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**DRAFT REPORT
ON THE RULE OF LAW**

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I. Introduction

1. The concept of the “rule of law” along with democracy and human rights¹ makes up the three pillars of the Council of Europe.
2. The concept of the rule of law is enshrined in a number of international human rights instruments and other standard-setting documents.
3. The present study follows Resolution 1594 (2007) of the Parliamentary Assembly of the Council of Europe on “The principle of the rule of law” (see in particular par. 6.2 which refers to the Venice Commission). Its purpose is to look for a consensual definition of the rule of law which may help international organisations in completing their task of disseminating this fundamental value. This definition should therefore be of a normative nature.
4. It has first to be underlined that there may be terminological misunderstandings. The “Rule of law” is not synonymous with a “Rechtsstaat” or an “Etat de droit” – the statute of the Council of Europe uses, in French, the terms “prééminence du droit”. Nor is the “Rule of law” the “Rule of the laws/of the statutes”, as translated into Russian (*verkhonstvo zakona*), which gave rise to a very formalistic interpretation.
5. This report aims also to reconcile the notions of “rule of law”, “Rechtsstaat” and “Etat de droit”.
6. *The present report was adopted by the Venice Commission at its ... plenary session (...).*

II. Historical origins, Rule of law, Etat de droit and Rechtsstaat

7. The qualities embodied in the rule of law have been propounded for centuries and go back to antiquity. The modern concept of the rule of law was brought to attention in particular by the British constitutional lawyer Professor A.V. Dicey in his *Introduction to the Study of the Law of the Constitution* (1885).
8. Dicey believed that there were two principles which were inherent in the non-codified British constitution. The first, and primary principle, was the “sovereignty or supremacy of Parliament” (thus endorsing the notion of representative government as the main feature of a democratic state). The second principle, which tempered the first (but in the UK context could not override it) was the rule of law.
9. Dicey therefore saw the rule of law as a constraint (although not ultimate control) of the theoretically unlimited power (in the British context) of the state over the individual. For him the rule of law principle resulted from the existing common (judge-made) law over the years (and was not necessary therefore to be codified in any written constitution). For Dicey the rule of law had three core features: First, that the law be applied equally – irrespective of wealth or class or whether or not the person was a public official. Second, that the law be certain and prospective, so as to guide peoples’ actions and transactions and not to permit them to be punished retrospectively.
10. Dicey’s third feature of the rule of law was more controversial; that any discretionary power would inevitably lead to the “arbitrary” exercise of power.²

¹ Statute of the Council of Europe (ETS no. 001), in particular preamble and Article 3.

² On the issue, see Jeffrey Jowell, *The Rule of Law and its Underlying Values*, pp. 6-7, and references, in *The Changing Constitution*, edited by Jeffrey Jowell and Dawn Oliver, 6th edition, Oxford University Press 2007; Kaarlo Tuori, *The Rule of Law and the Rechtsstaat*, in *Ratio and Voluntas* (to be published by the end of 2010), chapter 7,

11. In the first half of the twentieth century the rule of law became a highly contested concept as Dicey's opposition to discretionary power was portrayed by the architects of the "welfare state" as driven by his opposition to government intervention. Discretion was rightly seen as necessary for the decision-making required in an increasingly complex society.

12. From the middle of the twentieth century, the rule of law became reconciled to discretionary power, by permitting that power to be exercised, but still insisting that it be exercised in accordance with the letter as well as the purpose of the power-conferring law, and that it be exercised in accordance with the other elements of the rule of law, namely, certainty, equality of application of law; access to courts to challenge decisions, and that the courts apply fair procedures before an impartial and independent court, and in a way that is not arbitrary (or is rational or not unreasonable).

13. The rule of law as developed in that way includes procedural obligations (such as a fair hearing before an impartial and independent tribunal) as well as substantive obligations (access to justice; legal certainty; equal application of the law; respect for human rights).

14. The *Rechtsstaat* concept focuses, by definition, much more on the nature of the state. Whereas the rule of law emerged from courtrooms, the *Rechtsstaat* emerged from written constitutions³. The main theorist of this notion was Robert von Mohl (1831). The *Rechtsstaat* was defined in opposition to the absolutist state, which implies unlimited powers of the executive. Protection against absolutism had to be provided by the legislative power, rather than by the judiciary.

15. The old concepts of the *rule of law* as well of the *Rechtsstaat* were rather often *formal* in nature, in a positivist approach, especially after the failure of the 1848 revolution,⁴ whereas more recent concepts include *e.g.* human rights in the definition of these concepts, making it a substantive one, often reintroducing the idea of natural law without saying it.

