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CONFERENCE ON

"THE RULE OF LAW AS A PRACTICAL CONCEPT"

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REPORTS

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KEYNOTE SPEECH

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The Rule of Law

There is a paradox at the heart of the rule of law. That ideal demands certainty and condemns ambiguity in the law. But that is great uncertainty and alleged ambiguity in the ideal itself. Firm adherents are locked in great disagreement about what the rule of law really is. These disagreements are well summarized in the working paper of the Venice Commission that is before us. They are also well articulated in Lord Bingham's book. The natural reaction to the paradox might be just to junk the very idea of the rule of law as unclear and unhelpful. If we want to say that secret laws or trials are wrong or that prisoners should not be tortured or that parliaments should be subject to written constitutions, we should say just that and give up worrying about what the rule of law exactly means.

Indeed, whenever people seriously disagree about a political value – when they disagree about what, exactly, democracy or liberty or equality means – we find that kind of reaction: abandon the concept. But this is almost always a mistake. Political values are political commitments. Governments and peoples agree that there is an important value named by democracy or liberty or the rule of law, though they disagree, perhaps profoundly, about exactly how that value should be identified. It is important properly to locate that disagreement and to confront it. Otherwise we lose the opportunity to argue that secret trials and parliamentary supremacy are wrong *because* they violate the rule of law, and then to argue that the best explanation of why they do violate it shows that parliamentary supremacy is also wrong.

I will argue, this morning, that disagreements about the character of the rule of law reflect even deeper disagreements about a fundamental moral concept – the concept of personal dignity – and therefore about political legitimacy as well. I'll start with some comments about some of the important disagreements. But first I should emphasize two points about what seems uncontroversial.

The first is that there is a great deal uncontroversial about what the rule of law means. Lon Fuller, in his influential book called *The Internal Morality of Law*, provided a list of what the rule of law clearly forbids: not just secret laws and secret trials but also laws that cannot be obeyed and fake trials, for example. The second is that rule of law is not an all-or-nothing affair; so that nations that fail to obey its mandates in one respect are to be treated as tyrannies. The Rule of Law is aspirational and is therefore a matter of degree. My country, the U.S. fails to respect the Rule of Law when it holds detainees in Guantanamo without charge or trial for years and also, in my view, when it failed to ratify the Treaty of Rome accepting the jurisdiction of the International Criminal Court. But in other respects, including the rules of criminal procedure, the United States hews closer to what the rule of law ideally demands that many European nations

do. We must ask not whether a nation accepts or denies the rule of law but when and how far it falls short of the rule of law.

Now to the controversies.

1. Is the rule of law a formal or substantive?

One view has been held by Professor Joseph Raz: "A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies … It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law … The law may … institute slavery without violating the rule of law."

Lord Bingham sharply disagreed. "I would roundly reject [Raz's view] in favour of a 'thick' definition, embracing the protection of human rights within its scope. A state which savagely represses or persecutes sections of its people cannot in my view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside is the subject of detailed laws duly enacted and scrupulously observed." Bingham, Tom (2011-07-07).

Now of course both Raz and Bingham condemn the tyranny that Raz describes. But if Raz's position makes sense he must think that in *some* respect or to *some* degree his tyranny is better than it would be if it did not legislate openly and execute its laws faithfully. An analysis of the rule of law is not an exercise in reporting ordinary language. It would make no sense if it were, because ordinary speakers would give different definitions. We must accept, even though we disagree about its content, that the rule of law is a *value*. We must therefore define it in such a way as to reveal what it is that is good about it. That is why Raz and Bingham disagree: Raz thinks there is *something* better, even though not much, about a tyranny that follows its rules, and Bingham thinks there is *nothing* better just in carefully following duly enacted rules.

2. Is parliamentary supremacy consistent with the rule of law? Or does legality require limits on what a democratically elected parliament can adopt? Does it require that some judges have the power to overrule at least extreme parliamentary decisions?

Now I do not mean to ask whether parliament really does have the legal authority to do anything it wants in a nation that does not impose explicit limits on its power. There is an important debate among legal theorists in the UK whether the British parliament really is supreme in that way. Bingham thought that it is, but his former colleague Lord Steyn and Jeffrey Jowell, among many others, disagree. They think that parliament does not have the legal power to curtail the court's jurisdiction to protect suspected terrorists, for instance. The disagreement raises complex issues about the nature and ground of law; I will describe those issues in a minute. But I mean just now to concentrate on a different issue. Does the rule of law require that judges have the power to declare parliamentary enactments unconstitutional and therefore void?

Bingham apparently thought so. He thought that the British parliament's power was unlimited, but he also thought this fact a defect in the rule of law here. We can understand how one might think this. The rule of law requires that no one be above the law, and parliamentary supremacy means that legislatures – in practice the government of the day – really are above the law. Nothing restricts their will. Britain would better conform to the rule of law, Bingham thought, if judged did have some real veto power.

But many other legal theorists think exactly the contrary, and we can understand their view too. They think the situation in the US, and in many members of the Council of Europe, in which judges are given final authority over the validity of enactments is a direct violation of the rule of law because it places unelected judges beyond the law. Some of them, including Justice Scalia in the United States Supreme Court, find it particularly appalling that judges in an international tribunal, such as the European Court of Human Rights, should have that power. These critics think that the true meaning of the rule of law, at least in democracies, in that the people as a whole should have the final word on what the law will be and that a wholly unconstrained parliament comes as close as possible to that ideal.

The first lesson to draw from this controversy is that the familiar slogans in which the rule of law is expressed, though resonant of history, are nonsense if taken literally. There is no such thing as government of law not people or a state in which no one is above the law. In the end someone has to enact and interpret rules of law. We can mean only that legislative power and judicial power should be distributed in the right way, and the controversy is about which way is right.

The second lesson to notice is that this particular issue is bipolar: people think that the rule of law either requires or forbids supremacy of a political majority. There seems no room for a neutral position. That too, is revealing, and I will return to it.

3. The third issue I will discuss is a familiar jurisprudential one. When judges decide hard or novel cases do they make new law or do they discover what the law already is? When Judge Cardozo and Lord Atkin decided that product liability does not require privity of contract, were they inventing a radical new rule and applying it retroactively? Or were they simply erasing a traditional mistake about what the law really is and therefore only discovering not inventing law. This is the question that separates legal positivists from legal interpretivists.

The bearing of the question on the rule of law is evident. If judges must make new law in hard cases, then hard cases require judges to violate the rule of law. Judges must then often make law, in spite of not being responsible to the people, and, worse, they must then apply the new law they make retrospectively to the parties in the case, which offends a really cardinal principle of the rule of law.

But if, on the other hand, judges in hard cases can sensibly try to decide what the law really is, in spite of the fact that the law they recognize has never been recognized before, then judges do not violate the rule of law when their decisions are correct. On the contrary, they would violate the rule of law by *not* recognizing the unrecognized law because that would cheat the parties of a decision according to law. Notice that this, again, is a polar issue. On one view, the rule of law is violated, even if necessarily, whenever judges announce and apply an unexpected rule. On the other view, the rule of law would be violated if they did not do this.

The two opposing views of jurisprudence I mentioned, positivism and interpretivism, disagree about the rule of law because they take very different view of the nature and ground of law. For positivists, what the law is on some matter is just an historical or social fact. Law is what legislation or past judicial decisions have declared. So, by hypothesis, if past enactment or decisions do not dictate a solution in a novel case, then there is no law on the question at all, and judges must perforce exercise a discretion to make new law and apply it retrospectively. They have no other choice if they are to decide the new case at all. For positivists, therefore, the continental systems of law, which at least in principle try to restrict judges to interpreting a systematic code of laws, at least try to obey the rule of law in this respect. Bingham, who was a legal positivist, thought it obvious that judges make new law in hard cases. He thought it absurd to suppose that there is unknown law waiting for judges to discover. He therefore thought that common law systems in which judges have some discretion do violate the rule of law, and he therefore thought that this discretion should be limited.

For interpetivists, on the other hand, the law includes not only rules enacted or announced before, but also the principles that best justify those rules as a matter of political morality. What the correct statement of the law is depends, therefore, on a correct judgment of political morality. When positivists claim a gap in the existing law, there is in fact only a space waiting to be filled by interpreting the announced rules to discover what the principles that justify those announced rules would recommend in the new case. That tells us what the law really is, and what the rule of law requires judges to do.

We have now identified three deep controversies about the nature and practical application of the ideal of the rule of law, the ideal, we might say, of legality. How shall we adjudicate these disputes? Conceptual analysis of law is no help. Nor are historical or comparative studies studying how the Rule of Law has been defined in different documents. We need to understand these debates about the Rule of Law as deep debates in political theory and even political philosophy.

> For centuries the central debate in political theory has been about the nature of political *legitimacy*. Governments exercise coercion. Unjustified coercion is an insult to human dignity. What can make coercion consistent with dignity? In the modern era, beginning in the 17th Century, a variety of answers have been defended.

Social contract? If people consent, it is said, there is no insult. But the supposed social contract, even in its most sophisticated form, is a fiction. There is no sense in which people actually have consented.

Majoritarian democracy? Even in *its* most sophisticated form, majority verdict doesn't solve the problem. There is always a minority and the question persists: how is coercion compatible with their dignity?

Human rights? Government must not do anything too bad. But that doesn't in itself provide a complete solution. Coercive government may respect human rights and yet coerce people against their will.

I offer this suggestion: our debates about the Rule of Law reflect two different conceptions of what more, *beside* democracy and human rights, individual dignity demands.

The first thesis is that once democracy is in place and human rights are respected dignity demands only fair warning of when government will interfere in people's affairs. Fair warning demands that law be clear and publicized, that it be capable of being complied with, and that institutions like independent courts exist with procedures well calculated to adjudicate whether the warning has indeed been ignored. These are exactly the conditions demanded in what we might call traditional accounts of Rule of Law: in Dicey, for example, and in Fuller's *Internal Morality of Law.*

The second is that dignity makes a further demand: it demands what I will call egalitarian integrity. That is, that all those subject to coercive dominion are equal before the law in a deep sense. The principles that are assumed to justify how some are treated must be applied to all. The law must be not only public but also coherent in principle: it must be defensible overall in principle. This conception of what dignity requires is much more substantive than the fair warning conception. It requires that, so far as possible, the law as applied to different people display integrity: that is, that it avoid contradiction not just in detail but in principle.

Now obviously these two conceptions of dignity in law overlap considerably. They both condemn what I said is uncontroversially unacceptable: secret or fake trials, for example. But they differ sharply in emphasis and the difference comes to the surface in the controversies I mentioned about what the rule of law requires and condemns. I'll review these controversies again, from that point of view.

Is the Rule of Law formal or substantive?

On the fair warning conception of legality, the Rule of Law can be defined as distinct from any other political virtues. It can be defined simply formally, since it takes warning to provide a degree of respect in and of itself. On the egalitarian understanding, however, it is impossible to describe the benefit of legality simply in formal terms. It obviously contributes nothing to substantive equality before the law to advice people, as in Raz's story, that an inescapable terror

is to reign down upon them.

The fair warning conception therefore does not require any integration of legality with the other political virtues. The three pillars of the Council of Europe are independent of one another. But on the egalitarian model of integrity, integration is plainly necessary because equality requires both equal participation in law-making and respect for a variety of political rights. Bingham made that clear in the passage I quoted earlier.

Does the rule of law require constitutional judicial review, that is, review by judges with a veto power?

Fair warning adopts the first of the views I distinguished: it denies the legitimacy of judicial veto. A system in which a parliament's word is final and unquestionable can give much clearer warning than one in which parliament's decisions are subject to review by judges, and that is particularly true when those judges test legislation against spongy moral ideals like due process, equal protection, privacy, freedom of expression and the other abstractions now familiar in constitutional documents.

But egalitarian integrity takes the opposite view. If judicial review improves the likelihood that the law will show equal concern and respect for all citizens, then that is what the rule of law, on that conception, requires. The egalitarian conception does not condemn abstract moralistic tests. If judicial review is working well, abstraction improves its flexibility and its achievement. One striking example is the United States Supreme Court's decisions for racial integration and against criminalizing or penalizing homosexuality.

Positivism or interpretivism?

The fair warning view of legality must treat novel judicial decisions or constitutional or code interpretations as judicial legislation. Common law development or constitutional interpretation is, at least from the point of view of surprise, retrospective and often impossible to anticipate. Who could have known that Cardozo or Atkin would in effect repeal the old rule requiring privacy of contract for tort damages? Judges must have discretion, even in a supposed code system, because codes cannot anticipate everything. But according to the fair warning view we must concede that judges make law when they exercise that discretion, and in that way to that extent damage the rule of law.

But on the egalitarian view, supposedly novel decisions are justified if they correct arbitrary rules or distinctions that cannot be justified in principle. There is no difference in principle between those who suffer from a manufacturer's negligence who happen to be in a contractual relationship with the manufacturer and those who are injured more downstream in the commercial distribution. Integrity is improved by allowing judges to reinterpret common law precedent in this way.

The concept of law

Now just a brief word on how all this touches on the perennial philosophical controversy about the nature of law. Positivism draws a sharp line between law and morality; interpretivism blurs the line by holding that law must be interpreted in the light of the general principles that are necessary to justify the explicit rules. It is an important and neglected question what kind of argument the long argument between them really is. It makes no sense as a semantic or conceptual argument. It is at bottom a political argument.

Positivism begins in the fair warning conception of legality. It takes the key element in law's contribution to legitimacy to lie in the warning it provides in advance of coercion. Interpretivism makes the other choice: it focuses on law's contribution to political integrity and the equal moral status of citizens. So the textbooks get the order of argument wrong. It is often said that we must first understand the nature of law before we can consider what the Rule of Law means. That might seem natural. But I'm suggesting the opposite: our opinion about the nature of law depends on the more obviously political question of what we should take the Rule of Law to be. The Rule of Law is the fundamental question; your concept of law turns on what answer you give to that more fundamental question.

I can make no secret of my own preference. Like Bingham, I can make no sense of fair warning as an independent, stand-alone, moral principle. I believe that dignity and therefore legitimacy must depend in the end not just in the formal processes of legislation but on the principled integrity of what those processes produce.

Fair warning is crucial in some occasions: in the criminal law, for instance. But integrity is the more fundamental value, and we should therefore favour constitutionalism over parliamentary supremacy, the methods of interpretation rather than literalism, and a substantive conception of the rule of law that counts a full panoply of human rights essential to a full realization of the rule of law.

I have offered no argument for that view, at least here this morning. I argue now only for a particular way of understanding the paradox in the rule of law, the wide disagreements about what legality really means that are exposed in the Venice Commission's report and in Bingham's excellent book. The important point is that these make sense only as political, that is to say, moral disagreements. They are, moreover, particularly deep disagreements because they touch the character of human dignity and the legitimacy of political coercion.

Thank you.

THE COMMON CORE OF THE RULE OF LAW AND THE RECHTSSTAAT

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The objective of the Venice Commission's report on the rule of is to distill common features of the Anglo-American rule of law and the continental *Rechtsstaat* doctrine, and to produce an operational definition and a checklist which could be of practical use, mainly in the context of Council of Europe activities, but also in nation states, especially in the so-called new democracies with their legacy of socialist doctrine. Thus, it is a document of practical rather than theoretical orientation, although it includes a brief discussion of the history of the rule of law and *Rechtsstaat* notions.

Both the rule of law and the *Rechtsstaat* are doctrinal innovations of the 19th century. They addressed the same problem created by the rise of modern, centralized state: the tension between government power and individual rights. Both doctrines sought to find in law the means of preventing arbitrary use of government power. However, closer examination reveals significant differences between the two notions. These differences are due to the different legal cultural contexts of the doctrines. The rule of law is a common law doctrine while the *Rechtsstaat* is a product of continental legal culture, relying on codification, legislation and written constitution. Yet, as I shall argue, during the 20th century differences have lost much of their importance and a certain convergence, which even made possible the Venice Commission's report, has occurred. The doctrinal parties have learned from each other. Thus, to take two examples, the rule of law side has – at least to a certain extent - recognized the need of explicit constitutional safeguards, while the *Rechtsstaat* party has become increasingly aware of the indissoluble link between legal remedies and individual rights. But the doctrines still have their distinctive features. The *Recht* in the *Rechtsstaat* is not wholly equivalent to the law of the rule of law, and the concept of state (*Staat*) does not fit well in the conceptual universe of Anglo-American legal and political thinking. Hence, a common lawyer may still find the concept of *Rechtsstaat* hard to understand; and a continental lawyer, who tends to equate law with legislation, may still have difficulties with the remaining common-law emphasis of the rule of law.

The original differences between the rule of law and continental legal thinking are very much in the fore in A. V. Dicey's classical exposition of the three limbs of the rule of law. Indeed, Dicey's main d'oeuvre *Introduction to the Study of the Law of the Constitution* (originally published in 1885) is traversed by the opposition between the rule of law and continental legal thinking. The first principle, law's supremacy as opposed to arbitrary power captures, as I have argued, what unites the rule of law and the continental, mainly German, notion of the *Rechtsstaat*. By contrast, Dicey's second principle, equality, is directed against continental, in this case, French administrative law, or *droit administratif* as Dicey consequently writes (he never uses the English term 'administrative law'). Central to Dicey's notion of equality is that the same ordinary law of the land is applied by the same ordinary courts to both ordinary citizens and public officials. There is no specific body of rules for the latter as was the case in France with its *droit administrative*. Dicey also contrasts his third limb of the rule of law with continental legal thinking. Essential for the rule of law was what Dicey calls the inductive way of protecting individual rights: individual rights arise inductively from court decisions,

and no rights exist without legal remedies. In England, "individual rights are the basis, not the result, of the law of the constitution". For Dicey, this contrasts favorably with the continental deductive method where rights derive from abstract constitutional provisions and bills of rights and can easily be suspended or taken away by the constitutional legislator.

In the 20th century, especially three developments have brought the rule of law and the *Rechtsstaat* doctrines closer to each other: 1) the rise of administrative law; 2) the problematization of the concept law inherent in the notions of the rule of law and the *Rechtsstaat*; and 3) the increasing internationalization and transnationalisation of the rule of law).

Let us start with the rise of administrative law. In Germany, elaborating administrative law was already in the early 20th century seen as the primary task in strengthening the *Rechtsstaat*. In turn, in the UK one of the paradoxes of post-diceyan development is that administrative law – far from being an external opposite, as it was for Dicey – has come to occupy a central place within the rule of law doctrine. Thus, in contemporary accounts – such as those by Sir Jeffrey Jowell - the principles and remedies of administrative law exhaust much of the contents of the rule of law. According to Jowell, "the rule of law ... is enforced through our Administrative Law," and "in large part, Administrative Law is the implementation of the constitutional principle of the Rule of Law". The rule of law has become the connecting link between constitutional and administrative law, as the notion of the *Rechtsstaat* as well. Evidently, the main background factor to the rise of administrative law is the expansion of administrative discretion which has accompanied the rise of the welfare state and the growing involvement of government in economic and social regulation. In the face of this development, even in common-law countries safeguards against arbitrary governmental powers have increasingly been sought in specific administrative-law tools. The grounds for judicial review in the UK have much in common, not only with the requirements of the German principle of proportionality, but also with the French doctrine of *détournement du pouvoir*, which, in turn, has greatly influenced the administrative law of the Nordic countries, including Finland. The rapprochement has institutional aspects as well: specific tribunals dealing with administrative law cases have been established in the UK.

The second background factor explaining the rapprochement between the rule of law and the *Rechtsstaat* doctrines relates to the problematization of the concept law. In the course of the 20th century it became evident that the solution to the problem of arbitrary power, namely law, could be a source of new problems: that the threat to individual rights could arise from the law itself. This new problem can be termed "legal totalitarianism" or "totalitarianism in legal disguise". One of the undercurrents in 20th-century legal theory is the insight of a bifurcation of the sets of norms called law. This insight has informed contemporary authors such as Ronald Dworkin in his analysis of principles and policies or Jürgen Habermas in his account of law as an institution and as a medium. In his attack on "administrative absolutism", Roscoe Pound, the doyen of American legal scholarship in the first decades of the 20th century, evokes the contrast between *coordinating* and *subordinating* law, a distinction he borrowed from Gustav Radbruch. Mention should also be made of Lon Fuller's distinction between law as a form of managerial control and law based on an idea of reciprocity. In rule of law debates, perhaps the greatest influence has been exercised by Friedrich Hayek's distinction between rules of just conduct and rules of organization. Common to all these distinctions is a concern about the law's increasing instrumentalist use, which the other branch law – Dworkin's principles or Habermas' law as an institution – is hoped to be able to discipline. In more practical terms, the same concern has led to

emphasizing fundamental rights' binding effect even with regard to the legislator and to developing various models of constitutional review for monitoring this effect.

It is evident both in the rule of law and the *Rechtsstaat* tradition that any solution to the problem of "totalitarianism through law" must include limitations on the discretion of the legislature. Thus, in the rule of law tradition, it is the ambivalent relation of statute law to the law of the rule of law that generates the very problem. But it is also evident that within the English rule of law doctrine, every solution that proposes such limitations is afflicted by a new problem: how can restrictions on legislative power be justified in face of *parliamentary sovereignty*, i.e. the other master principle on which Dicey constructed his reading of English constitutional law? In recent decades, the uneasy relationship between parliamentary sovereignty and the rule of law has become manifest in debates on the grounds of *judicial review*. It has also led to the doctrine of competing sovereignties: the doctrine of parliamentary sovereignty being supplemented by the courts' judicial sovereignty in applying the law and in construing statutes.

The third background factor explaining the lowering of the wall separating the British and the continental European doctrine is the increasing internationalization and transnationalisation of the rule of law. The UK and continental European states are parties to the same international human rights instruments, the European Convention on Human Rights being the most prominent of these. Within Dicey's dichotomy, these instruments epitomize the Continental European deductive approach which Dicey contrasted with the inductive nature of the English constitution, resulting from judicial decisions in particular cases. The traditional English way of protecting individual rights sits rather awkwardly with the UK's international-law obligations. The Human Rights Act 1998, which regulates the Convention's legal significance in domestic UK law, is perhaps not a wholly satisfactory solution to this dilemma. Those common-law countries, such as the USA, which have adopted a written constitution have already dispensed with this limb of Dicey's conception of the rule of law. At least an outside observer might wonder whether this will be the constitutional future in the UK as well?

Time and space do not allow me to discuss in detail the definition of the rule of law which has been adopted in the Venice Commission's report and which is largely based on Sir Tom Bingham's ideas or the checklist annexed to the report. Let me just conclude by briefly commenting on the relationship between the three value pillars on which the Council of Europe is founded and which also constitute the basis for the Venice Commission's work. These are the rule of law, human rights and democracy. I would like to emphasise the interrelatedness of these core values. None of them can be discussed without taking into account the other two. Thus, the Venice Commission's definition of the rule of law includes human rights, and it also invokes democracy in the context of the principle of legality. Indeed, I belong to those who argue, in the wake of Jürgen Habermas, that, ultimately, the *Rechtsstaat* is only possible as a democratic *Rechtstaat*. Only a democratic *Rechtsstaat* can dissolve what might be called the paradox of the *Rechtsstaat*. This paradox was noticed quite early in doctrinal development, and Georg Jellinek, for instance, responded to it with his not wholly convincing idea of the self-limitation of the state. It can be formulated as follows: how can the law limit and discipline the exercise of state power, if the law itself emanates from this very state power, as it according to the dominant positivist understanding does. However, further discussion of this paradox and its dissolution must be left to another occasion!

THE RULE OF LAW IN ACTION

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1. Introduction:

It would be justifiable, that before elaborating on *The Rule of Law as a Goal for the XXI* we recall the developments following the beginning of the World War II, which marked the initiation of the debates on how a new order could be built after the war.

In autumn 1939, British *The Times* in its article by special reporter (allowing us to assume that it was an official position of the British Government) elaborated on a possible approach to *the principles and methods on which a new order may be rebuilt when Nazism has been defeated*. The article emphasized that the main task in this regard was to assert the already tested *values of Western civilization* and to give a new life to its cultural inheritance originated in ancient Greece and ancient Rome. The idea was that the pungency of Nazi threat had proved that this inheritance is hard to defend if it is treated a static ideal and, therefore, there was a call to give this inheritance a *dynamic expression.* For entirely practical reasons the inheritance was supposed to be maintained strictly according to the set of principles that were common to the Western democracies and, in particular, to *the upholding of the rule of law*, both nationally and internationally.[1] Thus, starting from 1939, the *Rule of Law* in its *practical significance* became an integral part of the European agenda as a goal for the rest of XX century.

Since then British notion of "the rule of law" has passed through "globalization" (being enshrined in *Universal Declaration of Human Rights*, 1948)[2] and "regionalization" (being declared at the European level as a *value,* which belongs to a *common heritage* or constitutes a *common principle* for European nations and enshrined in a number of European legal instruments starting with the *Brussels Treaty*, 1948,[3] and following with a number of other fundamental documents for the Council of Europe,[4] the European Union[5] and the European

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[1] See: "After the War: Another Chance to Rebuild; The Foundations of Federalism". – *The Times*, 17 November 1939.

[2] Universal Declaration of Human Rights. G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948).

[3] See Treaty of Economic, Social, and Cultural Collaboration and Collective Self-defense (Brussels Treaty), March 17, 1948. – Source: *American Foreign Policy*, 1950-1955: Basic Documents, Vol. 1 (Department of State Publication 6446; General Foreign Policy Series 117). – Washington, DC: Government Printing Office, 1957.

[4] See Statute of the Council of Europe / Statut du Conceil de l'Europe. London – Londres, 5.V.1945 (*ETS – Nos 1/6/7/8/11).*

[5] See Treaty on European Union. *Official Journal of the European Communities*, C 191, 29 July 1992 (92/C 191/01); Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and Certain related acts / Official Journal of the European Communities, C 340, 10 November

Court of Human Rights).[6] Notwithstanding the fact that the lawyers of different legal systems had already acquainted with the notion of "rule of law", the period of its "globalization" or initial European "regionalization" was marked by the fact that this notion was still considered as "a phrase of uncertain meaning."[7] Such a treatment significantly undermined practical applicability of the notion for ordinary human being in the society, in particular while facing any injustice or an arbitrary rule. Even the outcome of the long and thorough efforts of the International Commission of Jurists, which culminated with definition of the notion as

"[t]he principles, institutions and procedures, not always identical, but broadly similar, which the experience and traditions of lawyers in different countries of the world, often having themselves varying political structures and economic backgrounds, have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of men"[8] – had not provided for an sufficient practical relevance of the "rule of law" concept.

