

Dragoljub Popović
Judge of the European Court of Human Rights
Strasbourg

European Court of Human Rights and the Concept of Separation of Powers

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1. Introduction

As shown by its name the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) provides on one of the two traditional domains of Constitutional Law. The organisation of power remains outside its scope. However, the European Court of Human Rights (ECHR), set up by the Convention to ensure the observance of its provisions, had to address certain issues concerning organisation of power within High Contracting Parties to the Convention. One of those is the concept of separation of powers which found a particular place in the case-law of the ECHR.

2. Developments

In the case *Delcourt v. Belgium* a company director had been charged with criminal offences and convicted to a prison sentence. The *Procureur du Roi* of Bruges instituted proceedings against him. The director lodged application with the European Court of Human Rights (ECHR), alleging violations of the Convention on Human Rights. The complaint “related to the question whether the presence of a member of the *Procureur général’s* department at the deliberations of the Court of Cassation was compatible with the principle of “equality of arms” and hence with Article 6, paragraph (1), of the Convention”.

The applicant “was not criticising persons but rather the institution which gave an advantage” to his adversary in the proceedings at the national level. The Belgian legislation dated from the times of absolute monarchy and carried that stamp. There had been motions in Parliament to amend such legislation, but those were dismissed.

The *Procureur général* at the Court of Cassation was usually present at deliberations following oral hearings. The ECHR found that “litigants can have a feeling of inequality” in such situations, but went neither further nor beyond that.

The Government stated that the *Procureur général* was fully independent in respect to the Justice Ministry and the Government itself. He was not allowed to initiate criminal proceedings and therefore not a public prosecutor. The *Procureur général*

was an adjunct and an adviser of the judiciary, and his role within the Cassation Court proceedings could not jeopardise either its independence or impartiality. The system was a long lasting one and its substance has never been challenged. The ECHR found no breach of Article 6 (1) of the Convention thus approving of an institution well rooted in the legal mind of a nation preserving it for more than a century.¹

A state official connected to the Government assisted to deliberations of a court of law, which meant that the executive was interfering with prerogatives of the judiciary, but the ECHR showed a rather feeble interest in the concept of separation of powers.

The ruling in *Delcourt* fixed the Court's case-law for decades. It was more than twenty years later that the issue was addressed again.

In *Borgers v. Belgium* a practising lawyer was charged with forgery and using forged documents. A suspended sentence of imprisonment was imposed on him, as well as a fine. The case was given a judgment of the Court of Cassation, but the lawyer lodged application with the ECHR, alleging violation of Art. 6 (1) of the Convention. He raised the same issue that had been raised in *Delcourt*, complaining "he had been unable to reply to the submissions of the *avocat général* to address the court last" as well as "to the fact that the *avocat général* had participated in the deliberations which took place immediately after the hearing".

The Court noted "that the findings in the *Delcourt* judgment on the question of the independence and impartiality of the Court of Cassation and its *procureur général's* department" remained entirely valid.

However this time the ECHR addressed the question whether the mode of proceeding before the highest instance in Belgium "respected the rights of the defence and the principle of the equality of arms, which are features of the wider concept of a fair trial". The Court found that "by recommending that an accused's appeal be allowed or dismissed, the official of the *procureur général's* department becomes objectively speaking his ally or his opponent". Therefore the rights of defence were restricted, and the procedure before the Cassation Court of Belgium suffered inequality of parties.

The ECHR found that the participation of a state official, be it merely in an advisory capacity, in deliberations of a court of law, increased the inequality of parties to the proceedings. The Court found a violation of Art. 6 (1) of the Convention and ruled in favour of the applicant.²

This was a turning point in the evolution of the Court's case-law.³ It was for the first time that the ECHR took account of the concept of separation of powers in a particular aspect, concerning officials covered by the expression *ministère public* in the French doctrine.⁴

The ice was thus broken. The old Belgian procedural rules were found incompatible with the Convention on Human Rights.

In the evolution, which followed, the Court extended this approach to other countries. Another feature of the evolution was that it did not concern only officials being a part of the *ministère public*. This line of reasoning spread to other state organs.

¹ *Delcourt v. Belgium* (1970), *Judgments and Decisions* A 8-16

² *Borgers v. Belgium* (1991) *Reports*, A 214B. For comments on this case cf. bibliographical note in: V.BERGER, *Jurisprudence de la Cour Européenne des Droits de l'Homme*, Paris 2007, p.282-3

³ It was also considered to be a turning point in the history of Belgian judiciary; cf. J.CALLEWAERT, 'Au-delà des apparences... d'un revirement' *Rev.trim.dr.h.* (1992) p. 204

⁴ Cf. F.SUDRE, *Droit européen et international des droits de l'homme*, Paris 2005, p. 354. Cf. also P.VAN DIJK/F.VAN HOOFF/A.VAN RIJN/L.ZWAAK, *Theory and Practice of the European Convention on Human Rights*, Antwerpen-Oxford 2006, p. 582

In *Procola v. Luxembourg* it was for the first time that the institution of the Council of State was challenged.⁵ The applicant was an agricultural association for milk marketing, which had challenged a piece of legislation, adopted as a European directive by the law of Luxembourg.

The case fell within the competence of the Council of State. Article 76 of the Constitution of Luxembourg provided that the functions of the Council of State (*Conseil d'Etat*) were “to deliberate on draft legislation and any amendments proposed thereto, determine administrative disputes and give its opinion on any other question referred to either by the Grand Duke or pursuant to a statutory provision”. This was fairly a copy of the Napoleonic institution of the same name existing for almost two centuries in France.⁶

A statute laid down the organisation of the Conseil d'Etat. That body consisted “of twenty-one councillors, eleven of which [formed] the Judicial Committee”. A councillor of State was not prevented “from dealing with the same case if it [came] before the Judicial Committee”; in spite of the fact he had dealt with it already, while the Council of State was fulfilling another function.

