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in co-operation with
THE CONSTITUTIONAL COURT OF BELARUS

INTERNATIONAL CONFERENCE

**“THE ROLE OF CONSTITUTIONAL REVIEW BODIES
IN ENSURING THE RULE OF LAW IN RULE-MAKING
AND LAW-ENFORCEMENT”**

Minsk, Belarus

27-28 April 2017

REPORT

**“MEASURING THE IMMEASURABLE:
THE VENICE COMMISSION’S RULE OF LAW CHECKLIST”**

by
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Chairman,
Honourable judges,
Your Excellencies,
Ladies and Gentlemen,

It is a pleasure for me to participate on behalf of the Venice Commission of the Council of Europe in this conference devoted to “Ensuring the Rule of Law in Rule-making and Law-enforcement”. It is a topic which is very close to the core business and interests of the Venice Commission. According to Article 1 of its Statute,¹ one of its main objectives is indeed promoting the rule of law and democracy, and work concerning the constitutional, legislative and administrative principles which serve the principle of the rule of law should be given priority.

The Commission stressed in its report of 2011² that “the Rule of law requires a system of certain and foreseeable law, where everyone has the right to be treated by all decision-makers with dignity, equality and rationality and in accordance with the laws and to have the opportunity to challenge the decisions before independent and impartial courts through fair procedures.”

The Venice Commission has therefore clearly rejected the merely formal conception of the rule of law, that requires only that governmental action should be backed by law or, in other words, that it is sufficient that government acts through laws. Such an understanding of the rule of law – which may be resumed by formulas such as “the rule of the law”, or “rule by law” – cannot contribute to restraining abuse or misuse of power, which – instead – is one of the main purposes that the rule of law is meant to serve.³

The rule of law is intertwined and is partly overlapping with the two other core values of the Council of Europe:⁴ firstly, the protection of individual human rights from arbitrary and excessive interferences – and secondly, the promotion of democracy as involvement of the people in the decision-making process in a society. The rule of law promotes democracy by establishing accountability of the public powers, and enhances human rights protection by demanding procedural safeguards and by protecting minorities against arbitrary majority rules.

The rule of law pertains both to the structure of the state and to the functioning of its institutions, in particular to the manner in which its main principles are implemented. Even when constitutional and legislative reforms are needed and as important as they may be, pending these reforms it is already possible to implement and improve the rule of law through an appropriate interpretation of the manner in which the institutions are to perform their tasks.

¹ Resolution RES (2002) 3 Adopting the Revised Statute of the European Commission for Democracy through Law, CDL(2002)027-e.

² Venice Commission, Report on the Rule of law, CDL-AD(2011)003rev-e

³ Report on the Rule of law, para. 15.

⁴ The Rule of Law is mentioned in the Preamble of the Statute of the Council of Europe as one of the three “principles which form the basis of all genuine democracy”, together with individual freedom and political liberty.

Ensuring the implementation of the rule of law is the task of parliament, of the executive, of the judiciary and of constitutional courts. Law-making and law-enforcement have to comply with the principle of the rule of law in order for the purposes of the public authorities to be implemented in the frame of law, avoiding arbitrariness and discrimination.

Parliaments operate the main legislative choices, but the interpretation and application of the law is a prerogative of the executive branch of the State, and also of the judges, when – according to the principle of the rule of law – the law requires – for instance – their intervention to check the conformity with the law of an executive action of the Public Administration affecting private interests, or to settle conflicts between citizens.

The law has to be interpreted in view of its application in conformity with the rule of law. Law-makers also need to leave some discretion to the executive bodies of the States and to the judges. But the exercise of administrative or judicial discretion needs to be framed with due respect for the yardstick of the rule of law, notably the principle of legality, as explained in particular in the case-law of the European Court of Human Rights.

As a fundamental constitutional principle, the rule of law is inherent in every constitutional issue. Constitutional courts are the predominant guardians of the constitution as the supreme law. Within the framework of their constitutional competence, they ensure the respect for – and the implementation of – national constitutions and therefore have a strong influence on shaping the content of the principle of the rule of law in their country. The role of constitutional courts in strengthening the rule of law is the topic of today's conference and, as you know, it will also be explored in detail at the next Congress of the World Conference on Constitutional Justice, which will be held in Vilnius in September 2017.

