activities concerned or of the context in which they are carried out'.

40. It follows from the information set out above that the concept of a 'genuine and determining occupational requirement', within the meaning of that provision, refers to a requirement that is objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out. It cannot, however, cover subjective considerations, such as the willingness of the employer to take account of the particular wishes of the customer.

41. Consequently, the answer to the question put by the referring court is that Article 4(1) of Directive 2000/78 must be interpreted as meaning that the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement within the meaning of that provision.

Costs

42. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 4(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement within the meaning of that provision.

The Court was composed of the following Judges: K. Lenaerts, *President,* A. Tizzano, *Vice-President,* R. Silva de Lapuerta, M. Ilešič, L. Bay Larsen, M. Berger, M. Vilaras and E. Regan, *Presidents of Chambers,* A. Rosas, A. Borg Barthet, J. Malenovský, E. Levits, F. Biltgen *(Rapporteur),* K. Jürimäe and C. Lycourgos; *Advocate General:* E. Sharpston; *Registrar:* V. Tourrès

3. DOCUMENTATION

The Council of Europe and the Rule of Law

Introductory Remarks regarding the Rule of Law Checklist Established by the Venice Commission

by **Andrew Drzemczewski,** Strasbourg*

I. Council of Europe Membership Requirements and the Rule of Law

1. Membership Requirements: Pluralistic Democracy, Rule of Law and Protection of Human Rights; Monitoring

Article 3 of the Council of Europe's Statute specifies that every member of the Organisation must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms. Read together with Article 1 of the Statute, it further provides that members must collaborate sincerely and effectively, by discussion of questions of common concern and by agreements and common action, in the realisation of the aim of the Council of Europe as set out in Article 1 (a), namely *"to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their social and economic progress*". Hence, all Member States must respect their obligations under the Organisation's Statute, the European Convention on Human Rights (ECHR) and other conventions to which they are Parties as well as to observe a series of principles, rules, standards and values which have been elaborated within the Organisation with regard to democratic pluralism, human rights and the rule of law.

In addition, the authorities of certain States which became members since 1989 (principally from countries of Central and Eastern Europe) also entered into additional and specific commitments during the examination of their requests for membership. These commitments, undertaken in contacts with the Committee of Ministers, and in particular the Parliamentary Assembly (PACE), were explicitly referred to in the relevant Opinions adopted by the Assembly, including the commitment to sign the ECHR upon accession and ratify it soon afterwards.[1]

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The Rule of Law Checklist was established in 2016, see below at p. 184.

[1] For more in-depth analyses see, in particular, contributions in chapters 3 (Membership and Observer Status, by E. Klein), 27 (Core Monitoring Mechanisms and Related Activities, by A. Drzemczewski), 28 (Establishing Common Standards and Securing the Rule of Law, by M. Breuer) and 32 (Constitutional Standard-setting and Strengthening of New Democracies, by Ch. Grabenwater) in: *The Council of Europe. Its Law and Policies* (S. Schmahl and M. Breuer, eds., OUP, 2017). A list of formal and material conditions for membership elaborated by the Parliamentary Assembly can be found in 14 HRLJ (1993), at p. 248.

These so-called 'new democracies' agreed, upon becoming members, to abide by Council of Europe standards on the understanding that they remedy shortcomings in their constitutional, political and legal orders as part of the membership package.

However, what if breaches of the Rule of Law are detected after a State has acceded to the Council of Europe? What tools or mechanisms are available when there is an erosion of democratic checks and balances which (threaten to) undermine constitutional democracy?[2] Within the Council of Europe there exists a plethora of more or less effective mechanism which include: monitoring or reporting procedures that can be initiated within the Parliamentary Assembly and possibly also the Committee of Ministers,[3] seizure of the Venice Commission by, for example, a State organ, the Parliamentary Assembly or the Secretary General of the Council of Europe; action/initiatives, reports by the Human Rights Commissioner, that of the Consultative Council of European Judges, etc...[4] The alleged existence of discriminatory or inappropriate (application of), in particular, constitutional arrangements can also be litigated successfully before the European Court of Human Rights, as has been the case with respect to, for example, Bosnia-Herzegovina, the Czech Republic, Hungary, Lithuania and Turkey.[5]

