

YEREVAN INTERNATIONAL CONFERENCE

The role and significance of the Rule of Law Checklist and The role of Constitutional Court in overcoming legal gaps and legal uncertainty

Yerevan, 21-22 October 2016

Presentation by Mr Philippe Boillat
Director General for Human Rights and Rule of Law
Council of Europe

Mr President of the Constitutional Court of Armenia,
Presidents of Constitutional and Supreme Courts,
Esteemed and Honourable Judges,
Excellencies,
Ladies and Gentlemen,

This morning we already had occasion to discuss the importance of the Venice Commission's Rule of Law Checklist and the rule of Law in general.

While the Rule of Law is a universal concept, the Council of Europe has identified key components of this fundamental principle to provide guidance for its 47 member States. Building on the work done within the Council of Europe, the Venice Commission's Checklist is an essential tool to advance this important task of our Organisation.

The rule of law is one of the founding principles of the Council of Europe together with democracy and the protection of human rights. Since its adoption by the Venice Commission in March of

this year and its endorsement by the Committee of Ministers last month, we have used the Checklist actively in the programmes throughout our member States.

As Mr Helgesen explained, the Checklist develops the Venice Commission's Report on the Rule of Law adopted in 2011.¹ This Report in turn was able to build on earlier work carried out at the Council of Europe. In fact, the Rule of Law has been systematically referred to in the major documents of the Council of Europe.

The most important reference to the rule of law is the Preamble to the Statute of the Council of Europe, which underlines the "devotion" of member States "to the spiritual and moral values, which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy". Here already we can see the close link between the rule of law and democracy.

Another cornerstone is the Preamble to the European Convention on Human Rights, which states that "the governments of European countries ... are like-minded and

¹ CDL-AD(2011)003rev, [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2011\)003rev-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e).

have a common heritage of political traditions, ideals, freedom and the rule of law”.

The Declarations and Action Plans of the three summits of Heads of State and Government of the Council of Europe reaffirmed the commitment of the Member States and the Council itself to these basic values.

Resolution 1594 (2007) of the Parliamentary Assembly of the Council of Europe on “The principle of the rule of law” of November 2007 explains terminological problems, notably in languages other than English and insists that the “rule of law” should be translated into French as “prééminence du droit” rather than “prééminence de la loi”. [As Mr. Holovathy explained this morning,] This distinction is essential in order to emphasise the material aspect of the rule of law. It is not enough to apply any law, the quality of the law and the manner in which it was adopted are essential guarantees for the individual and society as a whole.

In its Report on the Rule of Law, the Venice Commission also warned against a formalistic concept of the rule of law that would merely require that an action of a public official be based on law.

“Rule by Law’, or ‘Rule by the Law’, or even ‘Law by Rules’ are obvious distorted interpretations of the Rule of Law.”²

While there is no final definition of the rule of law – and it is probably not possible to have consensual definition at international level –, in its Checklist, the Commission identified core elements of the rule of law that go much further than such a formalistic approach would allow. These core elements are:

- (1) Legality, including a transparent, accountable and democratic process for enacting law;
- (2) Legal certainty – one of the main topics of our Conference today;
- (3) Prevention of abuse of powers and prohibition of arbitrariness;
- (4) Equality before the law and non-discrimination and
- (5) Access to justice before independent and impartial courts, including fair trial.

In 2008, the Committee of Ministers summarised the work of the Council of Europe in its document “The Council of Europe and the Rule of Law”³, which reaffirms that the rule of law is part of the core mission of the Council of Europe. This document did not attempt to provide a definition of the rule of law, but it showed

² CDL-AD(2016)007, Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), Endorsed by the Committee of Ministers of the Council of Europe at the 1263th Meeting of the Ministers’ Deputies (6-7 September 2016), par. 15.

³ http://www.coe.int/t/dghl/standardsetting/minjust/mju29/CM%20170_en.pdf.

that the rule of law is a driving force for the work of the Council, even if this is not always done under the explicit “rule of law” heading⁴

In fact, the Council of Europe “works pragmatically on a daily basis to promote and strengthen the rule of law in and among its member states” as the Committee of Ministers pointed out⁵.

