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REPORT

**THE PRINCIPLE OF RULE OF LAW AND ITS
PRACTICAL IMPLICATIONS**

by
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Honourable President of the Constitutional Court of Armenia,
Honourable Presidents and Judges of Constitutional Courts,
Excellencies,

Ladies and gentlemen,

It is a great privilege and honour to be invited to this important Conference and to be able to address the key issue of this Conference.

The title of my presentation has two dimensions; a theoretical and a practical dimension.

Let me start by reflecting somewhat on the basic values of the Council of Europe.

Of the three pillars of the Council of Europe, the Rule of Law has long been the least visible. Democracy and Respect for Human Rights have long enjoyed much more attention. In recent years, however, the autonomy of the Rule of Law and its importance has become evident. Nowadays, respect for the Rule of Law has even become a mantra in the international circles.

It is the conviction of the Council of Europe, and of the Venice Commission, that the notions of the Rule of Law, pluralist democracy and respect for human rights are distinct but closely interconnected. They even partly overlap, as some principles belong to all three notions (it is the case for the principle of equality and for that of non-discrimination) or to two of the three notions (the fair trial principle is related to the notions of Rule of Law and respect for human rights), and the freedoms of expression, assembly and association are associated with democracy and respect for human rights.

These three principles are therefore intertwined and interdependent: there cannot be democracy without the Rule of Law and respect for human rights; there cannot be Rule of Law without democracy and respect for human rights; and respect for human rights cannot be achieved in the absence of democracy and Rule of Law.

And let me add that there cannot be prosperity and economic development without democracy, Rule of Law and respect for human rights.

However, ladies and gentlemen, this does not mean that there is no tension between these three pillars. Seen from Venice, one easily observes the tension between democracy and the Rule of Law. This is a key issue in present day Europe. The Venice Commission has had to face this tension in different recent opinions.

According to my view, it is slightly misleading to combine “democracy” and “the Rule of Law” with the conjunction “and”. This indicates that there is a complete harmony between these basic values in our societies, which is not always the case.

However, it is also slightly misleading to combine these concepts with the conjunction “or”. Such a perspective would indicate that there is complete disharmony between these values, which is not the case either. It is certainly not either/or.

The official name of the Venice Commission is “The European Commission for Democracy through Law”. In my view, this is the correct perspective: democracy is built and strengthened through the respect for law. Inherent in such a perception is the respect for human rights.

Let me focus on some areas where this tension is particularly exposed.

One area is the question of judicial review.

From the outset, there is a need to distinguish between judicial control of acts of the legislative branch, the Parliament, and judicial control of acts of the administrative branch, the Government.

The control of the administration is less spectacular and is normally seen as less threatening to democracy, from a theoretical perspective. This needs further analysis. On the one hand, it may be claimed, that if the courts are active in the area of administrative law, it could threaten the role of the politicians when distributing, for instance the economic resources in society. Seen from yet another perspective, it is, however, often argued that the real threat to democracy today does not stem from the judicial branch, but from the administrative branch. In such a perspective, could one imagine an alliance between the legislative and the judicial branch?

As for the judicial control of the legislative branch, however, one often sees that this form of control is discussed within a paradigm of "supremacy", which is the supreme body? This perspective has to be further elaborated. This perception presupposes a too dichotomistic approach. In the XXI Century, one should rather encourage more cooperation than competition between the state organs, in order to preserve and defend both democracy and the Rule of Law, as well as respect for human rights.

One important question is this: what should be the criteria for the intervention by the tribunals into the competence of the two other branches of the State? How should the criteria of the judicial review be defined? In different constitutions, one observes that this threshold is set differently. Then the courts will have to find their way between judicial activism and judicial constraints.

My second illustration relates to the fight against terrorism, the war on terror.