But *Realpolitik* has proven the limits of what can be and is accomplished in Strasbourg. Witness, for example, what little has been done with regard to two EU Member States, Hungary and Poland, when serious problems needed immediate attention. The Parliamentary Assembly did not even open a 'monitoring procedure' when rule-of-law norms had been seriously infringed in Hungary;[6] *ditto* as concerns the (unacceptable) length of time it took the Assembly to deal with the Polish constitutional crisis.[7]

2. The Rule of Law as a Core Precept: Strasbourg Court Case-Law and the Venice Commission's Checklist

Although respect for the Rule of Law, as one of the three core principles specified in the Statute, is a precondition, an axiom upon which membership of the Council of Europe is based, none of the Organisation's principal legal instruments provide, as such, an authoritative definition of what specifically is meant by the Rule of Law.[8] That said, in a number of its findings, the European Court of Human Rights has confirmed that the Rule of Law is a fundamental guiding principle to the application and interpretation of the ECHR. For the Court in Strasbourg the Rule of Law, referred to expressly in the Convention's Preamble, it is a concept inherent in all the provisions of the Convention.[9]

In its Resolution 1594 (2007) on 'The principle of the Rule of Law'[10] the Parliamentary Assembly invited the Venice Commission to reflect in-depth on the concepts of 'rule of law' and *'prééminence du droit'* which, in due course, led to the adoption – by the latter in 2016 – of a 'Rule of Law Checklist,' substantial extracts of which are provided below, at pp. 184-198.

As a precursor of the Venice Commission's Checklist, the Committee of Ministers, already in 2008, issued an analysis of how the Rule of Law is conceived within the framework of the Council of Europe. On the basis of the Court's case-law it identified, under three main headings, specific rule of law-related requirements – components, constitutive elements and sub-principles – that form part of the law of the ECHR: (a) the institutional framework and organisation of the State, (b) the principle of legality: principles of lawfulness, legal certainty and equality before the law, and (c) due process: judicial review, access to courts and remedies, fair trial.[11] This led the Committee of Ministers to stress a "*high degree of consensus in the Council of Europe about the basic requirements of the rule of law.*"[12]

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[2] For a discussion of the term 'constitutional democracy' consult the Special Issue of *The Hague Journal on the Rule of Law*, entitled 'The Crisis of Constitutional Democracy in Central Europe' (to be published in vol. 10, in January 2018).

[3] See A. Drzemczewski, "Human Rights in Europe: An Insider's Views" in: *European Human Rights Law Review* (2017), pp. 134-144, at pp. 134 and 136-139.

[4] See, in this respect chapters 27 and 28 in the book on the Council of Europe, footnote 1 above, and the report on the "Venice Commission's 'Rule of Law Checklist'" adopted unanimously by the Parliamentary Assembly's Committee on Legal Affairs and Human Rights (AS/Jur) on 29 June 2017, available at http://website-pace.net/en_GB/web/as-jur/committee-documents (to be presented, for adoption by the PACE plenary, at its October 2017 part-session in Strasbourg). See also 'Plan of Action on Strengthening Judicial Independence and Impartiality' adopted by the Committee of Ministers in April 2016 (to be implemented within a five-year period, ending April 2021, with regular progress reports), available at: https://rm.coe.int/1680700285

[5] See the cases of *Sejdić and Finci v. Bosnia and Herzegovina* (22 December 2009), *Adamiček v. Czech Republic* (12 October 2010), *Baka v. Hungary* (23 June 2016 = 36 HRLJ 109 (2016)), *Paksas v. Lithuania* (6 January 2011), *United Communist Party of Turkey and Others v. Turkey* (30 January 1998 = 19 HRLJ 118 (1998)), all available on the Court's website: http://www.echr.coe.int/Pages/home.aspx?p=home

[6] See Assembly Resolution 2064 (2015) of 24 June 2015, entitled "Situation in Hungary following adoption of Assembly Resolution 1941 (2013)", based on AS/Mon document 13806 of 8 June 2015, both available on the Assembly's portal: http://assembly.coe.int/nw/Home-EN.asp