The Council of Europe’s approach builds on several key aspects, such as the prohibition of arbitrariness, the right to seek redress from independent judges in open courts, legal certainty or equality of all before the law to cite but a few.⁶

The explicit references to the rule of law by the Committee of Ministers and the Parliamentary Assembly are indeed only the tip of the iceberg. The commitments by the Council of Europe’s Member States to the rule of law are the basis for the work of the Council on the rule of law and its constituent principles.

The Council of Europe promotes the rule of law not only in its work in the Judiciary, but also in specific fields of action. One of them is the fight against corruption. Corruption is the very denial of the rule of law and has to be fought at all levels.

⁴ See The Council of Europe and the Rule of Law - An overview - CM(2008)170, 21 November 2008, para. 22.

⁵ *Ibid.*, par. 29.

⁶ *Ibid.*, paras. 29-30.

Numerous instruments help our Member States in this fight, for instance our Criminal⁷ and Civil⁸ Conventions against Corruption, but also various other documents by the Committee of Ministers and the Group of States against Corruption (GRECO).⁹

Another field where the Council's work directly relates to the rule of law is the collection of data and surveillance, for instance. The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data¹⁰ provides rule of law guarantees in this important field.¹¹

We also find a rich source of practical guidance on the rule of law in the case-law of the European Court of Human Rights. The Court held that the rule of law is inherent in all parts of the Convention¹², starting from the principle of legality and notably by developing the principles of fair trial, legal certainty, the

⁷ <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/173>.

⁸ <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/174>.

⁹ Council of Europe, Recommendation CM/Rec(2000)10 of the Committee of Ministers to members States on codes of conduct for public officials, <https://wcd.coe.int/ViewDoc.jsp?id=353945&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>; CM/Res (97) 24 on the twenty guiding principles for the fight against corruption, <https://wcd.coe.int/ViewDoc.jsp?id=593789&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>, Group of States Against Corruption (GRECO), Immunities of public officials as possible obstacles in the fight against corruption, in Lessons learned from the three Evaluation Rounds (2000-2010) - Thematic Articles https://www.coe.int/t/dghl/monitoring/greco/general/Compendium_Thematic_Articles_EN.pdf.

¹⁰ <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108>.

¹¹ See also ECtHR, *Iordachi and Others v. Moldova*, 10 February 2009.

¹² ECtHR *Stafford v. United Kingdom*, 28 May 2002, para. 63.

separation of powers and the independence of the judiciary, and equality before the law.

In the famous judgment *Golder v. UK* of 1975, for instance, the Court stated that “one can scarcely conceive of the rule of law without there being the possibility of having access to the courts.”¹³ This does not only relate to procedural aspects. The reference to the rule of law by the Court as being inherent in all articles of the Convention gives it a substantive nature.

A key element of the rule of law is legal certainty – our second topic today - , which relates to a series of issues addressed in the Checklist: the publication of laws, the accessibility of legislation and court decisions, the stability and consistency of the law, legitimate expectations, non-retroactivity, *nullum crimen sine lege* and *nulla poena sine lege* and *res judicata*.

The need for legal certainty does not mean that discretionary power must be excluded altogether. Legislation that confers discretion to a state authority must indicate the scope of that discretion and it is essential that there is a procedure to prevent arbitrariness.¹⁴ The Yerevan Conference in October 2013 dealt in detail with the limits of discretionary power.

¹³ *Golder v. UK* (1975) 1 EHRR 524, para.34; See also *Philis v. Greece* (1991), Series A No. 209, para. 59.

¹⁴ The Council of Europe and the Rule of Law - An overview, CM(2008)170 21 November 2008, see para. 46.

Legal certainty requires that legislation is sufficiently *clear and precise*, and aims at ensuring that situations and legal relationships remain foreseeable. The rule of *res judicata* requires that final judgments cannot be called into question, but that they are enforced.¹⁵

In all these aspects, the role of an independent Judiciary, as the guarantor of justice, is essential in a State based on the rule of law.¹⁶ It is vital that the judiciary properly use its powers to determine which laws are applicable to the case, to resolve questions of fact, and to apply the law to the facts in a logical, reasoned and comprehensible manner.¹⁷

The cornerstone of the Council of Europe's standards on independence of the Judiciary are set out in Recommendation CM/Rec(2010)12 of the Committee of Ministers.¹⁸

¹⁵ This does not exclude, of course, the right to apply to an international court complaining that the final domestic judgment is in violation of an international legal obligation.

