is interesting to observe – especially in the context of the *ultra vires* action of the Polish executive and legislative organs which has resulted in the marginalisation of the country's Constitutional Tribunal – that the European Commission's assessment was based, to an extent, on that of the Venice Commission's opinion when it addressed its observations to the Polish Government on 1 June 2016. Subsequently, on 27 July 2016 and 21 December 2016 the European Commission triggered, for the first time, its 'Rule of Law Framework' mechanism, as it found that there existed a "*systematic threat to the rule of law*" in Poland.[45] This 'inter-play' between the EU Commission's Rule of Law Framework mechanism and the work of the Venice Commission has now been reinforced by the latter's adoption of its Rule of Law Checklist.

[45] Para. 72 of Commission Recommendation of 27 July 2017, doc. C(2016) 5703 final, available at: http://ec.europa.eu/justice/effective-justice/files/recommendation-rule-of-law-poland-20160727_en.pdf, and para. 6 of Commission Recommendation (EU) 2017/146 of 21 December 2016 regarding the rule of law complementary to Recommendation (EU) 2016/1374 available at : http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2017.022.01.0065.01.ENG

The text of the Commission's Opinion has been commented on by L. Pech, "EU Law Analysis," of 19 August 2016, available at http://eulawanalysis.blogspot.fr/2016/08/commission-opinion-of-1-june-2016.html

European Commission for Democracy through Law (Venice Commission), Strasbourg

Study No. 711/2013 of 18 March 2016, CDL-AD(2016)007 – Rule of Law Checklist – Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016) / Endorsed by the Ministers' Deputies at the 1263th Meeting (6-7 September 2016) / Endorsed by the Congress of Local and Regional Authorities of the Council of Europe at its 31st Session (19-21 October 2016)

This Checklist is also likely to be endorsed by the Parliamentary Assembly of the Council of Europe at its forthcoming part-session in Strasbourg on 9-13 October 2017, see footnote 4 above at p. 180.

Rule of Law Checklist*

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.

* Rule of Law Checklist adopted on the basis of comments by: Mr Sergio BARTOLE (Substitute Member, Italy [Professor of Law, University of Pavia, 1977-1982, subsequently at the Law Faculty of Trieste]); Ms Veronika BÍLKOVÁ (Member, Czech Republic [Lecturer at the Law Faculty of the Charles University in Prague]); Ms Sarah CLEVELAND (Member, USA [Professor of Human and Constitutional Rights, Columbia Law School, Member UN Human Rights Committee]); Mr Paul CRAIG (Substitute Member, United Kingdom [Professor of Law, University of Oxford]); Mr Jan HELGESEN (Member, Norway [formerly President and First Vice-President of the Venice Commission, Professor, University of Oslo]); Mr Wolfgang HOFFMANN-RIEM (Member, Germany [Professor of Law, former Judge on the Federal Constitutional Court, Karlsruhe (1999-2008), since 2012 Affiliate Professor, Bucerius Law School, Hamburg]); Mr Kaarlo TUORI (Member, Finland [Professor of Administrative Law, Helsinki University, First Vice-President of the Venice Commission since June 2016]); Mr Pieter VAN DIJK (Former Member, the Netherlands [Professor of Law, former Judge on the European Court of Human Rights and at the Raad van State]); Sir JEFFREY JOWELL (Former Member, United Kingdom [Emeritus Professor of Public Law at University College London, former Director of the Bingham Centre for the Rule of Law, 2010-2015]).

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, Selected standards [not reproduced here]. 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 introductive 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 [F, not reproduced here] 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 [not reproduced here]) 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 Member 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 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 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 organisations, 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

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[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, § 30 ff.

[3] CDL-AD(2011)003rev.

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) 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 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,

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[4] See Parliamentary Assembly of the Council of Europe, Motion for a resolution presented by Mr Holovaty 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).

[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).

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 to 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 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 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 beyond[15] – 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.

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[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).

[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.

[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, § 52 ff.

[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.

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 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. Legality[16]

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?

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 law[19]

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 public officials, it also requires that they have authorisation to act and that they subsequently*

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[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.

[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, § 115 ff. 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, § 47 ff. = 21 HRLJ 221 [226 f.] (2000); *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. at p. 192.

[22] Cf. below II.A.8.

act within the limits of the powers that have been conferred upon them, and consequently respect both procedural and substantive law. Equivalent guarantees should be established by law whenever public powers are delegated to private actors – especially but not exclusively coercive powers. Furthermore, public authorities must actively safeguard the fundamental rights of individuals vis-à-vis other private actors.[23]

46. *"Law" covers not only constitutions, international law, statutes and regulations, but also, where appropriate, judge-made law,*[24] *such as common-law rules, all of which is of a binding nature. Any law must be accessible and foreseeable.*[25]

3. Relationship between international law and domestic law

Does the domestic legal system ensure that the State abide by its binding obligations under international law? In particular: i. Does it ensure compliance with human rights law, including binding decisions of international courts? ii. Are there clear rules on the implementation of these obligations into domestic law?[26]

47. *The principle* pacta sunt servanda *(agreements must be kept) is the way in which international law expresses the principle of legality. It does not deal with the way in which international customary or conventional law is implemented in the internal legal order, but a State "may not invoke the provisions of its internal law as justification for its failure to perform a treaty"*[27] *or to respect customary international law.*

48. *The principle of the Rule of Law does not impose a choice between monism and dualism, but* pacta sunt servanda *applies regardless of the national approach to the relationship between international and internal law. At any rate, full domestic implementation of international law is crucial. When international law is part of domestic law, it is binding law within the meaning of the previous paragraph relating to supremacy of law (II.A.2). This does not mean, however, that it should always have supremacy over the Constitution or ordinary legislation.*

4. Law-making powers of the executive

Is the supremacy of the legislature ensured? i. Are general and abstract rules included in an Act of Parliament or a regulation based on that Act, save for limited exceptions provided for in the Constitution? ii. What are these exceptions? Are they limited in time? Are they controlled by Parliament and the judiciary? Is there an effective remedy against abuse? iii. When legislative power is delegated by Parliament to the executive, are the objectives, contents, and scope of the delegation of power explicitly defined in a legislative act?[28]

49. *Unlimited powers of the executive are,* de jure *or* de facto*, a central feature of absolutist and dictatorial systems. Modern constitutionalism has been built against such systems and therefore ensures supremacy of the legislature.*[29]

5. Law-making procedures

Is the process for enacting law transparent, accountable, inclusive and democratic? i. Are there clear constitutional rules on the legislative procedure?[30] ii. Is Parliament supreme in deciding on the content of the law? iii. Is proposed legislation debated publicly by Parliament and adequately justified (*e.g.* by explanatory reports)?[31] iv. Does the public have access to draft legislation, at least when it is submitted to Parliament? Does the public have a meaningful opportunity to provide input?[32] v. Where appropriate, are impact assessments made before adopting legislation (*e.g.* on the human rights and budgetary impact of laws)?[33]

[23] For a recent reference to positive obligations of the State to ensure the fundamental rights of individuals vis-à-vis private actors, see ECtHR *Bărbulescu v. Romania,* 61496/08, 12 January 2016, § 52 ff. (concerning Article 8 ECHR).

[24] Law "comprises statute law as well as case-law", ECtHR *Achour v. France*, 67335/01, 29 March 2006, § 42; cf *Kononov v. Latvia* [GC], 36376/04, 17 May 2010, § 185.

[25] ECtHR *The Sunday Times v. the United Kingdom (No. 1)*, 6538/74, 26 April 1979, § 46 ff. On the conditions of accessibility and foreseeability, see, *e.g.*, ECtHR *Kurić and Others v. Slovenia*, 26828/06, 26 June 2012, § 341 ff.; *Amann v. Switzerland*, 27798/95, 16 February 2000, § 50 = 21 HRLJ 221 [227] (2000); *Slivenko v. Latvia*, 48321/99, 9 October 2003, § 100. The Court of the European Union considers that the principles of legal certainty and legitimate expectations imply that "the effect of Community legislation must be clear and expectable to those who are subject to it": ECJ, 212 to 217/80, *Amministrazione delle finanze dello Stato v. SRL Meridionale Industria Salumi and Others*, 12 November 1981, § 10; or "that legislation be clear and precise and that its application be foreseeable for all interested parties": CJEU, C-585/13, *Europäisch-Iranische Handelsbank AG v. Council of the European Union*, 5 March 2015, § 93; cf. ECJ, C-325/91, *France* v *Commission*, 16 June 1993, § 26. For more details, see II.B (legal certainty), below at p. 190.

