Protection of human rights and the Rule of Law in Europe: A shared responsibility

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Ladies and gentlemen, it is both a privilege and an immense pleasure for me to be here at Tilburg University today. To celebrate with you that young academic researchers have explored important issues in the field of human rights for which they will be honoured with the Max van Stoel Human Rights Award. And, to share with you some thoughts on what must have been guiding principles for Max van der Stoel throughout his professional life: respect for human rights and the Rule of Law, and the importance of holding those in power accountable.

Achievements of Max van der Stoel

Some of you may remember Max van der Stoel as member of the Parliamentary Assembly of the Council of Europe (PACE), as the people in Greece do. He was appointed Rapporteur by PACE to investigate and report on the human rights situation in Greece after the military coup d’état in the late 60s of the past century. On the basis of his report, PACE, in a resolution, expressed its deep concern about the situation in Greece and invited the governments of the Member States of the Council of Europe to use their right to decide on the future of Greece’s membership. Before such a decision was taken, the military regime decided, in December 1969, to withdraw Greece from the Council of Europe. After the fall of this regime in 1974, Max van de Stoel was honoured as a hero in Greece. A square in Athens has been named after him as a token of gratitude.

1. This lecture was presented at the annual Max van der Stoel Human Rights Award, delivered at Tilburg University, the Netherlands. The Award ceremony is dedicated to the World Human Rights Day and entails the presentation of the Max van der Stoel Award for the best PhD thesis and the best Master’s thesis on human rights in the Netherlands.
2. Parliamentary Assembly of the Council of Europe, ‘Situation in Greece’ (1969) Recommendation 547.
3. Arrieën Kruyt, ‘Max van der Stoel, Held in Griekenland’ (5 November 2013) <https://internationaal.pvda.nl/nieuws/max-van-der-stoel-held-in-griekenland/>.

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Some of you may remember Max van der Stoel as the Minister of Foreign Affairs of the Netherlands (1973-1977) – as, for instance, the Czech do – and as the first prominent European politician who, during a visit to the Czechoslovak Socialist Republic, met with the spokesman of the dissident movement “Charta ’77”. This meeting had an enormous impact on later political developments in Czechoslovakia. From that moment onwards, human rights behind the Iron Curtain were on the agenda of Western European politicians.

On 1 March 2017 – exactly 40 years after that meeting took place – a monument in honour of Max van der Stoel was unveiled in a park in Prague, to mark this historical event.4

Some of you may remember Max van der Stoel as United Nations Special Rapporteur on the Human Rights situation in Iraq – as the victims of Saddam Hussein’s regime do.5

And some of you may remember him as the Organisation for Security and Co-operation in Europe’s first High Commissioner on National Minorities, with a mandate aimed at preventing conflict through silent diplomacy. His successes in this role are largely unrecognised, as they lie in what did not happen rather than in what did. In this capacity he travelled to many Eastern and Central European countries where ethnic tensions were rising, he encouraged inter-ethnic dialogue, and made practical recommendations to address the underlying issues. In “The former Yugoslav Republic of Macedonia” his work resulted in the establishment of the South Eastern European University in Tetovo, which is still a model for integrated education.6

Others will remember him as a family member or a friend.

However, all of us will remember him as a diplomat in the service of human rights. Always striving, discreet and dedicated, to achieve freedom, physical and mental, for the oppressed.

We should be thankful to Max van der Stoel for his tribute to Europe; to the world.

At the same time we should be aware that, what has been achieved in respect of guarantees for human rights and monitoring mechanisms over the past century, is not a self-evident possession forever. The world is changing every day: terrorist attacks, internal conflicts, migration gulsfs, and new people in power; we do not know what is going to happen tomorrow. What the future will bring us.

We should therefore not only foster these achievements, but also be cautious and defend them where and when necessary. This brings me to the topic of my keynote: the shared responsibility we have for the protection of human rights and the Rule of law in Europe.