The time has been changed. Now we are all familiar with the substance of the *Rule of Law*, notwithstanding how it is presented: either as one of the *values*, on which the "[European] Union is founded",[9] as one of the *principles* "which form the basis of all genuine democracy",[10] or as a *fundamental principle* of the European Convention "permeating it all and bonding it together"[11] *etc*. In particular, during the most recent years it was done a lot to reach a common understanding or to find a consensual definition of the "rule of law" notion both within the European Union[12] and within the Council of Europe institutions, in particular, the Parliamentary Assembly,[13] the Committee of Ministers,[14] and the Venice Commission.[15]

1997; Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (2001/C 80/01); Charter of Fundamental Rights of the European Union. *Official Journal of the European Unio*n (C 346, 18 December 2000).

[6] See: European Convention for the Protection of Human Rights and Fundamental Freedoms *(ETS No.5).*

[7] The Rule of Law in a Free Society: a report on the International Congress of Jurists. New Delhi, India. January 5-10, 1959 / prepared by Norman S. Marsh; with a foreword by Jean-Flavien Lalive. – Geneva: International Commission of Jurists, 1959, p. V.

[8] Ibidem, p. 197.

[9] Consolidated version of the Treaty on European Union (Article 2). *Official Journal of the European Union (C 115/13, 9 May.2008)*.

[10] Statute of the Council of Europe (Preamble and Article 3) *(ETS – Nos 1/6/7/8/11).*

[11] *The Hon. Chief Justice Emeritus Prof. John. J. Cremona*. The Rule of Law as a Fundamental Principle of the European Convention of Human Rights // In: A Council for all Seasons: 50th anniversary of the Council of Europe. – [Valetta]: Ministry of Foreign Affairs (Malta), 1999. – P. 124.

[12] See Conclusions [of the] Conference "The Rule of Law in a Democratic Society" (Noordwijk, The Netherlands, 23 and 24 June 1997). *Doc. PC-PR (97) misc 1.*; Council conclusions on the follow-up to the Noorwijk conference: the rule of law // Europe. EU Official Documents. Bulletin EU 5-1998.

[13] See The principle of the Rule of Law: Report of the Committee on Legal Affairs and Human Rights. Rapporteur: Mr Erik Jurgens, Netherlands, Socialist Group. *Doc. 11343, 6 July 2007*; Resolution 1594 (2007). The principle of the rule of law. *Text adopted by the Standing Committee*, acting on behalf of the Assembly, on 23 November 2007 (see Doc. 11343).

[14] See The Council of Europe and the Rule of Law – An Overview, CM (2008)170, 21 November 2008.

[15] Report on the Rule of Law adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011) on the basis of comments by Mr Pieter van Dijk (Member, Netherlands), Ms Gret Haller (Member,

Even though the consensual understanding has been reached that "the Rule of Law does constitute a fundamental and common European standard to guide and constraint the exercise of democratic power"[16] we have to admit that for the number of European countries to activate this standard appeared to be more challenging task than it was expected at the initial stage of their accession to the Council of Europe. Instead of becoming a practical concept, for the numerous cases the *Rule of Law* still remains as a *might-have-been-principle*. Therefore, the goal to reach the *Rule of Law* as a *principle in action* is still on the agenda not only for a number of the Council of Europe member-states but also for the Organization in general. The idea of this paper is to consider main obstacles and challenges that CE member-states are still facing in the area of *practical* (not philosophical) application of the *Rule of Law* as well as regarding the steps to be taken to shift and improve the situation so that the respect to the rule of law becomes an accomplished goal. The considerations presented are built upon professional experience of the author both at national level (being for a long time involved almost into all aspects of legal reforms in Ukraine) as well as at the European level (being for about fifteen years and in different capacities involved into the activities of the Parliamentary Assembly of the Council of Europe).

2. The Rule of Law in action: Key challenges at national level

a. Constitutional design

Ukraine with its Fundamental Law is among a few newly-emerged European democracies, the recently adopted constitutions of which embody the notion of "the rule of law". Constructed in the national languages, the respective formulas appear to be a word to word translation from the English phrase "*the rule of law*".

Ukrainian Constitution (1996), in particular, stipulates that: "In Ukraine, the principle of the *Rule of Law* is recognized and *is in action*" (in Ukrainian – *verkhovenstvo prava*).[17] The other three constitutions that should be mentioned in this respect are those of Montenegro,[18] of the Republic of Macedonia[19], and of the Republic of Serbia.[20] I all three cases the word "law" in their respective national languages (*pravo/pravoto*), as it could be put, connotes "the entire body of rules having the particular character of being 'law.'"[21] However, the word "rule" in the respective national languages are translated in different connotations: in Ukrainian (*verkhovenstvo*) it has a connotation of *supremacy* (that in hierarchical sense implies the supremacy of one group of norms of law over another), whereas in Montenegrin (*vladaviny*),

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Switzerland), Mr Jeffrey Jowell (Member, United Kingdom), Mr Kaarlo Tuori (Member, Finland). Study No. 512/2009. *CDL-AD(2011)003rev.*

[16] *Ibidem*, para.70.

[17] Article 8 (para.1) of the Constitution of Ukraine (1996), (*Italics are added by the author*).

[18] Article 4: "The state is based on the *rule of law*" (in Montenegrin – *vladaviny prava*).

[19] Article 8: "The fundamental values of the constitutional order of the Republic of Macedonia are: […] the *rule of law*; […]" (in Macedonian – *vladenieto na pravoto*).

[20] Article 1: "Republic of Serbia is a state […] based on the *rule of law* […] (in Serbian – *vladavina prava*).

[21] See in particular, *Paul Lasok QC.* The Rule of Law in the Legal Order of the European Community // In: Fundamental values / edited by Kim Economides … [et al.]. Oxford; Portland: Hart, 2000. – P. 91.

Macedonian (*vladenieto*) or Serbian (*vladavina*) its meaning can be expressed as "the sovereignty of law."[22]

Majority of national constitutions of the European countries do not contain the exact term "the rule of law". In particular, written in languages other than German or French, they contain formulas that in the respective national languages are very similar to German notion of *Rechtsstaat* (or French notion of *Etat de droit*). This group consists of the constitutions of Germany itself (*Rechtsstat*) as well as of Czech Republic (*pravni stat*)[23], Poland (*panstwo prawne*)[24], Russia (*pravovoie gosudarstvo*),[25] Slovak Republic (*pravni stat*)[26], Slovenia (*pravna drzava*)[27], Spain (*Estado de Derecho*),[28] Switzerland (*Stato diritto)*[29] etc.

Another constitutional wording worth to be mentioned in this regard still embodies the Soviet-type concept of *verkhovenstvo zakona (zakonov)* having nothing in common with the *Rule of Law* notion (or even with the concept of *Rechtsstaat*). Such a phrase is included into the constitution of Azerbaijan, according to which the goal of the nation is "to build a law-based state (*pravovoie gosudarstvo*) […] which shall secure the supremacy of the laws (*verkovenstvo zakonov*)."[30] The concept of *verkhovenstvo zakona (zakonov)* alongside with concept of *socialist (soviet) legality* were developed by *Andrei Vyshynsky* as an outcome of his own "theory of state and law", according to which "Law draws its force, and obtains its content, from the state."[31] The *Vyshynsky's* concept of *socialist (soviet) legality* was officially approved by Stalin as an equivalent to *Leninist legality.*[32] The legal term "*verkhovenstvo*

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[22] *Ibidem*. – P. 92.

[23] Article 1 (para.1): "The Czech Republic is a sovereign, unitary and democratic *pravni stat* […]".

[24] Article 2: "The Republic of Poland shall be a democratic *state ruled by law* […]" (in Polish – *panstwo prawne*).

[25] Article 1 (para. 1): ["…] Russia shall be a democratic federal *law-governed State* […]" (in Russian – *pravovoie gosudarstvo*). The term *pravovoie gosudarstvo* (as a Russian equivalent of the German term *Rechtsstaat* and that is in some cases translated into English term *pravovoie gosudarstvo* became under anathema since the October Revolution in 1917. In the course of *perestroika*, Mikhail Gorbachev, in May 1988, referred to the creation of "socialist *pravovoie gosudarstvo*". Such concepts as *pravovoie gosudarstvo* and *socialist legality* reflect the relationship between state power and law. At the theoretical level, there seems to be little coherent understanding of *pravovoie gosudarstvo* other than the minimum requirement that the state power should be subordinate to the Constitution. – See, in particular: *Hiroshi Oda*. The emergence of *Pravovoie gosudarstvo (Rechtsstaat)* in Russia. – Review of Central and East European Law. – 1999, Vol. 25, No. 3 (373-434).

[26] Article 1 (para.1): "The Slovak Republic is a sovereign, democratic *state governed by the rule of law* […]" (in Slovakian – *pravni stat*).

[27] Article 2: "Slovenia is a *state governed by the rule of law*" (in Slovenian – *pravna drzava*).

[28] Article 1 (para.1): "Spain is hereby established as a social and democratic *Estado de Derecho* […]".

[29] Article 5 has the title: "*Stato di diritto*".

[30] The preamble of the Constitution of Azerbaijan: "The people of Azerbaijan […] solemnly declares its following intentions: […] 4. to build a law-based, secular state (*pravovoie gosudarstvo*) which shall secure supremacy of the laws as an expression of the will of the nation; […]".

[31] Vyshynsky Andrei. *The Law of the Soviet State*. Translated from Russian by Hugh W. Babb; Introduction by John N. Hazard. – New York: Macmillan, 1954. – P. 5.

[32] See Strogovich M.S. *Socialist legality, legal order and application of the Soviet law (For the universities of Marxism-Leninism)*. – Moscow: Mysl, 1966. – S. 17-22. (*Sotsialisticheskaya zakonnost, pravoporiadok I primenieniye sovetskogo prava: dlia universitetov marksizma-leninizma*) [in Russian].

zakona (zakonov)", as it is used in Russian, Ukrainian or Belorussian languages would mean in English "the supremacy of the laws/the statutes". Therefore, it is obvious that the language of Lenin, Stalin and Vyshynsky is still present in one of the modern constitutions of the CE member-states. By all means, this type of language constitutes a solid obstacle towards making the Rule of Law effective or operative in this country.

There is also one more particular example of how the constitutional design of a CE member-state might not be a good promoter of the *Rule of Law* transformation from the European value and ideal into an efficient practical legal concept at the national level. Such an example is reflected in Ukrainian experience. The Constitution of Ukraine of 1996 demonstrates dualism in the constitutional design as it embodies two "similar but not always synonymous"[33] notions of "*Rechtsstaat*" (in Ukrainian – *pravova derzhava*)[34] and of "*the rule of law*."[35] Hence, this type of constitutional wording has entailed a dichotomy in contextual interpretation of the Constitution by majority of Ukrainian scholars. In particular, while interpreting the notion of *verkhovenstvo prava*/*the rule of law* (Article 8) most of them still do not believe that there is a *consensus* about "the necessary elements of the rule of law as well as of the *Rechtsstaaat* which are not only formal but also substantial or material (*materieller Rechtsstaatsbegriff*)."[36] One of the judges of the Constitutional Court of Ukraine has recently stated that Article 1 of the Constitution (referring to the concept of *pravova derzhava/Rechtsstaat* in it) and Article 8 (referring to the concept of *verkhovenstvo prava*/*the rule of law* in it) "have determined legal dualism in the structure of the legal system of Ukraine" because "*pravova derzhava/Rechtsstaat* and *verkhovenstvo prava*/*the rule of law* are the two, but different from each other, mechanisms of the legal system."[37]

b. Legal doctrine (Ukraine's experience)

The gravity of difficulties in promoting the Rule of Law in Ukraine and in transforming it into a practical concept is rooted in the number of factors that shape country's modern constitutional developments and majority of which derive from the historically determined legal culture and tradition.

For the period of more than three centuries Ukraine was embraced by Russian absolutism and the Russian version of Marxism. The ideology of the both of them had overall influence over Ukrainian legal culture and tradition. On its turn Russian legal culture and legal tradition was under the lasting influence of German positivism, which was a cradle of positivistic concept *Rechtsstaat*. Therefore, Russian concept of "*pravovoie gosudarstvo*" is merely borrowed German notion of *Rechtsstaat* that had being adjusted to the Russian political developments in different historical periods. Even at the edge of the Soviet Union its Communist party under the leadership of *Mikhail Gorbachev* so easily accommodated (in 1988) the concept of *sotsialisticheskoie pravovie gosudarstvo (Socialist Rechtsstaat)* as an official doctrine to be

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[33] See Report on the Rule of Law adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011). Study No. 512/2009. *CDL-AD(2011)003rev.* (paras.4, 13, 14, 15).

[34] Article 1: "Ukraine is a […] *pravova derzhava*" ("*Rechtsstaat*"/ "*law-besed state*").

[35] Article 8: "In Ukraine, the principle of *verkhovenstva prava (the Rule of Law)* is recognized and is in action".

[36] See *CDL-AD(2011)003rev.* (para.41).

[37] *Kampo V.* Ukraïns'ka doktryna verkhovenstva prava. – Kyiv, 2008. – P. 90 (The Ukrainian doctrine of the Rule of Law – *in Ukrainian*).

used as a new basis for the "radical strengthening of *socialist legality*" within the framework of *perestroika* process.[38] While striving for the goals of political reforms in the Soviet Union the leading role in making this concept effective was given to the Communist party. One of the basic principles underlying the concept of *sotsialisticheskoie pravovie gosudarstvo* was the principle of *verkhovenstvo zakona* (*supremacy of the Soviet statute laws)*. This principle was proclaimed as "an inalienable feature of *sotsialisticheskoie pravovie gosudarstvo*" in the Soviet practice[39]. Upon the collapse of the Soviet Union in 1991, the concept of *verkhovenstvo zakona* (*supremacy of the Soviet statute laws)* inherited from the Soviet legal doctrine, was replaced by a cognate doctrine of *diktatura zakona (dictatorship of the statut laws)* proclaimed by President Vladimir Putin as an official legal doctrine of the modern Russian state.[40]

Ukrainian legal thought continues its development under an immense influence imposed by the Russian legal thinking, which itself is deficient in the researches on the *rule of law* in light of it traditional interpretation provided by European institutions. In most cases the translations of the treatises of Western authors into Russian or Ukrainian appears to be inadequate and distorting the substance. Due to the long-standing tradition in the Russian legal culture and, in particular, in legal language, even Russian translation of the fundamental A.V. Dicey's *Introduction to the Study of the Law of the Constitution* published back in 1907, interprets for instance "the rule of law" notion as "*verkhovenstvo zakona (supremacy of the statute laws),*"[41] and the notion of "spirit of law" as "*dukh zakonnosti (spirit of legality).*"[42] The aforesaid observation can be made also with regard to Ukrainian translations of the modern treatises related to the *rule of law* issue (among them: *Theory of Justice* by *John Rawls,*[43] *The Concept of Law* by *H. L. A. Hart,*[44] *The Constitution of Liberty* by *Friedrich A. Hayek*).[45]

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[38] See Резолюция XIX Всесоюзной конференции КПСС: О демократизации советского общества и реформик политической системы. *Коммунист*. – 1988. – № 10. – С. 68 [Resolutions of XIX All-Union CPSU Conference on democratization of Soviet society and the reform of the political system. *Communist*, `1988, No. 10. – P.68 (in Russian)].

[39] See Лившиц Р. З. Право и закон в социалистическом правовом государстве. *Советское государство и право*. – 1989. – № 3. – С. 15 [Livshyts R.Z. Law and the laws in socialisticheskoie pravovoie gosudarstvo (Socialist Rechtsstaat). *Sovietskoie gosudarstvo i pravo*. – 1989. – No. 3. – P. 15 (in Russian)].

[40] See http://president.kremlin.ru/text/appears/2000/01/28883.shtml.

[41] See Дайси А. В. *Основы государственного права Англіи: Введение въ изученіе англійской конституции. Переводъ, дополненный по 6-му англійскому изданію*, О. В. Полторацкой; Под редакцій проф, П. Г. Виноградова. – Изданіе второе. – Москва: ТипографіяТ-ва И. Д. Сытина, 1907. – С. 211. [Dicey A. V. *Introduction to the Study of the Law of the Constitution / Translated and revised from 6th ed. in England* by O. V. Poltoratskaya; edited by Professor P. G. Vinogradov. – 2nd ed. – Moscow: Sytin Publishing House, 1907. –P. 211 (in Russian)].

[42] *Ibidem*, p. 227.

[43] Published in Ukrainian in 2001: the notion of "the Rule of Law" is translated as "*vlada zakonu*" or "*pravlinnia zakonu*" which means in English "*the rule of the laws*".

[44] The title being translated into Ukrainian as "*Concept zakonu (The concept of a law*")*.*

[45] Published in Ukrainian in 2002: the notion of "the Rule of Law" is translated as "*norma zakonu*" which means "*a rule of a law*".

The unsatisfactory mode of domestic legal thinking was the determinant for the author to move a motion for a resolution on the issue in the Parliamentary Assembly and to express a great concern regarding the fact that "certain traditions of the totalitarian states [were] still present in theory and practice" in most of the post-Soviet states. In particular, according to the principal trends in legal thinking "the rule of law" is perceived as "supremacy of the rules", or "written rules" set up in the statutes (in Russian: *verkhovenstvo zakona*).[46] The Assembly's report on the matter confirmed that in the states impacted by the Soviet Union "much of the legal-positivist tradition of the Soviet era is still prevailing."[47] Consequently, in its resolution, the Assembly has drawn attention to the fact that understanding the "rule of law" notion as the "supremacy of statute laws" (in Russian – "*verkhovenstvo zakona*") is a formalistic interpretation of this notion and "runs contrary to the essence" of the Rule of Law. Therefore, it was recommended that "*the rule of law*" should be translated into Russian as *verkhovenstvo prava.*[48]

Most of the Ukrainian scholars' developments on this matter published within last 15 years (upon the adoption in 1996 of the Constitution of Ukraine with its "*rule of law/verkhovenstvo prava*" formula) demonstrate that even nowadays the legal-positivist tradition in Ukraine's legal thinking is still prevailing.[49] The leading trend in this thinking is reflected in the thesis widely supported by Ukrainian scholars that "the Rule of Law (*verkhovenstvo prava*) principle can be implemented only by means of supremacy of the statute laws (*verkhovenstvo zakonu*)" assuming that a "dialectical link exists between the two principles – of *verkhovenstvo prava* and of *verkhovenstvo zakonu*". Following this trend the leading scholars consider and interpret the concept of *the rule of law* (*verkhovenstvo prava*) as merely "*an element*", or only as "*one of the principles*", or even only as "*a part of the featuring characteristics*" of Ukrainian *Rechtsstaat* (*pravova derzhava*). According to such an approach, the authors perceive *the rule of law* only as a fraction of the concept of *Rechtsstaat,* which in their view is greater (general) phenomenon. This perception derives from the positivistic concept of *Rechtsstaat* ("formal" *Rechtsstaat*) embracing the "canonical" thesis about *Rechtsstaat* as a state "bound by its statute laws". The followers of the abovementioned approach consider modern *Rechtsstaat* as a "state, in which the rule-of-law principle is supreme" in the way that it is a "state, in which the statutory laws have their supremacy". According to another thesis "the rule-of-law principle and the principle of the supremacy of statutory laws are of the same substance within the *Rechsstaat* concept". Ultimately, such a mode determines confusion by Ukrainian authors of the idea of "supremacy of statutory laws" with the concept of "rule of law".

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[46] See: The principle of the rule of law. *Motion for a resolution* presented by Mr Holovaty and others. *Doc 10180. 6 May 2004.*

[47] The principle of the rule of law. Report. Committee on Legal Affairs and Human Rights. Rapporteur: Mr Erik Jurgens, Netherlands, Socialist Group. *Doc 1343, 6 July 2007*.

[48] See: The principle of the rule of law. Resolution 1594 (2007). Text adopted by the Standing Committee, acting on behalf of the Assembly, on 23 November 2007 (para.4).

[49] For the comparative analysis of the prevailing trends in the contemporary legal writings on this subject see: Serhiy Holovaty. The Rule of Law: Reiterating the devious paths in Ukrainian legal thought. – *Pravo Ukraïny* – 2010 – No. 4. – P. 206-219; N. 5. – P. 64-76.

According to aforesaid way of thinking the trend prevailing in the interpretation of *the rule of law* (*verkhovenstvo prava*) concept suggests to explore its substance by "partitioning" the phrase "*the rule of law (verkhovenstvo prava)*", in particular, to deal with the meaning of the word "*law (pravo)*" first and afterwards to identify the meaning of the word "*rule (verkhovenstvo)*". Some authors suggest to apply to the concept of the "*rule of law (verkhovenstvo prava)*" the "etymological interpretation" (emphasizing that this notion "is a combination of two words different by their meaning – "*verkhovenstvo/rule*" and "*pravo/law*", and that only "the separate analysis of each of them could lead to the integral result"). The others suggest to apply the so-called "element-by-element analysis", according to which two words – the "rule" and the "law" – are different elements of "the phenomenon of the rule of law". In this case, they also suggest to start with analyzing "the first element" (presented by the word "*law*") aiming to finally find out "*what* is ruling?"

However, all the authors, who suggested to apply any of the method mentioned above, are common in understanding of the concept of *law*; they still consider *law* as "the aggregate of the norms and rules of conduct adopted and sanctioned by the state" (or as "the aggregate of normative acts", or as "the system of legislation" etc.). Interpretation of the *rule of law* concept in the way that is fostering the *rule by law* concept is definitely a manifestation of the mechanistic (positivistic) approach that in Ukrainian (or Russian) case establishes very favorable conditions for the *autocratic rule*. Consequently, such theoretical approach leads to the doctrinal deadlock and impedes the *action of the Rule of Law* concept in practical terms.

c. Legal education (Ukraine's experience)

As the positivistic approach of current Ukrainian legal doctrine has derived from the Soviet law schools it is further enshrined by the same doctrine to modern Ukrainian legal education and, consequently, to the legal profession.

Today's state of higher legal education is marked by controversies. Currently, in Ukraine there are over 200 law schools, whereas in Poland there are only 25, in Germany – 42, in the United Kingdom – 97, and even in the United States – less than 200[50] (but over 1,500 in Russia).[51] At the same time, only 90 of them made it to a ranking of Ukraine's law schools, and only 7 of those were awarded over 10 out of 100 points by graduates, employers, and experts.[52] The capacity of these 90 law schools is sufficient to annually graduate 36,135 lawyers.[53] 37% of all students graduate from the law-schools subordinated to law-

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[50] State of Legal Education and Science in Ukraine. Findings of the Research Conducted by the OSCE Project Co-ordinator in Ukraine in Cooperation with the National University of Kyiv Mohyla Academy. 2009-2010. [Unpublished. Presented at the Conference "The Role of Legal Education in the Society Governed by the Rule of Law: Ukraine's Challenges" (Lviv, Ukraine, 20-23 October, 2011)]. – P. 4.

[51] See at URL: http://www.law.uamir.ru/article/3284.html

[52] See Compass-2010 – a ranking of higher education institutions by fields of study:

URL:http://issuu.com/romankakulya/docs/compass-2010?mode=embed&viewMode=presentation&layout=http%3A%2F%2Fskin.issuu.com%2Fv%2Flight%2Flayout.xml&showFlipBtn=true.

[53] State of Legal Education and Science in Ukraine. Findings of the Research Conducted by the OSCE Project Co-ordinator in Ukraine in Cooperation with the National University of Kyiv Mohyla Academy. 2009-2010. [Unpublished. Presented at the Conference "The Role of Legal Education in the Society Governed by the Rule of Law: Ukraine's Challenges" (Lviv, Ukraine, 20-23 October, 2011)]. – P. 4.

enforcement agencies.[54] Judging by these figures alone, the question is: what professions does higher education train lawyers for?

European understanding suggests that "a lawyer" is *"a person qualified and authorized according to the national law to plead and act on behalf of his or her clients, to engage in the practice of law, to appear before the courts or advise and represent his or her clients in legal matters"*[55]. In view of the principles of the lawyer's profession, the Committee of Ministers emphasizes the following main principles of legal education:

> "All necessary measures should be taken in order to ensure a high standard of legal training and morality as a prerequisite for entry into the profession…"[56]

> "Legal education … should seek to strengthen legal skills, increase awareness of ethical and human rights issues, and train lawyers to respect, protect and promote the rights and interests of their clients and support the proper administration of justice".[57]

At the same time, modern Ukrainian understanding of the legal profession is marked by, the following approaches:

> "Legal activity is a type of social activity which is pursued by lawyers through legal means abiding by legal forms in the legislatively prescribed cases with the aim of resolving various legal problems. There are two main types of legal activity: criminal and civil".[58]

> "A far from exhaustive list of legal profession categories by affiliation with organizational structures includes a judge, a prosecutor and prosecutor's office investigators, an advocate and employees of legal attorney's offices, a lawyer in the law enforcement agencies (Ministry of Internal Affairs, Security Service of Ukraine, etc.), a legal counsel, an employee of law firms, a lawyer in the management system, a research lawyer and an expert, etc."[59]

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[54] *Ibidem*, P. 18.

[55] Recommendation R(2000)21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer adopted by the Committee of Ministers on 25 October 2000 at the 727 meeting of the Ministers' Deputies. (Pramble).

URL:https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=533749&SecMode=1&DocId=370286&Usage=2.

[56] *Ibidem.* Principle II, Para 2.

[57] *Ibidem.* Principle II, Para 3.

[58] Бризгалов І. В. *Юридична деонтологія: Короткий курс лекцій*. – К.: МАУП, 2003. – 3-тє вид., стереотип. – 48 с., стор. 22. *[*Bryzgalov I.V. *Legal Deontology: A Brief Course of Lectures*. – Kyiv: Interregional Academy of Personnel Management, 2003 – 3rd edition, reprint – 48 p., p. 18.]

[59] Бандурка О.М., Скакун О.Ф. *Юридична деонтологія: Підручник*. – Харків: Вид-во НУВС, 2002. – 336 с. [Bandurka O.M., Skakun O.F. *Legal Deontology: A Textbook* – Kharkiv: National University of Internal Affairs publishers, 2002. – 336 p.]

