

I. Introduction

1 . At its 86th plenary session (March 2011), the Venice Commission adopted the Report on the Rule of Law (CDL-AD(2011)003rev). This report identified common features of the Rule of Law, *Rechtsstaat* and *Etat de droit*. A first version of a checklist to evaluate the State of the Rule of Law in single States was appended to this report.

2. On 2 March 2012, the Venice Commission organised, under the auspices of the UK Chairmanship of the Committee of Ministers of the Council of Europe, in co-operation with the Foreign and Commonwealth Office of the United Kingdom and the Bingham Centre for the Rule of Law, a conference on “The Rule of Law as a practical concept”. The conclusions of this conference underlined that the Venice Commission would develop the checklist by, *inter alia*, including some suggestions made at the conference.

3. A group of experts made up of Mr Bartole, Ms Bilkova, Ms Cleveland, Mr Craig, Mr Helgesen, Mr Hoffmann-Riem, Mr Tuori, Mr van Dijk and Sir Jeffrey Jowell prepared the present detailed version of the checklist.

4. The Venice Commission wishes to acknowledge the contribution of the Bingham Centre for the Rule of Law, notably for the compilation of the selected standards in part III. The Commission also wishes to thank the secretariats of the Consultative Council of European Judges (CCJE), the European Commission against Racism and Intolerance (ECRI), the Framework Convention for the Protection of National Minorities and the Group of States against Corruption (GRECO), as well as of OSCE/ODIHR and of the European Union Agency for Fundamental Rights (FRA) for their co-operation.

5. The introductory part (I) first explains the purpose and scope of the report and then develops the interrelations between the Rule of Law on the one side and democracy and human rights on the other side (“the Rule of Law in an enabling environment”).
6. The second part (II, benchmarks) is the core of the checklist and develops the various aspects of the Rule of Law identified in the 2011 report: legality; legal certainty; prevention of abuse of powers; equality before the law and non-discrimination and access to justice; while the last chapter provides two examples of particular challenges to the Rule of Law (corruption and conflict of interest, and collection of data and surveillance).
7. The third part (III, selected standards) lists the most important instruments of hard and soft law addressing the issue of the Rule of Law.
8. The present checklist was discussed by the Sub-Commission on the Rule of Law on 17 December 2015 and on 10 March 2016, and was subsequently adopted by the Venice Commission at its 106th plenary session (Venice, 11-12 March 2016).

A. Purpose and scope

9. The Rule of Law is a concept of universal validity. The “need for universal adherence to and implementation of the Rule of Law at both the national and international levels” was endorsed by all Members States of the United Nations in the 2005 Outcome Document of the World Summit (§ 134). The Rule of Law, as expressed in the Preamble and in Article 2 of the Treaty on European Union (TEU), is one of the founding values that are shared between the European Union (EU) and its Member States.¹ In its 2014 New Framework to Strengthen the Rule of Law, the European Commission recalls that “the principle of the Rule of Law has progressively become a dominant organisational model of modern constitutional law and international organisations /.../ to regulate the exercise of public powers” (pp. 3-4). In an increasing number of cases States refer to the Rule of Law in their national constitutions.²

10. The Rule of Law has been proclaimed as a basic principle at universal level by the United Nations – for example in the Rule of Law Indicators –, and at regional level by the Organization of American States - namely in the Inter-American Democratic Charter - and the African Union - in particular in its

1. See, for example, FRA (Fundamental Rights Agency) (2016), *Fundamental rights: challenges and achievements in 2015 – FRA Annual report 2013*, Luxembourg, Publications Office of the European Union (Publications Office), Chapter 7 (upcoming).

2. Cf. CDL-AD(2011)003rev, § 30ff.

Constitutive Act. References to the Rule of Law may also be found in several documents of the Arab League.

