Strasbourg, 16 December 2025 **CDL-AD(2025)002**

Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

OF THE COUNCIL OF EUROPE

(VENICE COMMISSION)

THE UPDATED RULE OF LAW CHECKLIST

Adopted by the Venice Commission
at its 145th Plenary Session
(Venice, 12-13 December 2025)

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I. INTRODUCTION

A. Updating the Rule of Law Checklist

1. At its 86th plenary session (March 2011), the Venice Commission adopted the Report on the Rule of Law (CDL-AD(2011)003rev). A first version of a checklist to evaluate the state of the Rule of Law in single states was appended to this report.

2. Building on this work, at its 106th plenary session (March 2016), the Venice Commission adopted the Rule of Law Checklist (CDL-AD(2016)007). The Checklist was endorsed by the Committee of Ministers of the Council of Europe at their 1263rd meeting (September 2016), by the Congress of Local and Regional Authorities of the Council of Europe at its 31st Session (19-21 October 2016) and by the Parliamentary Assembly of the Council of Europe on at its 4th part Session (11 October 2017).

3. The Reykjavik Declaration, adopted at the 4th Summit of Heads of State and Government of the Council of Europe (May 2023), called for "*raising the profile of, and strengthening, the Venice Commission, for example by giving more visibility and status to its Rule of Law Checklist and exploring ways the Organisation can better support the implementation*". In its action plan for implementation of the Reykjavik declaration, the Committee of Ministers of the Council of Europe called for updating the Venice Commission Checklist, a process which the Rule of Law Checklist itself indicated as necessary at periodical intervals.

4. Mr Kaarlo Tuori was appointed to lead the process of updating the Checklist. A working group was set up within the Commission. A broad process of consultation of a wide range of stakeholders and users of the Checklist was carried out, which included the Committee of Ministers and the Parliamentary Assembly of the Council of Europe (PACE), the European Court of Human Rights (ECtHR), the Congress of Local and Regional Authorities, the Group of States against Corruption (GRECO) the Consultative Council of European Judges (CCJE), the Committee of Convention 108 (T-PD), the Advisory Body of Youth, the Access Info Group. Beyond the Council of Europe umbrella, the consultation process involved also the European Commission and the European Union Agency for Fundamental Rights, the United Nations Special Rapporteur on the independence of judges and lawyers, the regional ombud organisations, national Constitutional Courts, academia and civil society.

5. Four academic seminars have been organised by the Venice Commission and its partners: on private powers (Madrid, November 2024); on the respect for the decisions of Constitutional Courts (Yerevan, November 2024); on transnational constitutional standards (Venice, March 2025); and on the work of the Venice Commission 1990-2025 – Taking stock of 35 years for democracy through law (Milan, May 2025). In July 2025, the Venice Commission also organised a conference in London in conjunction with the United Kingdom Government and the Bingham Centre for the Rule of Law.

6. The present update was prepared on the basis of the contributions by Mr Tuori as well as by Mr Barrett, Ms Bernoussi, Ms Bílková, Mr Bustos Gisbert, Mr Cameron, Ms Cartabia, Mr Holovaty, Mr Hunt, Ms Nussberger, Mr Otty and Ms Suchocka, and taking into account all the inputs received during the consultation process.

7. In the updated Checklist, the Venice Commission has largely maintained the original structure. The Commission is conscious of the fact that Rule of Law standards can be grouped together in different ways. However, the Commission has considered it appropriate to make only relatively limited changes to the main division into benchmarks as the basic structure has widely been acknowledged as providing an accurate definition of the legal concept of the Rule of Law. A number of significant developments since 2016 have, however, underscored the particular significance of effective checks and balances and effective mechanisms for

constitutional review as providing support for the Rule of Law and democracy and safeguarding against regression in these areas. For these reasons, checks and balances and constitutional review have now been raised to the level of specific Rule of Law benchmarks.

8. The updated Checklist was discussed by the Joint Meetings of the Venice Commission's Sub-Commissions on the Rule of Law and the Judiciary on 9 October and on 11 December 2025. It was adopted by the Venice Commission at its 145th Plenary Session (Venice, 12-13 December 2025).[1]

B. Recent Developments

9. The 2011 Rule of Law report and the 2016 Checklist have been used as a point of reference not only in the opinions and reports of the Venice Commission but also in the judgments of the ECtHR and the resolutions of the PACE, as well as in the Rule of Law monitoring of the European Union and the Court of Justice of the EU (CJEU). The benchmarks of the Checklist have been widely accepted as a definition of the juridical contents of the Rule of Law. The Checklist has also contributed to reaffirming the Rule of Law as a legal concept and to identifying the common core of legal and culturally divergent notions, such as the common-law concept of the Rule of Law and the continental European concepts of the *Rechtsstaat* and *l'État de droit* or *la prééminence du droit*.

10. Since the adoption of the 2016 Checklist, Rule of Law regression has, however, occurred in a number of jurisdictions both in Europe and elsewhere as well as at the international level. Reactions to this regression within both the Council of Europe and the European Union, including by the ECtHR and the CJEU, have clarified and specified Rule of Law requirements, in particular those related to judicial independence. In this regard, a new issue, related to the execution of the rulings of the ECtHR and the CJEU, has also arisen: how to restore the Rule of Law effectively and expeditiously while respecting, in the process, the Rule of Law itself?

11. In its country-specific opinions, the Venice Commission has emphasised that Rule of Law violations often manifest a winner-takes-all attitude and a simplistic notion of majoritarian democracy. As already indicated, in the view of the Commission, Rule of Law and democracy regression have accentuated the significance of effective checks and balances and independent institutions not based on majority rule, such as constitutional courts, ombudspersons or other independent national human rights institutions and electoral commissions.

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

13. Since 2016, there have also been rapid developments in technology affecting certain basic premises of the Rule of Law (for example the accountability of individual human decision-makers or judicial independence). Also related to digitalisation and requiring Rule of Law - related responses, the power of private actors, including in relation to - but not limited to - platforms, has grown. The fact that technological developments and the growth in power of private actors, especially in this domain, often have cross-border implications further complicates their control by Rule of Law instruments.

[1] Part III on the Selected standards will be added at a later stage.

14. These developments have been taken up in the revised version of the Rule of Law Checklist, either within the benchmarks themselves or in a separate section on particular challenges to the Rule of Law.

C. Purpose of the Checklist

15. The present Checklist is intended to provide a tool for assessing the Rule of Law in a given country from the viewpoint of its constitutional and legal structures, the legislation in force and the existing case law. The Checklist aims to enable an objective, thorough, transparent and equal assessment. The Checklist recognises the differences between the common-law concept of the Rule of Law and Continental European concepts, such as the *Rechtsstaat, estado de derecho, stato di diritto* and *l'État de droit (la prééminence du droit),* but aims to distil the common normative elements of these notions. Equally the benchmarks are intended as a holistic guide to allow accurate overall assessment with Rule of Law compliance rather than a set of mandatory requirements applicable in every respect in all circumstances.

16. The Checklist is meant as a tool for a variety of actors who may decide to carry out such an assessment: These may include parliaments, governments and other state authorities, as well as local and regional authorities, when addressing the need and content of legislative reform, civil society and international organisations, including regional ones – notably the Council of Europe and the European Union.

17. It is not within the mandate of the Venice Commission to assess the Rule of Law in a given country on its own initiative. However, when the Commission, upon request, deals with Rule of Law issues within the framework of the preparation of a country-specific opinion, it will base its analysis on the parameters of the Checklist within the scope of its competence.

18. As with its predecessor, the Checklist is neither exhaustive nor final. It aims to cover the core elements of the Rule of Law. These may change over time, and the Checklist must therefore be developed to cover new aspects or to provide greater particularity in respect of certain benchmarks. New Rule of Law issues are likely to arise, and new standards may be elaborated which will require its revision. The Venice Commission will continue to review and update the Checklist on a regular basis.

19. The Checklist focuses on legal safeguards. However, the Rule of Law can only flourish in a country whose decision-makers and the population in its entirety in all its diversity feel collectively responsible for its implementation, making it an integral part of their own legal and political culture.[2] Formal norms must be complemented by informal ones. However, the Venice Commission wishes to emphasise that cultural and societal support of the Rule of Law do not remove the need of formal safeguards. Recent Rule of Law developments have demonstrated that legal and political culture is not stable and can change rapidly.

20. In addition to a receptive and supportive legal and political culture, free media and vigilant civil society, the Venice Commission stresses the significance of legal and civic education. The realisation of the Rule of Law falls mainly to legal professionals, whose competence and integrity is decisive for promoting the Rule of Law. Yet, legal education for legal professionals should be complemented by civic education fostering respect for human rights, democracy and the Rule of Law among the general public.

[2] A condition for the full application of the Rule of Law is that there is a government in effective and continuing control of the territory.

D. The Rule of Law, human rights and democracy

21. The Rule of Law is closely intertwined with democracy and human rights, *i.e.* the other basic values of the Council of Europe. The Rule of Law, human rights and democracy are interdependent. Democracy relates to the involvement of the people in the decision-making and deliberative processes in a society, contributing to legitimising public decisions; human rights seek to protect individuals from arbitrary and excessive interferences with their freedoms and liberties and to secure human dignity, while the Rule of Law focuses on limiting and independently reviewing the exercise of public powers. In different words, while the majority determines the collective interest, the Rule of Law and human rights place limits, both procedurally and materially, on what the majority can do. Democracy, human rights and the Rule of Law share a common objective: prevention of accumulation and arbitrary use of power.

22. The Rule of Law would be an empty shell without permitting access to human rights. Similarly, human rights can only be protected and promoted, when the Rule of Law is respected. While recognising that the Rule of Law requires protection of and respect for human rights, the Checklist will expressly deal with human rights only when they are linked to specific aspects of the Rule of Law.

23. The Rule of Law promotes democracy by setting limits to power, by establishing accountability on the part of those wielding public power and by safeguarding human rights, particularly those which protect minorities against arbitrary majority rules, and which establish and protect civil society and a free media. Similar to human rights, the Checklist will address those components of a democratic system as linked to the Rule of Law.

E. A Multi-Layered Approach

24. The Rule of Law is a concept of universal scope. The Rule of Law has been proclaimed as a basic principle by the United Nations and at the regional level by the Council of Europe, the European Union, the Organization of American States and the African Union. References to the Rule of Law can also be found in several documents of the Arab League.

25. While, historically, principles relating to democracy, human rights and the Rule of Law were first developed to control and regulate state (governmental) power, in the contemporary world public power is exercised not only by the state but also at supra- and sub-state levels. Furthermore, private actors increasingly wield power comparable to and sometimes even exceeding that of public bodies. As a matter of principle, the Rule of Law requires that the accumulation and exercise of power must be controlled and its abuse prevented at all levels wherever the power resides, whether with public or private actors.

26. The independence and effectiveness of local and regional governing bodies in a democratic system within a constitutional framework is also of special importance for the Rule of Law. Such bodies can themselves contribute to an effective system of checks and balances, and the Rule of Law may provide an important guarantee for their independence and effectiveness, particularly in their relations with state authorities. Within individual states, Rule of Law principles obligate national, regional and local authorities in their relationships with private subjects. The Rule of Law must be realised at all levels of public power.

II. BENCHMARKS

A. Legality[3]

1. Supremacy of the law

Is supremacy of the law recognised?

i. Is there a written constitution, enshrining human rights, separation of powers and democratic principles?
ii. Is there a clear hierarchy of legal acts and are there clear rules on settling normative conflicts?
iii. Is conformity of legislation with the constitution ensured?[4]
iv. Is legislation adopted without delay when required by the constitution or by law?

27. The principle of constitutionalism requires there to be a hierarchy of legislative acts with the constitution at the top of this hierarchy[5]. The constitution shall enshrine fundamental rights and freedoms in line with international standards. The concept of "law" covers not only constitutions, international law, statutes and different forms of secondary legislation, but also, where appropriate, binding judgments.[6] The supremacy of the constitution and of ordinary laws implies that lower-order norms are subject to review for their compliance with such higher-order ones.

2. Compliance with the law by public authorities

Do public authorities act on the basis of, and in accordance with standing law?[7]

i. Are the powers of public authorities defined by law and clearly delineated?[8]
ii. Is there a mechanism to ensure that public authorities are obliged to act within the scope of their legal powers?
iii. Are there mechanisms to ensure the effective implementation and protection of human rights by public authorities?
iv. Is there a mechanism to ensure compliance by public authorities with court decisions on non-conformity with the constitution?

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[3] The principle of legality is explicitly recognised as an aspect of the Rule of Law by the European Court of Justice, see CJEU, C-496/99 P, *Commission v. CAS Succhi di Frutta*, 29 April 2004, §63.
[4] See Benchmark G on Constitutional review below.
[5] Even in jurisdictions without a written constitution such as the United Kingdom there is a recognition of fundamental constitutional principles. In the case of the United Kingdom the Constitutional Reform Act references two fundamental constitutional principles: the Rule of Law and the independence of the judiciary. Protection for fundamental rights is also ensured by primary legislation and the common law in the form of case law developed by the courts.
[6] Law "comprises statute law as well as case-law", ECtHR, *Achour v. France*, no. 67335/01, 29 March 2006, §42; *Kononov v. Latvia* [GC], no. 36376/04, 17 May 2010, §185.
[7] The reference to « law » for acts and decisions affecting human rights is to be found in a number of provisions of the European Convention on Human Rights, including Article 6.1, 7 and Articles 8.2, 9.2, 10.2 and 11.2 concerning restrictions to fundamental freedoms. See, among many others, ECtHR, *Amann v. Switzerland*, no. 27798/95, 16 February 2000, §50; *Kurić and Others v. Slovenia* [GC], no. 26828/06, 12 March 2014, §341.
[8] Discretionary power is, of course, permissible, but must be controlled. See below II.C.1.

v. Does the action of the executive branch conform with the constitution and other laws?
vi. Is effective judicial review of the conformity of the acts and decisions of the executive branch of government with the law available?

28. A basic element of the Rule of Law is that the powers of public authorities are defined by law. Insofar as legality addresses the actions of public officials it also requires that they have authorisation to act and that they act within the limits of the powers that have been conferred upon them and respect both procedural and substantive law.

3. Rule of Law guarantees for the conduct of private actors

Is there sufficient regulation of the conduct of private actors that perform public tasks or that – because of their dominance of a particular sector – are able to take actions and decisions with a similar impact on ordinary citizens as those of public authorities?

i. Where private actors perform public tasks and/or are able to take actions and decisions with a similar impact on ordinary citizens as those of public authorities, does the law guarantee that these private actors are subject to similar Rule of Law and human rights requirements as public authorities?
ii. Are such private actors subject to the requirements of the Rule of Law and accountable in a manner comparable to that of public authorities? Is effective judicial review available in relation to the acts and decision of such private actors?
iii. Does the law provide for mechanisms to protect public decision-making processes and elections from undue influence by powerful private actors?
iv. In the case of private providers of Artificial Intelligence (AI) systems:
    a. Is there a governance framework in place for AI systems that, in particular, requires risks and impacts assessments?
    b. Is the responsibility of private actors, where appropriate, for the malfunction of AI systems ensured?
    c. Is there an independent mechanism to ensure oversight and accountability for the use of AI?

29. In several fields the state has delegated to hybrid (state-private) actors or private entities powers that traditionally have been the domain of state authorities, including in the fields of prison management, surveillance, counterterrorism and access to health care or media. There are also areas where private actors have emerged with a level of dominance of particular sectors, such that the extent of their powers are capable of being seen as equivalent to those ordinarily exercised by sovereign states. The Rule of Law must apply to such situations as well, with adjustments where this is necessary. The Rule of Law is about regulating major concentrations of power, whatever their origins, and thus goes beyond the requirement to regulate powers which the state has explicitly delegated to private entities. The Rule of Law has always had a horizontal dimension, illustrated by the requirements of access to court and fair trial.[9] While the law, in almost all legal cultures, has long recognised distinctions between public law and private law, the law also regulates the private sphere in a myriad of ways, e.g. in the fields of anti-trust / competition law, on-line safety regulation, consumer protection and labour law. If and when private parties perform public tasks (including providing public services), exercising power analogous to that of a state, or to such a degree that such exercise

[9] See Benchmark F on Access to justice below.

can threaten core elements of democracy, human rights or the Rule of Law itself, then this private power must also be subject to suitable regulation by the democratically elected legislature and effective supervision by the courts, rather than being left purely to control through "freedom of contract" or market forces.[10] The regulation of private actors' conduct should, in particular, be such as to ensure compliance by the state with any positive obligations to ensure implementation and effective protection of human rights obligations.[11] This is particularly important in the context of freedom of expression and public debate and in access to - and use and regulation of - online platforms.

30. Artificial Intelligence (AI) raises conflicting issues that need to be addressed in a nuanced way, as they involve different obligations and actors. First, there is the question of how the development and commercialisation of AI systems affects the Rule of Law, human rights and democracy. Here, the main actors to be addressed by new obligations are mostly private actors. They need to be made subject of specific rules to ensure that activities within the life cycle of AI systems are carried out in accordance with the Rule of Law, human rights and democracy. Second, new concrete obligations should be proposed to define the circumstances in which public authorities can use AI systems in full compliance with the requirements derived from the Rule of Law, human rights and democracy. In the case of private providers of AI systems, it is necessary to design a governance framework that authorises and supervises the commercialisation of AI systems which could undermine the fundamental principles of the Rule of Law. This kind of governance framework would, *inter alia*, provide for prior risk and impact assessments relating to human rights, the Rule of Law and democracy. This governance framework should include an independent oversight and accountability body equipped with adequate resources, including investigative powers, staff and financial support.

4. Relationship between international law and domestic law

Does the domestic legal system ensure that the state abides by its obligations under international law?

i. Does the overarching legal framework recognise the obligation of the state to respect international law and execute judgments of international courts?
ii. Are there clear legal rules on the relationship between international and domestic law and on the implementation of international obligations into domestic law?[12]

[10] Cf. the EU concepts of universal services/services of general interest, where the state intervenes to ensure that services are available at reasonable cost to citizens in various fields (postal services, banking, transport, health care, care of the elderly, assistance to disabled people, social housing etc.). See also, 2011 UN Guiding Principles on Business and Human Rights (Ruggie Principles) and the Council of Europe, Recommendation CM/Rec(2016)3 on human rights and business.

[11] For recent references to the positive obligations of the State to ensure the fundamental rights of individuals vis-à-vis private actors, see ECtHR, *Hasmik Khachatryan v. Armenia*, no. 11829/16, 12 December 2024, §§148-155 and 167-204 (concerning Article 3 ECHR); *M.Ş.D. v. Romania*, no. 28935/21, 3 December 2024, §§118-158 (concerning Article 8 ECHR); *Krachunova v. Bulgaria*, no. 18269/18, 28 November 2023, §§158-177 (concerning Article 4 ECHR); and *Bărbulescu v. Romania* [GC], no. 61496/08, 12 January 2016, §§108-141 (concerning Article 8 ECHR).

[12] Cf. Article 26 (*pacta sunt servanda*) and Article 27 (internal law and observance of treaties) of the 1969 Vienna Convention on the Law of Treaties; Venice Commission, CDL-STD(1993)006, The relationship between international and domestic law, paras. 3.6 (treaties), 4.9 (international custom), 5.5 (decisions of international organisations), 6.4 (international judgments and rulings); CDL-AD(2014)036, Report on the implementation of human rights treaties in domestic law and the role of courts, para. 50.

iii. Is there a clear commitment to give due consideration to resolutions, views, recommendations and opinions of international courts and of international human rights bodies?
iv. Is the conformity of legislation with international obligations ensured?[13]

31. The principle that states must fulfil in good faith their obligations under international law is the way in which international law expresses the principle of legality. International law does not dictate any specific way in which international customary or treaty law shall be implemented in the internal legal order. The state however "may not invoke the provisions of its internal law as justification for its failure to perform a treaty"[14] or to respect a rule of customary international law, or another binding source of international law. States shall duly implement binding decisions of international judicial bodies. They should also give due consideration to non-binding decisions such as advisory opinions from the ICJ, advisory opinions of the European Court of Human Rights and views, general comments or recommendations from e.g. the Council of Europe's Committee of Ministers or UN treaty bodies.