16. The French approach of *Etat de droit* (which followed the very positivistic concept of *Etat legal*) is not completely the same. It puts less emphasis on the nature of the state, which it considers as the guarantor of fundamental rights enshrined in the Constitution against the legislator. As developed at the beginning of the 20th Century by Carré de Malberg, the *Etat de droit* actually implies (judicial) constitutional review of ordinary legislation.⁵

17. Without entering into the details of the concepts of the various authors or even of the various documents drafted by international organisations (to be addressed below), it is possible to summarise the elements included in the various definitions of the rule of law.⁶ The present report will start with the elements that are universally recognised and continue with aspects that are rarely considered as been essential to the concept, and end with those that are retained only by some authors and/or texts. The first elements are included in the narrow or formal definitions, whereas the latter ones result from a broad or material (substantive) approach.

pp. 8ff; see also Erik O. Wennerström, *The Rule of Law and the European Union*, Uppsala: Iustus Förlag 2007, pp. 61 ff.

³ Wennerström, p. 50.

⁴ On the origin of the idea of *Rechtsstaat*, see Kaarlo Tuori, *The Rechtsstaat*, in particular pp. 4 ff.

⁵ See in particular Wennerström, pp. 73 ff.

⁶ Wennerström, pp. 93 ff.

18. 1) Rule by law, which simply means that the law is used as the instrument of government action.

2) Formal legality, which is indifferent toward the substance of the law

3) Democracy and legitimacy; democracy here is a procedural notion

4) Protection of individual rights (the narrowest substantive version)

5) Right of dignity/and or justice

19. In brief, there is a scale that begins with the most restrictive definitions of the rule of law (the most formal ones) and ends with the broadest ones (the most substantive ones). There is no strong dichotomy between formal and substantive definitions, but a variety of elements which may be included in such definitions, whose variety may in turn be very broad.

20. These various aspects apply *mutatis mutandis* to the *Rechtsstaat*.

21. *Rule of law* on the one hand, *Rechtsstaat* and *Etat de droit* on the other, are indeed different concepts, but their development throughout time led to them having more and more common features. For example, *rule of law* was developed in an environment of *common law*, judge-made law – but it had to deal with the parallel concept of sovereignty of Parliament (and thus with the importance of statutes adopted by Parliament). On the other hand, *the Rechtsstaat* and *Etat de droit* concepts focus on the role of formal statutes and of the Constitution, but, in their modern form, they also insist on constitutional review, which has to be made in principle by judges.

III. Rule of law in positive law

a. *International law*

22. In positive law, the concept of the *rule of law* can be found at the national as well as at the international level. The most important documents in this respect are international treaties. The next paragraph will first address the texts drafted by several international and supranational organisations before turning to examples of national law.

23. For the *Council of Europe*, the most important references to the rule of law are found in :

- 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”;
- the Preamble to the European Convention on Human Rights, which states that “the governments of European countries ... are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law”.

24. In both cases, the expression “rule of law” was translated into French by “*prééminence du droit*” and not by “*Etat de droit*”.

25. The problem of the quotation of the rule of law (or the *Rechtsstaat*, or the *Etat de droit*) in normative texts is that it is not defined in these texts. This does not mean that it is not a legal concept, but the definition is found in non-binding documents or in practice. The problem is that the notion of the rule of law looks as if it were adapted *ad hoc* to each specific situation.

26. For example, when addressing the issue of “the rule of law as part of the core mission of the Council of Europe”, the Committee of Ministers of the *Council of Europe* quoted a number of documents referring to such concept, but it also noted that “the foregoing overviews are not sufficient to allow the drawing up of a list of key rule of law requirements accepted by the

Council of Europe, let alone a definition”.⁷ This leads the document to state that “the Organisation works pragmatically on a daily basis to promote and strengthen the rule of law in and among its member states”. There appears, however, to be a consensus on including, in the rule of law, prohibition of arbitrariness, the right to seek redress from the courts, the separation of powers, legal certainty and equality of all before the law.⁸

27. Neither does Resolution 1594 (2007), titled “The principle of the rule of law”, adopted by the Parliamentary Assembly of the Council of Europe on 23 November 2007, clarify the content of the principle.

28. More can be found in the case-law of the European Court of Human Rights. The Court considers that the rule of law is a concept inherent in all articles of the Convention (and uses not only the terms “*prééminence du droit*”, but also “*Etat de droit*” in French).⁹ The case-law of the European Court of Human Rights, as summarised in the already mentioned report drafted in the framework of the Swedish Chairmanship of the Committee of Ministers (CM(2008)170), applies the notion of the rule of law to a number of issues, with a rather formal approach, starting from the principle of legality in the narrow sense, but developing various aspects of (procedural) due process and legal certainty as well as separation of powers later, including the judiciary, and equality before the law. The reference to the rule of law as inherent in all articles of the Convention gives it, however, a substantive nature too.