11. The Rule of Law is mentioned in the Preamble to the Statute of the Council of Europe as one of the three “principles which form the basis of all genuine democracy”, together with individual freedom and political liberty. Article 3 of the Statute makes respect for the principle of the Rule of Law a precondition for accession of new member States to the Organisation. The Rule of Law is thus one of the three intertwined and partly overlapping core principles of the Council of Europe, with democracy and human rights. The close relationship between the Rule of Law and the democratic society has been underlined by the European Court of Human Rights through different expressions: “democratic society subscribing to the Rule of Law”, “democratic society based on the Rule of Law” and, more systematically, “Rule of Law in a democratic society”. The achievement of these three principles - respect for human rights, pluralist democracy and the Rule of Law - is regarded as a single objective - the core objective - of the Council of Europe.

12. The Rule of Law has been systematically referred to in the major political documents of the Council of Europe, as well as in numerous Conventions and Recommendations. The Rule of Law is notably mentioned as an element of common heritage in the Preamble to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as a founding principle of European democracies in Resolution Res(2002)12 establishing the European Commission for the Efficiency of Justice (CEPEJ), and as a priority objective in the Statute of the Venice Commission. However, the Council of Europe texts have not defined the Rule of Law, nor has the Council of Europe created any specific monitoring mechanism for Rule of Law issues.

13. The Council of Europe has nevertheless acted in several respects with a view to promoting and strengthening the Rule of Law through several of its bodies, notably the European Court of Human Rights (ECtHR), the European Commission for the Efficiency of Justice (CEPEJ), the Consultative Council of Judges of Europe (CCJE), the Group of States against Corruption (GRECO), the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, the Commissioner for Human Rights and the Venice Commission.

14. In its Report on the Rule of Law of 2011,³ the Venice Commission examined the concept of the Rule of Law, following Resolution 1594(2007) of the Parliamentary Assembly which drew attention to the need to ensure a correct interpretation of the terms “Rule of Law”, “Rechtsstaat” and “Etat de

3. CDL-AD(2011)003rev.

droit” or “prééminence du droit”, encompassing the principles of legality and of due process.

15. The Venice Commission analysed the definitions proposed by various authors coming from different systems of law and State organisation, as well as diverse legal cultures. The Commission considered that the notion of the Rule of Law requires a system of certain and foreseeable law, where everyone has the right to be treated by all decision-makers with dignity, equality and rationality and in accordance with the laws, and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures. The Commission warned against the risks of a purely formalistic concept of the Rule of Law, merely requiring that any action of a public official be authorised by law. “Rule by Law”, or “Rule by the Law”, or even “Law by Rules” are distorted interpretations of the Rule of Law.⁴

16. The Commission also stressed that individual human rights are affected not only by the authorities of the State, but also by hybrid (State-private) actors and private entities which perform tasks that were formerly the domain of State authorities, or include unilateral decisions affecting a great number of people, as well as by international and supranational organisations. The Commission recommended that the Rule of Law principles be applied in these areas as well.

17. The Rule of Law must be applied at all levels of public power. *Mutatis mutandis*, the principles of the Rule of Law also apply in private law relations. The following definition by Tom Bingham covers most appropriately the essential elements of the Rule of Law: “All persons and authorities within the State, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts”.⁵

18. In its report, the Commission concluded that, despite differences of opinion, consensus exists on the core elements of the Rule of Law as well as on those of the Rechtsstaat and of the Etat de droit, which are not only formal but also substantive or material (materieller Rechtsstaatsbegriff). These core elements are: (1) Legality, including a transparent, accountable and democratic process for enacting law; (2) Legal certainty; (3) Prohibition of arbitrariness; (4)

4. See Parliamentary Assembly of the Council of Europe, Motion for a resolution presented by Mr Holovsky and others, The principle of the rule of law, Doc. 10180, § 10. In this context, see also the Copenhagen document of the CSCE, para. 2: “[participating States] consider that the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression.”

5. Tom Bingham, *The Rule of Law* (2010).

Access to justice before independent and impartial courts, including judicial review of administrative acts; (5) Respect for human rights; and (6) Non-discrimination and equality before the law.