[7] See, e.g., Committee on Political Affairs and Democracy, doc. AS/Pol/Inf (2016)10 on the exchange of views held in Paris on 8 March 2016 on 'The State of Democracy and the rule of law in Poland', available at http://www.assembly.coe.int/CommitteeDocs/2016/Apdocinf10_16%20EN.pdf and the information note of the Assembly's Monitoring Committee on 'The Functioning of Democratic institutions in Poland', doc.AS/Mon (2017) 14 of 9 May 2017, available at http://website-pace.net/documents/19887/3136217/AS-MON-2017-14-EN.pdf/a1215706-4f9a-40dd-af40-e1e03209d0a4

[8] See J. Polakiewicz and J. Sandvig, "Council of Europe and the Rule of Law" in vol. 4 *Civil and Legal Sciences* (2015), pp. 1-8, available at https://www.omicsonline.org/open-access/council-of-europe-and-the-rule-of-law-2169-0170-1000160.php?aid=63102

[9] See *Stafford v. United Kingdom* (Grand Chamber, 28 May 2002): "*Where the 'lawfulness' of detention is in issue, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. This primarily requires any arrest or detention to have a legal basis in domestic law but also relates to the quality of the law, requiring it to be compatible* ***with the rule of law, a concept inherent in all the Articles of the Convention***" (para. 63, emphasis added), repeated in *Baka v. Hungary* (Grand Chamber, 23 June 2016, para. 117 = 36 HRLJ 109 [129] (2016)). See also *Centro Europa 7 S.R.L. and di Stefano v. Italy* (Grand Chamber, 7 June 2012), a requirement of "the rule of law in a democratic society" (para. 156), *Sylvester v. Austria* (24 April 2003), para. 63, and *P.P. v. Poland* (8 January 2008), para. 88.

[10] Available at : http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17613&lang=en

[11] For more details, plus reference to specific case-law, consult "The Council of Europe and the Rule of Law – An overview," Committee of Ministers doc. CM (2008) 170, available at: https://www.coe.int/t/dghl/standardsetting/minjust/mju29/CM%20170_en.pdf, at paras. 34 to 59.

[12] CM (2008) 170, para. 25. See also P. Lemmens, "The contribution of the European Court of Human Rights to the rule of law" in: *The Contribution of International and Supranational Courts to the Rule of Law* (G. De Baere and J. Wouters, eds., Edward Elgar, 2015), pp. 225-242 and A. Nußberger, "The European Court of Human Rights and the rule of law – a tale of hopes and disillusions" in: *Essays in Honour of Leszek Garlicki* (M. Żubik, ed., Wydawnictwo Sejmowe, Warsaw, 2017), pp. 162-173.

Without the need to go into an in-depth analysis of what the Rule of Law entails for the Council of Europe,[13] suffice – for present purposes – it to provide a citation from the Concept Paper prepared for the 4th Congress of the World Conference on Constitutional Justice which is to be held in Vilnius on 11 to 14 September 2017.[14]

> "The prevalent modern concept of the rule of law refers to the 'governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.'[15] The European Commission for Democracy through Law (Venice Commission) identified common core elements of the Rule of Law, which are legality, including a transparent, accountable and democratic process for enacting laws, legal certainty, the prohibition of arbitrariness, access to justice before an independent and impartial court, including judicial review of administrative acts, respect for human rights as well as non-discrimination and equality before the law."[16]

The Concept Paper goes on to explain that constitutional courts and equivalent bodies are the primary guardians of a legal order based on the supremacy of law and the constitution as the supreme law, and that they have a strong influence on shaping the content of the principle of the Rule of Law. Hence, the indispensability of guaranteeing the independence of (constitutional) courts, which is one of the central elements of the principle of the Rule of Law.