The requirements for the legal profession are formulated accordingly:

> "A lawyer is a specialist who puts his/her knowledge to practical use, i.e. is skilled in producing legal documents and performing all actions and operations using the required means during resolution of a legal case that belongs to his/her field of professional expertise".[60]

Or: "General features of the legal profession:

- a lawyer serves the civil society and the state: his/her activity is, first and foremost, of social and state nature;
- a lawyer, as a rule, deals with social anomalies, "diseases" in the society;
- a lawyer has a formal status of an official: holding a position, s/he often pledges an oath of allegiance to his/her professional duty;
- a lawyer's work does not immediately create material or spiritual values: s/he is vested with certain governmental powers that have an administrative component (but are not necessarily solely administrative). For example, the job of a prosecutor, judge, investigator, etc. envisions their having special governmental powers, as well as the right and the obligation of exercising their powers in the name of the law;
- a lawyer acts independently: his/her work is not completely concurrent with the activities of an agency or institution employing him/her;
- a lawyer is urged to act creatively: s/he is in continuous search for the truth and does not have standard solutions, since s/he resolves specific cases for specific individuals and circumstances;
- a lawyer is a votary of law: in his/her activity s/he is always bound by law".[61]

Thus, the legal profession is interpreted not as liberal and self-regulating, but rather as a component of various institutions: prosecutor's office, investigation, advocacy, judiciary, etc. Given that, legal profession is interpreted to include both legal professions proper (advocate, judge) and law-enforcement ones (investigator, operating executive, etc.). Further, the legal profession is considered as one that focus less on human rights protection, than on "social anomalies", the need "to exercise powers of government in the name of the law", and resolve "specific cases" and "legal issues".

Ultimately, understanding of the legal profession determines the content of legal education. The study of the content and teaching methods in six leading Ukrainian schools[62] has proved that almost all the law schools still teach “Theory of State and Law.”[63] This discipline has

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[60] Бризгалов І. В. *Юридична деонтологія: Короткий курс лекцій*. – К.: МАУП, 2003. – 3-тє вид., стереотип. – 48 с., стор. 22. [Bryzgalov I.V. *Legal Deontology: A Brief Course of Lectures*. – Kyiv: Interregional Academy of Personnel Management, 2003. – 3rd edition, reprint – 48 p., p. 22.]

[61] Бандурка О.М., Скакун О.Ф. *Юридична деонтологія: Підручник*. – Харків: Вид-во НУВС, 2002. – 336 с. [Bandurka O.M., Skakun O.F. *Legal Deontology: A Textbook* – Kharkiv: National University of Internal Affairs publishers, 2002. – 336 p.]

[62] In particular, Yaroslav Mudryi National Law Academy in Kharkiv, Taras Shevchenko National University of Kyiv, National University of Kyiv-Mohyla Academy of Kyiv, Ivan Franko National University of Lviv, Donetsk National University, Taurida National V.I. Vernadsky University (in Crimea). These law schools determinate approaches and trends towards legal education and legal science in Ukraine.

nothing in common with traditional Legal Theory. It has not been changed for decades and derives from the "theory of state and law" developed and established by Andrei Vyshynskiy.

In university education and professional training, there is no discipline in the curricula devoted to the study of the human rights in particular in light of the requirements of the Recommendation on the European Convention on Human Rights[64]. At all the law schools, the discipline of Constitutional Law is taught on understanding of the constitution as a positive act of the State. Consequently, the structure of a relevant academic discipline is a clause-by-clause recitation and explanation of individual provisions of the Constitution of Ukraine.[65]

Another fundamental discipline, Administrative Law, has been not substantially changed since the Soviet period. It focuses on the structures and powers of the executive agencies, public office career and administrative liability of individuals for committed offenses, while very little attention is paid to the rights of persons in their relations with the public administration. The administrative law is predominantly taught as the punitive law, while ignoring such notions as "public administration", "discretionary power and its limitation", "judicial review of administrative decisions".[66] The main shortcoming in teaching Criminal Law is also caused by Soviet teaching methodology, in particular recitation of the national legislation. Considering that Ukraine continues to apply the Code of Criminal Procedure adopted in 1961 with all the institutes inherent to that time and the Soviet Law "On *Prokuratura*", the law school graduates continue to be carriers of the Soviet criminal-law doctrine.[67]

In the curricula of Ukrainian law schools, there are no courses providing students with the skills needed for legal profession, such as legal analysis and writing. With regard to the course on legal ethic (called legal deontology), it is fully shaped by the Soviet approach to understanding of the nature of the legal profession and its ethical values.

> "The objective of a course in legal deontology is: for students to gain basic knowledge on the legal foundations of the state and social life, to develop solicitous attitude to the interests of society, state, and individual, to identify axiological benchmarks for moral assessment of a professional lawyer's activities, to learn about the system and methodology of education and the requirements imposed on representatives of the

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[63] State of Legal Education and Science in Ukraine. Findings of the Research Conducted by the OSCE Project Co-ordinator in Ukraine in Cooperation with the National University of Kyiv Mohyla Academy. 2009-2010. [Unpublished. Presented at the Conference "The Role of Legal Education in the Society Governed by the Rule of Law: Ukraine's Challenges" (Lviv, Ukraine, 20-23 October, 2011)]. – P. 63-66.

[64] Recommendation Rec(2004)4 of the Committee of Ministers to member states on the European Convention on Human Rights in university education and professional training adopted by the Committee of Ministers on 12 May 2004, at its 114th Session.

URL: https://wcd.coe.int/ViewDoc.jsp?id=743277&Site=CM

[65] State of Legal Education and Science in Ukraine. Findings of the Research Conducted by the OSCE Project Co-ordinator in Ukraine in Cooperation with the National University of Kyiv Mohyla Academy. 2009-2010. [Unpublished. Presented at the Conference "The Role of Legal Education in the Society Governed by the Rule of Law: Ukraine's Challenges" (Lviv, Ukraine, 20-23 October, 2011)]. – P. 66-69.

[66] *Ibidem.* P. 69-73.

[67] *Ibid.* P. 73-75.

legal sphere".[68]

> "Legal deontology (in a broad sense) is a science that analyzes not only moral, but also psychological, political, professional, ethical, and aesthetical requirements that govern a specialist's attitude towards his/her work object – a client and towards his/her colleagues, and ensure on the whole the optimum and guaranteed behavior of individuals in their state of mutual dependence".[69]

Therefore, the results of undertaken studies prove that modern Ukrainian legal education is still penetrated by a positivist theory of law with its focus exclusively on presenting and learning legislation, perceiving legal profession predominantly as punitive dealing with a client as with the "object of work".

With regard to the regulation of the content and quality of legal education, it should be stated that the procedure for development of higher education standards, making amendments to them, and exercising control over their fulfillment shall be determined by the Government of Ukraine.[70] Ukraine's legislation, while declaring autonomy of higher education institutions and their self-governance, makes the real autonomy and self-governance impossible due to an extensive scope of regulatory powers vested with the Ministry of Education. The Ministry, having all the powers to develop higher education standards, including one for legal education, has failed to properly regulate this avenue. Such omission may testify to inability of any central executive agency to independently provide for development of higher education standards and exercise control over their implementation. Given the connection between the legal profession and the legal education, in the European area it is common for the professional legal community to participate in the development of legal education standards and accreditation of law schools, while on the part of the state this influence may partly be wielded by the Ministry of Justice. Ukraine enjoys a number of NGOs of different legal professions: judges, advocates, notaries, prosecutors, etc., but neither of them, nor the Ministry of Justice exert influence on development of legal education standards or accreditation of law schools.

Therefore, while legal education shall be considered as a prerequisite for effectiveness of the Rule of Law, its current state, as it is described, causes substantial impediments towards practical application of the Rule of Law not only in the near future but for the next generations too.

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[68] Цирфа Г.О. Юридична деонтологія: *Навч. посібник для дистанційного навчання*. За ред. Н.І.Клименко – К.: (Університет "Україна"), 2005 - 210 с. [Tsyrfa H.O. Legal Deontology: *Textbook for Distance Learning*. Ed. N.I. Klymenko. – Kyiv: University "Ukraine", 2005. – 210 p.]

[69] Бандурка О.М., Скакун О.Ф. *Юридична деонтологія: Підручник*. – Харків: Вид-во НУВС, 2002. – 336 с. [Bandurka O.M., Skakun O.F. *Legal Deontology: A Textbook* – Kharkiv: National University of Internal Affairs publishers, 2002. – 336 p.]

[70] Закон України «Про вищу освіту» від 17.01.2002. [The Law of Ukraine on Higher Education adopted 17.01.2002]. (Articles 11-13).

URL:
http://zakon3.rada.gov.ua/laws/show/%D0%B2%D0%B8%D1%89%D1%83%20%D0%BE%D1%81%D0%B2%D1%96%D1%82%D1%83

There is a long-standing need to make a shift in this rigid environment. However, until today it is not on the agenda of political and professional institutions. However, in the aims of the *Rule of Law as a practical concept*, the sphere of legal education should be included in the list of the reforms that are urgently needed in the country that for so many years is lagging behind with the genuine transformation of its legal system by bringing it into conformity with the European standards.

What should be done in this regard? First of all, the strict criteria should be established to the understanding of legal profession. The standards-setting competence for legal education, as well as for accreditation of the law schools, should be vested in the body independent from the state regulatory authority in the area of education. The relevant body should consist of the representatives of independent and self-governed legal profession and of Ministry of Justice. Legal education curricula have to be comprised in the way to provide students with the knowledge about doctrines, principles and institutes in the fundamental areas of law (constitutional and administrative law, criminal law, private law). Relevant doctrines, principles and institutes shall be taught in line with their interpretation by European institutions. The legal education curricula should include courses providing for proper skills required to practice law, in particular, in the area of legal analysis, interpretation and legal ethics.

d. Legal profession and professional legal training (Ukraine's experience)

Ultimately, legal doctrine, legal education as well as distorted understanding of the nature of legal profession appeared to be determinative for the regulation of access to legal profession, professional standards and accountability. Striving for the independence and quality of legal profession, the European institutions in particular emphasize that *"decisions concerning the authorization to practice as a lawyer or to accede to this profession should be taken by an independent body,"*[71] *"bar associations or other professional layers' associations should be self-governing bodies, independent of the authorities and the public."*[72]

Disregarding treatment of the law-enforcement profession as legal one, it worthwhile to mention that, in Ukraine, profession of the prosecutor is still treated as law-enforcement activity.[73]

With regard to other legal professions, in particular advocates and judges, the access to these professions, professional standards and professional accountability are marked by the following features.

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[71] Recommendation R(2000)21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer adopted by the Committee of Ministers on 25 October 2000 at the 727 meeting of the Ministers' Deputies (Principle I, para.2).

URL:https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=533749&SecMode=1&DocId=370286&Usage=2.

[72] *Ibidem.* Principle V, para 2.

[73] Закон України «Про прокуратуру» від 5.11.1991. [The Law of Ukraine on Procuratura adopted 5.11.1991]. (Article 4).

URL:http://zakon1.rada.gov.ua/laws/show/%D0%BF%D1%80%D0%BE%D0%BA%D1%83%D1%80%D0%B0%D1%82%D1%83%D1%80%D1%83

First of all, graduates from Ukrainian law schools do not have to pass any qualifying professional exams to start their legal practice. The access to the advocate's profession can be granted to *"any person, who has higher legal education…, work experience in the area of law of at least two years, a command of the state language, who has passed qualifying examinations ..."*[74] No professional training or apprenticeship is required as prerequisite to get an access for the position of advocate. Under such understanding of the legal profession, the criterion of "work experience in the area of law" makes this profession accessible for example for former police officers. The procedure to check command of the state language does not exist. Even though, according to current Ukrainian legislation, *advokatura* (advocacy) is a *"voluntary professional non-governmental association."*[75] The High Qualification Commission of *Advokatura* is established at the Cabinet of Ministers of Ukraine and regulated by the President of Ukraine.[76] Furthermore, local qualification and disciplinary commissions are established at the bodies of regional self-government.[77] Local qualification commissions are entitled to take qualifying written and oral exams according to procedure that does not provide any rules for transparent selection neither for the appeal on the results of the exams.[78] The list of questions for the qualifying exam is approved by the High Qualification Commission of *Advokatura* consists mainly from the general questions for oral discussion, and, in particular, do not require any proof of knowledge in the area of administrative law or administrative justice.[79] The institute of continuous professional training does not exist. The disciplinary procedure for the advocates is not officially established. Therefore, access to the profession of advocate, quality control over the legal practice and professional accountability depends on arbitrary decisions of the bodies governed by the executive power.

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[74] Закон України «Про адвокатуру» від 19.12.1992. [The Law of Ukraine on Advocacy adopted 19.12.1992]. (Article 2).

URL:http://zakon2.rada.gov.ua/laws/show/%D0%B0%D0%B4%D0%B2%D0%BE%D0%BA%D0%B0%D1%82%D1%83%D1%80%D1%83,

[75] *Ibid.* Article 1.

[76] *Ibid.* Article 14.

[77] *Ibid.* Articles 13.

[78] Порядок складання кваліфікаційних іспитів у регіональних кваліфікаційно-дисциплінарних комісіях адвокатури, Затверджений Вищою кваліфікаційною комісією адвокатури України при Кабінеті Міністрів України, Протокол N 6/2 від 01.10.1999. [The Procedure of Qualifying Examinations in Regional Qualification and Disciplinary Commissions of *Advokatura*. Approved by High Qualification Commission of *Advokatura* at the Cabinet of Ministers of Ukraine 01.10.1999, Protocol #6/2]

URL:http://vkka.gov.ua/index.php?page=news&id=19.

[79] Програма складання кваліфікаційних іспитів у регіональних кваліфікаційно-дисциплінарних комісіях адвокатури, Затверджена Вищою кваліфікаційною комісією адвокатури України при Кабінеті Міністрів України, Протокол N 6/2 від 01.10.1999 р. [The Program for Qualifying Examinations in Regional Qualification and Disciplinary Commissions of *Advokatura*. Approved by High Qualification Commission of *Advokatura* at the Cabinet of Ministers of Ukraine 01.10.1999, Protocol #6/2]

URL:http://zakon.nau.ua/doc/?uid=1041.8077.5&nobreak=1

Special attention should be driven to the access the position of judges, judicial training and accountability. Even though, the situation in Ukraine has been improved with the recent adoption of new *Law on the Judicial System and the Status of Judges*,[80] this latest piece of legislation preserves some notable instruments to prevent the judge from being well qualified, independent and impartial. The Venice Commission with regard to this Law, when it was submitted as a draft for the opinion, stressed that

> "From the point of view of the technique of legislation one cannot but remark that the Ukrainian legislator prefers a positive approach of making laws, in the sense of a legal positivism. This means that the legislator tries to mention or to enumerate all the possible facts which can form the elements of a legal rule. Therefore the legal texts are quite voluminous and contain elements which are perhaps not necessary, or which could be delegated to subordinate legislation (e.g. a regulation). One negative effect is certain: the rules are difficult to find and to know, also for the practising judge, and, if the law does not provide for a rule for facts in a certain case (no catalogue of facts is complete) the judge might be feeling completely at sea."[81]

The first threat derives from the Constitution itself, by which the power of appointment for the position of judge is vested with the President (for the initial appointment) and Parliament (for lifetime election).[82] The formal appointment procedure by itself would not be a problem if it would have sufficient safeguards that power of appointment will not be abused. The safeguards, in particular foresee the establishment special independent and competent body to give the government advice which it follows in practice.[83] According to the Opinion of the Venice Commission, both the composition of the bodies authorised to select judges (High Qualifications Commission and High Council of Justice) and their competencies do not prevent political intervention into the process of selection of judges.[84]

Similar comments refer to the disciplinary liability and disciplinary proceedings. The criteria for disciplinary liability remain vague and their application depends on the discretion of disciplinary body. And with regard to the composition of the Disciplinary Commission of Judges of Ukraine where the President, the Parliament and the Minister of Justice should have representatives, the Venice Commission in particular stated: *"It seems that the*

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[80] Закон України «Про судоустрій і статус суддів» від 7.07.2010. [The Law of Ukraine on the Judicial System and the Status of Judges of Ukraine adopted on 7.2010].

URL: http://zakon3.rada.gov.ua/laws/show/2453-17

[81] Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe adopted by the Venice Commission at its 82nd Plenary. (Para 9).

URL: http://www.venice.coe.int/docs/2010/CDL-AD(2010)003-e.pdf

[82] Constitution of Ukraine. (Article 128. Para 1.) URL: http://president.gov.ua/en/content/constitution.html

[83] The Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe from 13 October 1994 on the Independence, Efficiency and Role of Judges. (Principle I, Para 2 c). URL:http://www.hjpc.ba/dc/pdf/Recommendation%20no%20R%20(94)%2012.pdf

[84] Joint Opinion on the Draft Law On the Judicial System and the Status of Judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe adopted by the Venice Commission at its 82nd Plenary Session. (Para 32-49).

URL:http://www.venice.coe.int/docs/2010/CDL-AD(2010)003-e.pdf

approach according to which the executive and the legislature should always be represented in bodies in whose work judicial considerations should play a paramount role somehow reflects a distorted idea of checks and balances".[85]

With regard to the judicial training as prerequisite of the independent and competent judiciary, the European Charter on the Statute for Judges in particular states: *"The statute ensures by means of appropriate training at the expense of the state, the preparation of the chosen candidates for the effective exercise of judicial duties".*[86] It was reiterated in a number of the Venice Commission opinions on respective Ukrainian draft laws that it is vital for the justice system to establish training institutions as part of the judicial branch, to provide initial training as prerequisite of the access to the position of a judge and to ensure continuous training of initially appointed judges as well as of those elected for lifetime term.[87] With the new Law, the National School of Judges has been established with the authority to provide initial and continuous training for judges. However, the idea of judicial training is significantly undermined by its non-consistency with the content of legal education and at the same time preserving Soviet training methods and Soviet legal doctrine in the content of judicial training. The program of the qualifying exam for the position of judges may be taken as an example.[88] On the one hand, the questions require from the candidate for the position of a judge a detailed knowledge on administrative justice and on Convention for the Protection of Human Rights and Fundamental Freedoms, while relevant information is not included into the curricula of the Ukrainian law schools. On the other hand, the candidate for the position of a judge has to present his (or her) knowledge in the area of criminal law which is still based on the Soviet doctrine and is in contradiction to the ECHR and the ECrtHR case-law. Constitutional law is not included as a part of the knowledge to be proved by future judges. Finally, none of the questions are aimed to check the skills of a future judge such as ethic, legal analysis and interpretation.

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[85] *Ibidem*, para 57.

[86] The European Charter on the Statute for Judges (Article 2.3).

URL:http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges_EN.pdf

[87] See in particular Para 110-118 of Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe Adopted by the Venice Commission at its 82nd Plenary Session.

URL:http://www.venice.coe.int/docs/2010/CDL-AD(2010)003-e.pdf

[88] Програма письмового анонімного тестування кандидатів на посаду судді на виявлення належних теоретичних знань та рівня професійної підготовки на стадії проведення кваліфікаційного іспиту. Затверджена рішенням Вищої кваліфікаційної комісії суддів України від 2.06.2011. [The Program of Written Anonymous Testing of the Candidates for the Position of Judge in Order to Check Proper Theoretical Knowledge and the Level of Professional Ability at the stage of Qualifying Examination approved by the Decision of the High Qualification Commission of Ukraine 2.06.2011].

URL:http://vkksu.gov.ua/userfiles/doc/22.doc

3. Role of PACE in promoting the rule of law: monitoring procedure

The Council of Europe by itself is an effective mechanism of pan-European co-operation for promoting the rule of law in its member-states. Accordingly, "further *rapprochement* between different legal systems and greater coherence between them on essential points" is considered as one of the tasks for "building a common legal space" with common legal standards, in particular those reflecting the rule of law principles.[89] There are several activities distinguished, through which the CE is promoting and furthering the rule of law. Among them there are activities that promote the conditions necessary for the rule of law, the respect for the rule of law, address threats to the rule of law, and, in particular, ensure respect for the rule of law.[90]

At the same time, the established system is undermined by the fact that "*within the Council of Europe, there is no mechanism to ensure respect for the principle of the rule of law as such.*"[91] Despite such a gap, political monitoring by the Council of Europe statutory organs, in particular by the Parliamentary Assembly, of the member states' commitments and obligations is considered to contribute significantly to ensuring that the rule of law requirements are respected.[92] The monitoring helps to check and assess to what extent national legal systems and their rule-of-law related institutions are brought in line with the rule of law requirements, to find out the shortcomings and malfunction of such institutions and to react in the necessary cases.

a. Assembly's monitoring procedure: evolution and implications

In January 2012 it was the 15th anniversary of the establishment of the Monitoring Committee. By its Resolution 1115 (1997) the Assembly entrusted the Committee with the task of verifying the honoring not only *specific commitments* accepted by the member states upon their accession to the Council of Europe but first of all the *obligations* assumed by the member states under the terms of the Council of Europe Statute, the European Convention on Human Rights and all other Council of Europe conventions to which they are parties.[93] The Monitoring Committee is the only committee established by the Assembly with the statutory obligation to submit annual reports on its activities.

The 15-years activity of the Committee proved to be a significant tool in assisting the member-states that joined the CE after1989 to comply with the European rule-of-law standards, in particular by bringing those standards to states' national legal systems.

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[89] The Council of Europe and the Rule of Law – An overview. CM Documents. CM(2008) 170. 21 November 2008. See para.60.

[90] *Ibidem*, see paras 63-107.

[91] *Ibidem.*, see para.97 (*italics added – S.H.*).

[92] *Ibidem.*

[93] See Resolution 1115 (1997). Setting up of an Assembly committee on the honoring of obligations and commitments by member states of the Council of Europe (Monitoring Committee). *Text adopted by the Assembly* on 29 January 1997 (5th Sitting).

Among the Committee's benchmarking decisions is the one (Antalya, September 2005) setting up a list of criteria for closing the monitoring procedure and by those criteria providing the Assembly with a check-list for measuring progress made by a member state as well as the results achieved. With regard to the *statutory obligations* to observe of *the rule of law* principle, the Committee suggested that in particular the following factors have to be considered:

- the rules of community life must be defined by law by the people, through their representatives in parliament. If the law proves to be flawed, only parliament or the highest court in the country should be able to change it;
- corruption and the over-concentration of political, economic or social power in the hands of a few are all contrary to the notion of a law-governed state. In any democracy, respect for the rule of law is a vital safeguard against arbitrary action at every level;
- respect for the rule of law implies that everyone, be they a government minister, judge, official or ordinary member of the public, is subject to the law, that no-one is above the law and that the law is equal for all. Respecting the rule of law means ensuring order, stability, legal certainty and the proper execution of court decisions. Unless this principle is respected, human rights cannot be fully guaranteed and protected;
- the judiciary must be independent and impartial, its decisions must be beyond reproach and implemented in good faith and law enforcement agencies must be professional, unbiased and free from corruption.[94]

Until 2006, the Assembly failed in its numerous attempts to extend the monitoring procedure to any of the pre-1989 member states (with the exception of Turkey). Hence, in its Resolution 1515 (2006), the Assembly welcomed the initiative of the Monitoring Committee to extend the scope of monitoring to all Council of Europe member states in accordance with the initial Monitoring Committee's mandate.[95]

Since then, the Monitoring Committee prepares and attaches to its annual progress reports to the Assembly periodic reports on states which are not subjected to a monitoring procedure or involved in a post-monitoring dialogue.[96] Within five years the Committee has contributed through its annual progress reports to the debate on "*the state of democracy in Europe*" (in 2008 and 2010), and on "*the state of human rights in Europe*" (in 2009, where emphasized that "the rule of law is the backbone of human rights implementation").[97]

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[94] See Doc. 10960 revised. 20 June 2006 (para.24).

[95] See Resolution 1515 (2006). Progress of the Assembly's monitoring procedure (May 2005 to June 2006). *Text adopted by the Assembly* on 29 June 2006 (22nd Sitting).

[96] Currently 10 member states (Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Moldova, Montenegro, Russian Federation, Serbia and Ukraine) are subject to monitoring procedure and 4 member states (Bulgaria, "the former Yugoslav Republic of Macedonia", Monaco and Turkey) are engaged in post-monitoring dialogue.

[97] See Doc. 11941. 8 June 2009 (para.4).

Notwithstanding unflagging efforts of the Committee to ensure *the full respect for the rule of law* by all the member states, **it happened never before that "*the state of the rule of law in Europe*" was debated in the Assembly due to the Committee's progress report.**

For the purpose of this paper, all the annual progress reports developed by the Monitoring Committee starting from 2006[98] were studied. The remarkable results of the study are as following.

b. Member states undergoing a monitoring procedure or engaged in a post-monitoring dialogue

In 2007, the Assembly has recognized that "*full respect for the principle of the rule of law is the major challenge facing all the countries under monitoring*:

[T]he process of judicial reform has proved to be longer and more complex than initially envisaged. It involves reform of the education system, notably higher education; the creation of professional academies for future judges, lawyers and police officers; effective mechanisms, including at constitutional level, to guarantee the independence of the bodies responsible for the selection, career and disciplinary procedures of judges and prosecutors; the creation of bar associations; professional training; the drafting of codes of ethics; and substantial budgetary means. Judicial reform also requires revision or overhaul of substantial and procedural laws, especially in the field of criminal justice.'[99]

The Committee's progress reports submitted afterwards proved the aforesaid statement, in particular with regard to:

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[98] See: Progress of the Assembly's Monitoring Procedure (May 2005 – June 2006). Report. Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee). Rapportuer: Mr Gyorgy Frunda, Romania, Group of the European People's Party. *Doc. 10960 revised. 20 June 2006*; *Doc. 10960 Addendum. 12 June 2006*; Progress of the Assembly's monitoring procedure. Report. Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee). Rapportuer: Mr Eduard Lintner, Germany, Group of the European People's Party. *Doc. 11214. 30 March 2007; Doc. 11214 Addendum. 2 April 2007*; The state of democracy in Europe. The functioning of democratic institutions in Europe and progress of the Assembly's monitoring procedure. Report. Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee). Rapportuer: Mr Serhiy Holovaty, Ukraine, Alliance of Liberals and Democrats for Europe. *Doc 11628. 9 June 2008; Doc. 11628 Addendum. 6 June 2008*; The state of human rights in Europe and the progress of the Assenbly's monitoring procedure. Report. Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee). Rapportuer: Mr Serhiy Holovaty, Ukraine, Alliance of Liberals and Democrats for Europe. *Doc. 11941. 8 June 2009; Doc. 11941 Addendum. 8 June 2009*; The state of democracy in Europe and the progress of the Assembly's monitoring procedure. . Report. Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee). Rapporteur: Mr Dick Marty, Switzerland, Alliance of Liberals and Democrats for Europe. *Doc 12275. 2 June 2010; Doc 12275 Addendum. 2 June 2010*; The progress of the Assembly's monitoring procedure (June 2010 – May 2011). Progress report. Rapporteur: Mr Dick Marty, Switzerland, Alliance of Liberals and Democrats for Europe. *Doc. 12634. 6 June 2011; Doc. 12634 Addendum. 6 June 2011.*

[99] See Resolution 1548 (2007). Progress of the Assembly's monitoring procedure. *Text adopted by the Assembly* on 18 April 207 (15th Sitting).