The applicant complained that four out of five members of the Judicial Committee sat on the case, having to apply a piece of legislation they “had previously scrutinised in their advisory capacity”. The applicant complained the Judicial Committee was neither independent nor impartial, and alleged a violation of Article 6 (1) of the Convention on Human Rights.

The Court ruled that “Procola had legitimate grounds for fearing that the members of the Judicial Committee had felt bound by the opinion previously given”, and unanimously found for the applicant.

The ECHR was marching on. In *Vermeulen v. Belgium* the Government tried to put some limits to the effects of the case-law of the Court. In a civil case the *avocat général* participated in the proceedings, and also took part in deliberations. The Government suggested the case should be distinguished from *Borgers*, because the case was a civil suit, in which an agent of the government could not take sides, i.e. become an ally or an opponent of a party to the proceedings. The latter was possible in criminal proceedings. The Grand Chamber of the ECHR ruled that the nature of the functions of the state official in question did “not vary according as the case is a civil or a criminal one”. The essential was that a party could not reply to the submissions of the state official in the proceedings, as well as the fact that he was present at deliberations. The Court found for the applicant.⁷

In *Lobo Machado v. Portugal* the Belgian pattern was followed. A plaintiff, who had been employed by a state owned company, brought an action in a labour dispute, challenging the amount of his retirement pension. The case went to the Supreme Court, which considered the appeal sitting in private. “Three judges, a registrar and the member of the Attorney-General’s department were present at the deliberations. The parties had not been asked to attend.”

The Constitution of Portugal provides in its Article 221 that the duties of the Attorney-General’s department are “to represent the State, to act as prosecuting

⁵ *Procola v. Luxembourg* (1995) Reports A 326, cf. P.VAN DIJK e.a. op.cit. 618-9; a bibliographical note in: V.BERGER, op. cit. p. 231

⁶ On the origin of the French Council of State cf. J-L AUTIN - C.RIBOT, *Droit administratif général*, Paris 2005, p. 40; on its organisation M.FROMONT, *Droit administratif des Etats européennes*, Paris 2006, p. 121-2; M.L.RASSAT, *La justice en France*, Paris 2004, p. 66-71

⁷ *Vermeulen v. Belgium* (1996), Reports 1996-I

authority and to uphold the democratic legal order and the interests determined by law”.

The applicant complained he had not been able “to obtain a copy of the Attorney-General’s department’s written opinion or, therefore, to reply to it”. He also complained of the presence of a member of the Attorney-General’s department to the deliberations of the Supreme Court, which had been held in private.

The Portuguese government pointed out that the parties to the proceedings had exercised their procedural rights on an equal footing. The Government submitted that the “member of the Attorney-General’s department in its capacity as an institution of the judicial system had no other duty than to assist the court by giving a completely independent, objective and impartial written opinion *super partes* on the legal issue raised”. The Attorney-General’s function was to be an *amicus curiae*, and as such “a guarantor of the consistency of the Supreme Court’s case-law and protector of the public interest”. The Government invoked the rule in *Borgers*, insisting on the “part actually played in the proceedings by the member of the Attorney-General’s department”.

The Grand Chamber of the ECHR found unanimously for the applicant, on the grounds that parties had a right to adversarial proceedings. Such a right “means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service”. The breach of the Convention “was aggravated by the presence of the Deputy Attorney-General at the Supreme Court’s private sitting”, because this “afforded him, if only to outward appearances, an additional opportunity to bolster his opinion in private, without fear of contradiction”.⁸

The theory of appearances stood behind Court’s judgments. Its formula says that “justice must not only be done; it has to be seen to be done”. If justice was to be done in an impartial manner, then interference of the executive power with the tasks of the judiciary was by no means admissible. Many traditional institutions, which could not comply with this concept, existed all over Europe, remaining fairly unaffected by the case-law of the ECHR. However, a signal was given to a state which might be considered to be the champion of legal traditions. It was rather timid and had its limits, but seemed to be significant.

It was in *McGonnell v. The United Kingdom* that the signal was given.⁹ The case concerned rather peculiar institutions existing on the island of Guernsey, which belongs to Great Britain, enjoying a large scope of autonomy in legal matters.

The applicant had tried to obtain a permission to make residential use of his land. The legislative organ of the little island, called the States of Deliberation, adopted the Detailed Development Plan and maintained the prohibition on residential development of the applicant’s land. When deciding the matter, the States of Deliberation were chaired by the Deputy Bailiff. The applicant lodged a complaint with the island’s judiciary, appealing to the Royal Court, against the decision of the States of Deliberation.

The Royal Court of Guernsey is composed of a Bailiff and seven Jurats. The Bailiff, being a professional judge of the Royal Court, was the Deputy Bailiff who had chaired the States of Deliberation when the prohibition in the applicant’s case had been maintained. The Royal Court dismissed the appeal.

⁸ *Lobo Machado v. Portugal* (1996) Reports 1996-I

⁹ *McGonnell v. The United Kingdom* (2000) Reports 2000-II

The Bailiff of Guernsey was the senior judge of the Royal Court, but at the same time he “occupied the offices of ... Solicitor-General and Attorney-General respectively and, since 1970, Deputy Bailiff, before finally becoming Bailiff”. In his judicial capacity, the Bailiff was also the only professional judge in the Royal Court, sitting along with laymen, being the President of the Guernsey Court of Appeal at the same time.

Apart from his judicial capacity, the Bailiff was also President of the legislative organ, as well as President of four state committees, conducting the business of the executive power. In brief, the confusion of powers with the Bailiff was pretty obvious, but it provoked no troubles or a wish to alter or challenge the ancient institutions of the little island.

