts can be essential in safeguarding the rule of law against a simple majority vote has been underlined by recent developments in a number of eastern European countries, in particular Poland and Hungary, where semi-dictatorial regimes have risen to power. For example, the Hungarian constitutional order was modelled almost exclusively on the German *Rechtsstaat* concept. Ever since the late 1980s and early 1990s the rule of law has become a self-standing constitutional norm. Consequently, the Hungarian constitutional court served as an important counterforce to the Orban regime, declaring several legislative changes unconstitutional. Perhaps unsurprisingly, the 'government reacted by adopting the Fourth Amendment which incorporated into the Fundamental Law most of the provisions which had been found unconstitutional by the Court. In order to cement the superior constitutional authority of government acting in parliament, and to take the edge out of potential future attempts by the Court to oppose government action in the spirit of pre-2010 constitutionalism, the Fourth Amendment repealed every decision of the Constitutional Court which had been delivered prior to the entry into force of the Fundamental Law.<sup>36</sup>
- 25 The European Court of Human Rights has looked carefully to both the German, the eastern European and the southern European constitutional courts and the various minimum requirements of law embedded

in their jurisprudence. To provide a basic example, many constitutional orders contain an obligation for the legislator to seek the opinion of different state organs when proposing a law in parliament, while some legislators have ignored these rules. 'In the case law of constitutional courts this sort of non-compliance generally means a breach of the rules on legislative process and results in an invalid legal act.'<sup>37</sup> Other principles set out by national constitutional courts include, but are not limited to, that a law must provide for transparency of and sufficient judicial scrutiny on the use of power by the executive branch, respect for the fundamental rights of citizens and limits on the scope and duration of the use of power.<sup>38</sup>

- 26 Drawing both from these national constitutional courts and from the cases discussed in the previous section, in the cases of *Zakharov*, *Centrum för Rättvisa* and *Big Brother Watch*, the European Court of Human Rights distinguishes no less than nine minimum requirements of law, which the Member States' law must abide by. It assesses the legal regimes in Russia, Sweden and the United Kingdom step by step. This section will discuss per sub-section how the Court has interpreted these minimum requirements of laws and show that it will allow for exceptions to these principles in two types of cases. First, where a Member State performs poorly on one minimum requirement, but remedies that by performing exceptionally strong on another point. Second, when it is clear that in practice, power is not used arbitrarily, while the legal regime leaves room for doing so.<sup>39</sup>

35 M. Rosenfeld, "The Rule of Law and the Legitimacy of Constitutional Democracy," (2001) 74 *Southern California Law Review* 5.

36 N. Chronowski & M. Varju, "Two Eras of Hungarian constitutionalism: from the rule of law to rule by law" (2016) 8 *Hague Journal on the Rule of Law* (2).

37 T. Drinóczi, "Concept of quality in legislation—revisited: matter of perspective and a general overview", (2015) 36 *Statute Law Review* (3).

38 See e.g. C. Joerges, "Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration", (1996) 2:2 *European LJ* 105. A. Stone Sweet, "The politics of constitutional review in France and Europe", (2007) 5 *International Journal of Constitutional Law* (1). P. Pasquino, "Constitutional adjudication and democracy. Comparative perspectives: USA, France, Italy", (1998) 11 *Ratio Juris* (1). F. Fabbrini, "Kelsen in Paris: France's Constitutional Reform and the Introduction of A Posteriori Constitutional Review of Legislation", (2008) 9 *German Law Journal* (10).

39 See on the point of the exceptions that are allowed to the minimum requirements of law more in detail: B. van der Sloot, 'The half-way revolution of the European Court of Human Rights, or the 'minimum' requirements of 'law' (2021), chapter in: CRID/CRIDS festschrift, forthcoming.

## I. Accessibility of the domestic law

27 The first minimum requirement the Court sets out is that of accessibility. The foreseeability requirement is not incorporated in the list of minimum requirements of law as such. In its earlier jurisprudence, the ECtHR had already made clear that the requirement of accessibility, like that of foreseeability, has a different role and meaning in relation to surveillance activities by secret services and intelligence agencies. This is confirmed by the cases of *Zakharov*, *Centrum för Rättvisa* and *Big Brother Watch*. For example, in *Zakharov*, several rules and regulations were not made public by the government but published in a journal that was accessible only to people with a subscription. However, because a private website had picked the rules up and made them freely available to the public, the Court did ‘not find it necessary to pursue further the issue of the accessibility of the domestic law. It will concentrate instead on the requirements of “foreseeability” and “necessity”.’<sup>40</sup> Similarly, in *Big Brother Watch*, the discussion concerned the access to so-called ‘below the waterline arrangements’, which were not made public in any way. Instead of condemning such practice, the Court argued that in ‘the context of secret surveillance, it is inevitable that “below the waterline” arrangements will exist, and the real question for the Court is whether it can be satisfied, based on the “above the waterline” material, that the law is sufficiently foreseeable to minimise the risk of abuses of power. This is a question that goes to the foreseeability and necessity of the relevant law, rather than its accessibility.’<sup>41</sup> Consequently, although the Court finds potential flaws with respect to this minimum requirement of law in two cases (and it is these two cases in which the ECtHR has established a violation of Article 8 ECHR, not finding a violation of the right to privacy in *Centrum för Rättvisa*), it does not find a violation of Article 8 ECHR on this point yet, but rather stresses that it needs to see whether these deficiencies can be remedied by the other minimum requirements of law, derived from the principles of necessity and foreseeability.

## II. Scope of application of secret surveillance measures

28 The second minimum requirement is that national law must define the scope of application of secret surveillance measures by giving citizens an adequate indication as to the circumstances in which public authorities are empowered to resort

to such measures, in particular by clearly setting out (1) the nature of the offences which may give rise to an interception order and (2) a definition of the categories of people liable to be subject to surveillance measures. Countries have to ensure that their legal regimes conform to these standards, although the ECtHR also allows for a margin of discretion.

29 For example, in *Zakharov*, the Court noted with concern that Russian law allowed secret interception of communications in respect of a very wide range of criminal offences, including pickpocketing, and that interceptions could be ordered not only in respect of a suspect or an accused, but also in respect of a person who may have information about an offence or may have other information relevant to the criminal case. Furthermore, telephone or other communications could be intercepted following the receipt of information about events or activities endangering Russia’s national, military, economic or ecological security, without any further detail being provided about which activities might fall under these categories. Although the ECtHR accepted that the Russian law ‘leaves the authorities an almost unlimited degree of discretion in determining which events or acts constitute such a threat and whether that threat is serious enough to justify secret surveillance, thereby creating possibilities for abuse’,<sup>42</sup> it did not find a violation on this point. Instead, it referred to the fact that ‘prior judicial authorisation for interceptions is required in Russia. Such judicial authorisation may serve to limit the law-enforcement authorities’ discretion [.]’<sup>43</sup> Yet again, the Court treats the minimum requirements not so much as independent principles, each of which must be satisfied, but as communicating vessels. If there are deficiencies with respect to one minimum requirement, such might be remedied by performing strongly on another minimum requirement, in particular by laying down adequate mechanisms of oversight.

30 Similarly, in *Big Brother Watch*, the applicants were mindful that the second sub-criterion (definition of the categories of people liable to be subject to surveillance measures) was null and void in bulk interception regimes, because of the indiscriminate nature of such programmes. Consequently, they suggested that this flaw should be remedied by including the following in the list of minimum requirements of law: a requirement on objective evidence of reasonable suspicion in relation to the persons for whom data is being sought; prior independent judicial authorisation of interception warrants; and the subsequent notification of the

40 *Zakharov*, § 242.

41 *Big Brother Watch*, § 326.

42 *Zakharov*, § 248.

43 *Zakharov*, § 249.

surveillance subject. They argued that due to recent technological developments, the interception of communications data now has greater potential than ever before to paint an intimate and detailed portrait of a person's private life. The ECtHR, however, felt it would be wrong to automatically assume that bulk interception constitutes a greater intrusion into the private life of an individual than targeted interception, which by its very nature is more likely to result in the acquisition and examination of a large volume of the individual's communications. Although the Court agreed that the additional requirements proposed by the applicants might constitute important safeguards in some cases, it did not consider it appropriate to add them to the list of minimum requirements in the case at hand. 'Bulk interception is by definition untargeted, and to require "reasonable suspicion" would render the operation of such a scheme impossible. Similarly, the requirement of "subsequent notification" assumes the existence of clearly defined surveillance targets, which is simply not the case in a bulk interception regime. Judicial authorisation, by contrast, is not inherently incompatible with the effective functioning of bulk interception. While the Court has recognised that judicial authorisation is an "important safeguard against arbitrariness", to date it has not considered it to be a "necessary requirement" or the exclusion of judicial control to be outside "the limits of what may be deemed necessary in a democratic society".'<sup>44</sup>

