This is the published version of a chapter published in *Rule of Law in a Transitional Spectrum*.

Citation for the original published chapter:

Argren, R. (2024)  
Application of Article 18: Seeking to Uphold the Rule of Law under the ECHR  
In: Rigmor Argren (ed.), *Rule of Law in a Transitional Spectrum* (pp. 215-236).  
Uppsala: Iustus förlag

N.B. When citing this work, cite the original published chapter.

Permanent link to this version:  
http://urn.kb.se/resolve?urn=urn:nbn:se:oru:diva-110986
Application of Article 18: Seeking to Uphold the Rule of Law under the ECHR

Rigmor Argren

Abstract
The rule of law, a fundamental principle of European democratic societies, ensures that laws are clear, consistent, and applied without arbitrariness. Should the respect for the rule of law begin to backslide, Article 18 of the European Convention on Human Rights (ECHR) is meant to function as a safety device. This chapter begins by tracing how the notion of the rule of law, not a justiciable right under the ECHR as such, has been conceptualised by the European Court of Human Rights (ECtHR) and positioned in relation to the said Treaty. Next, the chapter outlines the linkage between the rule of law and the notion of European public order. Thereafter, the potential power of Article 18 is explored in relation to the anticipated function of preventing a decline in the respect for the rule of law. Additionally, the chapter traces the history of applying Article 18 and indicates unclear areas that remain with regard to the use of this provision. Furthermore, the chapter highlights the pros and cons of the contextual references increasingly relied on by the ECtHR in Article 18 judgments.

Keywords
Rule of law – European public order – European Court of Human Rights – European Convention on Human Rights Article 18 – Bad faith
1. Introduction

The rule of law lends itself to various interpretations and is referred to in a variety of situations. Although there are many diverging perspectives as to what this notion should or should not entail, it clearly comes with profoundly positive connotations, generally as an operational element of a democratic society. Even though the rule of law as a whole is not justiciable under the European Convention on Human Rights (ECHR), it is referred to in the European Court of Human Rights (ECtHR or the Court) case law. Often the rule of law is mentioned in connection with European public order, again a concept which the ECtHR cannot adjudicate on. There are, however, several avenues for the ECtHR to work on many of the rule of law elements, some of which are in fact rights protected by the ECHR. There is one provision in particular that has just started to come of age as regards exploring its capacity and function vis-à-vis rule of law issues, and that is Article 18.

It has been discussed in the literature whether the abuse of rights constitutes a breach of the principle of the rule of law, since in effect, such abuse means the laws are applied arbitrarily. Article 18 is meant to stifle such bad faith abuse of rights. This provision can be applied in situations where a State has introduced limitations to certain rights for ulterior purposes that are on non-permissible grounds. If the imposition of such limitations on individuals is the materialisation of a decline in the rule of law, this would fall under the scope of Article 18. This provision is intended for “situations where states limit rights for ulterior, hidden purposes and mask the abuse of power.” It must be underlined that the situation of concern here is not a state of emergency that threatens the life of the nation. Of concern under Article 18 are such situations where

---

1 See below, section 2.


5 Article 15 ECHR (n. 2).
a State seeks to limit certain rights with reference to non-permissive grounds, whilst trying to make them seem permissive. This will often be a situation where the rule of law is challenged, with simultaneous implications for the European public order.

In what follows, Section 2 provides a general introduction to the notion of the rule of law. Section 3 presents the rule of law in the way it currently appears in the ECtHR case law. Section 4 lays out the rule of law in relation to the European public order. Section 5 examines how Article 18 is used by the ECtHR to uphold and promote the rule of law. Section 6 concludes.

2. The Rule of Law: Between Politics and Human Rights

The rule of law has a particular role in legal and political discourse and is often used as a moral point of reference to evaluate legal orders, as well as social and political orders. In other words, there is undoubtedly a link (albeit not always entirely clear in what way) between the rule of law and democracy. It joins law and politics together in a manner which cannot be dissolved. Here, in Spano’s words: “Law and politics are thus inextricably entwined in a true democracy.” You can safely say that the rule of law is endowed with a normative value which serves as the beacon of a democratic society. As with many normative concepts shaped by the human mind, the rule of law carries within it a dimension of an ideal. The numerous people that have a stake (professional or otherwise) in the rule of law, ranging from ordinary citizens to those who carry essential functions in a democratic society, such as lawmakers in the form of politicians and lawyers, who execute the law in different roles, embody

a vast and variable array of interests. Taken together these constituents inevitably emphasise different elements of the rule of law.8