This tension between democracy and the Rule of Law, der Rechtsstat, has triggered discussions in many countries, inside and outside of Europe. Can we afford to uphold the Rule of Law under these dangerous circumstances? If a democratic government wants to strike hard against persons suspected of terrorism, should the government be prevented from doing so by some judges?

The Venice Commission has held, very clearly, that even terrorists or suspected terrorists enjoy full protection under the Rule of Law.

I was pleased to note that this was also the position taken by the Supreme Court of the United States in the case some years back, *Boumediene v. Bush*. The applicant was a prisoner at Guantanamo, claiming that he was protected under the Constitution of the United States. The argument by the US administration is, as we know, that these suspects have placed themselves outside the Rule of Law, and furthermore, the Constitution cannot apply during these dark and threatening days. Justice Kennedy, on behalf of the majority, gives a clear answer to this dilemma: "The laws and Constitution are designed to survive, and remain in force, in extraordinary times".

And Justice Kennedy adds: "Liberty and Security can be reconciled; and in our system they are reconciled within the framework of the law".

Ladies and gentlemen,

Still at the macro level, one might ask whether the principle of Rule of Law should be implemented in exactly the same way in every state, without taking into consideration the

historical, socio/economic peculiarities of a given state. I will come back to this question. But the point of departure is clear: There are some core elements in the principle of Rule of Law which must be implemented. If we want to establish independent tribunals in a given state, certain main core elements must be respected, irrespective of the socio-economic conditions and cultural and historical heritage. There are obvious limits to the number of models for independent tribunals. If, for political reasons, a member of a governing political party serves on the bench, the tribunal is not independent. The same conclusion applies if the state prosecutor also is among the judges.

The first stage of the Venice Commission's work on the Rule of Law led to a report adopted in 2011.

The Commission traced the historic root of the concept Rule of Law back to antiquity. Plato writes (in *Laws, Book IV*): "Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off, but if the law is the master of government and the government its slave, then the situation is full of promise and men enjoy all the blessings all the gods shower on a state".

During the last two centuries, this concept has been developed in different legal regimes and traditions: "Rule of Law", "Etat du Droit", "Rechtsstat", "Stato di Diritto", "Estado de Derecho". Certainly, there are different nuances in these traditions.

However, the Venice Commission realised there is a common core contained in this concept. And the Venice Commission decided to explore this core, not as a purely theoretical concept, but rather as a practical exercise. This led to the so-called "The Rule of Law Checklist", adopted by the Plenary in March this year.

The aim and purpose of this Checklist is to identify the core elements of the Rule of Law. It also struck the Commission that what was missing, was an operational tool for assessing the level of Rule of Law compliance in any given state: and we thought that the best tool would be a Checklist.

The Checklist is indeed intended as a comprehensive tool to assess the degree of respect for the Rule of Law in a given State. It may be used by a variety of stakeholders: state authorities, international organisations, non-governmental organisations, scholars and citizens in general. But the first addressees of the Rule of Law Checklist are the States themselves. When we talk about States, this means all bodies of the State, at national as well as local or regional level. Compliance with the Rule of Law is a complex process; the Rule of Law is achieved through successive steps, and never fully. Assessing the level of compliance with the Rule of Law in a given State requires insider knowledge and understanding of the system: no one would therefore be better placed to do so than the State itself. Assessments by the civil society of the State may offer, of course, a precious complementary vision of the situation. International organisations may then have a role in suggesting ways to improve the situation. The Venice Commission in particular may play a useful role in providing its objective legal opinions. A global appraisal should indeed involve all these angles of analysis.

What are main objectives of this document? The Checklist intends to enable an assessment which is

- *thorough*, by dealing with all the 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.

- Last but not least: the Checklist *aims to be practical and user-friendly*: as already said, the circle of the stakeholders is not defined and therefore includes all interested persons – and you, local and regional representatives, members of the Congress in particular.

Ladies and Gentlemen,

Let's move further to analyse the different benchmarks of this checklist. There are five core elements:

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

We have also added two specific, topical challenges to the Rule of Law: corruption and conflict of interest, collection of data and surveillance.