- 31 Instead, the Court distinguished between four phases of bulk interception regimes: (1) the interception of bulk data; (2) initial filtering and selection of the relevant data; (3) more in depth filtering of relevant data; and (4) the examination of the data finally deemed relevant. With respect to the first two stages, the ECtHR discussed, among others, whether domestic law gives citizens an adequate indication of the circumstances in which their communications might be intercepted. Although this was certainly not the case with the bulk interception regime in place in Britain, the Court did not find a violation on this point: 'while anyone could potentially have their communications intercepted under the section 8(4) regime, it is clear that the intelligence services are neither intercepting everyone's communications, nor exercising an unfettered discretion to intercept whatever communications they wish.'<sup>45</sup>

Consequently, the question whether this minimum requirement of law has been met is answered not only by looking at the legal regime in isolation, but also by referring to practice.<sup>46</sup>

### III. The duration of secret surveillance measures

- 32 A third minimum requirement of law regards a limitation on the duration of the secret surveillance measures. In its standard jurisprudence, the Court had already stressed that in general, it is not unreasonable to leave the overall duration of interception to the discretion of the relevant domestic authorities which have competence to issue and renew interception warrants, provided that adequate safeguards exist, such as a clear indication in the domestic law of (1) the period after which an interception warrant will expire, (2) the conditions under which a warrant can be renewed, and (3) the circumstances in which it must be cancelled.
- 33 In *Zakharov*, the Court found that the first two points had been met, but that the third point, the requirement to discontinue interception when no longer necessary, was covered by one of the two legal regimes under scrutiny only, which resulted in a violation of the minimum requirements of law.<sup>47</sup> In *Centrum för Rättvisa* the same problem emerged. While finding clear legal standards on the first two points, in 'respect of the third safeguard, the circumstances in which interception must be discontinued, the legislation is not equally clear. [] Nevertheless, notwithstanding that the relevant legislation is less clear with regard to the third safeguard, it must be borne in mind that any permit is valid for a maximum of six months and that a renewal requires a review as to whether the conditions are still met.'<sup>48</sup> The Court emphasised the existence of other forms of control and oversight in place, such as that the Foreign Intelligence Inspectorate having the power to decide that an intelligence interception should cease.<sup>49</sup> In *Big Brother Watch*, the discussion also concerned the third sub-requirement, as the national law only specified that the Secretary of State was under an

44 *Big Brother Watch*, § 318. See the critical opinion of Judge Koskelo, joined by judge Turkovic on this point, in the Partly Concurring, Partly Dissenting Opinion, points 23-27.

45 *Big Brother Watch*, § 337.

46 The Court did find a violation of the British regime because part of the collection of metadata/communication data was left unregulated, which is a violation not of the minimum requirements of law, but of the 'ordinary' 'in accordance with the law' requirement.

47 *Zakharov*, § 251-252.

48 *Centrum för Rättvisa*, § 129-130.

49 *Centrum för Rättvisa*, § 130.

obligation to cancel the orders when they were no longer necessary. Because the Secretary of State is part of the executive branch, it seems questionable whether this provision provides an adequate safeguard against potential abuse of power. The European Court of Human Rights, however, found no violation on this point, as ‘the duty on the Secretary of State to cancel warrants which were no longer necessary meant, in practice, that the intelligence services had to keep their warrants under continuous review.’<sup>50</sup> Again, the Court finds that a flaw with respect to the minimum requirements can be remedied by having in place adequate mechanisms of oversight (Centrum för Rättvisa) or by the self-restraint displayed in practice by the executive branch (Big Brother Watch).

#### IV. Procedures for processing the data

34 A fourth minimum requirement is that the law or relevant regulation must lay down procedures for storing, accessing, examining, using and destroying the gathered data. In essence, this requires Member States to lay down a data protection framework for intelligence agencies, which are not covered by the instruments of the European Union, in particular the General Data Protection Regulation<sup>51</sup> and the Law Enforcement Directive.<sup>52</sup>

35 In *Zakharov*, the Court found that although the Russian law had established an adequate framework on almost all accounts, it did not do so with respect to the deletion of data. Although the six-month storage time-limit set out in Russian law was in itself reasonable, the Court underlined the lack of a requirement to destroy immediately any data that are not relevant to the purpose for which they had been obtained. ‘The automatic storage for six months of clearly irrelevant data cannot be considered justified under Article 8. Furthermore, as regards the cases where the person has been charged with a

criminal offence, the Court notes with concern that Russian law allows unlimited discretion to the trial judge to store or to destroy the data used in evidence after the end of the trial. Russian law does not give citizens any indication as to the circumstances in which the intercept material may be stored after the end of the trial. The Court therefore considers that the domestic law is not sufficiently clear on this point.’<sup>53</sup>

36 Yet in *Centrum för Rättvisa*, the ECtHR found that under the prevailing law, intelligence had to be destroyed immediately when it appeared that they were deemed unimportant, their interception was unlawful or the data were shared in the context of professional secrecy; this regime, however, did not concern ‘raw data’, that is, data that have been collected, but have not yet been assessed on their potential value or relevance. ‘Although the FRA [National Defence Radio Establishment] may maintain databases for raw material containing personal data up to one year, it has to be kept in mind that raw material is unprocessed information. That is, it has yet to be subjected to manual treatment. The Court accepts that it is necessary for the FRA to store raw material before it can be manually processed.’<sup>54</sup> Consequently, it did not find a violation on this point, even though the raw data – of which in bulk interception regimes usually are mostly irrelevant for the purpose for which they have been collected – could be stored for up to a year.

37 In *Big Brother Watch*, the law required that every copy of intercepted material or data (together with any extracts and summaries) had to be destroyed as soon as retention was no longer necessary for the purposes. Again, the ECtHR seemed more lenient where it regarded the storage of raw data, of which under the prevailing regime, storage would ‘normally be no longer than two years’. The Court condoned this legal regime, referring both to practice and to the existence of adequate mechanisms for oversight: ‘while the specific retention periods are not in the public domain, it is clear that they cannot exceed two years and, in practice, they do not exceed one year (with much content and related communications data being retained for significantly shorter periods). Furthermore, where an application is lodged with the IPT [Investigatory Powers Tribunal], it can examine whether the time-limits for retention have been complied with and, if they have not, it may find that there has been a breach of Article 8 of the Convention and order the destruction of the relevant material.’<sup>55</sup>

50 *Big Brother Watch*, § 360.

51 Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

52 Directive 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.

53 *Zakharov*, § 255-256.

54 *Centrum för Rättvisa*, § 146.

55 *Big Brother Watch*, § 372-374. In addition, when the Court

## V. Authorisation procedures

38 As a fifth minimum requirement of law, the Court has made clear that there must be an adequate authorisation procedure in place. In general, it will take into account a number of factors in assessing whether the authorisation procedures are capable of ensuring that secret surveillance is not ordered haphazardly, irregularly or without due and proper consideration. These factors include, in particular, (1) the competent authority to authorise the surveillance, (2) its scope of review, and (3) the content of the interception authorisation. The competent authority to authorise the surveillance may be a non-judicial authority, provided that it is sufficiently independent from the executive.

39 In *Zakharov*, the Court did not find a violation with respect to the first factor, because the law-enforcement agency seeking authorisation for interception had to submit a reasoned request to that effect to a judge and because that judge had to give reasons for the decision to authorise interceptions. On the second point, however, the Court did find a violation, reiterating that ‘it must be capable of verifying the existence of a reasonable suspicion against the person concerned, in particular, whether there are factual indications for suspecting that person of planning, committing or having committed criminal acts or other acts that may give rise to secret surveillance measures, such as, for example, acts endangering national security.’<sup>56</sup> The Court found the Russian legal system did not meet the minimum requirements of law, both because judicial scrutiny did not extend to materials about undercover agents or police informers or about the organisation and tactics of operational-search measures, disabling the court to assess whether there was ‘a sufficient factual basis to suspect the person in respect of whom operational-search measures are requested of a criminal offence or of activities endangering national, military, economic or ecological security’,<sup>57</sup> and because the courts were not required to execute a necessity and

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scrutinised the State’s receipt of material intercepted by the U.S. National Security Agency, it acknowledged that while the compliance of the British intelligence agencies with the data protection principles was subject to exemption by ministerial certificate, they could not be exempted from the obligation to comply with two data protection principles; namely, the storage limitation principle and the obligation to take adequate technical and organizational security measures, which is why it deemed that sufficient data protection standards were in place on this point. *Big Brother Watch*, § 43.

56 *Zakharov*, § 260.

57 *Zakharov*, § 261.

proportionality check. It referred to the fact that in practice, courts never requested the interception agency to submit additional materials and ‘that a mere reference to the existence of information about a criminal offence or activities endangering national, military, economic or ecological security is considered to be sufficient for the authorisation to be granted.’<sup>58</sup> With respect to the content of the interception authorisation, the Court underlined that ‘it must clearly identify a specific person to be placed under surveillance or a single set of premises as the premises in respect of which the authorisation is ordered’,<sup>59</sup> which the ECtHR found one relevant regulatory regime did, while the other one did not because it did ‘not contain any requirements either with regard to the content of the request for interception or to the content of the interception authorisation. As a result, courts sometimes grant interception authorisations which do not mention a specific person or telephone number to be tapped, but authorise interception of all telephone communications in the area where a criminal offence has been committed. Some authorisations do not mention the duration for which interception is authorised.’<sup>60</sup> The Court found a violation of the minimum requirements of law on this point, also because an urgency procedure allowed authorities to bypass ordinary limitations to the use of powers.