¹⁶ The Council of Europe and the Rule of Law - An overview, CM(2008)170 21 November 2008, see para. 39.

¹⁷ Rule of Law Inventory Report, Hague Institute for the Internationalisation of Law, Discussion Paper for the High Level Expert Meeting on the Rule of Law of 20th April 2007, p. 16.

¹⁸ Recommendation CM/Rec(2010)12 of the Committee of Ministers to member States on judges: independence, efficiency and responsibilities, <https://wcd.coe.int/ViewDoc.jsp?id=1707137>; see also the Venice Commission's Report on the Independence of the Judicial System Part I: The Independence of Judges, CDL-AD(2010)004, [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2010\)004-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)004-e) and its Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, CDL-AD(2010)040, [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2010\)040-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)040-e); Report on Judicial Appointments, CDL-AD(2007)028, <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282007%29028-e>.

The European Commission for the Efficiency of Justice of the Council of Europe also examines¹⁹ the complex relationship between judicial independence and judicial accountability and assists the Council of Europe's Member States in improving the quality of their judicial systems. The opinions of the Consultative Council of European Judges²⁰ provide important guidance in this respect from the viewpoint of the judges themselves.

[The position of the prosecution is essential for the functioning of the whole judicial system.²¹ Through its opinions, the Consultative Council of European Prosecutors contributes to the work of the Council on the rule of law.²²]

¹⁹ Monitoring and Evaluation of Court System: A Comparative Study (2007), http://www.coe.int/t/dghl/cooperation/cepej/series/Etudes6Suivi_en.pdf

²⁰ http://www.coe.int/t/dghl/cooperation/ccje/textes/Avis_en.asp.

²¹ Recommendation CM/Rec(2000)19 of the Committee of Ministers to member States on the role of public prosecution in the criminal justice system, <https://wcd.coe.int/com.intranet.InstraServlet?command=com.intranet.CmdBlobGet&IntranetImage=2719990&SecMode=1&DocId=366374&Usage=2> and Recommendation CM/Rec(2012)11 of the Committee of Ministers to member States on the role of public prosecutors outside the criminal justice system,

<https://wcd.coe.int/ViewDoc.jsp?id=1979395&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>

²² http://www.coe.int/t/dghl/cooperation/ccpe/opinions/default_en.asp.

Mr President,

It is the highest courts in our member States, the Constitutional Courts and Supreme Courts, that have a particular responsibility for upholding the rule of law and for acting as a transmitter between the European Court of Human Rights and the lower national courts. It is by way of example that the highest courts can lead the whole judicial system in the pursuit of the protection of human rights and the rule of law.

Sound legal reasoning - linking established facts to the applicable legal provisions - is not only a human right of the individual; it is the essence of the work of the judge and as such the foundation of the rule of law.

We have seen too many judgments where such reasoning was absent, judgments being composed of a recitation of legal provisions, followed by the dispositive part, a decision for one party or the other, without any real reasoning. It is the role of the highest courts to “teach” lower courts how to reason their judgments, and to do so by referring to the case-law of the European Court of Human Rights, where appropriate.

Mr President,
Excellencies,
Ladies and Gentlemen,

As we have seen, the Council of Europe actively contributes to the implementation of the rule of law in numerous fields. The Venice Commission's Checklist is a practical tool not only for the Council of Europe, but for anyone who wants to improve the state of the rule of law: Members of Parliament, ministries of justice and other government bodies, but also civil society and international organisations.

Nevertheless, it is the highest courts - Constitutional Courts and Supreme Courts - that have a particular responsibility in ensuring the rule of law. By way of example, through properly reasoned judgments, referring where appropriate to the judgments of the European Court of Human Rights, they can advance the rule of law in their countries.

Thank you for your attention.