Each benchmark is sub-itemised into detailed questions.

- 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 the State action must be in accordance with and authorised by the law. State action means of course action of public authorities in general, at national as well as at infra-national level. The law should establish the relationship between the international and the national law and set out the cases in which exceptional measures could be adopted to derogate the normal regime of protection of citizens' rights.
- Legal certainty involves 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 bulwarks of the legal certainty.
- 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 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 etc. Similar situations must be treated equally and different situations differently. Positive measures could be allowed as long as they are proportionate and necessary.
- Access to justice implicates the presence of an independent and impartial judiciary and 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"
- Finally, we addressed some cases in which some particular actions and decisions can hinder and weaken the Rule of Law. It could be the case of the corruption for example, with the presence of a 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. Another issue which is more and more topical is collection of data and surveillance, due to the increased use of information technology.

The last section of the checklist includes a list of the major not only European, but also international standards divided into sections corresponding to the various benchmarks.

Of course, Ladies and Gentlemen, this checklist is neither exhaustive nor final. It should not be taken as a sort of Bible of the Rule of Law. Indeed, the checklist covers the most important aspects of this important principle but it could and it should change over time, to face the challenges of an ever-changing world. Nor is the Rule of Law something that can be achieved once and for all. Implementing the Rule of Law is an on-going task, which requires the commitment not only of the State, but also of the citizens. As underlined by the President of the Open Society Foundations Chris Stone, *“The Rule of Law is not a product made for export. Rather, the Rule of Law is a culture that thrives when nurtured, and is nourished through a root system that extends across continents and centuries”*.¹ The benchmarks are common, but the Rule of Law is to a large extent a cultural achievement.

The Rule of Law is linked not only to the protection and the promotion of human rights, but also to democracy. The 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”. The Rule of Law can only flourish in an environment where people feel collectively responsible for the implementation of the concept.

Ladies and Gentlemen,

A mistake that should be avoided in the use of this checklist is the mechanical interpretation of the detailed benchmarks in a given State. The assessment should not merely consist of counting the right answers, but 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. Indeed, whereas the Rule of Law is a global aspiration, this does not mean that its implementation has to be identical, without taking into account the peculiarities of the given State, such as its historical and political context, its constitutional order and its cultural traditions. This is without prejudice, as I said before, to respect for the fundamental core of the principle.

Ladies and Gentlemen,

We have produced what I find a remarkable tool, with a very high potential. What next?

Respecting the Rule of Law is very high on the national agendas of many member states. I believe it would be useful and important for all Council of Europe member states to initiate a full-fledged analysis of their level of compliance with the Rule of Law. As already said, this assessment should not be limited to the national level. In particular – but not only – in federal and regional states, the level of public power which is closest to the citizen is essential for its perception of the implementation of the Rule of Law. States, but also local and regional authorities, could launch a self-assessment exercise based on the Checklist, for example: why not?

Assessing the Rule of Law is also very topical in international circles. The European Union is reflecting on its own mechanism. I believe that, irrespective of the mechanism, the substance should be the same: the standards which the Council of Europe has built over the years form an indispensable basis for assessing the Rule of Law in any member State of the Council of

¹ Christopher Stone, Nurturing the Rule of Law, Annual Bingham Lecture 2016 “Spreading the Rule of Law: Mission Impossible?”

Europe. The Checklist gathers and codifies years of extensive work by all the relevant Council of Europe bodies and offers them in a handy, user-friendly format. In this respect, we believe that the Checklist represents a “Council of Europe product”, which should be promoted as such, including with other international organisations and with the European Union.

The Committee of Ministers recently endorsed the checklist and this will leave a durable “Council of Europe” mark on the Rule of Law in Europe and will foster both a common understanding and an improvement of this essential European value.

I thank you very much for your attention.