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“The Rule of Law and Constitutional Justice in the Modern World”**

Session 2 - “New challenges to the rule of law”

**Presentation of the Venice Commission’s Rule of Law Checklist
Mr Ben VERMEULEN, Judge, Council of State, the Netherlands,**

President Zalimas,
Colleagues, Honourable Judges,
President and Members of the Venice Commission,
Distinguished Guests,
Ladies and Gentlemen:

Just a few personal words beforehand, also on behalf of my fellow countryman Maarten Feteris. It is an honour and pleasure to be at this conference. I also attended the Third World Conference in Seoul, Korea, three years ago. That conference was organized very well, both in terms of logistics and content and of social and cultural interaction. It is clear to me that the organizers of this conference, the Lithuanian Constitutional Court and its staff, the Lithuanian government and the Venice Commission, are striving for that same high level of excellence and communication. And I am sure that they will succeed: our friends and colleagues have put into this not only their mind, but also their music and culture, *their Lithuanian heart and soul*. Thank you!

1. Introduction

Based on the responses to the questionnaire Professor Žalimas, President of the Constitutional Court of Lithuania, has provided us with a thorough report on ‘new challenges to the rule of law’. I will not comment on his report, but will give a short analysis of the Commission’s 2016 Rule of Law Checklist, as well as identify and evaluate – in the light of the checklist - a recent trend in state and society that challenges the rule of law.

As you know, the Venice Commission provides the Secretariat of the World Conference on Constitutional Justice, and organises in co-operation with the host Court each congress, including the wonderful congress we attend these days. But the primary task of the Venice Commission – officially named the European Commission of Democracy through Law – is to assist and advise states (all the Member states of the Council of Europe, but also several other States that also are Member of the VC) in constitutional issues in order to improve the democratic functioning of their institutions and the protection of human rights. In the slipstream of its opinions, addressed to individual states, the Venice Commission also publishes general reports. The 2016 Rule of Law Checklist is such a report.

The 2016 Checklist has its origin in the Report on the Rule of Law¹ that was adopted by the Venice Commission in March 2011. This report identified common features of the concept of *Rule of Law* and the related concepts of *Rechtsstaat* and *Etat de droit*. A short checklist to evaluate the state of the Rule of Law in single countries was appended. However, the Report did not try to give an all-encompassing, exact definition of these concepts. At an international conference in 2012 it was concluded that in order to be able to apply the Rule of Law as a practical, operational concept, it would not be necessary and not feasible to find a final – generally acceptable – definition. But it would be very useful to produce - in addition to the conceptual Rule of Law report - a more elaborate checklist with more or less detailed benchmarks.

2. The 2016 Rule of Law Checklist

Since 2012, the Commission has focused on determining several core elements of the rule of law, which according to its 2016 Rule of Law Checklist² include at least five principles :

- Legality
 - Legal certainty
 - Prevention of abuse/misuse of powers
 - Equality before the law and non-discrimination
 - Access to justice.
- The **principle of legality** is at the basis of every established and well-functioning democratic rule of law state. It entails the supremacy of the law, namely the fact that State action must be authorised by the law (the positive-foundational aspect of legality) and must be applied in accordance with the law (the negative-restricting aspect of legality).

¹ CDL-AD(2011)003rev.

² CDL-AD(2016)007.

Furthermore, the law should establish the relationship between international and national law and should set out in what cases exceptional measures may be adopted to derogate from the normal regime of protection of citizens' rights.

- **The principle of legal certainty** prescribes the accessibility of the law. The law must be certain, foreseeable, stable and take into account legitimate expectations. Basic principles such as *nulla poena sine lege* and non-retroactivity of criminal law are essential protections flowing from the principle of legal certainty.

- **Preventing the abuses of powers** implies having safeguards in the legal system against arbitrariness; the discretionary power of the officials may not be unlimited, and must be regulated by law.

- **Equality before the law and non-discrimination** also are essential principles flowing from the concept of the rule of law. It is paramount that equal cases are treated equally, and that the law guarantees the absence of any discrimination on grounds such as race, sex, colour, language, religion, political opinion and so on. Positive measures may be allowed, but only as long as they are proportionate and necessary.