[26] Cf. Article 26 (*pacta sunt servanda*) and Article 27 (internal law and observance of treaties) of the 1969 Vienna Convention on the Law of Treaties; CDL-STD(1993)006, The relationship between international and domestic law, § 3.6 (treaties), 4.9 (international custom), 5.5 (decisions of international organisations), 6.4 (international judgments and rulings); CDL-AD(2014)036, Report on the Implementation of Human Rights Treaties in Domestic Law and the Role of Courts, § 50.

[27] Article 27 of the Vienna Convention on the Law of Treaties; see also Article 46 (Provisions of internal law regarding the competence to conclude treaties).

[28] See Article 80 of the German Constitution; Article 76 of the Italian Constitution; Article 92 of the Constitution of Poland; Article 290.1 of the Treaty on the Functioning of the European Union, which states that "[t]he essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power".

[29] ECtHR *Sunday Times*, above note 25.

[30] On the need to clarify and streamline legislative procedures, see *e.g.* CDL-AD(2012)026, § 79; cf. CDL-AD(2002)012, Opinion on the draft revision of the Romanian Constitution, § 38 ff.

[31] According to the European Court of Human Rights, exacting and pertinent review of (draft) legislation, not only *a posteriori* by the judiciary, but also *a priori* by the legislature, makes restrictions to fundamental rights guaranteed by the Convention more easily justifiable: ECtHR *Animal Defenders International v. the United Kingdom*, 48876/08, 22 April 2013, §106 ff.

[32] UN Human Rights Committee, General Comment No. 25 (1996), Article 25 (Participation in Public Affairs and the Right to Vote) – The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, – provides that "[c]itizens also take part in the conduct of public affairs by exerting influence through public debate" (§ 8). Available at http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=453883fc22&skip=0&query=general comment 25. The CSCE Copenhagen Document provides that legislation is "adopted at the end of a public procedure" and the 1991 Moscow Document (http://www.osce.org/odihr/elections/14310) states that "[L]egislation will be formulated and adopted as the result of an open process" (§ 18.1).

[33] ECtHR *Hatton v. the United Kingdom*, 36022/97, 8 July 2003, § 128: "A governmental decision-making process concerning complex issues of environmental and economic policy such as in the present case must necessarily involve appropriate investigations and studies in order to allow them to strike a fair balance between the various conflicting interests at stake." See also *Evans v. the United Kingdom,* 6339/05, 10 April 2007, § 64. About the absence of real parliamentary debate since the adoption of a statute, which took place in 1870, see *Hirst (No. 2) v. the United Kingdom,* 74025/01, 6 October 2005, § 79 = 30 HRLJ 204 [213] (2009-2010)**.** In Finland, the instructions for law-drafting include such a requirement.

vi. Does the Parliament participate in the process of drafting, approving, incorporating and implementing international treaties?

50. *As explained in the introductory part, the Rule of Law is connected with democracy in that it promotes accountability and access to rights which limit the powers of the majority.*

6. Exceptions in emergency situations

Are exceptions in emergency situations provided for by law?

i. Are there specific national provisions applicable to emergency situations (war or other public emergency threatening the life of the nation)? Are derogations to human rights possible in such situations under national law? What are the circumstances and criteria required in order to trigger an exception?

ii. Does national law prohibit derogation from certain rights even in emergency situations? Are derogations proportionate, that is limited to the extent strictly required by the exigencies of the situation, in duration, circumstance and scope?[34]

iii. Are the possibilities for the executive to derogate from the normal division of powers in emergency circumstances also limited in duration, circumstance and scope?

iv. What is the procedure for determining an emergency situation? Are there parliamentary control and judicial review of the existence and duration of an emergency situation, and the scope of any derogation thereunder?

51. *The security of the State and of its democratic institutions, and the safety of its officials and population, are vital public and private interests that deserve protection and may lead to a temporary derogation from certain human rights and to an extraordinary division of powers. However, emergency powers have been abused by authoritarian governments to stay in power, to silence the opposition and to restrict human rights in general. Strict limits on the duration, circumstance and scope of such powers is therefore essential. State security and public safety can only be effectively secured in a democracy which fully respects the Rule of Law.*[35] *This requires parliamentary control and judicial review of the existence and duration of a declared emergency situation in order to avoid abuse.*

52. *The relevant provisions of the International Covenant on Civil and Political Rights, of the European Convention on Human Rights and the American Convention on Human Rights are similar.*[36] *They provide for the possibility of derogations (as distinguished from mere limitations of the rights guaranteed) only in highly exceptional circumstances. Derogations are not possible from "the so-called absolute rights: the right to life, the prohibition of torture and inhuman or degrading treatment or punishment, and of slavery, and the* nullum crimen, nulla poena *principle" among others.*[37] *Item II.A.6.i summarises the requirements of these treaties.*

7. Duty to implement the law

What measures are taken to ensure that public authorities effectively implement the law?

i. Are obstacles to the implementation of the law analysed before and after its adoption?

ii. Are there effective remedies against non-implementation of legislation?

iii. Does the law provide for clear and specific sanctions for non-obedience of the law?[38]

iv. Is there a solid and coherent system of law enforcement by public authorities to enforce these sanctions?

v. Are these sanctions consistently applied?

53. *Although full enforcement of the law is rarely possible, a fundamental requirement of the Rule of Law is that the law must be respected. This means in particular that State bodies must effectively implement laws. The very essence of the Rule of Law would be called in question if law appeared only in the books but were not duly applied and enforced.*[39] *The duty to implement the law is threefold, since it implies obedience to the law by individuals, the duty reasonably to enforce the law by the State and the duty of public officials to act within the limits of their conferred powers.*

54. *Obstacles to the effective implementation of the law can occur not only due to the illegal or negligent action of authorities, but also because the quality of legislation makes it difficult to implement. Therefore, assessing whether the law is implementable in practice before adopting it, as well as checking* a posteriori *whether it may be and is effectively applied is very important. This means that* ex ante *and* ex post *legislative evaluation has to be performed when addressing the issue of the Rule of Law.*

55. *Proper implementation of legislation may also be obstructed by the absence of sufficient sanctions (*lex imperfecta*), as well as by an insufficient or selective enforcement of the relevant sanctions.*

8. Private actors in charge of public tasks

Does the law guarantee that non-State entities which, fully or in part, have taken on traditionally public tasks, and whose actions and decisions have a similar impact on ordinary people as those of public authorities, are subject to the requirements of the Rule of Law and accountable in a manner comparable to those of public authorities?[40]

56. *There are a number of areas where hybrid (State-private) actors or private entities exercise powers that traditionally have been the domain of State authorities, including in the fields of prison management and health care. The Rule of Law must apply to such situations as well.*

B. Legal certainty

1. Accessibility of legislation

Are laws accessible?

i. Are all legislative acts published before entering into force?

ii. Are they easily accessible, *e.g.* free of charge via the Internet and/or in an official bulletin?

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[34] Cf. Article 15 ECHR ("derogation in time of emergency"); Article 4 ICCPR; Article 27 ACHR. For an individual application of Article 15 ECHR, see ECtHR *A. and Others v. the United Kingdom*, 3455/05, 19 February 2009, §§ 178, 182 = 30 HRLJ 83 [112] (2009-2010): a derogation to Article 5 § 1 ECHR was considered as disproportionate. On emergency powers, see also CDL-STD(1995)012, Emergency Powers; CDL-AD(2006)015, Opinion on the Protection of Human Rights in Emergency Situations.

[35] CDL-AD(2006)015, § 33.

[36] Article 15 ECHR: Article 4 ICCPR; Article 27 ACHR.

[37] CDL-AD(2006)015, § 9. On derogations under Article 15 ECHR, see more generally CDL-AD(2006)015, § 9 ff., and the quoted case-law.

[38] On the need for effective and dissuasive sanctions, see *e.g.* CDL-AD(2014)019, § 89; CDL-AD(2013)021, § 70.

[39] The need for ensuring proper implementation of the legislation is often underlined by the Venice Commission: see *e.g.* CDL-AD(2014)003, § 11: "the key challenge for the conduct of genuinely democratic elections remains the exercise of political will by all stakeholders, to uphold the letter and the spirit of the law, and to implement it fully and effectively"; CDL-AD(2014)001, § 85.