19. Since its 2011 Report was oriented towards facilitating a correct and consistent understanding and interpretation of the notion of the Rule of Law and, therefore, aimed at facilitating the practical application of the principles of the Rule of Law, a “checklist for evaluating the State of the Rule of Law in single countries” was appended to the report, listing these six elements, broken down into several sub-parameters.

20. In 2012, at a conference which the Venice Commission organised in London under the auspices of the UK Foreign Office and in co-operation with the Bingham Centre for the Rule of Law, it launched the project to further develop the checklist as a ground-breaking new, functional approach to assessing the State of the Rule of Law in a given State.

21. In 2013, the Council of the European Union has begun implementing a new Rule of Law Dialogue with the member States, which would take place on an annual basis. It underlined that “respecting the rule of law is a prerequisite for the protection of fundamental rights” and called on the Commission “to take forward the debate in line with the Treaties on the possible need for and shape of a collaborative and systematic method to tackle these issues”.⁶ In 2014, the European Commission adopted a mechanism for addressing systemic Rule of Law issues in Member States of the European Union (EU). This “new EU Framework to strengthen the Rule of Law” establishes an early warning tool based on “the indications received from available sources and recognised institutions, including the Council of Europe”; “[i]n order to obtain expert knowledge on particular issues relating to the rule of law in Member States, the (European) Commission ... will as a rule and in appropriate cases, seek the advice of the Council of Europe and/or its Venice Commission”.⁷

22. At the United Nations level, following the publication of “Rule of Law Indicators” in 2011,⁸ the United Nations General Assembly adopted in 2012 a

6. Council conclusions on fundamental rights and rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental Rights of the European Union, Justice and Home Affairs Council Meeting, Luxembourg, 6-7 June 2013, part c, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/137404.pdf.

7. Communication from the European Commission to the European Parliament and the Council, ‘A new EU Framework to strengthen the Rule of Law’, COM(2014) 158 final/2, http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf.

8. This document is a joint publication of the United Nations Department of Peacekeeping Operations (DPKO) and the Office of the United Nations High Commissioner for Human Rights (OHCHR).

Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, recognising that the “Rule of Law applies to all States equally, and to international organizations”.

23. The sustainable development agenda with its 17 Sustainable Development Goals (SDGs) and 169 targets to be delivered by 2030 was unanimously adopted by the UN General Assembly in September 2015. The SDGs, which comprise a number of Goals, are aimed to be truly transformative and have profound implications for the realization of the agenda, envisaging “[a world] in which democracy, good governance and the rule of law, as well as an enabling environment at the national and international levels, are essential for sustainable development...” Goal 16 commits States to “Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels”. The achievement of Goal 16 will be assessed against a number of targets, some of which incorporate Rule of Law components, such as the development of effective accountable and transparent institutions (target 16.6) and responsive, inclusive participatory and representative decision making at all levels (target 16.7). However, it is Target 16.3, committing States to “Promote the rule of law at the national and international levels and ensure equal access to justice for all” that offers a unique opportunity for revitalizing the relationship between citizens and the State. This Checklist could be a very important tool to assist in the qualitative measurement of Rule of Law indicators in the context of the SDGs.

24. The present checklist is intended to build on these developments and to provide a tool for assessing the Rule of Law in a given country from the view point of its constitutional and legal structures, the legislation in force and the existing case-law. The checklist aims at enabling an objective, thorough, transparent and equal assessment.

25. The checklist is mainly directed at assessing legal safeguards. However, the proper implementation of the law is a crucial aspect of the Rule of Law and must therefore also be taken into consideration. That is why the checklist also includes certain complementary benchmarks relating to the practice. These benchmarks are not exhaustive.