The protection of human rights and the Rule of Law in Europe: A shared responsibility

As you all know, in reaction to the atrocities that took place during the Second World War, the Council of Europe was established in 1949. People like Winston Churchill had strongly expressed their conviction that Europe, once hostilities had ceased, must join together in order to build a peaceful future. In Churchill’s words: ‘My counsel to Europe can be given in a single word: Unite!’7

4. Ewout Klei, ‘Anet Bleich: Max van der Stoel Voelde Zich heel Ellendig over de Dood van Jan Patocka’ (Jalta, 23 February 2017) <https://jalta.nl/geschiedenis/anet-bleich-max-van-der-stoel-voelde-zich-heel-ellendig-over-de-dood-van-jan-patocka/>.
5. Jeane Kirkpatrick, ‘It Is Appropriate to Speak of Genocide’ Washington Post (2 March 1992) <https://www.washingtonpost.com/archive/opinions/1992/03/02/it-is-appropriate-to-speak-of-genocide/0ffaf457-5cd6-41bd-bb06-7e23d642e2c1/?utm_term=.ffe3e1f0b830>.
6. ‘Max van der Stoel’ (OSCE) <http://www.osce.org/node/117034>.
7. Winston Churchill, speech, Zürich (September 1956).
Churchill’s country, now in the process of Brexit, was at the time – together with Belgium, France, Luxembourg, the Netherlands, Ireland, Italy, Denmark, Norway and Sweden – one of the founding States of the Council of Europe.

According to Article 3 of the Statute of the Council of Europe, every Member State must accept the principle of the Rule of Law, human rights and democracy. The Rule of Law is – or at least should be – a pillar of any national legal order in the Member States.

A reference to the Rule of Law is also made in the Preamble of the European Convention of Human Rights, which was signed in 1950 and has been ratified by all Member States of the Council of Europe.

It should, however, be noted that, at that time, only half of the European States – including Turkey that had acceded to the Council of Europe in 1950 – accepted the Rule of Law as a basic principle for organising their State and society.

All the countries proclaiming to be ‘socialist’ or ‘communist’ ferociously denied its value. While they paid lip services to the principle of democracy and codified long lists of socialist human rights in all the constitutions, which had been drafted according to the Stalin’s model Constitution of the Soviet Union, the rule of law remained an outcast in the socialist value system.

It was only after the end of the Cold War and the fall of the Berlin Wall, and with the accession of Central and Eastern European countries to the Council of Europe, that the value of the concept of the Rule of Law was gradually accepted also in this part of Europe.

Nowadays, it has been incorporated in all the European written constitutions, even in Belarus. The text of laws, however, acquires practical meaning and becomes legally enforceable only if there is a proper government structure, including an independent judiciary, to enforce the Rule of Law.

What does the Rule of Law actually mean?

Although the concept of the Rule of Law appears in major political texts and international treaties, it had not been defined in any of those texts.

The European Commission for Democracy through Law – the so-called Venice Commission – explained in a research report that the British concept “Rule of Law”, the German concept “Rechtsstaat”, and the French concept “État de droit” have different origins. It concluded, however, that the underlying standards are the same. These entail:

1. legality;
2. legal certainty;
3. prohibition of arbitrariness;
4. access to justice;
5. non-discrimination and equality before the law; and
6. respect for human rights.

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8. European Commission for Democracy through Law (Venice Commission), ‘Report on the Rule of Law’ (4 April 2011) 512/2009, CDL-AD(2011)003rev <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD (2011)003rev-e>.
9. ibid.
These standards coincide to a large extent with what the European Court of Human Rights (the Court) has underlined in its jurisprudence over the last decades.

As the Court already made clear in earlier judgments, for example, the case of Engel v. The Netherlands, in 1976: the rule of law is considered to be part of the ‘spirit’ of the Convention and to underlie all the Convention provisions.\(^{10}\)

In fact, the starting point for defining the Rule of Law can be a negative one: the Rule of Law is the opposite of arbitrariness.

While the extremes - total disregard of the Rule of Law or full compliance with it - might be self-evident, for less clear situations it might be worthwhile to address in more detail some of the components of the Rule of Law, as enshrined in the provisions of the Convention and as developed in the case-law of the European Court of Human Rights.

**Rule of Law and the case-law of the Court**

One of the most relevant provisions is Article 6 of the European Convention on Human Rights (the Convention or ECHR). This Article enumerates the most essential features of fair trial, a key component of the Rule of Law, including the right to be heard before an independent and impartial tribunal, the right to equality of arms, the presumption of innocence, and the right to defend oneself with legal assistance.

There is one important aspect that does not feature explicitly in the text of Article 6: the right of access to court. The Court has developed this right in its jurisprudence – in the case of Golder v. the United Kingdom – with direct reference to the principle of the Rule of Law.\(^{11}\)

More than 40 percent of the violations found by the Court, concern Article 6 of the Convention.\(^{12}\) Roughly half of these relate to unreasonable length of proceedings and the non-implementation of final domestic judgments. These problems should not be underestimated.

The Court has also pointed out in its jurisprudence that the right of access to court would be illusory if a domestic legal system would allow a final, binding judicial decision to remain inoperative.\(^{13}\) It has stressed that the execution of a judgment given by any court must therefore be regarded as an integral part the right to a fair trial.