- *constitutional reform* that was gravely needed to ensure effective *separation of powers* and properly functioning of democratic institutions – in *Bosnia and Herzegovina*, *Monaco* and *Ukraine;*[100]
- *independence of the judiciary* from the other branches of power and the need for it to be strengthened – in *Armenia*, *Azerbaijan*, *Bulgaria*, *Georgia*, *Monaco*, *Montenegro*, *Serbia*, *the Russian Federation* and *Ukraine;*[101]
- shortcomings in the area of the *independence of the judiciary* which still persisting – notably in *Armenia*, *Bulgaria*, *Russia*, *Serbia*, *Turkey* and *Ukraine;*[102]
- reform of the *Prosecutor General's office* remaining an essential unfulfilled commitment – in *Albania*, *Russia* and *Ukraine;*[103]
- a number of *systemic problems* in the *functioning of the judiciary* that were regarded as the origin of violations of the *right to a fair trial* within a reasonable period of time, and *non-execution of final domestic judicial decisions* or *unreasonable delays in proceedings* – in *Albania*, *Bosnia and Herzegovina*, *Russia*, "*the former Yugoslav Republic of Macedonia*" and *Ukraine;*[104]
- two specific *structural problems* of the *judiciary*, namely the quality of *domestic judicial remedies* compelling the higher courts to overrule final judgments through supervisory review (*nadzor*) proceedings, and the *length of pre-trial detentions* – in *Russia;*[105]
- the excessive use of force and *ill-treatment by the police* in *Albania*, *Armenia*, *Azerbaijan*, *Bosnia and Herzegovina*, *Bulgaria*, *Georgia*, *Moldova*, *Russia*, "*the former Yugoslav Republic of Macedonia*", *Turkey* and *Ukraine;*[106]
- violations of the *right to a fair trial within a reasonable time* that are often caused by numerous *systemic problems in the functioning of the judiciary*, in particular the non-execution of domestic final judgments – in *Albania*, *Bosnia and Herzegovina*, *Russia*, "*the former Yugoslav Republic of Macedonia*" and *Ukraine.*[107]

Although admitting that the Committee's activity appeared to be a good tool for pushing forward the necessary reforms in legal systems of the countries concerned, the Assembly is currently confronted with the situation when a *number of member states, which have been under a monitoring procedure or involved in a post-monitoring dialogue for many years,*[108]

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[100] See Resolution 1619 (2008). State of Democracy in Europe. Functioning of democratic institutions in Europe and progress of the Assembly's monitoring procedure. *Text adopted by the Assembly* on 25 June 2008 (24th Sitting), para.4.2.

[101] See Resolution 1619 (2008), para.4.3.

[102] See Resolution 1676 (2009). State of human rights in Europe and the progress of the Assembly's monitoring procedure. *Text adopted by the Assembly* on 24 June 2009 (23rd Sitting), para.6.1.

[103] See Resolution 1676 (2009), para.6.2.

[104] See Resolution 1676 (2009), para.7.

[105] See Resolution 1676 (2009), para.7.

[106] See Resolution 1676 (2009), para.12.

[107] See Doc. 11941, paras.18-24.

[108] For instance, monitoring procedure for Turkey was opened in 1996, closed in 2004, and followed at the same time with opening a post-monitoring dialogue procedure).

do not seem to be making any significant progress in terms of the fulfillment of their obligations and commitments.[109]

The above said may be proved by a numerous findings that are reflected in all the progress reports, concerning the Rule of Law principle, the with regard to:

- *Albania*: "a clear reform strategy and vision for the judiciary are still missing"; the reform of the Public Prosecutor's Office was considered as "a step back and risked compromising the impartiality of the Prosecutor General";[110]
- *Armenia*: "the failure of key institutions of the state to perform their functions in full compliance with […] the principles of the Rule of Law […] led to the crisis […] and culminated in the tragic events of 1 March 2008";[111]
- *Bosnia and Herzegovina*: "[…] severe criticism of the functioning of judiciary";[112]
- *Bulgaria*: "the judiciary is still regarded today as largely unaccountable, inefficient, non-transparent and corrupt"; "after the adoption of the amendments to the Constitution, the Venice Commission found a number of shortcomings from angle of separation of powers and the independence of the judiciary";[113]
- *Russia*: "concerns about broad extra-penal functions of the *Procuratura* still remain"; [a call on the Russian authorities for] "the reform of the *Procuratura*, with a view to gradually decreasing its broad powers of legality oversight";[114]
- *Serbia*: ([a call on the authorities] "to continue to work on the improvement of the constitutional and legal framework for the judiciary and the Public Prosecutor's Office in order to establish sufficient guarantees against political interference in their activities, as well as to increase the effectiveness and professionalism of judges and prosecutors";[115]
- *Turkey*: "concerns with respect to independence of the judiciary";[116]
- *Ukraine*: "the reform of the judiciary remains of particular concern", "as regards the reform of the Public Prosecutor's Office, this is a commitment undertaken by Ukraine upon accession which has not yet been honored";[117] "decision of the Constitutional Court of 30 September 2010, abrogating the constitutional amendments adopted in 2004 […], created a number of serious legal uncertainties."[118]

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[109] The progress of the Assembly's monitoring procedure (June 2010 – May 2011). Progress report. Committee on the Honoring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee). Rapporteur: Mr Dick Marty, Switzerland, Alliance of Liberals and Democrats in Europe. *Doc. 12634. 6 June 2011* (para.152).

[110] See Doc. 11941, para.9.

[111] See Doc. 11628, para.11.

[112] See Doc. 11941, para.11.

[113] See Doc. 11941, para.12.

[114] See Doc. 11941, para.14.

[115] See Doc. 11941, para.15.

[116] See Doc. 11941, para.16.

[117] See Doc. 11941, para.17.

[118] See Doc. 12643, para.41.

In the Committee's view, the failure of *constitutional reform* in a number of countries (particularly, in Bosnia and Herzegovina and in Ukraine) has impeded necessary reforms in their legal systems and progress in the honoring of their membership obligations and commitments.[119]

The country-by-country reports, developed by the Committee during last eight years, are more conclusive in their statements with regard to the fact that most of the member states in this group do not seem to be making any significant progress in terms of the fulfillment of their obligations and commitments, in particular *the obligation to ensure respect for the rule of law*. In particular, the following conclusions can be mentioned:

With respect to *Albania*:

> "a weak, poorly remunerated and partly corrupted judiciary has been one of the major concerns"; "there is a need for further improvement in order to create a stable and transparent justice system based on the rule of law"[120] (the authorities were called on to *"further pursue judicial reform" in order "to strengthen the independence and professionalism of judges",* to *" address the problem of remuneration of judges and increase the budget for the judiciary",* to *" continue the training of judges and prosecutors through the Magistrates' School and provide for competitive examinations for new appointments", in particular*).[121]

With respect to *Armenia*:

> "the present Constitution does not provide sufficient guarantees for the independence of the judicial power",[122] "the reform of the police and the reform of the judiciary with a view to guaranteeing its independence both in law and in practice" was stated by the Assembly as one of the "clear priorities for the democratic development of the country"[123] (the authorities were called on to "*fully implement the recommendations of the Venice Commission" due to the fact that the recommendations, notably concerning the independence of the judiciary, had not been taken into account,*[124] as well as to *"implement the reform of the judicial system, not least the general prosecutor's office, as soon as possible*").[125]

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[119] See Doc. 11214, para.207.

[120] Honoring of obligations and commitments by Albania. Report. Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee). Doc. 11115. 20 December 2006, para.129.

[121] See Resolution 1538 (2007), para.8.6.

[122] Constitutional reform process in Armenia. Report. Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee). Doc 10601. 21 June 2005, para.42.

[123] See Resolution 1837 (2011), para.12.

[124] See Resolution 1458n (2005), para.6.

[125] Honouring of obligations and commitments by Armenia. Report. Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee). Doc. 11117. 20 December 2006. See also: Resolution 1532 (2007), para.5.3.

With respect to *Azerbaijan*:

> "the need for the reform and train the Azerbaijani judiciary, effectively eradicate corruption among judges and improve negative image has repeatedly been urged by the Assembly […]";[126] "judicial corruption and lack of independence of the judiciary remain serious problems"[127] (the authorities were called on to "*step up the reform of the judiciary*",[128] to "*reform the system of selection of defence lawyers*",[129] to "*put an end to the strong influence still exerted by the executive over the judiciary"* and *"the right to a fair trial should be guaranteed*",[130] to "*foster the reforms under way in areas ranging from the rule of law to the separation of powers*").[131]

With respect to *Bosnia and Herzegovina*:

> "[…] rather severe criticisms of the functioning of the judiciary" and "execution of court decisions was also referred to as a major problem";[132] "very little progress can be reported on [the issue of] the implementation of the National Judicial Sector Reform Strategy"[133] (the authorities were called on to "*further pursue the judicial reform*").[134]

With respect to *Georgia*:

> "the Georgian government itself acknowledges the existence of serious problems in the functioning of law enforcement agencies and the administration of justice"; "the co-rapporteurs have some concerns with regard to the independence of the judiciary",[135] "the legal framework is still heavily influenced by the Soviet legacy",[136]

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[126] Honouring of obligations and commitments by Azerbaijan. Report. Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee). Doc. 11226. 30 March 2007, para.75.

[127] The functioning of democratic institutions in Azerbaijan. Report. Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee). Doc. 11627. 6 June 2008, para.102.

[128] See Resolution 1456 (2005), para.15.

[129] See Resolution 1545 (2007), para.7.4.

[130] See Resolution 1614 (2008), para.21.

[131] See Resolution 1750 (2010), para.22.

[132] See: Honouring of obligations and commitments by Bosnia and Herzegovina. Report Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee). Doc. 11700. 15 September 2008, para.137.

[133] Honouring of obligations and commitments by Bosnia and Herzegovina. Report Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee). Doc. 12112. 11 January 2010, para.43.

[134] See Resolution 1626 (2008), para.10.4.

[135] Honouring of obligations and commitments by Georgia. Report Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee). Doc. 10383. 21 December 2004, paras.37, 41.

[136] Implementation of Resolution 1415 (2005) on the honouring of obligations and commitments by Georgia. Report Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee). Doc. 10779. 5 January 2006, para.101.

> "the reform of the judiciary in Georgia […] has advanced at a quicker pace and with clearer objectives than in many other transformation societies of Central and Eastern Europe, some of whom are members of the European Union";[137] "despite all […] important reforms and legislative changes and the many efforts of the authorities to improve the public perception in this respect, this perception remains that the independence of the judiciary is limited and that they are open to pressure of the executive. […] the pressure on the judiciary and limitations on the independence of the judiciary continue to be of concern […]"[138] (the authorities were called on to "*complete the reform of the judicial system, the public prosecutor's office and the police*",[139] to "*complete the reform of the judicial system, the Bar, the Office of the Prosecutor General and the police in full compliance with European democratic standards*";[140] to "*implement a full transparent system of appointment and dismissal of judges and ensure that the new generation of magistrates is independent and highly professional*",[141] [to address] "*the problems of the administration of justice that could endanger the principles of equal application of the law and the right of a fair trial*").[142]

With respect to *Moldova*:

> "the reform of the judiciary remains one of the priority areas where further reforms are needed" and "the issue of professional training [in the judiciary] becomes urgent";[143]; "the building of a strong, independent and efficient judiciary requires the adoption of a comprehensive reform strategy"[144] (the authorities were called on to "*reform the judiciary in order to guarantee its independence and increase the effectiveness and professionalism in the courts*";[145] to "*further reform the judiciary in order to guarantee its independence and increase the effectiveness and professionalism in the courts*").[146]

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[137] Honouring of obligations and commitments by Georgia. Report Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee). Doc. 11502 rev. 23 January 2008, para.139.

[138] The honouring of obligations and commitments by Georgia. Report Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee). Doc. 12554. 28 March 2011, para. 90.

[139] See Resolution 1415 (2005), para.9.

[140] See Resolution 1477 (2006), para.10.5.

[141] See Resolution 1603 (2008), para.21.2.

[142] See Resolution 1801 (2011), para.11.

[143] Functioning of democratic institutions in Moldova. Report Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee). Doc. 10671. 16 September 2005, paras.90 and 103.

[144] Honouring of obligations and commitments by Moldova. Report Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee). Doc. 11374. 14 September 2007, para.104.

[145] See Resolution 1465 (2005), para.13.1.

[146] See Resolution 1572 (2007), para.17.1.

With respect to *Montenegro*:

> "some important steps have been taken to implement [the reform of the judiciary]; "the recruitment system of judges […] is highly politicized and does not guarantee merit-based, professional appointment"[147] (the authorities were called on to "*continue the reform of the judiciary and prosecutor's office with a view to guaranteeing their full independence and professionalism, thereby improving their public image*"; to "*further strengthen the financial situation of the courts*", to "*further strengthen the existing mechanisms of initial and in-service training of judges in the case-law of the Court, and provide them systematically with translations of the Court's case-law*").[148]

With respect to the *Russian Federation*:

> "judiciary is still […] perceived as weak, inefficient, partial, and corrupt"; "many judges allegedly prefer to get instructions from the *Prokuratura*"; "the general absence of legal culture and the citizens' overall distrust towards the courts is […] not only a heritage of Soviet times: it is due also to the poor quality of the judiciary system as a whole",[149] "the general oversight function [of the *Prokuratura*] remains a necessity in present day Russia and […] there are no European standards that would prevent them from keeping an institution that has proven its social worth over the last few centuries",[150] "[…] the fact that the *Prokuratura* acts both the representative of the state in court proceedings, as the general guardian of legality, and as an advocate for citizens against the state is incompatible with the principle of the rule of law"[151] (the authorities were called on to "*pursue reforms in the field of the judiciary in strict compliance with Council of Europe standards in order to effectively eradicate any doubts on the fairness and independence of the justice system in Russia*" and to "*continue to reform the Prokuratura in line with relevant European standards […] in particular with regard to the extensive general oversight powers*").[152]

With respect to *Serbia*:

> "[…] the Venice Commission considered that the legislative package on the reform of the judiciary tend to weaken judicial independence";[153] "[…] a comprehensive reform of the judiciary has been undertaken. However, […] the Serbian authorities [are

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[147] Honouring of obligations and commitments by Montenegro. Report Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee). Doc. 12192. 31 March 2010, para.59-60.

[148] See Resolution 1724 (2010), para.10.7.

[149] Honouring of obligations and commitments by the Russian Federation. Report Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee). Doc. 10568. 3 June 2005, paras.154-157.

[150] Ibidem, para.170.

[151] Ibidem, para.189.

[152] See Resolution 1455 (2005), para13 (viii-ix).

[153] Honouring of obligations and commitments by Serbia. Report Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee). Doc. 11701. 15 September 2008, para.161.

> encouraged] to pursue their efforts to ensure the independence of the judiciary"[154] (the authorities were called on to "*continue to work with the Venice Commission on the improvement of the constitutional and legal framework for the judiciary and the Office of the Public Prosecutor in order to establish sufficient guarantees against political interference in their activities*", to "*increase the effectiveness and professionalism of judges and of Jurisprudence*", to "*enact specific measures to combat corruption within the judiciary, while preserving the fundamental guarantee of independence of judges*";[155] to "*develop and implement the legislation on the judiciary in accordance with European standards, guaranteeing in particular that the judiciary and the prosecutors are immune from political influence*" and to "*enact specific measures to combat corruption within the judiciary*").[156]

With respect to *Ukraine*:

> "the judiciary was believed to be one of the most corrupted institutions in the country";[157] "a professional Bar association was not established contrary to the relevant commitment";[158] "[the reform of the public prosecutor's office] remains unfulfilled and even more – a huge step back was made by the 2004 constitutional amendments";[159] "[…] the Ukrainian Security Service's remit does not comply with [European] standards";[160] […] scope for genuine reform of the justice system, as required by Ukraine's accession commitments, is […] extremely limited in the absence of amendments to the constitution";[161] "the independence of the judiciary in Ukraine continues to be a principal concern";[162] "[…] systemic deficiencies in the justice system of Ukraine […] have been long-standing concerns of the Assembly, relating, *inter alia*, to the lack of independence of the judiciary, the excessive recourse to, and length of, detention on remand, the lack of equality of arms between the prosecution and defense, as well as the inadequate legal reasoning by the prosecution and courts in official documents and decisions"[163] (the authorities were called on to

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[154] Honouring of obligations and commitments by Serbia. Report Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee). Doc. 12813. 9 January 2012, para.70.

[155] See Resolution 1661 (2009), paras.15.6.2., 15.6.3., 15.6.4.

[156] See Resolution 1858 (2012). Provisional edition. *Text adopted by the Assembly* on 25 January 2012 (the Sitting), para.10.8.

[157] Honouring of obligations and commitments by Ukraine. Report Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee). Doc. 10676. 19 September 2005, para.116.

[158] Ibidem, para.150.

[159] Ibidem, para.157.

[160] Ibidem, para.177.

[161] The functioning of democratic institutions in Ukraine. Report Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee). Doc. 12357. 20 September 2010, para.54.

[162] The functioning of democratic institutions in Ukraine. Report Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee). Doc. 12814. 9 January 2012, para.26.

[163] See Resolution 1862 (2012). Provisional edition, para.5.

> "*continue the reform of the judiciary in order to ensure its independence and effectiveness*", to "*establish a professional Bar association*", to "*modify the role and functions of Prokuratura* […] *in line with Assembly Recommendation 1604 (2003) on the role of the public prosecutor's office in a democratic society governed by the rule of law*";[164] "to "*adopt, as soon as possible and in close consultation with the Venice Commission, a law on the Public Prosecutor's Office that is fully in line with European standards and values*", to *"remove the general oversight function from the Prosecutor's Office and reform this institution in line with Ukraine's accession commitments*", to [*reform the justice system with a view to*] "*eliminating all forms of corruption in the judiciary, while ensuring the independence of the courts*"; to "*bring the system of training of judges and the training institutes into compliance with European standards*"; to "*reform Bar and establish a professional Bar association in line with the commitments Ukraine undertook on accession to the Council of Europe*"; to "*adopt, as soon as possible, the new Criminal Procedural Code*").[165]

With respect to *Bulgaria*:

> "the reform of the judicial system in Bulgaria […] has been a slow process", "[the judiciary] is seen as inefficient, non-transparent and corrupt";[166] "[r]egrettably, in order to meet the strict European Union accession deadlines, some of the reforms involved cosmetic changes that pushed them in an undesired direction. This was particularly the case of amendments to the Judicial System Act, adopted in February 2007 and the 2007 amendments to the constitution"[167] (the authorities were called on to "*address, from the point of view of separation of powers and in line with the Venice Commission's recommendations, the structure of the Supreme Judicial Council with the view to ensuring the independence of the judiciary with regard to the executive authorities*", to "*provide* […] *initial training for judges before their appointment and set up a transparent system of evaluation of their competences to help dispel the widespread perception of corruption and mistrust in the judiciary*").[168]

The assessment of experience of 15-years monitoring of fulfillment their commitments and obligations to fully respect the rule of law principle by the member states, remaining under monitoring procedure *stricto sensu* or those involved into post-monitoring dialogue demonstrates both the undisputable achievements and the weaknesses of the process.

The Assembly's monitoring procedure and the Committee's working methods in this area could be in general regarded as a great PACE achievement. Within the period of operation, the Committee has developed, in respect of the member states remaining under the monitoring procedure *stricto sensu* the following documents: in respect of **Albania – 4** reports (with 4 resolutions adopted by the Assembly), in respect of **Armenia – 11** reports

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[164] See Resolution 1466 (2005), para.13.

[165] See Resolution 1755 (2010), paras.7.2.3, 7.2.4, 7.3.1, 7.3.3, 7.3.6, 7.3.7.

[166] Post-monitoring dialogue with Bulgaria. Report Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee). Rapporteur: Mr Serhiy Holovaty, Ukraine, Alliance of Liberals and Democrats for Europe. Doc. 12187. 29 March 2010, para.22.

[167] See Resolution 1730 (2010), para.3.

[168] Ibidem, paras.7.2, 7.3.

(with 11 resolutions), in respect of **Azerbaijan – 9** reports (with 9 resolutions), in respect of **Bosnia and Herzegovina – 6** reports (with 6 resolutions), in respect of **Georgia – 6** reports (with 6 resolutions), in respect of **Moldova – 7** reports (with 7 resolutions and 1 recommendation), in respect of **Montenegro – 1** report (with 1 resolution), for **Russia – 3** reports (and **2** resolutions and **2** recommendations), in respect of **Serbia – 2** reports (with 2 resolutions), in respect of **Ukraine – 12** reports (with 11 resolutions and 8 recommendations); in respect of **Bulgaria** as a member states involved in post-monitoring dialogue **– 1** report (with 1 resolution adopted by the Assembly).

At the same time:

- a number of country-by-country reports and of documents developed by the Assembly as a result of the debates in plenary sittings did not necessarily caused tangible results in respecting of the rule of law in the country: in the member states with the largest number of reports and documents adopted by the Assembly (Armenia, Azerbaijan, Ukraine) the state of the rule of law is too far from that required by the membership in the Organization;
- in almost all of the member states under the monitoring procedure *stricto sensu* or those involved into post-monitoring dialogue:

    - the reform of legal system, in particular the reform of the judiciary and of the public prosecutor's office in compliance with the European standards, has been not yet accomplished;
    - further reforms are still needed in the legal education system, including: higher education; creation of professional training institutions for future judges, prosecutors, lawyers and police officers; professional initial and in-service training for judges in case-law of the ECrtHR;
    - effective mechanisms, including those at constitutional level, to guarantee the independence of the bodies responsible for the selection, career and disciplinary procedures for judges and prosecutors have not been set up;
    - the establishment of bar associations still lies with the unfulfilled commitments;
    - judiciary is not provided with the substantial budgetary means;
    - revision or overhaul of substantial and procedural laws, especially in the area of criminal justice, has not been made;
    - judiciary is highly corrupted, inefficient and not independent.

- the fact that within 15-years period number of states have not made any significant progress in direction to the full respect for the rule of law undermines the credibility of the Council of Europe in general, and of PACE monitoring procedure in particular;
- the discriminatory approach towards monitoring has to be eliminated, when for the same period of monitoring procedure the Assembly submitted more than 10 reports on one countries, while on others – significantly less (and as in case for Russia, **the last debate** took place **7 years ago**);
- the debates "on the state of the rule of law in Europe" has to be introduced in the Assembly and take place alongside with the debates on "the state of democracy" and "the state of human rights".

c. Member states which are not under a monitoring procedure

Some very specific cases of opening or re-opening of the monitoring procedure during the 15-years period of the Committee's activity demonstrate that membership in the European Union is not a determining factor influencing PACE decisions on the monitoring. In particular **Bulgaria**, being already an EU member, is still a subject to the PACE monitoring procedure through a post-monitoring dialogue. There are some other examples illustrating that any member of the Council of Europe, irrespectively of its membership in the European Union, may be subject to the opening or re-opening of the monitoring procedure *stricto sensu*.

In June 2002, a request was referred by the Bureau for the opinion of the Committee to re-open the monitoring procedure with respect to **Latvia**. The Committee decided not to follow the request. The decision was instead to continue a post-monitoring dialogue with Latvia. In December 2003, the Bureau submitted new request, and in April 2004 the Committee decided not to re-open the monitoring procedure with respect to Latvia. The Bureau followed the Committee's recommendation.[169]

In March 2003, the PACE Bureau made an application to the Monitoring Committee to initiate a monitoring procedure with respect to **Liechtenstein** in the light of serious concerns raised with respect to constitutional amendments proposed by the Princely House of Liechtenstein and approved by referendum. In its opinion, the Venice Commission stated that these amendments as "a step backward could lead to an isolation of Liechtenstein within the European community of states and make its membership in the Council of Europe problematic."[170] In September 2003, the Committee recommended to the Bureau that a monitoring procedure should be initiated for Liechtenstein. The Bureau did not follow the Committee's opinion. The Bureau decided instead to set up an Ad Hoc Committee to carry out a dialogue with the Parliament of Liechtenstein. The Ad Hoc Committee developed a report, which was made public in September 2006.[171]

In January 2006, an application to initiate a monitoring procedure with respect to **Italy** was tabled in the light of concerns raised with respect to monopolization of electronic media and possible abuse of power. This motion was referred to the Committee by Bureau for an opinion on 29 May 2006. The Committee adopted its opinion to the Bureau in September 2007 with the view that a monitoring procedure should not be opened "at [that] stage" but that the legislative developments in Italy should be followed in its periodic reports. The Bureau of the Assembly endorsed the opinion of the Monitoring Committee on 22 November. The Assembly ratified the decision not to open a monitoring procedure with respect to Italy during its 2008 January-part session.[172]

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[169] See Doc. 11214, para.169.

[170] Opinion on the amendments to the Constitution of Liechtenstein proposed by the Princely House of Liechtenstein adopted by the Venice Commission at its 53rd plenary session. [Venice, 13-14 December, 2002]. *CDL-AD(2002)032* (Conclusions).

[171] See Doc. 11214, para.168.

[172] See Doc. 11628, paras.250-259.

In October 2007, an application was referred by the Bureau to the Committee to initiate a monitoring procedure to investigate an electoral fraud in the **United Kingdom**. On 24 January 2008 the Committee, adopted the opinion and sent it to the Bureau, recommending to the Assembly not to open a monitoring procedure at that stage. The Assembly during its 2008 April-part session ratified the decision not to open a monitoring procedure with respect to the United Kingdom.[173]

In March 2011, the Committee was seized by the Bureau to prepare a written opinion on the motion for a resolution on the "Serious setbacks in the field of the rule of law and human rights in **Hungary.**"[174]

[As can be seen from the text of the motion,[175] as well as from the proceedings of the current affairs debate that gave rise to it, the following concerns with regard to Hungary's respect for the rule of law gave rise to the request:

(a) the new constitution removed a number of checks and balances with regard to the executive power including in respect of oversight and regulatory bodies that, according to European standards, should be impartial and independent;

(b) the new constitution seriously reduced the competencies, and the scope of decision making, of the Constitutional Court, which was widely seen as a guarantor of the rule of law . In this respect it was disturbing that on a number of occasions the ruling party (which has a constitutional majority in parliament) amended the constitution (including the newly adopted one) after the Constitutional Court had ruled against a government decision, in order to nullify the basis for the ruling;

(c) the new constitution in many areas abolished the possibility to appeal, in a court of law, against a government decisions, or rendered such appeal meaningless by specifying that only the decision procedure could be appealed, but not the merit of the decision itself.]