40 In addition, the Court stressed that ‘the requirement to show an interception authorisation to the communications service provider before obtaining access to a person’s communications is one of the important safeguards against abuse by the law-enforcement authorities’,<sup>61</sup> and found that in certain circumstances, communications service providers had to install equipment giving the law-enforcement authorities direct access to all mobile telephone communications of all users and that they were under an obligation to create databases storing information about all subscribers, and the services provided to them, for three years; the secret services had direct remote access to those databases. This system, the Court found, was particularly prone to abuse, which is why it stressed that the need for safeguards against arbitrariness and abuse was particularly great. But the Court did not find a violation of the minimum requirements of law, instead suggesting that it would ‘examine with particular attention whether the supervision arrangements provided by Russian law are capable of ensuring that all interceptions are performed lawfully on the

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58 *Zakharov*, § 263.

59 *Zakharov*, § 264.

60 *Zakharov*, § 265.

61 *Zakharov*, § 269.

basis of proper judicial authorisation',<sup>62</sup> shifting its attention from the existence of *ex ante* to *ex post* oversight.

41 In *Centrum för Rättvisa*, the ECtHR underlined that although 'a requirement of prior judicial authorisation constitutes an important safeguard against arbitrariness, nevertheless, prior authorisation of such measures is not an absolute requirement *per se*, because where there is extensive subsequent judicial oversight, this may counterbalance the shortcomings of the authorisation.'<sup>63</sup> In addition, the Court stressed that although in *Zakharov* it had underlined the importance of public scrutiny, in the case of prior authorisations, complete secrecy is allowed, when adequate safeguards are put in place, which the ECtHR felt Sweden had: 'while the privacy protection representative cannot appeal against a decision by the Foreign Intelligence Court or report any perceived irregularities to the supervisory bodies, the presence of the representative at the court's examinations compensates, to a limited degree, for the lack of transparency concerning the court's proceedings and decisions. [] As an additional safeguard against abuse and arbitrariness, the task of examining whether the mission is compatible with applicable legislation and whether the intelligence collection is proportional to the resultant interference with personal integrity has been entrusted to a body whose presiding members are or have been judges. Furthermore, the supervision of the Foreign Intelligence Court is extensive as the FRA, in its applications, must specify not only the mission request in question and the need for the intelligence sought but also the signal carriers to which access is needed and the search terms – or at least the categories of search terms – that will be used.'<sup>64</sup> In addition, it condoned the urgency procedure in place wherewith the executive power could itself decide to grant a permit, as the 'legislation states that such a decision must be followed by an immediate notification to and a subsequent rapid review by the Foreign Intelligence Court where the permit may be changed or revoked'.<sup>65</sup>

42 In *Big Brother Watch*, the Court went even further. While the Court considered judicial authorisation to be an important safeguard, and perhaps even "best practice", it stressed that by itself, it can neither be necessary nor sufficient to ensure compliance with Article 8 of the Convention. Even the requirement that a non-judicial body performing oversight

should be independent was put up for discussion by the Court, when it assessed the fact that under the prevailing legal regime, the executive branch itself assessed and authorised the warrants and it concluded: 'It is true that the Court has generally required a non-judicial authority to be sufficiently independent of the executive. However, it must principally have regard to the actual operation of a system of interception as a whole, including the checks and balances on the exercise of power, and the existence (or absence) of any evidence of actual abuse, such as the authorising of secret surveillance measures haphazardly, irregularly or without due and proper consideration. In the present case there is no evidence to suggest that the Secretary of State was authorising warrants without due and proper consideration.'<sup>66</sup> Yet again, the Court refers to the fact that in practice, the authorities did not arbitrarily use their powers, although the legal regime allows them a rather broad margin of appreciation.

43 Finally, under the British regime, any breaches of safeguards should be notified to the Interception of Communications Commissioner, while the Commissioner observed that the process by which analysts selected material for examination, which did not require pre-authorisation by a more senior operational manager, relied mainly on the professional judgment of analysts, their training and subsequent management oversight. Although the Court agreed that it would be preferable for the selection of material by analysts to be subject at the very least to preauthorisation by a senior operational manager, given that analysts were carefully trained and vetted, records were kept and those records were subject to independent oversight and audit, 'the absence of pre-authorisation would not, in and of itself, amount to a failure to provide adequate safeguards against abuse.'<sup>67</sup>

## VI. Ex post supervision of the implementation of secret surveillance measures

44 As a sixth minimum requirement of law, the regulatory regime must put a robust and independent *ex post* oversight mechanism in place on the use of powers by the executive branch. As has become clear from the previous sub-sections, it is this minimum requirement that is arguably the most important one to the ECtHR, as it allows flaws with respect to the other minimum requirements to be repaired, by having adequate mechanisms for oversight in place.

62 *Zakharov*, § 271.

63 *Centrum för Rättvisa*, § 133.

64 *Big Brother Watch*, § 138-139.

65 *Big Brother Watch*, § 140.

66 *Big Brother Watch*, § 377-378.

67 *Big Brother Watch*, § 344-345.

Again, like with *ex ante* oversight, the Court stresses that although it is in principle desirable to entrust supervisory control to a judge, supervision by a non-judicial body may be considered compatible with the Convention, provided that the supervisory body is independent of the authorities carrying out the surveillance, and is vested with sufficient powers and competence to exercise an effective and continuous control. In addition, the Court stresses, it is essential that such an oversight body has access to all relevant documents, including closed materials, and that all those involved in interception activities have a duty to disclose to it any material required. Still, the ECtHR allows for a number of exceptions to this minimum requirement.

- 45 In *Zakharov*, for example, the Court found the safeguards and competences of the various authorities with respect to oversight and control quite limited. Still, a legal framework was in place which, at least in theory, introduced some supervision by prosecutors, although their capacity to do so was limited and oversight on their activities was minimal. Yet again, the Court turns to the practical implementation and working of these safeguards, stressing that ‘it is for the Government to illustrate the practical effectiveness of the supervision arrangements with appropriate examples.’<sup>68</sup> As the Member State could not demonstrate that the prosecutor’s supervision of secret surveillance measures was effective in practice, because the prosecutor did not have access to all relevant documents, due to the fact that it could not scrutinise all relevant interceptions and because its operations were not subject to public scrutiny, the Court considered that the prosecutor’s supervision of interceptions as it was organised was not capable of providing adequate and effective guarantees against abuse. Interestingly, the Court did note that the public prosecutor could hardly be said to be an independent supervisory authority, but still it did not find a violation on that specific point.<sup>69</sup>
- 46 As discussed, in *Big Brother Watch* the Court distinguished between the four phases of bulk interception regimes previously mentioned: (1) the interception of bulk data; (2) initial filtering and selection of the relevant data; (3) more in depth filtering of relevant data; and (4) the examination of the data finally deemed relevant. Because of the meagre legal regime with respect to the first two stages, the Court required more rigorous safeguards to be in place with respect to the third and fourth stages. On this point, the Court stressed that it was not persuaded that the safeguards governing the selection of bearers for interception and the selection of intercepted material for examination

were sufficiently robust to provide adequate guarantees against abuse. Of greatest concern, it continued, was the absence of robust independent oversight of the selectors and search criteria used to filter intercepted communications.

- 47 ‘In practice, therefore, the only independent oversight of the process of filtering and selecting intercept data for examination is the *post factum* audit by the Interception of Communications Commissioner and, should an application be made to it, the IPT. [] In a bulk interception regime, where the discretion to intercept is not significantly curtailed by the terms of the warrant, the safeguards applicable at the filtering and selecting for examination stage must necessarily be more robust.’<sup>70</sup> The fact that this is perhaps the most important minimum condition of law was emphasised by the fact that on this point, the Court did not allow the Member State to remedy this flaw by referring to practice; rather, the ECtHR reasoned the other way around when it stresses that ‘while there is no evidence to suggest that the intelligence services are abusing their powers – on the contrary, the Interception of Communications Commissioner observed that the selection procedure was carefully and conscientiously undertaken by analysts –, the Court is not persuaded that the safeguards governing the selection of bearers for interception and the selection of intercepted material for examination are sufficiently robust to provide adequate guarantees against abuse.’<sup>71</sup>

## VII. Conditions for communicating data to and receiving data from other parties

- 48 A seventh minimum requirement of law concerns the sharing of intelligence data. The Court has held that when receiving data from or sharing data with foreign intelligence agencies, the minimum requirements of law should apply *mutatis mutandis*.
- 49 In *Centrum för Rättvisa*, the ECtHR stressed that the purpose of signals intelligence naturally demands that it may be reported to concerned national authorities, in particular the authority which ordered the mission. Under the Swedish legal regime, discretion was given to the government to communicate personal data to states or organisations when deemed to be in the Swedish interest. The Court did note that the Swedish law did not indicate that potential harm to the individuals concerned must also be considered and that there

68 *Zakharov*, § 284.

69 *Zakharov*, § 279.

70 *Big Brother Watch*, § 346.