[40] Cf. Article 124 of the Constitution of Finland: "A public administrative task may be delegated to others than public authorities only by an Act or by virtue of an Act, if this is necessary for the appropriate performance of the task and if basic rights and liberties, legal remedies and other requirements of good governance are not endangered."

2. Accessibility of court decisions

Are court decisions accessible? i. Are court decisions easily accessible to the public?[41] ii. Are exemptions sufficiently justified?

57. *As court decisions can establish, elaborate upon and clarify law, their accessibility is part of legal certainty. Limitations can be justified in order to protect individual rights, for instance those of juveniles in criminal cases.*

3. Foreseeability of the laws

Are the effects of laws foreseeable?[42] i. Are the laws written in an intelligible manner? ii. Does new legislation clearly state whether (and which) previous legislation is repealed or amended? Are amendments incorporated in a consolidated, publicly accessible, version of the law?

58. *Foreseeability means not only that the law must, where possible, be proclaimed in advance of implementation and be foreseeable as to its effects: it must also be formulated with sufficient precision and clarity to enable legal subjects to regulate their conduct in conformity with it.*[43]

59. *The necessary degree of foreseeability depends however on the nature of the law. In particular, it is essential in criminal legislation. Precaution in advance of dealing with concrete dangers has now become increasingly important; this evolution is legitimate due to the multiplication of the risks resulting in particular from the changing technology. However, in the areas where the precautionary approach of laws apply, such as risk law, the prerequisites for State action are outlined in terms that are considerably broader and more imprecise, but the Rule of Law implies that the principle of foreseeability is not set aside.*

4. Stability and consistency of law

Are laws stable and consistent? i. Are laws stable, to the extent that they are changed only with fair warning?[44] ii. Are they consistently applied?

60. *Instability and inconsistency of legislation or executive action may affect a person's ability to plan his or her actions. However, stability is not an end in itself: law must also be capable of adaptation to changing circumstances. Law can be changed, but with public debate and notice, and without adversely affecting legitimate expectations (see next item).*

5. Legitimate expectations

Is respect for the principle of legitimate expectations ensured?

61. *The principle of legitimate expectations is part of the general principle of legal certainty in European Union law, derived from national laws. It also expresses the idea that public authorities should not only abide by the law but also by their promises and raised expectations. According to the legitimate expectation doctrine, those who act in good faith on the basis of law as it is, should not be frustrated in their legitimate expectations. However, new situations may justify legislative changes going frustrating legitimate expectations in exceptional cases. This doctrine applies not only to legislation but also to individual decisions by public authorities.*[45]

6. Non-retroactivity

Is retroactivity of legislation prohibited? i. Is retroactivity of criminal legislation prohibited? ii. To what extent is there also a general prohibition on the retroactivity of other laws?[46] iii. Are there exceptions, and, if so, under which conditions?

7. Nullum crimen sine lege and nulla poena sine lege principles

Do the *nullum crimen sine lege* and *nulla poena sine lege* (no crime, no penalty without a law) principles apply?

62. *People must be informed in advance of the consequences of their behaviour. This implies foreseeability (above II.B.3) and non-retroactivity especially of criminal legislation. In civil and administrative law, retroactivity may negatively affect rights and legal interests.*[47] *However, outside the criminal field, a retroactive limitation of the rights of individuals or imposition of new duties may be permissible, but only if in the public interest and in conformity with the principle of proportionality (including temporally). The legislator should not interfere with the application of existing legislation by courts.*

8. Res judicata[48]

Is respect of *res judicata* ensured? i. Is respect for the *ne bis in idem* principle (prohibition against double jeopardy) ensured? ii. May final judicial decisions be revised? iii. If so, under which conditions?

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[41] ECtHR *Fazlyiski v. Bulgaria*, 40908/05, 16 April 2013, §§ 64-70, in particular § 65; *Ryakib Biryukov v. Russia,* 14810/02, 17 January 2008, in particular § 30 ff.; cf. *Kononov v. Latvia*, 36376/04, 17 May 2010, § 185.

[42] ECtHR *The Sunday Times v. the United Kingdom (No. 1)*, 6538/74, 26 April 1979, § 46 ff.; *Rekvényi v. Hungary*, 25390/94, 20 May 1999, § 34 ff.

[43] ECtHR *The Sunday Times v. the United Kingdom (No. 1)*, 6538/74, 26 April 1979, § 49.

[44] The Venice Commission has addressed the issue of stability of legislation in the electoral field: Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev, II.2; Interpretative Declaration on the Stability of the Electoral Law, CDL-AD(2005)043.

[45] For example, individuals who have been encouraged to adopt a behaviour by Community measures may legitimately expect not to be subject, upon the expiry of this undertaking, to restrictions which specifically affect them precisely because they availed themselves of the possibilities offered by the Community provisions: ECJ, 120/86, *Mulder v. Minister van Landbouw en Visserij*, 28 April 1988, § 21ff. In the case-law of the European Court of Human Rights, the doctrine of legitimate expectations essentially applies to the protection of property as guaranteed by Article 1 of the First Additional Protocol to the European Convention on Human Rights: see *e.g.* ECtHR *Anhaeuser-Busch Inc. v. Portugal* [GC], 73049/01, 11 January 2007, § 65; *Gratzinger and Gratzingerova v. the Czech Republic* [GC] (dec.), 39794/98, 10 July 2002, § 68 ff.; *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom,* 21319/93, 21449/93, 21675/93, 21319/93, 21449/93 and 21675/93, 23 October 1997, § 62 ff.

[46] See Article 7.1 ECHR, Article 15 ICCPR, Article 9 ACHR, Article 7.2 of the African (Banjul) Charter on Human and Peoples' Rights [ACHPR] for criminal law; Article 28 of the Vienna Convention on the Law of Treaties for international treaties.

[47] The principle of non-retroactivity does not apply when the new legislation places individuals in a more favourable position. The European Court of Human considers that Article 7 ECHR includes the principle of retrospectiveness of the more lenient criminal law: see *Scoppola v. Italy (No. 2),* 10249/03, 17 September 2009.

[48] Article 4 Protocol 7 ECHR, Article 14.7 ICCPR, Article 8.4 ACHR (in the penal field); on the respect of the principle of *res judicata*, see *e.g.* ECtHR *Brumărescu v. Romania,* 28342/95, 28 October 1999, § 62; *Kulkov and Others v. Russia*, 25114/03, 11512/03, 9794/05, 37403/05, 13110/06, 19469/06, 42608/06, 44928/06, 44972/06 and 45022/06, 8 January 2009, § 27; *Duca v. Moldova*, 75/07, 3 March 2009, § 32. The Court considers respect of *res judicata* as an aspect of legal certainty. Cf. *Marckx v. Belgium*, 6833/74, 13 June 1979, § 58.

63. Res judicata *implies that when an appeal has been finally adjudicated, further appeals are not possible. Final judgments must be respected, unless there are cogent reasons for revising them.*[49]

C. Prevention of abuse (misuse) of powers[50]

Are there legal safeguards against arbitrariness and abuse of power (*détournement de pouvoir*) by public authorities?

i. If yes, what is the legal source of this guarantee (Constitution, statutory law, case-law)?

ii. Are there clear legal restrictions to discretionary power, in particular when exercised by the executive in administrative action?[51]

iii. Are there mechanisms to prevent, correct and sanction abuse of discretionary powers (*détournement de pouvoir*)? When discretionary power is given to officials, is there judicial review of the exercise of such power?

iv. Are public authorities required to provide adequate reasons for their decisions, in particular when they affect the rights of individuals? Is the failure to state reasons a valid ground for challenging such decisions in courts?

64. *An exercise of power that leads to substantively unfair, unreasonable, irrational or oppressive decisions violates the Rule of Law.*

65. *It is contrary to the Rule of Law for executive discretion to be unfettered power. Consequently, the law must indicate the scope of any such discretion, to protect against arbitrariness.*

66. *Abuse of discretionary power should be controlled by judicial or other independent review. Available remedies should be clear and easily accessible.*

67. *Access to an ombudsperson or another form of non-contentious jurisdiction may also be appropriate.*

68. *The obligation to give reasons should also apply to administrative decisions.*[52]

D. Equality before the law and non-discrimination

1. Principle

Does the Constitution enshrine the principle of equal treatment, the commitment of the State to promote equality as well as the right of individuals to be free from discrimination?