26. Assessing whether the parameters have been met requires sources of verification (standards). For legal parameters, these will be the law in force, as well as, for example, in Europe, the legal assessments thereof by the European Court of Human Rights, the Venice Commission, Council of Europe monitoring bodies and other institutional sources. For parameters relating to the practice, multiple sources will have to be used, including institutional ones such as the CEPEJ and the European Union Agency for Fundamental Rights.

27. The checklist is meant as a tool for a variety of actors who may decide to carry out such an assessment: These may include Parliaments and other State authorities when addressing the need and content of legislative reform, civil society and international organisations, including regional ones – notably the Council of Europe and the European Union. Assessments have to take into account the whole context, and avoid any mechanical application of specific elements of the checklist.

28. It is not within the mandate of the Venice Commission to proceed with Rule of Law assessments in given countries on its own initiative; however, it is understood that when the Commission, upon request, deals with Rule of Law issues within the framework of the preparation of an opinion relating a given country, it will base its analysis on the parameters of the checklist within the scope of its competence.

29. The Rule of Law is realised through successive levels achieved in a progressive manner: the more basic the level of the Rule of Law, the greater the demand for it. Full achievement of the Rule of Law remains an on-going task, even in the well-established democracies. Against this background, it should be clear that the parameters of the checklist do not necessarily all have to be cumulatively fulfilled in order for a final assessment on compliance with the Rule of Law to be positive. The assessment will need to take into account which parameters are not met, to what extent, in what combination etc. The issue must be kept under constant review.

30. The checklist is neither exhaustive nor final: it aims to cover the core elements of the Rule of Law. The checklist could change over time, and be developed to cover other aspects or to go into further detail. New issues might arise that would require its revision. The Venice Commission will therefore provide for a regular updating of the Checklist.

31. The Rule of Law and human rights are interlinked, as the next chapter will explain. The Rule of Law would just be an empty shell without permitting access to human rights. Vice-versa, the protection and promotion of human rights are realised only through respect for the Rule of Law: a strong regime of Rule of Law is vital to the protection of human rights. In addition, the Rule of Law and several human rights (such as fair trial and freedom of expression) overlap.⁹ While recognising that the Rule of Law can only be fully realised in an environment that protects human rights, the checklist

9. See FRA (2014), *An EU internal strategic framework for fundamental rights: joining fundamental rights: joining forces to achieve better results*. Luxembourg, Publications Office of the European Union (Publications Office).

will expressly deal with human rights only when they are linked to specific aspects of the Rule of Law.¹⁰

32. Since the Venice Commission is a body of the Council of Europe, the checklist emphasises the legal situation in Europe, as expressed in particular in the case-law of the European Court of Human Rights and also of the Court of Justice of the European Union within its specific remit. The Rule of Law is however a universal principle, and this document also refers, where appropriate, to developments at global level as well as in other regions of the world, in particular in part III enumerating international standards.

B. The Rule of Law in an enabling environment

33. The Rule of Law is linked not only to human rights but also to democracy, *i.e.* to the third basic value of the Council of Europe. Democracy relates to the involvement of the people in the decision-making process in a society; human rights seek to protect individuals from arbitrary and excessive interferences with their freedoms and liberties and to secure human dignity; the Rule of Law focuses on limiting and independently reviewing the exercise of public powers. The Rule of Law promotes democracy by establishing accountability of those wielding public power and by safeguarding human rights, which protect minorities against arbitrary majority rules.

34. The Rule of Law has become “a global ideal and aspiration”,¹¹ with a common core valid everywhere. This, however, does not mean that its implementation has to be identical regardless of the concrete juridical, historical, political, social or geographical context. While the main components or “ingredients”¹² of the Rule of Law are constant, the specific manner in which they are realised may differ from one country to another depending on the local context; in particular on the constitutional order and traditions of the country concerned. This context may also determine the relative weight of each of the components.

