REVISTA IIDH

ENERO/JUNIO 1986

Instituto Interamericano de Derechos Humanos

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REVISTA

IIDH

Instituto Interamericano de Derechos Humanos

Enero/Junio 1986
San José, Costa Rica

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Editada por el Departamento de Publicaciones del Instituto Interamericano de Derechos Humanos. Primera edición, N° 1, setiembre de 1985. Primera edición, N° 2, Abril de 1986. Primera edición N° 3, Octubre de 1986.

INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS
Departamento de Publicaciones
Apartado Postal 10.081
San José, Costa Rica

Director de Publicaciones: Lic. Daniel Zovatto

DOCTRINA

The Interpretation of the word "Law" in the Jurisprudence of the European Court of Human Rights *

J. J. Cremona

References to both international law and simply law are to be found in various provisions of the European Convention on Human Rights. References to international law are to be found in Articles 7 and 15 of the Convention and in Article 1 para. 1 of the First Protocol. References to simply law are scattered throughout the Convention, including the last-mentioned article itself which speaks of conditions "provided for by law and by the general principles of international law".

Article 6, para. 1 provides that "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair andpublic hearing within a reasonable time by an independent and impartial tribunal established by law". This phrase "established by law" has been examined by the European Court in a number of cases, but in most of them it did not call for any elaborate interpretation, the Court being content to state in concise terms that a particular tribunal was in fact one "established by law" (**Engel and Others,** 8 June 1976, Series A N° 22, para. 89, **Le Compte, Van Leuven and De Meyere,** 23 June 1981, Series A N° 43, para. 56, **Albert and Le Compte,** 10 February 1983, Series A N° 58, para. 31, **Sramek,** 22 October 1984, Series A N° 84, para. 38).

A rather more complex point in this connection arose, however, in the **Piersack** case (judgment of 1 October 1982, Series A N° 53, para. 33), where it was argued that, because of the presence of one of its members (alleged to be contrary to a provision of the Belgian Judi-

* Working paper for the meeting between a delegation of the European Court of Human Rights and the Inter-American Court of Human Rights, San José, Costa Rica, 13-16 January, 1986.

cial Code), the Brabant Assize Court was not a tribunal established by law. The Court eventually did not find it necessary to examine this issue as the complaint in this respect was found to coincide in substance with another already held to be well-founded. Before doing so, however, it remarked that in order to resolve this issue it would have had to determine whether the phrase "established by law" covered not only the legal basis for the very existence of the "tribunal", as to which there was no dispute, but also the composition of the bench in each case (i.e. not only the **institutional** but also the **organizational** aspect); if so, whether it could review the manner in which national courts interpreted and applied on that point domestic law, and finally whether the law should not itself have been in conformity with the Convention and notably the requirement of impartiality contained in Article 6, para. 1.

This last observation in fact recalls a principle established in two previous cases. In the **Winterwerp** judgment of 24 October 1979, Series A, N° 33, paras. 45-46, the Court observed, in the context of Article 5, that the words "in accordance with a procedure prescribed by law" essentially refer back to domestic law; they state the need for compliance with the relevant procedure under that law. But, the Court was careful to add, the domestic law must itself be in conformity with the Convention, including the general principles expressed or implied therein. The notion underlying the term in question is, as the Court went on to say in that case, one of fair and proper procedure, namely that any measure depriving a person of his liberty should issue from and be executed by an appropriate authority and should not be arbitrary. The principle that the domestic law itself must be in conformity with the Convention, including the general principles expressed or implied therein, was in fact re-affirmed in the **X vs United Kingdom** judgment of 5 November 1981, Series A N° 46, para. 41.

That the Court has jurisdiction to determine whether the procedure prescribed by law was in fact respected in a given case is of course beyond doubt. Whilst it is not normally the Court's task to review the observance of domestic law by the national authorities, it is otherwise, the Court said, where, as in that case, the Convention refers directly back to that law, with the consequence that the Court can and should exercise a certain power of review. However, the Court added, the logic of the system of safeguard established by the Convention sets limits upon the scope of this review and it is in the first place for the national authorities, notably the courts, to interpret and apply the domestic law, even in those fields where the Convention "incorporates" the rules of that law; the national authorities are, in the nature of things, particularly qualified to settle the issues arising in this connection (para. 46).

Incidentally Article 5, para. 1, is one of those instances where the two texts of the Convention, English and French, are not perfectly concordant, in that while the English text speaks of "a procedure prescribed by law" with an express reference to the term "law", the French text uses the phrase "selon los voies legales". The difference

does not, however, seem to have called for special comment.

The phrase "prescribed by law" occurs also in several of the provisions of the Convention justifying, under certain conditions, a derogation from particular protected rights, e.g. Article 9, para. 2, Article 10, para. 2, and Article 11, para. 2. The corresponding French phrase "prévues par la loi" is used also in Article 8, para. 2 whereas in this provision the English text, rather inconsistently, uses the phrase "in accordance with the law". For "prévues par la loi" in Article 1 of Protocol N° 1 and in Article 2 of Protocol N° 4 the English text has "provided for by law" and "in accordance with law" respectively. On this, having regard to Article 33, para. 4, of the Vienna Convention of 23 May 1969 on the Law of Treaties, the Court remarked in the **Sunday Times** judgment of 26 April 1969, Series A, N° 30, para. 48, that confronted with versions of a law-making treaty which are equally authentic but not exactly the same, it must interpret them in a way that reconciles "them as far as possible and is most appropriate in order to realise the aim and achieve the object of the treaty.