71 *Big Brother Watch*, § 347.

was no legal provision requiring the recipient to protect the data with the same or similar safeguards as those applicable under Swedish law, which meant that there were no legal limits imposed on the authority of the Swedish authorities when deciding on whether to share data with foreign counterparts. Still, referring to the existence of adequate mechanisms of oversight yet again, although in ‘the Court’s view, the mentioned lack of specification in the provisions regulating the communication of personal data to other states and international organisations gives some cause for concern with respect to the possible abuse of the rights of individuals. On the whole, however, the Court considered that the supervisory elements described below sufficiently counterbalance these regulatory shortcomings.’<sup>72</sup>

- 50 In *Big Brother Watch*, the Court assessed whether the regime for obtaining intelligence from foreign (non-European) counterparts abided by the minimum requirements of law. Remarkably, it did not assess the situation in which data were sent by foreign intelligence agencies to the British authorities on their own initiative, because the British government asserted that this rarely happens. ‘As the Government, at the hearing, informed the Court that it was “implausible and rare” for intercept material to be obtained “unsolicited”, the Court will restrict its examination to material falling into the second and third categories.’<sup>73</sup> Consequently, yet again, the Court refers to the fact that in practice, a certain power or discretion is seldom used in order to justify a legal regime, although the law itself may not meet the minimum requirements of law. The Court did discuss instances in which the British authorities requested intelligence from their counterparts and acknowledged that under the regulatory regime, in exceptional circumstances, a request for communications could be made in the absence of a relevant interception warrant, albeit only if such did not amount to a deliberate circumvention of the legal requirements in place. In such a case, the request had to be considered and decided on by the Secretary of State personally and be notified to the Interception of Communications Commissioner. Again, the Court found such a regime unproblematic because in practice, it was not used, stressing that ‘no request for intercept material has ever been made in the absence of an existing RIPA warrant.’<sup>74</sup>

## VIII. Notification of interception of communications

- 51 The eighth minimum requirement of law is that the people subject to secret surveillance should be notified thereof. Although this principle is included in its lists of minimum requirements, it seems to serve primarily as barter. The ECtHR acknowledges that it may not be ‘feasible in practice to require subsequent notification in all cases. The activity or danger against which a particular series of surveillance measures is directed may continue for years, even decades, after the suspension of those measures. Subsequent notification to each individual affected by a suspended measure might well jeopardise the long-term purpose that originally prompted the surveillance. Furthermore, such notification might serve to reveal the working methods and fields of operation of the intelligence services and even possibly to identify their agents.’<sup>75</sup> Consequently, this requirement has played a minor role of significance itself, and serves primarily as an argument for the ECtHR to stress that to remedy a deficiency with respect to this minimum requirement, Member States should put in place additional mechanisms of oversight and relief.
- 52 For example, in *Zhakarov*, although the Court formally underlined that notification should happen as soon as it is possible (although that might take years or even decades), in practice, persons were not notified at any point or under any circumstances in Russia. That meant that unless criminal proceedings had been opened against the interception subject and the intercepted data had been used as evidence, or unless there had been a leak, the person concerned would never find out that her communications had been intercepted. In addition, access to the information was conditional on the person’s ability to prove that his communications were intercepted. Information was provided only in very limited circumstances, namely if the person’s guilt had not been proved in accordance with the procedure prescribed by law, that is, she had not been charged or the charges had been dropped on the ground that the alleged offence was not committed or that one or more elements of a criminal offence were missing. Even then, only information that did not disclose State secrets would be provided, where information concerning the facilities used in operational search activities, the methods employed, the officials involved, and the data collected were considered a State secret. Although the Court was clearly unsympathetic to this approach, it did not find a violation on this point, stressing that it would bear in mind the absence of notification and the lack of an effective possibility of requesting and obtaining

72 *Centrum för Rättvisa*, § 150.

73 *Big Brother Watch*, § 417.

74 *Big Brother Watch*, § 429-430.

75 *Zakharov*, § 287; *Centrum för Rättvisa*, § 164.



information when assessing the effectiveness of remedies available under Russian law.<sup>76</sup>

- 53 To provide another example, in *Centrum för Rättvisa*, there was a legal obligation to inform natural persons that were subject to surveillance activities, at the latest one month after the signals intelligence mission was concluded, except where secrecy was required. Just as in *Zakharov*, in practice, a notification had never been made by the governmental authorities, citing reasons of secrecy. Remarkably, the Court did not find a violation on this point because the claimant in the Swedish case was a legal person. ‘Taking into account that the requirement to notify the subject of secret surveillance measures is not applicable to the applicant and is, in any event, devoid of practical significance,<sup>77</sup> like in *Zakharov*, the Court concluded that its findings on the point of the notification would be taken into account when evaluating the last minimum requirement of law: the available remedies.

## IX. Available remedies

- 54 The final minimum requirement of law is that the legal regime of the Member State must lay down robust and effective remedies, in particular for people that were subject to secret surveillance. In this respect, the Court has made clear that review and supervision of secret surveillance measures may come into play at three stages: when the surveillance is first ordered; while it is being carried out; and after it has been terminated. As regards the first two stages, the very nature and logic of secret surveillance dictate that not only the surveillance itself but also the accompanying review should be affected without the individual’s knowledge. Consequently, since the individual will necessarily be prevented from seeking an effective remedy of her own accord or from taking a direct part in any review proceedings, it is essential that the procedures established should themselves provide adequate and equivalent guarantees safeguarding her rights.
- 55 In *Zakharov*, where the remedies were available only to persons who were in possession of information about the interception of their communications, while the subjects of interception were not notified at any point and there was no possibility of requesting and obtaining information about interceptions from the authorities, the Court found that Russian law
- did not provide for effective remedies to a person who suspects that she has been subjected to secret surveillance.<sup>78</sup>
- 56 In *Centrum för Rättvisa*, the Foreign Intelligence Inspectorate, at the request of an individual, could investigate whether her communications had been intercepted through signals intelligence, and if so, could verify whether the interception and treatment of the information was in accordance with law. A request could be made by legal and natural persons regardless of nationality and residence, which is why the Court was satisfied that the remedies available were not dependent on prior notification and were adequate. This is remarkable because, speaking of practical relevance, being able to submit a claim without having any indication that one’s rights may be violated seems illusory. In addition, the Court acknowledged that the Inspectorate did not have the authority to order compensation to be paid, that the individual could not obtain information whether her communications had actually been intercepted – only if there had been any unlawfulness – and that the decision of the Inspectorate was final. This meant that an individual who was not satisfied with the response from the Inspectorate could not seek review and that the procedure to correct, block or destroy personal data was dependent on the individual’s knowledge that personal data had been registered as well as on the nature of that data.<sup>79</sup>
- 57 The reason for the Court’s lenience was based on the fact that Swedish law provides for several remedies of a general nature, in particular the possibility of addressing individual complaints to the Parliamentary Ombudsmen and the Chancellor of Justice. The two institutions had the right of access to documents and other materials. While their decisions were not legally binding, their opinions command great respect in Sweden, according to the Court. They also had the power to initiate criminal or disciplinary proceedings against public officials for actions taken in the discharge of their duties. The Court deemed it of relevance that a practice had developed in the last several years according to which the Chancellor may receive and resolve individual compensation claims for alleged violations. The Court also noted that the Data Protection Authority could receive and examine individual complaints under the Personal Data Act. ‘In the Court’s view, the aggregate of remedies, although not providing a full and public response to the objections raised by a complainant, must be considered sufficient in the present context, which involves an abstract challenge to the signals intelligence regime itself and does not concern a complaint against a particular

<sup>76</sup> *Zakharov*, § 290-291.

<sup>77</sup> *Centrum för Rättvisa*, § 167.

<sup>78</sup> *Zakharov*, § 300.

<sup>79</sup> *Centrum för Rättvisa*, § 173.

intelligence measure. In reaching this conclusion, the Court attaches importance to the earlier stages of supervision of the regime, including the detailed judicial examination by the Foreign Intelligence Court of the FRA's requests for permits to conduct signals intelligence and the extensive and partly public supervision by several bodies, in particular the Foreign Intelligence Inspectorate.<sup>80</sup> Yet again, both practice and the fact that there is judicial oversight, remedy a deficiency as to this minimum requirement.

## E. Recent developments, or how the European Court of Human Rights has gradually also become a European Constitutional Court

58 It is clear from the previous section that the Court is willing to scrutinise Member States' laws at a very detailed level, evaluating whether a considerable number of minimum requirements and sub-requirements have been met. At the same time, the Court adopts a flexible approach. First, when scrutinising laws, it often assesses how certain powers are used in practice. Although formally speaking, a governmental organisation may be vested with too broad powers, devoid of the necessary safeguards and conditionalities, the ECtHR may still deem the law convention-compliant when in practice, the organisation uses its powers discretely. Second, when the Court establishes what seems to be a flaw in the legal regime with respect to one of the minimum requirements of law, it often allows Member States to remedy that flaw by performing strongly on one of the other minimum requirements of law, in particular the existence of adequate judicial oversight. Consequently, it is questionable whether both the term 'minimum' and the term 'law' are entirely appropriate when the Court speaks of the 'minimum requirements of law'.

59 Nevertheless, it is clear that these cases will have an enormous impact on the Court's jurisprudence in the coming years,<sup>81</sup> as it takes a fundamentally

80 *Centrum för Rättvisa*, § 178.