29. In the *United Nations*, the notion, which already appears in the Preamble to the Universal Declaration of Human Rights, is used to promote a number of principles which vary according to the specific context. A comparison between two reports drafted at short intervals (2002 and 2004) shows this variety of approach; the first one insists for example on an independent judiciary, independent human rights institutions, defined and limited powers of government and fair and open elections, whereas the second focuses, in a more classical way, on quality of legislation, supremacy of law, equality before the law, accountability to the law, legal certainty, procedural and legal transparency, avoidance of arbitrariness, separation of powers etc.¹⁰ A 2005 Resolution of the UN Human Rights Commission focuses on the separation of powers, the supremacy of law and the equal protection under the law.¹¹ A very broad definition of the rule of law had been offered by former UN Secretary-General Kofi Annan. In his 2004 report it says: “The “rule of law” [...] refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”¹²

30. Amongst regional organisations, it is worth mentioning in particular the OSCE. The main elements of this organisation’s doctrine in the field were summarised in a document on the

⁷ See The Council of Europe and the Rule of Law – An overview - CM(2008)170, 21 November 2008, par. 22.

⁸ *Ibid.*, par. 29-30.

⁹ ECtHR *Stafford v. United Kingdom*, 28 May 2002, par. 63.

¹⁰ Wennerström, pp. 23ff ; see UN Secretariat Documents A/57/275 and S/2004/616.

¹¹ HR Res. 2005/32 *Democracy and the rule of law*.

¹² The rule of law and transitional justice in conflict and post-conflict societies. Report of the Secretary-General, Doc. S/2004/616, 23 August 2004, see para. 6.

*OSCE Commitments relating to the rule of law.*¹³ According to the 1990 Copenhagen document (2), “the rule of law... does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression.” “Democracy is an inherent element of the rule of law” (3). The document on OSCE Commitments relating to the rule of law then quotes various commitments of the participating states on independence of the judiciary and legal practitioners, and impartial operation of the public judicial service, as well as on the administration of justice. The Helsinki Ministerial Council Decision No. 7/08 on “*Further strengthening the rule of law in the OSCE area*” encouraged the participating States to strengthen the rule of law, inter alia, in the following areas: independence of the judiciary, effective administration of justice, right to a fair trial, access to a court, accountability of state institutions and officials, respect for the rule of law in public administration, the right to legal assistance and respect for the human rights of persons in detention; prevention of torture and other cruel, inhuman or degrading treatment or punishment; awareness-raising and education on the rule of law for the legal professions and the public; provision of effective legal remedies and access to the same; adherence to rule of law standards and practices in the criminal justice system; and the fight against corruption.

31. The *OECD* also attempted a definition, according to which “the rule of law is composed of the following separate fundamental elements, which must advance together: [1] The existence of basic rules and values that a people share and by which they agree to be bound (constitutionalism). This can apply as much to an unwritten as to a written constitution. [2] The law must govern the government. [3] An independent and impartial judiciary interprets the law. [4] Those who administer the law act consistently, without unfair discrimination. [5] The law is transparent and accessible to all, especially the vulnerable in most need of its protection. [6] Application of the law is efficient and timely. [7] The law protects rights, especially human rights. [8] The law can be changed by an established process that is itself transparent, accountable and democratic.”¹⁴

32. In the *European Union*, the concept of rule of law is enshrined not only in the Preamble to the Treaty on European Union (TEU), but also in Article 2, according to which “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, *the rule of law* and respect for human rights, including the rights of persons belonging to minorities”. It also appears as a basis of the EU’s external action¹⁵ as well as in the Preamble to the Charter of Fundamental Rights of the European Union. In French, the term *Etat de droit* is used, whereas the German version uses *Rechtsstaatlichkeit*. Here too, the notion is not defined.

33. A thorough study on this issue shows that the concept of *rule of law* has been used in the European Union with a number of meanings at least as high as in other international organisations, including of course formal notions such as the supremacy of law, but also substantive ones such as fundamental rights; notions specific to European Union law have been developed, such as fair application of the law and effective enjoyment of Community rights, and even anti-corruption (in external relations).¹⁶

¹³ http://www.osce.org/documents/odihr/2009/01/36062_en.pdf.

¹⁴ Equal Access to Justice and the Rule of Law, OECD Development Assistance Committee (DAC). Mainstreaming Conflict Prevention (2005).