The applicant raised the argument that “the non-judicial functions of the Bailiff ... gave rise to such close connections between the Bailiff as a judicial officer and the legislative and executive functions of government that the Bailiff no longer had the independence and impartiality”.

The British government “recalled that the Convention does not require compliance with any particular doctrine of separation of powers”.

The Court agreed with the respondent government “that neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts as such”. The case did not “require the application of any particular doctrine of constitutional law to the position in Guernsey”. The Court’s only concern was “whether the Bailiff had the required ‘appearance’ of independence, or the required ‘objective’ impartiality”.

At this stage the concepts of the separation of powers and the one of appearance seemed to be confronted, but the Court’s further analysis showed that the two concepts were actually considered to be linked and intermingled.

The Court applied the rule in *Procola*, and found that “in both cases a member, or members, of the deciding tribunal had been actively and formally involved in the preparatory stages of the regulation at issue”.

The Court’s ruling was “that any direct involvement in the passage of legislation, or of executive rules” was “sufficient to cast doubt on the judicial impartiality of a person subsequently called on to determine a dispute over whether reasons exist to permit a variation from the wording of the legislation or rules at issue”. The ECHR found a breach of Article 6 (1) of the Convention.

It was rather clear after *McGonnell* that in spite of stating *expressis verbis* its principal disapproval of following doctrines of constitutional law, the ECHR was indeed following the concept of separation of powers. A person could not conduct business of more than one branch of government; otherwise the Convention on Human Rights would be breached.

Many traditional institutions existing in the United Kingdom, apart from those of the little island, as well as in other countries, remained outside the scope of the Court’s case-law, but the beginning of the 21st century marked another turning point.

The leading case was *Kress v. France*. The applicant underwent a gynaecological operation under general anaesthetic. She suffered consequences of the operation to such an extent that she was 90% disabled.

The lady sued the hospital before the administrative justice of France. The Strasbourg Administrative Court ruled in her favour and accorded her damages of 5.000 French francs. The applicant appealed against that judgment, but the appeal was dismissed. She lodged a second appeal with the Council of State (*Conseil d’Etat*) and was again refused.

The applicant filed a complaint with the ECHR referring to the *Borgers* and *Lobo Machado* cases. The Government Commissioner's submissions had not been communicated to the applicant before the hearing at the *Conseil d'Etat*, so that she had not been able to reply to those and speak last. A further complaint was that "the fact that the Government Commissioner had been present at the trial bench's deliberations – which were held in private – when he had earlier submitted that her appeal should be dismissed, offended against the principle of equality of arms and cast doubt on the court's impartiality".

The French government objected that its Commissioner enjoyed complete freedom of opinion and did not represent a part of the government structure. This was similar to the arguments already put forward by the Belgian and Portuguese governments in the cases referred to by the applicant.

The ECHR found a violation of Article 6 (1) of the Convention on Human Rights, referring to the precedents *Borgers*, *Vermeulen* and *Lobo Machado*.¹⁰ However, to explain the relevant domestic law and practice the Court had to elaborate on the origins and development of the administrative courts in France, status of judges of those courts, and especially on the proceedings before the *Conseil d'Etat*. The judgment exposed in brief the history of the administrative justice in France, beginning with the times of Consulate.

The nominal President of the *Conseil d'Etat* is the Prime Minister himself. Members of that body are appointed "by decree of the President of the Republic adopted in Cabinet". However the ECHR did not want to go too far. Confusion of powers with the Bailiff of Guernsey had common features with the one existing with the Council of State in France, but it was difficult to put an equality sign between the two. The French administrative pattern had spread to many countries of Europe. What was the Court to do with the systems stemming out of the French one and modelled after it?

The ECHR made a prudent approach, which is easy to understand in such circumstances. It limited the considerations to the procedural aspect of the matter. The Court's finding was that "the Government Commissioner could legitimately be regarded by the parties as taking sides with one of them". Therefore the Court stated "a party may have a feeling of inequality if, after hearing the Commissioner make submissions unfavourable to his case at the end of the public hearing, he sees him withdraw with the judges of the trial bench to attend the deliberations held in privacy of chambers".

The Court's final holding was that there had been a violation of Article 6(1) of the Convention "on account of the Government Commissioner's participation in the *Conseil d'Etat*'s deliberations".

This was indeed another turning point. The whole system of administrative law in France was basically rooted in the tradition and the case-law of the Council of State. On the other hand, the system has been adopted outside France in many countries¹¹. That is probably one of the reasons why the Court showed so much prudence in its approach to the problem. The separation of powers was not mentioned in the text of the judgment, but the concept stood behind Court's deliberations, as well as the theory of appearance.

¹⁰ *Kress v. France (GC) Reports 2001-VI*; cf. CH.GRABENWARTER, *Europäische Menschenrechtskonvention, München-Wien* 2003 p. 358; V.DIMITRIJEVIĆ e.a., *Međunarodno pravo ljudskih prava, Beograd* 2006, p.193

¹¹ The Netherlands, Belgium, Italy and Greece follow the French pattern in this respect; cf. M.FROMONT, *op. cit.* p. 14-33

The break through after the *Kress* judgment was neither easy to accept, nor without some fundamental problems. One of those was typical for a judge-made law. It concerned determining the scope of applicability of the precedent. There were subsequent judgments of the ECHR aiming to reduce that scope.

The case of *Kleyn and Others v. The Netherlands* concerned the role of the Council of State in a country which had adopted the French system of review of administrative actions.¹²

The government had submitted its Transport Infrastructure Planning Bill to the Council of State (*Raad van State*) for an advisory opinion, and the latter made a number of suggestions for improving the bill before sending it to Parliament.