The rule of law has been referred to as “one of the most fundamental principles of law”,9 a statement that potentially clouds the reality that the rule of law covers not one, but several principles. Common to these principles is that they are meant to shield those governed from an arbitrary use of power by those who govern. In other words, when the rule of law is upheld, it secures the rational and reasonable use of governmental power.10 This means that the concept relates to laws and regulations; how administrative bodies apply or implement laws and regulations, and to the establishment and delivery of the judiciary.11 The concept of the rule of law often arises in relation to constitutional discussions, with a general perception that human rights have something to do with it, albeit less clear exactly what or how. A reasonable point of departure when it comes to understanding the rule of law concept may therefore be to examine the distinction between its thick and thin versions.

Authors that emphasise the formal characteristics of law understand the concept mainly in its *thin* version.12 From this perspective, the requirements are “public, prospective, consistent, clear and stable legal norms”,13 which are governed and enacted in accordance with the principles of due process. And lastly, the authors that understand the rule of law in its thin version emphasise that judicial review must be available to those governed by the laws. Formal attributes are underlined, with a focus on, in addition to clarity, procedure of adoption and temporal

---

10 Spano (n. 7) 138.
12 This version of rule of law is often associated with Joseph Raz, and his publication “The Rule of Law and Its Virtue”, in his book *The Authority of Law*, OUP, 1979.
13 Wohlwend (n. 6) 2.
scope. In other words, the objective of the rule of law in its thin version is to secure “not a morally good legal system, but a legally good one”.

When, on the other hand, the rule of law in its substance is expanded to encompass human rights protection, we have the thick version of the concept. From this perspective, the rule of law embraces the protection of human rights within its scope. A state which savagely represses or persecutes sections of its people cannot in my view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside is the subject of detailed laws duly enacted and scrupulously observed.

It must be noted that the thick version of the rule of law presents numerous alternatives when it comes to whether or not all human rights should be included. In case of a selection of human rights, the question of how many and which human rights you should read into the concept arises. Furthermore, scholars have pointed out that from a regional or international perspective, the rule of law “… must reflect this particular setting within a pluralistic and often heterarchical network of different legalities, protecting concurring or competing values in (and of) different legal regimes.” In other words, the rule of law seen from a regional perspective differs from the rule of law which is limited to the national perspective. It is worth pointing out that international law has a different kind of normativity and may not have the same social embeddedness as is the case in the national setting. That is the reality when the ECtHR

14 Polgári (n. 8) 46.
18 Polgári (n. 8) 47.
charts out how the rule of law should be understood under the ECHR and within the realms of the European public order.

3. The Rule of Law in ECtHR Case Law

The drafters of the ECHR were clearly inspired by the Universal Declaration of Human Rights (UDHR),\(^{21}\) which sets out that the rule of law is instrumental when it comes to the protection of human rights: “... if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.”\(^{22}\) Just as in the UDHR, the rule of law is only explicitly mentioned in the preamble. Here, the drafters, rather than emphasising that the rule of law is instrumental for the protection of human rights, integrate the concept into their identity, and introduce themselves as like-minded governments of European countries with “a common heritage of political traditions, ideals, freedom and the rule of law ...”\(^{23}\) The first mention of the rule of law in ECtHR case law, is in *Golder v the United Kingdom* in 1975, a case which concerned access to court.\(^{24}\) In this case, it was made clear that under the ECHR, the rule of law is “one of the features of the common spiritual heritage of the member States of the Council of Europe”.\(^{25}\) With the rule of law explicitly engrained in the contextual part of the ECHR as an identity trait of the Member States, the ECtHR has so far refrained from making a definition of the concept. Given that treaty preambles in accordance with the general rule of treaty interpretation of Article 31 in the Vienna Convention on the Law of Treaties are part of the “context for the purpose of the interpretation”,\(^{26}\) it seems reasonable that crafting exact definitions cannot be a priority.

---


\(^{22}\) *Ibid.*, Preamble.

\(^{23}\) ECtHR (n. 2) Preamble.


\(^{25}\) *Ibid.*, § 34.