81 Already, even in cases in which the ECtHR does not apply the 'quality of law' doctrine as such, it is increasingly willing to carefully scrutinise laws in order to assess whether there are adequate safeguards against the abuse of power, under the heading of 'necessary in a democratic society'. ECtHR, *Trajkovski and Chipovski v. North Macedonia*, application nos. 53205/13 and 63320/13, 13 February 2020, § 53-54. See also: See also, inter alia: ECtHR, *Gaughran v. the United Kingdom*, application no. 45245/15, 13 February 2020. ECtHR, *S. and Marper v. the United*

different approach than it did for more than 50 years. In these types of cases, the Court not so much assesses whether the executive branch is abusing its powers, but rather, whether the legislative branch has granted the executive power such broad powers and laid down so few limitations, that it is nearly impossible for the executive branch to violate the law. Just like the constitutionalists had wanted when drafting the European Convention on Human Rights and setting out the powers and competences of the European Court of Human Rights, the Court now accepts the task of scrutinising the legislative branch as well. To be able to do so adequately, two final limitations on its powers have been removed as well, which will be discussed in this section. First, the Court would normally only evaluate cases after all domestic remedies have been exhausted. Second, the Court would normally only establish a violation of the Convention and would not specify that, let alone how, the national legislator should change its laws and policies.

60 Ever since its foundation, the ECtHR requires applicants to exhaust all domestic remedies before the Court will declare an application admissible. Thus, normally, a claimant would need to go to a district court, a court of appeal and the supreme court at the national level before being allowed to bring the case to the attention to the ECtHR. This ensures that a Member State can remedy a potential violation of the Convention by having in place effective remedies for victims; for example, when a claimant's house was unlawfully entered by the police, and a judge at the national level has established a violation of her right to privacy and has awarded adequate compensation, she will no longer be accepted in her claim by the ECtHR. The European Court of Human Rights is consequently not a court of first instance; it is not even a court of fourth instance (next to the three levels of judicial scrutiny traditionally provided at the national level). This means that it will not redo the case in its entirety, but instead focus only on the question of whether there has been a potential violation of the Convention: 'the Strasbourg Court is not a court of "fourth instance", it is not a court of appeal, or a court of revision or of cassation. It cannot question the domestic courts' establishment of the facts in your case, nor their assessment or application of domestic law, nor your guilt or innocence in a criminal case.'<sup>82</sup>

61 However, in the types of cases discussed in sections D and E, the Court allows for an exception to this

Kingdom, application nos. 30562/04 and 30566/04, 04 December 2008.

82 <[https://www.echr.coe.int/Documents/COURtalks\\_Inad\\_Talk\\_ENG.PDF](https://www.echr.coe.int/Documents/COURtalks_Inad_Talk_ENG.PDF)>.

rule, because it feels that the domestic remedies are ineffective or because the question of whether they are effective is at the core of the complaint by the applicants. If domestic remedies do not allow individuals a right to appeal to a court, or if that court does not have full discretion to scrutinise the actions of the executive branch or the legal regime as such, or if the body performing oversight is not sufficiently independent or equipped, individuals are allowed to bring their case directly to the ECtHR. For example, in *Zhakarov*, the Court found several flaws with respect to the minimum requirements of law – as discussed in section C – and concluded: ‘In view of the above considerations, the Court finds that Russian law does not provide for effective remedies to a person who suspects that he has been subjected to secret surveillance. By depriving the subject of interception of the effective possibility of challenging interceptions retrospectively, Russian law thus eschews an important safeguard against the improper use of secret surveillance measures. For the above reasons, the Court also rejects the Government’s objection as to non-exhaustion of domestic remedies.’<sup>83</sup>

- 62 In *Big Brother Watch*, which concerned in part the same regime as was brought forward for evaluation to the Court several years ago, in *Kennedy* (2010),<sup>84</sup> the ECtHR went one step further. In *Kennedy*, the Court had found several flaws in the national system of supervision and oversight, but in *Big Brother Watch*, the Court considered that in view both of the manner in which the Investigatory Powers Tribunal (IPT) had exercised its powers and the very real impact its judgments had on domestic law and practice, ‘the concerns expressed by the Court in *Kennedy* about its effectiveness as a remedy for complaints about the general compliance of a secret surveillance regime are no longer valid.’<sup>85</sup> The Court acknowledged that this must mean in principle that the claims in *Big Brother Watch* had to be declared inadmissible, because the applicants had not exhausted all domestic remedies. But the Court allowed an exception because the applicants had reason to believe that the IPT did not provide an adequate form of oversight. This means that not only an objective evaluation of the adequacy of the domestic remedies can exempt applicants from the requirements to exhaust them, but also a justified subjective feeling as to their effectiveness.
- 63 This flexibility signals that in general, the Court is increasingly willing to act as a court of first instance

in a wide range of cases. In particular with respect to the *in abstracto* claims discussed in section D, the European Court of Human Rights is transforming from a court which assesses whether in a concrete case, one or more human rights of the applicant have been violated and whether compensation is required, to a court that assesses the quality of laws in general, not as a court of last instance, but as a court of first instance. Not only natural persons who have been harmed directly and individually are allowed to submit a complaint, people and organisations, such as civil rights organisations, will be received in their application when they invoke societal interests and the principles of the rule of law. Just like a constitutional court might do at a national level, where constitutional courts often also act as the court of first instance in matters concerning the legality, legitimacy and constitutionality of laws and policies, it assesses whether a law respects the basic principles connected to the rule of law and separation of power. Not surprisingly, some judges of the European Court of Human Rights have explicitly described the ECtHR as a ‘European Constitutional Court’<sup>86</sup> and although not making such explicit statements itself, the ECtHR is increasingly using terms that seem inspired by constitutional courts at the national level (that assess, inter alia, the ‘constitutionality’ or ‘constitution-compliance’ of national laws), by stressing that it performs a test of ‘conventionality’, ‘convention-compliance’ or ‘convention-check’ to describe its evaluative tasks.<sup>87</sup>

86 ECtHR, *Baka v. Hungary*, application no. 20261/12, 23 June 2016.

87 ECtHR, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*, application no. 45036/98, 30 June 2005. ECtHR, *Sorensen and Rasussen v. Denmark*, application nos. 52562/99 52620/99, 11 January 2006. ECtHR, *Kart v. Turkey*, application no. 8917/05, 08 July 2008. ECtHR, *Nilsen v. the United Kingdom*, application no. 36882/05, 09 March 2010. ECtHR, *O.H. v. Germany*, application no. 4646/08, 24 November 2011. ECtHR, *Kronfeldner v. Germany*, application no. 21906/09, 19 January 2012. ECtHR, *Interdnestrcom v. Moldova*, application no. 48814/06, 13 March 2012. ECtHR, *K v. Germany*, application no. 61827/09, 07 June 2012. ECtHR, *G. v. Germany*, application no. 65210/09, 07 June 2012. ECtHR, *M.N. and F.Z. v. France and Greece*, application nos. 59677/09 and 1453/10, 08 January 2013. ECtHR, *Animal Defenders International v. the United Kingdom*, application no. 48876/08, 22 April 2013. ECtHR, *Lynch and Whelan v. Ireland*, application nos. 70495/10 and 74565/10, 18 June 2013. ECtHR, *Povse v. Austria*, application no. 3890/11, 18 June 2013. ECtHR, *Mikalauskas v. Malta*, application no. 4458/10, 23 July 2013. ECtHR, *Avotins v. Latvia*, application no. 17502/07, 25 February 2014. ECtHR, *Niskasaari and Otavamedia Oy v. Finland*, application no. 32297/10, 23 June 2015. ECtHR, *Maslak and Michalkova v. Czech Republic*, application no. 52028/13, 14 January 2016. ECtHR, *Duong v. v. Czech*

83 *Zakarov*, § 300-301.

84 ECtHR, *Kennedy v. the United Kingdom*, application no. 26839/05, 18 May 2010.

85 *Big Brother Watch*, § 253.