35. Historically, the Rule of Law was developed as a means to restrict State (governmental) power. Human rights were seen as rights against intrusions by holders of this power (“negative rights”). In the meantime the perception

10. On the issue, see in particular the Report on the Rule of Law adopted by the Venice Commission, CDL-AD(2011)003rev, § 59-61. The report also underlines (§ 41) that “[a] *consensus* can now be found for the necessary elements of the Rule of Law as well as those of the Rechtsstaat which are not only formal *but also substantial or material*” (emphasis added).

11. *Rule of Law. A Guide for Politicians*, HIIL, Lund/The Hague, 2012, p. 6.

12. Venice Commission Report on the Rule of Law, CDL-AD(2011)003rev, § 37.

of human rights has changed in many States as well as in European and international law. There are several differences in the details, but nonetheless there is a trend to expand the scope of civil and political rights, especially by acknowledging positive obligations of the State to guarantee effective legal protection of human rights vis-à-vis private actors. Relevant terms are “positive obligations to protect”, “horizontal effects of fundamental rights” or “Drittwirkung der Grundrechte”.

36. The European Court of Human Rights has acknowledged positive obligations in several fields, for instance related to Art. 8 ECHR.¹³ In several decisions the Court has developed specific positive obligations of the State by combining Art. 8 ECHR and the Rule of Law.¹⁴ Even though positive obligations to protect could not be solely derived from the Rule of Law in these cases, the Rule of Law principle creates additional obligations of the State to guarantee that individuals under their jurisdiction have access to effective legal means to enforce the protection of their human rights, in particular in situations when private actors infringe these rights. Thus the Rule of Law creates a benchmark for the quality of laws protecting human rights: legal provisions in this field – and beyond¹⁵ – have to be, *inter alia*, clear and predictable, and non-discriminatory, and they must be applied by independent courts under procedural guarantees equivalent to those applied in conflicts resulting from interferences with human rights by public authorities.

37. One of the relevant contextual elements is the legal system at large. Sources of law which enshrine legal rules, thus granting legal certainty, are not identical in all countries: some States adhere largely to statute law, save for rare exceptions, whereas others include adherence to the common law judge-made law.

38. States may also use different means and procedures - for example related to the fair trial principle - in criminal proceedings (adversarial system as compared to inquisitorial system, right to a jury as compared to the resolution of criminal cases by judges). The material means that are instrumental in guaranteeing fair trial, such as legal aid and other facilities, may also take different forms.

39. The distribution of powers among the different State institutions may also impact the context in which this checklist is considered. It should be

13. See for example ECtHR, *Centro Europe 7 and di Stefano v. Italy*, 38433/09, 7 June 2012, § 134, 156; *Bărbulescu v. Romania*, 61496/08, 12 January 2016, § 52ff.

14. See ECtHR, *Sylvester v. Austria*, 36812/97 and 40104/98, 24 April 2003, § 63; *P.P. v. Poland*, 8677/03, 8 January 2008, § 88.

15. As Rule of Law guarantees apply not only to human rights law but to all laws.

well-adjusted through a system of checks and balances. The exercise of legislative and executive power should be reviewable for its constitutionality and legality by an independent and impartial judiciary. A well-functioning judiciary, whose decisions are effectively implemented, is of the highest importance for the maintenance and enhancement of the Rule of Law.

40. At the international level, the demands and implications of the Rule of Law reflect the particularities of the international legal system. In many respects that system is far less developed than national constitutional and legal systems. Apart from special regional systems like that of the European Union, international systems have no permanent legislator, and for most cases no judiciary with obligatory jurisdiction, while the democratic characteristics in decision-making are still very weak.

41. The European Union's supranational nature led it to develop the concept of Rule of Law as a general principle of law applicable to its own legal system. According to the case law of the Court of Justice of the European Union, the Rule of Law includes the supremacy of law, the institutional balance, judicial review, (procedural) fundamental rights, including the right to a judicial remedy, as well as the principles of equality and proportionality.