Ensuring the application of the rule of law is also the task of the private individuals. Participation of the citizens in the strengthening of the rule of law is thus paramount. That is what the Venice Commission calls an “enabling environment”. Mr Miklashevich, President of the Constitutional Court of Belarus, also referred to a “constitutional responsibility” of individuals. The rule of law can only flourish in an environment where people feel collectively responsible for its implementation.

Chairman,
Ladies and Gentlemen,

Reference to the principle of the rule of law has found its way into basically all modern constitutions⁵ and into the main political documents of the United Nations, the Council of Europe and other international organisations. It has become the cornerstone of every legal system in the modern world.

But, if it is true that its importance has increasingly been stressed at both national and international levels, its actual implementation has somewhat escaped a systemic and coherent approach based on international standards. Working towards strengthening the rule of law and assessing the level of compliance with it has proved somehow difficult. This

⁵ Constitution of Belarus, Preamble and Section 1, Principles of the Constitutional System, Article 1. The Republic of Belarus is a unitary, democratic, social state based on the Rule of law

difficulty in moving from a theoretical consecration to a fully-fledged application of the principle of the rule of law has stemmed in the first place from the difficulty to determine its exact content. Doctrinal debates on the differences and possible convergences between the traditional concepts of rule of law, *Rechtstaat* and *Etat de droit* have not helped operationalise the rule of law. The Venice Commission itself devoted considerable time and energy to finding an acceptable definition, and finally reached the conclusion that the rule of law was indefinable. No traditional definition would be totally acceptable in both continental Europe and in common-law countries.

There is no international treaty providing for a definition of the rule of law, there is no treaty mechanism to monitor it, at least not specifically.

What to do, then?

The Venice Commission proceeded from the conviction that a definition is not indispensable from a functional perspective, provided however that the core content of the rule of law is respected.

For this reason, the Commission has abandoned its defining efforts and instead has concentrated on determining the core elements of the rule of law, which in its Rule of Law Checklist⁶ it has found to be:

- Legality
- Legal certainty
- Prevention of abuse/misuse of powers
- Equality before the law and non-discrimination.
- Access of Justice.

There are certainly other specific challenges to the rule of law; the Venice Commission has singled out two topical ones: these are 1) corruption and conflict of interest – we have heard from Mr Mitskevich that the fight against corruption is a priority of Belarus – and 2) collection of data and surveillance.

- The **principle of legality** is at the basis of every established and well-functioning democracy. It entails the supremacy of the law, namely the fact that State action must be in accordance with – and authorised by – the law. The law should establish the relationship between international and national law and should set out the cases in which exceptional measures may be adopted to derogate from the normal regime of protection of citizens' rights.

- **Legal certainty** prescribes the accessibility of the law. The law must be certain, foreseeable and easy to understand. Basic principles such as *nullum crimen sine lege/nulla poena sine lege*, or the non-retroactivity of the criminal law are essential protections flowing from the principle of legal certainty.

⁶ Venice Commission, Rule of Law checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), CDL-AD(2016)007.

- **Preventing the abuses of powers** means having in the legal system safeguards against arbitrariness; providing that the discretionary power of the officials is not unlimited, and it is regulated by law.
- **Equality before the law** is probably the principle that most embodies the concept of rule of law. It is paramount that the law guarantees the absence of any discrimination on grounds such as race, sex, colour, language, religion, political opinion, birth, political power and so on. Similar situations must be treated equally and different situations differently. Positive measures may be allowed as long as they are proportionate and necessary.
- **Access to justice** implies the presence of an independent and impartial judiciary and the recognition of the right to have a fair trial. The independence and the impartiality of the judiciary are central to the public perception of justice and thus to the achievement of the classical formula: “justice must not only be done, it must also be seen to be done”. In countries where **constitutional justice** is provided, the rule of law demands that there should be effective access to the constitutional court, and that parliaments and the executive take into account the arguments used by the constitutional court and abide by its judgments. We have heard this morning notably from Mr Kokotov that this matter is a rather complex and sensitive one.
- Some particular actions and decisions can hinder and weaken the rule of law. It could be the case of corruption for example, with the presence of weak criminal system to fight bribes, grafts and misuse of public money. But, also the conflict of interest between a public office and private gains.