¹⁵ Article 21 TEU.

¹⁶ Wennerström, see in particular the tables at pp. 160, 218-219, 289-290 and 302.

b. National law

34. In national legislation, the term *Rechtstaat* is found in a number of provisions of the German Fundamental Law, in particular for what concerns the constitutional order of the Länder and the European Union¹⁷. Moreover, the substantive interpretation of the *Rechtsstaat* has gained ground in Germany, both in the doctrine of constitutional law and in the practice of the Constitutional Court.¹⁸

35. In the United Kingdom, the notion of the *rule of law* remains essentially based on case-law. The Constitutional Reform Act of 2005 makes an explicit mention of the notion of the rule of law by stating that “This Act does not adversely affect — (a)the existing constitutional principle of the rule of law, or — (b)the Lord Chancellor’s existing constitutional role in relation to that principle.”

36. The notion of the rule of law (or of *Rechtsstaat*/*Etat de droit*) appears as a main feature of the state in a number of constitutions of former socialist countries of Central and Eastern Europe (Albania, Armenia, Belarus, Bosnia and Herzegovina, Croatia, the Czech Republic, Estonia, Georgia, Hungary, Moldova, Montenegro, Romania, Serbia, Slovakia, Slovenia, “the Former Yugoslav Republic of Macedonia”, Ukraine) it is more rare in old democracies (Andorra, Finland, Germany, Malta, the Netherlands – at international level -, Norway, Portugal, Spain, Sweden, Switzerland, Turkey). It can be mostly found in preambles or other general provisions. There are, however, more concrete provisions in Spain, according to which “the Courts control the power to issue regulations and to ensure that the rule of law prevails in administrative action”; courts as well as prosecutors are subject to the rule of law.¹⁹ In Switzerland, “the state’s activities shall be based on and limited by the rule of Law”.²⁰

37. The notion of the rule of law is however often difficult to apprehend in former socialist countries. The point is that they experienced the notion of *socialist legality*. The classical Marxist approach is based on the idea of the withering of the state and therefore of the law which emanates from it. It is well known that the practice in the Soviet system was quite opposite and that it led on the contrary to the hypertrophy of the state. For what concerns the law, the 1936 Soviet Constitution (Article 113) for example, stated that “Supreme supervisory power over the strict execution of the laws by all People’s Commissariats and institutions subordinated to them, as well as by public servants and citizens of the U.S.S.R, is vested in the Procurator of the U.S.S.R.” Apart from the specific role of the general prosecutor (Procurator), what has to be retained is “strict execution of the laws”. Here there is no general concept of the rule of law, but a much narrower notion of strict execution of the laws, based on a very positivistic approach. This forbids to go beyond the first stage of the definition of the rule of law, “rule by law”. This conception may still be enshrined in practice and prevent the development of a more comprehensive definition of the rule of law; law is more easily conceived as an instrument of power than as a value to be respected. In other words, especially in new democracies, the values of the rule of law still need “sedimentation”, that is that they have to become part of day to day practice.²¹

¹⁷ Articles 28 and 23.

¹⁸ Kaarlo Tuori, *The Rechtsstaat*, p. 12.

¹⁹ Articles 106, 117 and 124 of the Constitution.

²⁰ Article 5.1 of the Constitution (“Le droit est la base et la limite de l’autorité de l’Etat” / « Grundlage und Schranke staatlichen Handelns ist das Recht »)

²¹ On the rule of law’s sedimentation, see Kaarlo Tuori, *The “Rechtsstaat” in the Conceptual Field – Adversaries, Allies and Neutrals*, *Associations* Vol. 6 (2002) Number 2, pp. 201-214, 212.

IV. In search of a definition

38. The divergences of the meanings given to the notion of the rule of law – as well as of Rechtsstaat - may lead to giving up defining it, or even doubting its usefulness. This notion is perhaps not universally recognised as a fundamental concept in public law²², but since it is used in legal texts, it has to be understood and therefore be defined. The question is not whether the rule of law should have been introduced into these legal texts, but how the concept has to be understood in these legal texts..

39. An objection could be raised to the effect that no right or obligation can be inferred from the mere concept of the rule of law. Such an approach however overlooks that not every legal provision confers rights or obligations to individuals, and this is especially true for international law. A provision asking a state to ensure the effectiveness of the rule of law may be considered of programmatic character, but this does not mean that it has no real content and that the state is free to do what it wants. This is clearly illustrated by the references to the rule of law principle by international organisations, this looks quite different.