42. The contextual elements of the Rule of Law are not limited to legal factors. The presence (or absence) of a shared political and legal culture within a society, and the relationship between that culture and the legal order help to determine to what extent and at what level of concreteness the various elements of the Rule of Law have to be explicitly expressed in written law. Thus, for instance, national traditions in the area of dispute settlement and conflict resolution will have an impact upon the concrete guarantees of fair trial offered in a country. It is important that in every State a robust political and legal culture supports particular Rule of Law mechanisms and procedures, which should be constantly checked, adapted and improved.

43. The Rule of Law can only flourish in a country whose inhabitants feel collectively responsible for the implementation of the concept, making it an integral part of their own legal, political and social culture.

II. Benchmarks

A. Legality¹⁶

1. Supremacy of the law

Is supremacy of the law recognised?

- i. Is there a written Constitution?
- ii. Is conformity of legislation with the Constitution ensured?
- iii. Is legislation adopted without delay when required by the Constitution?
- iv. Does the action of the executive branch conform with the Constitution and other laws?¹⁷
- v. Are regulations adopted without delay when required by legislation?
- vi. Is effective judicial review of the conformity of the acts and decisions of the executive branch of government with the law available?
- vii. Does such judicial review also apply to the acts and decisions of independent agencies and private actors performing public tasks?
- viii. Is effective legal protection of individual human rights vis-à-vis infringements by private actors guaranteed?

16. The principle of legality is explicitly recognised as an aspect of the Rule of Law by the European Court of Justice, see ECJ, C-496/99 P, *Commission v. CAS Succhi di Frutta*, 29 April 2004, § 63.

17. This results from the principle of separation of powers, which also limits the discretion of the executive: cf. CM(2008)170, The Council of Europe and the Rule of Law, § 46.

44. State action must be in accordance with and authorised by the law. Whereas the necessity for judicial review of the acts and decisions of the executive and other bodies performing public tasks is universally recognised, national practice is very diverse on how to ensure conformity of legislation with the Constitution. While judicial review is an effective means to reach this goal, there may also be other means to guarantee the proper implementation of the Constitution to ensure respect for the Rule of Law, such as a priori review by a specialised committee.¹⁸

2. Compliance with the law¹⁹

Do public authorities act on the basis of, and in accordance with standing law?²⁰

- i. Are the powers of the public authorities defined by law?²¹
- ii. Is the delineation of powers between different authorities clear?
- iii. Are the procedures that public authorities have to follow established by law?
- iv. May public authorities operate without a legal basis? Are such cases duly justified?
- v. Do public authorities comply with their positive obligations by ensuring implementation and effective protection of human rights?
- vi. In cases where public tasks are delegated to private actors, are equivalent guarantees established by law?²²

45. A basic requirement of the Rule of Law is that the powers of the public authorities are defined by law. In so far as legality addresses the actions of

18. The Venice Commission is in principle favourable to full review of constitutionality, but a proper implementation of the Constitution is sufficient: cf. CDL-AD(2008)010, Opinion on the Constitution of Finland, § 115ff. See especially the section on Constitutional Justice (II.E.3).

19. On the hierarchy of norms, see CDL-JU(2013)020, Memorandum – Conference on the European standards of Rule of Law and the scope of discretion of powers in the member States of the Council of Europe (Yerevan, Armenia, 3-5 July 2013).

20. The reference to « law » for acts and decisions affecting human rights is to be found in a number of provisions of the European Convention on Human Rights, including Article 6.1, 7 and Articles 8.2, 9.2, 10.2 and 11.2 concerning restrictions to fundamental freedoms. See, among many other authorities, ECtHR *Amann v. Switzerland*, 27798/95, 16 February 2000, § 47ff; *Slivenko v. Latvia*, 48321/99, 9 October 2003, § 100; *X. v. Latvia*, 27853/09, 26 November 2013, § 58; *Kurić and Others v. Slovenia*, 26828/06, 12 March 2014, § 341.

21. Discretionary power is, of course, permissible, but must be controlled. See below II.C.1.

22. Cf. below II.A.8.