32. The principle of the Rule of Law does not impose a choice between monism and dualism or between direct or indirect incorporation of international law in the domestic legal system, but the principle of *pacta sunt servanda* ("agreements must be kept") applies regardless of the national approach to the relationship between international and internal law. At any rate, full domestic implementation of binding international law is crucial from the perspective of international law. When international law is part of domestic law, it is binding law within the meaning of the above paragraph relating to supremacy of law.[15] This does not mean, however, that it should always have supremacy over the constitution or ordinary legislation as an issue of domestic law.

5. Law-making powers of the executive

Is the primary role of the legislature as lawmaker ensured?

i. Does the overarching legislative framework require that, in principle, it is the legislature, rather than the executive, which is to set out general and abstract rules on those subjects that have a significant impact on individuals and society?
ii. Are exceptions permitted to the above principle ? Are these exceptions limited in time and controlled by the legislature and the judiciary? Is there an effective remedy against abuse?
iii. Is the principle of subsidiarity applied, when relevant, in delegating legislative power?
iv. When the responsibility to legislate is delegated by the legislature to the executive, are the objectives, contents, scope and, when needed, time limits of the delegation of power explicitly and specifically defined in a legislative act?

33. Unlimited powers of the executive are, *de jure* or *de facto*, a central feature of absolutist and dictatorial systems. Modern constitutionalism has been developed to safeguard against such systems and therefore ensures supremacy of the constitution, giving the legislature

[13] As to the compliance with international standards, see also Benchmark G on Constitutional review below.
[14] Article 27 of the Vienna Convention on the Law of Treaties; see also Article 46 (Provisions of internal law regarding the competence to conclude treaties).
[15] See II.A.1. on Supremacy of the law above.

control over the powers of the executive. Democracy requires that regulation of issues deemed societally important should normally be in a statute passed by the representatives of the people, the legislature. However, it is impracticable that the legislature at national level passes all the norms necessary for regulation of a complex modern society. Good reasons of expert knowledge, speed of enactment, knowledge of local conditions (etc.) may justify secondary forms of legislation. Under such a justification, the constitution may establish norm-giving power for the government, executive agencies or local and regional authorities, or the legislature may delegate such power. Such delegation would however need to be explicit and specific, in order to avoid in particular that overly wide law-making powers are delegated to the government and other executive or legislative bodies. Different constitutional systems can provide for different balances as regards democracy and effectiveness in this respect.[16]

6. Law-making procedures

Is the procedure for enacting legal acts efficient, transparent, inclusive and democratic?

i. Are there clear constitutional rules on the legislative procedure?[17]
ii. Does the parliament have the power to decide on the content of the law?
iii. Is proposed legislation debated publicly by parliament and adequately justified in explanatory documents? Is sufficient time allocated to the discussion in all phases of the legislative process including adequate time for the political opposition?[18] Is the opposition involved in setting the agenda of parliamentary debates and in the work of parliamentary committees?[19] Is democratic deliberation in the approval of the law sufficiently guaranteed even if AI systems are used within the legislative procedure?
iv. Are expedited or urgent procedures confined to exceptional situations or circumstances? Are expedited procedures, or the introduction of exceptions, qualifications or late amendments only resorted to a limited extent and in a transparent manner, and are there guarantees against circumvention of normal lawmaking rules? Are major reforms and constitutional amendments clearly excluded from expedited procedures?
v. Are there principles which attempt to balance the need for efficiency in the law-making process, as well as the right of the political majority to determine an issue, with the need to provide for adequate discussion of draft legislation and the right of the political minority to raise its concerns?
vi. Are there rules prescribing broad public consultations on reforms and legislation that concern matters of particular constitutional or societal importance (e.g. constitutional reforms, electoral legislation), as well as targeted consultations of stakeholders on legislation affecting them? Are these rules generally respected, are the outcomes of these consultations made public and is effect given to these outcomes, where

[16] ECtHR, *the Sunday Times v. the United Kingdom (No. 1)* , no. 6538/74, 26 April 1979, §46 and further. See also II.A.7 below, regarding emergency powers.
[17] On the need to clarify and streamline legislative procedures, see e.g. Venice Commission, CDL-AD(2012)026, Opinion on the compatibility with Constitutional principles and the Rule of Law of actions taken by the Government and the Parliament of Romania in respect of other State institutions and on the Government emergency ordinance on amendment to the Law N° 47/1992 regarding the organisation and functioning of the Constitutional Court and on the Government emergency ordinance on amending and completing the Law N° 3/2000 regarding the organisation of a referendum of Romania, para. 79; cf. CDL-AD(2002)012, Opinion on the draft revision of the Romanian Constitution, para. 38 and further.
[18] Safe for the legal derogations provided by law, see A.5.ii above on the Law-making power of the executive.
[19] Venice Commission, CDL-AD(2010)025, Report on the role of the opposition in a democratic Parliament, paras. 108 and 114.

appropriate? Is there a duty to make impact assessments where appropriate? Does the public have access to draft legislation at the drafting stage to allow for sufficient time to provide meaningful input or at least when it is submitted to parliament?

vii. Are clear rules in place prescribing when participation of the legislature in the process of approving, incorporating, implementing and withdrawing from international treaties is obligatory? Is such participation obligatory for international treaties that touch upon issues falling within the competence of the legislature pursuant to domestic law and other issues of particular significance? Are there clear procedures in place to verify that draft laws comply with the constitution and international obligations, including compatibility checks during the drafting process? Are there defined legal consequences or corrective mechanisms when draft laws are found to be incompatible with the constitution and/or international obligations?

34. The Rule of Law is closely connected with democracy in that it promotes accountability and safeguards the public interest while ensuring the protection of the rights of all persons so necessarily limiting the powers of the majority. The quality of law depends to a large extent on the quality of the legislative process. This procedure needs to be efficient, transparent, inclusive and democratic. The text of the draft legal act needs to be accessible and when appropriate accompanied by robust explanatory material and impact assessments. The legislature should follow the standard legislative procedure and avoid resorting to expedited adoption of legal acts on a regular basis.[20] Legislative procedures should recognise the role of the opposition and allow for targeted and transparent consultations of stakeholders affected by the draft legislation as well as the civil society, think tanks and the general public, when appropriate.[21] A meaningful public debate, providing an opportunity for the public to participate in the conduct of the public affairs and influence its outcome, is an essential aspect of a democratic society.[22] Proposals for draft laws should be available to the public in advance of, or at the very least at the time of, presentation to the legislature to allow for public debate and input.[23]

35. The increasing use of AI systems by parliaments must not undermine the democratic procedures of the legislative process. In particular, it is necessary that the use of AI systems is made known to the public, with sufficient safeguards on compliance with technical and oversight requirements.[24] On the other hand, it is essential that AI systems under no circumstances replace democratic deliberation with purely technological considerations.

[20] See also II.A.7. below on Exceptions in emergency situations.

[21] It is of utmost importance to involve particularly interested groups where legislation affects human rights, i.e. groups such as national human rights institutions, lawyers' associations, other specific groups when dealing with specific rights such as children rights, minority rights, gender-related rights, etc. There are different mechanisms for involving the public in the work of drafting legislation, such as consultative assemblies.

[22] Venice Commission, CDL-AD(2023)044, Georgia - Opinion on the Law on the Special Investigation Service and on the provisions of the Law on Personal Data Protection concerning the Personal Data Protection Service, paras. 28-30. See also: UN Human Rights Committee, General Comment No. 25 (1996), Article 25 (Participation in Public Affairs and the Right to Vote) - The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, which provides that "[c]itizens also take part in the conduct of public affairs by exerting influence through public debate" (para. 8).

[23] Different states can naturally provide for different balances between the legislature and the executive when it comes to the work of drafting treaties. While parliament need not normally be given a role in drafting treaties, including some form of parliamentary representation in the state's delegation to the drafting process can be appropriate in certain circumstances, notably when the treaty concerns the "core" issues which normally should be in a statute (see also II.A.5.i above).

[24] See Inter-Parliamentary Union, Guidelines for AI in Parliaments, December 2024.

7. Exceptions in emergency situations

Does the legal system provide a mechanism to exercise power in an expedited manner in emergency situations and to control that power?

i. Are there specific constitutional or legal provisions applicable to emergency situations (such as a state of emergency or martial law)? Is the definition of an emergency situation clear and precise?
ii. Are strict conditions set for derogating from human rights? What are the circumstances and criteria required in order to trigger a derogation? Does national law prohibit derogation from certain rights even in emergency situations? Do derogations from human rights always need to be justified?
iii. Are derogations and any resulting measures that follow necessary, temporary and proportionate, that is, limited to the extent strictly required by the exigencies of the situation, in duration, circumstance and scope?
iv. What is the procedure for determining an emergency situation? Are there parliamentary controls and judicial review of the existence and duration of the emergency situation and of the necessity, proportionality and temporariness of individual measures adopted during the state of emergency?
v. Are there other independent mechanisms (including ombudspersons and national human rights institutions) capable of providing oversight in such contexts?
vi. Is adequate protection provided for civil society and the media in any emergency context?[25]

36. The security of the state and its democratic institutions and the safety of its population are vital public and private interests that deserve protection and may lead to a temporary derogation from certain human rights and to an extraordinary division of powers. However, emergency powers may be abused by governments to stay in power, to silence the opposition and to restrict human rights in general. Emergency powers must therefore respond directly to the condition of necessity.[26] Strict limits on the duration, circumstance and scope of such powers are therefore essential.[27] Even in a state of public emergency the fundamental principle of the Rule of Law must prevail. State security and public safety are vital public interests, but they can only be effectively secured in a democracy which fully respects the other requirements of Rule of Law, while taking into account exceptional circumstances. In

[25] Council of Europe, Recommendation CM/Rec(2024)7 on the effective protection of human rights in situations of crisis.

[26] CDL-PI(2020)005rev, Report - Respect for Democracy Human Rights and Rule of Law during States of Emergency – Reflections, para. 10.[27] In its Report - Respect for Democracy Human Rights and Rule of Law during States of Emergency – Reflections (CDL-PI(2020)005rev, paras. 6-16), Venice Commission has listed the principles governing the state of emergency (i.e. overarching principle of the Rule of Law, necessity, proportionality, temporariness, effective (parliamentary and judicial) scrutiny, predictability of emergency legislation, and loyal co-operation among state institutions). As to the condition of temporariness, the ECtHR has considered that the question of proportionality may require that the duration of the measures is linked to the duration of the emergency but has not required that the emergency itself be temporary (ECtHR, *A. v the United Kingdom*, no. 3455/05, 19 February 2009, §178).

[27] In its Report - Respect for Democracy Human Rights and Rule of Law during States of Emergency – Reflections (CDL-PI(2020)005rev, paras. 6-16), Venice Commission has listed the principles governing the state of emergency (i.e. overarching principle of the Rule of Law, necessity, proportionality, temporariness, effective (parliamentary and judicial) scrutiny, predictability of emergency legislation, and loyal co-operation among state institutions). As to the condition of temporariness, the ECtHR has considered that the question of proportionality may require that the duration of the measures is linked to the duration of the emergency but has not required that the emergency itself be temporary (ECtHR, *A. v the United Kingdom*, no. 3455/05, 19 February 2009, §178).

order to avoid abuse, this requires parliamentary control and judicial review of the existence and duration of a declared emergency situation and of the measures taken under the emergency powers, throughout the duration of the state of emergency. It is essential that the principles of the necessity, proportionality and temporariness apply not only to the definition of the powers in the constitution and the complementing law, as well as the activation and application of these powers, but also specifically to the individual measures adopted during the state of emergency.[28]

37. The International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR) and the American Convention on Human Rights (ACHR)[29] provide for the possibility of derogations, as distinguished from mere limitations, on the rights guaranteed only in highly exceptional circumstances, provided the principle of non-discrimination is respected. Derogations are not possible from the so-called absolute rights: the right to life[30], the prohibition of torture and inhuman or degrading treatment or punishment, the prohibition of slavery, the prohibition on the retroactive application of criminal laws and the *nullum crimen*, *nulla poena* (no crime, no penalty) principle among others.[31]

8. Duty to implement the law

What measures are taken to ensure that public authorities effectively implement the law, including, where appropriate, against private actors?

i. Are potential obstacles to the implementation of the law analysed before and after its adoption?
ii. Are there effective remedies against non-implementation of the law?
iii. Does the law provide for clear and specific sanctions for non-obedience to the law?
iv. Is there a solid and coherent system of law enforcement by public authorities to enforce these sanctions? Are these sanctions consistently applied?
v. Is data made publicly available on the enforcement of law by public authorities?
vi. Is *ex ante* and *ex post* evaluation of laws foreseen as part of the legislative process?

38. Although full enforcement of the law is rarely possible, a fundamental requirement of the Rule of Law is that the law must be respected. This means in particular that state bodies must effectively implement laws. The very essence of the Rule of Law would be called in question if laws were not duly applied and enforced.[32] The duty to implement the law is threefold: (i), individuals must obey the law; (ii) the state must reasonably enforce the law; and (iii) public officials must act strictly within the limits of the powers conferred on them.

39. Obstacles to the effective implementation of the law can occur not only due to the illegal or negligent action of authorities, but also because the quality of legislation makes it difficult

[28] *Ibid.*, para. 6.
[29] Article 15 ECHR: Article 4 ICCPR; Article 27 ACHR.
[30] With the exception of lawful acts of war.
[31] Venice Commission, CDL-AD(2006)015, Opinion on the Protection of Human Rights in Emergency Situations, para. 9 and the quoted case law on derogations under Article 15 ECHR.
[32] The need for ensuring proper implementation of the legislation is often underlined by the Venice Commission: see e.g. CDL-AD(2014)003, Joint Opinion on the draft Law amending the electoral legislation of Moldova, para. 11: "the key challenge for the conduct of genuinely democratic elections remains the exercise of political will by all stakeholders, to uphold the letter and the spirit of the law, and to implement it fully and effectively"; CDL-AD(2014)001, Joint Opinion on the draft Election Code of Bulgaria, para. 85.

to implement. Therefore, assessing whether the law is capable of implementation in practice before adopting it, as well as checking a posteriori whether it may be and is effectively applied is very important. This means that *ex ante* and *ex post* legislative evaluation has to be performed when addressing the issue of the Rule of Law. Evaluation of the strengths and weaknesses of past legislation should be a natural part of the legislative process.

40. Proper implementation of the law may also be obstructed by the absence of sufficient specification of sanctions within the law, as well as by an insufficient or selective enforcement of the relevant sanctions.

9. Compliance with the law and new technologies

Do public authorities comply with the law when deploying new technologies?

i. Are personal data undergoing automatic processing sufficiently protected with regard to their collection, storing and processing by the state as well as by private actors?
ii. Is the data subject provided at least with information on the existence of an automated personal data file, its main purposes and further details[33] necessary to guarantee fair processing in respect of the data subject?
iii. Are the procedures for authorising the use of AI and bulk and targeted interception systems by public authorities set out in law?
iv. Does the law provide safeguards to ensure respect for the principles of the Rule of Law when public authorities deploy AI systems, with regard to transparency, human oversight of AI and bulk and targeted interception operations, and a risk and impact management framework to prevent infringements of human rights, the Rule of Law, and democracy?
v. Are there independent authorities with sufficient powers and resources to ensure compliance with the legal conditions under domestic law that give effect to international principles and requirements regarding the protection of individuals and personal data, surveillance and the deployment of AI systems?
vi. Are there accessible and effective remedies for human rights violations resulting from the use of personal data and AI systems by public authorities? In particular, when used for surveillance purposes?

41. Ensuring personal data protection is an essential requirement of Rule of Law. The Council of Europe rules on the topic are set in Convention 108+ which has also been ratified by a significant number of non-European states. The ECtHR has also issued abundant case law on the topic.[34] Personal data protection involves both substantive and procedural requirements as summarized in questions i-ii.

42. The increasing use of information technology has made the collection of data possible to an extent which was not previously foreseen. This has highlighted the need to develop national

[33] Including the identity of the controller and the data protections officer, the purposes of the processing of data, the period for which the personal data will be stored, the right to access, rectification and erasure of data, the object the processing of personal data and the right to lodge a complaint.
[34] See also Venice Commission, CDL-AD(2024)043, Report on a rule of law and human rights compliant regulation of spyware, and the quoted ECtHR case law therein. At European Union level, see also Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation - GDPR) and Directive (EU) 2016/680 on the protection of natural persons regarding processing of personal data connected with criminal offences or the execution of criminal penalties, and on the free movement of such data (Law Enforcement Directive – LED).

and international legal protection of individuals with regard to automatic processing of personal information. There must be safeguards in force to ensure that collection, storing and processing of data by the state as well as by private actors comply with the principles of lawfulness, fairness, transparency, purpose limitation, data minimization, accuracy, storage limitation, integrity and confidentiality.

43. The full application of the procedural principles and requirements granting individuals access to all data banks in the area of law enforcement and national security is not possible for obvious reasons. As the individual will not be in a position in these areas to effectively defend their own interests, the general data protection supervisory body in these areas must be given sufficient powers and resources to itself monitor compliance with these principles and requirements, and act as an effective safeguard of individual rights. Alternatively, a specialist oversight body can be established with appropriate powers and resources.

44. All forms of targeted and bulk surveillance must be fully regulated in primary legislation and restricted by the principles of necessity and proportionality.[35] Remedies and guarantees against abuse of surveillance must be provided, including in respect of video surveillance of public places.[36]

45. Bulk interception involves the scanning, collection and analysis of internet-based data and communications by means of algorithms. This involves major interferences with privacy as well as limitations on other rights such as to freedom of expression, information and association.[37] For this reason, bulk interception requires additional safeguards.[38]

46. The Council of Europe rules on the activities within the lifecycle of AI systems are outlined in the Framework Convention on Artificial Intelligence (CETS 225), which has been signed by several non-member states of the Council of Europe.[39] Any use of AI systems by public

[35] In particular, there should be specific legislation authorising the use or export of computer network exploitation (spyware) both by public and by private actors, because of its greatly increased potential to interfere with privacy, and because of the need to apply specific safeguards to it, see CDL-AD(2024)043, para. 16 and Section V.K, in particular para. 131.

[36] The EU's AI Act prohibits, with few specific exceptions, the use of 'real-time' remote biometric identification systems in publicly accessible spaces for the purposes of law enforcement (Article 5) and classifies as "high risk" AI systems using biometrics, inter alia, when intended to be used for emotion recognition. See: Regulation (EU) 2024/1689 laying down harmonised rules on artificial intelligence (Artificial Intelligence Act).

[37] See in particular in the cases of *Centrum för Rättvisa v. Sweden* [GC], no. 35252/08, 25 May 2021 and *Big Brother Watch and others v. UK* [GC], nos. 58170/13, 62322/14 24960/15, 25 May 2021. See also the CJEU, Joined Cases C-203 and 698/15, *Tele2 Sverige AB v. Post- och telestyrelsen, and Secretary of State for the Home Department v. Tom Watson, Peter Brice and Geoffrey Lewis*, 21 December 2016, ECLI:EU:C:2016:970; Case C-623/17, *Privacy International v. Secretary of State for Foreign and Commonwealth Affairs, Secretary of State for the Home Department, Government Communications Headquarters, Security Service, Secret Intelligence Service*, 6 October 2020, ECLI:EU:C:2020:790; Joined Cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net and Others v Premier ministre and Others*, 6 October 2020, ECLI:EU:C:2020:791.