Application of Article 18: Seeking to Uphold the Rule of Law under the ECHR

task. Furthermore, concepts such as freedom, equality, or politics also lack universal definitions: they tend to be defined differently and to be dependent on who uses them and what the context is geographically as well as substantially. Additionally, social concepts are often defined differently during different time periods.\(^{27}\) Even without explicitly marking out a definition of the rule of law, the ECtHR has since the *Golder* case made clear that the rule of law not only concerns access to the judicial institutions (and their reviews). The ECtHR has further clarified that the rule of law also relates to the quality of the law. Therefore, any national law must be “compatible with the rule of law, a concept inherent in all the Articles of the Convention”.\(^ {28}\)

Although the principle of the rule of law is in itself not justiciable, the ECtHR is increasingly inclined to take it (or some aspects of it) into consideration when assessing individual complaints.\(^ {29}\) The ECtHR makes reference to the rule of law in a variety of situations, but most frequently in relation to the formal concept as indicated above in the cases of *Golder* and *Amuur* respectively, which focus on legality and procedural safeguards.

The ECtHR has used the ‘rule of law’ as an ancillary justification to underline positive obligations of investigation that arise from Article 2 (right to life) and Article 3 (right not to be tortured). The obligation to investigate under Article 2, is an obligation of means, not of result. Thus, the Court will assess the quality of the investigation. The ECtHR points out that although the investigation need not be public, it must meet a certain qualitative standard; “the test is whether there is a sufficient element of public scrutiny in respect of the investigation or its results to secure accountability in practice as well as in theory, maintain public confidence in the authorities’ adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts.”\(^ {30}\) Similarly,


\(^{29}\) Polgári (n. 8) 69.

with regard to Article 3, an investigation “should be capable of leading to the identification and punishment of those responsible”. 31

In addition to judicial safeguards and access to court as in the Golder case, the ECtHR refers to the rule of law when it examines standards of “in accordance with the law” in relation to the limitation clauses in Articles 8 to 11 (right to respect for private and family life; freedom of thought, conscience and religion; freedom of expression and freedom of assembly and association), Articles 5 (right to liberty and security) and 7 (no punishment without law) respectively. The ECtHR has set out three conditions that need to be met. The law has to be accessible, foreseeable and precise in its formulation. 32

As this section has demonstrated, the Court engages with elements of the rule of law from several perspectives. Perhaps more productive than seeking to position the concept of the rule of law into a binary frame of thick or thin is, as Polgari proposes, to examine its three essential elements: formal, procedural and substantive. 33 Beginning with the substantive element, the Court seemingly includes (or is capable of operationalising) all three of these elements based on the ECHR. In terms of substantive rights, several ECHR rights have proven to protect elements of the rule of law for individuals who have brought complaints before the ECtHR.

Moving on to the procedural element, the ECHR provides two avenues for bringing a complaint, for the individual under (Article 34) but also for a State, which can bring cases in accordance with Article 33. The latter provides a mechanism for any Member State to raise issues or concerns perceived to be in contravention of the European public order. Both these avenues collectively enable the ECtHR to exercise the role of a controlling agent vis-à-vis the Member States, without taking a normative stance that would be socially unacceptable in the given State, or even a display of arbitrary authority by the ECtHR. 34 The formal element of a domestic rule of law is often recalled in the case law, with a focus on legality and procedural safeguards. 35 Institutionally, the ECtHR fulfils

31 ECtHR, Krastanov v Bulgaria (Application no. 50222/99) Judgment 30 September 2004 § 57.
32 Polgári (n. 8) 59.
33 Ibid., 47.
34 Palombella (n. 20) 144.
35 Polgári (n. 8) 52.
several functions: it is another remedial level to turn to with individual applications after the national remedies have been exhausted. The ECtHR also watches over State compliance with the positive and negative human rights obligations enshrined in the ECHR. Furthermore, the ECtHR shapes the scope and content of the human rights protected by the ECHR through its case law.\(^{36}\) In this vein, the ECtHR pointed out in \textit{Wolter and Sarfert v Germany},\(^{37}\) that the rule of law as a general principle serves as “an underlying value” to the ECHR.\(^{38}\)