II. Rule of Law and Constitutional Democracy under Threat

1. Specific Problems: Court Packing, Budget Reductions, Non-Implementation of Judgments, Non-Appointment of Judges

The independence of constitutional courts – in those States where they exist – hinges on the premise of the existence of the separation of powers in a State based on the Rule of Law. It is this independence that enables constitutional courts to effectively control the respect for the separation of powers.[17] It follows logically from this that constitutional courts need to ensure the normative superiority of the Constitution over statutory law and subordinate legislation within the legal order, including the need to ensure compliance with a State's international legal obligations, as well as, in the case of States Parties to the ECHR, the additional safeguards embedded in common European rule-of-law values, protected and consolidated by the case-law of the European Court of Human Rights.

That said, there is nothing surprising in observing the existence of an in-built antagonism, or friction, between constitutional courts and, say, a governing majority, as a Constitutional Court is often tasked to annul texts that conflict with the Constitution. So it is, unfortunately, also not too uncommon to observe how executive and legislative authorities have attempted to influence, discipline, not to say block or make subservient, the work of, in particular, constitutional courts. This is a phenomenon, a political reality, with respect to which one must be consistently attentive.

In this respect, major problems have surfaced in a number of States, especially in 'new democracies' of Central and Eastern Europe. In order to (try to) ensure that the findings of constitutional courts are 'favourable' to the political majority, governments and parliaments have resorted to, *inter alia*:[18]

– packing the court – here the example most often cited is that of President Roosevelt's idea of 'packing' the US Supreme Court[19] which had struck down important elements of his New Deal economic reforms. Such initiatives can, at least in part, sometimes, be tempered by ensuring appointment/election by means of a qualified majority. The Hungarian 2012 constitutional amendment – increase of the membership of the Constitutional Court from 11 to 15 members – provides a (bad) example;[20]

– the 'tactic' of **budget reductions** – the Venice Commission had to provide a helping-hand to the Constitutional Courts of Ukraine and Bosnia-Herzegovina in this respect back in 1998 and 2004, respectively;[21]

– the **non-implementation of judgments –** a recent Polish example is that of the non-publication (and in certain instances undue delay in publishing), in the Official Journal, by the Prime Minister's Office, of the Constitutional Tribunal's judgments;[22]

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[13] A good up-to-date overview has been made by M. Breuer, in chapter 28 (Establishing Common Standards and Securing the Rule of Law), at pp. 641-644, in the book he has co-edited on the *Council of Europe* (see footnote 1, above). See also, in this connection, R. McCorquodale, "Defining the International Rule of Law: Defying Gravity?" in vol. 65 *ICLQ* (2016), pp. 277-304, esp. at pp. 279-284.

[14] The title of the forthcoming Congress is "The Rule of Law and Constitutional Justice in the Modern World"; the full text of the concept paper is available at: http://www.wccj2017.lt/data/public/uploads/2016/09/concept-wccj-ga2016004-e.pdf

[15] Report of the United Nations Secretary-General Kofi Annan; see doc. S/2004/616, 23 August 2004, para. 6.

[16] Report on the Rule of Law (CDL-AD(2011)003rev), available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-e

and the Rule of Law Checklist (CDL-AD(2016)007), available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e = below at p. 184 ff. [substantial extracts].

[17] Website of 2nd Congress of the World Conference on Constitutional Justice, Rio de Janeiro, 16-17 January 2011: http://www.venice.coe.int/WCCJ/Rio/Papers/WCCJ_papers_E.asp See, in particular, keynote speech by Austrian Constitutional Court Justice and Venice Commission Vice-President, C. Grabenwarter, available at: http://www.venice.coe.int/WCCJ/Rio/Papers/AUT_Grabenwarter_keynotespeech.pdf

[18] The examples listed have, in part, been taken from unpublished paper by S.R. Dürr, "Constitutional Courts – an endangered species?" presented at a conference entitled "European Constitutional Democracy in Peril – People, Principles, Institutions," held in Budapest, 23-24 June 2016. All Venice Commission documents referred to in these introductory remarks are accessible on the Commission's website: http://www.venice.coe.int/webforms/events/

[19] See B. Cushman, "Court-packing and compromise" in 29 *Constitutional Commentary* (University of Minesota Law School), (2013) pp. 1-30, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2327892

[20] See, e.g., Hungarian Helsinki Committee "Hungary's Government has taken control of the Constitutional Court," 25 May 2015, available at https://www.helsinki.hu/en/hungarys-government-has-taken-control-of-the-constitutional-court/