In that judgment the Court first observed that the word "law" covers not only statute law but also unwritten law. Thus it did not attach importance to the fact that contempt of court, which was at the centre of that case, was a creature of the common law. It would clearly be contrary to the intention of the drafters of the Convention, the Court said, to hold that a restriction imposed by virtue of the common law is not "prescribed by law" on the sole ground that it is not enunciated in legislation: this would deprive a common law State who is a party to the Convention of the protection of Article 10, para. 2 and strike at the very roots of the State's legal system.

The Court then went on to say that in its opinion two requirements flowing from the expression "prescribed by law" are the following:

1. 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.

2. 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. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.

In the case before it the Court felt, not without some doubts on a particular aspect, that these requirements were satisfied in the circumstances. Incidentally, it may not be amiss to add here that one facet of Dicey's classic exposition of the rule of law has been in fact identified with the view that the individual should have the assurance that the law can be ascertained with reasonable certainty.

This case concerned control of prisoners' correspondence in England. In 1952 the Prison Act was promulgated which in the first place vested the Home Secretary with control over and responsibility for prisons and prisoners in England and Wales. Another provision of the same Act empowered the Home Secretary to make rules "for the regulation and management of prisons...and for the classification, treatment, employment, discipline and control of persons required to be detained therein". The Prison Rules currently in force were in fact made in 1964 and were laid before Parliament and made subject to the negative resolution procedure. Amongst other things, they regulated prisioners correspondence. These rules were then supplemented by Standing Orders and Circular Instructions issued by the Home Secretary to prison governors, who were required to comply with them. The Court accepted that it was common ground between the Commission, government and the applicants alike that a legal basis for the interference complained of was to be found in both the Prison Act and the Prison Rules, but not in the said Orders and Instructions which were unpublished and lacked the force of law. It added, however, that, whilst not being law, these directives might, to the limited extent that that prisoners were made sufficiently aware of their contents, be taken into account for the purpose of the abovementioned requirement of foreseeability.

That also delegated legislation may be covered by the term "law" in the contexts considered above emerges also from the **Barthold** case, **infra.** It is also to be noted in this connection that in the **De Wilde, Ooms and Versyp** judgment of 18 June 1971, Series A, N° 12, para. 93 (the "Vagrancy Cases") the Court found that the supervision of the applicants' correspondence during their detention, which unquestionably constituted an interference with the exercise of the right protected by paragraph 1 of Article 8 of the Convention, was "in accordance with the law" within the meaning of paragraph 2 of that article as it was provided for in Articles 20 to 23 of the Belgian Royal Decree of 21 May 1965 taken in conjunction with Article 95. That Decree, which as a legislative instrument is rather in a class of its own, was made by the King under authority from the Belgian Constitution.

Several of the principles set out above were re-affirmed in the **Malone** judgment of 4 August 1984, Series A, N° 82, paras. 66-68. The phrase "in accordance with the law" in Article 8, para. 2, of the Convention was again held to include requirements **over and above** compliance with domestic law, such as accessibility and foreseeability in the sense already indicated in the previous case-law. The view was also re-affirmed that that phrase does not merely refer back to domestic law, but also relates to the **quality** of that law, requiring it to be compatible with the rule of law, expressly mentioned in the preamble to the Convention. The phrase thus implies, the Court added, that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the safeguarded rights. Especially where a power of the executive is exercised in secret (the case in fact concerned the interception of communications effected by or on behalf of the police in the general context of criminal investigations) the risks of arbitrariness are evident.

The Court accepted that the requirements of the Convention, notably in regard to foreseeability, cannot be exactly the same in the special context of interceptions 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 Court added, 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.

In this general context the Court also took up a point already made in the **Silver** judgment to the effect that a law 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 by the law in this connection will depend upon the particular subject-matter. The Court then went on to state in the **Malone** case that 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 itself, as opposed to accompanying administrative practice, 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. In the case before it the Court found that English law did not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities, and the minimun degree of legal protection to which citizens are entitled under the rule of law was to that extent lacking.

In the **Barthold** judgment of 25 March 1985, Series A, N° 9, para. 45, which concerned prohibitory injunctions issued against a veterinary surgeon restricting him from repeating specific statements in the press, the Court, interpreting the phrase "prescribed by law" in the context of Article 10, para. 2, re-affirmed its previous jurisprudence. In that case the legal basis of the interference complained of was provided by one section of each of two parliamentary Acts and by a provision of the Rules of Professional Conduct of the Hamburg Veterinary Surgeons. With regard to the latter, the Court held that, although those Rules emanated from the Veterinary Surgeons Council and not directly from parliament, they were nevertheless to be regarded as "a law" within the meaning of the above-mentioned provision of the Convention. The competence of the Veterinary Sur-

geons Council, the Court added, derived from the independent rule-making power that the veterinary profession, like other liberal professions, traditionally enjoyed, by parliamentary delegation, in the Federal Republic of Germany. Furthermore, the Court went on to say, it was a competence exercised by the Council under the control of the State, which in particular satisfied itself as to the observance of national legislation, and the Council was obliged to submit its rules of professional conduct to the **Land** government for approval.

No doubt the interpretation of the word "law" in the various contexts in which it is used in the Convention can by no means be considered exhaustive since, as experience constantly shows, new cases have a habit of raising novel points. Still, it appears to be by now sufficiently well-developed to permit the extraction of at least an interesting nucleus of guiding principles on the subject.

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