4. The Rule of Law and the European Public Order

In stating that the principle of the rule of law is one of the “fundamental components” of the European public order, the ECtHR has rightly signposted that the rule of law is not limited to an identity marker of the Member States, but actually is a principle that can be operationalised and which would be negated by legal arbitrariness.\(^{39}\) Thus, when the rule of law is considered from the perspective of a European public order, it becomes a general principle of governance to establish effective and meaningful democracy.\(^{40}\) But the notion of a European public order is decisively too vague to qualify as a legal concept.\(^{41}\) This, however, has not prevented the ECtHR from expressing its view that the ECHR, in addition to safeguarding individual human rights, also plays a role as a “constitutional instrument of European public order” where human

\(^{36}\) \textit{Ibid.}, 44.
\(^{38}\) \textit{Ibid.}, § 60.
\(^{39}\) ECtHR, \textit{Al-Dulimi and Montana Management Inc. v Switzerland} (Application no. 5809/08) Judgment [GC] 21 June 2016 § 145.
\(^{41}\) Kanstantsin Dzehtsiarou, \textit{Can the European Court of Human Rights Shape European Public Order?} CUP, 2022, 25.
rights are concerned. Similarly, the Court has acknowledged the European public order in the *Al-Dulimi and Montana Management Inc. v Switzerland* case. Dzehtsiarou has suggested that by mentioning the European public order, the ECtHR aims to influence and shape the European public order, despite it not being a justiciable concept under the ECHR. On the other hand, taking the stance that the ECtHR should not make any mention of contextual matters, seems to be a very extreme position to take. As will be discussed later, there may be reasons for the Court to develop a sound approach to under what conditions and in what way contextual factors are included in the case law.

In contrast to the ECHR, the Statute of the Council of Europe mentions the rule of law not only in its preamble but also in Article 3, which starts: “Every Member of the Council of Europe must accept the principle of the rule of law …” The ECtHR has argued that “the States Parties are required, in that context, to ensure a level of scrutiny of Convention compliance which, at the very least preserves the foundations of that public order.” It is, however, worth recalling that not all the States that have ratified the ECHR are members of the Council of Europe. Russia, for instance, left both the Council of Europe and renounced the ECHR in 2022.

Although the ECtHR remains restricted in what it actually can do when it comes to counteracting structural threats and supporting the rule of law, it has not refrained from expressing its view. With regard to the

---

43 *Al-Dulimi and Montana Management Inc. v Switzerland* (n. 39).
45 See further section 5.2.
46 Article 3, Council of Europe, Statute of the Council of Europe, adopted 5 May 1949 (ETS No. 001).
49 For an account that predicted this as a possible outcome already in 2020, see Bill Bowring, ‘Russia and the European Convention (or Court) of Human Rights: The End?’, *Revue québécoise de droit international* 2020, 201–218.
restrictions experienced by Mr Navalnyy, the Grand Chamber iterated the following: “the restriction in question would have affected not merely the applicant alone, or his fellow opposition activists and supporters, but the very essence of democracy as a means of organising society”. Given that there is a contextual but fundamental connection between organising society, the rule of law, democracy and human rights in the European public order, the question arises regarding to what extent Article 18 can function as a tool to, if not promote, then at least maintain or prevent the rule of law from backsliding in the Council of Europe’s Member States. These are the matters we shall delve into further in the following section.

5. Upholding the Rule of Law in the Public Order of Europe with the Support of Article 18

Article 18 of the ECHR states that “The restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.” It took quite some time before the ECtHR finally put this provision into effective use and found a violation of Article 18, which it did in 2004. The ECtHR first came to such a conclusion in Gusinskiy v Russia. In this case, the ECtHR held that there had been a violation of Article 18 taken in conjunction with Article 5.

The conception of Article 18 is based on mala fide, quite the opposite of the bona fide presumption that traditionally underpins human rights provisions. Article 18, therefore, cannot easily escape being seen as an anomaly. The prohibition of the abuse of rights in positive international

50 ECtHR, Navalnyy v Russia (Applications nos. 29580/12 and 4 others) Judgment [GC], 15 November 2018, 174.
51 Article 18, ECHR (n. 2).
52 ECtHR, Gusinskiy v Russia (Application no. 70276/01) Judgment 19 May 2004.
law is widely discussed in the literature.54 Furthermore, it has been argued that it is a general principle of law, which can be found in various legal systems, also in international law.55 The inclusion of a mala fide provision in the ECHR is not unique to the human rights regimes: a similar feature is found in Article 30 of the American Convention of Human Rights.56

In the following section, the background to Article 18 of the ECHR is first briefly outlined. Next, the ECtHR’s contemporary perception and the use made of this provision are presented. Lastly, it is noted that the operationalisation of Article 18 brings to the forefront the intrinsic connection between law and politics that underpins the discussions on the rule of law.