Republic, application no. 21381/11, 14 January 2016. ECtHR, J.N. v. the United Kingdom, application no. 37289/12, 19 May 2016. ECtHR, Avotins v. Latvia, application no. 17502/07, 23 May 2016. ECtHR, Al-Dulimi and Montana Management Inc. v. Switzerland, application no. 5809/08, 21 June 2016. ECtHR, V. M. v. the United Kingdom, application no. 49734/12, 01 September 2016. ECtHR, J.M.O. v. the United Kingdom, application no. 54318/14, 21 February 2017. ECtHR, Draga v. the United Kingdom, application no. 33341/13, 25 April 2017. ECtHR, S.M.M. v. the United Kingdom, application no. 77450/12, 22 June 2017. ECtHR, Dakir v. Belgium, application no. 4619/12, 11 July 2017. ECtHR, Burmych and others v. Ukraine, application nos. 46852/13, 47786/13, 54125/13, 56605/13 and 3653/14, 12 October 2017. ECtHR, Aliyev v. Azerbaijan, application nos. 68762/14 and 71200/14, 20 September 2018. ECtHR, F.J.M. v. the United Kingdom, application no. 76202/16, 06 November 2018. ECtHR, Zammit and Vassallo v. Malta, application no. 43675/16, 28 May 2019. ECtHR, G. v. Germany, application no. 9173/14, 28 May 2019. ECtHR, Jeantet v. France, application no. 40629/16, 24 September 2019. ECtHR, Petithory Lanzmann v. France, application no. 23038/19, 12 November 2019. Terminology that is echoed in concurring and dissenting opinions: ECtHR, Nada v. Switzerland, application no. 10593/08, 12 September 2012. ECtHR, Calovskis v. Latvia, application no. 22205/13, 24 July 2014. ECtHR, Delta Pekarny A.S. v. Czech Republic, application no. 97/11, 02 October 2014. ECtHR, Y.Y. v. Turkey, application no. 14793/08, 10 March 2015. ECtHR, Biao v. Denmark, application no. 38590/10, 24 May 2016. ECtHR, J.K. and others v. Sweden, application no. 59166/12, 23 August 2016. ECtHR, De Tommaso v. Italy, application no. 43395/09, 23 February 2017. ECtHR, Correia De Matos, application no. 56402/12, 04 April 2018. ECtHR, Svetina v. Slovenia, application no. 38059/13, 22 May 2018. ECtHR, G.I.E.M. S.R.L. and others v. Italy, application nos. 1828/06, 34163/07 and 19029/11, 28 June 2018. Is used by applicants: ECtHR, P4 Radio Hele Norge Asa v. Norway, application no. 76682/01, 06 May 2003. ECtHR, Py v. France, application no. 66289/01, 11 January 2005. ECtHR, Behrami and Behrami v. France and Saramati v. France, Germany and Norway, application nos. 71412/01 and 78166/01, 02 May 2007. ECtHR, Vassis and others v. France, application no. 62736/09, 27 June 2013. ECtHR, Gerasimenko and others v. Russia, application nos. 5821/10 and 65523/12, 01 December 2016. ECtHR, Paradiso and Campanelli v. Italy, application no. 25358/12, 24 January 2017. ECtHR, Larrea and others v. France, application nos. 56710/13, 56727/13 and 57412/13, 07 February 2017. ECtHR, McGill and Hewitt v. the United Kingdom, application nos. 7690/18 and 9348/18, 14 May 2019. ECtHR, S.A. Bio D’Ardennes v. Belgium, application no. 44457/11, 12 November 2019. And by governments: ECtHR, Kanagaratnam and others v. Belgium, application no. 15297/09, 13 December 2011. ECtHR, Michaud v. France, application no. 12323/11, 06 December 2012. ECtHR, Emars v. Latvia, application no. 22412/08, 18 November 2014. ECtHR, Kiril Zlatkov Nikolov v. France, application nos. 70474/11 and 68038/12, 10 November 2016. ECtHR, Charron and Merle-Montet v.

64 This means that the Court, at least in these types of cases, has transformed from a traditional human rights court, that assesses in concreto whether one of more of the human rights of an applicant have been violated and if so, whether damages should be awarded, to a constitutional court, that assesses laws in abstracto and tests them on general principles deriving from the rule of law and the separation of powers. As Judge Pinto de Albuquerque explained in his partly concurring, partly dissenting opinion in Villanianatos and others (2013), when the ECtHR assesses laws in abstracto, it does ‘an abstract review of the “conventionality” of a Greek law, while acting as a court of first instance. The Grand Chamber not only reviews the Convention compliance of a law which has not been applied to the applicants, but furthermore does it without the benefit of prior scrutiny of that same legislation by the national courts. In other words, the Grand Chamber invests itself with the power to examine in abstracto the Convention compliance of laws without any prior national judicial review.’<sup>88</sup> The Court’s use of such terminology is not restricted to cases described in sections C and D,<sup>89</sup> but applied more broadly to a wide variety of cases, for example when it stresses that it performs a ‘review of Convention compliance’ of laws that prohibit the full-face veil in public places.<sup>90</sup>

65 In addition, a second limitation to the ECtHR’s capacity to scrutinise Member States’ legislative branch was removed. Normally, even in cases revolving around the quality of law, the ECtHR would not say that, let alone specify how, a Member State would need to change its laws. Formally speaking, the Court only holds that there has been a violation of the Convention and whether the state needs to pay damages to the applicants. One of the problems of focusing on concrete violations of the Convention was that structural problems were sometimes left unaddressed. Suppose a Member State had in place a law or policy through which the legislative power granted the executive power the authority to violate the Convention. Under its standards approach, the ECtHR would not rule that that law or policy should be changed or amended, but only that the violation in a concrete matter was in violation of the Convention.

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France, application no. 22612/15, 16 January 2018.

88 ECtHR, Matelly v. France, application no. 10609/10, 02 November 2014.

89 See for example: Centrum För Rättvisa v. Sweden, § 97-98 and Big Brother Watch on multiple occasions.

90 ECtHR, S.A.S. v. France, application no. 43835/11, 01 July 2014, §153-154. See also: ECtHR, Dakir v. Belgium, application no. 4619/12, 11 July 2017. ECtHR, Belcacemi and Oussar v. Belgium, application no. 37798/13, 11 July 2017.

- 66 Thus, if the Polish parliament granted prison authorities the power to constantly monitor all correspondence by prisoners, the ECtHR would not say that the law should be amended, but only find a violation of the Convention if an applicant claimed that her correspondence was unlawfully monitored, perhaps awarding a small amount of money by way of remedy. Although the implicit message was clear, several countries simply refused to change their laws and rather continued to pay damages to victims. Although in a way, the judgements discussed in section D provide a partial solution to this problem, because the ECtHR does not look at concrete violations stemming from a potentially more structural problem, but at the law or policy as such. In another way it makes things worse, because the Court does not award any damages to the applicants in these cases due to the fact that they have not suffered any concrete harm. This means that even the incentive of paying continuous damages is removed.
- 67 This approach has had two consequences. First, because the Court did not order the legislative branch explicitly to remedy legislative regime and structural problems as such, a continuing violation of the Convention could persist. Second, and following from that, this sometimes resulted in a high number of cases before the Court, on occasions reaching a number of several thousand individual applications per underlying issue.<sup>91</sup> Seeing this problem, at the Conference on the Future of the European Court of Human Rights on 18–19 February 2010, the Interlaken Declaration and Action Plan was adopted, requesting the Court to develop clear and predictable standards for a “pilot judgment” procedure.<sup>92</sup> By 2011, the Court embedded a new rule in the Rules of the Court, which specified that the Court may initiate a pilot-judgment procedure and adopt a pilot judgment where the facts of an application reveal the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications.<sup>93</sup> A pilot-judgment procedure may be initiated by the Court of its own motion or at the request of one or both parties.<sup>94</sup> In such a judgement,

the Court has to identify both the nature of the structural or systemic problem or other dysfunction, as well as the type of remedial measures which the Member State concerned is required to take at the domestic level by virtue of the operative provisions of the judgment. The Court may even direct in the operative provisions of the pilot judgment that the remedial measures be adopted within a specified time. The Court may adjourn the examination of all similar applications pending the adoption of the remedial measures required by virtue of the operative provisions of the pilot judgment.<sup>95</sup>

- 68 Such judgements have been issued a significant number of times since and have been considered with respect to Article 8 ECHR several times as well.<sup>96</sup> For example, in *Kuric and others* (2012), the applicants claimed that they had been arbitrarily deprived of the possibility of preserving their status as permanent residents in Slovenia. The Court observed that the “erasure” of the applicants’ names from the register, together with the names of more than 25,000 others, occurred as a result of the joint effect of two sections of the legislation. Inter alia, it found that the domestic legal system failed to clearly regulate the consequences of the “erasure” and the residence status of those who had been subjected to it. Therefore, not only were the applicants not in a position to foresee the measure complained of, but they were also unable to envisage its repercussions on their private or family life, or both. Consequently, the Court found a violation of Article 8 ECHR in that specific case, for which it awarded substantial amounts of damages.
- 69 In addition, it stressed that normally, ‘the Court’s judgments are essentially declaratory, the respondent State remains free, subject to the supervision of the Committee of Ministers, to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court’s judgment. However, in exceptional cases, with a view to helping the respondent State to fulfil its obligations under Article 46, the Court will seek to indicate the type of measure that might be taken in order to put an end to a situation it has found to exist. In the present case, the Court has found violations of the applicants’ rights guaranteed by Articles 8, 13 and 14, which essentially originated in the prolonged failure of the Slovenian authorities, in spite of
- 95 Rule 61, Rules of the Court. <[https://www.echr.coe.int/Documents/Rules\\_Court\\_ENG.pdf](https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf)>.
- 96 Though claims to that end are also sometimes rejected: ECtHR, *Jurek v. Poland*, application no. 31888/06, 14 December 2010. ECtHR, *Pisarkiewicz v. Poland*, application no. 222/05, 14 December 2010. ECtHR, *Gorski v. Poland*, application no. 10827/07, 14 December 2010.

91 <[https://www.echr.coe.int/Documents/FS\\_Pilot\\_judgments\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf)>.

92 <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12418&lang=en>>.

93 <<https://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=003-3481961-3922418&filename=New%20rule%20on%20pilot%20judgment%20procedure%2023.03.11.pdf>>.