- **Access to justice** implies the presence of an independent and impartial judiciary and the recognition of the right to have a fair trial. The independence and the impartiality of the judiciary are central to the public perception of justice and thus to the achievement of the classical formula: "justice must not only be done, it must also be seen to be done". In countries where **constitutional justice** is provided, the rule of law demands that there should be effective access to the constitutional court, and that parliaments and the executive take into account the arguments used by the constitutional court and abide by its judgments.

In the 2016 Checklist these principles are analysed, and subdivided into their more specific components, formulated as benchmarks. All benchmarks reflect and are related to hard and soft law standards.

Of course, the Venice Commission itself since its adoption uses the Rule of Law Checklist in the assessment of draft constitutional and legislative reforms; until now in at least 8 opinions, concerning France, Turkey, Moldova, Ukraine and Poland. Other Council of Europe institutions as well as the EU Parliament and Constitutional courts also refer to the checklist. I assume that the coming years the Checklist will be applied as an authoritative corpus of rule of law standards.

3. A few reflections on the Checklist

3.1 No formalistic conception

The Checklist (para. 15), in line with the 2011 Report, warns against a purely formalistic conception of the Rule of Law, that merely requires that actions of public officials be authorized by law. Such a concept of the rule of law – that may be defined as ‘the rule of the law’, ‘rule by the law’ or even ‘law by rules’ – is qualified as a distorted interpretation. Indeed, the Checklist contains other and more principles and benchmarks than those associated with the formalistic conception of the German ‘Gesetzesstaat’ (or: ‘formeller Rechtsstaat’). However, the principles and benchmarks in the Checklist primarily are of a formal and/or procedural character. To a large extent they correspond to Lon Fuller’s eight principles of legality, developed in his *Morality of the Law* (1964), and are derived from the Anglo-Saxon rule of law-tradition.

Understandably, the Venice Commission has chosen to differentiate the concept of rule of law from that of human rights and democracy. Indeed, for instance the Preamble of the Statute of the Council of Europe differentiates between these core values, mentioning the rule of law as one of the principles which form the basis of all genuine democracy, together with individual freedom and political liberty. The risk of fully including human rights and democracy in the concept of the rule of law may be, that this concept becomes a catch all-phrase containing a whole variety of legal desiderata, thereby losing its focus.

3.2 Rule of law and human rights

Nevertheless, I believe some additions of a substantive nature would be necessary, in that *human rights should have a more prominent place in the rule of law* concept as well as in a future update of the Checklist. This is in line with the comments today, that all stressed that fundamental rights as expression of human dignity should have an important place within the rule of law concept. The Venice Commission rightly has emphasized that the rule of law and human rights are interlinked. I would even claim that the protection and promotion of human rights are to be realized through respect for the rule of law. Indeed, *the realization of human rights is what the rule of law is about*. As the Commission observed, the rule of law would be an empty shell without this dimension (para. 31; see also para. 33).

In sum: it is necessary to add to the Checklist, based on the Anglo-Saxon concept of rule of law, substantive elements included in for instance the German concept of the 'materieller Rechtsstaat', such as fundamental rights protection and separation of powers.³

3.3 Rule of law as a restraint to majority decision making

The Checklist also indicates that the *rule of law is linked to democracy*. However, this link is less clear – or to be more precise: of another nature - than the harmonious connection between the rule of law and human rights. According to the Venice Commission, the Rule of Law promotes democracy by establishing accountability of those wielding public power and by safeguarding human rights, which protect minorities against arbitrary majority rules (para. 33). This observation - the rule of law protects minorities against arbitrary majority rules – rightly suggests that these two values – democracy vs rule of law - do not necessarily coincide, and indeed may conflict. I would even put it more strongly: there is an inherent tension between the rule of law (protecting fundamental minority rights) and democracy. It is this tension that must be clearly identified, in order to understand the challenge that populist tendencies currently pose to the rule of law.

Often democracy and rule of law are regarded as aspects of a more or less coherent set of interconnected values, in that democracy is a part of the rule of law, or the rule of law is an inherent feature of democracy. I myself however believe that both concepts are not necessarily in harmony with each other, and even may fundamentally clash. In a famous essay in *Foreign Affairs* 1997 Fareed Zakaria already has given a fundamental analysis of democracies which are in conflict with the rule of law (or constitutionalism), the so-called *illiberal democracies*. According to Zakaria, illiberal democracies are increasing around the world, more and more are limiting the freedoms of the people they pretend to represent. He pointed out that in western countries electoral democracy and civil liberties/freedoms most of the time still go hand in hand. But in other countries these two concepts are coming apart; the majority is not held in check; and the position of minorities and opposition is weak. Illiberal democracies believe that they have the mandate to act in the way they see fit as long as they hold regular elections.