40. What could a *consensus* be founded on for the definition of the rule of law as well as that of the Rechtsstaat?

41. At any rate, some formal aspects of the rule of law must be retained as generally recognised in legal provisions as well as in literature:

- (1) prohibition of arbitrariness
- (2) legality
- (3) legal certainty
- (4) separation of powers
- (5) independence and impartiality of the judiciary
- (6) respect for (judicial) human rights
- (7) hierarchy of norms
- (8) non-discrimination and equality before the law

(1) Prohibition of arbitrariness

42. This is the point of departure of the reflexion on both the Rechtsstaat and the rule of law. “The initial problem that the doctrines of the rule of law and the *Rechtsstaat* set out to solve was similar: how to discipline extra-legal government power”.²³ For example, as stated above, one of the first objectives of Dicey, when addressing the issue of the rule of law, was putting an end to arbitrary power. Arbitrariness may be considered as a gross violation of the law (or of legality), but it may also result from legislation conferring excessive discretionary power.

43. Arbitrariness without a violation of the text of the law should be avoided through the implementation of the principle of legal certainty, which will developed below.

(2) Legality (supremacy of the law)

44. The importance of the principle of legality was already underlined by Dicey. It first implies that the law must be followed. This requirement applies not only to individuals, but also to authorities. In so far as legality addresses the actions of public officials, it requires also that they

²² This is for example the point of view of Martin Loughlin, as expressed in document CDL-DEM(2009)006 (The rule of law in European jurisprudence), p. 3.

²³ Kaarlo Tuori, The Rule of Law and the Rechtsstaat, *in* Ratio and Voluntas (to be published by the end of 2010), chapter 7, p. 21.

act within the powers that have been conferred upon them.²⁴ The notion of law is however not always interpreted in the same way; in the Anglo-American tradition (of the rule of law), the importance of judge-made law is crucial, whereas in the continental tradition (of the Rechtsstaat) reference is made to law adopted by Parliament.

45. In other words, the rule of law requires that the State acts on the basis of, and in accordance with the law (the state is bound by law). This means that all decisions and acts of public officials must be authorised by law²⁵ and that all legal subjects, especially state authorities and officials, should be bound by the law when performing governance. So policy and decision-making must respect the limits and the guidance provided by the law.

46. These two elements of the principle prescribe that the state can not abuse its powers. So, for example, Parliament shall not be allowed to override fundamental rights by ambiguous laws. This offers essential legal protection of the individual *vis-à-vis* the state and its organs and agents.²⁶

47. The term “law”, as used in this chapter, refers primarily to national legislation. However, the development of international law as well as the importance given by international organisations to the respect of the rule of law lead to addressing the issue at international level as well: the principle *pacta sunt servanda* is the way in which international law expresses the principle of legality.

(3) Legal certainty

48. The principle of legal certainty is essential to the public's confidence in the judicial system and the rule of law.²⁷ To achieve this confidence, the state must make the text of the law easily *accessible*. It has also a duty to respect and apply, in a *foreseeable* and consistent manner, the laws it has enacted. Foreseeability means that the law must be foreseeable as to its effects: it has to be formulated with sufficient precision to enable the individual to regulate his or her conduct. In this context, a law which confers a discretion to a state authority must indicate the scope of that discretion. It would be contrary to the rule of law for the *legal discretion granted to the executive* to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion and the manner of its exercise with sufficient clarity, to give the individual adequate protection against arbitrariness.²⁸

49. Legal certainty requires that legal rules are *clear and precise*, and aim at ensuring that situations and legal relationships remain foreseeable. *Retroactivity* also goes against the principle of legal certainty, since law subjects have to know the consequences of their behaviour. It is clearly inadmissible in penal law (Article 7 ECHR). In addition, legal certainty requires respect for the principle of *res judicata*. Final judgements by domestic courts should not be called into question, legal certainty also requires that final court judgments be enforced. In private disputes, enforcement of final judgments may require the assistance of the state bodies in order to avoid any risk of “*private justice*” contrary to the rule of law.²⁹ Systems which

²⁴ Jeffrey Jowell, The Rule of Law and its underlying Values, in: Jeffrey Jowell/Dawn Oliver (Eds.), The Changing Constitution (6th edition), p. 10.

²⁵ See Jeffrey Jowell, The Rule of Law and its underlying Values, in: Jeffrey Jowell/Dawn Oliver (Eds.), The Changing Constitution (6th edition), p. 10.

²⁶ The Council of Europe and the Rule of Law - An overview, CM(2008)170 21 November 2008, see para. 43.

²⁷ The Council of Europe and the Rule of Law - An overview, CM(2008)170 21 November 2008, see para. 51.