[38] For example, the ECtHR has found that independent and effective oversight of the bulk interception regime and a robust judicial regime did not amount to sufficient "end-to-end" safeguards to provide adequate and effective guarantees against arbitrariness and the risk of abuse. It considered the absence of independent authorisation (together with a failure to include the categories of so-called selectors or identifiers in the application for a warrant and the failure to subject these selectors linked to an individual to prior internal authorisation) a fundamental deficiency of the bulk interception regime. See: ECtHR, *Big Brother Watch and others v. UK* [GC], nos. 58170/13, 62322/14 24960/15, 25 May 2021, §425.

[39] Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law (CETS No. 225). See for an overview of signatures (and ratifications) the Treaty Office of the Council of Europe.

authorities must be regulated by law. Laws must ensure that activities within the lifecycle of the AI system are consistent with the obligations to protect human rights. The implementation of AI systems by public authorities must comply with specific requirements for the respect of the Rule of Law, democracy and human rights, which imply procedures for the implementation of AI systems, assessment of the risks associated with the use of these systems[40], specific technical requirements (in particular transparency and reliability of AI systems), effective remedies, oversight mechanisms of their use and rules related to accountability and responsibility for the use of AI systems[41]. In this context, it seems appropriate to pre-test AI systems in safe normative environments (regulatory sandboxes) before their general implementation, where important risks for human rights, democracy and the Rule of Law are at stake.[42] The use of AI systems in the judiciary requires specific guarantees (cf. II.F.4 below).

B. Legal certainty

1. Accessibility and foreseeability of the law

Are laws accessible and foreseeable?[43]

i. Are all legislative acts published before entering into force?
ii. Are they easily accessible?
iii. Are legislative acts and other sources of law written in an intelligible manner? Is explanatory material made available, where appropriate?
iv. Does new legislation clearly state whether (and which) previous legislation is repealed or amended?

[40] *Ibid.,* Article 16. The EU's Artificial Intelligence Act (Regulation (EU) 2024/1689 lays down harmonised rules on AI) referring to fundamental rights and, in general, to high-risk AI systems. See also: Explanatory Report to the Framework Convention on Artificial Intelligence, para. 105 and further. A specific Methodology for the Risk and Impact Assessment of Artificial Intelligence Systems form the Point of View of Human Rights, Democracy and the Rule of Law (HUDERIA Methodology) has been approved by the Committee on Artificial Intelligence of the Council of Europe. See also: "The Administration and You – a Handbook", 3rd edition (published by the European Committee on Legal Co-operation (CDCJ) in 2024), which takes into account the impact of the increasing use of AI systems and automated decision-making by public authorities in their relations with individuals.

[41] Explanatory Report to the Framework Convention on Artificial Intelligence, paras. 95-102.

[42] OECD, Recommendation of the Council on AI, V.2.3.a.; Framework Convention on Artificial Intelligence, Article 13. Regulatory sandboxes are a recommended approach to avoid adverse impacts on human rights, democracy and Rule of Law "that aim to foster innovation, provide legal certainty and enable regulatory learning" (Explanatory Report to the Framework Convention on Artificial Intelligence, para. 92). The advantages of the use of this instrument are numerous (see Explanatory Report to the Framework Convention on Artificial Intelligence, para. 93)

[43] ECtHR, *The Sunday Times v. the United Kingdom (No. 1)*, no. 6538/74, 26 April 1979, §46 and further; *Rekvényi v. Hungary*, no. 25390/94, 20 May 1999, §34. On the conditions of accessibility and foreseeability, see e.g., ECtHR, *Kurić and Others v. Slovenia* [GC], no. 26828/06, 26 June 2012, §§341-349; *Amann v. Switzerland*, no. 27798/95, 16 February 2000, §50. The CJEU has held that "the principle of legal certainty requires, on the one hand, that the rules of law be clear and precise and, on the other, that their application be foreseeable for those subject to the law, in particular, where they may have adverse consequences. That principle requires, *inter alia*, that legislation must enable those concerned to know precisely the extent of the obligations imposed on them, and those persons must be able to ascertain unequivocally their rights and obligations and take steps accordingly" (CJEU, C-156/21, *Hungary v European Parliament and* Council, 16 February 2022, §223; See in a similar vein: C-504/19, *Banco de Portugal and Others*, §51 and C-623/22, *Belgian Association of Tax Lawyers and Others*, 29 July 2024, §§36-45).

v.	Are amendments incorporated in a consolidated, publicly accessible, version of the law? Are new amendments or laws published a reasonable period in advance of their coming into effect?
vi.	Is failure to publish a legal act in accordance with the prescribed requirements recognised as a valid ground for challenging this act before a court?

47. Legal certainty is a fundamental principle of law, guaranteeing citizens the foreseeability and stability of legal rules. Legal certainty has several functions: it makes it possible to ensure peace and order in a society and contributes to legal effectiveness by enabling individuals to have sufficient knowledge of the law to be able to comply with it. It also provides individuals with a means by which they can measure whether there has been arbitrariness in the exercise of state power.

48. Laws, and regulation in general, must be easily accessible free of charge via the Internet and in an official bulletin. It should be relatively simple to find the relevant legal text in force, which is to be written in plain, clear and understandable language.[44]

49. Foreseeability means not only that the law must be published in advance of implementation and, where possible, be foreseeable as to its legal and factual effects, it must also be formulated with sufficient precision and clarity to enable legal subjects to regulate their conduct in conformity with it.[45]

50. The precise degree of foreseeability required depends however on the nature of the law. In particular, a high level of foreseeability is essential in criminal legislation. Identification of areas requiring regulation is particularly challenging in an era of rapid technological change but the core requirement for foreseeability of any state intervention (if necessary, with professional advice) and interference with ordinary legal rights remains. The central objective is to allow those subject to the law to regulate their conduct and organise their affairs appropriately and to ensure that state intervention is necessary, proportionate and lawful.

2. Stability and consistency of law

Are laws stable and consistent?

i.	Are laws stable in that they are not changed frequently or suddenly without a clear reason for doing so?
ii.	Are the circumstances in which legislative intervention in pending proceedings is permitted clearly circumscribed and limited to cases concerning compelling grounds of public interest?[46]
iii.	Are laws consistently applied?

51. Instability and inconsistency of legislation or executive action may affect a person's ability to plan his or her actions. However, stability is not an end in itself: law must also be capable of adaptation to changing circumstances.

[44] For example, legislative acts should be made easily available on the website of the Parliament or another official website, with simplified search options, e.g. without having to know the number of the draft or the stage of the drafting process.
[45] ECtHR, *The Sunday Times v. the United Kingdom (No. 1)*, no. 6538/74, 26 April 1979, §49. See also II.A.6.vi. above on access to draft legislation.
[46] ECtHR, *Vegotex International SA v Belgium* [GC], no. 49812/09, 3 November 2022, §§92-94.

52. Law can be changed, set aside and/or developed, either in its substance or in its effect, through legislation (with appropriate public debate and notice, and without adversely affecting legitimate expectations - cf. II.B.4 below) or, in some legal traditions, through the development of case law by appellate courts, in accordance with recognised principles. Although in principle the legislature is not prevented from regulating through new retrospective legislation rights derived from the laws previously in force, any laws having retrospective effect will require particularly close scrutiny, whereby the principle of the Rule of Law and the notion of a fair hearing preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of a dispute, save on compelling grounds of the general interest.[47] There are particular dangers inherent in the use of retrospective legislation which affects the judicial determination of a dispute to which the state is a party, including to make the litigation of no utility to the claimant.[48] Respect for the Rule of Law and the notion of a fair trial require that any reasons adduced to justify such measures be treated with the greatest possible degree of circumspection. These principles are essential elements of the concepts of legal certainty and protection of litigants' legitimate trust.[49] Legislation targeting a single identifiable pending case (*lex singularis*) violates the principle of separation of powers and should not be allowed.

53. Certain areas of law must enjoy a particular stability. For electoral law in particular the perception that the law is being changed for any other purpose than improving the electoral system must be avoided. Late and frequent amendments to primary or secondary electoral legislation undermine the credibility of the electoral process and thereby trust in democracy.[50]

3. Legal certainty in court decisions

Are courts' decisions accessible?

i. Are court decisions published and easily accessible to the public[51] including through reliable on-line sources?
ii. Are court decisions written in a way that can be understood by the public and the parties involved in the proceedings? Are they communicated effectively in a simple language?
iii. Are the principles by which Courts may interpret and develop the law sufficiently clear?

[47] ECtHR, *Stran Greek Refineries and Stratis Andreadis,* no. 13427/87, 9 December 1994, §49.
[48] ECtHR, *The National & Provincial Building Society, the Leeds Permanent Building Society and the Yorkshire Building Society v. the United Kingdom*, nos. 21319/93, 21449/93 and 21675/93, 23 October 1997, §112.
[49] ECtHR, *Vegotex International SA v Belgium* [GC], no. 49812/09, 3 November 2022, §§ 92-94.
[50] Venice Commission, CDL-AD(2002)023rev2-cor, Code of good practice in electoral matters, II.2. Therefore, unless necessary to repair a situation contrary to international standards, when amendments are made in accordance with these standards based on consensus between government and opposition following broad public consultations or to implement decisions by national constitutional courts or supreme courts with equivalent jurisdiction, international courts or recommendations by international organisations, the fundamental elements of electoral law, in particular the electoral system proper, membership of electoral commissions and the drawing of constituency boundaries, should not be open to amendment less than one year before an election, or should be written in the constitution or at a level higher than ordinary law (cf. CDL-AD(2024)027, Revised interpretative declaration on the stability of electoral law).
[51] ECtHR, *Fazliyski v. Bulgaria*, no. 40908/05, 16 April 2013, §§64-70, in particular §65; *Ryakib Biryukov v. Russia*, no. 14810/02, 17 January 2008, §30 and further; *Kononov v. Latvia*, no. 36376/04, 17 May 2010, §185.

iv.	Is the consistency of case law across the judiciary fully ensured? Are there any judicial remedies available to ensure consistency in case law for the parties involved in proceedings?
v.	Are exemptions to the requirement of accessibility sufficiently justified and are any restrictions on publication (whether through anonymisation or otherwise) no more than reasonably necessary?

54. As court decisions can in some legal traditions establish laws and - in other traditions - interpret and clarify laws, their accessibility is part of legal certainty. Limitations can be justified in order to protect individual rights, for instance those of juveniles in criminal cases. Court decisions should be therefore written in a clear and understandable language and should be consistent with the case law on the relevant matter.[52] They should also be communicated in a way that is easy for the public to understand, through means that are easily accessible to the public and reflect modern communication practices.

55. Uniform application of laws enhances the public's perception of fairness and justice, and confidence in the administration of justice. Regardless of whether case law precedents are considered to be a source of law or not or whether they are binding or not, reasoning with previous decisions is a powerful instrument for judges both in common law as well as in civil law countries.[53] The principles by which Courts may interpret and develop the law must be sufficiently clear.

4. Basic principles of legal certainty: Legitimate expectations, non-retroactivity, *nullum crimen et nulla poena sine lege, res judicata* and *ne bis in idem*

Are the basic principles of legal certainty respected?

i.	Is respect for the principle of legitimate expectations ensured?
ii.	Is respect of *res judicata* (finality of judgments ensured? [54]
iii.	May final judicial decisions be revised? Are the conditions under which final judicial decisions can be revised clear and narrowly framed?
iv.	To what extent is there a general prohibition on the retroactivity of laws (other than criminal legislation)? Are there exceptions, and, if so, under which conditions?
v.	In respect of criminal legislation in particular: is retroactivity of criminal legislation prohibited? Do the *nullum crimen sine lege* (no crime without a law) and *nulla poena sine lege* (no penalty without a law) principles apply? Is proportionality of penalties and sanctions recognised and respected? Is respect for the *ne bis in idem* principle (prohibition against double jeopardy) ensured?

56. The principle of legitimate expectations is part of the general principle of legal certainty. It expresses the idea that public authorities, including the judicial authorities, should not only abide by the law but also by their promises and raised expectations. According to the

[52] There are naturally other reasons for coherence and clarity in judgments, in particular, the need to understand the reasoning of the court for the purposes of review/appeal.
[53] CCJE, Opinion No. 20 (2017) on the role of courts with respect to the uniform application of the law, Main conclusions and recommendations (a) and (b).
[54] Article 4 Protocol 7 ECHR, Article 14.7 ICCPR, Article 8.4 ACHR (in the penal field); on the respect of the principle of *res judicata*, see *e.g.* ECtHR, *Brumărescu v. Romania*, no. 28342/95, 28 October 1999, §62; *Kulkov and Others v. Russia*, nos. 25114/03, 11512/03, 9794/05, 37403/05, 13110/06, 19469/06, 42608/06, 44928/06, 44972/06 and 45022/06, 8 January 2009, §27; *Duca v. Moldova*, no. 75/07, 3 March 2009, §32. The Court considers respect of *res judicata* as an aspect of legal certainty. Cf. *Marckx v. Belgium*, no. 6833/74, 13 June 1979, §58.

legitimate expectation doctrine, those who act in good faith on the basis of law as it is, should not be frustrated in their legitimate expectations. This doctrine applies not only to legislation but also to individual decisions by public authorities as well as court decisions. This last requirement must not undermine the ability of judges to reverse case law, but such reversals must be predictable.[55] It should however be emphasised that the principle of legitimate expectations is not absolute and may not apply in all circumstances where, for example, unforeseen circumstances arise, and vital public interests are engaged. Furthermore, certain categories of legal interest are inherently subject to change (e.g. extent of entitlement to social benefits, taxation policies).

57. The principle of legal certainty and the protection of legitimate expectations also gives rise to the duty for the legislature to provide, save in exceptional circumstances, for a reasonable time period between the official publication of the law until its entry into force (*vacatio legis*). This is particularly necessary in the case of significant reforms in various fields of public life (e.g., entrepreneurship activities, education, social and health care, taxation).

58. *Res judicata* (finality of judgments) implies that when an appeal has been finally adjudicated on, further appeals are not possible. Final judgments must be respected, unless there are cogent reasons for revising them.[56] In principle, a departure from *res judicata* is justified only when made necessary by circumstances of a substantial and compelling character.[57] Neither the ECtHR nor the CJEU impose a requirement that final rulings of domestic courts must be reopened to implement its judgments.[58] Nevertheless, in certain circumstances, for example in the context of the restoration of the Rule of Law, the obligation to execute judgments of international courts could justify a departure from the principle of *res judicata*. It will, however, be essential that safeguards are put in place to guarantee an adequate balance between the principles engaged (i.e. the right to a fair trial before an independent tribunal and the principle of *res judicata* as element of the right to legal certainty) (cf. II.H.1 on Restoration of the Rule of Law below).[59]

59. People must be informed in advance of the consequences of their behaviour. This implies foreseeability[60] and non-retroactivity especially of criminal legislation.[61] The principle of non-retroactivity applies to all sanctions that are criminal in nature (cf. II.C.2 on Procedural

[55] The CJEU has held "the right to rely on the principle of the protection of legitimate expectations presupposes that precise, unconditional and consistent assurances originating from authorised, reliable sources have been given to the person concerned by the competent authorities of the European Union" (CJEU, C-349/17, *Eesti Pagar A.S.*, 5 March 1997, §97; See also: C-416/24 and C-417/24, *On Air Media Professionals*, §§60-67). In the case law of the ECtHR, the doctrine of legitimate expectations essentially applies to the protection of property as guaranteed by Article 1 of the First Additional Protocol to the European Convention on Human Rights: see *e.g.* ECtHR, *Anhaeuser-Busch Inc. v. Portugal* [GC], no. 73049/01, 11 January 2007, §65; *Gratzinger and Gratzingerova v. the Czech Republic* [GC] (dec.), no. 39794/98, 10 July 2002, §68 and further; *The National & Provincial Building Society, the Leeds Permanent Building Society and the Yorkshire Building Society v. the United Kingdom*, nos. 21319/93, 21449/93 and 21675/93, 23 October 1997, §62 and further.

[56] See: The Council of Europe and the Rule of Law - An overview, CM(2008)170, 21 November 2008, para. 48.

[57] ECtHR, *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, 11 July 2017, §62.

[58] *Ibid.*, §91; See also CJEU, C-620/17, *Hochtief Solutions AG Magyarországi Fióktelepe*, §55-56.

[59] Venice Commission, CDL-AD(2024)029, Poland - Joint Opinion of the Venice Commission and the Directorate General Human Rights and Rule of Law on European standards regulating the status of judges, paras. 41-45; CDL-AD(2024)035, Poland – Opinion on the draft constitutional amendments concerning the Constitutional Tribunal and two Laws on the Constitutional Tribunal, para. 39 and further.

[60] See II.B.1. above on Accessibility and foreseeability of the law.

[61] The principle of non-retroactivity does not apply when the new legislation places individuals in a more favourable position. The ECtHR considers that Article 7 ECHR includes the principle of "retrospectiveness" (retroactivity) of the more lenient criminal law: see *Scoppola v. Italy (No. 2)* [GC], no.10249/03, 17 September 2009, para. 109.

safeguards below).[62] In civil and administrative law, retroactivity may negatively affect rights and legal interests. However, outside the criminal field, a retroactive limitation of the rights of individuals or imposition of new duties may be permissible, but only if in the public interest and in conformity with the principle of proportionality (including temporally).[63] The legislator should not be able to interfere with the application of existing legislation by courts in pending cases.

60. *Nullum crimen, nulla poena sine lege* (no crime, no penalty without a law) embodies the principles that only the law can define a crime and prescribe a penalty, which cannot be applied retrospectively, and that the criminal law must not be construed to an accused person's disadvantage. Effective safeguards against arbitrary prosecution, conviction and punishment should be provided.[64] Proportionality is of particular importance if there are sanctions imposed, a principle that applies also to administrative and civil penalties.[65]

61. The ECtHR has examined a number of cases concerning the prosecution of the applicants under two different heads in relation to the same facts, most often in relation to tax offences. In particular, it has concluded that no duplication arises if two sets of proceedings – administrative and criminal – are sufficiently closely connected in substance and in time, in that they form a coherent whole. However, the *non bis in idem* principle (the prohibition of double jeopardy) is breached where the two sets of proceedings were distanced in time and represented two largely independent processes of collection and assessment of evidence.[66]

5. Legal certainty and new technologies

Are there mechanisms in place to ensure that AI systems used by public authorities comply with the principles of legal certainty? i. Is the right to be informed when an AI system is being used by public authorities fully assured? ii. Are the minimum technical requirements to be met by the AI system fully safeguarded? In particular are the AI systems used by public authorities required

[62] ECtHR, *Engel and Others v. The Netherlands*, nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, 8 June 1976, §§82-83. See also: *Nicoleta Gheorghe c. Roumanie*, no. 23470/05, 3 April 2012, §§25-26; *Balsytė-Lideikienė v. Lithuania*, no. 72596/01, 4 November 2008, §§56-61; *Lutz v. Germany*, no. 9912/82, 25 August 1987, §§54-55; *Öztürk v. Germany*, no. 8544/79, 21 February 1984, §49.

[63] The exceptions to the principle of non-retroactivity could be accepted in the financial and tax domain when the public interest is at stake (see also II.B.2.ii above).