[21] See S.R. Dürr, footnote 18 above, and Venice Commission press release "Budget of the Constitutional Court [Bosnia-Herzegovina] – a determining factor of its independence," 29 September 2004, available at http://www.venice.coe.int/webforms/events/default.aspx?id=17

[22] See Venice Commission Opinion No 833/2015, doc. CDL-AD(2016)001, of 11 March 2016 on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, in 36 HRLJ (2016), pp. 216-227, para. 43, and Opinion No 860/2016, doc. CDL-AD(2016)026, of 14 October 2016 on the Act on the Constitutional Tribunal, esp. §§ 19, 74-101, 126 and 130, with respect to non-publication (of two important judgments) and the late publication of 21 judgments on 11August 2016. The unacceptable and precipitated manner in which important legislative proposals were 'pushed-through' in late December 2015 must also be noted. See also E. Łętowska and A. Wiewiórowska Domagalska, "A 'good' change in the Polish Constitutional Tribunal?" in 62 *Osteuropa Recht* (2016), pp. 79-93.

– attempts to actually abolish a Constitutional Court – by, for example, the merger of the Constitutional and Supreme Courts, as had been attempted in Georgia back in 2002;[23]

– the non-appointment of judges – there is a well-known example: the Ukrainian Parliament's refusal to accept the oath of 11 judges elected/appointed by the judiciary and the President in 2005, which led to a constitutional crisis whereby the Constitutional Court could not sit for one and a half years, as the quorum had not been attained.[24] More recent examples are the Polish President's refusal to swear-in duly elected judges and the refusal, by the Slovak President, to appoint judges who were proposed to him by Parliament;

– other 'tools' which may be resorted to are **criminal prosecution of judges** – obviously if there is clear proof of corruption, this may be envisaged, but any such move is perceived as an interference of the Constitutional Court's work;[25] this also encompasses the (potentially abusive) use of **disciplinary proceedings** with respect to judges;

– the dismissal of judges – there exists an interesting example of how, in 2013, Moldova's Parliament was asked, by a 'displeased' governmental majority, to enact a law, by a simple majority, providing for the dismissal of a judge who no longer had the 'trust' of Parliament. Two readings of the text were pushed through Parliament in one day: fortunately, the Venice Commission's President and Ms Ashton, the then High Representative of the European Union for Foreign Affairs and Security Policy, 'intervened' to bring this procedure to an abrupt halt; the President of Moldova did not enact the law and Constitutional Court itself later found the text to be unconstitutional.[26]

The above, as well as other recent developments are worrying. In addition to the constitutional crisis in Poland, relating to two closely interlinked issues of the appointment of judges and amendments to legislation on the procedure of the Constitutional Tribunal,[27] other examples of what has happened in Hungary (constitutional amendments between 2011-2013 which negatively affected the Constitutional Court),[28] in Romania (the Law on the Constitutional Court amended by Government emergency ordinance removing the Court's competence to control the constitutionality of resolutions of the Parliament, in 2012),[29] in Turkey (the Constitutional Court was accused of rendering 'unpatriotic' judgments in 2014 when it started adjudicating sensitive matters, notably about access to blocked internet sites;[30] and the dismissal of two of the Court's judges in 2016 on the basis of an emergency decree law) and in Georgia (in 2016, quorum and voting majority issues in the Constitutional Court)[31] all confirm the need for constant and reinforced vigilance.

2. Safeguards to Consolidate the acquis

As already noted above, there exist within the Organisation a number of mechanisms to respond to breaches of 'common European' Rule of Law standards in order to constrain the (abusive) exercise of democratic power. But how can this be ensured in Member States? Perhaps by means of some form of constitutional entrenchment? Here, the problem is that the issue of 'constitutional entrenchment' is a subject which, at this moment of time, might be inappropriate and even dangerous to broach, especially in States where serious, balanced and non-partisan discussion cannot be guaranteed. For example, in Poland, the properly constituted (at the time) Constitutional Tribunal rightly based itself on the 1997 Constitution to invalidate attempts to undermine the established constitutional order by abusive use of statutory provisions, stressing the need to uphold the supremacy of Constitution norms which cannot be changed by statutes.[32] But what if, as has occurred in Hungary, there is a parliamentary majority that would permit (politically motivated/sectarian) amendments to the Constitution?