²⁸ The Council of Europe and the Rule of Law - An overview, CM(2008)170 21 November 2008, see para. 46.

²⁹ The Council of Europe and the Rule of Law - An overview, CM(2008)170 21 November 2008, see para. 49.

allow for the quashing of final judgments without cogent reasons of public interest and for an indefinite period of time are incompatible with the principle of legal certainty.³⁰

50. The existence of conflicting decisions within a supreme court is contrary to the principle of legal certainty. It is therefore required that the courts, especially the highest courts, establish mechanisms to avoid conflicts and ensure the coherence of their case-law.

51. Legal certainty - and supremacy of the law - imply that the law is *implemented* in practice. This means also that it is implementable. Therefore, assessing whether the law is implementable in practice before adopting it, as well as checking *a posteriori* whether it may effectively be applied is very important. This means that *legislative evaluation* has to be considered when addressing the issue of the rule of law.

(4) Separation of powers

52. The three branches of government (legislative, executive and judicial powers) have to fulfil independent yet interdependent functions that should remain separated, with mechanisms of mutual checks and balances. Thus, at no time all authority should rest with a single branch of government or should a single branch of government have predominance. Instead, power has to be measured, apportioned, and restrained among the three government branches.

53. The separation of powers is a principle designed to ensure that the functions, personnel and powers of the major institutions of the state are not concentrated in any specific body.

54. There are many different ways to separate the powers in a state. But, without separation of persons a meaningful separation of powers is not possible. Due to the needed cooperation and coordination between the branches, a complete separation is impossible. The branches will always be interrelated and will have to cooperate with one another. The main principle has to be that no branch becomes more powerful than the other two but that a balance exists. This can best be guaranteed if the constitution (written or unwritten) clearly states what the executive, the legislative and the judiciary can do, and does so in a balanced way.

55. To protect the judicial process from interferences by the legislature or the executive is of special importance. This leads to the next principle:

(5) Independence and impartiality of the judiciary

56. The role of the judiciary is essential in a state based on the rule of law. It is the guarantor of justice, a fundamental value in a law-governed State.³¹ It is vital that the judiciary has power to determine which laws are applicable and valid in the case, to resolve issues of fact, and to apply the law to the facts, in accordance with an appropriate, that is to say, sufficiently transparent and predictable, interpretative methodology.³²

57. The judiciary must be independent and impartial. Independence means that the judiciary is free from external pressure, respectively is not controlled by the other branches of government, especially the executive branch. The judges should not be subject to political influence or

³⁰ The Council of Europe and the Rule of Law - An overview, CM(2008)170 21 November 2008, see para. 48.

³¹ The Council of Europe and the Rule of Law - An overview, CM(2008)170 21 November 2008, see para. 39.

³² 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.

manipulation.³³ Impartial means that the judiciary is not – even apparently - interested in the outcome of the case in favour of any one of the participants.³⁴

58. There has to be a fair and open hearing, absence of bias, and a reasonable period within which the case is heard and decided. Additionally, there must be a recognised, organised and independent legal profession, which is legally empowered, willing and *de facto* able to provide legal service.³⁵

59. Moreover, there must be an agency or organisation, a prosecutor, which is also to some degree autonomous from the executive, and which ensures that violations of the law, when not denounced by victims, can be brought before the courts.³⁶

60. Finally, judicial decisions must be effectively implemented, and there should be no possibility (save in very exceptional cases) to revise a final judicial decision (respect of *res judicata*).

(6) Respect for judicial human rights

61. Human rights are not just part of the rule of law; neither is the rule of law one human right amongst others.³⁷ However, human rights in the judicial process are essential to a state based on the rule of law. They are part of procedural due process.³⁸

62. These are the following rights: (1) the right of access to justice, (2) the right to a legally competent judge, (3) the right to be heard,³⁹ (4) inadmissibility of double jeopardy (*ne bis in idem*) (Article 4 of Protocol 7 to ECHR), (5) the legal principle that measures which impose a burden should not have retroactive effects (6) the right to an effective remedy (Article 13 ECHR) for any arguable claim, (7) anyone accused of a crime is presumed innocent until proved guilty,⁴⁰ and (8) the right to a fair trial or, in Anglo-American parlance, the principle of natural justice; there has to be a fair and open hearing, absence of bias, and a reasonable period within which the case is heard and decided. Additionally, there must be a recognised, organised and independent legal profession, which is legally empowered, willing and *de facto* able to provide legal service.⁴¹

63. Most of these rights (as well as the principle of independence and impartiality of the judiciary) are enshrined in Article 6 ECHR.