[64] ECtHR, *S.W. v. the United Kingdom*, no. 20166/92, 22 November 1995, §34; *C.R. v. the United Kingdom*, no. 20190/92, 22 November 1995, §32; *Del Río Prada v. Spain* [GC], no. 42750/09, 21 October 2013, §77; Vasiliauskas v. Lithuania [GC], no. 35343/05, 20 October 2015, §153. See also: Venice Commission, CDL-AD(2020)005, Armenia - Amicus curiae brief for the Constitutional Court of Armenia relating to Article 300.1 of the Criminal Code, paras. 46-47.

[65] Venice Commission, CDL-AD(2025)037, Armenia - Amicus Curiae Brief on the compatibility of article 236 of the Criminal Code with the European standards on legal certainty, para. 16. There are other justifications, beyond the principle of legal certainty for the principles of *nullum crimen* and proportionality in sentencing, and, naturally, other important criminal law principles (such as *ultima ratio*, indicating that criminal law is to be regarded as a last resort) which should be respected, but for other reasons than legal certainty.

[66] ECtHR, *A and B v. Norway* [GC], nos. 24130/11 and 29758/11, 15 November 2016, §§117-134, as applied more recently in *Jóhannesson and Others v. Iceland*, no. 22007/11, 18 May 2017, §§49- 56.

	to fulfil the minimum requirements of reliability[67], cybersecurity and transparency?[68]
iii.	Are auditability and algorithmic certification systems in place?
iv.	Does law provide for mechanisms to ensure that AI systems comply with the principles of legal certainty?

62. Legal certainty requires citizens to be able to foresee how the law will be applied, so they can anticipate the consequences of their behaviour and ensure their legitimate expectations are not unjustifiably disappointed. When a public authority introduces an AI system, its use should ensure that the system's outputs meet these specific requirements, in particular with regard to (1) knowing that the decision is taken by an AI tool[69]; (2) being confident that the output is consistent with the law; (3) being able to foresee the possible outcomes an AI tool may produce. This implies the need for certain specific technical requirements for AI systems before they can be used by public authorities, such as those listed in question (ii).

63. The technical principles to assure legal certainty are reliability (which includes robustness, accuracy, performance and other prerequisites related to data[70]), cybersecurity (safety and security)[71] and transparency (which encompasses explainability[72] and interpretability[73]).

[67] Reliability refers to "the role to be played by standards, technical specifications, assurance techniques and compliance schemes in evaluating and verifying the trustworthiness of artificial intelligence systems and for transparently documenting and communicating evidence for this process" (Explanatory Report to the Council of Europe Framework Convention on Artificial Intelligence, para. 84).

[68] The term 'algorithmic transparency' is often used to describe openness about the purpose, structure and underlying actions of an algorithm-driven system (Explanatory Report to the Council of Europe Framework Convention on Artificial Intelligence, para. 58); OECD, Recommendation of the Council on AI, IV.1.3 on transparency and explainability.

[69] Article 15, para. 2, of the Council of Europe Framework Convention on Artificial Intelligence for example that parties "shall seek to ensure that, as appropriate for the context, persons interacting with artificial intelligence systems are notified that they are interacting with such systems rather than with a human".

[70] These requisites refer to the ability of an AI system to maintain stable and accurate performance in different situations, even in the face of noisy data, unexpected scenarios or deception attempts. Other functional prerequisites are "data quality and accuracy, data integrity, data security, and cybersecurity. Relevant standards, requirements, assurance and compliance schemes may cover these elements as a precondition for successfully building justified public trust in artificial intelligence technologies" (Explanatory Report to the Council of Europe Framework Convention on Artificial Intelligence, para. 85). See also: OECD, Recommendation of the Council on AI, IV.1.4.

[71] This principle aims at "ensuring that, like any other software system, artificial intelligence systems are "secure and safe by design", which means that the relevant artificial intelligence actors should consider the security and safety as core requirements, not just technical features. They should prioritise security and safety throughout the entire lifecycle of the artificial intelligence system" (Explanatory Report to the Council of Europe Framework Convention on Artificial Intelligence, para. 87)

[72] "The term "explainability" refers to the capacity to provide, subject to technical feasibility and taking into account the generally acknowledged state of the art, sufficiently understandable explanations about why an artificial intelligence system provides information, produces predictions, content, recommendations or decisions… In such cases transparency could, for instance, take the form of a list of factors which the artificial intelligence system takes into consideration when informing or making a decision" (Explanatory Report to the Council of Europe Framework Convention on Artificial Intelligence, para. 60). See also OECD, Recommendation of the Council on AI, IV.1.3.

[73] Interpretability "refers to the ability to understand how an artificial intelligence system makes its predictions or decisions or, in other words, the extent to which the outputs of artificial intelligence systems can be made accessible and understandable to experts and non-experts alike. It involves making the internal workings, logic, and decision-making processes of artificial intelligence systems understandable and accessible to human users, including developers, stakeholders, and end-users, and persons affected" (Explanatory Report to the Council of Europe Framework Convention on Artificial Intelligence, para. 61)

64. The technical requirements need to be complemented by mechanisms to ensure auditability and certification of AI systems, either directly by public authorities or through trusted third parties (agencies, registers, certifications) that can confirm compliance with these technical requirements.

C. Prevention of abuse of power[74]

1. General safeguards

Are there legal safeguards against arbitrariness and abuse of power by public, especially administrative, authorities? Are the concepts of arbitrariness and abuse of power clearly defined?

i. Are these safeguards laid down in binding legal sources (e.g. constitution, statutory law, domestic and international case law)?
ii. Are there mechanisms to prevent, correct and sanction abuse or misuse of public powers?
iii. Are there clear legal restrictions on the exercise of discretionary power by public authorities?[75]
iv. Is it ensured that general substantive legal principles such as equality, proportionality and protection of legitimate expectations, apply to public/administrative action and decision-making?
v. Is there judicial review of the exercise of power?
vi. Is there supervision of public/administrative action by an ombudsperson-like institution?[76]

65. The Rule of Law as such aims to control power by public authorities and, increasingly, also by private actors. Here the main focus is on abuse of power by administrative authorities. However, as indicated in item II.A.3 above, when public functions are exercised by private actors, similar safeguards against abuse of power should be in place as in respect of public authorities.

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[74] Protection against arbitrariness has been mentioned by the ECtHR in several cases. In addition to those quoted in the next note, see e.g. *Husayn (Abu Zubaydah) v. Poland*, no. 7511/13, 24 July 2014, §521 and further; *Hassan v. the United Kingdom* [GC], no. 29750/09, 16 September 2014, §106; *Georgia v. Russia (I)*, no. 13255/07, 3 July 2014, §182 and further (Article 5 ECHR); *Ivinović v. Croatia*, no. 13006/13, 18 September 2014, § 40 (Article 8 ECHR). For the CJEU, see e.g. *Hoechst v. Commission*, Joined cases 46/87 and 227/88, 21 September 1989, §19; T-402/13, *Orange v. European Commission*, T-402/13, 25 November 2014, §89. On the limits of discretionary powers, see Appendix to Council of Europe Recommendation CM/Rec(2007)7 on good administration, Article 2.4 ("Principle of lawfulness"): "[Public authorities] shall exercise their powers only if the established facts and the applicable law entitle them to do so and solely for the purpose for which they have been conferred".

[75], The Council of Europe and the Rule of Law - An overview, CM(2008)170, 21 November 2008, para. 46; ECtHR, *Malone v. the United Kingdom*, no. 8691/79, 2 August 1984, §68; *Segerstedt-Wiberg and Others v. Sweden*, no. 62332/00, 6 June 2006, §76 (Article 8). The complexity of modern society means that discretionary power must be granted to public officials. The principle by which public authorities must strive to be objective ("*sachlich*") in a number of States, such as Sweden and Finland, goes further than simply forbidding discriminatory treatment and is seen as an important factor buttressing confidence in public administration and social capital.

[76] See in this respect: Venice Commission, CDL-AD(2019)005, Public Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles").

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

67. There should be general substantive principles which also limit the discretion of public authorities, such as equality, proportionality and protection of legitimate expectations (cf. II.B.4 above).

2. Procedural safeguards

Are there procedural safeguards against arbitrariness and abuse of power by public authorities?

i. Are public authorities obligated to respect the principle of *audi alteram partem* ("listen to the other side")? Is failure to respect this principle a valid ground for challenging administrative decisions in courts?
ii. Does the law facilitate or, at least, allow for public consultations to be held before discretionary administrative decisions affecting a large number of persons are taken?
iii. Is the failure to state reasons a valid ground for challenging such decisions in courts?
iv. Is there a mechanism in place to hold those responsible for administrative and public law decisions legally accountable?
v. If the administrative decision is based on an AI system, is an explanation of the reasons why the AI system chooses a particular solution guaranteed? Is it clear who is responsible (public or private) if the system goes wrong? Is it clear what aspects of the decision are left to the system and what aspects are left to human will?
vi. Does the law provide adequate procedural safeguards, including fair trial guarantees, and access to an effective remedy, in case of administrative measures which in substance amount to the determination of a criminal charge (irrespective of the categorisation of these administrative measures in domestic law) ?

68. There should be procedural safeguards preventing abuse of discretionary power, such as respect for the principle of *audi alteram partem* ("listen to the other side"), which entails that those affected by a decision should have the opportunity to be heard.

69. As a key element of democratic governance, for discretionary administrative decisions that affect a large number of persons, for example in the field of planning or in respect of environmental issues, public consultations should be facilitated, to ensure that final decisions benefit from the views of a wide variety of stakeholders and create a basis for societal support.

70. In principle, the obligation to give reasons also applies to administrative decisions.[77] There are however limits to this obligation, which, in essence, allows a person affected by a particular decision to know why a decision has been taken or, in the context of Court proceedings, why they have won or lost. As the ECtHR has held "The obligation [of the tribunal] to give reasons does not require a detailed answer to every argument advanced by the complainant, but only

[77] See e.g. Article 41.2.c of the Charter of Fundamental Rights of the European Union. Cf. also II.F.3.v below on Fair trial.

a specific and explicit reply to the arguments which are decisive for the outcome of those proceedings".[78]

71. Any discretionary power must be controlled by judicial or other independent review. Available remedies should be clear and easily accessible. Access to an ombudsperson or another form of non-contentious jurisdiction may also be appropriate.

72. Those responsible for administrative and public law decisions should be legally accountable.

73. Algorithmic decision-making and the use of AI create new Rule of Law issues. The principle of accountability is essential when AI systems play a prominent role in public authorities' decisions (in particular when this concerns use of AI in the judiciary, cf. II.F.4 below). It implies a clear explanation of the reasons why the system makes a recommendation. Only if those reasons are communicated and can be understood by citizens will it be possible for those affected to complain to the relevant authorities.[79] The principle of accountability also "emphasises the need for clear lines of responsibility".[80] It needs to be clarified who is responsible if something goes wrong in its use with procedures to determine who (public or private actor) is to blame for any wrongdoing by an AI system used by public authorities[81] but also enough information for the person concerned to identify and challenge the decisions made or recommended by an AI system. [82] In establishing accountability and responsibility for the use of AI systems, it is important to which aspects of a public decision are the result of the automated work of the AI system and which aspects depend on decisions made by humans. Specific training in the use of AI systems by public administration staff is essential.

74. According to the case law of the ECtHR, administrative measures which in substance amount to the determination of a criminal charge are subject to the requirements of fair trial, irrespective of their categorisation in domestic law.[83]

3. Corruption[84] and conflicts of interest

Are there adequate measures to prevent and fight against corruption?

[78] ECtHR, *Melgarejo Martinez de Abellanosa v. Spain*, no. 11200/19, 14 December 2021, §41
[79] OECD, Recommendation of the Council on AI, IV.1.5.
[80] Explanatory Report to the Framework Convention on Artificial Intelligence, para. 68.
[81] *Ibid.:* "In other words, all actors responsible for the activities within the lifecycle of artificial intelligence systems, irrespective of whether they are public or private organisations, must be subject to each Party's existing framework of rules, legal norms and other appropriate mechanisms so as to enable effective attribution of responsibility applied to the context of artificial intelligence systems".
[82] *Ibid,* para. 69*:* "The principle of accountability and responsibility is inseparable from the principle of transparency and oversight, since the mechanisms of transparency and oversight enable accountability and responsibility by making clearer how artificial intelligence systems function and produce outputs. When the relevant stakeholders understand the underlying processes and algorithms, it becomes easier to trace and assign responsibility in the event of adverse impacts on human rights, democracy or the rule of law, including violations of human rights".
[83] ECtHR, *Nicoleta Gheorghe c. Roumanie*, no. 23470/05, 3 April 2012, §§25-26; *Balsytė-Lideikienė v. Lithuania*, no. 72596/01, 4 November 2008, §§56-61; *Lutz v. Germany*, no. 9912/82, 25 August 1987, §§54-55; *Öztürk v. Germany*, no. 8544/79, 21 February 1984, §49; *Engel and Others v. The Netherlands*, nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, 8 June 1976, §§82-83.
[84] See Group of States Against Corruption (GRECO), *Lessons learned from the three Evaluation Rounds (2000-2010) - Thematic Articles*; *Report on Trends and Conclusions of Fourth Evaluation Round in the field of Corruption Prevention of MPs, Judges and Prosecutors* (2017)*; Report on Key Principles, Trends and Challenges of Fifth Evaluation Round in the field of Central Governments (Top Executive Functions) and Law Enforcement Agencies* (2025).

i. In the exercise of public duties, are specific rules of conduct applicable to public officials to prevent corruption? Is non-compliance with these measures subject to effective, proportionate and dissuasive sanctions?
ii. Have more specific preventive measures been taken in those sectors which are exposed to high risks of corruption?
iii. Have corruption and corruption-related offences been criminalised in conformity with international standards? Are these offences subject to effective, proportionate and dissuasive sanctions? Can additional measures be attached to a conviction for corruption or a corruption-related offence?
iv. Are all categories of public officials covered by the above preventive and criminal law measures? Are certain categories of public officials subject to further measures, such as regular disclosure of income, assets and interests, and/or further requirements at the beginning and the end of their public office or mandate?
v. Are the bodies responsible for combating corruption and preserving public sector integrity provided with adequate human and financial resources, and – where appropriate – investigative powers and a suitable level of specialisation? Do these bodies enjoy sufficient operational independence from the executive and the legislature?
vi. Are measures in place to encourage disclosure of corrupt acts, in particular laws and policies protecting whistle-blowers, but also reporting hotlines and other measures to make anti-corruption bodies accessible to individuals?
vii. Does the state comply with the results of international monitoring in this field? Does the state itself assess the effectiveness of its anti-corruption policies, and does it take adequate corrective action when necessary? Is action taken against phenomena which undermine the effectiveness or integrity of anti-corruption efforts[85]?

75. Corruption undermines public trust, weakens institutions and leads to arbitrariness and abuse of power. Moreover, corruption may offend equal application of the law. It therefore undermines the very foundations of the Rule of Law. Although all three branches of powers are concerned, corruption is a particular concern for the judiciary, prosecutorial and law enforcement bodies, which play an instrumental role in safeguarding the effectiveness of anti-corruption efforts. Effective compliance with, and implementation of, preventive and punitive measures, as addressed in a variety of international conventions and other instruments, is essential in fighting corruption.[86]

76. On the preventive side, specific rules of conduct[87] should be applicable to all categories of public officials (e.g. civil servants, elected and appointed officials at state and local levels, judges, prosecutors etc) covering 1) the promotion of integrity in public life (impartiality and neutrality etc.), 2) gifts and other benefits, 3) use of public resources, 4) use of information that is not meant to be public, 5) contacts with third parties and persons seeking to influence public decision-making (including governmental and parliamentary work), and 6) conflicts of

[85] E.g. manipulation of the legislative process, non-compliance and non-enforcement of court decisions and sanctions, immunities, interference with the enforcement efforts of anti-corruption and other responsible bodies – including political intimidation, instrumentalisation of certain public institutions, intimidation of journalists and members of civil society who report on corruption.
[86] United Nations Convention against Corruption; Council of Europe Criminal Law Convention on Corruption (CETS 173); see also the Civil Law Convention on Corruption (CETS 174), Additional Protocol to the Criminal Law Convention on Corruption (CETS 191), Recommendation CM/Rec(2000)10 on codes of conduct for public officials, Resolution CM/Res (97)24 on the twenty guiding principles for the fight against corruption.
[87] Such rules of conduct should include provisions on the monitoring of these rule and their enforcement. See: GRECO, Codes of conduct for public officials: GRECO findings & recommendations, Greco(2019)5.

interest. The latter may arise where a public official has a private interest (which may involve a third person, e.g. a relative or spouse) liable to influence, or appearing to influence, the impartial and objective performance of his or her official duties.[88] In order to prevent and manage such conflicts of interest, public officials should be subject to rules identifying positions and activities incompatible with their public office, requirements on the disclosure of conflicts of interest in advance and rules on recusal in case of an actual, potential or perceived conflict of interest. Legislation and regulations on lobbying[89] and the control of campaign finance play an important role in preventing and managing conflicts of interest. Furthermore, certain categories of officials (e.g. high-ranking officials or those working in areas where risks of corruption are considered to be high) should be subject to stricter rules, such as requirements to disclose their income, assets and interest (whereby the disclosure reports are coupled with an appropriate level of scrutiny), special integrity requirements for their appointment, professional disqualifications and post-employment restrictions, in order to limit revolving doors or so-called "*pantouflage*".

77. Criminal law provisions aimed at preserving public integrity should be aligned with international standards (by e.g. providing for the punishment of passive and active bribery, trading in influence, abuse of office, breach of official duties), with the offences being subject to effective, proportionate and dissuasive sanctions and a possibility for additional measures, such as confiscation of the proceeds of corruption, disqualification from public office (etc.), to be taken. International cooperation in investigation and asset recovery should be promoted.[90] Bodies in charge of fighting corruption, be it law enforcement type institutions or corruption prevention institutions, should have appropriate resources and enjoy sufficient operational independence from the executive and the legislature to carry out their functions.[91]

D. Checks and balances

1. Institutional checks and balances

Is a system of checks and balances between the main constitutional bodies guaranteed by the constitution? i. Does the constitution guarantee the separation of powers? Does it include a system of checks and balances between the main constitutional bodies? ii. Is the principle of loyal cooperation between constitutional bodies respected? Are anti-blockage mechanisms in place in case co-operation fails? iii. Is judicial independence guaranteed in law and practice?

[88] United Nations Convention against Corruption, in particular Article 8.5; CM/Rec(2000)10, Appendix - Model code of conduct for public officials, Article 13 and further; cf. CM/Res (97) 24 on the twenty guiding principles for the fight against corruption.
[89] Council of Europe Recommendation CM/Rec(2017)2 on the legal regulation of lobbying activities in the context of public decision-making and explanatory memorandum; Venice Commission, CDL-AD(2013)011, Report on the Role of Extra-Institutional Actors in the Democratic System (Lobbying).
[90] Articles 43-49, United Nations Convention against Corruption; Articles 25-31, Criminal Law Convention on Corruption (CETS 173).
[91] See *inter alia* Venice Commission, CDL-AD(2023)046, Georgia – Opinion on the provisions of the Law on the Fight against Corruption concerning the Anti-Corruption Bureau, para. 17 which outlines that those in charge of investigating and prosecuting corruption would normally require a higher level of independence, but that specific "preventive" functions (in the field of campaign finance and asset and income declarations) may require further safeguards for the independence and perception of political neutrality of such a body.

iv. Is there an independent and well-functioning system of constitutional review of legislative and executive measures?[92]
v. Are the rights of a parliamentary minority guaranteed in the constitution or the Rules of Procedure of Parliament?
vi. Does the constitution guarantee local (and regional) self-governance?
vii. Is there a professional civil service, with sufficient guarantees against arbitrary dismissal?
viii. Are there independent, non-political bodies in the fields of human rights monitoring and electoral law? Is their independence guaranteed by the constitution?