The moderating role of the Rule of Law was last year again relied upon by the Grand Chamber of the Court in the case of Ibrahim v. the United Kingdom.\(^{14}\) The Court reminded us that ‘[t]here could be no question of watering down fair trial rights of Article 6 for the sole reason that the individuals in question are suspected of involvement in terrorism’.\(^{15}\) The Court recalled that, in these challenging times, it is of utmost importance that the Contracting Parties demonstrate their commitment to human rights and the Rule of Law by ensuring respect for the minimum guarantees of Article 6 of the Convention.

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10. Engel and Others v The Netherlands App nos 5100/71, 5101/71, 5354/72 and 5370/72 (ECtHR, 8 June 1976) para 69.
11. Golder v The United Kingdom App no 4451/70 (ECtHR, 21 February 1975) para 34.
12. European Court of Human Rights, ‘Overview 1959-2015’ (March 2016) <http://www.echr.coe.int/Documents/Overview_19592015_ENG.pdf>.
13. See, for example, Metaxas v Greece App no 8415/02 (ECtHR, 27 May 2004) para 25.
14. Ibrahim and Others v The United Kingdom App nos 50541/08, 50571/08, 50573/08 and 40351/09 (ECtHR (GC), 13 September 2016).
15. ibid para 252.
Elements of the Rule of law are not exclusively found in Article 6 of the Convention. Article 3 of the Convention enshrines the fundamental principle that the State may not torture or treat people in an inhuman or degrading manner. Article 5 ECHR, enshrining the right to liberty and security, requires a legal basis for any form of detention. Article 7 of the Convention contains the guarantee that there should be no punishment without a law and the right not to be punished twice is laid down in Article 4 of Protocol 7 ECHR. Last but not least, Article 14 ECHR guarantees the principle of equality of individuals before the law and thus guarantees an essential element of the ‘Rule of Law’.

These provisions, as developed in the jurisprudence of the Court, contain institutional and substantive safeguards. The most important institutional safeguard is the independence of the judiciary.

Why is the independence of the judiciary so important?

In its case law, the Court has called the judiciary a ‘guarantor of justice’ and has emphasized the role of the courts in preventing de facto or de iure impunity for unlawful acts.

But the very existence of courts is not sufficient. They are of no assistance if they are not independent and impartial.

In order to determine whether a court is independent, the European Court of Human Rights focuses on many aspects such as ‘the manner of appointment of its members and their term of office, the existence of safeguards against external pressure and the question whether the court presents an appearance of independence’.17

In its jurisprudence the Court emphasises the principle of the separation of powers.

What separation of powers means, and why it is so important, becomes painfully obvious in situations where it is absent.

That means no right to freedom of expression, to fair trial, to privacy, etc. or, at least, only to the extent that those in power would allow individuals to exercise such rights. That means that judges could be dismissed if they hand down a ruling which displeases the executive.

Before I started my work in Strasbourg, I was judge in the Netherlands. I was also a member on the board of ‘Judges for Judges’, an independent and non-political Dutch foundation set up by judges to support fellow judges abroad who have problems whilst executing their professional duties.18

In recent years this foundation received requests for support from judges who were: seriously threatened or put under pressure, dismissed on questionable grounds, arrested and detained or sometimes even murdered. These requests for support were received from judges from a large number of countries worldwide: Venezuela, Honduras, Colombia, Swaziland, Philippines, Tunisia, but also Russia, Georgia, Serbia, Bulgaria, Ukraine and Turkey. It is outside the scope of this keynote to elaborate on these cases. I will simply draw your attention to two recent occurrences.

Last month, in Turkey the trial started against a former Rapporteur of the Turkish Constitutional Court who was also President of a now dissolved Turkish judges association. He, like many other former Turkish judges, has been in detention since 2016.19

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16. Prager and Oberschlick v Austria App no 15974/90 (ECtHR, 26 April 1995).
17. Kleyn and Others v The Netherlands App nos 39343/98, 39651/98, 43147/98 and 46664/99 (ECtHR (GC), 6 May 2003) para 190.
18. (Rechters voor Rechters) <http://www.rechtersvoorrechters.nl/>.
19. Parliamentary Assembly of the Council of Europe, ‘Václav Havel Human Rights Prize 2017 Awarded to Murat Arslan’ (9 October 2017) <http://assembly.coe.int/nw/xml/News/News-View-en.asp?newsid=6808&2>. 
On 27 October 2017, the United Nations Special Rapporteur on the Independence of Judges and Lawyers, Mr Diego García-Sayán, stated at the end of his visit to Poland that:

‘Today, the independence of the judicial system and other crucial democratic standards, like separation of powers, are under threat in Poland.’