³ Furthermore, I believe that the five rule of law principles (legality; legal security; prevention of abuse of powers; equality/non-discrimination; access to justice) which currently are distinguished in the Checklist, have a more vital meaning when they specifically function as instruments of human rights protection. For instance, restrictions on human rights should live up to strict requirements of legality.

Zakaria argued that democracy without constitutional liberalism creates centralized regimes, and results in authoritarian regimes, erosion of liberty, ethnic tensions. The lack of fundamental liberties makes opposition very difficult. Critics are imprisoned; the media are controlled by the state. Non-governmental organizations are suppressed or prohibited. Centralizing of different branches of the government leads to a weakening of the separation of powers, attacking the independence of the judiciary. As an example he mentioned Russia, that already under Jeltsin was developing in the direction of authoritarianism. Currently, even several Council of Europe states may be qualified as illiberal democracies. And an extreme example is Venezuela, formerly an illiberal democracy now degenerated into dictatorship.

In many countries a main cause for these tensions between democracy and rule of law is the rise of strong populist movements. Economic insecurity; cuts in social welfare; worries about social cohesion, inspired by mass immigration, Islamic fundamentalism and terrorist threats; the euro-crisis and interferences in national sovereignty by international organizations like the EU and the European Court of Human Rights; all these issues foster the opinion that there is a widening gap between citizens and the political institutions, and they all inspire these movements.

Though there is a great variation between different versions of populism, there are at least a few basic characteristics. Populism:

1. is anti-elitist and sets 'the true and pure – common – people [*populus/demos*] against corrupt political and legal elites, the so called establishment. Only the populists adequately represent 'the' people and are truly democratic; the traditional political parties are not;
2. is anti-pluralistic: the morally pure people is one and unified and must be protected against the loss of its own authentic nature. Often populism appeals to the notion of a homogeneous people, and rejects mass emigration because that will subvert its unity;
3. does not accept rule of law limitations to majority rule: because populist rule is the correct manifestation of the will of the people, rule of law principles like judicial control or protection of fundamental minority rights should not constrain its operation.

I believe that populism in the form of an illiberal-democratic response poses a serious threat to the rule of law – to *liberal* democracy characterized by values of legal certainty, separation of powers, judicial control, and fundamental freedoms. In the long run it may even become a threat to *democracy as such* (for instance by limiting the freedom of expression, association etc. and thereby of disturbing free election processes). One of the reasons that this threat is real, is that populism often raises some plausible issues, and may function as a useful corrective to the unresponsiveness of the political and legal elites. For instance it may

identify relevant problems, for instance i) that parts of the population in fact are not adequately represented; ii) that certain sensitive social, economic and legal issues (such as Islamic fundamentalism; the side-effects of immigration; the undemocratic aspects of the EU and the operation of the European Central Bank; the infringement of national sovereignty by supranational courts) should openly be discussed, not being hidden by political correctness; (iii) that established political parties are losing their legitimacy and cling to power by forming cartels.

For the time being the principles and institutions guarding the rule of law hopefully will withstand populist tendencies. But in the long run, legal rules and judicial procedures will not be sufficient: it is necessary that plausible populist criticism is openly and fundamentally addressed, by refuting the illegitimate aspects of it on the basis of good reasons and by taking the legitimate criticism seriously.

4. Concluding remarks

Mr. Chairman, colleagues and friends, let me conclude.

(i) The Venice Commission's Rule of Law Checklist provides us with a valuable, practical set of operational requirements to measure the rule of law quality of the political/legal systems in various countries.

(ii) The five principles the Checklist has identified are fundamental to the rule of law. However, in my view some material, substantive guarantees - such as protection of fundamental rights and separation of powers - should be added to these more or less procedural-formal principles.

(iii) There is a tension between majoritarian/electoral democracy and the rule of law, currently deepened by the rise of populist movements. I believe for the time being the constitutional principles and institutions guarding the rule of law generally will withstand populist tendencies. But in the long run legal rules and judicial procedures will not be sufficient. A rule of law democracy can only survive on the basis of a social infrastructure, a legal culture, a living reality – preconditions that legal procedures and institutions by themselves cannot realize.