Chairman,
Ladies and Gentlemen,

If it is indefinable, is the rule of law also immeasurable? Can its implementation be quantified at all? How would this be possible, notwithstanding that – admittedly – there exist different manners of realising the rule of law, depending on the local context, notably the prevailing constitutional order and traditions but also on the historical, political, social and geographical context of the country concerned?

Thanks to the Venice Commission’s Checklist, the level of compliance with the rule of law becomes – to a certain extent – measurable. The common core elements which have now been identified are valid everywhere, they do not depend on the domestic context. In the Checklist, they have been sub-itemised into detailed benchmarks based on identified European and international standards. The source of each requirement becomes apparent. Overall, in abstract, these benchmarks provide a radiography of the ideal, rule-of-law-compliant state.

A list of sources of verification is further provided. Through them, the benchmarks stop being abstract and become real. The result of this process is a picture of the state of the rule of law in the given country, in a given moment.

Admittedly, however, the Checklist only provides a measure for legal safeguards. It does not purport to measure benchmarks relating to the practice, with only few exceptions. Also, the

Checklist is neither exhaustive nor final: there might be further issues coming up in the future deserving attention.

With these caveats, the Checklist aims to enable an assessment which is

- *thorough*, by dealing with all the core dimensions of the rule of law.
- *objective and transparent*, referring explicitly to the national and international standards, including the case-law of the European Court of Human Rights, which are to be used for the assessment.
- *equal*: the same benchmarks and standards are applied in every situation, to any country.

The Checklist should not be applied mechanically. The assessment should not merely consist of counting the right answers; it should not be the arithmetic sum of ticked boxes. The Checklist is intended to provide a global overview of the situation, while focusing on the most important criteria.

The checklist enables and indeed aims at an individualised assessment. But, assessments carried out by different countries, thanks to recourse to the same, detailed benchmarks and sources of verification, become comparable.

Who should carry out this assessment? While it may certainly be used by international bodies, monitoring bodies and the Venice Commission,⁷ the Checklist is primarily meant for the institutions of each country: parliament, the executive, the judiciary the constitutional court, which have the primary task of ensuring the implementation of the rule of law. The Checklist is designed to provide a clear picture of how things *are*, against the background of how things *should be*. And it gives leads as to how improve them.

Chairman,
Ladies and Gentlemen,

The rule of law is not “all or nothing”. There can hardly be countries where it is fully realised and countries where it does not exist at all. The rule of law is achieved through successive levels, in a progressive manner. Full achievement remains an ideal, an ongoing task even in well-established democracies. But, the lower the level of compliance with the rule of law, the greater the demand and the need for it.

Compliance with the rule of law is a priority of our times, and should be pursued and enhanced, on structural matters or on matters of institutional functioning.

⁷ The Venice Commission has used the Checklist, since its adoption, in several of its assessments of draft constitutional and legislative reforms: Opinion on the Draft Constitutional Law on "Protection of the Nation" of France, CDL-AD(2016)006; Opinion on the Legal Framework governing Curfews in Turkey, CDL-AD(2016)010; Amicus Curiae Brief for the Constitutional Court of the republic of Moldova on the Right of Recourse by the State against Judges Republic of Moldova, CDL-AD(2016)015; Opinion on the Amendments to the Law on elections regarding the exclusion of candidates from party lists in Ukraine, CDL-AD(2016)018; Opinion on the Act on the Constitutional Tribunal of Poland, CDL-AD(2016)026; Opinion on the suspension of the second paragraph of Article 83 of the Constitution (parliamentary inviolability) in Turkey, CDL-AD(2016)027-e; Joint Opinion on the Electoral Code of "the former Yugoslav Republic of Macedonia", as amended on 9 November 2015, CDL-AD(2016)032; Opinion on Emergency Decree Laws N°s 667-676 adopted following the failed coup of 15 July 2016 in Turkey, CDL-AD(2016)037.

We believe that the Checklist may assist in this endeavor and accompany in this process.

Thanks for your attention.