78. The separation of powers, especially as reflected in judicial independence, is a basic principle of constitutional democracy. In turn, checks and balances are a necessary guarantee for the functioning of democratic institutions, for the protection of minorities and for the Rule of Law. This system of checks and balances should include not only institutional arrangements and relationships but also non-institutional mechanisms, in the form of a robust and adequately protected civic space (including but not limited to a free media, independent academic institutions and non-governmental organisations) capable of monitoring institutions and contributing to deliberative decision-making.

79. A well-functioning system of checks and balances does not undermine the effectiveness of state institutions. Effectiveness and 'checks and balances' are, rather, to be seen as mutually reinforcing one another. Checks and balances also do not contradict the political obligation of loyal co-operation of state institutions, as it merely ensures that there is a proper allocation of responsibility between different branches of the state. The principle of loyal co-operation may serve as a useful mechanism to solve conflicts between different constitutional bodies.[93] However, as there is a risk of this principle not being respected, with one constitutional body blocking the work of another, the legislation should provide for appropriate anti-blockage mechanisms.[94]

80. The choice between a parliamentarian, semi-presidential and presidential political system is a political decision, falling under the discretion of the constitutional legislator. However, the independence of judiciary and the availability of effective constitutional review[95]is an essential element in all systems of checks and balances, regardless of the choice of the political regime.

81. In addition to the judiciary and constitutional review, checks and balances may include other independent, non-majoritarian bodies, which may monitor risks of abuse of political power and may contribute to safeguarding the interests of minorities, especially in the field of

[92] Cf. in more detail Benchmark G on Constitutional review below.
[93] See for example: Venice Commission, CDL-AD(2012)026, Opinion on the compatibility with Constitutional principles and the Rule of Law of actions taken by the Government and the Parliament of Romania in respect of other State institutions and on the Government emergency ordinance on amendment to the Law N° 47/1992 regarding the organisation and functioning of the Constitutional Court and on the Government emergency ordinance on amending and completing the Law N° 3/2000 regarding the organisation of a referendum of Romania, para. 73 seq.; CDL-AD(2022)053-e, Montenegro - Urgent Opinion on the Law on amendments to the Law on the President of Montenegro, para. 29.
[94] See also in this respect Benchmark G on Constitutional review below. In some countries, constitutional courts are able address possible conflicts between different constitutional bodies. This however does not negate the need for anti-blockage mechanisms, in particular when the functioning of the constitutional court itself is being obstructed.
[95] For those countries with a written constitution.

human rights monitoring, electoral law, the regulation of media. An independent central bank may also constitute an element of checks and balances.[96]

82. Self-governance at local and regional level not only promotes democracy but constitutes an integral element of institutional checks and balances. In this context, respect for the principle of subsidiarity is important: when an issue can more adequately be dealt with at local or regional level, central authorities should refrain from intervening.

83. A professional civil service may also provide a further safeguard against abuse of majoritarian political power. Professional civil servants should be protected against arbitrary dismissal. Different jurisdictions may adopt varying approaches in respect of the composition of the civil service. However, time-limited appointments or political appointments at the higher levels of to the administration subordinated to the Government are not in themselves contrary to the Rule of Law.

2. Guaranteeing the legal framework of civic space

Is there a legal framework which facilitates and protects a civic space?

i. Do existing laws and policies recognise and protect fundamental rights related to civic space (in particular freedom of expression, assembly and association)? Are restrictions to these rights in line with international human-rights standards? Are the basic guarantees enshrined in the constitution? Do laws and policies effectively protect civic space for all groups in society, without discrimination?
ii. Is the founding, functioning and continued existence of civil society organisations effectively protected in law? Do legal and policy frameworks protect the independence and pluralism of civil society actors? Does this include enabling legislation ensuring that there are no undue restrictions on civil society organisations' access to funding?
iii. Is the freedom of expression guaranteed against unnecessary interferences and in accordance with international human-rights obligations? Is the right to receive and access information guaranteed?
iv. Are constitutional and legal protections in place to ensure pluralism of media? Are there rules governing the transparency of media ownership and to prevent media market concentration? Does the law protect the freedom of the media, including editorial independence and protection of sources? Are media professionals guaranteed access to information and public documents? Do online platforms with a significant social impact have to comply with the rule of law? Are there safeguards in place to ensure that the regulations governing these platforms are enforced by independent regulators, and that these regulators' decisions are subject to judicial review?
v. Does the law protect whistleblowers?
vi. Are there laws that protect privacy and freedom of expression for media professionals, including against surveillance and SLAPPs[97]?

[96] In the constitutions and/or organic laws of some Venice Commission member states, independent central banks are explicitly mentioned as a mechanism to preserve monetary stability, as a constitutional public good. For EU member states the independence of central banks is enshrined in the Treaty on the Functioning of the EU.

[97] SLAPPs are strategic lawsuits against public participation, understood as "legal actions that are threatened, initiated or pursued as a means of harassing or intimidating their target, and which seek to prevent, inhibit, restrict or penalise free expression on matters of public interest and the exercise of rights associated with public participation". See: Council of Europe, Recommendation CM/Rec(2024)2 on countering the use of strategic lawsuits against public participation (SLAPPs); Directive (EU)

vii. Does the legal framework recognise and protect the right to freedom of assembly? Is the procedure for notifying or obtaining authorisation for manifestations not unduly hindering the right to freedom of assembly? Are the grounds for prohibiting or ending assemblies sufficiently clear and foreseeable? Are sanctions for breaches of the rules on assemblies proportionally applied?"

84. A robust civic space, indispensable for a well-functioning system of checks and balances, needs both legal and cultural guarantees. Without a supportive political and legal culture (cf. II.H.2.b below), legal guarantees cannot be fully realised.

85. Freedom of expression, assembly and association should be enshrined in the constitution and further protected through ordinary legislation and judicial practices. Limitations to these freedoms should be in line with international human rights law.

86. Especially important is to facilitate the formation and activities of civil society organisations, and to protect these organisations from undue interference, as well as to create guarantees for a free and pluralistic media.

87. It is essential to guarantee a robust civic space in both the analogue and digital worlds. It is therefore necessary to transfer and adapt the recognised principles of power checks and balances reflected in the Rule of Law to the digital civic space.[98] Given the important public function performed by online platforms in today's societies, those with significant social impact may be considered private actors whose decisions impact ordinary citizens similarly to those of public authorities (cf. II.A.3). Therefore, it is crucial to establish a responsibility framework for these platforms to ensure compliance with the rule of law. One way to achieve could be to impose legal requirements within the terms of use that these platforms impose on their users. In any case, the social impact of some online platforms justifies a risk assessment and mitigation framework aimed at ensuring respect for human rights, as well as equitable access to private expression and participation in public debate. Similarly, platforms with significant social impact should be legally required to assess and mitigate the risks of discriminatory effects arising from their content moderation mechanisms and other platform features. This framework should be enforced by independent regulators and be subject to subsequent judicial review alongside previous alternative dispute resolution mechanisms, such as mediation.

88. While often associated with exposing corruption (cf. II.C.3.vi), whistleblowers are more in general instrumental in shining a light on serious threats or harm to the public interest, thereby providing a check on institutional powers.[99] Law and policies should be in place to support reporting by whistleblowers and protect them from retaliation.

2024/1069 of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation').

[98] UN General Assembly, The right to privacy in the digital age, A/RES/75/176 of 16 December 2020, UN GAOR, 75th sess., Suppl. no. 49, op. para. 3: "(…) the same rights that people have offline must also be protected online (…)".

[99] Council of Europe, Recommendation CM/Rec(2014)7 on the protection of whistleblowers; Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law.

E. Equality and non-discrimination

1. Non-discrimination[100]

Is respect for the principle of non-discrimination ensured?

i. Does the constitution include the principle of and the right to non-discrimination on the basis of specific grounds?
ii. Is non-discrimination effectively guaranteed by law?
iii. Do the constitution and/or legislation clearly define and prohibit both direct and indirect discrimination[101] and recognise different manifestations of such discrimination[102]?
iv. Is there a legal obligation for public authorities to prevent and sanction unjustified discrimination, and provide for compensation even when the conduct occurs in relations between private persons? Is there, in particular, an effective legal framework in place to combat hate crimes[103] generally and hate speech[104] in particular?
v. Is there an obligation for public authorities to conduct an effective and adequate investigation as to motive in cases of violence and where there are grounds to suspect that the violence has been motivated by discriminatory reasons (whether gender-based, racial, religious, LGBTI-phobic or otherwise)?

89. The principle of non-discrimination under the ECHR requires the prohibition of any unjustified unequal treatment under the law, and that all persons have guaranteed equal and effective protection against discrimination, both in direct and indirect forms, on grounds such as sex, gender, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. The concept of "other

[100] See for example Article 14 ECHR; Protocol 12 ECHR; Article 4 paragraphs 2 and 4 of the Istanbul Convention; Articles 12, 26 ICCPR; Article 24 ACHR; Article ACHPR.
[101] Direct discrimination describes a difference in treatment of persons in analogous or relevantly similar situations based on an identifiable characteristic or status (see e.g. ECtHR, *Carson and Others v. the United Kingdom* [GC], no. 42184/05, 16 March 2010, §61). Indirect discrimination may take the form of disproportionately prejudicial effects of a general policy or measure which though couched in neutral terms has a particular discriminatory effect on a particular group (see e.g. ECtHR*, Biao v. Denmark* [GC], no. 38590/10, 24 May 2016, §103).
[102] Different manifestations of such discrimination include harassment (unwanted conduct related to a protected ground, with the purpose or effect of violating the dignity of a person and/or creating an intimidating, hostile, degrading, humiliating or offensive environment), instruction to discriminate (dictating a less favourable treatment of individuals due to one of the protected grounds), multiple discrimination (discrimination on several grounds operating separately), intersectional discrimination (discrimination on several grounds, whereby these grounds operate and interact with each other in such a way that they are inseparable and produce specific types of discrimination) and discrimination by association (less favourable treatment of an individual because of their association with another individual who possesses a "protected characteristic"). See for definitions of these different manifestations and relevant case law of the ECtHR and/or CJEU: European Union Agency for Fundamental Rights and Council of Europe, Handbook of European non-discrimination law (2018).
[103] Hate crime is a criminal offence committed with a hate element based on one or more actual or perceived personal characteristics or status. Appendix to CM/Rec(2024)4 - Recommendation of the Committee of Ministers to member States on combating hate crime, para. 2.
[104] Hate speech is understood as all types of expression that incite, promote, spread or justify violence, hatred or discrimination against a person or group of persons, or that denigrates them, by reason of their real or attributed personal characteristics or status. Appendix to CM/Rec(2022)16 - Recommendation of the Committee of Ministers to member States on combating hate speech, para. 1.2.

status" has a wide meaning and has been held by the ECtHR to include (but not to be limited to) age, gender identity, sexual orientation, health and disability, parental and marital status, status related to employment and residence. Similar principles are reflected in the European Union Charter of Fundamental Rights and the case law of the CJEU as well as in other treaty bodies and international courts. Where applicable protection of indigenous peoples is also provided for.[105]

2. Equality in law

Is equality in law guaranteed?

i. Does the constitution require legislation (including regulations) to respect the principle of equality in law?[106] Does it provide that differentiations have to be objectively justified?
ii. Can legislation violating the principle of equality be challenged in court?
iii. Are there individuals or groups with special legal privileges? Are these exceptions and/or privileges based on a legitimate aim and in conformity with the principle of proportionality?
iv. Is there a requirement that draft laws and policies are subject to an impact assessment to identify discriminatory effects?

90. The principle of equality incorporates both the concept of "equality in law", implying that laws should be written to be fair and non-discriminatory, and "equality before the law", implying that the same requirements are to be met in applying the law (cf. II.E.3 below).

91. Legislation must respect the principle of equality: it must treat similar situations equally and different situations differently and guarantee equality with respect to any ground of potential discrimination. Not all differences in treatment – or failure to treat differently persons in relevantly different situations – constitute discrimination, but only those devoid of "an objective and reasonable justification"[107] do so.

92. When considering a particular situation, the appropriate approach is to ask (a) whether there has been a difference in treatment of persons in analogous or relevantly similar situations – or a failure to treat differently persons in relevantly different situations and (b) if so whether such difference – or absence of difference – is objectively justified? In particular, i) whether it pursues a legitimate aim; and ii) whether the means employed are reasonably proportionate to the aim pursued?

3. Equality before the law

Is equality before the law guaranteed?

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[105] See UNHRC General Comment No. 23, Article 27 (Rights of Minorities); IACHR, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, judgment of January 31st, 2001, Series C No. 79, §154.

[106] Cf. e.g. Venice Commission, CDL-AD(2014)010, Romania – Opinion on the draft law on the review of the Constitution, paras. 41-42; CDL-AD(2013)032, Opinion on the Final Draft Constitution of the Republic of Tunisia, para. 44 and further: equality should not be limited to citizens and include a general non-discrimination clause.

[107] ECtHR, *Molla Sali v. Greece* [GC], no. 20452/14, 19 December 2018, §135; *Fabris v. France* [GC], no. 16574/08, 7 February 2013, §56; D.H. and Others v. the Czech Republic *[GC],* no. 57325/00, 13 November 2007, §175.

i. Does the national legal order clearly provide that the law applies equally to every person, regardless of personal characteristics or status[108]?[109] Does it provide that differentiations have to be objectively justified, on the basis of a reasonable aim, and in conformity with the principle of proportionality?[110]
ii. Is there an effective remedy against discriminatory or unequal application of legislation or its consequences?[111]

93. The Rule of Law requires the universal subjection of all to the law. It implies that law should be equally applied and consistently implemented. According to the case law of the ECtHR the principle of non-discrimination is of a "fundamental nature" and underlies the Convention together with the Rule of Law and the values of diversity and social peace.[112] The principle of equal treatment should permeate all democratic institutions.[113]

4. Positive action

Does the legal framework envisage the possibility to take positive action?

i. Does the constitutional framework permit positive action to treat groups differently in order to correct factual or historic inequalities?
ii. Does the constitution oblige public authorities to promote conditions for the attainment of substantive equality?
iii. Does the legal framework allow for mechanisms to promote a balanced participation in decision-making bodies?

[108] Personal characteristics or status includes, but is not limited to: sex, gender, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority or an indigenous people, property, birth, sexual orientation, gender identity, sex characteristics, age, state of health, disability, marital status, or other status. See, amongst others, Article 26 ICCPR; Article 14 ECHR; Protocol 12 ECHR; Article 4 Istanbul Convention; Articles 20-21 EU Charter of Fundamental Rights; ECRI, General Policy Recommendation No. 17 on preventing and combating intolerance and discrimination against LGBTI persons (2023); Recommendation CM/Rec(2025)7 on equal rights for intersex persons, Appendix, para. 2a.

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

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

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

[112] ECtHR, *S.A.S v France* [GC], no. 43835/11, 1 July 2014, §149.

[113] ECtHR, *Karácsony and others v. Hungary*, nos. 42461/13 and 44357/13, 17 May 2016, §147: "Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids abuse of a dominant position (..)". The Court also underlines the need for equal treatment of all members of parliament referring to PACE, Resolution 1601 (2008) on procedural guidelines on the rights and responsibilities of the opposition in a democratic parliament, para. 5.

94. The prohibition on discrimination does not prohibit states from treating groups differently in order to correct factual inequalities. Indeed, in certain circumstances a failure to attempt to correct such inequality through different treatment may in itself give rise to a breach of the prohibition on discrimination. Alongside the negative obligation incumbent on states not to discriminate, the prohibition may imply positive obligations to prevent, stop and punish discrimination.[114]

95. Equality is not merely a formal criterion but should result in substantively equal treatment. To reach that end, differentiations may be accepted. For example, positive action may be a way to ensure substantive equality in limited circumstances so as to redress past disadvantage or exclusion.[115] The balanced participation in political and public decision-making is a question of justice, but it would also lead to better and more efficient policy making as well as to the improvement of quality of life for all.[116]

96. "The law should provide that the prohibition of racial discrimination does not prevent the maintenance or adoption of temporary special measures designed either to prevent or compensate for disadvantages suffered by persons on grounds [of belonging to a particular group], or to facilitate their full participation in all fields of life. These measures should not be continued once the intended objectives have been achieved."[117] A similar approach can be applied to gender-based and other types of discrimination.[118]

5. Equality, non-discrimination and new technologies

Is non-discrimination in the use of new technologies fully ensured?

i. Is equal access to new technologies guaranteed?
ii. Are there mechanisms in force to avoid discriminatory bias within the lifecycle of AI systems?
iii. Are there remedies in place to challenge unequal or discriminatory treatment by AI systems?
iv. Is equality and non-discrimination a criterion to be assessed before authorising the use of an AI system?
v. Are there specific mechanisms to safeguard equal treatment of candidates and/or parties during electoral processes?

[114] See e.g. ECtHR, *Pla and Puncernau v Andorra,* no. 69498/01, 13 July 2004, §62; *Horváth and Kiss v Hungary,* no. 11146/11, 29 January 2013, §104.
[115] Cf. Article 1.4 and 2.2 of the International Convention on the Elimination of All Forms of Racial Discrimination (CEDR); Article 4 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Article 5.4 of the Convention on the Rights of Persons with Disabilities (CRPD); Article 4.4 of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention).
[116] Council of Europe, Recommendation CM/Rec(2003)3 on balanced participation of women and men in political and public decision making. See also, CDL-PI(2019)005 Compilation of Venice Commission Opinions and Reports concerning Electoral Systems and Gender Representation.
[117] European Commission against Racism and Intolerance (ECRI) Recommendation No. 7 (2003), para. 5.
[118] Some structural disadvantages, notably in relation to gender-based inequalities, have led to the adoption of positive measures. Such measures aim to counterbalance systemic and historic inequalities and do not constitute discrimination. See, for example, UN Convention on the Elimination of all forms of Discrimination against Women (1979), Article 4, para. 1: "Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved."

97. Lack of equal access to new technologies can have a far-reaching impact on the right to equality and non-discrimination. This inequality is also linked to other social, economic and cultural criteria that can exacerbate and perpetuate pre-existing inequalities. It is therefore necessary for public authorities to actively ensure equal opportunities for access to new technologies.

98. The potential impact of the use of AI systems on equality and non-discrimination is increasingly recognised[119]. This effect can arise from discriminatory biases in the data used, in the model upon which the system is built, in the design, in the outcomes, in the self-learning process or in the way a human decision maker confirms any technical bias of AI systems. Tackling this effect requires a comprehensive policy, which needs to be tailored to each national context[120] taking into account that there is no "silver bullet" for addressing bias[121].

99. In order to safeguard equal treatment in the face of AI systems, individuals and social groups must have access to specific legal remedies, including compensation, for pecuniary and non-pecuniary damage suffered as a result of discrimination arising from activities within the lifecycle of AI systems. In particular, these tools must ensure that AI systems can provide a reasoned explanation when their recommendations imply any form of unequal treatment. It is not all unequal treatment by AI that should be prohibited. Only those that are not objectively justified should be prohibited. The justification for unequal treatment should be provided by reinforcing the obligations of AI systems to explain, as far as possible, the way they arrived at any output. This approach also makes it possible to integrate the justification and explanation of 'positive' measures into the design and operation of AI tools.