2. Non-discrimination[53]

Is respect for the principle of non-discrimination ensured?

i. Does the Constitution prohibit discrimination?

ii. Is non-discrimination effectively guaranteed by law?

iii. Do the Constitution and/or legislation clearly define and prohibit both direct and indirect discrimination?

69. *The principle of non-discrimination requires the prohibition of any unjustified unequal treatment under the law and/or by law, and that all persons have guaranteed equal and effective protection against discrimination on grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

3. Equality in law

Is equality in law guaranteed?

i. Does the Constitution require legislation (including regulations) to respect the principle of equality in law?[54] Does it provide that differentiations have to be objectively justified?

ii. Can legislation violating the principle of equality be challenged in the court?

iii. Are there individuals or groups with special legal privileges? Are these exceptions and/or privileges based on a legitimate aim and in conformity with the principle of proportionality?

iv. Are positive measures expressly provided for the benefit of particular groups, including national minorities, in order to address structural inequalities?

70. *Legislation must respect the principle of equality: it must treat similar situations equally and different situations differently and guarantee equality with respect to any ground of potential discrimination.*

71. *For example, rules on parliamentary immunities, and more specifically on inviolability, "should … be regulated in a restrictive manner, and it should always be possible to lift such immunity, following clear and impartial procedures. Inviolability, if applied, should be lifted unless justified with reference to the case at hand and proportional and necessary in order to protect the democratic workings of Parliament and the rights of the political opposition".*[55]

72. *"The law should provide that the prohibition of discrimination does not prevent the maintenance or adoption of temporary special measures designed either to prevent or compensate for disadvantages suffered by persons on grounds [of belonging to a particular group], or to facilitate their full participation in all fields of life. These measures should not be continued once the intended objectives have been achieved."*[56]

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[49] Cf. The Council of Europe and the Rule of Law – An overview, CM(2008)170, 21 November 2008, § 48.

[50] Protection against arbitrariness was mentioned by the European Court of Human Rights in a number of cases. In addition to those quoted in the next note, see *e.g. Husayn (Abu Zubaydah) v. Poland*, 7511/13, 24 July 2014, § 521 ff.; *Hassan v. the United Kingdom,* 29750/09, 16 September 2014, § 106; *Georgia v. Russia (I)*, 13255/07, 3 July 2014, § 182 ff. (Article 5 ECHR); *Ivinović v. Croatia*, 13006/13, 18 September 2014, § 40 (Article 8 ECHR). For the Court of Justice of the European Union, see *e.g.* ECJ, 46/87 and 227/88, *Hoechst v. Commission*, 21 September 1989, § 19; T-402/13, *Orange v. European Commission*, 25 November 2014, § 89. On the limits of discretionary powers, see Appendix to Recommendation of the Committee of Ministers on good administration, CM/Rec(2007)7, Article 2.4 ("Principle of lawfulness"): "[Public authorities] shall exercise their powers only if the established facts and the applicable law entitle them to do so and solely for the purpose for which they have been conferred".

[51] CM(2008)170, The Council of Europe and the Rule of Law, § 46; ECtHR *Malone*, 8691/79, 2 August 1984, § 68 = 5 HRLJ 319 [337] (1984); *Segerstedt-Wiberg and Others v. Sweden,* 62332/00, 6 June 2006, § 76 (Article 8). The complexity of modern society means that discretionary power must be granted to public officials. The principle by which public authorities must strive to be objective ("sachlich") in a number of States such as Sweden and Finland goes further than simply forbidding discriminatory treatment and is seen as an important factor buttressing confidence in public administration and social capital.

[52] See *e.g.* Article 41.1.c of the Charter of Fundamental Rights of the European Union. Cf. also item II.E.2.c.vi and note 126 below at p. 197.

[53] See for exemple, Article 14 ECHR; Protocol 12 ECHR; Articles 12, 26 ICCPR, Article 24 ACHR; Articles 2, 3 ACHPR.

[54] Cf. *e.g.* CDL-AD(2014)010, §§ 41-42; CDL-AD(2013)032, Opinion on the Final Draft Constitution of the Republic of Tunisia, § 44 ff.: equality should not be limited to citizens and include a general non-discrimination clause.

[55] CDL-AD(2014)011, Report on the Scope and Lifting of Parliamentary Immunities (§ 200); ECtHR *Cordova v. Italy*, *No. 1 and No. 2*, 40877/98 and 45649/99, 30 January 2003, §§ 58-67.

[56] ECRI (European Commission against Racism and Intolerance) Recommendation No. 7, § 5.

4. Equality before the law

Is equality before the law guaranteed?

i. Does the national legal order clearly provide that the law applies equally to every person irrespective of race, colour, sex, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or status?[57] Does it provide that differentiations have to be objectively justified, on the basis of a reasonable aim, and in conformity with the principle of proportionality?[58]

ii. Is there an effective remedy against discriminatory or unequal application of legislation?[59]

73. *The Rule of Law requires the universal subjection of all to the law. It implies that law should be equally applied, and consistently implemented. Equality is however not merely a formal criterion, but should result in substantively equal treatment. To reach that end, differentiations may have to be tolerated and may even be required. For example, affirmative action may be a way to ensure substantive equality in limited circumstances so as to redress past disadvantage or exclusion.*[60]

E. Access to justice[61]

1. Independence and impartiality

a. Independence of the judiciary

Are there sufficient constitutional and legal guarantees of judicial independence?

i. Are the basic principles of judicial independence, including objective procedures and criteria for judicial appointments, tenure and discipline and removals, enshrined in the Constitution or ordinary legislation?[62]

ii. Are judges appointed for life time or until retirement age? Are grounds for removal limited to serious breaches of disciplinary or criminal provisions established by law, or where the judge can no longer perform judicial functions? Is the applicable procedure clearly prescribed in law? Are there legal remedies for the individual judge against a dismissal decision?[63]

iii. Are the grounds for disciplinary measures clearly defined and are sanctions limited to intentional offences and gross negligence?[64]

iv. Is an independent body in charge of such procedures?[65]

v. Is this body not only comprised of judges?

vi. Are the appointment and promotion of judges based on relevant factors, such as ability, integrity and experience?[66] Are these criteria laid down in law?

vii. Under which conditions is it possible to transfer judges to another court? Is the consent of the judge to the transfer required? Can the judge appeal the decision of transfer?

viii. Is there an independent judicial council? Is it grounded in the Constitution or a law on the judiciary?[67] If yes, does it ensure adequate representation of judges as well as lawyers and the public?[68]

ix. May judges appeal to the judicial council for violation of their independence?

x. Is the financial autonomy of the judiciary guaranteed? In particular, are sufficient resources allocated to the courts, and is there a specific article in the budget relating to the judiciary, excluding the possibility of reductions by the executive, except if this is done through a general remuneration measure?[69] Does the judiciary or the judicial council have input into the budgetary process?

xi. Are the tasks of the prosecutors mostly limited to the criminal justice field?[70]

xii. Is the judiciary perceived as independent? What is the public's perception about possible political influences or manipulations in the appointment and promotion of the judges/prosecutors, as well as on their decisions in individual cases? If it exists, does the judicial council effectively defend judges against undue attacks?

xiii. Do the judges systematically follow prosecutors' requests ("prosecutorial bias")?

xiv. Are there fair and sufficient salaries for judges?

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[57] For example, Article 1.2 Protocol 12 ECHR makes clear that "any public authority" – and not only the legislator – has to respect the principle of equality. Article 26 ICCPR States that "All persons are equal before the law and are entitled without discrimination to the equal protection of the law". "The principle of equal treatment is a general principle of European Union law, enshrined in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union": CJEU, C-550/07 *P, Akzo Nobel Chemicals and Akcros Chemicals v Commission*, 14 September 2010, § 54.

[58] A distinction is admissible if the situations are not comparable and/or if it is based on an objective and reasonable justification: See ECtHR *Hämäläinen v. Finland*, 37359/09, 26 July 2014, § 108: "The Court has established in its case-law that in order for an issue to arise under Article 14 there must be a difference in treatment of persons in relevantly similar situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment (see *Burden v. the United Kingdom* GC, no. 13378/05, § 60, ECHR 2008 = 29 HRLJ 351 [358] (2008))".

[59] Cf. Article 13 ECHR; Article 2.3 ICCPR ; Article 25 ACHR ; Article 7.1.a ACHPR.