Once the piece of legislation was passed, the competent ministries adopted a routing decision for construction of a new railway.

The citizens affected by the routing decision lodged appeals with Administrative Jurisdiction Division of the Council of State. There were more than 280 appeals.

Two of the plaintiffs brought a complaint of the lack of impartiality of the Administrative Jurisdiction Division of the Council of State, on the grounds that the division belonged to the Council of State, whose plenary had been involved in advising the government on the bill which preceded the piece of legislation, affecting the plaintiffs.

The challengers invoked the *Procola* judgment. “They noted similarities between the organisation and functioning of the Netherlands Council of State and the Luxemburg *Conseil d’Etat* and quoted several comments published in the legal press by learned authors.”

A special chamber of the Administrative Jurisdiction Division, formed to try this issue, ruled against the plaintiffs. The competent bench was composed of three ordinary councillors, but the plaintiffs had not complained about their impartiality, as persons. They rather put in question the impartiality of the whole institution of the Council of State.

The special chamber, which dismissed this particular complaint, argued “only a lack of impartiality on the part of a judge can lead to his removal from a case”. To which the chamber added, “a lack of independence of the tribunal to which a judge belongs can [not] constitute grounds for that judge’s removal from a case”. The special chamber also took a stand towards the *Procola* judgment. It ruled that “the Council of State has [not] in advisory opinions on the legislation that is at issue in this appeal, expressed itself in a way contrary to the position taken by the applicants in their appeal”.

The applicants persevered complaining of impartiality of the domestic court and alleged violation of Article 6 (1) of the Convention on Human Rights.

Like in the *Kress* judgment, the Court exposed a short history of the Council of State in the national law. It was obvious that the institution, although much older than the French invasion of the Netherlands at the beginning of the 19th century, was subsequently shaped after the Napoleonic model. Ever since 1861 the Council of State was competent to hear administrative disputes. The present organisation of the Council of State is such that it is composed of a vice-president, 28 ordinary and 55 extra-ordinary councillors. The monarch presides the Council of State. The plenary of the council is composed solely of the ordinary councillors, whereas the extra-ordinary councillors perform only the judicial function.

¹² *Kleyn and Others v. The Netherlands (GC) Reports 2003-VI*; cf. P.VAN DIJK e.a. op.cit. p. 619. On the Council of State in the Netherlands cf. M.FROMONT, op. cit. p. 122-3

The *Procola* judgment had a significant impact on the working methods of the Dutch Council of State. The government stated before the Court that so called “*Procola* risks were as good as excluded”. Adaptations of procedure were adopted so that “only members who have not participated in the advice sit” on a bench in a case. Extraordinary councillors are always eligible to sit, because the plenary of the Council of State is composed of ordinary councillors. In other words the judicial and advisory functions of the Council of State could not interfere with each other, which meant that the concept of separation of powers was preserved.

The applicants for their part referring to *Procola* and *Mc Gonnell*, insisted on the fact that in *Procola* the Court had found the “institution’s structural impartiality”.

A peculiarity of this case consists of third party interventions, made by the governments of Italy and France. There was indeed no interest whatsoever of the two intervening governments in constructing railways in the Netherlands. They felt affected by the question of the position of the Council of State and separation of powers. France is the birthplace of the system, and Italy, like the Netherlands, one of the followers of the French pattern of organisation of the respective institution.

The Italian government put forward that a distinction should be made “between an abstract assessment of a provision, such as an advisory opinion, and an evaluation of the application of a provision in a specific case”. This led to the conclusion that it was incompatible with the requirements of impartiality for a judge “to assess specific facts twice, but not for an abstract provision to be assessed by the same judge in different individual cases”. This meant differentiating of functions a person is to perform within one and the same institution, i.e. tending to preserve the concept of separation of powers, in spite of confusing powers in the same persons. That had already been rejected by the Court in *Procola*.

The French government advocated the system once born in France as such; by stating “it was impossible to separate the judicial function of the *Conseil d’Etat* from its advisory responsibilities”. An adviser to the government relies, according to this opinion, on the case-law, while a judge takes account of the adviser’s opinion. The French government went so far as to state that it was “the best possible guarantee of legal certainty”. The impartiality of a body vested both with advisory and judicial powers could not pose a problem if an advisory opinion concerned only a point of law. On the contrary, if a question of fact intervened, “the assessment of the question whether an appellant could have objectively justified fears of bias depended on the merits of each case”.

The ECHR finding was that the appearances were important for an objective impartiality test. The Court also mentioned “the notion of the separation of powers between political organs of government and the judiciary [had] assumed growing importance in the Court’s case-law”. The Court made reference to its own judgment in *Stafford v. The United Kingdom* at this point.¹³ In that case the Grand Chamber found a violation of Article 5 (1) and (4) of the Convention because “the lawfulness of the applicant’s continued detention was not reviewed by a body with the power to release or following procedure containing the necessary judicial safeguards”. The lawfulness of detention was reviewed by the Secretary of State, i.e. an organ of the executive that acted in matters, which should fall within the competence of the judiciary.¹⁴

¹³ *Stafford v. The United Kingdom (GC)Reports 2002-IV*

¹⁴ For similar British cases before the ECHR, in which the executive decided on personal liberty v. E.BARENDT, ‘Separation of Powers and Constitutional Government’, in R.BELLAMY (ed.), *The Rule of Law and the Separation of Powers*, Dartmouth 2005, p. 291-2

The ECHR stated it did not require “States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers’ interaction”. It found that the case did not require “the application of any particular doctrine of constitutional law”, and refused to make an abstract assessment of Dutch legislation on the Council of State.