94 <[https://www.echr.coe.int/Documents/Pilot\\_judgment\\_procedure\\_ENG.pdf](https://www.echr.coe.int/Documents/Pilot_judgment_procedure_ENG.pdf)>.

the Constitutional Court's leading judgments, to regularise the applicants' residence status following their "erasure" and to provide them with adequate redress.<sup>97</sup> That is why the Court decided to issue a pilot judgment as well, indicating that the Member State should, within one year, set up an *ad hoc* domestic compensation scheme. In addition, it ruled that the examination of all similar applications would be adjourned pending the adoption of these measures.<sup>98</sup>

- 70 Another example is the case of Novruk and others (2016), in which the applicants argued that their private life in Russia was disrupted by an exclusion order. The Court found that in the light of the overwhelming European and international consensus geared towards abolishing the outstanding restrictions on entry, stay and residence of HIV-positive nonnationals who constitute a particularly vulnerable group, Russia did not advance compelling reasons or any objective justification for their differential treatment for health reasons and consequently found a violation of Articles 8 and 14 ECHR. In addition to complaining about their own situation, the applicants claimed that there was a structural policy of the Russian government on this point, which Russia denied. The Court stressed that it was concerned that the scope of the proposed draft legislation adopted by the national legislator, that was aimed at remedying the situation, was restricted to those non-nationals who had permanently resident spouses, parents or children in Russia, which it felt was too limited to adequately remedy the situation. It abstained at that moment from issuing a pilot judgement directly, giving the Russian legislator the chance to remedy the situation itself in full, but at the same time made clear: 'Should the efforts made by the Government to tackle the underlying Convention problem or the remit of the envisaged reform prove to be insufficient, the Court may reassess the need to apply the pilot-judgment procedure to this type of case.'<sup>99</sup>

97 ECtHR, Kuric and others v. Slovenia, application no. 26828/06, 26 June 2012, § 406-408.

98 The pilot judgement is now closed: ECtHR, Anastasov and others v. Slovenia, application no. 65020/13, 18 November 2016.

99 ECtHR, Novruk and others v. Russia, application nos. 31039/11, 48511/11, 76810/12, 14618/13 and 13817/14, 15 March 2016, § 135.

## F. Analysis

- 71 Just after the Second World War, H.L.A. Hart and Lon Fuller engaged in a now classic debate, *inter alia*, about a German court's decision on the so called grudge informer. In 1944 a woman, in trying to get rid of her husband, reported to the authorities derogatory remarks her husband had made about Hitler while home on leave from the German army. After the Second World War, she was put on trial; she defended herself by stressing that her conduct was required by the prevailing laws at that time. The court of last resort held that she was guilty nevertheless since she followed a Nazi law out of free choice that conflicted with the 'sound conscience and basic sense of justice inherent to all decent human beings'. This allusion to pre- or supra-legal norms, that the constitutionalists had wanted to put in the European Convention on Human Rights, infuriated Hart. A stern positivist, he believed that there were no such things as pre- or supra-legal norms, only man made laws. He believed fervently that the question of fact, what is a law or not, should be detached from the normative question, whether a law is good. If laws were adopted according to the prevailing legal standards, they should be considered law, however callous the content of the law might be.<sup>100</sup>

- 72 Lon Fuller, to the contrary, replied that the question of what is and what ought to be cannot be separated.<sup>101</sup> He did not so much refer to pre- or supra-legal norms, that are derived from natural law, but used the term 'inner morality' of law. He believed that, much like a craftsman has to adhere to certain standards and practices when making a table – and a table needs to accord to a number of minimum principles to be called a table proper – a lawmaker needs to abide by certain standards and practices and a law must meet a number of minimum requirements to be called a law proper.<sup>102</sup> If a chair has one uneven leg, we might call it dysfunctional, if it lacks one leg altogether we might call it defect or broken and if it has no legs whatsoever, we might call it a cushion instead of a chair. The same applies to a legal order.

- 73 Consequently, Fuller argued that legal orders must not be approached merely as factual objects; rather, taking a teleological approach, he stressed that they should be viewed as purposive enterprises. Legal

100 H. L. A. Hart, "Positivism and the Separation of Law and Morals" (1958) 71 Harvard Law Review (4).

101 L. L. Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart', (1958) 71 Harvard Law Review (4).

102 L. L. Fuller, *The Morality of Law* (Yale University Press, 1969), 96.

orders are made by men for a purpose; namely, first to ensure order and second to achieve certain general, common goals. As an end in itself and as an instrument to reach these societal goals, legal orders must abide by the minimum standards of the rule of law to be effective. Respect for the ‘inner morality’ of law, among others, ensures that citizens are able to take into account the norms the laws provide.<sup>103</sup> Fuller specified a number of minimum requirements of law and failure to meet those: ‘The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, (8) a failure of congruence between the rules as announced and their actual administration.’<sup>104</sup>

- 74 Consequently, Fuller questioned whether the Nazi laws on which the grudge informer based the legitimacy of her actions, could properly be called laws and could be considered binding, because the legal order the Nazi regime had put in place failed to meet a high number of these minimum requirements.<sup>105</sup> Importantly, Fuller also stressed that these minimum requirements of law should not be understood as absolute, stand-alone principles. There is no legal regime that can fulfil them all to an optimal extent. He stressed two limitations in particular.

103 See further: L. L. Fuller, ‘Means and Ends’. In: L. L. Fuller, *The Principles of Social Order* (Duke University Press, 1981).

104 L. L. Fuller, *The Morality of Law*, p. 39.

105 Fuller also thought the law in the case of the grudge informer had been incorrectly applied in the private domain by the Nazi court. ‘This question becomes acute when we note that the act applies only to public acts or utterances, whereas the husband’s remarks were in the privacy of his own home. Now it appears that the Nazi courts (and it should be noted we are dealing with a special military court) quite generally disregarded this limitation and extended the act to all utterances, private or public.’ Is Professor Hart prepared to say that the legal meaning of this statute is to be determined in the light of this apparently uniform principle of judicial interpretation? L. L. Fuller, ‘Positivism and Fidelity to Law: A Reply to Professor Hart’, (1958) 71 *Harvard Law Review* 630, p. 654.

- 75 First, Fuller distinguished between two kinds of morality, namely the morality of duty and the morality of aspiration. The morality of aspiration is aimed at the ideal, the maximum, something that shall never be attained. The morality of duty, in contrast, starts at the bottom, at the minimum rules which need to be respected, without exception.<sup>106</sup> As Fuller explained, there are always a multitude of different aspirations working at the same time: e.g., one strives to be the perfect parent, a good spouse and productive employee at the same time. The attempt should be to find the right equilibrium between those different ideals, as the pursuit of one may block or hinder the pursuit of others. Although the respect for the basic dignity and autonomy of citizens was part of the morality of duty, interestingly, Fuller categorised the eight principles derived from the ‘inner morality of law’ as matters of aspiration. Only in a utopia can all eight elements be respected in full. He referred anecdotally to the efforts of Communist Poland to make laws so clear that they would be intelligible even to the workers and the peasants. The result was, however, that this type of clarity could only be achieved at the cost of legal consistency and the overall coherence of the system.

- 76 Second, Fuller stressed that rules can never be understood in isolation. A judge, when interpreting a legal regime, should always look to practice.<sup>107</sup> Fuller believed that positive law is built on customs and pre-legal norms; for example, a rule prohibiting vehicles in the park presupposes some general understanding of what a park and a vehicle are, why the rule was adopted and in which contexts it should be applied.<sup>108</sup> If we want to interpret a text, for example, we have to know what the writer wanted to convey and it should best be read by someone who is aware of this purpose. If a mechanic were to write an instruction on how to build a machine in poor English, Fuller illustrates, and two persons were to read his instructions, an English professor and another mechanic, Fuller argues that the latter would not get lost in the ‘literal or factual’ interpretation of the text, but try to find its essence and would thus understand the instructions better than the English professor. ‘As for the application of the dichotomy of *is* and *ought* to the law, it is fairly clear that with legal precepts, as with the instructions for assembling a machine, what a direction *is* can be understood only by seeing toward what end result it is aimed. The

106 L. L. Fuller, ‘The Morality of Law’, p. 18.

107 L. L. Fuller, ‘Some presuppositions shaping the concept of “Socialization”’, p. 39-40. In: J. L. Tapp & F. J. Levinne, *Law, justice and the individual in society: psychological and legal issues* (Holt, Rinehart and Winston, 1977).