Being aware that the other 33 member states of the Council of Europe, which are not subject to the monitoring procedure *stricto sensu* or involved into a post-monitoring mechanisms, should also be reminded of the need to respect their statutory obligations as member states of this Organisation (*inter alia* the principle of the rule of law) the Assembly noted that:

- *in Greece*, there was a failure to ensure full execution for the *Dougoz* and *Peers* judgments concerning overcrowding in detention facilities;[176]
- *in Italy*, structural deficiencies continue to cause repetitive findings of violations of the ECHR for excessive length of judicial proceedings, and Italian legislation

[173] See Doc. 11628, paras.260-265.

[174] See Resolution 1827 (2011). The progress of the Assembly's monitoring procedure (June 2010 – May 2011). *Text adopted by the Assembly* on 24 June 2011 (27th Sitting), para.4.

[175] Serious setbacks in the fields of the rule of law and human rights in Hungary. Motion for a resolution presented by Mrs Pourbaix-Lundin and others. Doc. 12490. 25 January 2011.

[176] See Resolution 1548 (2007), para.22.3.1.

did not allow the reopening of domestic criminal proceedings impugned by the Court and no other measures have been taken to restore the right to a fair trial;[177]

- as regards the effective implementation of the judgments of the ECrtHR, worrying delays have arisen in *Greece*, *Italy*, *Poland* and *Romania* (in some cases, they reveal major structural problems which lead to repeated violations of the ECHR);[178]
- unlawful or overlong detention on remand must be eliminated in *Poland;*[179]
- *the United Kingdom* must put an end to the practice of delaying full implementation of ECrtHR judgments "with respect to politically sensitive issues, such as prisoners' voting rights."[180]

In addition, the signature and ratification of Council of Europe Conventions by all its member states also constitutes a statutory obligation, the fulfillment of which is under the Committee's monitoring procedure. However, as it was indicated in the last progress report (which has completed two full cycles of reports for each country that is not subject to the monitoring procedure *stricto sensu* or involved in a post-monitoring mechanisms), despite repeated calls, among 33 members concerned there is not a single country that has signed and ratified all Council of Europe Conventions with a monitoring mechanism. The 'newer' member states were estimated in this regard as being "much more advanced in fulfilling this commitment than the 'older' members". Therefore, "the respect of obligations remains a problem also in the countries, which have never been covered by the Assembly monitoring procedure *stricto sensu.*"[181]

In the view of the need to increase the impact of the PACE monitoring procedure regarding the compliance by all CE member states with statutory obligations, the initiative to introduce the debate "on the state of the rule of law in Europe" in the Assembly is put forward as an idea designed to improve the working methods to get tangible results in the future.

4. Role of PACE in promoting the rule of law: other activities

a. The institution of Ombudsman

The analysis of the numerous Ombudsman institutions in Europe, conducted in 2003 by the Committee on Legal Affairs and Human Rights, has revealed that the approaches to this institution in the newly emerged democracies and in "old" democracies were different: in the Central and Eastern European countries the significance of the activities of ombudsmen institutions was overwhelmingly attached to "the rule of democratically enacted law" whereas in Western Europe ombudsmen institutions primarily were oriented to act "as mediators between citizens and the authorities and, when justice and fairness so require, try to work towards better solutions" with the essential aim to ensure "good administration". Due to this, the issue was raised whether there was a possibility for a single "model" constitution of the Ombudsman's offices that could be referred as the one valid throughout Europe; and, if

[177] See Resolution 1548 (2007), para.22.3.2.

[178] See Resolution 1827 (2011), para.17.

[179] See Doc. 12643, para.141.

[180] Ibidem.

[181] Ibidem, para.125, 136, 146.

not, then how the various functions that might be attributed to the Ombudsman's office should be distributed between different state authorities.[182]

As a result, confirming *the importance of the institution of ombudsman within national systems for* the protection of human rights and *promotion of the rule of law*, the Assembly set up an extensive list of basic characteristics, which "are essential for any institution of ombudsman to operate effectively", namely: establishment on the constitutional level in a text guaranteeing the essence of the characteristics described in paragraph 7 of the Recommendation 1615 (2003), with the elaboration and protection of these characteristics in the enabling legislation and statute office.[183]

In light of the need to strengthen the rule of law throughout European societies, as a quite proper step in this regard could be considered if the Assembly examines the extent to which the above Recommendation upon almost 10 years of its adoption is fulfilled by all CE member states. The results of such an examination could be presented as a consistent part of the special report on *the state of the rule of law in Europe* that is suggested for consideration and debate in the Assembly.

b. The institution of public prosecutor's office and criminal justice

Taking into account, that the office of public prosecutor, on the one hand, plays a central and vital role in ensuring the rule of law in national systems, and on the other, that there were considerable national discrepancies in the organization, role and powers of public prosecutors in member states, the Assembly addressed this issue in a special report produced by the Committee on Legal Affairs and Human Rights[184].It was stated in the report that at certain stage, some degree of harmonization was achieved between the criminal systems of CE member states.

However, certain practices demonstrated potential inconsistencies with the principle of the rule of law and gave rise to the number of concerns. Among other concerns it was mentioned the prosecutor's supervisory role over constitutionality, legality and the judicial system. Such a role was common for number of countries in Central and Eastern Europe that demonstrated slow transformation of the public prosecutor's office into the one complying with the rule-of-law requirements. Therefore, taking note of Committee of Ministers Recommendation Rec(2000)19 on the role of public prosecution in the criminal justice system, as well as recognizing and appreciating the essential role of the public prosecutor in ensuring security and liberty throughout European societies (in particular, by safeguarding the rule of law), the Assembly has made a list of recommendations to the member states in order to bring national

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[182] The institution of Ombudsman. Report Committee on Legal Affairs and Human Rights. Rapporteur: Mrs Lili Nabholz-Haidegger, Switzerland, Liberal, Democratic and Reformer's Group. Doc. 9878. 16 July 2003, paras.12-13.

[183] See Recommendation 1615 (2003). The institution of ombudsman. *Text adopted by the Standing Committee*, acting on behalf of the Assembly, on 8 September 2003, para.7.

[184] Role of the public prosecutor in a democratic society governed by the rule of law. Report Committee on Legal Affairs and Human Rights. Rapporteur: Mr Alexandar Arabadjiev, Bulgaria, Socialist Group. Doc. 9796. 24 April 2003.

systems in compliance with the Council of Europe's basic principles (in particular with the principle of the rule of law).[185]

As it could be noted from the analysis of the reports on fulfillment of commitments and obligations by member states, number of countries has not yet been accomplished the task to bring the public prosecutor's office in compliance with the European standards. Therefore, it appears to be appropriate if a new study on this issue is made by the Assembly at this stage. The results of this study could also constitute a part of the above suggested report on *the state of the rule of law in Europe*. Moreover, it can be regarded as a follow-up to the LAHR Committee's report on allegations of politically motivated abuses of the criminal justice system in member states[186] and the Assembly's relevant resolution.[187]

c. Judiciary: corruption as a still existing challenge

Complementing to the Assembly's tireless efforts to address the issue of functioning of the judiciary in the member states undergoing a monitoring procedure or engaged in the post-monitoring dialogue, the Committee on Legal Affairs and Human Rights has addressed the issue of judicial corruption in its thematic report.[188] In the report, the term "*judicial/judiciary*" was used not in its strictest sense (i.e. as referring only to judges and prosecutors) but covering "all players in the justice process (including police)."[189]

The report revealed that none of the Council of Europe member states is immune from the problem. Judicial corruption appeared to be "deeply embedded" in many member states. Particularly alarming the situation emerged in Armenia, Bulgaria, Croatia, Georgia and "the former Yugoslav Republic of Macedonia". The above mentioned states comprise different groups: 1) Armenia and Georgia – a group undergoing a monitoring procedure; 2) Bulgaria and "the former Yugoslav Republic of Macedonia" – a group of those which are engaged in the post-monitoring dialogue; 3) Croatia (and Bulgaria), - a group of EU member states. At the same time, these are not the only states within each group, where corruption constitutes a serious matter of concern. Thus, with regard to the first group, the report mentions almost all of states undergoing a monitoring procedure (namely Albania, Azerbaijan, Bosnia and Herzegovina, Moldova, Montenegro, Russia and Ukraine). Turkey, as a state engaged in the post-monitoring dialogue, is also mentioned in the report. With regard to the European Union member states, the report points out not only new members from Central and Eastern Europe (namely Czech Republic, Estonia, Latvia, Romania and Slovakia) but also Western European states – namely Italy and Germany.

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[185] See Recommendation 1604 (2003). Role of the public prosecutor's office in a democratic society governed by the rule of law. *Text adopted by the Standing Committee*, acting on behalf of the Assembly, on 27 May 2003.

[186] Allegations of politically motivated abuses of the criminal justice system in Council of Europe member states. Report. Committee on Legal Affairs and Human Rights. Rapporteur: Mrs Sabine Leutheusser-Schnarrenberger, Germany, Alliance of Democrats and Liberals for Europe. Doc. 11993. 7 August 2009.

[187] See Resolution 1685 (2009). Allegations of politically motivated abuses of the criminal justice system in Council of Europe member states. *Text adopted by the Assembly* on 30 September 2009 (32nd Sitting).

[188] Judicial corruption. Report. Committee on Legal Affairs and Human Rights. Rapporteur: Mr Kimo Sasi, Finland, Group of the European People's Party. Doc. 12058. 6 November 2009.

[189] *Ibidem*, para.7.

Being aware of the fact, that judicial corruption "undermines the rule of law, which is the backbone of pluralistic democracy",[190] and in view of the latest findings of the two Assembly's committees in this area, the Council of Europe has to consider as vitally important to look for new methods of tackling the problem. Long-standing and systematic Assembly's calls on the CE member states to take all the necessary measures in this field did not prove their effect. As well as mere encouragement for the Monitoring Committee "either to draw up thematic reports on the subject or at least to dedicate a substantial chapter to this issue in its country reports for all countries undergoing a monitoring procedure and in the context of the post-monitoring dialogue"[191] is not likely to impact the problem substantially. In our view, as one of the possible solutions could be regarded a regular thematic debate in the Assembly on the *state of the rule of law in Europe*, grounded on the clear verification mechanism of whether the member states are really doing a wide range of measures for the purpose to clean their national judiciary.

d. National parliaments: contributors to furthering the rule of law?

Within the framework of the Parliamentary Assembly's regular debate *on the state of human rights in Europe*, the main topic for debate in 2001 was proposed by the Committee on Legal Affairs and Human Rights with the title "National parliaments: guarantors of human rights in Europe". The conclusion of the Committee's report was that the state of the involvement of national parliaments in the process of scrutinizing the action of governments so as to ensure the supervision of human rights obligations by member states is still far from satisfactory. It was stated that in general, "most of national parliaments are far from exploiting their full potential in this process"[192] and, in particular, "most national parliaments do not yet exercise regular and effective control over the implementation of the [European] Court's [of Human Rights] judgments".[193] Therefore, there was mentioned "an urgent need to build national parliaments' capacity to provide effective oversight of human rights implementation" and that "bolder steps must be taken for national parliaments to become genuine guarantors of human rights".[194]

In this regard, the Assembly has invited national parliaments to implement a set of basic principles for parliamentary supervision of international human rights standards,[195] and to set up and/or reinforce structures that would permit the mainstreaming and rigorous supervision of their international human rights obligations, on the basis of these principles[196]. In addition, the Assembly called on all member states, in particular, to "provide for adequate parliamentary procedures to systematically verify the compatibility of draft legislation with

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[190] See Resolution 1703 (2010). Judicial corruption. *Text adopted by the Assembly* on 27 January 2010 (5th Sitting), para.1.

[191] *Ibidem*, para.12.

[192] National parliaments: guarantors of human rights in Europe. Report. Committee on Legal Affairs and Human Rights. Rapporteur: Mr Christos Pourgourides, Cyprus, Group of the European People's Party. Doc. 12636. 6 June 2011, para.91.

[193] *Ibidem*, para.14.

[194] *Ibidem*, paras.91-92.

[195] See Resolution 1823 (2011). National parliaments: guarantors of human rights in Europe. *Text adopted by the Assembly* on 23 June 2011 (25th Sitting), pata.7.

[196] *Ibidem*, para.6.6.

[the European] Convention [on Human Rights] standards and avoid future violations of the Convention […]."[197]

As it was correctly stated in the report, "in the European human rights protection system, the crown jewel is undeniably the European Convention on Human Rights, as interpreted by the Strasbourg Court"[198]. At the same time, the *Rule of Law* is a *fundamental principle* of the European Convention "permeating it all and bonding it together."[199]

In light of the mentioned above, deeper involvement of national parliaments into this area of activity can be considered as a positive move on the path of making the rule of law a practical concept. For example, it is worth encouraging them (or other state bodies that are obliged to ensure adherence to the rule of law principle) to use a *Checklist for evaluating the state of the rule of law in single states* approved by the Venice Commission[200] as a basis for verification of the compatibility of national draft legislation (or other relevant texts of state bodies) with the Convention standards. Or it is worth calling on parliaments to provide for adequate parliamentary procedures in this regard.

e. The European Court of Human Rights: growing difficulties undermine the rule of law

It is obvious that the European Convention on Human rights system is in danger of asphyxiation if the states do not concentrate their efforts on ensuring effective protection of human rights on the domestic, national plane.[201]

Partially, the Convention's reality, was entailed by the admission to the Council of Europe those "new" members, which, at the time of their accession, did not have functional democracies developed and were lacking national capacities for implementation the rule of law. It is unfortunate that in many of those member states necessary reforms have not been fulfilled and in a number of them there is still a lack of political will to implement such reforms.

At the same time, an overview of the current state shows that the challenges of structural/systemic deficiencies in member states, the challenges of non-implementation or delaying in the implementation of the Court's judgments, of the overload of the Court as well

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[197] *Ibidem*, para.6.4.

[198] National parliaments: guarantors of human rights in Europe. Report. Committee on Legal Affairs and Human Rights. Rapporteur: Mr Christos Pourgourides, Cyprus, Group of the European People's Party. Doc. 12636. 6 June 2011, para.51.

[199] *The Hon. Chief Justice Emeritus Prof. John. J. Cremona*. The Rule of Law as a Fundamental Principle of the European Convention of Human Rights // In: A Council for all Seasons: 50th anniversary of the Council of Europe. – [Valetta]: Ministry of Foreign Affairs (Malta), 1999. – P. 124.

[200] See Annex to the Report : Report on the Rule of Law. Adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011) on the basis of comments by Mr Pieter van Dijk (Member, Netherlands), Ms Gret Haller (Member, Switzerland), Mr Jeffrey Jowell (Member, United Kingdom), Mr Kaarlo Tuori (Member, Finland). Study No. 512/2009. *CDL-AD(2011)003rev.*

[201] Guaranteeing the authority and effectiveness of the European Convention on Human Rights. Report Committee on Legal Affairs and Human Rights. Rapporteur: Ms Marie-Louise Bemelmans-Videc, Netherlands, Group of the European People's Party. Doc. 12811. 3 January 2012, para.6.

as of absence of effective domestic remedies remain to be a major problem not only for "new" CE members. In particular, among the states with substantial implementation problems (beside Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Georgia, Moldova, Poland, Romania, Russian Federation, and Ukraine) there are also Greece, Portugal, the United Kingdom, Italy and Turkey.[202] Major structural/systemic problems that contribute to the overload of the Court are not yet resolved in Italy, as well as in Poland, Romania, Russian Federation, Turkey and Ukraine).[203] The lack of effective domestic remedies is still a major issue for Italy, as well as for Bulgaria, Greece, Moldova, Poland, Romania, Russian Federation, Turkey and Ukraine.[204]

The Assembly has recently enhanced its efforts in contributing to the effective implementation of the Court judgments. Having made since 2000 seven reports, adopted seven resolutions and six recommendations it tried to bring political pressure to bear on governments to eliminate delays with the execution of the Court's judgments, to help the respective states to overcome structural deficiencies and to accelerate the process of fully complying with the Court's Judgments.[205]

However, the Assembly's efforts in this area have not lead to a tangible result yet. Hopefully, the Assembly's call on national parliaments "to introduce specific mechanisms and procedures for parliamentary oversight of the implementation of the court's judgments", as well as its call upon member states to set up "effective domestic mechanisms […] for rapid execution of judgments of the European Court of Human Rights"[206] will lead to practical outcome. By all means, the Assembly, as statutory organ of the Council of Europe, should now become more influential than ever in its efforts to guarantee the value of the human rights protection system established by the Convention. The credibility and viability of this system definitely should not be left solely in the hands of the Committee of Ministers. In case if national parliaments do not seriously exercise parliamentary control over the execution of the Court's judgments the Assembly should be ready to react more severely than it was used to do, and as it was already suggested, not excluding the suspension of the voting rights of national delegations.[207] The need to make the fundamental principle of the Convention – *the rule of law* – to be actually operational envisages that the Assembly will be in the position to take and adequate action should the state concerned continuously fail to execute the

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[202] Implementation of judgments of the European Court of Human Rights. Report Committee on Legal Affairs and Human Rights. Rapporteur: Mr Christos Pourgourides, Cyprus, Group of the European People's Party. Doc. 12455. 20 December 2010.

[203] Guaranteeing the authority and effectiveness of the European Convention on Human Rights. Report. Committee on Legal Affairs and Human Rights. Rapporteur: Ms Marie-Louise Bemelmans-Videc, Netherlands, Group of the European People's Party. Doc. 12811. 3 January 2012, para.6.

[204] *Ibidem*, para.27.

[205] National parliaments: guarantors of human rights in Europe. Report. Committee on Legal Affairs and Human Rights. Rapporteur: Mr Christos Pourgourides, Cyprus, Group of the European People's Party. Doc. 12636. 6 June 2011, paras.52-53.

[206] See Resolution1787 (2011). Implementation of judgments of the European Court of Human Rights. *Text adopted by the Assembly* on 26 January 2011 (6th Sitting), paras.10.1, 10.2.

[207] Implementation of judgments of the European Court of Human Rights. Report. Committee on Legal Affairs and Human Rights. Rapporteur: Mr Christos Pourgourides, Cyprus, Group of the European People's Party. Doc. 12455. 20 December 2010, para.213.

judgments or should the national parliament fail to exert appropriate pressure on the government to implement the Court's judgment.[208]

There is no other way than only to regret that the Interlaken,[209] as well as post-Interlaken, debate on the future of the Convention system does not sufficiently take into account the potentially important role of parliaments and that the Izmir Declaration[210] has also remained silent in this respect.[211] Such an apparent lack of the acknowledgement of the value of the "national parliaments' dimension" appears to be totally counter-productive for the whole idea of making the rule of law a practical concept in Europe. However, as we can observe, the Assembly continues its affirmative actions in the area, trying to ensure that both the Assembly itself and national parliaments "are provided with an opportunity to scrutinize the reports which member states have been required to submit to the Committee of Ministers on national implementation of relevant parts of the Interlaken and Izmir Declarations."[212]

Although currently a positive move is evident the relationships between the European Court of Human Rights and the national parliaments as well as the national legal systems were among the issues that were discussed during Wilton Park Conference. It was stated there that, while the governments have a fundamental role, the responsibility for the viability of the Convention system is also shared one: with national courts, national parliaments and other national institutions. Thus, the need of the "national parliaments' dimension" in this sphere was recognized. In particular it was stated that: national parliaments must ensure the compatibility of all legislation, including new laws, with the Convention provisions, requiring an effective system of parliamentary scrutiny of draft legislation; there should be rigorous parliamentary oversight and monitoring of the implementation of judgments, and a parliamentary committee could be established for this purpose.[213]

A number of ideas were developed at the conference with regard to the Court's long-term perspective. Though, one of them is looking very doubtful. Concerning the *election of judges* of the European Court of Human Rights, it was suggested that "*much more can be done nationally* in this respect", and "judges need to be persons who are respected and heard in their domestic jurisdiction". The idea to emphasize on the election of judges exclusively on the *national* level sounds hardly acceptable, if at all, due to the current state of the judiciary functioning in member states in general, and especially due to the level of judicial corruption. Taking into account that it is acknowledged that judicial corruption is "deeply embedded" in many member states,[214] the question arises: will we strengthen the rule of law in Europe

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[208] See Resolution1787 (2011), para.105.

[209] See High Level Conference on the Future of the European Court of Human Rights. Interlaken Declaration. 19 February 2010.

[210] See High Level Conference on the Future of the European Court of Human Rights (organized within the framework of Turkish Chairmanship of the Committee of Ministers of the Council of Europe). Izmir, Turkey. 26-27 April 2011. Declaration. www.coe.int/izmir

[211] See Resolution 1823 (2011), para.5.2.

[212] See Resolution 1856 (2012). Guaranteeing the authority and effectiveness of the European Convention on Human Rights. *Text adopted by the Assembly* on 24 January 2012 (4th Sitting), para.5.

[213] 2020 Vision for the European Court of Human Rights. 17-19 November 2011. Conference report /WP1139 (held under the United Kingdom Chairmanship of the Council of Europe).

[214] On the issue of corruption as still remaining problem for judiciary in member states see: 4(c) in present paper above.

when corrupt and in some countries even undereducated, domestic judiciary, plays determinant role in decision-making process on the issue who will be a national judge in the European Court? Doesn't this question sound rhetoric?

5. Conclusion

Starting from the moment when the *Rule of Law* was put into the foundation of a new order in post-war world, it was tested by practice and proved to be not a static fundamental European ideal but a common value and a common principle for all European nations with concrete practical implications. By this time the consensual understanding of its substance has been already achieved at the European level due to the contributions of mainly Council of Europe institutions – the Committee of Ministers, the Parliamentary Assembly, the European Court of Human Rights and the Venice Commission.

Despite obvious success, the issue of the Rule of Law is back to the European agenda. Nowadays it is still considered as a goal for the future, and already for XXI century. Notwithstanding its all-European recognition and acceptance as of a common value, in certain part of Europe the Rule of Law remains to be a *might-have-been-principle*. Moreover, in many European societies there is still a challenge of how to apply this concept in practice. It especially concerns the countries of post-communist societies.

As Ukraine's experience reveals (not excluding extension of this experience to other, first of all, to post-Soviet states), there is still confusion among the scholars and jurists in wrestling with and understanding of the meaning of the rule of law. Schooled in the Soviet legal positivist tradition, where "law" and "rights" are the creation of the State, many academics and authors have proved themselves incapable or unwilling to see the rule of law as a set of fundamental overarching principles grounded in justice, fairness and natural rights. They continue interpret the notion of 'the rule of law' in line with the notion of the 'rule by laws', where State establishes a constitution, which is seen as the main statute of the land sitting at the top of a hierarchy of other statute laws. The prevalence of this classic Soviet legal thinking finds expression in the view that the principle of the rule of law can be realized only through the supremacy of the statute laws; first and foremost through the basic law (the constitution) which itself is seen as the purview and the property of the State.

The remaining challenge is to graft for all the spheres of legal science, legal education, professional legal training and the practice of legal profession in the post-totalitarian part of Europe the notion of the rule of law in the universalist terms, as it is applied in modern liberal democracies (e.g. in terms how it is consensually interpreted by the European institutions). This is, so to say, a theoretical aspect of the challenge that modern agenda for Europe is facing.

As concerns a practical one, the efforts of the Council of Europe, as an Organization which by itself is an effective mechanism of pan-European co-operation for the promoting the rule of law in member states should be mobilized with a new force. The task is to make the member states to bring finally in full compliance with the European standards their national institutions, mechanisms and procedures that are of fundamental importance for the protection of individuals from the arbitrary power of the state and which empower an individual to own human dignity.

In this regard it is suggested for the consideration as one of the possible solutions that, in addition to the debate on the state of democracy and on the state of human rights in Europe taking place in the Parliamentary Assembly on a regular basis, the debate on *the state of the rule of law in Europe* could be held at least once within a three-years period.

LAW-MAKING PRINCIPLES UNDER THE RULE OF LAW

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Preliminary remarks

Rules of the legislative interpretation and legislative drafting

The report of the Venice Commission on the rule of law is aimed at offering a definition which is of a nature "that allows of practical application". Therefore my contribution to the Conference has to take into consideration the practical aspects of the relation between the rule of law and the legislative drafting. Which is the connection linking a practical definition of the rule of law and the activity of the legislative drafting? I think that it is not sufficient underlining the fact that the law is a written document and, therefore, it requires a work of drafting. This is evidently a poor and unsatisfactory answer to my question as far as it does not identify the instrumental character of the legislation, which is certainly adopted as a written document in view of getting some specific results and effects which the authors of the law have in mind and choose as possible purposes of their legislative activity. Moreover it has to comply with the principle of the rule of law if the purposes of the public authorities are to be implemented in the frame of law, avoiding arbitrariness and discrimination in treating the people interested by the measures provided for by the legislation.

This point was clearly emphasized even in the title of their book by the two authors, Twining and Miers, of the well-known "*How to do things with rules"*. If the law has to be instrumental in doing things with rules, or – as Anthony Bradley said during a Unidem Seminar in Trieste – in promoting what the Government wants to happen, the making of the law has also to be technically instrumental in helping the advent of these results and effects. It is a problem of the technicalities of writing the law, of having in mind the operational aspects of the implementation of the legislative rules by the organization of the State and by the concerned individual persons, but it is also the problem of finding the verbal expressions and the legislative structure which can produce the things we want to do by adopting the legislative rules.

The Venice Commission Report reminds us that the Commonwealth of Nation's *Latimer House Principles* correctly require that "judiciaries and parliaments should fulfil their respective but critical roles in the promotion of the rule of law in a complementary and constructive manner". In a democracy – at least as far as the basic or fundamental decisions have to be taken - it is a task of the legislative Assemblies deciding the things what have to be done or has to happen. This is the justification of the entrusting of the legislative function to the Parliaments in the frame of the implementation of the separation of the powers, but – on the other side – the last word in the process of the interpretation/application of the law is a prerogative of the executive branch of the State, of the individual persons, and eventually of the judges also, when, according to the principle of the rule of law, the law requires – for instance – their intervention to check the conformity with the law of an executive action of the Public Administration affecting private interests, or to settle conflicts between citizens.