Back in 2015 the main '*qualitative difference*' between Hungary and other constitutional failures in a number of 'new democracies' were perceived as a process which

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[23] See S.R. Dürr, footnote 18 above, in which he explained how the then Secretary of the Venice Commission, G. Buquicchio (now the Commission's President), was able to convince the President of Georgia, Mr Shevardnadze, to refrain from a planned merger of the Constitutional and Supreme Courts.

[24] It is interesting to note, in this connection, that in such cases, and based on the Ukrainian experience, the Venice Commission usually recommends a 'default mechanism' for taking the oath, whereby retiring judges stay in office until their successors take up their new functions.

[25] See Venice Commission doc. CDL-AD (2010)044, Opinion on the Constitutional Situation in Ukraine, adopted at its 85th plenary session on 17-18 December 2010. Note can also be taken, in this respect, of the opening of a criminal enquiry with respect to the former President of the Polish Constitutional Tribunal, Andrzej Rzepliński, and the 'chilling effect' this, finally aborted, attempt may have had on the independence of this judicial organ.

[26] According to the Constitution of the Republic of Moldova, the President can reject a law only once and, if the Parliament maintains its vote, the President is obliged to promulgate it. Before the second vote in Parliament, the law was challenged before the Constitutional Court (a prior review), which ruled the text unconstitutional: judgment No. 18 of 2 June 2014 (for more details see press release issued by the Constitutional Court, available at: http://www.constcourt.md/libview.php?l=en&idc=7&id=551&t=/Media/News/Dismissal-of-the-Constitutional-Court-judges-by-the-Parliament-is-unconstitutional/)."

[27] See doc. CDL-AD (2016)001, footnote 22 above, esp. § 138 referring to the crippling of the Constitutional Tribunal's effectiveness, and doc. CDL-AD (2016)026, § 128 in which it is stated that by prolonging the constitutional crisis the Parliament and Government have obstructed the Constitutional Tribunal which (now) cannot play its constitutional role as the guardian of democracy, the rule of law and human rights. See also L. Garlicki, *"Disabling the Constitutional Court in Poland?" and* M. Wyrzykowski, *"Bypassing the Constitution or changing the constitutional order outside the Constitution"* in: *Transformation of Law Systems in Central, Eastern and Southeastern Europe in 1989-2015. Liber Amicorum in Honorem of H.C. Rainer Arnold* (A. Szmyt, B. Banaszak (eds.), Gdańsk University Press, 2016), at pp. 63-78 and pp. 159-179, T. Koncewicz, "*Of institutions, democracy, constitutional self-defence and the rule of law: The Judgments of the Polish Constitutional Tribunal in cases K 34/15, K 35/15 and beyond" in vol. 53 Common Market Law Review* (2016), pp. 1764-1792. and report by the (Polish) Helsinki Foundation for Human Rights, "The Constitutional crisis in Poland 2015-2016", available at http://www.hfhr.pl/wp-content/uploads/2016/09/HFHR_The-constitutional-crisis-in-Poland-2015-2016.pdf

[28] See, in particular, a number of Venice Commission opinions analysed by the Monitoring Committee of the Parliamentary Assembly in its report issued on 8 June 2015, in note 6 above.

[29] See, in this connection, the Venice Commission's highly critical opinion on this and related events, document CDL-AD (2012)026.

[30] Cf., the Venice Commission's positive assessment of the introduction of full individual complaints before the Constitutional Court, doc. CDL-AD (2011)040.

[31] See Venice Commission doc. CDL-AD (2016)017. In this instance the President vetoed amendments to legislation on the Constitutional Court – taking into account the Venice Commission's views with respect to lowering the quorum proposal and the majority for taking decisions; Parliament accepted the changes introduced in the veto.