³³ Thomas Carothers, *The Rule of Law Revival*, *Foreign Affairs* 77 (1998), 95 (96).

³⁴ Jeffrey Jowell, *The Rule of Law and its underlying Values*, in: Jeffrey Jowell/Dawn Oliver (Eds.), *The Changing Constitution* (6th edition), p. 12.

³⁵ 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.

³⁶ 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.

³⁷ Cf. Jeffrey Jowell, *The Rule of Law and its underlying Values*, in: Jeffrey Jowell/Dawn Oliver (Eds.), *The Changing Constitution* (6th edition), p. 22.

³⁸ Cf. Kaarlo Tuori, *The Rule of Law and the Rechtsstaat*, p. 34.

³⁹ Jeffrey Jowell, *The Rule of Law and its underlying Values*, in: Jeffrey Jowell/Dawn Oliver (Eds.), *The Changing Constitution* (6th edition), p. 19.

⁴⁰ Thomas Carothers, *The Rule of Law Revival*, *Foreign Affairs* 77 (1998), 95 (96).

⁴¹ 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.

(7) Hierarchy of norms – coherence of the legal system

64. The legal order may include a number of contradictory provisions. However, respecting a number of principles avoids any incoherence from appearing.

65. The first principle is that of hierarchy of norms. The Constitution has priority over ordinary legislation. Primary legislation has priority over secondary legislation. The law of the central state has priority over the law of subordinate entities.

66. Moreover, European Union law is generally recognised as having priority over national law. The purpose of the present study is not to determine the place of international law. However, that place should be made clear in each state by written law or case-law.

67. In case of conflicting norms of the same rank, the traditional sayings *lex posterior derogat priori* – *lex specialis derogat generali* – *lex posterior generalis non derogat speciali priori* apply.

68. The above-mentioned principles would be *lex imperfecta* if no court were in a position to apply them. Judicial review is therefore of primary importance. According to the general trend not only in Europe but also all over the world, it should also include constitutional review.

(8) Non-discrimination and equality before the law

69. Non-discrimination, together with equality before the law, constitutes a basic and general principle relating to the protection of human rights. As underlined by the Council of Europe's 2008 document on the issue,⁴² these two principles are human rights principles as much as they are rule of law principles, and the Court's case-law tends to apply the prohibition of non-discrimination without there being a special need to refer to it as a rule of law principle, although there is some recognition that equality in rights and duties of all human beings before the law is an aspect of the rule of law.

70. Non-discrimination means that the laws refrain from discriminating against certain individuals or groups. Any discrimination under the law is prohibited and all persons have guaranteed equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

71. Equality before the law means that each individual is subject to the same laws, with no individual or group having special legal privileges. All persons, regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, are to be treated the same before the law. All laws at all levels have to treat individuals and groups equally.

72. Even if at first glance the principle of equality is of a substantive nature, it has been included in the notion of rule of law since the time of Dicey's rather formal approach – even if for Dicey it related essentially to the idea that civil servants had to be submitted to ordinary law.⁴³ Actually, equality before the law means that the law has to be applied to each subject, and it is logical for it to be applied in the same way, already from the perspective of the mere principle of legality; it would rather be for the opposite approach to look strange. Therefore, equality and non-discrimination still belong to formal aspects of the rule of law.⁴⁴

⁴² The Council of Europe and the Rule of Law - An overview, CM(2008)170 21 November 2008, see para. 53.

⁴³ Jowell, p. 7.

⁴⁴ Wennerström, p. 82.

73. More general aspects of *human rights* and *democracy* do not appear as part of the consensus on the notion of rule of law. As stated in the introduction, these are two of the three pillars of the Council of Europe, the rule of law being the third one.

V. Conclusion

74. The notion of rule of law has not been developed in legal texts and practice like the other pillars of the Council of Europe, human rights and democracy. Human rights are at the basis of an enormous corpus of constitutional and legal provisions and of case-law, at national as well as at international level. Democracy is implemented through detailed provisions concerning elections and the functioning of institutions, even if they often do not refer to this concept.

75. On the contrary, legal provisions referring to the rule of law are rare, both at national and at international level, and are of a very general character; they do not define the concept.

76. This has led to doubting the very usefulness of addressing this notion as a legal one. However, it is a legal notion since it is included in legal provisions; moreover, case-law refers to the rule of law; this is especially the case of the European Court of Human Rights, but also at the national level. Moreover, a number of international documents aim at ensuring the respect of basic values by the states.