The drafting of the legislation has to take into account the possible developments which this arrangement of the governing structure of the State requires.

I mean that there is an intermediation of an executive or judicial body of the State between the law and the acts aimed at implementing the law itself. But the same happens when a direct implementation of the law by the citizens or other individual persons who are affected by the legislative measures, is at stake. Everybody shall try to find out the specific operational meaning of the law. Interpreting the law is giving a meaning to it. The law has to be interpreted in view of its application and – as you know very well – the legal interpretation implies many choices as far as the interpreter has to select the legal and cultural rules and practices which have to be complied with in giving a meaning to the text of the law. There is an old rule of the legal tradition according to which *in claris non fit interpretatio*, that is a clear statement of the law does not require interpretation. But the old rule does not take into consideration the fact that even in this case we have to interpret the legislative text before giving it its meaning. Interpretation is also required before deciding that the meaning of the law can be understood *ictu oculi* and that the words used by the legislator and the structure of the legislative acts are not in contradiction with the usual meaning of those words and with the traditional structure of the legal discourse. We can say that a legal text is clear, that it complies with the exigency of the clarity, only when we are in the position of deciding that we don't have any difficulty in interpreting the law because the language of the legislator is in conformity with the rules concerning the correct choices of the legislative language and the structure of the legal documents. Therefore a text of law is clear if we don't have any difficulty in following the ordinary legal and cultural rules of the interpretation of the law.

As a matter of fact, it is evident that the drafters of the legislation have to take into account in their work the legal and cultural rules of the interpretation of the law. If they comply with the suggestions of drafting which can be derived from these rules, they can hope that the interpreters will give to the legislative texts the meanings which the legislators had in mind at the time of the adoption of the laws themselves. The drafting of the legislation requires that the authors of the law in some way anticipate the results of the interpretation of the legislative texts which the bodies and the individual persons entrusted with the task of implementing the legislation, will adopt in giving to those texts their meaning. It follows that the drafting of the laws can be successful only if the legal and cultural rules and practices of the interpretation of the law are taken into consideration in writing the legislative texts. Therefore the activity of the legislative drafters falls in the field of the operational aspects of the legal culture.

The experience of many countries, specially civil law countries (for instance, my country), offers many examples of a legislation drafted without any consideration of its implementation, that is a legislation which has a very poor normative content, because there are many provisions which have a mere political relevance. This is especially frequent in the case of the declaration of principles: the legislators adopt statements which are deprived of any normative content and are used to promote and circulate the political purposes and guidelines of the legislators only. These provisions can create difficulties in the interpretation of the law and in any case they are not sufficient in view of the exigency of complying with the requirements of the rule of law.

As a matter of fact, there are many reasons which justify the correct practices adopted in some countries where the functions of the adoption and of the approval of the legislative acts are distinguished from the functions of the drafting of those acts and are entrusted to State's bodies which are different from the offices which are in charge of the technicalities of writing

and organizing the structure of the laws. I mean that we have to distinguish, on one side, the political functions which pertain to the Parliament and regard the choices concerning the content and the purposes of the legislation and, on the other side, the technical functions which imply the compliance with the cultural and legal rules of the legislative drafting. The distinction is important because the attention paid to the technical exigencies of the legislation should have characteristics of continuity and uniformity while the guidelines of the political choices can change during the time according to the developments of the political situation. Therefore, if – on one side - the political authors of the legislation can change even during the staying in office of the same Parliament in presence of a change of the majority supporting the Cabinet or of the Cabinet itself, it should be advisable – on the other side - having a stable technical structure of drafters, even if the drafting functions could be limited – as I happens, for instance, in my Country – to the technical supervision and revision of the texts elaborated by the members of the Parliament. The continuity of the legislative language can be useful even in understanding the changes of the political guidelines which are at the basis of a new legislation.

Legislative drafting and the principle of legality

When I underline the importance of the attention given by the drafters to the rules of the legislative interpretation in view of insuring a correct understanding of the legislation by the State's bodies and the individuals, who are bound to interpret and apply the laws, I don't pretend to restrict to this aspect the implications of the relations between the rule of law and the legislative drafting even if the requisites of the clarity, of the coherence and of the conciseness of the laws emphasized by Luzius Mader in the mentioned UNIDEM Seminar are essential factors of a good legislation. The reference to the rule of law has also a substantial content as far as the compliance with the principle of the rule of law implies – according to the Venice Commission Report – the legality of a transparent, accountable and democratic process for enacting law, the legal certainty, the absence of arbitrariness, the access to independent and impartial courts, the respect for human rights and for the principle of non-discrimination and equality before the law. The presence of all these factors have also to be insured and it necessarily requires the presence of a great deal of legal expertise to be added to the technical knowledge strictly connected with the abilities of drafting the legislation. It follows that the legislative activity has to be supported by the help of legal experts in the field of the substantial elements of the rule of law, who can be the drafters themselves or other legal professional experts.

Moreover writing the law in view of its interpretation implies that we have to be specially attentive to the rules which regard the succession of the rules of law in the time, especially when compliance with the principle of legality is required and the presence of a previous legislative regulation of the activity of the public authorities is a necessary condition in view of their functioning in compliance with the principle of the rule of law. The identification of the relevant legislation is very important from this point of view. The generally accepted rule is that the new law abrogates the old one when it conflicts with it. This conflict can be verified in different ways. As a matter of fact, the continental doctrine of law derives from the principle concerning the succession of the legislative acts in the time at least two different modalities of abrogation: the explicit abrogation and the implicit abrogation, that is:

1) a previous rule is abrogated when the new law introduces rules which are conflicting with the old ones and explicitly indicates the previous rules which have to be considered as abrogated;

2) the new rules are conflicting with the old ones and it is not possible to implement all of them at the same time, but the legislator does not explicitly state anything about the solution of the possible conflict; notwithstanding the legislative silence, according to the prevailing doctrine and the legal rules about the conflicts of law, we suppose that in the presence of the mentioned conflict the new legislation implicitly abrogates the previous legislation.

In this second case the last decision is evidently left to the interpreters: it depends on their interpretation to ascertain the possible existence of a conflict between the old and the new rules of law and it stays with them to apply the legal and cultural rules concerning the implicit abrogation.

We have the same situation when the new legislation apparently contains a rule of explicit abrogation of the old rules but, as a matter of fact, it is written in a very generic and summary way and does not explicitly mention the individual rules which are abrogated. For instance, it only states that are abrogated the previous rules which are conflicting with the new ones. Also in this case the last decision is left to the interpreters and the final effect depends on their interpretation of the relations between the different rules. The construction may be more complicated when the new or the old legislation are special legislations because the relations between general and special legislations shall be treated in a different way from the relations concerning acts of general legislations only. And identifying the special legislation is a task of the interpreters also.

If we want to comply with the principles of clarity and certainty of the law, we should avoid leaving too large space to the interpreters: we should prefer the way of the explicit abrogation which does not open spaces to the interpretative discretion of the people who are entrusted with the task of implementing the law.

A special care is required when we want to amend the previous legislation because in this case we can have only a partial substitution of a new legislation for the previous rules of law: also in this case the legislator should avoid leaving a great deal of discretion to the interpreters in identifying the old rules which are abrogated and the new rules which are taking their place. The same exigencies are present when a new law makes reference to the previous legislation in view of its implementation: also in this case a generic mention of the relevant rules is normally insufficient and the clarity and the certainty of law should require the specific quotation of the individual provisions of the legislative acts (or of the overall legislative acts) to which the legislator wants to make reference, otherwise a lot of freedom of choice is left to the interpreters.

Discretion and legislative drafting with special regard to the relations between the principles of law and the rule of law

Dealing with the entrusting of discretion in the implementation of the law to the administrative bodies of the State is always a delicate task for the drafters. The Venice Commission Report correctly avoid sharing the old diffidence about the discretion which has to be left or may to be left to the legal agents who are in charge of the executive or judicial functions. The new social and economic functions of the State require more space for the executive bodies of the State (but also for the judges) and for their discretion. It follows that leaving space to discretion is no more considered as a regrettable choice of the legislator but

it is necessary that the drafters take consciously the decision concerning the space of discretion which is left open. In any case this decision cannot imply a complete absence of regulations, instead it frequently happens that the new rules are written in very general terms leaving to the interpreters the completion of the regulation of the cases which are dealt with. The legislator very frequently provides in the matter by using those general legal statements which enunciate the s.c. principles of law. It is a correct choice even from the point of view of the rule of law, but the drafters have again to be conscious of the specificity of this technical arrangement. As Friedman put it, when the legislator makes use of the principles, he chooses of adopting a kind of delegation of normative power to those who are entrusted with the task of implementing the legislation and are, therefore, in charge of completing the normative content of the principles before applying them to the cases of the life. Moreover, the operational use of the principles may require, in view of their application, the specific strategies described by Ronald Dworkin. For instance, when more than one principle is at stake, principles are not applied in an all- or-nothing fashion (as it happens with the other legislative rules), but they require their mutual balancing in such a way that the concerned principles are only partially applied without ceasing to be in force.

The case – law of the European Court of Human Rights is especially useful in identifying the requirements which have to be complied with if we want to draft a legislation which satisfies the yardstick of the rule of law. I am specially referring to cases where the principle of legality is at stake. For instance, in the field of the right to respect for private and family life (art. 8 ECHR), the legal basis of the State's interference in the individual sphere of freedom has to be accessible and previously knowledgeable (*Baranowski v. Poland*), its statements have to be clear and precise in providing for the designation of the holder of the power and the modalities of its exercise (*Gorzelik v. Poland, Vogt v. Garmany*), the material limits and the purposes of the discretion shall be sufficiently precise (*Hasan and Chaus v. Bulgaria*). Moreover the way of the access to the judicial or quasi – judicial protection has to be specifically indicated (*Al Nashif v. Bulgaria*). Also in the field of the freedom of expression (art. 10 ECHR) the legislation providing for the public interferences has to be accessible and previously knowledgeable (*Sunday Times v. United Kingdom*). It is true that it is accepted that the legislator cannot provide for all the details of the cases and modalities of the implementation of the law (*Sanoma Uitgevers B.V.),* but in any case the last decision has to be adopted in view of avoiding arbitrariness and discrimination and by a neutral and independent office of the State as it is a judge (and not, for instance, a prosecutor which could be one of the parties in the relevant judicial procedure). Statements of law which enunciate principles in view of controlling the exercise of administrative or judicial discretion can be drafted in general terms, but in any case they have to provide for all the mentioned elements if the legislator wants to satisfy the requirements of the rule of law.

With regard to the drafting of principles of law we cannot forget that a law can be interpreted in a systematic way, which is it has to be construed in the light of the previous legislation and on the basis of the idea that the legislator adopted a line of coherence with the principles of the precedent legislation. We take an interpretative attitude that – on one side – supposes that the meaning of a new legislation is affected by the previous legislation, and that - on the other side – it is due to affect the interpretation of the old legislation. In this context the principles of law play a relevant role. If they are not explicitly stated, we can derive them from the overall legislation and from its interpretation accepted by the majority of the interpreters and by the prevailing case law in the concerned matter. Therefore a special care is required when the drafters are dealing with the principles of the legislation. Moreover, if this is the case, we have to explicitly state our will of derogating from the principles of the previous legislation:

otherwise we are in danger of having a conflict between the result of the work of the interpreters and the original intention of the legislator. This suggestion specially deserves to be kept in mind when we work to draft a new special legislation inspired by principles which are different from those of the existing legislation.

Special attention deserves to be devoted also to avoid the existence of lacunae in the drafted legislation. The work of people charged with the task of writing the law is obviously supported by the suggestions and the proposals of the experts, who gives a complete and clear idea of the substantial aspects of the objects of the new legislation, of all the possible cases which can be implicated by it and of the relevant interests which are at stake. But it is frequent that – notwithstanding the attention paid by the drafters – the practice of the implementation of the law shows the presence of lacunae. Because lacunae are usually filled with reference to the legal principles, this is another reason to be very careful and attentive in writing the statements which enunciate the principles to avoid incoherence and ambiguity which can dangerously affect the work of the interpreters. We cannot forget that in filling lacunae by analogy the interpreters use as a basis of their reasoning the principles of the previous legislation and identify the missing rules on their basis as far as they cover cases which are similar to the case at stake (interested by the lacuna) and are inspired to similar purposes. Therefore also these modalities of the legal interpretation have to be kept in mind by the drafters of the legislation. It frequently happens that they state the principles of the legislation which they are working about, in the opening provisions of the legislative acts, clearly showing the intent of inspiring in this way all the new texts and their interpretation.

Legislative drafting and legal language

Drafting a law is writing a law. It implies the use of the language. Therefore there are many rules which regard the choice of the words and of the expressions which shall be used in writing the legislative acts.

First of all it is advisable distinguishing two different kinds of language, the ordinary everyday language and the legal technical language. It is evident that the interpreters shall give its ordinary everyday meaning to words or expressions which don’t have any technical relevance as it happens frequently in the legislative practice. But if a word or expression has a technical legal meaning, this last one shall be preferred by the interpreters. The drafters of the law should take into account – in writing the legislative texts - these different attitudes of the interpreters. Words and expressions which have a technical legal meaning should be preferred as far as it is possible according to the exigencies of the content of the legislation. If this is not the case, words and expressions should be used taking into account their ordinary everyday meaning and having also in mind the possibility that their specific meaning can be affected by the connection with the other words and expressions which are used and present in the same text. Ordinary and everyday words and expressions can modify their usual meaning in the frame of a legislation, even if they don’t necessarily acquire a technical and legal relevance.

But if we analyse the legislative practice, we easily discover the presence of a third kind of language, that is the language of the natural sciences and of the industrial technologies which can be distinguished from the technical legal language and from the everyday ordinary language. Words and expressions of this third kind of language are frequently identified everywhere the law is dealing, for instance, with medical matters or the use of modern technologies: the legislations concerning pandemic diseases and the requirements of the

health public structures, on one side, and, on the other side, the use of computers and the access to the international computer network are typical examples. The practice of the different fields of activities interested by this legislation offers a great deal of elements to understand the meaning of those words and expressions. But it could be advisable extending to this language the recent practice of many legislators who devote the initial provisions of the texts of their legislative acts to a summary of the relevant words and expressions used in the concerned matters and give a short definition of their meaning in those texts. It is a choice which deserves a sincere approval because it aims to firmly stating and fixing the terms of the relation between the legislators and the interpreters. It certainly favours the understanding of the legislative will by the legal operators who are entrusted with the task of implementing the legislation. But also in this case the problems and the dangers of the ambiguities and difficulties of the legal language cannot be completely prevented. Even the legal provisions stating the meaning of words and expressions of the legislative language, that is their definitions, have to be interpreted according to the legal and cultural rules of the legal interpretation: therefore the last word in the matter depends on the interpretation given to those definitions by the legal authorities which are in charge of insuring the coherence and the continuity of the interpretation of the law, for instance – in my country – the Court of Cassation.

Conclusions

In this paper legal and cultural rules of the legislative interpretation are frequently mentioned. The distinction between the two kinds of rules is abstractly simple but in practice it is not easy distinguishing where the legal rules end and where the cultural rules start. For instance, even if there are interpretative legal rules requiring that the interpretation of legal text has to be based on the meaning of the words in their mutual connection, the idea of the systemic interpretation - that is the interpretation of the legal provisions in the frame of all the acts which contains them and of all the legislative norms which are present in the legal order and can be relevant for the case at stake - has certainly a cultural origin but it would be difficult to state it as a correspondent satisfying legal rule notwithstanding the fact that it is difficult defining the modalities of the legal interpretation without taking into consideration the tool of the systemic interpretation. Moreover also the rules concerning the filling of lacunae of law imply the systemic interpretation as far as they require the use of the explicit and implicit principles of law, and in many legal orders there are legal provisions concerning the recourse to the analogy in filling the lacunae of law.

The interpretation of the legislative acts is part and parcel of the activities of the public authorities. Therefore if the compliance with the rule of law has to be a necessary feature of those activities, it would be advisable providing for a legislation concerning the interpretative rules that the public authorities should follow. On one side, these legislative provisions will give to the people affected by the implementation of the law a previous clear indication about the modalities which are adopted by the acting public authorities in the interpretation of the law. In this way the legislator will satisfy one of the major exigencies of the rule of law. Moreover, on the other side, they will offer an useful regulation of the substantial aspects of the drafting of the legislation, which can also become the necessary yardstick in view of the evaluation of the clarity, the coherence and the efficacy of the legislation. Leaving the work of the drafters of the legislation without legislative regulations would be unthinkable in a State’s legal order inspired to the rule of law as far as not only the procedural aspects of the writing of the law but also the content of the law itself are concerned. A positive answer to this exigency can derive from a legislation which has been written to deal, on one side, with

the problems of the drafting of the legislative acts and of their interpretation, and binding, on the other side, also the work of the interpreters of the law. It would be a useful way of establishing a strict connection between the adoption of the legislative rules and their application which can strengthen the compliance with the rule of law.

It is evident that these conclusions stick to the traditional conception of the functioning of a democratic State, according to which the implementation of the legislation shall comply with the will of the legislators in the frame of the principle of the separation of powers. They are aimed at supporting the adhesion to this doctrine by the public authorities. It is a position which bypasses the recent debates about the doctrine of the original intent and the interpretative practice which the German authors call *entfremdung.* It is specially fitted to the working of the public authorities when the application of economic and social measures is at stake. The modern legislation of the contemporary State is of a provisional nature because it is aimed at providing for the regulation of always changing social and economic problems. The discussion about the original intent and the *emfremdung* specially pertains to the debate concerning the construction of the constitutional provisions which are due to stay in force for a long time and require, therefore, a more flexible construction and suggest an interpretative attitude allowing an approach which can be detached from the historical intent of the framers of the constitution.

Therefore, as far as the ordinary legislation is concerned, we can conclude that the drafting of the legislative acts is strictly connected with the establishment of the rule of law if we aspire to a functioning democracy where the Executive is bound to respect and implement the decisions of the Parliament and does not pursue policies which are not supported by the consent of the legislative Assemblies and are not covered by *ad hoc* legal rules.

INTERACTION BETWEEN GOVERNMENT AND PARLIAMENT IN THE LEGISLATIVE PROCESS

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Virtually every country of Europe has the same political system, namely the parliamentary system. It is a well-known fact that it has come down to us through development of the monarchical system, starting first in Great Britain, then elsewhere, and essentially reaching its culmination just after the First World War, as universal suffrage was being adopted, initially for men only.

The main feature of the parliamentary system is dialogue between parliament and government, a dialogue for which there are two strong incentives, the threats of being held to account or suffering dissolution.

Thus it is fairly easy to describe the form of the parliamentary system as having been based on the principle of the separation of powers, although historically the opposite was more the case, with, where French doctrine is concerned, the theory being attributed to Montesquieu, who set it out in chapter 6 of book 11 of "The Spirit of the Laws", entitled "Of the Constitution of England".

However, while what has just been said may be applied to all parliamentary systems, a distinction quickly becomes apparent between two different concepts, as already pointed out in the Thirties, and here I am thinking in particular of an article by René Capitant in Mélanges Carré de Malberg. The difference relates to whether the government/parliament combination should be regarded as working together or against each other.

When they work together they, if I may say so, follow the British model of cabinet government whereby the Prime Minister and ministers are in fact members of parliament, so represent both the wishes of the sovereign and the wishes of the nation, to use Dicey's terms. In addition, as demonstrated clearly by Bagehot, the legislative and executive authorities work closely together, or virtually merge, although a formal separation is maintained: action by parliament is not governed by the same legal arrangements as government action.

It is more the continental, and more specifically French or Italian, model when they work against each other: government and parliament are structurally opposed, and the whole question is how the government will be able to impose its will on parliament, which, for its part, will do all that it can to assert its prerogatives and move from supervision to control. And the legend of the separation of powers flourishes, for apparently it is for parliament to make the laws that the government applies, what might be described as authority holding authority in check.

In actual fact this distinction is very much a thing of the past: the cabinet government model has been widely adopted, and the question that remains is that of whether or not the party system makes it easy to build a majority which endures throughout a parliamentary term. But since the United Kingdom currently has a coalition government, this distinction, too, is becoming blurred!

With the principle of the separation of powers, although concepts differ from one country to another, the production of legislation is a central issue: the making of law, if we use these words with their literal meaning, is in principle the role of the legislative authority. But in a state governed by the rule of law, policy is pursued through the introduction of rules which will enable it to develop, and it is certainly the role of government to implement policy. Thus the government inevitably plays a dominant part in the making of law.

This is made possible by British-style cabinet government, or what we in France call majority parliamentarianism, a term used by Maurice Duverger and Jean-Luc Parodi, whereas my own proposed term – "structured/stabilised parliamentarianism" – has not, I have to admit, been taken up. What is meant is that there is a majority in every legislature – so a parliament – which will support the government. Don't forget what Bagehot advised a Prime Minister to say if asked what purpose parliament served: "It has chosen me, and kept me in power"!

And thanks to that support, Prime Ministers can get those laws passed that they consider necessary, these sometimes being forced upon them, but subject to the limit imposed by the possibility of members of the majority voting against their own government, a rare event, but one which does occur. This presupposes the aforementioned interaction, in my view very much to the benefit of the government, which has a role in law-making in terms of both the initiative for and the adoption of legislation.

I. Initiative:

So in theory it is parliament which makes the law, especially as it represents the people and thereby enables popular consent to rules to be manifested, and the government which applies it. Yet it is not really difficult to demonstrate, backed up by statistics that the law originates mainly from the government, although parliament may be involved in its preparation at an early stage.

A. The leading role of government:

This is nothing new: back in 1899, Adhémar Esmein, whom we in France regard as the father of classic constitutional law, wrote that, under parliamentary government, it is both desirable and logical for parliamentary initiative to be very discreetly exercised by those members of parliament who belong to the majority. Only ministers should propose major measures. It is the majority that will propose them through its own body, but in orderly and disciplined fashion, in other words in the best possible conditions.

That says it all, and the statistics are clear. In the days when I worked on this subject a good forty years ago, the proportion of legislation that was of governmental origin, in every parliamentary system of the day, was generally between 85 and 95%. Only in Italy, Sweden and France's Fourth Republic was the rate lower, not exceeding 70%, but that in itself is quite a high figure.

A far more recent thesis, which it was my honour to supervise, written by Céline Vintzel on the subject of "Government weapons in legislative procedure", reported very similar results in the present day: over 80% of government bills in the United Kingdom, 77% in Germany and about the same on average in recent Italian legislatures, now that Italy has – still imperfectly – come closer to majority parliamentarianism. In recent years in France, the proportion has been slightly lower, around 70% for the latest legislature (2007-2012). But this should not be interpreted as a sudden revitalisation of parliament, for many of the bills adopted were in fact government bills in disguise, tabled by friendly MPs who had been asked to do so for several reasons, the main one being to avoid the punctilious supervision of the Conseil d'Etat.

The long and difficult research that would be necessary to move from the quantitative to the qualitative has not yet been done. I believe that it would offer even stronger evidence, showing that parliamentary initiatives, or at least those which are successful, relate to fairly minor matters.

But there is nothing really unusual about this: after all, the government enjoys the confidence of its majority, so it is unsurprising that it acts in that majority's name. For all that, this change of role is not always understood, and the idea is still voiced that "It is not right for parliament not to be taking the initiative for legislation". This led to the revision of the French Constitution in 2008, drawing on the work of a committee chaired by Mr Balladur and amending several articles of the constitution accordingly. Until 2008, the government had priority in setting the agenda, which in actual fact gave it exclusivity, whereas there is now equal sharing, with two weeks in every four for government initiatives and the other two for the Assembly. Of course the Assembly has a majority which the government has means of influencing… but not always. Furthermore, Article 48 also provides for the agenda to be set by the opposition groups on one day every month. This is nice in symbolic terms, but is it really the opposition's role to propose legislation? Unsurprisingly, opposition proposals have little chance of success, leading to argument and frustration.

Nevertheless, the government on its own does not necessarily determine the content of the draft legislation to be put before parliament.

B. Preparatory work on legislation

I think that it is now widely accepted that laws should be discussed in advance, and not emerge in final form from the discussions that take place in ministries.

This often leads to consultation with the social partners, individually, at a "round table" session attended by a minister or even the Prime Minister, or through a body on which those partners are represented, which in France means the Economic, Social and Environmental Council, whose role was – slightly – strengthened by the 2008 revision of the constitution. Such consultation is all the more desirable for the fact that an "organic law", a law ranked immediately below the constitution itself, now requires draft legislation to be accompanied by an "impact assessment", whereby the government has to specify the state of existing legislation, the developments expected from the bill being tabled, and the latter's compatibility with European standards.

These provisions stem from a Conseil d'Etat report published in 2006, which explains to parliament how law should properly be made, providing another example of parliament losing ground in this respect!

In fact, one might think that, while parliament as an institution does not necessarily have a major part to play in the preparation of draft legislation, that does not prevent its members from doing so, either individually after being tasked by the government or involved in the drafting of a white paper or collectively through group discussion of bills. This is an area where practices differ widely: I may be wrong, but I understand that this is usually the case in the House of Commons, facilitated by the close connections known to exist between the government and its majority. I think, although I have little information on the subject, that it is also the case in Germany, where groups' *Arbeitskreise* or *Arbeitsgruppen* provide opportunities for discussions between MPs, parties and government. The position is much less clear-cut in France, probably because of the tropism effect of our presidential system, with the government tending to impose its will on its majority. But things do change, and might change even more because of the alterations introduced by the 2008 revision of the French Constitution.

When he was chair of the majority group of MPs in the National Assembly, Jean-François Copé had started to refer to "legislative coproduction", rather to the annoyance of the head of government, but reflecting this search for a new form of association with the adoption of legislation.

Although this is not necessarily institutionalised, I believe it to be all the more important for the fact that an MP is able to give the government an insight into the political acceptability of the measure it is proposing, in other words, how it will be received by voters, a subject not without interest to a government clearly thinking about winning re-election. That said, the main stage at which parliament and government meet in the context of the production of law is of course during parliamentary debate of the law, so we need to turn our attention to the adoption procedure.