[32] See, in this connection, footnotes 22 and 27 above, especially with respect to observations concerning the non-publication of two of its important judgments. This subject must be assessed in the wider context, as explained by D. Landau, "Abusive Constitutionalism" in vol. 47 *UC Davis Law Review* (2013), pp. 189-260, available at: https://lawreview.law.ucdavis.edu/issues/47/1/Articles/47-1_Landau.pdf

"*consisted of the deep and unfortunate* change *of the constitutional rules themselves, leading to a thorough dismantling of checks and balances and standards for the protection of rights, whereas in the other cases in Central Europe, the problem seems confined to the mere* disregard *of the rules, without otherwise departing from the best constitutional practices of liberal constitutionalism*."[33] But this is no longer the situation today.

Thus, if and when there is a proposal to radically or even surreptitiously alter or undermine democratic structures of the State, or there is a need to guard against widespread temporary irrationality (based on, e.g., a perceived major terrorist threat), how best to ensure the quality of a legal order based on the Rule of Law?[34] Does one establish a solid, stringent in-built parliamentary majority (e.g., the need for a three-fifths parliamentary majority to amend the Constitution)? Might there a need to supplement constitutional amendments by a referendum, perhaps?[35] Can the Austrian, Bulgarian, German and Portuguese constitutional 'safeguard procedures' (justiciably unamendable provisions) serve as models?[36] Or the Swedish system, where amendment of Fundamental Laws necessitates the adoption of a text twice, with a simple majority of votes cast, with intervening parliamentary elections?[37] The Dutch model likewise merits to be studied: any revision of the Constitution involves two parliamentary readings (with a general election in between), and a qualified two-thirds majority in both Houses of Parliament in the second reading.[38]

Without entering into detailed discussion about the distinction between rigid and flexible constitutions, and the extent to which Rule of Law principles such as legal certainty and the separation of powers transcend the text of a Constitution (including its rules on revision of the Constitution), one can – at least in principle – work on the premise that for all Council of Europe Member States "*the Rule of Law... constitute[s]a fundamental and common European standard to guide and constrain the exercise of democratic power.*"[39]

* * *

Two additional comments with respect to Poland.

Although it may be inappropriate to go as far as Bojan Bugarič does, in his article "A crisis of constitutional democracy in post-Communist Europe: 'Lands in-between' democracy and authoritarianism," to include Poland in the category of States in which he had detected the "*shallow institutionalization of the rule-of-law institutions*" and "'*Potempkin' harmonization*" with such institutions,[40] it is certainly correct to say, as does the Council of Europe's Human Rights Commissioner, that the recent erosion of the Rule of Law in Poland seriously threatens human rights standards.[41] The situation in the country is extremely worrying, as has been underlined in no uncertain terms by the vast majority of the informed legal community in Poland, including the former Presidents of the Polish Constitutional Tribunal[42] and the Polish Ombudsman, Adam Bodnar.[43]

Of relevance in this context is the fact that in January 2016 the EU Commission commenced a procedure against Poland in its 'Rule of Law Framework.'[44] Here, it

[33] *Per* M. Rosenfeld, W. Sadurski and R. Toniatti, "Introduction to the Symposium", in: M. Rosenfeld, W. Sadurski and R. Toniatti "Central and Eastern European constitutionalism a quarter of a century after the fall of the Berlin Wall" in vol. 13 *International Journal of Constitutional Law* (2015), pp. 119-123 at p. at p. 121 (emphasis in original), available at : https://academic.oup.com/icon/article-lookup/doi/10.1093/icon/mov014. For further studies on these comparative constitutional law issues see, for instance, W. Sadurski, *Rights before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe,* (Springer, 2nd edition, 2014), and E. Carpano, *Etat de Droit et Droits européens*, (L'Harmattan, 2005).

[34] See, N.W. Barber, "Why Entrench?" in vol. 14 *International Journal of Constitutional Law* (2016), pp. 325-350, at p. 341.

[35] For a useful overview, see Venice Commission "Report on Constitutional Amendment", document CDL-AD (2010)001, available at http://www.venice.coe.int/webforms/documents/?pdf=cdl-ad(2010)001-e. Referendums, referred to at paras. 46-50, do not appear to be an appropriate option in States like Poland right now, as their purpose is often "taken hostage" by other short-term (political) considerations.