5.1 The Path on Which Article 18 Came of Age

Article 18, somewhat peculiar in its content, has been held to be one of the human rights tools available against the backsliding of the rule of law in Europe.57 This provision is not based on the premise of good faith which underpins the ECHR at large. In stark contrast to the other provisions in the ECHR, Article 18 is included for such situations when States infringe on human rights in bad faith.58 Article 18 is parasitical to the ECHR provisions, as is the case with Article 14, the right to non-dis-

56 Article 30 reads: “The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.” 1969 American Convention on Human Rights, OAS Treaty Series No. 36, 1144 UNTS 123, entered into force 18 July 1978.
Application of Article 18: Seeking to Uphold the Rule of Law under the ECHR

crimination. Although Article 18 is applied in conjunction with other ECHR provisions, the ECtHR can find violations solely under Article 18. In any event, Article 18 extends further than to the provisions with textual limitation clauses, which makes the provision autonomous in this aspect.

The documentation of the drafting history of Article 18 is sparse. According to the travaux préparatoires of the ECHR, the provision should be regarded as one of the general principles of the ECHR and an “application of the theory of misapplication of power”. The drafters of the ECHR included Article 18 to be relied on in the event States claimed to organise and protect human rights in their territory, with measures that, however, have the opposite effect in practice. It cannot go unnoticed that this ambition encapsulates the post-war sentiment of ‘never again’ which prevailed among the drafters of ECHR at that time. Additionally, it can be argued that the intention was to codify an existing principle of international law, namely, the principle that the abuse of power constitutes a violation of law.

The phrasing of Article 18 “shall not be applied for any purpose other than” aligns with the wording in the limitation clauses of the ECHR. Furthermore, Article 18 has a focus on the component of intention or purpose in the permissive ECHR restrictions. The provision only applies in situations that fulfil three cumulative elements. First, the provision applies only to State action. Second, this action must concern a limitation of ECHR rights with explicit or implicit permissible limitation clauses,

59 At one stage of the ECHR drafting process, these two provisions were in fact part of the same draft Article 13. Ibid., 48.
60 There can be a breach of Article 18 even if there is no breach of the Article in conjunction with which it applies. ECtHR, Merabishvili v Georgia (Application no. 72508/13) Judgment [GC] 28 November 2017, § 288.
62 Travaux Préparatoires Article 18 – CDH(75)11, available at: Library_TP_Art_18_CDH(75)11_BIL.pdf – ECHR – ECHR / CEDH (coe.int) [20230731], 8.
63 Ibid., 3.
64 Heri (n. 58) 26.
65 Ibid., 48.
66 Article 18, ECHR (n. 2).
67 Schabas (n. 61) 624.
and third, this limiting State action must be carried out in a manner which feigns a legitimate aim. Due to the linkage to limitation provisions, it is not possible to complain under Article 18 in conjunction with an absolute right; this is held to be incompatible with the Convention ratione materiae. 68

Commonly, the claimant bringing an Article 18 case is someone who expresses criticism towards their government. 69 Often the State exerts repression “against an opposition which it considers dangerous”. 70 Thus, victims of Article 18 violations tend to be members of civil society, human rights defenders, politicians from opposition parties or journalists. 71 In this regard, the ECtHR has pointed out that an Article 18 violation can be of particular gravity due to the key function that a claimant’s role or work has in a democratic society. A case in point is Kogan and Others v Russia, where the ECtHR underlined the prominent role of human rights defenders in a democratic society. 72 The States which most frequently figure in the ECtHR Article 18 case law are also to a large extent States that can be termed newer Member States of the Council of Europe. Furthermore, Article 18 violations seemingly occur in countries that have a track record of diminishing the respect for the rule of law. 73 These States often exercise “strong control over the judiciary or curb the powers of the judiciary and thus prevent the Convention standards from having any real purchase as domestic legal remedies.” 74 The finding of an Article 18 violation by the ECtHR is indicative of domestic authorities having ventured outside of what is seen as the rule of law as a defining element of the European public order. Such findings have increased steadily in the last 20 years.