The European Court of Human Rights is receiving quite a number of complaints concerning unfair judicial disciplinary proceedings.

In the case of Oleksandr Volkov v. Ukraine of 2013, concerning the dismissal of a Supreme Court judge, the Court concluded that the disciplinary procedure against him disclosed a number of structural and general shortcomings. The Court furthermore noted that this case disclosed serious systemic problems as regards the functioning of the Ukrainian judiciary, in particular as regards the separation of powers. It urgently recommended Ukraine to restructure the institutional basis of its legal system. Similar cases followed. In January 2017 the Court decided in the case of Kulykov and Others v. Ukraine, concerning 18 dismissed judges, and reached the same conclusions.

This is surely not exclusively a Ukrainian problem. In 2012 in Harabin v. Slovakia, the Court found that the Slovak Constitutional Court had failed to address doubts as to impartiality of its judges in disciplinary proceedings against the Supreme Court President, Mr Harabin.

In 2016 the Grand Chamber of the Court in the case of Baka v. Hungary, noted that the premature termination of Mr Baka’s term of office as President of the Supreme Court had not been reviewed by a tribunal or other body exercising judicial powers, since the applicable legislation did not afford such a remedy. The Court considered that the respondent State had impaired the very essence of Mr Baka’s right of access to a court, and held that there had been a violation of Article 6, paragraph 1 of the Convention.

And only one month ago, the Court in the case of Kamenos v. Cyprus held that objectively justified fears may arise as regards the impartiality of judges, where the Supreme Court frames the charges against a judge and then, exactly the same judges sitting as the Supreme Council of Judicature, conduct the disciplinary proceedings against him. The Court emphasises that these findings do not concern the outcome of the relevant disciplinary proceedings; it does not make a statement as to whether or not these judges should have been dismissed. It is important to have legal instruments to remove judges from office in certain situations, for instance, in case of judicial corruption, misconduct or disrespect of the law.

In the aforementioned cases, the Court is rather detecting shortcomings in the legal instruments applied. Any such deficiency would be worrying, because a weakness in the system may accidentally, or on purpose, result in sanctions against the wrong persons. There may be a risk of an arbitrary use of disciplinary proceedings against judges.

20. OHRHC, ‘Poland Judicial Independence Under Threat, UN Experts Finds’ (27 October 2017) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22321&LangID=E>.
21. Oleksandr Volkov v Ukraine App no 21722/11 (ECtHR, 9 January 2013) para 117.
22. Kulykov and Others v Ukraine App nos 5114/79 et al (ECtHR, 19 January 2017) paras 135-137.
23. Harabin v Slovakia App no 58688/11 (ECtHR, 20 November 2012) para 142.
24. Baka v Hungary App no 20261/12 (ECtHR (GC), 23 June 2016) para 121.
25. Kamenos v Cyprus App no 147/07 (ECtHR, 31 October 2017) paras 102-110.
26. ibid para 111.
At this point I would like to stress that judicial independence is not a privilege enjoyed by judges, it is a citizen’s fundamental right.\(^{27}\)

It is therefore of utmost importance that national legal systems for sanctioning judges contain strong procedural safeguards against arbitrariness.

Strong safeguards against arbitrariness, a system of ‘checks and balances’, are, in my view, ‘core’ ingredients of the Rule of Law. And not just written on paper, but safeguards which are put into practice.

Max van der Stoel rightly pointed out that when a crisis becomes acute, everyone wonders what went wrong. But things do not need to get to that point.

As the former President of the Supreme Court of the Netherlands, Geert Corstens, said:

‘The rule of law is something we have to work hard to achieve, but is worth every effort: from politicians, from the executive branch, from the courts, but also from practice-orientated lawyers and researchers at universities.’\(^{28}\)

Whatever the next decades will bring us, we have to invest in preventing the conflicts of tomorrow, by sharing responsibility for the protection of human rights and the Rule of Law in Europe.

It is not a luxury, but a necessity.

\(^{27}\) Rechters voor Rechters, ‘Matters of Principle. Codes on the Independence and Impartiality of the Judiciary’ (NVVR Guide to Judges Code, 2.1 Independence) 99. <http://www.rechtersvoorrechters.nl/media/matters_of_principle/Rechters-voor-Rechters_Matters-of-Principles.pdf>.

\(^{28}\) Geert Corstens, lecture, European University Institute, Florence, Italy.