After determining its task in such a way, the Court found first that the applicants appealed against the routing decision, taken by two ministries, whereas the advice had been given on a bill. The Court made a distinguishing from *Procola* and *McGonnell* on the grounds that “the advisory opinions given on the ... Bill and the subsequent proceedings on the appeals brought against the routing decision cannot be regarded as involving ‘the same case’ or ‘the same decision’”. The Court held with twelve votes to five that there had been no violation of Article 6 (1) of the Convention.

The problem of separation of powers was quite visible in the proceedings of this case. In spite of the fact that it did not want to follow any particular doctrine, the Court was somehow shaping its own position on the subject, by developing the case-law. The ruling in this case represented an attempt of limiting the scope of previous precedents, but those were however maintained.

In the case of *Pabla Ky v. Finland* the ECHR revisited the problem of separation of powers. The concept was clearly at stake and the Court followed the same line of reasoning as in *Kleyn*. The case concerned a dispute over renovation of premises between two companies and the proceedings were instituted before the so-called “Housing Court”, a special division of the Helsinki District Court.¹⁵

When the applicant company appealed against the first instance judgment to the Helsinki Court of Appeal, one of its expert members was a member of the Finnish Parliament at the time.

The ECHR was thus faced with the question “whether, in the circumstances of the case, the Court of Appeal had the requisite ‘appearance’ of independence, or the requisite ‘objective’ impartiality”. The Court quoted the rules of precedents in *McGonnell* and *Kleyn*.

In applying the rules of the above mentioned precedents to the case the Court found that there was no indication “that M.P. was actually or subjectively biased against the applicant company when sitting in the Court of Appeal in its case”. The Court also found that there was “no objection *per se* to expert lay members participating in the decision-making in a court”.

The Court ruled, “unlike the situation it [had] examined in *Procola* ... and *McGonnell* ... M.P. had not exercised any prior legislative, executive or advisory function in respect of the subject matter”. The judicial proceedings could therefore not be regarded as involving “the same case” or “the same decision” in the sense of Article 6 (1) of the Convention. The mere fact that a parliamentarian sat at the Court of Appeal was not “sufficient to raise doubts as to the independence and impartiality of the Court of Appeal”. There was accordingly no breach of Article 6 (1) of the Convention.

The Spanish judge, Borrego Borrego, was the only dissenter in this case. He quoted *dicta* of Italian and San Marino cases in which the rulings were that courts of law in terms of Article 6 of the Convention had to be independent not only in respect to the executive, but also to the legislative power. He also quoted Montesquieu as authority, and an earlier British case.

The ECHR was hesitating as to the field of application of the concept of separation of powers. Basically, the Court’s most recent case-law was maintained, which was

¹⁵ *Pabla Ky v. Finland, Reports 2004-V*

exactly the reason for posing the question of meaning and scope of the concept, well known in modern constitutional law.

Shortly after the judgment in *Pabla Ky* the ECHR had to take a stand for another time. The Grand Chamber tried the case *Martinie v. France* in which a civil servant was responsible for some audit accounts. His appeal on points of law before the *Conseil d'Etat* had been inadmissible, which made him seek protection from the ECHR.

The applicant's complaint related to a breach of Article 6 (1) of the Convention, invoking the whole line of precedents that have been discussed in this text: *Kress*, *Borgers*, *Vermeulen* and *Lobo Machado*.¹⁶

The Government referred to the recent developments of French law, which had been provoked by the *Kress* judgment. It consisted of "a decree (no. 2005-1586) incorporating the new procedure ... published in the Official gazette on 20 December 2005, adding in particular Article R. 731-7 to the Administrative Courts Code". According to that provision "the Government Commissioner shall be present at deliberations; he shall not participate in them".

The Government insisted on distinguishing the notions of presence and participation. The Court refused to make a distinction: the mere presence of a government officer at deliberations of a court of law was sufficient "to influence their outcome". The guarantee required by Article 6 (1) of the Convention "was not afforded by the French system".

The ECHR interpreted its case-law in such a way as not to allow the presence of a government officer at deliberations of a court of law. The concept of separation of powers, although vague, undefined, hardly shaped by the judge-made law, even uncertain in substance, was able to inspire judgments. In other words the rule in *Martinie* was following the landmark, being the precedent in *Kress*.

Only half a year after the *Martinie* judgment decisive questions regarding the concept of separation of powers were put forward in *Sacilor -Lormines v. France*. At the moment of writing this text the case is given a chamber judgment, still susceptible of a request of referral to the Grand Chamber.¹⁷

A mining company had to cease activity because it was not profitable any more. There were several procedures to follow concerning closing of mines. The company addressed a ministry and the *Conseil d'Etat* in its administrative capacity. In the further course of proceedings the company addressed the *Conseil d'Etat* in its judicial capacity as well, tending to annul some administrative decisions.

The company lodged an application with the ECHR complaining that the *Conseil d'Etat* was not an independent tribunal in the sense of the Convention, because it cumulated consultative and judiciary functions. The applicant stressed "the rise of importance of the concept of separation of powers in the Court's case-law". It insisted that an "institution exercising legislative functions and confectioning laws ... [could] not be an independent and impartial tribunal in cases of implementation of such reforms". Moreover "within the *Conseil d'Etat* there was no corps of state officials to fulfil the judiciary function exclusively".

The Court had censured the way of functioning of the Council of State in Luxemburg, although there were heavier eligibility conditions for its members than in France, where only the age of 45 is sufficient. Therefore, the applicant went so far as to allege the councillors of State in France were not justices at all. Beside the lack of

¹⁶ *Martinie v. France* (app. no. 58675/00) judgment of 12 April 2006, *inedited*

¹⁷ *Sacilor-Lormines v. France* (app. no. 65411/01) judgment of 9 November 2006, *inedited*

substantial conditions for their eligibility the councillors do not enjoy “any particular guarantees against external pressure”.