[60] Cf. Articles 1.4 and 2.2 of the International Convention on the Elimination of All Forms of Racial Discrimination (CEDR); Article 4 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Article 5.4 of the Convention on the Rights of Persons with Disabilities (CRPD).

[61] On the issue of access to justice and the Rule of Law, see SG/Inf(2016)3, Challenges for judicial independence and impartiality in the member States of the Council of Europe, Report prepared jointly by the Bureau of the CCJE and the Bureau of the CCPE for the attention of the Secretary General of the Council of Europe as a follow-up to his 2015 report entitled "*State of Democracy, Human Rights and the Rule of Law in Europe – a shared responsibility for democratic security in Europe*.

[62] CDL-AD(2010)004, § 22: "The basic principles ensuring the independence of the judiciary should be set out in the Constitution or equivalent texts".

[63] Cf. CM/Rec(2010)12 of the Committee of Ministers to Member States on judges: independence, efficiency and responsibilities, § 49 ff.; CDL-AD(2010)004, § 33 ff.; for constitutional justice, see "The Composition of Constitutional Courts", Science and Technique of Democracy No. 20, CDL-STD(1997)020, pp. 18-19.

[64] "Judges… should enjoy functional – but only functional – immunity (immunity from prosecution for acts performed in the exercise of their functions, with the exception of intentional crimes, e.g. taking bribes)": CDL-AD(2010)004, § 61.

[65] OSCE Kyiv Recommendations on Judicial Independence, § 9.

[66] Cf. CM/Rec(2010)12, § 44.

[67] The Venice Commission considers it appropriate to establish a Judicial Council having decisive influence on decisions on the appointment and career of judges: CDL-AD(2010)004, § 32.

[68] "A substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself": CDL-AD(2007)028, § 29.

[69] CDL-AD(2010)038, Amicus Curiae Brief for the Constitutional Court of "the former Yugoslav Republic of Macedonia" on amending several laws relating to the system of salaries and remunerations of elected and appointed officials.

[70] Recommendation CM/Rec(2012)11 of the Committee of Ministers to member States on the role of public prosecutors outside the criminal justice system; CDL-AD(2010)040, §§ 81-83; CDL-AD(2013)025, Joint Opinion on the draft law on the public prosecutor's office of Ukraine, §§ 16-28.

74. *The judiciary should be independent. Independence means that the judiciary is free from external pressure, and is not subject to political influence or manipulation, in particular by the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers. Judges should not be subject to political influence or manipulation.*

75. *The European Court of Human Rights highlights four elements of judicial independence: manner of appointment, term of office, the existence of guarantees against outside pressure – including in budgetary matters – and whether the judiciary appears as independent and impartial.*[71]

76. *Limited or renewable terms in office may make judges dependent on the authority which appointed them or has the power to re-appoint them.*

77. *Legislation on dismissal may encourage disguised sanctions.*

78. *Offences leading to disciplinary sanctions and their legal consequences should be set out clearly in law. The disciplinary system should fulfil the requirements of procedural fairness by way of a fair hearing and the possibility of appeal(s) (see section II.E.2 below).*

79. *It is important that the appointment and promotion of judges is not based upon political or personal considerations, and the system should be constantly monitored to ensure that this is so.*

80. *Though the non-consensual transfer of judges to another court may in some cases be lawfully applied as a sanction, it could also be used as a kind of a politically-motivated tool under the disguise of a sanction.*[72] *Such transfer is however justified in principle in cases of legitimate institutional reorganisation.*

81. *"[I]t is an appropriate method for guaranteeing the independence of the judiciary that an independent judicial council have decisive influence on decisions on the appointment and career of judges". Judicial councils "should have a pluralistic composition with a substantial part, if not the majority, of members being judges."*[73] *That is the most effective way to ensure that decisions concerning the selection and career of judges are independent from the government and administration.*[74] *There may however be other acceptable ways to appoint an independent judiciary.*

82. *Conferring a role on the executive is only permissible in States where these powers are restrained by legal culture and traditions, which have grown over a long time, whereas the involvement of Parliament carries a risk of politicisation.*[75] *Involving only judges carries the risk of raising a perception of self-protection, self-interest and cronyism. As concerns the composition of the judicial council, both politicisation and corporatism must be avoided.*[76] *An appropriate balance should be found between judges and lay members.*[77] *The involvement of other branches of government must not pose threats of undue pressure on the members of the Council and the whole judiciary.*[78]

83. *Sufficient resources are essential to ensuring judicial independence from State institutions, and private parties, so that the judiciary can perform its duties with integrity and efficiency, thereby fostering public confidence in justice and the Rule of Law*[79] *Executive power to reduce the judiciary's budget is one example of how the resources of the judiciary may be placed under undue pressure.*

84. *The public prosecutor's office should not be permitted to interfere in judicial cases outside its standard role in the criminal justice system* – e.g. *under the model of the "Prokuratura". Such power would call into question the work of the judiciary and threaten its independence.*[80]

85. *Benchmarks xii-xiv deal, first of all, with the perception of the independence of the judiciary. The prosecutorial bias is an example of absence of independence, which may be encouraged by the possibility of sanctions in case of "wrong" judgments. Finally, fair and sufficient salaries are a concrete aspect of financial autonomy of the judiciary. They are a means to prevent corruption, which may endanger the independence of the judiciary not only from other branches of government, but also from individuals.*[81]

b. Independence of individual judges

Are there sufficient constitutional and legal guarantees for the independence of individual judges?
i. Are judicial activities subject to the supervision of higher courts – outside the appeal framework –, court presidents, the executive or other public bodies?
ii. Does the Constitution guarantee the right to a competent judge ("natural judge pre-established by law")?[82]
iii. Does the law clearly determine which court is competent? Does it set rules to solve any conflicts of competence?
iv. Does the allocation of cases follow objective and transparent criteria? Is the withdrawal of a judge from a case excluded other than in case a recusal by one of the parties or by the judge him/herself has been declared founded?[83]

86. *The independence of individual judges must be ensured, as also must the independence of the judiciary from the legislative and, especially, executive branches of government.*

87. *The possibility of appealing judgments to a higher court is a common element in judicial systems and must be the only way of review of judges when applying the law. Judges should not be subject to supervision by their colleague-judges, and* a fortiori *to any executive hierarchical power,*

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[71] See in particular ECtHR *Campbell and Fell v. the United Kingdom,* 28 June 1984, 7819/77 and 7878/77, § 78 = 6 HRLJ 255 [280] (1985).

[72] Cf. CDL-AD(2010)004, § 43.

[73] CDL-AD(2010)004, § 32.

[74] Cf. Recommendation (94)12 of the Committee of Ministers on the Independence, Efficiency and Role of Judges (Principle I.2.a), which reflects a preference for a judicial council but accepts other systems.

[75] CDL-AD(2007)028, Report on Judicial Appointments, § 44 ff. The trend in Commonwealth countries is away from executive appointments and toward appointment commissions, sometimes known as judicial services commissions. See J. van Zyl Smit (2015), The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice (Report of Research Undertaken by Bingham Centre for the Rule of Law), available at http://www.biicl.org/documents/689_bingham_centre_compendium.pdf.

[76] CDL-AD(2002)021, Supplementary Opinion on the Revision of the Constitution of Romania, §§ 21, 22.

[77] See CDL-PI(2015)001, Compilation of Venice Commission Opinions and Reports concerning Courts and Judges, ch. 4.2, and the references.

[78] CDL-INF(1999)005, Opinion on the reform of the judiciary in Bulgaria, § 28; see also, *e.g.*, CDL-AD(2007)draft, Report on Judicial Appointments by the Venice Commission, § 33; CDL-AD(2010)026, Joint opinion on the draft law on the judicial system and the status of judges of Ukraine, § 97, concerning the presence of ministers in the judicial council.

[79] CM/Rec(2010)12, § 33 ff.; CDL-AD(2010)004, § 52 ff.

[80] CDL-AD(2010)040, § 71 ff.

[81] Cf. CDL-AD(2012)014, Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, § 81.

[82] CDL-AD(2010)004, § 78; see *e.g.* European Commission on Human Rights, *Zand v. Austria*, 7360/76, 16 May 1977, D.R. 8, p. 167; ECtHR *Fruni v. Slovakia*, 8014/07, 21 June 2011, § 134 ff.