---

69 Çali (n. 57) 280.
70 Heri cites Teitgen’s speech from one of the ECHR drafting sessions. Heri (n. 58) 50.
71 Çali (n. 57) 280.
72 ECtHR Kogan and Others v Russia (Application No. 54003/20) Judgment 7 March 2023 § 77.
73 Çali (n. 57) 280.
74 Çali (n. 48) 252.
5.2 Article 18 in Current ECtHR Case Law

By the end of 2020, the Court had delivered a total of 18 Article 18 violation judgments.\(^75\) Three years later, in 2023, the number had increased to 27 violations of Article 18, predominantly taken in conjunction with another provision. Furthermore, the finding of an Article 18 violation has occurred in the last five years, at the time of writing. The cases in which a violation of Article 18 is found often concern the deprivation of liberty, that is Article 5 claims.\(^76\) In contrast, the ECtHR remains reluctant to find Article 18 violations when Articles 6 (right to a fair trial) and 7 (no punishment without law) are concerned.\(^77\) In essence, this hinges on whether or not Articles 6 and 7 of the ECHR contain any express or implied restrictions that can be the basis for an Article 18 examination by the ECtHR.\(^78\) Additionally, Article 18 violations have been found in connection with Article 8 (right to private life),\(^79\) Article 10 (freedom of expression)\(^80\) and Article 11 (freedom of assembly and association).\(^81\) In the early Article 18 cases, the standard of proof for establishing bad faith on behalf of a State was set so high that it was arguably nearly impossible for the claimants to reach it.\(^82\) This changed in 2017, with the case of *Merabishvili v Georgia*.\(^83\) From this case onwards, the ECtHR has settled for the standard of “beyond reasonable doubt”.\(^84\)

What has remained unclear, however, are situations with a mixed purpose – that is when the State presents a combination of a permissive and

---

\(^75\) Çalt (n. 57) 279.
\(^76\) Ibid., 280.
\(^77\) Ibid., 299.
\(^78\) For example, in relation to the right to a fair trial, the right to legal representation and the right of access to court can all be limited or restricted in certain circumstances. Leach and Donald (n. 4) 403.
\(^79\) E.g., ECtHR, *Kogan and Others v Russia* (Application No. 54003/20) Judgment 7 March 2023, § 78.
\(^81\) E.g., ECtHR, *Navalnyy v Russia* (n. 50) § 176. Note that in this case the ECtHR found an Article 18 violation when taken in conjunction with both Articles 5 and 11.
\(^83\) *Merabishvili v Georgia* (n. 60).
\(^84\) Ibid., § 314.
a non-permissive ground for the limitation(s) introduced. The ECtHR makes reference to the ideals and values of a democratic society governed by the rule of law, as an integral purpose of the ECHR, when it scrutinises the level and kind of alleged ulterior purpose under Article 18. The ulterior motive for limitation can be fully or in part ulterior from the beginning. In other cases, the motive may transform from a permissive aim to a non-permissive one. Linked to this is also the malpractice of “chain detentions”. In Selahattin Demirtaş, the applicant was re-detained upon release, based on the same facts, but on a different charge. The ECtHR decisively held that this conduct constituted a continuing violation of Article 5 in conjunction with Article 18.

When a permissive purpose is tainted with a non-permissive purpose of limitation, the ECtHR examines the circumstances of the case and seeks to assess “the nature and degree of reprehensibility of the alleged ulterior purpose”. What is not clear, is how the ECtHR assesses how reprehensive the ulterior purpose is. Seemingly, the context may have a role to play when the ECtHR infers the State motivations from the circumstances. For instance, in the case of Selahattin Demirtaş, the ECtHR relied on external factors: “In the present case, the concordant inferences drawn from this background support the argument that the judicial authorities reacted harshly to the applicant’s conduct as one of the leaders of the opposition, to the conduct of other HDP members of parliament and elected mayors, and to dissenting voices more generally.”