77. Therefore, a definition has to be found. The aim of the present report was to find one which could be consensual. It is clear that such a consensual definition cannot include all - innumerable - aspects retained by all documents relating to the rule of law (or the Rechtsstaat). Even if there has been, at least since the end of World War II, a trend towards retaining some substantive aspects under the concept of the rule of law, a broad consensus can be found only on a formal definition, but an enlarged one, including respect for judicial human rights as well as non-discrimination and equality before the law goes much further than the mere respect of (positive) legislation, or the post-Soviet understanding of rule of law as the rule of statutory law.

78. After agreeing on the definition, it becomes easier to address the way how to ensure the respect of the principle. The Council of Europe, the international organisation which has defined the rule of law as one of its three pillars, could contribute to the implementation of the principle through the assessment of the situation in its members states.⁴⁵

⁴⁵ See Review of the rule of law situation: feasibility and methodology, DG-HL (2010) 21.

- Annex -

Checklist for evaluating the state of the rule of law in single states

2. Prohibition of arbitrariness

- a) Are there specific rules prohibiting arbitrariness?
- b) Are there limits to discretionary power?
- c) Is there a system of full publicity of government information?

1. Legality (supremacy of the law)

- a) Does the State act on the basis of, and in accordance with the law?
- b) To what extent are general principles of law applied?
- c) To what extent does the government operate without using law?
- d) To what extent does the government use incidental measures instead of general rules?
- d) Are there exception clauses in the law of the State, allowing for special measures?
- f) Are there internal rules ensuring that the state abides by international law?
- g) Does the *nulla poena sine lege* system apply?

3. Legal certainty

- a) Are all the laws published?
- b) If there is any unwritten law, is it accessible?
- c) Are there limits to the legal discretion granted to the executive?
- d) Are there many exception clauses in the laws?
- e) Are the laws written in an intelligible language?
- f) Is retroactivity of laws prohibited?
- g) Is there a duty to maintain the law?
- h) Are final judgments by domestic courts called into question?
- i) Is the case-law of the courts coherent?
- j) Is legislation generally implementable and implemented?
- j) Are laws foreseeable as to their effects?
- k) Is legislative evaluation practiced on a regular basis?

4. Separation of powers

- a) Do the three branches of government fulfil independent functions?
- b) Is there a branch of government that has predominance in the State, e.g. supremacy of the executive?
- c) Is there a separation of persons in the State?
- d) Does the constitution (as far as it exists) clearly define the competences of the governmental branches?
 - .) To what extent is there a system of checks and balances?
 - .) To what extent do the courts allow a margin of discretion to the government?
 - .) Is there immunity for the other two branches of government?
 - .) Is there a system of political responsibility of government?
 - .) Has the Executive the obligation to provide information to Parliament?
- e) Is the judicial process free from interferences by the legislature or the executive?
- f) What internal checks and procedures are in place to guarantee the separation of powers?
- g) Are they implemented and are they effective in preventing unlawful government behaviour?

5. Independence and impartiality of the judiciary

- a) Is the judiciary independent?
- b) Is the department of public prosecution to some degree autonomous from the state apparatus? Does it act on the basis of the law and not of political expediency?
- c) Are single judges subject to political influence or manipulation?

- d) Is the judiciary impartial? What provisions ensure its impartiality on a case-by-case basis?
- e) Do citizens have effective access to the judiciary?
- f) Does the judiciary have sufficient remedial powers?
- g) Is there a recognised, organised and independent legal profession?
- h) Are judgments implemented?
- i) Is respect of *res iudicata* ensured?

6. Respect for (judicial) human rights

Are the following rights guaranteed (in practice)?

- a) The right of access to justice: Do citizens have effective access to the judiciary?

- b) The right to a legally competent judge
- c) The right to be heard
- d) *Ne bis in idem*
- e) Non-retroactivity of measures
- f) The right to an effective remedy
- g) The presumption of innocence
- h) The right to a fair trial

[6a. Respect for civil, political and social rights

Are the following rights guaranteed (in practice)?

- a)
- b)
- c)
- .) Is there a limitative system of restrictions?
- .) Are positive obligations recognised as enforceable?]

7. Hierarchy of norms – coherence of the legal system

- a) Is there a clear hierarchy of norms?
- b) Does the constitution have priority over the other laws?
- c) Are there clear rules on the relationship between norms of the same hierarchical level?
- d) Is there judicial review of respect of these principles, including constitutional review?
- e) Is the relationship between international law and national law clearly defined?

8. Non-discrimination and equality before the law

- a) Are the laws applied generally and without discrimination?
- b) Are there laws that discriminate against certain individuals or groups?
- c) Are laws interpreted in a discriminatory way?
- d) Are there individuals or groups with special legal privileges?