[83] On the allocation of cases, see CM/Rec(2010)12, § 24; CDL-AD(2010)004, § 73 ff. The OSCE Kyiv Recommendations cite as a good practice either random allocation of cases or allocation based on predetermined, clear and objective criteria (§ 12).

exercised for example by civil servants. Such supervision would contravene their individual independence, and consequently violate the Rule of Law.[84]

88. *"The guarantee can be understood as having two aspects. One relates to the court as a whole. The other relates to the individual judge or judicial panel dealing with the case. … It is not enough if only the court (or the judicial branch) competent for a certain case is determined in advance. That the order in which the individual judge (or panel of judges) within a court is determined in advance, meaning that it is based on general objective principles, is essential".*[85]

c. Impartiality of the judiciary[86]

Are there specific constitutional and legal rules providing for the impartiality of the judiciary?[87]

i. What is the public's perception of the impartiality of the judiciary and of individual judges?

ii. Is there corruption in the judiciary? Are specific measures in place against corruption in the judiciary (*e.g.* a declaration of assets)? What is the public's perception on this issue?[88]

89. *Impartiality of the judiciary must be ensured in practice as well as in the law. The classical formula, as expressed for example by the case-law of the European Court of Human Rights, is that "justice must not only be done, it must also be seen to be done".*[89] *This implies objective as well as subjective impartiality. The public's perception can assist in assessing whether the judiciary is impartial in practice.*

90. *Declaration of assets is a means of fighting corruption because it can highlight any conflict of interest and possibly lead to scrutiny of any unusual income.*[90]

d. The prosecution service: autonomy and control

Is sufficient autonomy of the prosecution service ensured?

i. Does the office of the public prosecution have sufficient autonomy within the State structure? Does it act on the basis of the law rather than of political expediency?[91]

ii. Is it permitted that the executive gives specific instructions to the prosecution office on particular cases? If yes, are they reasoned, in writing, and subject to public scrutiny?[92]

iii. May a senior prosecutor give direct instructions to a lower prosecutor on a particular case? If yes, are they reasoned and in written form?

iv. Is there a mechanism for a junior prosecutor to contest the validity of the instruction on the basis of the illegal character or improper grounds of the instruction?

v. Also, can the prosecutor contesting the validity of the instruction request to be replaced?[93]

vi. Is termination of office permissible only when prosecutors reach the retirement age, or for disciplinary purposes, or, alternatively, are the prosecutors appointed for a relatively long period of time without the possibility of renewal?[94]

vii. Are these matters and the grounds for dismissal of prosecutors clearly prescribed by law?[95]

viii. Are there legal remedies for the individual prosecutor against a dismissal decision?[96]

ix. Is the appointment, transfer and promotion of prosecutors based on objective factors, in particular ability, integrity and experience, and not on political considerations? Are such principles laid down in law?

x. Are there fair and sufficient salaries for prosecutors?[97]

xi. Is there a perception that prosecutorial policies allow selective enforcement of the law?

xii. Is prosecutorial action subject to judicial control?

91. *There is no common standard on the organisation of the prosecution service, especially about the authority required to appoint public prosecutors, or the internal organisation of the public prosecution service. However, sufficient autonomy must be ensured to shield prosecutorial authorities from undue political influence. In conformity with the principle of legality, the public prosecution service must act only on the basis of, and in accordance with, the law.*[98] *This does not prevent the law from giving prosecutorial authorities some discretion when deciding whether to initiate a criminal procedure or not (opportunity principle).*[99]

92. *Autonomy must also be ensured inside the prosecution service. Prosecutors must not be submitted to strict hierarchical instructions without any discretion, and should be in a position not to apply instructions contradicting the law.*

93. *The concerns relating to the judiciary apply,* mutatis mutandis*, to the prosecution service, including the importance of assessing legal regulations, as well as practice.*

94. *Here again,*[100] *sufficient remuneration is an important element of autonomy and a safeguard against corruption.*

95. *Bias on the part of public prosecution services could lead to improper prosecution, or to selective prosecution, in particular on behalf of those in, or close to, power. This would jeopardise the implementation of the legal system and is therefore a danger to the Rule of Law. Public perception is essential in identifying such a bias.*

96. *As in other fields, the existence of a legal remedy open to individuals whose rights have been affected is essential to ensuring that the Rule of Law is respected.*

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[84] CM/Rec(2010)12, § 22 ff.; CDL-AD(2010)004, § 68 ff.; CM/Rec(2000)19 of the Committee of Ministers to member States on the role of public prosecution in the criminal justice system, § 19; CDL-AD(2010)004, Report on the Independence of the Judicial System – Part I: The Independence of Judges, § 72.

[85] CDL-AD(2010)004, § 79.

[86] Article 6.1 ECHR; Article 14.1 ICCPR; Article 8.1 ACHR; Article 7.1.d ACHPR. See also the various aspects of impartiality in the Bangalore principles of judicial conduct, Value 2, including absence of favour, bias or prejudice.

[87] See *e.g.* ECtHR *Micallef v. Malta* [GC], 17056/06, 15 October 2009, §§ 99-100 = 30 HRLJ 274 [282 f.] (2009-2010).

[88] On corruption, see in general II.F.1 [not reproduced here].

[89] See *e.g.* ECtHR *De Cubber v. Belgium,* 9186/80, 26 October 1984, § 26: *Micallef v. Malta*, 17056/06, 15 October 2009, § 98 = 30 HRLJ 274 [282] (2009-2010); *Oleksandr Volkov v. Ukraine,* 21722/11, 9 January 2013, § 106.

[90] CDL-AD(2011)017, Opinion on the introduction of changes to the constitutional law "on the status of judges" of Kyrgyzstan, § 15.

[91] See in particular CM/Rec(2000)19, § 11 ff.; CDL-AD(2010)040, § 23 ff.

[92] Cf. CDL-AD(2010)040, § 22.

[93] Cf. CDL-AD(2010)040, § 53 ff.

[94] CDL-AD(2010)040, § 34 ff., 47 ff.

[95] CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System – Part II: The Prosecution Service, § 39.

[96] CDL-AD(2010)040, § 52.

[97] CDL-AD(2010)040, § 69.

[98] See II.A.1, above at p. 188.

[99] CDL-AD(2010)040, § 7, 53 ff.

[100] See II.E.1.a.xiv for judges, above at p. 193.

e. Independence and impartiality of the Bar

Are the independence and impartiality of the Bar ensured?
i. Is there a recognised, organised and independent legal profession (Bar)?[101]
ii. Is there a legal basis for the functioning of the Bar, based on the principles of independence, confidentiality and professional ethics, and the avoidance of conflicts of interests?
iii. Is access to the Bar regulated in an objective and sufficiently open manner, also as remuneration and legal aid are concerned?
iv. Are there effective and fair disciplinary procedures at the Bar?
v. What is the public's perception about the Bar's independence?

97. *The Bar plays a fundamental role in assisting the judicial system. It is therefore crucial that it is organised so as to ensure its independence and proper functioning. This implies that legislation provides for the main features of its independence and that access to the Bar is sufficiently open to make the right to legal counsel effective. Effective and fair criminal and disciplinary proceedings are necessary to ensure the independence and impartiality of the lawyers.*

98. *Professional ethics imply* inter alia *that "[a] lawyer shall maintain independence and be afforded the protection such independence offers in giving clients unbiased advice and representation".*[102] *He or she "shall at all times maintain the highest standards of honesty, integrity and fairness towards the lawyer's clients, the court, colleagues and all those with whom the lawyer comes into professional contact",*[103] *"shall not assume a position in which a client's interest conflict with those of the lawyer"*[104] *and "shall treat client interest as paramount".*[105]

2. Fair trial[106]

a. Access to courts

Do individuals have an effective access to courts?
i. *Locus standi* (right to bring an action): Does an individual have an easily accessible and effective opportunity to challenge a private or public act that interferes with his/her rights?[107]
ii. Is the right to defence guaranteed, including through effective legal assistance?[108] If yes, what is the legal source of this guarantee?
iii. Is legal aid accessible to parties who do not have sufficient means to pay for legal assistance, when the interests of justice so require?[109]
iv. Are formal requirements,[110] time-limits[111] and court fees reasonable?[112]
v. Is access to justice easy in practice?[113] What measures are taken to make it easy?
vi. Is suitable information on the functioning of the judiciary available to the public?