100. Ensuring the right to equality and non-discrimination requires all actors (including private actors) to consider the impact of an AI system. Discriminatory effects can occur in both public and private use of an AI system. Much of the success in combating the discriminatory biases of AI tools lies in ensuring that they are taken into account in the data used, in the design and the training of the system. Therefore, prior assessment of the impact and risks of an AI system on equality and non-discrimination is essential not only before such a system can be used by public authorities, but throughout the lifecycle of the AI system. Some AI systems are to be prohibited due to their inherent discriminatory effects.[122]

[119] See Fundamental Rights Agency (EU), Bias in Algorithms. Artificial Intelligence and Discrimination (2022); Council of Europe Framework Convention on Artificial Intelligence, Article 10.
[120] Explanatory Report to the Framework Convention on Artificial Intelligence, para. 77.
[121] See Fundamental Rights Agency, Bias in Algorithms. Artificial Intelligence and Discrimination, p. 78.
[122] See the prohibition of discriminatory profiling in Article 5 of Regulation (EU) 2024/1689 (Artificial Intelligence Act).

F. Access to justice

1. Independence and impartiality of the judiciary

Are there sufficient and effective constitutional and legal guarantees of judicial independence and impartiality?

i. Are the basic principles and safeguards of internal and external judicial independence and impartiality, enshrined in the constitution (or ordinary legislation for countries without a written constitution)?
ii. Are judges appointed until a specified retirement age? Are grounds for removal limited to serious breaches of disciplinary or criminal provisions, as established by law, or situations in which the judge can no longer perform judicial functions? Is the applicable procedure clearly prescribed by law? Are there legal remedies before an independent body for individual judges against decisions linked to their judicial career?
iii. Is the appointment and promotion of judges decided on the basis of merit, with use of objective criteria focusing on ability, qualifications, experience and integrity, in a transparent and independent procedure? Is there an independent Judicial Council or other equivalent body with a balanced composition, with at least half being judges elected by their peers[123], which is responsible for questions of appointment, promotion, discipline and removal or other equivalent body? Are there sufficient safeguards for the independence of any such body, particularly protecting it against political influence? If there is no Judicial Council, is there another system with adequate involvement of the judiciary in place that is embedded in the legal culture and effectively guarantees independence?
iv. Are the rights (freedom of expression, freedom of association, right to privacy, right to property, access to justice etc.) of judges safeguarded? Are there clear rules on the extent of justified limitations on the rights of judges? Are judges protected against possible threats and attacks?
v. Is there an appropriate system for the allocation of cases to particular courts and judges and clear and transparent criteria for this purpose as well as for the recusal of individual judges in appropriate cases so as to safeguard the independence and impartiality of the tribunal?
vi. Is financial autonomy of the judiciary effectively guaranteed? Are the salaries of the judges fair and sufficient and are sufficient resources allocated to the courts to allow their proper functioning? Is there full transparency in this regard?
vii. Does the law provide for legal and disciplinary accountability (including for corruption) while securing judicial independence?

101. The right to a fair hearing under all international instruments and domestic constitutions requires that a case be heard by an independent and impartial tribunal. Judicial independence is an essential condition for the right to a fair hearing and judicial independence is a

[123] Council of Europe, Recommendation CM/Rec(2010)12 on the independence, efficiency and responsibilities of judges, para. 27; ECtHR, *Grzęda v. Poland* [GC], no. 43572/18, 15 March 2022, §305; see also Venice Commission, CDL-AD(2017)018, Bulgaria - Opinion on the Judicial System Act, para.14; CDL-AD(2018)028, Malta - Opinion on Constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement, para. 42; CDL-AD(2021)043, Cyprus - Opinion on three Bills reforming the Judiciary, para. 53; CDL-AD(2022)020, Lebanon - Opinion on the draft law on the independence of judicial courts, para. 45, amongst other Opinions.

prerequisite to the Rule of Law. Given its importance, the basic principle of judicial independence must be entrenched in any constitution and reflected in primary legislation.

102. Judges cannot uphold the Rule of Law if domestic law deprives them of adequate guarantees on matters directly touching upon their independence and impartiality.[124] Some of the most common measures which may undermine judicial independence include changing judicial appointment procedures, replacing judges or failing to appoint or vote on nominees.[125] Moreover, there are clear links between the guarantee of judicial independence, the integrity of the judicial appointment process and the autonomy of any national body with responsibility for safeguarding the independence of the courts and judges.[126]

103. Independence means that the judiciary is free from external and internal pressure. Judges must not be subject to political influence or manipulation, in particular by the executive branch, or directives or pressures by fellow judges (e.g. court or section presidents, superior courts, judicial councils or even judicial associations).[127] The participation in the process of adjudication of a judge whose appointment was vitiated by undue interference without effective domestic court review constitutes a violation of the requirement that there be access to a "tribunal established by law".[128] Furthermore, impartiality implies that the judge decides free from any personal or ideological considerations.

104. The term "independence" characterises both a state of mind which denotes a judge's imperviousness to external pressure as a manifestation of professional and moral integrity, and a set of institutional and operational arrangements – involving both a procedure by which judges can be appointed in a manner that ensures their independence and selection criteria based on merit – which must provide safeguards against undue influence and/or unfettered discretion of the other state powers, both at the initial stage of the appointment of a judge and during the performance of his or her duties.[129]

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[124] CJEU, *Associação Sindical dos Juízes Portugueses,* C-64/16, 27 February 2018, §§35-38 and 44-45; *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, 19 November 2019, §§119-130.

[125] Other measures can include lowering the judicial retirement age, restricting the jurisdiction of a court or access to it, requiring an increase in the quorum, expanding the court, reassigning jurisdiction to another court, changing the assignment of cases, changing oversight of the judiciary, selective non-removal of judges, nullifying judicial decisions and finally reinstating the powers of the replaced judiciary to courts so it can loyally endorse measures taken by those in power. See for an overview: S. Bisarya and M. Rogers / International IDEA, *Designing Resistance. Democratic Institutions and the Threat of Backsliding* (27 October 2023). While in isolation these measures may not always be against the standards of the Venice Commission nor be systematically problematic, it is often the combination of such measures which undermines judicial independence.

[126] ECtHR, *Grzęda v. Poland* [GC], no. 43572/18, 15 March 2022, §264 and §§298-309. Concerning the National Council of the Judiciary: *Ibid.*, §§300-309 and 345-346.

[127] ECtHR, *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, 1 December 2020, §§ 220-234; *Reczkowicz v. Poland*, no. 43447/19, 22 July 2021, §§216-220 and 276-277; *Dolińska-Ficek and Ozimek v. Poland*, no. 49868/19 and 57511/19, 8 November 2021, §§348-349; CJEU, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, 19 November 2019, §§123-125; *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Polish Supreme Court - Appointment)*, C-487/19, 6 October 2021, §§108-111 and 124-130; *Krajowa Rada Sądownictwa (Continued holding of a judicial office)*, C-718/21, 21 December 2023, §§46-58 and 60-77; , *„R" S.A. v AW „T" sp. z o.o.,* C-225/22, 4 September 2025, §§47-50 and 56-57.

[128] ECtHR, *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, 1 December 2020, §§287-289.

[129] ECtHR, *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, 1 December 2020, §234; CJEU, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, 19 November 2019, §123; *Asociaţia 'Forumul Judecătorilor din România'*, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, 18 May 2021, §§195-200, 206-207.

105. Concerning the manner of appointment and dismissal of judges, it is necessary to have a holistic view and to take into account the composition, mandate, and the method of appointment of members of a Judicial Council or equivalent body with responsibility for such matters. Independence of the Council or equivalent body must be guaranteed, as has been specified in recent jurisprudence of both the ECtHR and CJEU.[130] Decisions relating to judicial careers should be made by independent bodies, either directly or based on their recommendations. Judges should be appointed and promoted based on their ability, integrity and experience, following a fair assessment of their merits as established by law. The risks of politicisation through the involvement of other government bodies, and of self-interest and corporatism through the exclusive involvement of judges, must be avoided.

106. Outside influence in determining the term of office should be excluded unless justified by very strong reasons (probationary terms, renewable terms in office, changes of age limits are each matters which would require particularly close scrutiny and would likely only be justifiable where accompanied by appropriate safeguards).[131] The same applies to non-consensual transfer of judges to another court.[132]

107. Offences leading to disciplinary sanctions and their legal consequences should be set out clearly in law and disciplinary sanctions should comply with the principle of proportionality. The disciplinary system should fulfil the requirements of procedural fairness by including provision for a fair and public hearing and the possibility of an appeal, as a rule before an independent judicial body. Only exceptional circumstances may justify dispensing with a hearing.[133] A judge's decision, including the interpretation of the law, assessment of facts or weighing of evidence, must not give rise to disciplinary liability, except in cases of malice, wilful default or serious misconduct.[134]

108. As concerns the composition of the Judicial Council, both politicisation and corporatism must be avoided.[135] An appropriate balance should be found between judges and lay

[130] See footnote 127 above.
[131] See amongst others: ECtHR, *Pająk and others v. Poland,* no. 25226/18, 24 October 2023, §§186-200; *Baka v. Hungary*, no. 20261/12, 23 June 2016, §117 and further; CJEU, *Commission v. Poland (Independence of the Supreme Court)*, C-619/18, 24 June 2019, §§71-79; *Commission v. Poland (Independence of ordinary courts)*, C-192/18, 5 November 2019, §§113-115 and 126-130.
[132] Venice Commission, CDL-AD(2010)004, Report on the independence of the judicial system – Part I: The independence of judges, para. 43; CDL-AD(2022)010, Opinion on the December 2021 amendments to the organic Law on Common Courts of Georgia, para. 43 ; CDL-AD(2018)033, Opinion on the draft law amending the law on Courts of "the former Yugoslav Republic of Macedonia", paras. 21-23; CDL-AD(2015)026, Opinion on the Amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015, para. 24; CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, paras. 17.
[133] ECtHR, *Ramos Nunes de Carvalho e Sá v. Portugal*, nos. 55391/13, 57728/13, and 74041/13, 6 November 2018, §§187-192, and in particular §190.
[134] CCJE, Opinion No. 27 (2024) on the disciplinary liability of judges, recommendation 12.
[135] Venice Commission, CDL-AD(2018)003, Opinion on the Law on amending and supplementing the Constitution (Judiciary) of the Republic of Moldova, para. 56; CDL-AD(2021)043, Cyprus, Opinion on three Bills reforming the Judiciary, para. 50; CDL-AD(2024)009, Bosnia and Herzegovina – Interim Follow-up Opinion to previous Opinions on the draft Law on the High Judicial and Prosecutorial Council, para. 28; CDL-AD(2025)038, Spain – Opinion on the manner of election of the judicial members of the General Council of the Judiciary, paras. 40 and 66.

members.[136] The involvement of other branches of government must not pose threats of undue pressure on the members of the Council and the whole judiciary.[137]

109. Appropriate allocation of cases can be understood as having two aspects. One relates to the court as a whole. The other relates to the individual judge or judicial panel dealing with the case. It is appropriate that both matters are adequately and transparently prescribed by law so as to ensure and promote independence and impartiality in decision making. Likewise appropriate and transparent criteria governing recusal of an individual judge must be provided for so as to safeguard both subjective and objective impartiality. In that way the principle, that justice must not only be done, but also be seen to be done, is safeguarded.

110. Sufficient resources are essential to ensuring judicial independence from state institutions and private parties, so that the judiciary can perform its duties with integrity and efficiency, thereby fostering public confidence in justice and the Rule of Law.[138] Executive power to reduce the judiciary's budget is one example of how the resources of the judiciary may be placed under undue pressure. Fair and sufficient salaries are a concrete aspect of the judiciary's financial autonomy.[139] They are a means to prevent corruption, which may endanger the independence of the judiciary not only from other branches of government, but also from individuals.[140]

111. Judicial independence is not a privilege of judges, but an essential element of the separation of powers and a guarantee of the rights of parties to a fair trial.[141] It however does not preclude judges from being held accountable for wrongdoing. Ensuring legal and disciplinary accountability of judges in a way that does justice to their independence, including for corruption[142], is essential for ensuring public confidence in the judiciary.[143]

2. Independence and impartiality of other actors in the judicial process

Do other actors in the judicial process have a sufficient degree of autonomy and impartiality? i. Does the office of the public prosecution have sufficient autonomy within the state structure? Does the law impose obligations on the prosecutor to act only in accordance with the law, in a consistent manner and on the basis of evidence?

[136] See Venice Commission, CDL-AD(2018)003, Opinion on the Law on amending and supplementing the Constitution (Judiciary) of the Republic of Moldova, para. 56; CDL-AD(2023)039, Opinion on the draft Amendments to the Constitution of Bulgaria, para. 48; See also CDL-PI(2025)002, Compilation of Venice Commission Opinions and Reports concerning Courts, part 4.2.
[137] CDL-INF(1999)005, Opinion on the reform of the judiciary in Bulgaria, para. 28; see also e.g., CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, para. 33; CDL-AD(2010)026, Joint opinion on the draft law on the judicial system and the status of judges of Ukraine, para. 97, concerning the presence of ministers in the Judicial Council.
[138] Council of Europe, Recommendation CM/Rec(2010)12 on the independence, efficiency and responsibilities of judges, para.33 and further; CDL-AD(2010)004, para. 52 and further.
[139] CJEU, *Associação Sindical dos Juízes Portugueses,* C-64/16, 27 February 2018, §§44-52.
[140] Cf. CDL-AD(2012)014, Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, para. 81.
[141] CCJE, Opinion No. 18 (2015) on the position of the judiciary and its relation with the other powers of state in a modern democracy, para. 10
[142] See, also in respect of judges, part II.C.3 on preventive measures and criminal law responses to corruption.
[143] See, *inter alia*, Venice Commission, CDL-AD(2017)002, Republic of Moldova, *Amicus Curiae* Brief on the criminal liability of judges.

ii. Are appointments, promotions, discipline and transfers of prosecutors, including the appointment and dismissal of the head of the public prosecution service, depoliticised? If a prosecutorial council has been set up to deal with or provide professional expertise on the appointment / election of prosecutors, promotion, discipline and transfer of prosecutors, is this body sufficiently independent both from the political majority of the day and the prosecution service?
iii. Are prosecutors appointed for sufficiently lengthy periods to safeguard their independence? Are there effective legal remedies for individual prosecutors against any decision concerning the prosecutorial career (appointment, transfer, promotion, dismissal)?
iv. Are sufficient resources allocated to the prosecutorial offices to allow their independent and proper functioning?
v. If prosecutors may receive instructions in individual cases from the executive, is it ensured that such instructions are exceptional, strictly regulated reasoned and in writing and may be contested or challenged? If prosecutors may receive instructions in individual cases from senior prosecutors, is it ensured that prosecutors receive these in writing and can challenge those instructions they consider to be in contradiction with the law? Is prosecutorial conduct subject to effective judicial control?
vi. Is there a recognised, organised and independent legal profession responsible for advising and assisting parties and is the operation of such a profession adequately provided for by law so as to guarantee principles of independence, integrity and confidentiality and proper adherence to professional ethics?
vii. Are there effective, independent and fair disciplinary procedures regulating the legal profession?
viii. Are there proper safeguards to protect legal professionals from interference and hindrance in their work and to ensure that they may provide effective legal advice and representation?

112. The prosecution service has a dual responsibility for supporting the accusation and, at the same time, for ensuring that cases without adequate legal or evidential foundation or cases involving an abuse of process do not reach the court.

113. There is no common standard on the organisation of the prosecution service, especially in respect of the authority required to appoint public prosecutors, or the internal organisation of the public prosecution service. However, sufficient autonomy must be ensured to shield prosecutorial authorities from undue political influence. While the prosecutorial service has to act on the basis of law, it should be given some discretion when deciding whether to initiate a criminal procedure or not by reference to the public interest.

114. Instructions by the executive concerning specific cases are generally undesirable.[144] If such instructions are not prohibited, they must be strictly regulated, whereby such instructions are reasoned, in writing, challengeable by the prosecutor concerned and subject to public

[144] The Venice Commission has in the past for example recommended removing a Minister's power to give instructions not to prosecute in specific cases, or at least to limit this prerogative to clearly defined exceptional circumstances. See: CDL-AD(2023)029, The Netherlands - Joint opinion of the Venice Commission and Directorate General of Human Rights and Rule or Law (DGI) of the Council of Europe on the legal safeguards of the independence of the judiciary from the executive power, para. 72.

scrutiny.[145] Autonomy must also be ensured inside the prosecution service. Prosecutors must not be submitted to strict hierarchical instructions without any discretion and should be in a position not to apply instructions contradicting the law.[146]

115. The allocation of sufficient resources to the prosecutorial offices is important to ensure their independent and proper functioning. Sufficient remuneration of prosecutors is an important element of their autonomy and a safeguard against corruption.

116. Lawyers play a crucial role in the justice systems of all democracies. They are essential to the respect of the Rule of Law and in particular access to justice for all and the right to a fair trial to have one's human rights vindicated. This implies that legislation provides for the main features of its independence and that access to the legal profession is sufficiently open to make the right to legal counsel effective, as is recognised in the United Nations Basic Principles on the Role of Lawyers[147] and the Council of Europe Convention for the Protection of the Profession of Lawyer.[148] The Basic Principles and the Convention demonstrate a strong international consensus that lawyers must be independent of the executive and able to discharge their functions without fear or favour. Domestic and international case law also consistently recognises the centrality of an independent legal profession for the Rule of Law.[149]

117. Professional ethics also imply *inter alia* that "[a] lawyer shall maintain independence and be afforded the protection such independence offers in giving clients unbiased advice and representation".[150]

3. Fair trial

Does the judiciary guarantee a fair trial on the basis of the requirements of Article 6 ECHR or equivalent provisions in other international instruments[151]?

[145] *Ibid., para. 67*; Council of Europe Recommendation CM Rec (2000) 19 at 11-16 on the role of public prosecution in the criminal justice system.
[146] The Venice Commission distinguishes in this respect between general instructions and case-by-case instructions, with the latter requiring special safeguards, namely (i) all instructions given by a senior prosecutor in a specific case must be reasoned and in writing; (ii) in case of doubt as to the legality of an instruction, the lower prosecutor should have the right to initiate a review by a court or an independent body such as a prosecutorial council; (iii) the law should clearly establish that the parties to the case have access to the instructions given by a superior public prosecutor. See: Venice Commission, CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor's office, as amended, para. 112); CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, paras. 57-60.
[147] The Basic Principles were adopted by all UN Member States at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August to 7 September 1990.
[148] The Council of Europe Convention for the Protection of the Profession of Lawyer (CETS 226) was drafted as a response to the increasing number of attacks on lawyers practising their profession, be it in the form of harassment, threats or attacks, or interference in the exercise of their professional responsibilities. It reflects the principles set out in the United Nations Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, Cuba, 27 August-7 September 1990).
[149] Supreme Court of Canada, *Canada (Attorney General) v Federation of Law Societies of Canada* [2015], 1 SCR 401, §102; ECtHR, *Nikula v Finland*, no. 31611/96, 21 March 2002 §45; *Steur v Netherlands*, no. 39657/98, 28 October 2003, §36; *Elci and Others v Turkey*, nos. 23145/93 and 25091/94, 24 March 2004, §669; *Morice v France* [GC], no. 29369/10, 23 April 2025, §§ 132-139.
[150] International Bar Association – International Principles on Conduct for the Legal Profession (2024), para. 1.
[151] E.g. ICCPR, Article 14; ACHR, Article 8.

i. Do individuals have an effective access to courts not only in theory, but also in practice?
ii. Is the right to be heard and equality of arms guaranteed? Are basic rights upheld in case of trials in absentia? Is the right to a new trial always guaranteed when the person was not aware of the proceedings?[152]
iii. Is the right to defence guaranteed, including through effective legal assistance, whereby access to legal representation is regulated in an objective and sufficiently open manner including in respect of legal aid for such representation?
iv. Is the presumption of innocence in criminal proceedings guaranteed, particularly also in view of public statements of public authorities and media coverage?
v. Is there an obligation to provide reasons for judgments? If not, is it regulated which judgments can be excluded from this obligation?
vi. Are judicial decisions effectively and promptly issued and executed? Is the reasonable duration of judicial processes effectively respected? Are there effective legal remedies where proceedings are unreasonably long or judgments are not executed or in case the rights of defence are violated? Are sanctions or other legal consequences provided for in cases of non-compliance or non-execution, in particular by actions of public officials or political actors?
vii. Is publicity in judicial proceedings guaranteed?