The Government replied that the administrative justice in France relied on “a strong tradition of independence”. The French institution should be treated in the same way as the Council of State of the Netherlands, which had been recognised to be an independent tribunal.

The Government pointed out that “the participation of the members of the *Conseil d’Etat* in the active administration was far from susceptible of provoking its lack of independence or impartiality; on the contrary it strengthened its capacity of control of administration, because of enabling its members to have an exact knowledge of real functioning of the active administration”. The position of the *Conseil d’Etat* was in conformity with “fundamental constitutional principles of the rule of law: independence of judges and the separation of powers”.

The judgment stressed “the growing role of the concept of separation of executive and judiciary powers in the case-law of the Court”. The essential for an independent tribunal was “the way of appointment and the duration of mandate of its members, the existence of protection towards external pressure, as well as the appearance of independence”.

The immovability of members of the *Conseil d’Etat* is indeed not based on a legal text, but is however “guaranteed in practice in the same way as its independence by ancient customs, such as to run the institution by the *bureau*...without external influences”.

The Court held that the French *Conseil d’Etat* did not suffer lack of independence. As to the appointment of councillors, the Court remarked that “once appointed those justices do not receive either pressure or instructions in exercising their judiciary function”.

The most important issue was the one of cumulating judiciary and executive powers on the side of the *Conseil d’Etat*. The Court repeated its *dictum* in *Kleyn*, that the Convention did not demand application of any constitutional theory, adding the rule of *Pabla Ky*, which says that the separation of powers should not be treated in an abstract way, and it differentiated the case from *Procola*. The members of the judiciary body who tried the case had not taken part in the adopting of a consultative opinion. That opinion could by no means be considered the “same issue” or the “same decision”, which was basically the ruling in *Kleyn*.

The Court concluded that the “cumulating judiciary competence of the *Conseil d’Etat* with its administrative attributions did not bring a violation of Article 6 (1) of the Convention in this particular case”.

As to a government officer being present at deliberations of the *Conseil d’Etat* the Court found for the applicant, remaining faithful to its case-law in *Kress and Martinie*.

2. Reflections

The ECHR seems to stick to the traditional concept of separation of powers. There are three functions of government - legislative, executive and judicial - and each of those should be conferred to a separate body or authority, so that “no individual

should be a member of more than one of them”. I am borrowing the quotation from Barendt, although many authors give basically the same definition.¹⁸

Some scholars underline the specialization and independence of the three authorities vested with principal state functions, as well as the interdiction of cumulating the functions in one single body.¹⁹ Others recently stress the impossibility of a unique approach to the concept.²⁰

Another significant feature should be considered to belong to the classical definition, which to my mind is important for the Court’s understanding of the doctrine of separation of powers. Richard Bellamy says, “the underlying rationale ... [of the concept] ... is that individuals or groups should not be judges in their own cause”. Carlos Miguel Pimentel finds this to be an extrapolation of the old judiciary principle separating the judge from a party to the proceedings.²¹

The ECHR actually connected its approach to the concept of separation of powers with the idea of a fair trial. That is why the whole evolution finds its place in the case-law on Art. 6 of the Convention.

The ECHR has not expressly ruled on distinctions between the French and the American versions of the concept of separation of powers, as such. The former is based on a distinction between two types of activities of the administration; one of which consists of settling disputes. The latter has its expression in the doctrine of checks and balances.²² The Court was not willing to take into account the most recent scholarly developments of the concept, such as for instance, those labelled by the expression *new separationism* or the analysis stressing influences and balance between political and civil societies.²³

An overall picture of the evolution of the Court’s case-law shows at the beginning the Court’s refusal to take notice of the concept of separation of powers, as had been the case in *Delcourt*. The ECHR first allowed the concept to mark its judgment in *Borgers* at the beginning of the nineties of the last century on the issue concerning criminal proceedings before a court of second appeal.

Further on, the concept also applied to civil proceedings but it spread to the institution of the Council of State, as shaped after the French pattern. Those were the results of *Vermeulen* and *Procola*. The influence of the concept of separation of powers in Court’s judgments affected many countries, as could be proven by *Lobo Machado* and *McGonnel*.

¹⁸ E.BARENDT, op.cit. p. 277, referring to J.C.VILE, *Constitutionalism and the Separation of Powers* (1967); M.TROPER, ‘Séparation des pouvoirs’ in: PH.RAYNAUD et S.RIALS, *Dictionnaire de philosophie politique*, Paris 2003, p.709, W.HALLER/A.KÖLZ, *Allgemeines Staatsrecht*, Basel 1999, p.181, T.FLEINER/L.R.BASTA FLEINER, *Allgemeine Staatslehre*, Berlin/Heidelberg, 2004, p. 405-6.

¹⁹ M.TROPER, *La séparation des pouvoirs et l’histoire constitutionnelle française*, Paris 1973, p. 19,69-70,114

²⁰ Cf. D.G.LAVROFF, Conclusion, in : A.PARIENTE (ed.), *La séparation des pouvoirs*, Paris 2007, p. 140-141, V.CONSTANTINESCO-S.PIERRE-CAPS, *Droit constitutionnel*, Paris 2004, p. 164-5

²¹ R.BELLAMY, ‘The Political Form of the Constitution: the Separation of Powers, Rights and Representative Democracy’, in: R.BELLAMY (ed.) op.cit. p.254, C.M.PIMENTEL, *De l’Etat de droit a l’Etat de jurisprudence? Le juge de l’habilitation et la séparation des pouvoirs*, in: A.PARIENTE (ed.), op. cit. p. 13

²² On the distinctions cf. E.BARENDT, op.cit. p. 280; R.BELLAMY, op.cit. p. 267

²³ Cf. B.ACKERMAN, ‘The New Separation of Powers’, in: R.BELLAMY (ed.) op.cit. p. 488-490. The author advocates the pattern of constrained parliamentarism as the best way to apply the concept of separation of powers, but also introduces integrity and regulatory branches into analysis. S.MILACIC, ‘De la séparation des pouvoirs a l’idée des contre-pouvoirs: Montesquieu revigoré par le néolibéralisme’, in : A.PARIENTE (ed.) op.cit. p. 44-5, M.A.COHENDET, *Droit constitutionnel*, Paris, 2006, p.363

The Court was however trying to put some rational limits to the evolution of its jurisprudence. The outcome of those efforts was the judgments in *Kleyn* and *Pabla Ky*.