In addition to the unclarities mentioned above, some ECtHR judges have raised objections as to whether Article 18 actually is the appropriate provision to apply with regard to actions of bad faith. In the Navalnyy v Russia case, some of the judges shone the spotlight on a separate issue in relation to Article 18, in a partly concurring partly dissenting Opinion. Here, five judges discussed how Article 18 relates to Article 17. In their

---

85 Heri (n. 58) 31.
86 Merabishvili (n. 60) § 307; Navalnyy v Russia [GC] (n. 50) § 165.
87 See, e.g., Demirtaş (n. 40).
88 Ibid., § 433.
89 Merabishvili v Georgia (n. 60) § 307.
90 Demirtaş (n. 40) §§ 432–436, in particular § 436.
view, Article 18 should be subsumed under Article 17.\textsuperscript{91} Heri, however, argues convincingly that these two provisions have distinct and separate features, which does not permit the latter to be subsumed under the former.\textsuperscript{92} As Heri points out, the provisions have a common aim “to prevent the creeping return of totalitarianism”.\textsuperscript{93} But their angle of approach is distinctively different, each one with their own unique merit. As discussed in this section, the purpose of Article 18 is to prevent States from applying ulterior purposes whilst feigning a legitimate aim. Article 17, on the other hand, has its attention on rights bearers, and is there to prevent the abuse of rights by their bearers.\textsuperscript{94} Thus, these two provisions seek to tackle different types of abuse.\textsuperscript{95}

Çalı has argued that the ECtHR case law under Article 18 may be a burgeoning doctrine of bad faith jurisprudence. The ECtHR approaches some States with a higher level of scrutiny and explores the relevance of applying Article 18. However, you may contend that the ECtHR no longer turns a blind eye to blatant State abuse of power.\textsuperscript{96} On the other hand, this practice means that the ECtHR can be perceived as having double standards, as well as being seen as increasingly politicised and unprincipled.\textsuperscript{97} It would seem likely that such calling into question or challenges will continue to be raised, with growing mention of contextual matters in the ECtHR case law. Nevertheless, it is here submitted that even though this shift in the ECtHR’s focus may result in the perception that “the Court [is] straying beyond legal questions into the political arena”,\textsuperscript{98} it would constitute a greater wrong for the ECtHR to turn a blind eye and keep silent when witnessing a backsliding of the rule of law. As a corollary, you have to assume that ECtHR reference to the rule of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{91} Navalnyy v Russia (n. 50). Partly concurring, partly dissenting Opinion of Judges Pejchal, Dedov, Ravarani, Eicke and Paczolay § 25.
\item \textsuperscript{92} Heri conducts an extensive discussion on the matter, see Heri, (n. 58) 45–54. For a counter-argument in addition to the partly concurring, partly dissenting Opinion in the Navalnyy case (n. 50), see Tzevelekos (n. 55) 162–167.
\item \textsuperscript{93} Ibid., 45.
\item \textsuperscript{94} Ibid., 48. States are seen as rights-bearers in this regard, through their possibility to file inter-State applications.
\item \textsuperscript{95} Ibid., 54.
\item \textsuperscript{96} Heri (n. 58) 55.
\item \textsuperscript{97} Çalı (n. 48) 270.
\item \textsuperscript{98} Leach and Donald (n. 4) 413.
\end{itemize}
\end{footnotesize}
law and the European public order is unlikely to diminish, and cannot be ignored. Furthermore, it may well be that the ECtHR seeks to strengthen its cooperation with the Committee of Ministers, in order to promote a better implementation of its judgments, if or when this is called for.

The Committee of Ministers, as the decision-making body of the Council of Europe has the full scale of political tools at hand, which allows it to move “from encouragement to warning and shaming”⁹⁹ In contrast to the ECtHR, the Committee of Ministers has a wide range of soft tools available to it.¹⁰⁰ In 2010, the Committee of Ministers, decided on a two-track system for supervising the execution of ECtHR judgments, distinguishing between a standard procedure and an enhanced procedure.¹⁰¹ The latter is selected if urgent individual measures are required, when pilot judgments are concerned, when the ECtHR/Committee of Ministers has identified a structural or in other ways complex problem or cases filed as inter-state cases under Article 33.¹⁰² Scholars have described this as a shift in the ECtHR’s case law towards more process-based reviews.¹⁰³ Part of this change is that the ECtHR sees the quality of reasoning of national courts as increasingly significant. Against this background, it is not surprising that the execution of Article 18 judgments is considered “as a separate, serious, and urgent matter requiring continuous and demanding supervision”.¹⁰⁴ Considering the individual claimants, the Committee of Ministers has also requested individual measures when there have been findings of Article 18 violations.¹⁰⁵

---

⁹⁹ Çali (n. 57) 297.
¹⁰⁰ Ibid., 300.
¹⁰² Çali (n. 57) 277.
¹⁰⁴ Çali (n. 57) 300.
6. To Conclude

In this chapter, it has been pointed out that the principle of the rule of law in and of itself is not a justiciable right under the ECHR. However, it remains a principle to be reckoned with and not only in political discourse. It is a fact that for almost 50 years, the ECtHR has made reference to the rule of law in its case law. Arguably, it can be seen as a general principle under the ECHR, under the auspices of the European public order. Furthermore, certain elements associated with the rule of law are justiciable under the ECHR.