118. The right of an individual to have an easily accessible and effective opportunity to challenge a private or public act (*locus standi*) implies that formal requirements, time limits and court fees must be reasonable.

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

120. Provisional measures in case of irreparable harm and access to justice in emergency situations should be guaranteed within the right to access to courts.

121. The right to appeal against a judicial decision is a general principle of the Rule of Law often guaranteed at constitutional or legislative level by domestic legislation, in particular in the criminal field.

122. The presumption of innocence is essential in ensuring the right to a fair trial in criminal proceedings. In order for the presumption of innocence to be guaranteed, the burden of proof must be on the prosecution.[153] Rules and practice concerning the required proof have to be clear and fair.

[152] Although proceedings that take place in the accused's absence are not of themselves incompatible with Article 6 of the Convention, a denial of justice nevertheless occurs where a person convicted in absentia is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been established that he has waived his right to appear and to defend himself or that he intended to escape trial (ECtHR, *Sejdovic v. Italy* [GC], no. 56581/00, 1 March 2006, §82). This is because the duty to guarantee the right of a criminal defendant to be present in the courtroom – either during original proceedings or at a retrial – ranks as one of the essential requirements of Article 6 (ECtHR, *Stoichkov v. Bulgaria*, no. 9808/02,24 March 2005, §56).

[153] "The burden of proof is on the prosecution": ECtHR, *Barberá, Messegué and Jabardo v. Spain*, no. 10590/83, 6 December 1988, §77; *Telfner v. Austria*, no. 33501/96, 20 March 2001, §15; cf. *Grande Stevens and Others v. Italy*, nos. 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10, 4 March 2014, §159.

123. There must be adequate and effective respect for and enforcement of judicial decisions, including by the executive where its conduct is in issue. The right to a fair trial and the Rule of Law in general would be devoid of any substance if judicial decisions were not executed.

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

4. Digital technologies within the judicial system

Are digital technologies used in a manner which is consistent with the Rule of Law, including the right to a fair trial?

i. Is the use of digital technologies and artificial intelligence systems within the judicial system regulated by law?
ii. Do personal data collected by the judiciary enjoy specific protection provided by law?
iii. Does the law distinguish between the implementation and use of digital technologies aimed at better administrative management of the judiciary and those aimed at assisting the judge in assessing the facts and applying the law to concrete cases?
iv. In the case of the implementation and use of AI systems designed to assist the judge in assessing the facts and applying the law to specific cases, does the law provide for:
    a. the final decision of the judge on the recommendations made by the system, prohibiting a fully automated decision?
    b. The minimum requirements to be met by an AI system, in particular: respect for human rights (especially non-discrimination) and judicial independence, transparency, security, robustness (accuracy and reliability) and interoperability?
    c. Its prior testing in regulatory safe environments (regulatory sandboxes)?
    d. Prior evaluation and subsequent monitoring of the AI system by independent bodies?
v. In the case of the implementation and use of AI systems intended to assist the judge in assessing the facts and applying the law to specific cases, does the law provide for the right of individuals to challenge the implementation of such a system, its design, its use in the specific case and the specific recommendations made by it in the judicial process?

125. The use of digital technologies within the judiciary can improve its efficiency and contribute to a better guarantee of individuals' rights, but the use of digital technologies can also pose risks for individuals' rights: diminishing the guarantees of the right to a fair trial, reproducing, perpetuating and exacerbating existing bias and prejudices, affecting the right to data protection, protection of the privacy of those involved in proceedings, protection of victims or inequality in individuals' access to technology. Both the advantages and the risks derived from the use of digital technologies require that their deployment in the judiciary be provided for by law and be accompanied by transparent governance frameworks and

continuous human oversight (as is the case for the use of AI by all public authorities, cf. II.A.9.iv-v above).

126. Laws governing the use of AI systems within the justice system raise specific issues. All AI systems within the judiciary should have as their primary objective the strengthening of the effectiveness of the judiciary and the rights of citizens. In order to maintain public trust and ensure accountability, their use must be transparent, explainable, and subject to independent oversight mechanisms (cf. II.A.9.iv-v and II.B.5.ii-iii above).

127. A distinction should be made between AI systems used to improve the administrative management of justice and those intended to be used in the exercise of judicial functions. While the former should be subject to the general requirements for the use of AI systems by public authorities, the latter require careful implementation in order to guarantee citizens' rights to a fair trial. In the case of AI systems used in judicial functions, AI outputs should be fully traceable and explainable to enable human oversight and accountability (cf. II.C.2 above).

128. Human-centred AI implies that all judicial decisions related to investigation, assessment of facts and application of the law to concrete cases should be made by judges on their own responsibility. AI systems may assist judges in certain tasks facilitating decision-making (e.g. legal research, evidence discovery and classification, pre-filling standardised field for judgments, sending notification about deadlines etc.), but a fully automated decision by the AI system should not be allowed. Thus, they should meet specific requirements when used for investigation, assessment of facts and application of law to concrete cases.

129. Human rights that require special attention in the use of AI systems in justice are data protection, equality, non-discrimination, privacy, access to justice, presumption of innocence and fair trial, including the rights of defence. The law should provide for a specific assessment of the risks of the AI system to these rights and should ensure they are tested in safe legal environments (sandboxes) before their general use. All judicial actors should be involved in risk assessment, pre-testing of AI systems and their monitoring. Transparency must be ensured throughout the lifecycle of the AI systems (cf. II.A.9 and II.B.5 above), particularly when these systems may impact judicial outcomes (for example, by requiring disclosure of information on the system design, the decision-making logic and/or the data sources used).

130. The law should provide accessible and effective remedies for human rights violations resulting from the operation of AI systems.[154] These remedies should make it possible to challenge (i) the public decision to implement a particular system; (ii) its design; (iii) its use in a specific case; and (iv) the recommendations it generated in that case.[155] For these remedies to be effective, individuals must have access to understandable information about how the AI system reached its conclusions or made the specific recommendations (cf. II.B.5 above).

131. As for any use of AI systems by public authorities (cf. II.A.3 and II.A.9 above), AI systems used in the judiciary must be subject to transparent governance frameworks. This includes documentation of design choices, data sources, decision-making processes, and known

[154] Cf. Article 14, Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law (CETS No. 225).

[155] According to UNESCO's 2024 Global Toolkit on AI on the Rule of Law for the Judiciary (p.136): "the potential for AI to reinforce or amplify existing biases is a major concern. The rights to liberty, security, and fair trial may be infringed upon when an individual's physical freedom or personal safety is at stake, such as with predictive policing, recidivism risk assessment, and sentencing. …."black box" AI systems make it impossible for legal professionals such as judges, attorneys, and prosecutors to comprehend the rationale behind the outcomes of the system, which complicates the justification and appeal of the decision".

limitations. Independent oversight bodies should be empowered to audit these systems regularly, and their findings should be made publicly accessible to ensure accountability.

G. Constitutional review

1. Constitutional review

Do constitutional checks and balances include independent constitutional review?

i. Does the constitution[156] provide for judicial constitutional review? Does it establish a specialised Constitutional Court?
ii. If the constitutional review is carried out by some other body, what are the guarantees of an independent evaluation? Are they entrenched in the constitution?
iii. If there is a specialised Constitutional Court in place is the composition of the court, its jurisdiction, the status of the judges and the guarantees of their tenure, the parties entitled to appeal as well as the constitutional principles on which the activity of the Constitutional Court is to be based, entrenched in the constitution? Can the Court establish its own rules of procedure?

132. As the supreme legal norm, the constitution requires a guardian capable of upholding its principles, preserving the separation of powers, and protecting the rights it guarantees. Some form of judicial review of constitutionality - whether concentrated or diffuse - is widely regarded as an effective means of ensuring respect for the constitution and protecting human rights. In this regard, constitutional justice remains a central feature of constitutional democracy and a determining criterion of the Rule of Law, ensuring that all public authorities act in conformity with the constitution and that decisions taken by the Constitutional Court or an equivalent body are binding on all branches of power.

133. The Venice Commission has consistently noted that there is no single model of constitutional justice. National systems vary significantly and reflect a wide range of institutional arrangements. The Commission has generally endorsed the establishment of a constitutional court or equivalent body.[157] While noting that there is no general requirement to do so, it has expressed the view that the establishment of such an organ as a separate institution can be effective in implementing the Rule of Law in a given country. If - instead of a constitutional court or equivalent body - a non-judicial form of constitutional review is provided for, it should be ensured that the body performing such a review is free from political interference. In circumstances where a separate constitutional court or equivalent body is not considered to be the only means by which constitutional rights may be safeguarded, the primary focus of this benchmark is to identify key questions for those jurisdictions with such bodies. In jurisdictions without such specialist bodies, the core objectives of independence, impartiality and effectiveness identified by other benchmarks, and in particular Benchmark F on Access to justice, will likely be of key relevance. While the questions in this part focus on constitutional courts, they also apply to equivalent bodies entrusted with constitutional review.

[156] For countries that have a written Constitution.
[157] Venice Commission, CDL-INF (97) 2, Ukraine - Opinion on the Constitution of Ukraine, Chapter XII; CDL-AD(2010)044 Ukraine - Opinion on the Constitutional Situation in Ukraine, para. 52; CDL-AD(2016)025. Kyrgyzstan - Joint Opinion on the Draft Law “On Introduction of Amendments and Changes to the Constitution” of the Kyrgyz Republic, para 47; CDL-AD(2022)004 Chile - Opinion on the drafting and adoption of a new Constitution, para 52.

134. In jurisdictions with a specialised Constitutional Court, the composition of the court, its jurisdiction, the status of the judges and the guarantees of their tenure, the parties entitled to appeal as well as the constitutional principles on which the activity of the constitutional court is to be based should be entrenched at the constitutional level, so that they are protected against possible attempts by contingent political majorities in government to modify them. Similarly, where a specialised Constitutional Court is not envisaged, the guarantees of an independent constitutional review shall be provided in the constitution (or other relevant legislation, for countries that do not have a written constitution), and, when needed, complemented by an organic law. The Rules of Procedure should be drafted by the constitutional court itself, as an expression of the Court's autonomy within the limits of the constitution (and the law on the Constitutional Court, where appropriate); the Constitutional Court should have the possibility to modify them in the light of experience without the intervention of the legislator.[158]

135. In addition to *ex post* constitutional review, a mechanism for *ex ante* constitutional review should also be in place. *Ex ante* constitutional review can take place either in the executive at the law-drafting phase or in a parliamentary committee, assisted by constitutional experts.

2. Composition and appointment

Does the composition and the process of appointment of constitutional judges provide sufficient safeguards for the Constitutional Court's independence?

i. Does the appointment procedure provide sufficient guarantees for the independence of constitutional judges? In particular, if constitutional judges are elected by Parliament, is there a requirement for a qualified majority? Are there constitutional mechanisms to overcome possible political deadlocks? In case of prolonged vacancies, is the prorogation envisaged until the incumbent judge is replaced in order to ensure the continuity of the institution?
ii. What are the professional requirements that guarantee a high level of qualification of constitutional court judges? What are the guarantees for their integrity?
iii. What other guarantees of independence are provided? Are there adequate safeguards against the undue removal of a judge?
iv. Are there any incompatibilities with the office of constitutional judge? Is a prohibition on appointing active members of Parliament or persons affiliated with political parties as judges of the Constitutional Court established by law? Is it strictly observed in practice? Are there any other restrictions on performing other duties before or after the term of office? Are other incompatibilities which endanger the impartiality of the judges prohibited?

136. The composition of the Constitutional Court and the method for selecting its judges are of critical importance for safeguarding the Court's independence and authority. Constitutional courts are generally composed of a significant number of judges, often between 8 and 15.[159]

137. In pluralistic democracies, a balanced and diverse composition, respectful of different characteristics (gender balance, age, political diversity, and ethnic, linguistic or religious background), contributes to the perceived impartiality and inclusiveness of the institution,

[158] Venice Commission, CDL-AD(2004)023 Azerbaijan - Opinion on the Rules of Procedure of the Constitutional Court of Azerbaijan, paras. 5-6.
[159] Venice Commission, CDL-STD(1997)020, The composition of Constitutional Courts, Chapter III, Comparative table of replies to the questionnaire on the composition of Constitutional Courts, p. 35 and further.

hence its legitimacy and the acceptance of its decisions, in particular in multi-ethnic or multilingual states. Involving multiple state organs and political actors in the selection of constitutional judges has proven effective in enhancing the perceived independence of the Court.[160]

138. The selection of constitutional judges must be guided by objective criteria established by law. These criteria should prioritise merit, with a focus on legal expertise, independence, and integrity. Comparative practice indicates that constitutional courts are generally composed of legal professionals - judges, lawyers, or university professors - with significant experience or seniority in the legal field.[161] In addition to professional qualifications, candidates for constitutional courts are required to demonstrate integrity and high moral standing.[162]

139. The term of office for constitutional judges is generally long, set either for a fixed period, until a mandatory retirement age, or in some systems, even for life. The term of office should allow for regular and partial renewal of the Court's composition; staggered renewal makes it possible for successive parliamentary majorities to participate in appointments. Long, non-renewable terms are generally considered the most conducive to independence, particularly from the appointing authorities.[163] If the constitutional provisions on term of office of judges of the Constitutional Court are amended, any shortening of the term of office should only apply to judges appointed after the entry into force of the new provisions.[164]

140. Where judges are elected by Parliament, the requirement of a qualified majority (e.g. two-thirds or three-fifths) serves as an institutional safeguard against politicisation. An anti-deadlock mechanism (for example, nomination of candidates by other neutral bodies after several unsuccessful votes in Parliament) should be envisaged in order to avoid such stalemate, while not creating a disincentive to reaching agreement on the basis of a qualified majority in the first instance. There is no single model for designing an anti-deadlock mechanism. In order to guarantee the uninterrupted functioning of the Constitutional Court, the Venice Commission recommends that the members of the court should continue their functions until their successor is appointed.[165]

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[160] Venice Commission, CDL-STD(1997)020, The composition of constitutional courts - Science and Technique of Democracy, no. 20 (1997), p. 10,21; CDL-AD(2005)039. Bosnia and Herzegovina - Opinion on proposed voting rules for the Constitutional Court of Bosnia and Herzegovina, para. 3

[161] Venice Commission, CDL-AD(2024)015, Bosnia and Herzegovina - Opinion on the method of electing judges to the Constitutional Court, paras. 8-20.

[162] Venice Commission, CDL-STD(1997)020, The composition of constitutional courts - Science and Technique of Democracy, no. 20 (1997), p. 10; CDL-AD(2016)001, Poland - Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, para. 119; CDL-AD(2017)011, Armenia - Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, paras 12-13..

[163] Venice Commission, CDL-STD(1997)020, The composition of constitutional courts - Science and Technique of Democracy, no. 20 (1997), p.21; CDL-AD(2020)016, Armenia - Opinion on three legal questions in the context of draft constitutional amendments concerning the mandate of the judges of the Constitutional Court, paras. 35 and 38; CDL-AD(2025)005, Republic of Moldova - Opinion on the draft law on the Constitutional Court, para 37.

[164] Venice Commission, CDL-AD(2020)016, Armenia - Opinion on three legal questions in the context of draft constitutional amendments concerning the mandate of the judges of the Constitutional Court, para. 39.

[165] Venice Commission, CDL-AD(2022)054, Opinion on the draft law "on amending some legislative acts of Ukraine regarding improving procedure for selecting candidate judges of the Constitutional Court of Ukraine on a competitive basis", paras. 58, 59 and 67; CDL-AD(2021)048, Serbia - Urgent opinion on the revised draft constitutional amendments on the judiciary, para. 49; CDL-AD(2024)002, Bosnia and Herzegovina - Opinion on certain questions relating to the functioning of the Constitutional Court of Bosnia and Herzegovina, para. 22.

141. The *irremovability* of constitutional judges is a fundamental safeguard of judicial independence.[166] The cases of termination of a judge's mandate must be narrowly defined and must be laid down in clear, detailed, and precise legal provisions [167], and be subject to strict procedural guarantees. The Constitutional Court itself should be responsible for making the final decision, ideally by a qualified majority of its sitting members.[168]

142. Constitutional judges are generally prohibited from holding other offices concurrently. Incompatibility rules vary in rigidity but typically cover political and public functions, including roles such as minister, member of parliament, senior civil servant, or political party leader, while constitutional judges are often permitted to retain academic affiliations. These rules should be set out in law and, where appropriate, in the constitution.[169]

143. The President of the Court may be appointed by an external body or elected by the other judges from their own ranks, with the latter seen, in general, as a stronger safeguard for the independence of the Constitutional Court.[170] Should the president be appointed by parliament or by another external body, guarantees of independence should be provided. Clear rules should be established to determine who is acting as interim President, when the President of the Court is not elected or appointed in due time.

3. Access to constitutional justice

Do the conditions of access to the Constitutional Court and the scope of acts that may be reviewed provide for an effective constitutional review?

i. Is the constitutionality of laws and all other normative acts reviewable?
ii. If there are exceptions to the reviewability of the constitutionality of normative acts, are these exceptions justified?
iii. Do individuals have effective access to constitutional justice (direct or indirect) against individual acts which affect them, and against general acts?
iv. Does the procedure before the Constitutional Court provide sufficient guarantees of impartiality, due process and effectiveness?

144. The jurisdiction of constitutional courts typically extends to a broad range of normative acts and institutional matters. These commonly include the review of ordinary and organic laws, constitutional laws, regulations, internal rules of legislative assemblies and other bodies, as well as the compatibility of international agreements with the constitution. Constitutional courts may also adjudicate disputes concerning the distribution of normative competences among branches of government, including conflicts between the central government and local authorities, or between the executive and legislative branches. Electoral disputes likewise fall within the jurisdiction of many constitutional courts. Additional areas may include questions

[166] Venice Commission, CDL-AD(2019)024, Armenia – Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the amendments to the Judicial Code and some other laws, para. 58. See also in this respect II.F.1 on the independence of the judiciary above.
[167] Venice Commission, CDL-AD(2005)015, Ukraine - Opinion on the amendments to the Constitution, para 46; CDL-AD(2017)011, Armenia - Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, para. 19.
[168] Venice Commission, CDL-AD(2005)015, Ukraine - Opinion on the amendments to the Constitution, para. 46; CDL-AD(2016)025, Kyrgyzstan - Joint Opinion on the Draft Law "On Introduction of Amendments and Changes to the Constitution" of Kyrgyz Republic, para. 54.
[169] CDL-STD(1997)020, The composition of constitutional courts - Science and Technique of Democracy, no. 20 (1997), para. 15.
[170]. Venice Commission, CDL-AD(2011)016, Hungary - Opinion on the new Constitution, para. 94.

related to the status of elected representatives, the protection of fundamental rights, and the legality of political parties. In some systems, constitutional courts also exercise advisory functions, such as mandatory consultation prior to declaring a state of emergency or dissolving legislative chambers. Moreover, shielding potentially unconstitutional laws from review (through exclusivity or ouster clauses) can be considered as a direct attack on the supremacy of the constitution.[171]

145. Access to court is decisive for the effectiveness of constitutional review. Individual complaint has proven to be the most effective remedy. While direct individual access to constitutional courts enhances the protection of fundamental rights, it often leads to a substantial increase in caseload. To address this challenge, systems that provide for individual complaints typically include procedural safeguards to filter out inadmissible or manifestly unfounded cases. Indirect individual access offers several advantages (the legal expertise of the referring body serves as an effective filter) and the Venice Commission sees an advantage in combining indirect access with a form of direct access, balancing the different existing mechanisms.[172] The requirement to exhaust available legal remedies before submitting a constitutional complaint serves to prevent an excessive caseload for the constitutional court and emphasises the subsidiary nature of the constitutional complaint mechanism.