108 L. L. Fuller, *Anatomy of the law* (Penguin Books, 1971), 60.

essential meaning of a legal rule lies in a purpose, or more commonly, in a congeries of purposes. Within the framework of this purpose, or set of related purposes, the sharp dichotomy between fact and evaluation cannot be maintained; the “fact” involved is not a static datum but something that reaches toward an objective and that can be understood only in terms of that reaching.<sup>109</sup>

- 77 Much like these two ideal positions, this article has explained that there were two groups with contrasting perspectives when the European Convention on Human Rights was drafted. The first group focussed primarily on potential violations of the executive and potentially the judicial branch in concrete instances; remedies could be afforded by the European Court of Human Rights by awarding damages to the victims of those violations, such as when the executive branch had operated outside the bounds set by the legislative branch. This group did not want to include in the operative part of the Convention references to pre- or supra-legal norms. The second group wanted to focus in particular on the more general and societal problems that derived from laws and policies as such and wanted the Court to be able to assess pre- or supra-legal norms and the principles derived from the rule of law. The second group wanted the Court to scrutinise the national legislative branch and in their view, the Court should not only be able to award damages to the victims of a specific violation of the Convention, it should have the power to require Member States to amend or change their laws and policies as well.
- 78 Although neither group was glaringly victorious, it is clear that idea that the democratic legislator should not be scrutinised by the European Court of Human Rights took the upper hand. Both through changes made to the Convention and through its interpretation by the Court, the Convention-system moved increasingly towards providing relief only to natural persons who could demonstrate that they had been harmed in their individual interests in their specific case. Consequently, by far most cases before the Court concerned the executive and the judicial branch of Member States and how they had acted in concrete cases. This article has shown that while for more than 50 years, this has been the standard interpretation of the ECHR, in the last few years, the Court has made a fundamental change to its approach.
- 79 Starting around the 1980s, the ECtHR began to focus on the accessibility and foreseeability of laws and policies, shifting the attention from the question

of whether the executive power had abided by the boundaries set out by the legislative power, to the question of whether the legislator had made laws that were sufficiently clear to citizens. Citizens should be able to know to a reasonable extent what repercussions certain actions or inactions have; if citizens don't know which actions are forbidden, they won't be able to follow the rules. Although the Court initially connected these principles to the term ‘prescribed by law’, used in Articles 9, 10 and 11 ECHR, and not to ‘in accordance with the law’, used in Article 8 ECHR, it later absolved this distinction. Referring more and more to the principles connected to the ‘rule of law’ contained in the preamble of the ECHR, and it was especially in cases with respect to the right to privacy that this approach gained significance.

- 80 Especially in cases revolving around surveillance activities by special police units and intelligence agencies, the ECtHR acknowledged that the principles of accessibility and foreseeability in their traditional meaning held little sway, unpredictability and unforeseeability being one of the *conditio sine qua non* for effective secret surveillance. That is why the Court stressed that the legal regime should have in place additional safeguards to remedy the fact that these standard principles could not be met. Doing so, it shifted its attention from the relationship between the legislator and citizens to the relationship between the legislative branch and the executive branch and from abuse of power (where the executive branch uses powers beyond the boundaries set by the legislator) to the danger of arbitrary use of power (where the executive stays within those boundaries, but the problem is that the boundaries are very broad or non-existent).
- 81 Slowly but surely, the ‘quality of law’ became a standard doctrine applied in a wide variety of cases. The Court required laws, *inter alia*, to specify clearly the categories of people liable to be subject to the use of power by the executive branch and the nature of the offences which may give rise to such measures, to set limits on the duration of the measures, specify procedures to be followed and the circumstances in which recorded data must be erased, specify with sufficient clarity the scope and conditions of exercise of the authorities’ discretionary power, provide adequate and effective safeguards against abuse, and lay down procedures for supervision and independent and impartial judicial oversight.
- 82 An important next step was taken by the European Court of Human Rights in the case *Zakharov* in December 2015. That case was revolutionary for two reasons. First, after more than 60 years of rejecting *in abstracto* claims, the Court made explicit that in cases revolving around secret surveillance, where people generally do not know whether they have been the

109 L. L. Fuller, “American Legal Philosophy at Mid-Century: A Review of Edwin W. Patterson’s Jurisprudence, Men and Ideas of the Law”, (1953-1954) 6 *Journal of Legal Education* 457, p. 470-471.



target of data gathering activities, this principle could no longer be upheld. Second, because the Court cannot evaluate whether there was an interference of the right to privacy of the claimant, whether that interference was prescribed by law, whether that interference was in the public interests, and whether a fair balance was struck between the competing interests at stake. The Court's only task is to assess whether the law of the Member State abides by the 'minimum principles of law'. It took a similar approach in the subsequent cases of *Centrum För Rättvisa* and *Big Brother Watch*.

- 83** In these cases, the Court carefully scrutinised the laws and policies before it on no less than nine minimum requirements of law: (1) accessibility of the domestic law; (2) scope of application of the secret surveillance measures; (3) the duration of secret surveillance measures; (4) the procedures for processing data; (5) authorisation procedures; (6) ex post supervision of the implementation of secret surveillance measures; (7) conditions for communicating data to and receiving data from other parties; (8) notification of interception of communications; and (9) available remedies. It found multiple violations of these minimum requirements in *Zakharov* and *Big Brother Watch*. In *Centrum För Rättvisa*, the European Court of Human Rights did not find a violation, but stressed that there was room for improvement of the Swedish legal system on a number of points.
- 84** In these cases, the Court not so much assesses whether the executive branch is abusing its powers, but rather, whether the legislative branch has granted the executive power such broad powers and laid down so few limitations, that it is nearly impossible for the executive branch to violate the law. Just like the constitutionalists had wanted when drafting the European Convention on Human Rights and setting out the powers and competences of the European Court of Human Rights, the Court now accepts the task of scrutinising the legislative branch as well. Interestingly, it takes a similar approach to Lon Fuller, who had specified eight minimum requirements of legal orders. Understanding the Court's approach through a Fullerian lens might also solve the puzzle of why the ECtHR allows for exceptions to the minimum requirements of law when either practice is such that there is no arbitrary use of power or when a deficiency with respect to one minimum requirement of law is remedied by a Member State performing exceptionally strong on another minimum requirement of law. Like Fuller had proposed, the ECtHR does not so much treat these principles as 'minimum' requirements of 'law', but as principles of aspiration. If a law fails to meet all these principles, it clearly cannot be called a law proper, but there is no law that accords in full to all these standards.
- 85** Finally, this article showed that in order to be able to fully scrutinise Member States' legislative branch, the European Court of Human Rights removed two final limitations.
- 86** First, the Court would normally only evaluate cases after all domestic remedies had been exhausted. However, the Court allows for an exception to this rule when it feels that the domestic remedies are ineffective or when the question whether they are effective is at the core of the complaint by the applicants. If domestic remedies do not allow individuals a right to appeal to a court, or if that court does not have full discretion to scrutinise the actions of the executive branch or the legal regime as such, or if the body performing oversight is not sufficiently independent or equipped, individuals are allowed to bring their case directly to the ECtHR. Doing so, in particular with respect to the *in abstracto* claims, the European Court of Human Rights is transforming from a court which assesses whether in a concrete case, one or more human rights of the applicant have been violated and whether compensation is required, to a court that assesses the quality of laws in general, not as a court of last instance, but as a court of first instance. Not only natural persons who have been harmed directly and individually are allowed to submit a complaint, people and organisations, such as civil rights organisations, will be received in their application if they invoke societal interests. Just like a constitutional court might do at a national level, it assesses whether a law respects the basic principles connected to the rule of law and separation of power. Not surprisingly, a number of judges on the ECtHR have described its role as a European Constitutional Court.
- 87** Second, even in cases revolving around the quality of law, the ECtHR would normally not say that, let alone specify how, a Member State would need to change its laws. Formally speaking, the Court only holds that there has been a violation of the Convention and determines whether the state needs to pay damages to the applicants. This approach had two consequences. First, because the Court did not order the legislative branch to explicitly remedy the structural problem as such, a continuing violation of the Convention could persist. Second, and following from that, this sometimes resulted in a high number of cases before it. That is why the Court adopted a new rule, which specifies that the Court may initiate a pilot-judgment procedure and adopt a pilot judgment where the facts of an application reveal the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications. In such a judgement, the Court has to identify both the nature of the structural or systemic problem, or other dysfunction, as well as the type of remedial measures which the Member State concerned is

required to take at the domestic level by virtue of the operative provisions of the judgment. The Court may even direct in the operative provisions of the pilot judgment that the remedial measures be adopted within a specified time.

- 88** This completes the circle. The constitutionalists had hoped to have a reference to supra-legal standards and the rule of law in the Convention and hoped the Court would focus on scrutinising laws and policies as such and remedy structural and societal problems. But the Convention and the practice of the European Court of Human Rights went in the opposite direction, focussing almost without exception on concrete violations brought by natural persons that had been harmed directly and individually from that Convention violation and awarding damages to them specifically. In just a number of years, the Court has revised its stance fundamentally and is willing to focus on the role of the legislator, assess the quality of laws in detail, and even instruct the legislator on how to revise or amend its legal regime. Whether this is merely because the Court was faced with the practical problem that it received thousands of similar cases on an underlying structural problem that was left unaddressed on the one hand and with the fact that no cases could be brought with respect to mass surveillance measures, of which the victims typically remain unaware, on the other hand, or that the Court is alarmed both by the rise of populist and totalitarian regimes in eastern Europe and by the ease with which the legislative branch throughout Europe is willing to give blanket and unconditioned power to the executive branch in the fight against terrorism and organised crime is unclear. What is clear is that it was precisely these types of problems that the constitutionalists were concerned with: both the shoals of complaints of natural persons and the lack of scrutiny at the point where it was needed the most – the legislative branch.