Significant developments were later made by *Kress* and *Martinie* judgments. The prudent approach is preserved and the case-law seems to be fixed by *Sacilor-Lormines*. This is of course only an attempt of interpretation of the Court's case-law of the last decade and a half and it might well be contested.

Whatever the critics of such an interpretation may be, it is hard to deny that the concept of separation of powers has significantly penetrated the case-law of the ECHR. It bears characteristic features of judge-made law and lacks a coherent approach. As it was repeatedly stated in the judgments, the Court does not follow any particular constitutional doctrine. There is no specific concept of separation of powers to be attributed to the ECHR, and it is hardly predictable that such a doctrine might show up in future.

In regard to such developments it is important to mention that the case-law of the ECHR influenced the legal systems of nation-states, being parties to the Convention on Human Rights. The rise of influence of the concept of separation of powers in the Court's case-law led to certain adaptations at national levels. Those were made in almost all countries affected by the Court's case-law, but they differ in scope and technique.

3. Adaptations

Some of the adaptations to the ECHR jurisprudence could already be perceived in the first part of this text. The government of the Netherlands stated in *Kleyn* "the Council of State had adopted a provisional practice in anticipation of further clarification by the ECHR in its future case-law". Therefore, the "so-called 'Procola risks' were as good as excluded". The Government referred to parliamentary documents of the years 1997-8 and 2000-1.

Belgium also complied with the case-law of the Court, especially in respect of the judgment in *Borgers*. In a case tried by the ECHR in 2002 the Government explained the way of adapting the Belgian law to the jurisprudence of the ECHR. At first the Court of Cassation allowed parties to address the court after the State Counsel. Subsequently a piece of legislation was passed in the year 2000 to amend the Judicial Code, which provided for the same solution.²⁴

The speediest and most efficient adaptation to the ECHR case-law in respect of separation of powers was the one made in Luxembourg after *Procola*. The ECHR had issued its judgment on 28. September 1995 and the legislative reform took place the following month. In 1996 a broader constitutional and legislative reform was made to introduce new administrative courts and redress the whole system of dealing with administrative disputes.²⁵

Portugal also complied with the case-law of the ECHR, by way of introducing amendments to the legislation. Special legislation was passed in the form of a decree-law in order to adapt the Portuguese legal system to the jurisprudence of the ECHR.²⁶

²⁴ *Wynen and Centre Hospitalier Interrégional Edith-Cavel v. Belgium, Reports 2002-VIII*

²⁵ D.SPIELMANN, 'Luxembourg', in: R.BLACKBURN-J.POLAKIEWICZ (eds.), *Fundamental Rights in Europe, Oxford 2001*, p. 556-7

²⁶ I.CABRAL BARRETO, 'Les effets de la jurisprudence de la Cour européenne des droits de l'homme sur l'ordre juridique et judiciaire portugais', in: *Liber Amicorum Luzius Wildhaber, Kehl/Strasbourg/Arlington 2007*, p. 81

One of the countries that were mostly affected by the ECHR case-law was the United Kingdom. It has been remarked among scholars that the doctrine of separation of powers, put forward by Montesquieu, “became a constitutional commonplace” everywhere except in Britain.²⁷ Although the precedent in *McGonnel* could have been interpreted to apply only to a certain territory enjoying a large scope of home rule, it was obvious that proper British institutions were affected too. Justices of the House of Lords, being the highest court in the United Kingdom – the Law Lords – were at the same time members of the upper house of Parliament. Even worse was the position of the Lord Chancellor of Justice, who used to be a Cabinet Minister, the Speaker of the parliamentary upper house and a judicial member of the House of Lords. On top of it he was also entitled to appoint justices.

The British sought at first to solve the problem in their traditional way, i.e. by introducing new constitutional conventions. According to one of those the Lord Chancellor was not to sit any more in cases “dealing with legislation with whose passage he was involved or where the government’s interests [were] concerned”.²⁸

Introducing constitutional conventions proved however to be insufficient. To be able to comply with the case-law of the ECHR the British Parliament adopted the Constitutional Reform Act of 2005. The Act reformed the judiciary system and reshaped the function of the Chancellor of Justice. The House of Lords in its judicial function is to be transformed into the Supreme Court of the United Kingdom with twelve Justices of the Supreme Court, appointed by the Queen at the recommendation of the Prime Minister. The Supreme Court of the United Kingdom shall be competent to try cases arising from the devolution in Great Britain, which brings an appearance of a constitutional review of legislation, vested with that institution.

According to the 2005 legislation the Chancellor of Justice is to remain in the executive branch of government, as a Cabinet Minister and head of Department of Constitutional Affairs.²⁹

The scope and technique of the adaptations which took place in the United Kingdom show a considerable amount of European impact in a country which for a long time seemed to be resistant to such influences.