99. *Individuals are usually not in a position to bring judicial proceedings on their own. Legal assistance is therefore crucial and should be available to everyone. Legal aid should also be provided to those who cannot afford it.*

100. *This question addresses a number of procedural obstacles which may jeopardise access to justice. Excessive formal requirements may lead to even serious and well-grounded cases being declared inadmissible. Their complexity may further necessitate recourse to a lawyer even in straightforward cases with little financial impact. Simplified standardised forms easily accessible to the public should be available to simplify judicial procedures.*

101. *Very short time-limits may in practice prevent individuals from exercising their rights. High fees may discourage a number of individuals, especially those with a low income, from bringing their case to court.*

102. *Responses to the preceding questions concerning procedural obstacles should enable a preliminary conclusion to be made regarding how access to the court is guaranteed. However, a complete reply should take into account the public's perception on these matters.*

103. *The judiciary should not be perceived as remote from the public and shrouded in mystery. The availability, in particular on the internet, of clear information regarding how to bring a case to court is one way of guaranteeing effective public engagement with the judicial system. Information should be easily accessible to the whole population, including vulnerable groups and also made available in the languages of national minorities and/or migrants. Lower courts should be well-distributed around the country and their court houses easily accessible.*

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[101] See Recommendation No. R(2000)21 of the Committee of Ministers to member States on the freedom of exercise of the profession of lawyer.

[102] International Bar Association – International Principles of Conduct for the Legal Profession, 1.1.

[103] *Ibid.*, 2.1.

[104] *Ibid.*, 3.1.

[105] *Ibid.*, 5.1.

[106] Article 6 ECHR, Article 14 ICCPR, Article 8 ACHR, Article 7 ACHPR. The right to a fair trial was recognised by the European Court of Justice, as "inspired by Article 6 of the ECHR": C-174/98 P and C-189/98 P, *Netherlands and Van der Wal v Commission*, 11 January 2000, § 17. See now Article 47 of the Charter of Fundamental Rights.

[107] "The degree of access afforded by the national legislation must also be sufficient to secure the individual's "right to a court", having regard to the principle of the Rule of Law in a democratic society. For the right of access to be effective, an individual must have a clear, practical opportunity to challenge an act that is an interference with his rights", ECtHR *Bellet v. France*, 23805/94, 4 December 1995, § 36; cf. ECtHR *M.D. and Others v. Malta*, 64791/10, 17 July 2012, § 53.

[108] Article 6.3.b-c ECHR, Article 14.3 ICCPR; Article 8.2 ACHR; the right to defence is protected by Article 6.1 ECHR in civil proceedings, see *e.g.* ECtHR *Oferta Plus SRL v. Moldova*, 14385/04, 19 December 2006, § 145 = 28 HRLJ 412 [422] (2007). It is recognised in general by Article 7.1.c ACHPR.

[109] Article 6.3.c ECHR, Article 14.3.d ICCPR for criminal proceedings; the right to legal aid is provided up to a certain extent by Article 6.1 ECHR for civil proceedings: see *e.g.* ECtHR *A. v. the United Kingdom,* 35373/97, 17 December 2002, § 90 ff. = 23 HRLJ 391 [399] (2002); for constitutional courts in particular, see CDL-AD(2010)039rev, Study on individual access to constitutional justice, § 113.

[110] For constitutional justice, see CDL-AD(2010)039rev, § 125.

[111] For constitutional justice, see CDL-AD(2010)039rev, § 112; for time limits for taking the decision, see § 149.

[112] On excessive court fees, see *e.g.* ECtHR *Kreuz v. Poland (no. 1),* 28249/95, 19 June 2001, §§ 60-67; *Weissman and Others v. Romania*, 63945/00, 24 May 2006, § 32 ff.; *Scordino v. Italy*, 36813/97, 29 March 2006, § 201; *Sakhnovskiy v. Russia*, 21272/03, 2 November 2010, § 69; on excessive security for costs, see *e.g.* ECtHR *Aït-Mouhoub v. France*, 22924/93, 28 October 1998, §§ 57-58; *Garcia Manibardo v. Spain,* 38695/97, 15 February 2000, §§ 38-45; for constitutional justice, see CDL-AD(2010)039rev, § 117.

[113] On the need for an *effective* right of access to court, see *e.g. Golder v. the United Kingdom*, 4451/70, 21 January 1975, § 26 ff.; *Yagtzilar and Others v. Greece,* 41727/98, 6 December 2001, § 20 ff.

b. Presumption of innocence[114]

Is the presumption of innocence guaranteed?
i. Is the presumption of innocence guaranteed by law?
ii. Are there clear and fair rules on the burden of proof?
iii. Are there legal safeguards which aim at preventing other branches of government from making statements on the guilt of the accused?[115]
iv. Is the right to remain silent and not to incriminate oneself nor members of one's family ensured by law and in practice?[116]
v. Are there guarantees against excessive pre-trial detention?[117]

104. *The presumption of innocence is essential in ensuring the right to a fair trial. In order for the presumption of innocence to be guaranteed, the burden of proof must be on the prosecution.*[118] *Rules and practice concerning the required proof have to be clear and fair. The unintentional or purposeful exercise of influence by other branches of government on the competent judicial authority by prejudging the assessment of the facts must be avoided. The same holds good for certain private sources of opinion like the media. Excessive pre-trial detention may be considered as prejudging the accused's guilt.*[119]

c. Other aspects of the right to a fair trial

Are additional fair trial standards enshrined in law and applied in practice?
i. Is equality of arms guaranteed by law? Is it ensured in practice?[120]
ii. Are there rules excluding unlawfully obtained evidence?[121]
iii. Are proceedings started and judicial decisions made without undue delay?[122] Is there a remedy against undue lengths of proceedings?[123]
iv. Is the right to timely access to court documents and files ensured for litigants?[124]
v. Is the right to be heard guaranteed?[125]
vi. Are judgments well-reasoned?[126]
vii. Are hearings and judgments public except for the cases provided for in Article 6.1 ECHR or for *in absentia* trials?
viii. Are appeal procedures available, in particular in criminal cases?[127]
ix. Are court notifications delivered properly and promptly?

105. *The right to appeal against a judicial decision is expressly guaranteed by Article 2 Protocol 7 ECHR and Article 14.5 ICCPR in the criminal field, and by Article 8.2.h ACHR in general. This is a general principle of the Rule of Law often guaranteed at constitutional or legislative level by domestic legislation, in particular in the criminal field. Any court whose decisions cannot be appealed would run the risk of acting arbitrarily.*

106. *All aspects of the right to a fair trial developed above may be inferred from the right to a fair trial as defined in Article 6 ECHR, as elaborated in the case-law of the European Court of Human Rights. They ensure that legal subjects are properly involved in the whole judicial process.*

d. Effectiveness of judicial decisions

Are judicial decisions effective?
i. Are judgments effectively and promptly executed?[128]
ii. Are complaints for non-execution of judgments before national courts and/or the European Court of Human Rights frequent?
iii. What is the perception of the effectiveness of judicial decisions by the public?

107. *Judicial decisions are essential to the implementation of the Constitution and of legislation. The right to a fair trial and the Rule of Law in general would be devoid of any substance if judicial decisions were not executed.*

3. Constitutional justice (if applicable)

Is constitutional justice ensured in States which provide for constitutional review (by specialised constitutional courts or by supreme courts)?
i. Do individuals have effective access to constitutional justice against general acts, *i.e.*, may

[114] Article 6.2 ECHR; Article 15 ICCPR; Article 8.2 ACHR; Article 7.1.b ACHPR.

[115] ECtHR *Allenet de Ribemont v. France*, 15175/89, 10 February 1995, § 32 ff. On the involvement of authorities not belonging to the judiciary in issues linked to a criminal file, see CDL-AD(2014)013, *Amicus Curiae* Brief in the Case of Rywin v. Poland (Applications Nos 6091/06, 4047/07, 4070/07) pending before the European Court of Human Rights (on Parliamentary Committees of Inquiry). The European Court of Human Rights decided on the *Rywin* case on 18 February 2016: see in particular § 200 ff. On the issue of the systematic follow-up to prosecutors' requests (prosecutorial bias), see item II.E.1.a.xiii., above at p. 193.

[116] ECtHR *Saunders v. the United Kingdom*, 19187/91, 17 December 1996, §§ 68-69; *O'Halloran and Francis v. the United Kingdom*, 5809/02 and 25624/02, 29 June 2007, § 46 ff., and the quoted case-law. On the incrimination of members of one's family, see *e.g.* International Criminal Court, Rules of Procedure and Evidence, Rule 75.1.