Of particular interest in this chapter has been the analysis of Article 18, the only provision in the ECHR which is crafted on the presumption of bad faith. The provision is not autonomous: it can only come into play with regard to convention rights that explicitly or implicitly permit limitations. Since 2004, the findings of violations of Article 18 have increased steadily. Therefore, you have to acknowledge that the ECtHR and the Committee of Ministers no longer turn a blind eye to certain traits of bad faith and disregard for the ECtHR’s judgments. At the same time, establishing that a State has introduced limitations for ulterior purposes, often requires the ECtHR to consider contextual aspects in its reasoning, which must be seen as potentially problematic.

It is clear that since the provision deals with breaches that are carried out in bad faith whilst feigning grounds of permissive limitations/constraints, establishing evidence can be particularly problematic. Whilst it must be seen as a positive development that the standard of evidence has been brought to a level that is manageable by claimants, it must be acknowledged that the standard of ‘beyond reasonable doubt’ has in practice made the ECtHR engage more with how to legally approach bad faith on the part of Member States. The increased reliance on contextual elements in this regard puts the tangled relationship between politics and law centre stage, decisively prompting the ECtHR as well as the Committee of Ministers to further explore appropriate responses to how the rule of law in the European public order is best upheld and promoted.
References

1949 Statute of the Council of Europe, adopted 5 May 1949 (ETS No. 001)
1950 Convention for the Protection of Human Rights and Fundamental Freedoms, (as amended by the protocols) [ECHR] adopted 3 September 1953, 213 UNTS 222
1969 American Convention on Human Rights, OAS Treaty Series No. 36, 1144
UNTS 123, entered into force 18 July 1978
Bingham, T., *The Rule of Law*, Allen Lane, 2010
Bowring, B., ”Russia and the European Convention (or Court) of Human Rights: The End?”, *Revue québécoise de droit international*, 2020
Committee of Ministers, “Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements” (10 May 2006)
Dzehtsiarou, K., *Can the European Court of Human Rights Shape European Public Order?*, CUP, 2022
ECtHR, *Aliyev v Azerbaijan* (Applications nos. 68762/14 and 71200/14) Judgment 20 September 2018


ECtHR, *Golder v the United Kingdom* (Application no. 4451/70) Judgment 21 February 1975

ECtHR, *Gusinskiy v Russia* (Application no. 70276/01) Judgment 19 May 2004


ECtHR *Kogan and Others v Russia* (Application No. 54003/20) Judgment 7 March 2023

ECtHR, *Krastanov v Bulgaria* (Application no. 50222/99) Judgment 30 September 2004


ECtHR, *Miroslava Todorova v Bulgaria* (Application No. 40072/13) Judgment 19 October 2021

ECtHR, *Navalnyy v Russia* (Applications nos. 29580/12 and 4 others) Judgment [GC] 15 November 2018


ECtHR, *Wolter and Sarfert v Germany* (Application no. 59752/13, 66277/13) Judgment 23


Kolb, R., *Good Faith in International Law*, Hart, 2017


Lemmens, P., ”The Contribution of the European Court of Human Rights to the Rule of Law”, in Geert De Baere and Jan Wouters (eds), International and Supranational Courts and the Rule of Law Edward Elgar, 2015, 225–241

Neumann, M., The Rule of Law. Politicizing Ethics Ashgate, 2002

Palombella, G., ”Non-Arbitrariness, Rule of Law and the ”Margin of Appreciation”: Comments on Andreas Follesdal”, Global Constitutionalism 10(1) 2021, 139–150

Polgári, E., ”In Search of a Standard: References to the Rule of Law in the Case-Law of the European Court of Human Rights”, ICL Journal 14(1) 2020, 43–69

Raz, J., The Authority of Law, OUP, 1979


Travaux Préparatoires Article 18 - CDH(75)11, available at: Library_TP_Art_18_CDH(75)11_BIL.pdf - ECHR - ECHR / CEDH (coe.int) [20230731]


Wohlwend, D., The International Rule of Law, Edward Elgar, 2021