146. A useful method for alleviating the court's caseload can be the creation of smaller panels of judges when deciding matters initiated by one of the types of individual access, where the plenary only acts if new or important questions need to be decided. The panel composition should reflect the balance of the full composition. It is important that the law establishing the constitutional court provides for the possibility of a decision by the plenary if there are conflicting decisions by the chambers; otherwise, the unity of the constitutional court's jurisprudence is endangered. There also need to be clear rules to avoid any possibility of bias in the allocation of cases to the chambers or in the composition of panels.[173]

147. Validity quorum, requiring the participation of a minimum number of judges for a decision to be valid, ensures both the institutional legitimacy of the decision-making process and the proper functioning of the court as a collegial body. A very strict voting requirement, particularly for standard decisions on the constitutionality of legislation, may hinder the decision-making process of the Court and risk rendering it ineffective.[174] In such cases, the Court may be unable to fulfil its core function of ensuring compliance with the constitution. Anti-deadlock mechanisms should be provided to prevent blockages and tied votes.

148. Hearings may be held either in public or in closed plenary sessions. While oral hearings can serve important functions—such as enabling direct interaction between the parties and the judges and potentially accelerating proceedings[175] — the court should retain discretion to conduct proceedings in written form where appropriate. This may be important in order to avoid an overburdening of the court with individual complaints.[176] It is important that the applicant or the initiator of the proceedings has the opportunity to address the court, at least

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[171] *Ibid.*, para. 113.
[172] Venice Commission, CDL-AD(2010)039rev, Study on individual access to constitutional justice, para. 108.
[173] *Ibid.,* para. 225.
[174] See e.g. Venice Commission, CDL-AD(2024)002, Bosnia and Herzegovina - Opinion on certain questions relating to the functioning of the Constitutional Court of Bosnia and Herzegovina, paras. 16-17.
[175] Venice Commission, CDL-AD(2004)035, Russian Federation - Opinion on the Draft Federal Constitutional Law 'on modifications and amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation', para 4.
[176] Venice Commission, CDL-AD(2008)029, Kyrgyzstan - Opinion on the Draft Laws amending and supplementing the Law on Constitutional Proceedings and the Law on the Constitutional Court, para 44.

through the submission of observations. Such arrangements contribute to procedural fairness and ensure that all interests are appropriately heard in the constitutional process.

4. Effects of decisions

Is effective follow-up given to decisions and judgments of the Constitutional Court?

i. Are the decisions and judgments of the Constitutional Court respected by public authorities and by individuals? Is there a prohibition on overruling the decisions of the Constitutional Court by adopting a legal regulation that has been already declared unconstitutional?
ii. Do Parliament and the executive take the decisions and reasoning of the Constitutional Court into account in practice? Do they address the legislative or regulatory gaps identified – or created - by the Constitutional Court within a reasonable time frame?
iii. Are Constitutional, supreme and ordinary courts under the obligation to implement the decisions of supranational bodies and especially supranational courts? Are there exceptions to this obligation?
iv. When a decision of an ordinary court is overturned following an appeal on grounds of unconstitutionality, is the case reopened and examined by an ordinary court in the light of the arguments put forward by the Constitutional Court?

149. The publication of constitutional court decisions should not be dependent on any intervention by the Prime Minister, the government or any other political body.[177] Decisions of the Constitutional Court on the merits of a case must be binding on all public authorities, including state and local self-government bodies, their officials, as well as natural and legal persons, and implemented in good faith. Failure to execute such decisions constitutes a violation of the supremacy of the constitution. When other state authorities adopt new individual acts, they must take into account the legal reasoning set out in the Constitutional Court's decisions. It is particularly important that the legislature does not disregard the rulings of the Constitutional Court when enacting or amending legislation. When the Constitutional Court has declared a law to be unconstitutional, it precludes the legislature from adopting a new law with an identical content as the one the Constitutional Court has declared to be unconstitutional.

150. The legal consequences of constitutional court decisions annulling normative acts may vary across jurisdictions and often depend on legislative provisions governing their scope.[178] A strict application of the *ex tunc* effect (i.e. retroactive invalidity) may, in certain cases, have significant societal consequences.

151. Many national constitutions contain an obligation to respect international and supranational law. In those cases, national constitutional courts act not only as guardians of the national constitutional principles, but also as guardians of international and supranational law within the national legal order. In the European continent, many constitutional courts are required to implement human rights and other constitutional principles as protected by the ECHR as interpreted by the decisions of the ECtHR. For the member states of the EU, constitutional courts – like any other courts – must respect the rights and obligations stemming from EU law, including the principle of primacy of EU law and, where member states act within

[177] Venice Commission, CDL-AD(2016)026, Poland - Opinion on the Act on the Constitutional Tribunal, para. 82.
[178] Venice Commission, CDL-AD(2010)039rev, Study on individual access to constitutional justice, para. 167.

the scope of EU law, the Charter of Fundamental Rights of the EU.As to the American continent, member states of the Organization of American States which have ratified the American Convention on Human Rights have a duty to apply it at domestic level and, for those who have recognised the jurisdiction of the Inter-American Court of Human Rights (IACHR), a duty to follow its interpretation of the Convention apply. In dualist states different considerations may apply but, depending on the context, relevant domestic courts may be entitled or even obliged to have regard to decisions of supranational bodies in appropriate circumstances.

H. Particular challenges to the Rule of Law

1. Restoration of the Rule of Law

Are the measures aiming to restore the Rule of Law after a period of regression themselves compatible with the overall standards of the Rule of Law?

i. Has a comprehensive diagnosis been made of the reasons and consequences of the Rule of Law regression? Are there short-term and long-term plans for the restorative measures to be taken?
ii. Is the restoration of the Rule of Law based on an intention to implement binding judgments of an international court or non-binding opinions by an international supervisory body?[179] If yes, are all the relevant requirements or recommendations of those entities adequately taken into account?
iii. Are the restorative measures compatible with the basic principles of the constitution?
iv. Do the restorative measures affect the Constitutional Court? If yes, is its role as an independent body and objective arbitrator respected?
v. Is broad public participation ensured in deciding how to restore the Rule of Law?
vi. Is the principle of proportionality respected in resolving conflicts between different interests? Are the subjective rights of the judges taken into account? Do judges whose rights are affected by the restorative measures have accessible legal remedies at their disposal?
vii. Is a departure from basic principles of the Rule of Law such as the principle of legal certainty, the principle of *res judicata* (finality of judgments), and the principle of irremovability of judges, justified by a pressing need and proportionate?

152. Even legal systems that appear stable and robust are not immune to changes that undermine the Rule of Law. Such changes can affect many of the benchmarks defined in this Rule of Law Checklist. Experience has shown that the undermining of judicial independence is, as a rule, the first and crucial factor in such scenarios as independent courts are key guardians of the Rule of Law.

[179] See the Venice Commission's approach in assessing the reform of the Constitutional Court in Poland: "(…) without losing sight of the magnitude of the problem and the context of the reform of the Constitutional Tribunal, it analyses the reform of the Constitutional Tribunal of Poland first and foremost as a measure of execution of the judgments of the ECtHR (…)." (CDL-AD(2024)035, Poland – Opinion on the draft constitutional amendments concerning the Constitutional Tribunal and two Laws on the Constitutional Tribunal, para. 18).

153. It is necessary to have a holistic approach to reforms substantially altering the judicial system, especially when they change the personal composition of the courts. Reforms can be necessary in order to combat flaws in the system, but they themselves must respect core Rule of Law principles. The restoration of the Rule of Law does not necessarily imply a return to the way it was before and should not entail the re-creation of a system that has proven to be vulnerable to being undermined. Instead, any restoration of the Rule of Law must strive to address the very flaws that allowed the regression to occur, in order to build better safeguards for the future.

154. The disproportionate and unjustified interference of the legislative and executive powers in the administration of justice poses a threat to the functioning of the legal system's checks and balances.[180] At the same time, it endangers the protection of individual rights. The ECtHR and the CJEU have for example held that the very essence of the right to a "tribunal established by law" may be jeopardised by serious irregularities in the appointment of judges if these are based on flawed procedures.[181] Reform measures impacting the judges' work may also violate their rights (Articles 6, 8 and 10 ECHR).[182]

155. Given the important role of constitutional courts in preserving the separation of powers and protecting constitutionally guaranteed rights, changes to their composition, competence and working methods should be thoroughly reviewed and should have regard to core Rule of Law principles. While radical measures, even if adopted by a constitutional majority, may seem necessary, this may run the risk of providing arguments and precedent to a future constitutional majority to do the same.[183] Re-building public confidence in the institution of constitutional justice is of paramount importance.[184]

156. Given the importance of judicial independence for the legal system as a whole, the effective restoration of the Rule of Law in cases of regression within a reasonable time must take into account principles such as legal certainty, cf. II.B.1 and II.B.4 above in respect of legitimate expectations, *res judicata*, foreseeability and non-retroactivity, in particular by enacting transitional measures.

157. As already emphasised, any measure taken with a view to restoring the Rule of Law has to meet the overall requirements of the Rule of Law. However, in this context some balancing between different – apparently conflicting – elements of the Rule of Law can be required.[185]

158. When deciding on measures to restore the Rule of Law, it is necessary to consider the severity of the system's flaws, how long the system has been in place, and the extent to which public confidence has been undermined.[186]

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[180] Venice Commission, CDL-AD(2017)031, Poland - Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, para. 129.
[181] See its preliminary ruling in CJEU, C-585/18, C-624/18, C-625/18, *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, 19 November 2019; its Grand Chamber judgment C-791/19, *Commission v. Poland (Disciplinary regime for judges),* 15 July 2021; and its Grand Chamber judgment C-718/21, *L.G.,* 21 December 2023, §§59-62. .
[182] ECtHR, Grzęda v. Poland ([GC], no. 43572/18, 15 March 2022; Tuleya v. Poland, nos. 21181/19 51751/20, 6 July 2023.
[183] Venice Commission, CDL-AD(2024)035, Poland - Opinion on the draft constitutional amendments concerning the Constitutional Tribunal and two laws on the Constitutional Tribunal, para. 34.
[184] *Ibid.*, para. 35.
[185] Venice Commission, CDL-AD(2024)018, Poland - Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law of the Council of Europe on the draft law amending the Law on the National Council of the Judiciary of Poland, para. 31
[186] Venice Commission, CDL-AD(2024)035, Poland - Opinion on the draft constitutional amendments concerning the Constitutional Tribunal and two laws on the Constitutional Tribunal, para. 18.

159. Taking radical measures, such as the dismissal of judges or invalidation of decisions *ex tunc* (from the outset), will require particularly careful scrutiny and safeguards, such as the possibility of judicial review of any decisions affecting individual judges.[187] Otherwise, such measures can erode legal certainty and, in this way, undermine the very objectives they seek to serve.[188] The guiding principle applicable to all restorative measures should be to restore confidence, in the mind of the reasonable and objective observer, as to the independent functioning of the system.

160. For the restoration of the Rule of Law to be effective, it is also essential that the relevant issues are resolved without delay and transparently to minimise any period of uncertainty.[189]

2. Legal and civic education

a. Legal education

To what extent does legal education foster respect for human rights, democracy, and the Rule of Law?

i. Is constitutional law a mandatory part of an undergraduate law degree? Are the subjects of democracy, Rule of Law and human rights obligatory parts of the constitutional law course, as well as being integrated into other appropriate subjects of the law degree, including public international law, EU law, administrative law, criminal procedure (etc.)?[190]
ii. Is undergraduate teaching of law adequately designed to foster the students' abilities to engage in critical thinking?
iii. Is the establishment of new universities and colleges offering law degrees regulated by law? Are there well-functioning internal and external mechanisms of quality control of university legal education?[191]

[187] Venice Commission, CDL-AD(2024)029, Poland - Joint Opinion of the Venice Commission and the Directorate General Human Rights and Rule of Law on European standards regulating the status of judges, para. 22 (and 36); paras. 42-45.
[188] Venice Commission, CDL-AD(2024)035, Poland - Opinion on the draft constitutional amendments concerning the Constitutional Tribunal and two laws on the Constitutional Tribunal, para. 38 and further.
[189] It should be noted that "the need to quickly (re-)establish a fully functioning judiciary may justify some modifications in the application of procedural standards but not, for instance, the complete lack of some form of judicial review, which, arguably, would violate Article 6 of the ECHR" (cf. Venice Commission, CDL-AD(2024)029, Poland - Joint Opinion of the Venice Commission and the Directorate General Human Rights and Rule of Law on European standards regulating the status of judges, para. 36).
[190] For Council of Europe members this would include the Council of Europe legal standards in the areas of democracy, human rights and the Rule of Law, particularly the ECHR. See e.g. the Council of Europe's OCEAN (Open Council of Europe Academic Networks), which unites universities and research institutions from its 46 member States around the shared goal of human rights, democracy and the Rule of Law. For EU member States this would include also relevant principles of EU constitutional law.
[191] See e.g. ECtHR, *Tarantino and Others v. Italy*, nos. 25851/09, 29284/09 and 64090/09, 2 April 2013, §§48-52, where the Court states "the State is justified in being rigorous in its regulation of the sector – especially in the fields of study in question where a minimum and adequate education level is of utmost importance – in order to ensure that access to private institutions is not available purely on the basis of the financial means of candidates, irrespective of their qualifications and suitability for the profession upheld". How each state blends internal and external quality controls is within its margin of appreciation. It is important that whatever external controls are deemed necessary do not become overly bureaucratic and onerous, or a threat to academic freedom.

iv. Do universities and other bodies providing professional education[192] enjoy sufficient safeguards protecting their independence in respect of curricula, academic appointments, student admissions, management[193] and funding?[194]

v. Do universities and/or professional bodies offer continuing education for legal professionals? To what extent are such courses mandatory?[195]

161. A number of international organisations and their institutions have published documents recognising the need for high quality of legal education, e.g. the United Nations, the Council of Europe and the European Parliament.[196] Specifically in the field of human rights, it should be stressed that human rights are understood to be a dynamic concept, as based on the understanding of "international human rights law" introduced with the Universal Declaration of Human Rights in 1948.[197] Such a dynamic concept of human rights requires legal education to keep pace with their development over time.[198] These courses must be taught in accordance with academic freedom, including freedom of research. Academic freedom is explicitly protected in the EU Charter of Fundamental Rights (Article 13), with additionally Article 15, para. 3 of the International Covenant on Economic, Social and Cultural Rights requiring state parties to "respect the freedom indispensable for scientific research and creative activity".[199]

162. There are many different ways of teaching which foster critical thinking, e.g. problem-based teaching in seminars, the Socratic method, legal clinics etc. While lectures still have a role to play in a system of legal education, more interactive teaching methods must also be a significant part of it.

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[192] As law is a professional qualification, other actors – such as bar councils and judicial associations – may legitimately exercise some degree of influence on the content of certain university courses, while respecting academic freedom.

[193] Venice Commission, CDL-AD(2021)029, Hungary - Opinion on the constitutional amendments adopted by the Hungarian parliament in December 2020, para. 65.

[194] Academic freedom is legally grounded in various recognised rights such as the right to education and the freedom of expression. See further on academic freedom e.g. Report of the Special Rapporteur on the right to education, Farida Shaheed, A/HRC/56/58, 24 June 2024. It has both an institutional and a personal dimension and applies both inside the academic community and outside the academic community, including with the public.

[195] See e.g. Council of Europe Recommendation No. R(2000)21 on the freedom of exercise of the profession of lawyer, II.2: "[a]ll 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 and to provide for the continuing education of lawyers".

[196] United Nations Basic Principles on the Role of Lawyers, para 9 (1990); United Nations Declaration on Human Rights Education and Training (2011); Council of Europe Recommendation Rec(2004)4, on the European Convention on Human Rights in university education and professional training; Recommendation CM/Rec(2010)7 on the Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education; The Council of Europe's HELP (Human Right Education for Legal Professionals) programme; European Parliament resolution on legal professions and the general interest in the functioning of legal systems, P6_TA (2006) 0108, 23 March 2006; UNESCO, World Programme for Human Rights Education.

[197] As different from – for example – earlier concepts of "rights of man" or "rights and duties of man and citizen".

[198] For example, Article 1 ECHR on the obligation to respect human rights is a continuing obligation, meaning that, where necessary, a state is under an obligation to amend its laws to bring them into line with the requirements of the Convention, as laid down by an ECtHR judgment. States must also take judgments affecting other states – not simply judgments against their own state – into account (see e.g. ECtHR, *Opuz v. Türkiye*, no. 33401/02, 9 June 2009, §163).

[199] As outlined by the ECtHR: "academic freedom (…) should guarantee freedom of expression and of action, freedom to disseminate information and freedom to conduct research and distribute knowledge and truth without restriction" (*Kula v. Turkey*, no. 20233/06, 19 June 2018, § 38). See also *Sorguç v. Turkey*, no. 17089/03, 23 June 2009, §35, *Lombardi Vallauri v. Italy*, no. 39128/05, 20 October 2009, §43.

b. Civic education

To what extent is the public educated about the importance of human rights, democracy, and the Rule of Law? i. To what extent does school education emphasise the importance of the issues of democracy, human rights and the Rule of Law to society? ii. Do civil society organisations, including lawyers' associations, participate in public debate on the Rule of Law and human rights?

163. Experience shows that the Rule of Law, like any other constitutional value, must be sustained by a robust and common shared culture. Written principles are not self-sufficient. For institutional safeguards to function properly, constitutional and ethical values must be embedded in the established practice of legal professionals (judges, prosecutors, legal practitioners in both state employment and private practice) and those holding public office. The internal aspect of judicial independence in particular is dependent upon proper teaching and mentoring. More generally, an efficient and effective system of public administration that respects Rule of Law standards both depends upon, and builds, social capital.[200] Primary and secondary school education promoting the importance of human dignity and the rights and freedoms of individuals are of particular importance in building a peaceful society in which minority and individual rights are safeguarded from unjustified interference by majoritarian rule. Conversely, where the population does not have confidence in the administration of justice or public administration and is not aware of the importance of respect for human rights and the Rule of Law, the risk of democratic and Rule of Law regression is great. Consequently, civil society organisations, including lawyers' associations (Bar Councils etc.) should have the opportunity to, and should strive to, educate the public about these values. Moreover, a robust civic education for all citizens, especially the youth, are integral components of a rule-of-law-based institutional framework.[201]

[200] See, e.g. Bo Rothstein, Dietlind Stolle, The Quality of Government and Social Capital: A Theory of Political Institutions and Generalized Trust, QoG WORKING PAPER SERIES 2007:2.
[201] See, e.g. the Venice Commission, The Rule of Law: A User Guide (2025); and, the European Commission's animations explaining the Rule of Law