[117] Cf. Article 5.3 ECHR.

[118] "The burden of proof is on the prosecution": ECtHR *Barberá, Messegué and Jabardo v. Spain*, 10588/83, 6 December 1988, § 77 = 9 HRLJ 267 [284 f.] (1988); *Telfner v. Austria*, 33501/96, 20 March 2001, § 15; cf. *Grande Stevens and Others v. Italy*, 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10, 4 March 2014, § 159.

[119] Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), IV.

[120] See *e.g. Rowe and Davis v. the United Kingdom,* 28901/95, 16 February 2000, § 60.

[121] See *e.g. Jalloh v. Germany,* 54810/00, 17 July 2006, § 94 ff., 104; *Göçmen v. Turkey,* 72000/01, 17 October 2006, § 75; *O'Halloran and Francis v. the United Kingdom*, 5809/02 and 25624/02, 29 June 2007, § 60.

[122] Article 6.1 ECHR; Article 8.1 ACHR; Article 7.1.d ACHPR ("within reasonable time").

[123] CDL-AD(2010)039rev, § 94. See *e.g.* ECtHR *Panju v. Belgium,* 18393/09, 28 October 2014, §§ 53, 62 (the absence of an effective remedy in case of excessive length of proceedings goes against Article 13 combined with Article 6.1 ECHR).

[124] This right is inferred in criminal matters from Article 6.3.b ECHR (the right to have adequate time and facilities for the preparation of one's defence): see *e.g. Foucher v. France*, 22209/93, 18 March 1993, § 36.

[125] Cf. ECtHR *Micallef v. Malta*, 17056/06, 15 October 2009, § 78 ff. = 30 HRLJ 274 [280] (2009-2010); *Neziraj v. Germany,* 30804/07, 8 November 2012, § 45 ff.

[126] "Article 6 § 1 (Article 6-1) obliges the courts to give reasons for their judgments": ECtHR *Hiro Balani v. Spain,* 18064/91, 9 September 1994, § 27; *Jokela v. Finland*, 28856/95, 21 May 2002, § 72; see also *Taxquet v. Belgium*, 926/05, 16 November 2010, § 83 ff. Under the title "Right to good administration", Article 41.2.c of the Charter of Fundamental Rights of the European Union provides for "the obligation of the administration to give reasons for its decisions".

[127] On appeals procedures, see ODIHR Legal Digest of International Fair Trial Rights, p. 227.

[128] See *e.g. Hirschhorn v. Romania*, 29294/02, 26 July 2007, § 49; *Hornsby v. Greece,* 18357/91, 19 March 1997, § 40; *Burdov v. Russia,* 59498/00, 7 May 2002, § 34 ff. = 23 HRLJ 85 [87] (2002); *Gerasimov and Others v. Russia*, 29920/05, 3553/06, 18876/10, 61186/10, 21176/11, 36112/11, 36426/11, 40841/11, 45381/11, 55929/11, 60822/11, 1 July 2014, § 167 ff.

individuals request constitutional review of the law by direct action or by constitutional objection in ordinary court proceedings?[129] What "interest to sue" is required on their part?

ii. Do individuals have effective access to constitutional justice against individual acts which affect them, *i.e.* may individuals request constitutional review of administrative acts or court decisions through direct action or by constitutional objection?[130]

iii. Are Parliament and the executive obliged, when adopting new legislative or regulatory provisions, to take into account the arguments used by the Constitutional Court or equivalent body? Do they take them into account in practice?

iv. Do Parliament or the executive fill legislative/regulatory gaps identified by the Constitutional Court or equivalent body within a reasonable time?

v. Where judgments of ordinary courts are repealed in constitutional complaint proceedings, are the cases re-opened and settled by the ordinary courts taking into account the arguments used by the Constitutional Court or equivalent body?[131]

vi. If constitutional judges are elected by Parliament, is there a requirement for a qualified majority[132] and other safeguards for a balanced composition?[133]

vii. Is there an *ex ante* control of constitutionality by the executive and/or legislative branches of government?

108. *The Venice Commission usually recommends providing for a constitutional court or equivalent body. What is essential is an effective guarantee of the conformity of governmental action, including legislation, with the Constitution. There may be other ways to ensure such conformity. For example, Finnish law provides at the same time for a priori review of constitutionality by the Constitutional Law Committee and for* a posteriori *judicial control in case the application of a statutory provision would lead to an evident conflict with the Constitution. In the specific national context, this has proven sufficient.*[134]

109. *Full judicial review of constitutionality is indeed the most effective means to ensure respect for the Constitution, and includes a number of aspects which are set out in detail above. First, the question of* locus standi *is very important: leaving the possibility to ask for a review of constitutionality only to the legislative or executive branch of government may severely limit the number of cases and therefore the scope of the review. Individual access to constitutional jurisdiction has therefore been developed in a vast majority of countries, at least in Europe.*[135] *Such access may be direct or indirect (by way of an objection raised before an ordinary court, which refers the issue to the constitutional court).*[136] *Second, there should be no limitation as to the kinds of acts which can be submitted to constitutional review: it must be possible to do so for (general) normative as well as for individual (administrative or judicial) acts. However, an individual interest may be required on the part of a private applicant.*

110. *The right to a fair trial imposes the implementation of all courts' decisions, including those of the constitutional jurisdiction. The mere cancellation of legislation violating the Constitution is not sufficient to eliminate every effect of a violation, and would at any rate be impossible in cases of unconstitutional legislative omission.*

111. *This is why this document underlines the importance of Parliament adopting legislation in line with the decision of the Constitutional Court or equivalent body.*[137] *What was said about the legislator and the executive is also true for courts: they have to remedy the cases where the constitutional jurisdiction found unconstitutionality, on the basis of the latter's arguments.*

112. *"The legitimacy of a constitutional jurisdiction and society's acceptance of its decisions may depend very heavily on the extent of the court's consideration of the different social values at stake, even though such values are generally superseded in favour of common values. To this end, a balance which ensures respect for different sensibilities must be entrenched in the rules of composition of these jurisdictions".*[138] *A qualified majority implies a political compromise and is a way to ensure a balanced composition when no party or coalition has such a majority.*

113. *Even in States where* ex post *control by a constitutional or supreme court is possible,* ex ante *control by the executive or legislative branch of government helps preventing unconstitutionalities.*

(...)

F. Examples of particular challenges to the Rule of Law [not reproduced here]

III. SELECTED STANDARDS [not reproduced here]

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[129] CDL-AD(2010)039rev, Study on individual access to constitutional justice, § 96.

[130] CDL-AD(2010)039rev, §§ 62, 93, 165.

[131] CDL-AD(2010)039rev, § 202; CDL-AD(2002)005, Opinion on the Draft Law on the Constitutional Court of the Republic of Azerbaijan, §§ 9, 10.

[132] CDL-AD(2004)043, Opinion on the Proposal to Amend the Constitution of the Republic of Moldova (introduction of the individual complaint to the constitutional court), §§ 18, 19; CDL-AD(2008)030, Opinion on the Draft Law on the Constitutional Court of Montenegro, § 19; CDL-AD(2011)040, Opinion on the law on the establishment and rules of procedure of the Constitutional Court of Turkey, § 24.

[133] CDL-AD(2011)010, Opinion on the draft amendments to the Constitution of Montenegro, as well as on the draft amendments to the law on courts, the law on the State prosecutor's office and the law on the judicial council of Montenegro, § 27; CDL-AD(2012)024, Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, § 33; CDL-AD(2009)014, Opinion on the Law on the High Constitutional Court of the Palestinian National Authority, § 13; The Composition of Constitutional Courts, Science and Technique of Democracy No. 20, CDL-STD(1997)020, pp. 7, 21.

[134] CDL-AD(2008)010, Opinion on the Constitution of Finland, § 115 ff.

[135] There is only one (limited) exception in the Council of Europe member States with a constitutional jurisdiction: CDL-AD(2010)039rev, §§ 1, 52-53.

[136] CDL-AD(2010)039rev, §§ 1 ff., 54-55, 56 ff.

[137] Cf. CDL-AD(2008)030, Opinion on the Draft Law on the Constitutional Court of Montenegro, § 71.

[138] CDL-STD(1997)020, p. 21.

Editors' note: See also Andrew Drzemczewski's Introductory remarks regarding the Rule of Law Checklist above at pp. 179-184.