In France there has been some hesitation as whether to fully comply with the case-law of the ECHR, as far as the concept of separation of powers is concerned. French academics were not persuaded that *Procola* should require changes in the proceedings of the *Conseil d’Etat*.³⁰ However, as the Government exposed in *Martinie*, a decree was passed in December 2005, amending procedure before the *Conseil d’Etat*. Its crucial point is that “the Government Commissioner shall be present at the deliberations. He shall not participate in them”.³¹

As it was explained above, the rule in *Martinie* says there is a violation of the Convention “on account of presence of the Government Commissioner at the

²⁷ J.M.KELLY, *A Short History of Western Legal Theory*, Oxford, 1999, p. 279, especially referring to the Lord Chancellor’s position

²⁸ R.BLACKBURN, ‘The United Kingdom’, in: R.BLACKBURN-R.POLAKIEWICZ (eds.) op.cit. p. 989-91. Blackburn suspected in 2001 that this could be sufficient (see note 210 on p. 991). Another effort of the same kind was made in June 2003, but it did not work either; cf. B.STIRN-D.FAIRGRIEVE-M.GUYOMAR, *Droits et libertés en France et au Royaume-Uni*, Paris 2006, p. 254-5

²⁹ D.FRISON, *Introduction au droit anglais et aux institutions britanniques*, Paris 2005, p. 116-7 ; 163-4

³⁰ Cf. C.DUPRE, ‘France’, in: R.BLACKBURN-J.POLAKIEWICZ (eds.) op.cit. p. 331, referring to the opinions expressed by Austin and Sudre.

³¹ For a critical attitude towards this provision cf. M.FROMONT, op. cit. p. 356-7

deliberations of the bench of the *Conseil d'Etat*". By failing to comply with the case-law of the ECHR in this respect France lost many repetitive cases before the Court.³²

The French had to decide whether or not to remain faithful to their own understanding of separation of powers, which is basically rooted in history. Protagonists of the revolution of 1789 were suspicious towards conservative judiciary. Therefore they did not want to let it interfere with the business of the executive.³³ This led to creating a system of separation of what is called *administration active* and *administration contentieuse*, which means that the judiciary function in administrative disputes is vested with the administration itself. This ruined the idea of specialisation of authorities holding different state functions. The pattern is still exposed to criticism from the standpoint of the theory of separation of powers, so that even some French authors consider it shocking.³⁴ However it was difficult to give up one of the ideas which created the pattern and found many followers outside France.

It is noteworthy that the French Cassation Court was more inclined to comply with the ECHR case-law than its counterpart as far as the administrative disputes are concerned, the *Conseil d'Etat*. The *avocat général* does not attend deliberations of the Cassation Court as of 1. October 2001, as the Government explained in *De Luca v. France*, aiming to combat application of the rule in *Reinhardt and Slimane-Kaid v. France*. The Government lost the case however, for having failed to communicate in written the conclusions of the state official to the other party, which was the *ratio decidendi* of the landmark ruling.³⁵ Avoiding presence of the state official at deliberations proves the impact of the idea of separation of powers, as existing outside France. As far as it did not tackle the sensitive area of administrative disputes it penetrated more easily into the French legal system.

Finally the decisive move was made by a decree of 1. August 2006. It provides on the right of a party to demand the Government commissioner to be excluded from the proceedings.³⁶ In the light of such developments one can assume the French law was brought in line with the ECHR case-law.

4. Conclusion

Although the ECHR does not follow any particular constitutional doctrine it basically rejected the French pattern of the separation of powers. This has been done by approaching the old doctrine in a manner which bares characteristic features of a

³² Cf. for example judgments in cases *Eisenchteter v. France* (17306/02) and *Seidel v. France* (21764/04) of 12. December 2006 following the rule in *Martinie*. Jean Foyer noted that in 90% of cases before ECHR France was 'condemned' for breaching Art. 6 of the Convention, which is, according to this author, being applied rigorously. Cf. J.FOYER, 'La jurisprudence de la Cour européenne des droits de l'homme', in: *Archive de philosophie du droit*, Tome 50/2007 p. 243

³³ Y.GAUDEMET, *Droit administratif*, Paris 2005, p. 42-3 ; M.FROMONT, op. cit. p. 14-16

³⁴ Y.GAUDEMET, op. cit. p. 43

³⁵ *Reinhardt and Slimane-Kaid v. France* [GC] Reports 1998-II; *De Luca v. France* (8112/02) of 25 January 2006. Cf. P.VAN DIJK e.a. op. cit. p. 585

³⁶ Art. R. 733-3. J.O. 178 ; 3.8.2006. I owe my gratitude to Mr Jean-Marc Sauvé, vice president of the *Conseil d'Etat*, who kindly sent me the text of the decree and introduced me to the most recent developments of the French law in this respect. Cf. also B.STIRN, "Convention européenne des droits de l'homme et commissaire du gouvernement", in: *La lettre de la justice administrative*, No 13, Octobre 2006, p. 3

judge-made law. The Court's approach to the French administrative system as such, has however always been prudent.

The case-law of the ECHR also managed to inspire a constitutional reform in the United Kingdom, a country which used to be somewhat negligent to the old concept, as developed in scholarly works. The British system complies with the fundamental ideas of separation of powers, owing to a legislative reform.

Those examples lead to a conclusion that there is a fair amount of convergence as far as developments at national levels are concerned, and those are based on the adaptations of the legal systems of member states, aiming to comply with the ECHR case-law.

There are scholars and lawyers who describe the European Convention on Human Rights and the case-law of the Strasbourg Court as an embryo of a future European Constitution.³⁷ The adaptations of national legal systems to the case-law of the ECHR in respect of separation of powers that have taken place everywhere seem to provide an argument in favour of such opinions.

³⁷ I.CABRAL BARETO, *op. cit.* p. 77, fn. 38, where opinions of several authors are quoted; CH.GRABENWARTER, *op. cit.* p. 6-7, referring to authors who use expressions like European Constitution of Human Rights (Frowein) or Fundamental Rights' Constitution (Hoffmeister) to denote the Convention