II. The procedure for adopting legislation

As we see it, if a law has public support, this is because not only have the representatives of the people agreed to it, but they have also, during their deliberations, made the text at least acceptable, if not the subject of unanimous agreement. That is what makes parliamentary procedure meaningful, usually with the refinement brought by a succession of readings enabling the text to be gradually improved step by step and thus made acceptable. Parliament's main weapon, making it possible to counterbalance the initiative, which as we have just said, largely comes from the government, is its right of amendment, a right so strong that the rules of parliamentary procedure have had to increase the number of weapons available to the government to prevent the very nature of its text from being changed.

A. The importance of amendments

While it is acknowledged that, not only are legislative texts usually of governmental origin, but parliamentary debate can change them to make them as acceptable as possible, this requires them to be allowed to be altered, which is the purpose of the amendment process. MPs attach a great deal of importance to this, to the extent that this may be thought to be the

place where their capacity to take the initiative has taken refuge. Assemblies' regulations have a lot to say on the subject and place this right under a high degree of protection.

The government, parliamentary committees and MPs all have the right to introduce amendments. It is not vital for this right to be able to be exercised by the government, for the text has usually been tabled by the government itself. It is nevertheless a useful right for governments in respect of private bills and, even more so, in respect of texts which, as frequently happens, have been amended by the committees which have examined them, leaving the governments concerned wishing to restore their texts. Generally speaking, it is the case that a text discussed during a public sitting is one stemming from the work of a committee. This was not the case in France until 2008, since Article 42 explicitly provided for bills to be discussed in the form of the government's texts, with the committees to which they were referred being allowed to table amendments. This situation has now been reversed, other than for a few specific texts such as budget legislation, and France has taken up the general – and desirable – practice of other parliamentary systems, whereby texts have already been amended by committees.

The scope for amendments by committees varies widely from one country to another: it has no reason to exist in the House of Commons, where the "Public Bill Committee" is disbanded as soon as it has made its report, and it is limited in Germany, although rapporteurs can, at the final reading, propose solutions envisaged by their committees. There is more scope in Italy, and there used to be considerable scope in France, since it was the committee's ordinary channel of expression, it being unable, as we have just said, to see the text that it wished to present to the public sitting, until the 2008 change. If that change has all the effects that may be expected, amendments by committees should become rare, as they will already have been included in the text under debate.

Members' right of amendment is universally accepted, and this is vital so that each MP can play a legislative role. Discussion is possible of whether it should be exercised collectively, by a parliamentary group, requiring a minimum number of signatures (as in Germany at the third reading), and this may make possible or facilitate the start of discussion.

The individual right, however, is recognised everywhere, immediately bringing the problem of congestion, or even the obstruction of the work of assemblies which have several hundred members. Hence the need for governments to have weapons enabling them to get their texts through in spite of everything, or at least texts which they can consider satisfactory.

B. Government weapons

The subject is extremely wide-ranging, and the "Government weapons" thesis to which I have alluded runs to over 800 pages… There is therefore no question of going into detail, but I shall just say that, while governments are powerful in terms of initiative, as has been said, they are fragile when they enter the parliamentary bullring, a redolent term evoking not just bulls, but also the banderillas that matadors stick into them, and the possibility that the bull may be killed if the government suffers defeat on a major issue. These weapons are found at every stage of parliamentary debate: there may be points that are inadmissible, especially if an amendment would raise the state's expenditure or reduce its revenue, or again because the amendment is a matter for a regulation (France) or has no direct relationship with the law. There may be a limit on presentation time, or a restriction on the number of readings: the urgent procedure in France, now known as the accelerated procedure, enabling the final vote

to be taken after a single reading in each assembly, is unfortunately very widely used, even when there is no urgency whatsoever, contributing to a decline in the quality of the law.

There may also be various forms of single vote arrangements, or procedures like those in the Commons which bear such subtle names as guillotine and kangaroo closures… In short, there is a vast arsenal, and while we in France feel that our parliament is particularly badly done by, there is no certainty that it is worse off than others. The general philosophy, however, is the same from each country to the next, and derives from the very structure of the parliamentary system: of course parliament must debate, but that debate must also come to an end. And since the government is responsible for managing society through law, its initiatives must be successful, even if the price to be paid is the changes that parliament wants, meaning the parliamentary majority; hence discussions in advance are worthwhile.

On this front, as so frequently on others, it is all a matter of balance: with rules that are too benevolent, the government may become impotent; if they are too restrictive, parliament will be regarded as the place for obtaining a rubber stamp, to revive an old image. But it is not that easy to strike the right balance, especially as a part has to be played here by the way in which parliament is regarded in the national political culture. Germany's distinction between a working parliament and a debating parliament is particularly relevant in this context, and might lead to a distinction being made between different modes of operation, each of which has its own balance. Although we in France have in practice come round to majority government, we continue to regard it as parliament's role to make life difficult for the government. In short, as we see, while we can say that interaction between government and parliament occurs everywhere, if we go into detail we come to believe that balances are not the same in every case, although we may feel that, just about everywhere, it is the government that makes the law, but parliament that writes it, which is not quite the same thing.

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One final observation: increasingly, the rule of law means consulting the constitutional court to check whether the laws adopted are in conformity with the principles of the constitution. But this supervision of the law, which might in principle be regarded as supervision by parliament, also turns into supervision by the government, as the law is largely created by the government. It is as if a kind of need for balance is leading to a new separation superseding the old one between legislative and executive authorities. If this successfully, in another way, leads to citizens' freedom being protected in political society, this can only be welcomed.

THE CONTROL OF EXECUTIVE DISCRETION IN IMPLEMENTING LAWS IN ORDER TO PREVENT ARBITRARINESS - CROATIAN MODEL OF JUDICIAL REVIEW OVER SUBORDINATE LEGISLATION

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I.

1. European Commission for Democracy through Law (Venice Commission) in its *Report on the Rule of Law*[1] tried to designate "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 (materieller Rechtsstaatsbegriff)", about which "it seems that a *consensus* can now be found". They 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
> (6) Non-discrimination and equality before the law.[2]

2. The cited elements of the rule of law the Venice Commission established on two groups of definitions: Firstly, on definitions "based on very different systems of law and the state".[3] Secondly, on the following definition by Tom Bingham which "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".*[4]

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[1] European Commission for Democracy through Law (Venice Commission) *Report on the Rule of Law*, adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011) on the basis of comments by Mr Pieter van Dijk (Member, Netherlands), Ms Gret Haller (Member, Switzerland), Mr Jeffrey Jowell (Member, United Kingdom) and Mr Kaarlo Tuori (Member, Finland), Study No. 512/2009, CDL-AD(2011)003rev, Strasbourg, 4 April 2011.

[2] Report on the Rule of Law, § 40, p. 10.

[3] Report on the Rule of Law, § 40, p. 10.

[4] Report on the Rule of Law, § 35, p. 10. "This short definition, which applies to both public and private bodies, is expanded by 8 'ingredients' of the rule of law. These include: (1) Accessibility of the law (that it be intelligible, clear and predictable); (2) Questions of legal right should be normally decided by law and not discretion; (3) Equality before the law; (4) Power must be exercised lawfully, fairly and reasonably; (5) Human rights must be protected; (6) Means must be provided to resolve disputes without undue cost or delay; (7) Trials must be fair, and (8) Compliance by the state with its obligations in international law as well as in national law.", ibid, § 36, p. 10.

3. The Council of Europe emphasises two essential aspects of the rule of law: the quality of the laws and the control of executive discretion in implementing laws in order to prevent arbitrariness.[5] This paper is dealt with the second aspect. It is interacted by all cited elements of the rule of law.

4. The aim of the paper is to present the Croatian model of the control of the executive in order to prevent arbitrariness primarily when the executive creates subordinate legislation within the constitutional order of the Republic of Croatia.

The starting point will be the Article 3 of the Croatian Constitution which provides that:

> *"Freedom, equal rights,....the rule of law ... are the highest values of the constitutional order of the Republic of Croatia"*[6]

II.

5. The role of the executive in implementing laws is twofold. Firstly, it adopts subordinate legislation by itself. It means that executive creates legal norms. Secondly, it applies directly legal norms when decides on rights and obligations of the parties in concrete cases regardless which of the two legislations (primary or subordinate) are to be implemented.

6. Therefore, the control over the executive discretion in implementing laws in order to prevent arbitrariness may be observed from the different aspects. In that sense it ought to be kept in mind the fact that the Council of Europe consists of 47 member states with different national legal orders and with various institutional control mechanisms of the executive discretion, different by scope and by substance. Their national public laws are based on different legal schools within different legal cultures. Due to the different historical developments, the biggest differences are between European-continental and Anglo-Saxon legal tradition. In addition, huge differences are noticeable within the European-continental law regarding certain legal issues.

7. Croatian public law was built up within the European-continental legal environment, on the foundations of the German and French legal school. For example, the legal institute of discretionary power (Germ. *freies Ermessen*, franc. *pouvoir discrétionnaire*) has been scrutinized and applied since the first half of the twentieth century.[7] Croatian law in Tito's

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[5] Communication on the activities of the Committee of Ministers Address by Rt Honorable David Lidington MP, Minister for Europe, representing the Chairmanship of the Committee of Ministers, to the Parliamentary Assembly (Strasbourg, 24 January 2012), Ministers' Deputies CM Documents, CM/AS(2012)2, 26 January 2012.

[6] The Constitution of the Republic of Croatia (The Official Gazette of the Republic of Croatia No. 56/90, 135/97, 113/00, 28/01, 76/10)

[7] Krbek, Ivo: Diskreciona ocjena, Jugoslavenska akademija znanosti i umjetnosti, Zagreb, 1937. (*Discretionary power, Yugoslav Academy for Science and Arts, Zagreb 1937*) (this book undoubtedly belongs to the best European works on discretionary power ever made in Europe); Krbek, Ivo: Upravno pravo I. (Diskreciona ocjena) II.izdanje, Klub slušača prava, Zagreb 1940. (*Amdinistrative Law I. (Discretionary power) by lectures of I. Krbek, II.Edition,*); Tasić, Đorđe: Diskreciona vlast po francuskom pozitivnom pravu i teoriji, Arhiv za pravne i društvene nauke, Beograd, god. 1929, knj. XXXV; *(Disrectionary Power by French Positive Law and Theory*) Tasić, Đorđe: Diskreciona vlast u nemačko-austrijskoj literaturi, Arhiv za pravne i društvene nauke, Beograd, br. XVII/1928. ili XVIII/1933.; *(Disrectionary Power in German-Austrian Literature*) Tasić, Đorđe: O slobodnoj oceni, Arhiv za pravne i društvene nauke, Beograd, god. 1937, str. 289. i dalje (*On Discretionary Power*) ; Slavnić-Bojičić, Lj.:

communist Yugoslavia (1945-1991), although founded on the "socialist legality", has never given up from the fundamental postulates of the discretionary power immanent to the German and French legal environment. Finally, in the contrast to all the states belonging to the ex-communist bloc influenced by the former Soviet Union, Yugoslavia had already in 1963 institutionalized and organized the constitutional court at the federal lever and at the level of each federal unit. Even more, during Tito's Yugoslavia, Croatia had an organized Administrative Court (1952-1991) which established very rich case-law.

Croatia has been the member of the Council of Europe since 1996 and party to the European Convention on Human Rights (hereinafter: the Convention) since 1997. Convention law has been considered in Croatia as "self-executive" and it has been applied directly. Under influence of such law, Croatia accepts more and more certain institutes which derive from the Anglo-Saxon law (for example, the concept of the "legitimate expectation").

On July 1 2013, Croatia will become a full member of the European Union. Thus, Croatian public law is definitely suitable for the topic that is dealt in by this paper. It happily reconciles former "two legal Europe": the one, founded on Western-European legal tradition and the other one that had for a long time rested on the former Soviet legal concept. But at the same time, it has been open for the Anglo-Saxon influences.

III.

8. In general, the reasons for the existence of subordinate legislation could be found in the objective impossibility of a primary legislation to enact in details all the rules required for its proper application. The subordinate legislation elaborates and approves these details. Unlike the legislative procedure that is more complex and slow, the enactment of subordinate legislation is done in a more flexible procedure and it allows easier additions or amendments when necessary.

9. In Croatian law, the term "executive" implies all state bodies and the whole net of the public administration (i.e. *core public authorities*) and all private entities when they are authorized to exercise certain public function (i.e. *hybrid public authorities*).

10. For the elaboration of the scope of the controls over practice of subordinate legislation, it should start from the Bradley' systematisation, i.e. a) publication and accessibility, b) consultation of interests, c) drafting of subordinate legislation, d) parliamentary oversight of subordinate legislation, e) judicial review of subordinate legislation.[8]

11. For the review of the control over the practice of subordinate legislation it is important to start from the Article 5 of the Croatian Constitution which provides the following:

Diskreciono pravo organa uprave (komentar sudske odluke), Pravni život, Beograd, br. 6-7 (1984). (*Discretionary right of the administrative body (comment of a judgment*).

[8] Anthony Bradley, The Relation between Primary and Secondary Legislation, Outline of lecture at Unidem Campus Trieste Seminar – "The Quality of Law", June 2010.

> *"All laws in the Republic of Croatia have to be in accordance with the Constitution and all other subordinate legislation with the Constitution and with a law".*[9]

It means that in Croatia, in accordance with the European continental legal heritage, marked by the strict hierarchy of the legal norms, the power of the Parliament to enact general laws has to emanate from the Constitution and the power of the executive to adopt and enforce the subordinate legislation has to emanate from the general laws enacted by the Parliament (exceptionally, during the war time and other extraordinary circumstances, when Parliament is not in session, the executive has a direct constitutional power to rule independently on all necessary issues).[10]

12. Furthermore, the Article 90 of the Croatian Constitution provides that:

> *"Before their entry into force, laws and other regulations of government bodies shall be published in Narodne novine, the official journal of the Republic of Croatia.*
>
> *Ordinances of bodies vested with public authority shall, before their entry into force, be published in an accessible manner, in compliance with law."*[11]

From the above constitutional provision it is evident that the subordinate legislation of the Republic of Croatia has to be publicly announced and accessible.

13. The consultation of interests by drafting the subordinate legislation is foreseen by the Croatian Governmental Rules on Procedure[12] as well as by the Code of consultation of interests in the course of drafting the laws, subordinate legislation and acts[13] which provide necessity of consultation of the publics on the relevant issues.

14. Parliamentary oversight of the subordinate legislation is foreseen only in the case of the so-called "delegated legislation" which implies the authorization of the Government to intervene in the legislative power of the Parliament. The Government may by its decrees amend already existing laws. This power exists only in time when the Parliament is not in session and is restricted by the Constitution.[14]

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[9] The Constitution of the Republic of Croatia (The Official Gazette of the Republic of Croatia No. 56/90, 135/97, 113/00, 28/01, 76/10).

[10] Article 101 par. 1 of the Constitution of the Republic of Croatia: „The President in a time of war may issue decrees having the force of law, within the authority given by Parliament. If the Parliament is not in session, the President may issue decrees having the force of law which may rule all the issues that war time demands."

[11] The Constitution of the Republic of Croatia (The Official Gazette of the Republic of Croatia No. 56/90, 135/97, 113/00, 28/01, 76/10).

[12] Rules of Procedure of the Government of the Republic of Croatia, Article 29 (The Official Gazette of the Republic of Croatia No. 154/11 and 121/12).

[13] The Code of consultation of interests in the course of drafting laws, subordinate legislation and acts (The Official Gazette, No. 140/2009).

[14] Article 88 of the Constitution of the Republic of Croatia (The Official Gazette of the Republic of Croatia No. 56/90, 135/97, 113/00, 28/01, 76/10): "The Croatian Parliament may, for a maximum period of one year, authorise the Government of the Republic of Croatia to regulate by decree individual issues falling within the purview of the Parliament, save for those pertaining to the elaboration of constitutionally established human rights and fundamental freedoms, national rights, the electoral system, and the organisation, remit and operation of governmental bodies and local self-government. Decrees based on statutory authority shall not have

Subordinate legislation is autonomously drafted and enacted according to the law except in the case of the Governmental subordinate legislation that is checked by the Legislation Office, an expert body of the Government.

IV.

15. Without disregarding the above-mentioned control mechanisms, further analysis will be focused on the judicial control over executive practice of subordinate legislation**.**

16. The judicial control over the subordinated legislation is basically divided between High Administrative Court and Constitutional Court. The competence for reviewing depends on the authority that enforced the legislation:

- REGULATIONS: The Constitutional Court (the CC) controls the governmental and state administration subordinate legislation. This legislation will be called: "regulations".

- GENERAL ACTS: High Administrative Court (the HAC) controls the subordinate legislation of the local and regional self-government, legal persons vested with public powers and legal persons performing public services. This legislation will be called: "general acts".

17. The aspects of the extent and contents of the above mentioned control is basically the same for both of them, regulations and general acts.

18. Essentially, that control faces two aspects: the first one is formal (whether the relevant public authority was authorized by law to create the act and whether the adopting procedure was in accordance with the higher legal norm that authorized public authority to enforce the respective act). Here we talk about the so called "existential dependence" of the lower act to the higher one. The second one is substantial aspect (whether the contents of the lower act is in accordance with the contents of the higher one and whether the enforcer has contravened the boundaries of its competence by regulating something that goes beyond the contents of the higher act). Here we speak about "substantial (content-related, material) dependence" of the lower act to the higher one.

19. Briefly, the effects of that control are in the following: both of the Courts have the authority to repeal the subordinate legislation (*cassation powers*) in case they determine that it is not in accordance with the higher act from which it emanates, either in formal or in substantial aspect. But, the CC has an additional power to annul the regulations if it finds that it violated human rights and freedoms or if it had caused an unequal treatment of the beneficiaries in the practice.

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retroactive effect. Decrees passed on the basis of statutory authority shall cease to be valid upon the expiry of a period of one year from the date when such authority was granted, unless otherwise decided by the Croatian Parliament."

20. Moreover, the CC has supervisory powers over individual HAC judgments by which it decided on (il) legality of a general act. The CC may quash each such judgment and return the case to the HAC in order to decide again on legality of the general act. Thus, the Court, in fact indirectly controls the constitutionality of the general act.

19. At last, if the HAC during the judicial procedure finds out that the general law enacted by the Parliament on which is based the general act is not in accordance with the Constitution, it has to stop its procedure on the control of legality of the relevant general act and submit to the Constitutional Court the request for the constitutional review of the general law enacted by the Parliament. The same rule refers for other regulations (it means that if HAC finds out that other regulation on which is based the general act is not in accordance with the Constitution, it will have to stop the procedure on the control of legality of the act in issue and submit to the CC the request for the constitutional review of that other regulation or its respective norm with the general law and with Constitution).

21. As can be concluded, the formal and substantial control of the regulations and general acts of the public authorities in Croatia is codified, compact and dogmatically strictly formed. At the same time it is extremely wide by its scope.

22. If concentrated on dimension of the constitutional control, it can be concluded that the Court carries out a direct and very wide control of the constitutionality and legality of both, primary and subordinate legislation and it removes from the legal order all legal norms that are not in accordance with the higher one either formally or substantially.

23. The Constitutional Court started with safeguarding the rule of law and thus the prevention of the arbitrariness of the executive in the early years of Croatian independence, almost 20 years ago.

The General Law on Administrative Procedure as a core procedural law for the administrative actions in decision making process provided the discretionary power of the executive imposing it the obligation to reason the ruling of decision. At the same time it allowed the omission of the reasoning in the cases in which the "public interest" (provided by the law or decree) explicitly was a ground for the omission. This provision paved the floor to a number of laws which used this possibility and prescribed accordingly the public interest as a legal ground for not reasoning the decision in the individual case.

Having realized that implementation of such legal norms goes in totally wrong direction, the Court quashed a number of individual administrative acts that didn’t contain the reasons for the respective decision. Moreover, it started to control the laws by which the Parliament enacted the disputable discretion. That discretion the Court assessed as “legalized arbitrariness”.

24. For example, already in 1993, the Court repealed the provision of the Citizenship Law which entitled the executive not to elaborate the reasons for the refusal of granting the citizenship. The Court explained that the reasoning of the decision strengthens the principle of legality and prevents the possibility of arbitrariness. By giving the unlimited discretion to the executive, the legislator, by the opinion of the Court, violated the constitutional order of the Republic of Croatia.

However, continuous abuse of executive discretion in implementing law led the Court at last to repeal the respective provision of the General Law on Administrative Procedure because of the same reasons. The discretionary power is still possible, but the chosen alternative within the given possibilities has to be reasoned.

25. Another problem that is quite often in Croatian legal order can be seen in cases when the legislator enacts a new general law, but leaves in force the subordinate legislation from the previous laws under one condition – "*if the regulation or general act is not contrary to the provisions of this (meaning new) general law*". Interpretation whether something in the old subordinate legislation is or is not in accordance with a new law is entirely left to the free assessment of the executive. What then happens? In practice, the executive implement the old subordinate legislation in the aspect which suit them better and issues that don't correspond to their interests are declared as contrary to the new law and not applicable respectively. Such provisions deeply undermine the essence of the rule of law and deliberately allow the arbitrariness. It could be said that it is a gold mine of discretion that leads to the arbitrariness.

26. Most of the cases which the Court controlled in order to prevent the arbitrariness of the executive discretion in implementing law refer to the review of substantial aspect of the subordinate legislation. The executive pursues to contravene the boundaries of the conferred substantive power and by default they modify the general laws adjusting them to their needs.

In that sense, an interesting aspect of the Court's control is firstly, the constitutional competence to monitor compliance with the Constitution and laws in practice. Secondly, it supervises the executive in the conferred power to create the subordinate legislation. In both of cases the Court makes reports to the Parliament demanding from it a suitable action. Almost all reports refer to the rule of law as the one of the highest values of the Croatian legal order.

27. Continuously, it is already mentioned that Croatian Constitution imposes an obligation to publish the subordinate legislation. The executive practice, unfortunately, shows the abuse of it even performs a deliberate and obvious arbitrariness. The Court is active in that aspect as well. For example, the Court abolished the Regulation on the distribution of the apartments and loans for their purchase which was issued by the minister of defence. The Regulation was based on a very loose legal norm given by the Law on Defence in connection to the Government Decision which entitled the Ministry to manage the apartments owned by the State. The minister was authorized to enact the detailed regulation for its implementation. He explicitly prescribed that the Regulation will not be published in the Official Gazette. It was a scholastic example of the unconstitutional and illegal action by the minister in the field of law implementing. The Court invited the Ministry to inform it on the relevant issues from its point of view. They did it by explaining that it was an internal act of the Ministry which in no way affected the rights and liabilities of the addresses.

V.

28. However, there is another very important issue because of which the Court is very much worried. Such issues tremendously undermine the rule of law in Croatia and give an enormous space for the uncontrolled arbitrariness of the executive discretion.

Out of any judicial control stay all the acts of the executive which could have been subsumed neither under regulations nor under general acts nor under the individual administrative acts. It's been said that those acts make so called "grey zone" within the state based on the rule of law. That "grey zone" undermines the rule of law and extends the executive discretion beyond the conferred powers.

29. Namely, there is no need to stress that the governments are still successful in creating enclaves which are outside parliamentary or judicial control, especially in the politically sensitive matters of budget financing and (governmental) social and economic powers. The principles of the supremacy of constitution and of laws and the necessary existence of legal authorities for the adoption of subordinate legislation are firmly accepted.

However, the administrative practice still does not respect the rules that should protect the vertical separation of power in the legal hierarchy. The difference between generally binding regulations and general acts, on the one hand, and the so called "general instructions", which are the most often given by ministers within their administrative portfolio and which, as a rule, serve to instruct on how certain norms on all administrative levels should be applied in practice, is sometimes vague; instructions and guidelines can also enclose norms that influence the private (destiny) of the citizens.

Relevant (legal) norms which contain definitions on how the administration should act are very broad and ensure a sort of a shelter for the administrative bodies. This is perfectly rational as long as fundamental legal principles, such as the supremacy of constitutional and legal regulations and the authority limits are respected, but this is not always the case. Constitutional court’s and/or administrative court’s reviews of general instructions is yet insufficient.

VI.

30. As it was noted in the Tom Bingham's book "The Rule of Law" that the "ministers and public officers at all levels must exercise the powers conferred to them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably[15], which further means that "a decision-making power conferred by the statute must always be exercised so as to advance the policy and objects of the Act, and not to frustrate them or advance some other object"[16] it can be seen that the case law of the Constitutional Court of the Republic of Croatia is nothing but the follow up of this statement. It is firm in safeguarding the rule of law as the highest value of the Croatian constitutional order. Still, the Croatian executive practice given through the subordinate legislation tends to exceed the limits of the conferred powers or it even violates the clear constitutional provisions with the explanations based on the arbitrary assessments on the legal nature of the issues in question. The "grey zone" acts which are not publicly accessible and which may fall into the field of legislation when applied to individual cases are the right examples of arbitrariness that undermine the rule of law. The Constitutional Court of the Republic of Croatia can come sometimes to their knowledge only in the proceedings for the protection of human rights and freedoms instituted by the constitutional complaint.

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[15] Tom Bingham "The Rule of Law", Part II, Chapter 6, "The Exercise of Power", p.60.

[16] Ibid, p.63.

RULE OF LAW – EXECUTIVE DISCRETION IN THE FIELD OF FREEDOM OF ASSEMBLY

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Freedom of assembly is one of the essential foundations of a democratic society and a basic condition for its progress and each individual's self-fulfilment. It is included as a guaranteed right or freedom in the constitutions of most democracies and only a limited range of specifically enumerated restrictions are permitted.

At the European and international level, freedom of assembly is guaranteed by Article 11 of the European Convention on Human Rights (ECHR) and Article 21 of the International Covenant in Civil and Political Rights (ICCPR), together with the corresponding case law. Article 11 ECHR provides:

1. *Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*

2. *No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.*

In *Barankevich v. Russia,*[1] (a case dealing with a complaint by the Applicant of a violation of Article 11 in the light of Article 9 ECHR that he had not been allowed to hold a service of worship in a town park) the European Court of Human Rights concisely set out the nature of the right and its context together with the bases for legitimate interference.

"… [T]he right of peaceful assembly enshrined in Article 11 is a fundamental right in a democratic society and, like the right to freedom of thought, conscience and religion, one of the foundations of such a society (…). As has been stated many times in the Court's judgments, not only is democracy a fundamental feature of the European public order but the Convention was designed to promote and maintain the ideals and values of a democratic society. Democracy, the Court has stressed, is the only political model contemplated in the Convention and the only one compatible with it. By virtue of the wording of the second paragraph of Article 11 (…), the only necessity capable of justifying an interference with any of the rights enshrined in those Articles is one that may claim to spring from a "democratic society" (...).

[1] Barankevich v. Russia judgment of 26 July 2007, paras. 24 and 25.