[36] See, on this subject, e.g., K. Gözler, *Judicial Review of Constitutional Amendments. A Comparative Study* (Ekin Press, 2008) and *Engineering Constitutional Change* (X. Contiades, ed., Routlage, 2012).

[37] See Swedish Constitution: Instrument of Government (2015), Chapter 8, Article 14, available at: http://www.servat.unibe.ch/icl/sw00000_.html. See also Venice Commission "Report on Constitutional Amendment", footnote 35 above, para. 42.

[38] For details see W.J.M. Voermans, "The constitutional revision process in the Netherlands," in the book edited by X. Contiades, footnote 36 above, pp. 257-272, at p. 261. The Netherlands does not possess a constitutional court.

[39] Report on the Rule of Law adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011), doc. CDL-AD (2011)003rev, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-e, at p. 14, para. 69.

Tied to these considerations is, I submit, the need to accept existence of certain unalterable, essential constitutionally guaranteed set of 'rules of law' which cannot or should not be changed by means of constitutional amendment, bearing in mind Professor Palombella's '*jurisdictio/gubernaculum*' distinction whereby the Rule of Law "*comes down to the idea of the subordination of the law to another kind of law, which is not up to the sovereign to change at will*," found in our common European heritage as required by Council of Europe membership (and, *mutatis mutandis,* within the EU): see D. Kochenov, "EU Law without the Rule of Law: Is the Veneration of Autonomy worth it?" in vol. 34 *Yearbook of European Law* (2015), pp. 74-96, at p. 82. See also T. Bingham, *The Rule of Law* (Allen Lane, Penguin Books London, 2010), *passim.*

[40] In vol. 13 *International Journal of Constitutional Law* (2015), pp. 219-245 at pages 233 and 234, respectively. See also his article "The Rule of Law Derailed: Lessons from the Post-Communist World" in vol. 7 *Hague Journal on the Rule of Law* (2015), pp. 177-197.

[41] See report by N. Muižnieks, of 15 June 2016, doc. CommDH(2016)23, available at http://www.coe.int/en/web/commissioner/-/erosion-of-rule-of-law-threatens-human-rights-protection-in-poland; https://rm.coe.int/16806db712

[42] See M. Steinbeis, *Statement by the former presidents of the Constitutional Tribunal: Andrzej Rzepliński, Marek Safjan, Jerzy Stępień, Bohdan Zdziennicki and Andrzej Zoll, VerfBlog,* 2017/7/13, http://verfassungsblog.de/statement-by-the-former-presidents-of-the-constitutional-tribunal-andrzej-rzeplinski-marek-safjan-jerzy-stepien-bohdan-zdziennicki-and-andrzej-zoll/, DOI: https://dx.doi.org/10.17176/20170713-175409

[43] "*No one has done anything like this in Poland since the transformation in 1989*" available at https://www.rpo.gov.pl/en/content/interview-dr-adam-bodnar-onet-0 Interview with M. Zimmerman, 22 January 2016.

[44] See EU Framework to strengthen the Rule of Law and action taken with respect to Poland: http://ec.europa.eu/justice/effective-justice/rule-of-law/index_en.htm. See also, e.g., comments regularly made on this subject on the *Verfassungsblog,* footnote 42 above, and contributions in chapters 1 (The *Acquis* and its Principles, by D. Kochenov), 8 (The Bite, the Bark, the Howl: Article 7 TEU and the Rule of Law initiatives, by L. Besselink), and 12 (Protecting EU Values: *Solange* and the Rule of Law Framework, by A. von Bogdandy, C. Antpöhler and M. Ioannidis) in: *The Enforcement of EU Law and Values* (A. Jakab and D. Kochenov, eds., OUP, 2017), and a study by A. Timmer, B. Majtényi, K. Häusler, O. Salát, "EU Human rights, democracy and rule of law: from concepts to practice", (2014) FRAME Deliverable 3.2, available at http://www.fp7-frame.eu/wp-content/uploads/2016/08/10-Deliverable-3.2.pdf, esp. at pp. 28-38.

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

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

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

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

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

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

Rule of Law Checklist*

INTRODUCTION

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

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