The right to freedom of assembly covers both private meetings and meetings in public thoroughfares as well as static meetings and public processions; in addition, it can be exercised by individual participants of the assembly and by those organising it (…). States must refrain from applying arbitrary measures capable of interfering with the right to assemble peacefully. In view of the essential nature of freedom of assembly and association and its close relationship with democracy there must be convincing and compelling reasons to justify an interference with this right (…)"

In carrying out its scrutiny of the impugned interference, the Court has to ascertain whether the respondent State exercised its discretion reasonably, carefully and in good faith. It must also look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 11 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts(…)

Furthermore, although the essential object of Article 11 is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected, there may in addition be positive obligations to secure the effective enjoyment of these rights (…)."

The OSCE/ODIHR and the Venice Commission have published a set of Guidelines on freedom of assembly,[2] which reflect the European Court of Human Rights case-law as well as practice in other democratic countries adhering to the rule of law. These provide essential guidance to all involved in implementing national legislation on freedom of peaceful assembly.

The Venice Commission (usually in conjunction with ODIHR) has also adopted a body of opinions on laws of Council of Europe states concerning freedom of assembly[3] and also on the closely related topic of laws regulating freedom of religion. What these laws have in common is their detailed regulation of freedoms which, in principle, admit of only very restricted interference according to the international rules. The laws as initially presented to the Venice Commission for examination were generally considered complicated though imprecise, highly bureaucratic and unclear as to what was and what was not allowed.

It is interesting to consider whether a specific law is desirable for the purpose of regulating the exercise of the freedom of assembly, the exercise of fundamental rights and freedoms being a constitutional matter *par excellence* and, as such, governed in principle primarily by the Constitution and by the Convention. ECtHR jurisprudence dictates that fundamental rights should, insofar as possible, be allowed to be exercised without regulation except where their exercise would pose a threat to public order and where necessity would demand state intervention with a legislative basis for any interference with the freedom. The relevant regulation, in other words, should focus on what is forbidden rather than on what is allowed: it should be clear that all that is not forbidden is permissible, and not vice-versa. So though it is not necessary for a state to enact a specific law on assemblies, with control of such events

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[2] OSCE/ODIHR - Venice Commission Guidelines on Freedom of Peaceful Assembly, as revised in 2010, http://venice.coe.int/docs/2010/CDL-AD(2010)020-e.asp?PrintVersion=True

[3] See list of published opinions at end of this paper.

being left to general public order laws and policing, states may nonetheless decide to enact laws specifically regulating freedom of assembly.[4] This means that in either case the emphasis should be on facilitation of assembly and discretion exercised to give effect to this.

Typically, the laws governing assemblies examined by the Venice Commission contained an elaborate procedure for advance "**notification**" by organisers to the authorities of an intention to hold an assembly. The written notification was often required to be submitted a considerable number of days in advance and to contain very detailed information about the proposed assembly such as "*program, purpose location, duration, measures taken by the organiser for the purpose of maintaining order and the monitoring service organized for the purpose, together with the estimated number of participants of the public assembly*."[5] Some laws left unclear what the consequences were if all the required details were not included. The Venice Commission has regularly recommended that a specific provision be included to allow an organizer to supplement information given or fix any flaws in the notification without prejudice to its validity[6] since the alternative would be that an assembly could be terminated if conducted without a fully compliant notification.

In effect, these onerous notification requirements where strictly enforced could amount, not to a genuine requirement for mere "notification" so as to give the authorities an opportunity to permit and, where necessary, protect, the notified assembly but to an application to the authorities for "permission" to hold an assembly even where it was to comprise a very small number of people and occasion little or no disturbance to the public.

A necessary consequence of a strict notification procedure is, of course, that there can be no scope for **spontaneous assemblies** anywhere in the law to allow a response to a significant political or other event even though these are protected by Article 11 ECHR.

The texts examined by the Venice Commission generally contained specific and blanket prohibition against holding assemblies in a list of places which would generally be considered desirable such as in the vicinity of government and other public buildings, courts, prisons or in central areas in capital cities or other locations considered sensitive so as to allow the demonstrators the opportunity to assemble within sight and sound of their target audience. Often these provisions did not allow for any flexibility in decision-making in this regard by the competent authorities. Some laws entirely prohibited assemblies at night time. Disruption of traffic could also be a specific reason for prohibition. In addition where more than one assembly was proposed in close proximity to another at the same time, whether it was a counter-demonstration or unrelated, a prohibition applied even though both simultaneous and counter-demonstrations are, in principle, required by international standards to be permitted. The *Guidelines*[7] comment as follows: "*blanket legislative provisions that ban assemblies at specific times or in particular locations require much greater justification than restrictions on particular assemblies. Given the impossibility of having regard to the specific circumstances of each particular case, the incorporation of such*

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[4] CDL-AD(2004)039, § 13 – 17.

[5] CDL-AD(2010)031 Public Assembly Act of the Republic of Serbia para. 16

[6] CDL-AD(2008)025 Law on the Right of Citizens to Assemble Peaceably, without Weapons, to Freely Hold Rallies and Demonstrations of the Kyrgyz Republic.

[7] Guidelines para 83.

blanket provisions in legislation (and their application) may be found to be disproportionate unless a pressing social need can be demonstrated. As the [ECtHR] has stated, "sweeping measures of a preventive measure to suppress freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words may appear to the authorities, and however illegitimate the demands made may be – do a disservice to democracy and often even endanger it."[8]

The assembly laws examined all permitted **appeal or judicial review** of a decision to prohibit or amend a proposal for an assembly to a court. However the Venice Commission repeatedly commented that such appeals must be able to be decided within a time which, in general, permitted the assembly to take place as originally proposed and this was not always possible.[9]

Some of the laws examined contained detailed **definitions** of different types of assembly which were the subject of the law. The definitions differentiated between, say, static assemblies and marches and identified different assemblies according to the type of message to be conveyed and the method of conveying it. Whilst it could be assumed that the purpose of such detailed definitions was to guarantee freedom of assembly to all the various types of assembly defined it was unclear, nonetheless, whether there were other types of assembly which fell outside the definitions and it was not clear that such assemblies as fell outside the definitions were regulated by the laws or indeed whether they were prohibited. The purpose of an assembly should be irrelevant once the assembly is peaceful and not justified by one of the reasons listed in Article 11(2) ECHR. This type of definition can allow a form of content restriction which is impermissible. State authorities should be neutral as regards content.

The laws generally require there to be identified **organisers** of a notified assembly. In this regard, the Venice Commission repeatedly observed that it was the duty of the law enforcement authorities to ensure public order and liabilities should not attach to organisers for any purported failure on their part to persuade others to maintain public order.

In its opinions, the Venice Commission has advised that **termination** of an assembly should be a matter of last resort[10] and not be the function of the organiser. Assemblies should be accommodated by law enforcement authorities as far as possible. Whilst it would be a justified response to terminate an assembly which became violent, behaviour of certain participants that did not turn an otherwise peaceful assembly into a non-peaceful one should be dealt with by prosecution of individuals. The test for termination or prohibition should be that of imminent threat of violence.

As an example of a system in contrast to those which enact a specific law on assemblies, Ireland does not have legislation which specifically governs the holding of public assemblies with rules which require advance notification or provide for an elaborated administrative regulation. There is legislation prohibiting public assemblies which support unlawful

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[8] Stankov v Bulgaris (2001) para 97.

[9] See for example: CDL-AD(2010)049 and CDL-AD(2010)031.

[10] CDL-AD(2010)016 paras 47 and 51. CDL – AD(2010)031 paras 44.

organisations or which obstruct justice[11] and a variety of relevant offences created in general public order Acts which prohibit fighting and intoxication in public. The police are also given powers to control access to events.[12]

Ireland's Constitution provides that *"... [the] State guarantees liberty for the exercise, subject to public order and morality, of... [the] right of the citizens to assemble peaceably and without arms."* The article of the Constitution goes on to provide that *"[p]rovision may be made by law to prevent or control meetings which are determined in accordance with law to be calculated to cause a breach of the peace or to be a danger or nuisance to the general public and to prevent or control meetings in the vicinity of either House of the Oireachtas [Parliament]."*[13] Constitutional restrictions in this 1937 document might be considered inconsistent in some respects with the ECHR in that it, potentially, permit the prevention or control of meeting which are not in themselves unlawful[14]. The Constitution Review Group has recommended that this article by repealed and replaced with an addition modelled on Article 11 ECHR.[15] However, in practice, assemblies are held with minimal formal requirements.

In the course of a talk on freedom of assembly, mention should be made of one of the greatest organisers in modern times of peaceful assemblies who showed the power and possibilities of public demonstration. Irish barrister Daniel O'Connell – known as the Liberator - conducted a crusade in Ireland during the early 1840s with the single purpose of petitioning the Parliament of the United Kingdom for the repeal of the Act of Union 1800 (which created a union between Great Britain and Ireland) and the consequent re-institution of the Irish House of Commons. During 1843 when he was 68 years old he blanketed large parts of Ireland with what *The Times* of London called *'monster meetings'.* He held two per week between March and September, 40 of which had a minimum of 300,000 in attendance. In June and July attendances of half a million were regularly reported and on Lady Day (15 August) at the historical site of Tara – the seat of the ancient High Kings of Ireland - *The Times* reported an attendance of one million people. O'Connell insisted on and always achieved peaceful, orderly meetings no matter how large or how provoked the crowd. No menace was offered by these highly staged events other than that which was necessarily implied by the frustration of millions of their political demands. However, on the eve of the greatest monster meeting yet to be held, in Clontarf near the centre of Dublin, the government proclaimed the meeting, prohibiting it. O'Connell immediately called it off knowing that if it proceeded it would be met with military force. Such was his control of his followers that all immediately abandoned the plan. O'Connell was arrested and charged with sedition but described the prohibition as "*the grossest violation of the law".* Peel's government had, in effect, abandoned the rule of law as all knew that the Repeal Association was not military in

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[11] Offences against the State Act 1939 Section 27 and Offences Against the State (amendment) Act 1972 Section 4(4)1.

[12] Criminal Justice (Public Order) Acts 1994 and 2003.

[13] Article $40.6.1^0$.ii Bunreacht na hÉireann.

[14] JM Kelly: The Irish Constitution 4th Edition Hogan and Whyte paragraph 7.5.159.

[15] Report on the Constitution Review Group (1996, Pn 2632) at 306.9.

character and was pressing for the repeal of a relatively recent statute. A large peaceful meeting was held the next day but the repeal campaign was at an end.[16]

The Rule of Law

Whichever approach is taken – having a specific regulatory law on assemblies or regulating assemblies by the general law – each is subject to constitutional principles including the rule of law and the same international human rights standards. Restrictions on the freedom of assembly by Article 11(1) ECHR may be qualified but only according to the exhaustive list of legitimate aims contained in Article 11 (2) set out above which, according to ECtHR case law, should be narrowly interpreted. This necessarily and significantly limits executive discretion. But it is not enough that a restriction fall under one of the admissible restrictions if the reason is not also sufficiently important or proportionate i.e. 'necessary in a democratic society", to be justified. The Venice Commission has regularly made this point.

The more detailed rules there are the more difficult it is to manage to comply with them all – whatever their importance or relevance in a particular case. If a position is taken by the legislature or the enforcing authorities that any failure to comply means that an assembly is unlawful and therefore prohibited, this lack of power to exercise discretion to permit the assembly will result in inadequate protection of the freedom. Whilst the rules may be foreseeable and accessible i.e. prescribed by law, strict enforcement of rules which are not essential for one of the permitted restrictions will not be a proportionate response.

Strict execution of very detailed laws based on very positivistic approach can mean that law is primarily used as an instrument of control and power. Where such a method of implementation is used as an instrument to restrict or limit exercise of a freedom its guarantee is not respected. The object of Article 11 is to protect the freedom of association not to present an obstacle to its exercise and the guarantees in Articles 9, 10 and 11 impose a positive duty on the State to facilitate its exercise. To give effect to the guarantees – whatever style of national rule-making is adopted – executive discretion must acknowledge this positive duty to facilitate and protect the guarantees.

Concerns for public order gives States a wide margin of appreciation but the State nonetheless must seek to facilitate exercise of the freedom in the absence of real threats of violence.[17] National authorities are required to take necessary measures to safeguard right of individuals and this include practical measures to ensure effective application of the European Convention. Thus we have the famous wording that "*the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective*".[18] Article 1 of the Convention plays a significant role in this respect by requiring the parties to the Convention to "*secure to everyone within their jurisdiction the rights and freedoms defined in...[the] Convention"* and there must be effective domestic legal remedies as required by Article 13 which they must be capable of being exercised. The state must prevent interference with rights and at the same time provide protection where necessary.[19]

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[16] Oliver MacDonagh O'Connell – the Life of Daniel O'Connell 1775 – 1847 1991 Weidenfeld and Nicholson, New York.

[17] Stankov v Bulgaria applications

[18] Airey v Ireland 2 EHRR 305

[19] Plattform *"Ärzte für das Laben" v Austria "*

The obligation necessarily applies to the activities of the states and their authorities in their implementation of law affecting guaranteed rights. This is essence of the principal of subsidiarity on which the Convention is based. Real protection of the freedoms guaranteed by the European Convention will arise only where states fully exercise their positive duty to protect them. This will always require the exercise of executive discretion in their favour with a determination to restrict as little as possible

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CDL-AD(2008)020 Joint Opinion on the Draft Law amending and supplementing the law on conducting meetings, assemblies, rallies and demonstrations of the Republic of Armenia by the Venice Commission and OSCE/ODIHR.

CDL-AD(2008)025 Joint Opinion on the Amendments to the Law on the right of citizens to assemble peaceably, without Weapons, to freely hold rallies and demonstrations of the Kyrgyz Republic by the Venice Commission and OSCE/ODIHR.

CDL-AD(2009)034 Joint Opinion on the Draft Law on Assemblies of the Kyrgyz Republic by the Venice Commission and OSCE/ODIHR.

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CDL-AD(2009)052 Joint Opinion on the order of organising and conducting peaceful events of Ukraine by the Venice Commission and OSCE/ODIHR.

CDL-AD(2010)016 Joint Opinion on the Act on Public Assembly of the Sarajevo Canton (Bosnia and Herzegovina) by the Venice Commission and OSCE/ODIHR.

CDL-AD(2010)031 Joint opinion on the public Assembly Act of the Republic on Serbia by the Venice Commission and OSCE/ODIHR.

CDL-AD(2010)033 Joint opinion on the law on peaceful assemblies of Ukraine by the Venice Commission and OSCE/ODIHR.

CDL-AD(2010)049 Interim joint opinion on the draft law on assemblies of the Republic of Armenia by the Venice commission and OSCE/ODIHR

CDL-AD(2010)050 Joint opinion on the draft law on peaceful assemblies of the Kyrgyz Republic by the Venice commission and OSCE/ODIHR.

CDL-AD(2011)025 Joint opinion on the draft law on presidential and parliamentary elections, the draft law on elections to local governments and the draft law on the formation of election commissions of the Kyrgyz Republic adopted by the Council for Democratic Elections.

CDL-AD(2011)031 Joint opinion on the draft law on freedom of peaceful assembly of Ukraine by the Venice Commission and the OSCE/ODIHR.

CONCLUDING REMARKS FOLLOWING THE GENERAL DISCUSSION

Mr Jan E. HELGESEN
Professor, University of Oslo, Norway
First Vice-President of the Venice Commission

1) At this Conference, we have discussed and analysed different aspects of "the rule of law". The discussions have been conducted at different levels, from a theoretical level to a practical level.

In my concluding remarks, I shall concentrate on three main dimensions (which are the items on our agenda for the Conference):

- some general remarks
- the process of drafting laws
- judicial review/control

It is my intention that these concluding remarks do not only serve as a summing up of the Conference which has now come to a close, rather that they could serve as some kind of bridge between the discussions at this Conference and the future work of different institutions and persons, including the institution which I represent today, the Venice Commission.

2) Some general remarks

A consensus has emerged from our discussions: no exact definition of the concept "rule of law" is possible or useful. We should rather describe features or elements inherent in this concept. In other words: "We recognize a state governed by the rule of law when we see one."

This is exactly the approach taken by the Venice Commission when elaborating *"Report on the Rule of Law", CDL-AD(2011)003 rev.* Here, the Commission has established and defined different central elements in "the rule of law". As an annex, the Commission has established a "checklist for evaluating the state of rule of law". It is, however, necessary to underline that this "check-list" is certainly not exhaustive.

It is necessary to emphasize, however, that if one analyses "the rule of law" from such a functional perspective, one must not (as also expressed by *Ronald Dworkin* in his key-note speech here) lose sight of the links to the principle as such. One must not eliminate or amend the core of the principle.

During our discussions today, as elsewhere when "the rule of law" is analysed, yet two another basic concepts are brought in the forefront: "democracy" and "respect for human rights". These are the three pillars on which the Council of Europe is built. The challenge is to discuss the relationship between these basic concepts.

Quite often, one focuses primarily on "rule of law" and "democracy" However, a deepened analysis will prove that the protection and promotion of human rights has implications for a modern interpretation of "democracy" and "the rule of law".

According to my view, it is slightly misleading to combine "democracy" and "the rule of law" with the conjunction "and". This indicates that there is a complete harmony between these basic values in our societies, which is not always the case.

However, it is also slightly misleading to combine these concepts with the conjunction "or". Such a perspective would indicate that there is complete disharmony between these values, which is not the case either. It is certainly not either/or.

The official name of the Venice Commission is "The European Commission for Democracy through Law". In my view, this is the correct perspective: democracy is built and strengthened through the respect for law. Inherent in such a perception is the respect for human rights.

The first general item on the agenda of this Conference was "The Rule of Law as a Goal for the XXI Century". The concept of "the rule of law" can trace its origins way back. Plato said: "Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off, but if the law is the master of the government and the government its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state."

We discussed how the principle of "the rule of law" was further developed from late 1880s.

As for the evolution in the XXI Century, we must be open to recognize the fact that although the core of the principle of "the rule of law" does not change as such, the content, the elements inherent in the principle, do change. But the core of the principle should be preserved and protected, also in different societal circumstances. As an example, during the discussion at this seminar, we heard repeated references to the importance of including "the rule of law" in the foundation of the regimes in transition in the South Mediterranean.

I shall briefly indicate some aspects of such changes. All of them are linked to the fact that we see new structures in our societies:

- The role of the state has changed. The state shall not only refrain from intervening in the life of the individual, the state shall provide and secure basic needs of the individual.
- There are new actors in society. On the one hand, the state is not the only subject acting. Private subjects, the market, are also providing goods and services. On the other side, new legal subjects are covered and protected by the principle. The conflict is no longer only between the government and the people, but also between majority and minority of the people.
- There are new values to be protected by society. Suffice as an example, the fight against terror. This presents challenges to the application of "the rule of law".
- The emergence of transnational, international and supranational law. These norms are seen as sources of law in a domestic legal system, new ideas and values are introduced. They furthermore limit the sovereignty of the people/the democracy.
- Different legal cultures must coexist in a complex world. One cannot claim that the principle of "rule of law" must be translated into one single model, irrespective of the character and organization of the society. One must accept that the details will be hammered out differently.

3) The process of drafting laws

This item is rarely discussed within the framework of "the rule of law". The presentations and the discussion at this Conference prove that this perspective must be included in an analysis of the "rule of law" in the XXI Century.

In modern, complex states with heavy political agendas, one could observe a tendency by the legislative body to leave details to the administrative branch. This could be done by formal delegation of power to the administration or by introducing very open concepts in the legislation, leaving wide room for discretion to the administration.

The reasons for such legislative techniques might differ from one state to the other. These are but some of the more common ones:

- political compromises
- weak governments with fragile support in Parliament
- coalition governments with internal disputes, leading to parallel disputes in Parliament
- political/practical convenience

There is also another reason for open, discretionary concepts in the legislation. This is not linked to political preferences, but rather to the structure of legal norms. In our discussion today, we have also touched the problems of interpretation of norms. The fact that legal norms are constructed in sentences, not from a formal, mathematical language, but from verbal language, presupposes the process of interpretation. This gives, by nature, the court a decisive role in the political development in any society. This leads us also to the issues of "judicial control/review" (under 4).

The role of the legislative branch – and its relationship to the courts - seen from the perspective of the principle of "the rule of law", is certainly an issue for further research and discussions.

4) Judicial control/review

From the outset, there is a need to distinguish between judicial control of acts of the legislative branch, the Parliament, and judicial control of acts of the administrative branch, the Government.

The control of the administration is less spectacular and is normally seen as less threatening to democracy, from a theoretical perspective. This needs further analysis. On the one hand, it may be claimed (as above under 3) that if the courts are active in the area of administrative law, it could threaten the role of the politicians when distributing for instance the economic resources in society. Seen from yet another perspective, it is, however, often argued that the real threat to democracy today does not stem from the judicial branch, but from the administrative branch. In such a perspective, could one imagine an alliance between the legislative and the judicial branch?

One often sees that the issue of judicial control is discussed within a paradigm of "supremacy", which is the supreme body. This perspective has to be further elaborated. This perception presupposes a too dichotomist approach. In the XXI Century, one should rather encourage more cooperation than competition between the state organs, in order to preserve and defend both "democracy" and "the rule of law" – and respect for human rights One important question is

this: what should be the criteria for the intervention by the tribunals into the competence of the two other branches of the State? How should the criteria of the judicial review be defined? In different constitutions, one observes that this threshold is set differently. Then the courts will have to find their way between judicial activism and judicial constraints.

A crucial element in the "rule of law" is the independence of the judiciary and the judges. During the years, these problems have occupied the Venice Commission to a large degree. The Commission has, on different occasions, adopted opinions and reports where these issues are analysed and commented upon (CDL-AD(2010)004 Report on the Independence of the Judicial System Part I: The Independence of Judges, adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010); CDL-AD(2010)040 Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service; adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010)).

5) The practical approach - for the future

The issues discussed during the Conference today, are all future areas of work for different institutions and persons. This is the practical approach for the future.

During our discussions today, the Venice Commission has been referred to and called upon. I can assure you that the Commission will respond properly.

The Venice Commission will approach these tasks with the basic philosophy it has followed since its inception: "the rule of law" adds value to the two other pillars: "democracy" and "human rights".

The Venice Commission will further develop the checklist which is annexed to the report on the rule of law; this checklist is neither exhaustive nor final, and is indeed likely and even meant to evolve with time. Several suggestions made during the conference would represent useful additions to the checklist: for example, the need for legitimate expectations to be fulfilled, for laws to be certain and accessible; the need for prosecutors and other parties in a case to disclose all relevant material; the concept of proportionality and the right of access to the file ('dossier').

The Venice Commission will reflect on the role of the legislator in States governed by the rule of law. In particular, it will prepare Guidelines on "the principles of good law-making", as in previous cases, jointly with the OSCE/ODIHR. It will proceed on the basis of its vast experience in assessing legislation from its 58 member States. The Bingham Centre expressed an interest in providing regular courses on legislative drafting to Council of Europe countries.

The Venice Commission will also reflect on the role of public administration in States governed by the rule of law, including the necessity of promoting principles of good, lawful, fair and reasonable administrative action, including appropriate remedies for their breach. A report will be prepared on this topic.

The Venice Commission will take up an important issue which in the report on the rule of law it had explicitly reserved for a further study: the role of hybrid (state-private) actors or private actors in States governed by the rule of law. This refers to those hybrid or private entities which are responsible for tasks previously exercised by the State and whose power to interfere with individual rights has a weight comparable to state power. The Venice Commission will prepare a study on this matter.

PROGRAMME

Opening remarks
(9h30-10h15)

Chair: Professor Sir Jeffrey Jowell KCMG QC, Director of the Bingham Centre for the Rule of Law and former UK member of the Venice Commission

Mr Dominic Grieve QC MP, Attorney General, UK
Lord Phillips of Worth Matravers, President of the UK Supreme Court and Chair of the Bingham Centre's Council
Mr Gianni Buquicchio, President of the Venice Commission
Mr Keith Whitmore, President of the Congress of Local and Regional Authorities of the Council of Europe

First Session

The Rule of Law as a Goal for the XXI Century
(10h15-11h45)

Chair: Dame Rosalyn Higgins DBE QC, President of the British Institute of International and Comparative Law, former President of the International Court of Justice

Keynote speech: Mr Ronald Dworkin, Frank Henry Sommer Professor of Law at New York University and Professor Emeritus of Jurisprudence at University College London

The common core of the Rule of Law and the Rechtstaat: Mr Kaarlo Tuori, Professor of Jurisprudence at University of Helsinki, Vice-President of the Venice Commission

The rule of law in action: Mr Serhiy Holovaty, Professor of Jurisprudence, Taras Shevchenko University of Kyiv, member of the Parliamentary Assembly of the Council of Europe, former Ukrainian member of the Venice Commission

Discussion and conclusions by the Chair

Coffee break

Second Session

The quality of the laws
(12h15-13h30)

Chair: Ms Angelika Nussberger, Judge at the European Court of Human Rights, former German substitute member of the Venice Commission

Law-making principles under the rule of law: Mr Sergio Bartole, Emeritus University of Trieste, Italian substitute member of the Venice Commission

The interaction between the parliament and the government in the law-making process:
Mr Jean-Claude Colliard, President of University Paris 1 Pantheon-Sorbonne, former member of the Constitutional Council, French member of the Venice Commission

Discussion and conclusions by the Chair

Lunch at Lancaster House

Third session

Preventing arbitrariness
(15h00-16h15)

Chair: Lord Mance, Judge at the UK Supreme Court

The control of executive discretion in implementing laws in order to prevent arbitrariness:
Ms Slavica Banić, Judge at the Constitutional Court of Croatia, Croatian substitute member of the Venice Commission

Executive Discretion in the field of freedom of assembly: Ms Finola Flanagan, Office of the Attorney General of Ireland, Irish member of the Venice Commission

Discussion and conclusions by the Chair

General discussion

The Rule of Law as a Practical Concept
(16h15-17h00)

Chair: Mr Jan Helgesen, First Vice-President of the Venice Commission, Professor, University of Oslo

Conclusions
(17h00-17h20)

Mr Jan Helgesen, First Vice-President of the Venice Commission, Professor, University of Oslo

Professor Sir Jeffrey Jowell KCMG QC, Director of the Bingham Centre for the Rule of Law and former UK member of the Venice Commission

Closing remarks
(17h20-17h30)

Mr Richard Heaton, First Parliamentary Counsel and Permanent Secretary, Government in Parliament Group, Cabinet Office