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DRAFT CHECKLIST
ON THE RULE OF LAW

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I. INTRODUCTION

A. Purpose and scope

1. The Rule of Law is mentioned in the Preamble to 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. Article 3 of the Statute makes respect for the principle of the Rule of Law a precondition for accession of new member states to the Organisation. The Rule of Law is thus one of the three intertwined and partly overlapping core principles of the Council of Europe, with democracy and human rights. The close relationship between the Rule of Law and the democratic society has been underlined by the European Court of Human Rights through different expressions: “democratic society subscribing to the Rule of Law”, “democratic society based on the Rule of Law” and, more systematically, “Rule of Law in a democratic society”. The achievement of these three principles - respect for human rights, pluralist democracy and the Rule of Law - is regarded as a single objective - the core objective - of the Council of Europe.

2. The Rule of Law has been systematically referred to in the major political documents of the Council of Europe, as well as in numerous Conventions and Recommendations. The Rule of Law is notably mentioned as an element of common heritage in the Preamble to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as a founding principle of European democracies in Resolution Res(2002)12 establishing the European Commission for the Efficiency of Justice (CEPEJ), and as a priority objective in the Statute of the Venice Commission. However, the Council of Europe texts have not defined the Rule of Law, nor has the Council of Europe created any specific monitoring mechanism for Rule of Law issues.

3. The Council of Europe has nevertheless acted in several respects with a view to promoting and strengthening the Rule of Law through several of its bodies, notably the European Court of Human Rights (ECHR), the European Commission for the Efficiency of Justice (CEPEJ), the Consultative Council of Judges of Europe (CCJE), the Group of States against Corruption (GRECO), the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, the Commissioner for Human Rights and the Venice Commission.

4. The Rule of Law is also one of the basic principles of the European Union, as expressed in the Preamble and in Article 2 of the Treaty of the European Union. It has been proclaimed as a basic principle at universal level by the United Nations, and at regional level by the Organization of American States - namely in the Inter-American Democratic Charter - and the African Union - in particular in its Constitutive Act. References to the Rule of Law may also be found in several documents of the Arab League.

5. In its Report on the Rule of Law of 2011,¹ the Venice Commission examined the concept of the “Rule of Law”, following Resolution 1594(2007) of the Parliamentary Assembly which drew attention to the need to ensure a correct interpretation of the terms “Rule of Law”, “Rechtsstaat” and “Etat de droit” or “prééminence du droit”, encompassing the principles of legality and of due process.

6. The Venice Commission analysed the definitions proposed by various authors coming from different systems of law and state organisation, as well as diverse legal cultures. The Commission considered that the notion of 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 law, and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures. The Commission warned against the risks of a purely formalistic concept of the Rule of Law,

¹ CDL-AD(2011)003rev.

merely requiring that any action of a public official be authorised by law. “Rule by Law”, or “Rule by the Law”, or even “Law by Rules” are distorted interpretations of the Rule of Law.

7. The Commission also stressed that individual human rights are affected not only by the authorities of the state, but also by hybrid (state-private) actors and private entities which perform tasks that were formerly the domain of state authorities, or include unilateral decisions affecting a great number of people, as well as by international and supranational organisations. The Commission recommended that the Rule of Law principles be applied in these areas as well.

8. In its report, the Commission concluded that, despite differences of opinion, consensus existed on the core elements of the Rule of Law as well as on those of the Rechtsstaat and of the Etat de droit, which are not only formal but also substantive or material (materieller Rechtsstaatsbegriff). These core elements are: (1) Legality, including a transparent, accountable and democratic process for enacting law; (2) Legal certainty; (3) Prohibition of arbitrariness; (4) Access to justice before independent and impartial courts, including judicial review of administrative acts; (5) Respect for human rights; and (6) Non-discrimination and equality before the law.

9. As the reflection of the Venice Commission in its 2011 Report was oriented towards facilitating a correct and consistent understanding and interpretation of the notion of the Rule of Law and, therefore, aimed at facilitating the practical application of the principles of the Rule of Law, a “checklist for evaluating the state of the Rule of Law in single countries” was appended to the report, listing these six elements, broken down into several sub-parameters.

10. In 2012, at a conference which the Venice Commission organised in London under the auspices of the UK Foreign Office and in co-operation with the Bingham Centre for the Rule of Law, it launched the project to further develop the checklist as a ground-breaking new, functional approach to assessing the state of the Rule of Law in a given country.

11. In 2014, the European Commission adopted a mechanism for addressing Rule of Law systemic issues in member states of the European Union (EU). This “new EU Framework to strengthen the Rule of Law”, a first step and a complement to Article 7 of the Treaty on European Union (TEU), establishes an early warning tool based on “the indications received from available sources and recognised institutions, including the Council of Europe”; the European Commission will “as a rule and in appropriate cases seek the advice of the Council of Europe and/or its Venice Commission”. In addition, the Council of the European Union has begun implementing a new Rule of Law Dialogue with the member states, which will take place on an annual basis.²

12. At United Nations level, following the publication of “Rule of Law Indicators” in 2011,³ the United Nations General Assembly adopted in 2012 a Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, recognising that the “Rule of Law applies to all States equally, and to international organizations”.

13. Through the checklist, the Venice Commission intends to provide a tool for assessing the Rule of Law in a given country from the view point of its constitutional and legal structures, the legislation in force and the existing case-law. In addition to a list of legal parameters, the checklist contains a certain number of more factual parameters aiming at complementing the legal picture mostly by taking into account the perception of the public.

² Council conclusions on fundamental rights and rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental Rights of the European Union, Justice and Home Affairs Council Meeting, Luxembourg, 6-7 June 2013, part c, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/137404.pdf.

³ This document is a joint publication of the United Nations Department of Peacekeeping Operations (DPKO) and the Office of the United Nations High Commissioner for Human Rights (OHCHR).

14. The sustainable development agenda with its 17 Sustainable Development Goals (SDGs) and 169 targets to be delivered by 2030 was unanimously adopted by the UN General Assembly in September 2015. The SDGs, which comprise a number of Goals, are aimed to be truly transformative and have profound implications for the realization of the agenda, envisaging “[a world] in which democracy, good governance and the rule of law, as well as an enabling environment at the national and international levels, are essential for sustainable development...” Goal 16 commits states to “Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels”. The achievement of Goal 16 will be assessed against a number of targets, some which incorporate rule of law components, such as the development of effective accountable and transparent institutions (target 16.6) and responsive, inclusive participatory and representative decision making at all levels (target 16.7). However, it is Target 16.3, committing states to “Promote the rule of law at the national and international levels and ensure equal access to justice for all” that offers a unique opportunity for revitalizing the relationship between citizens and the state. This Checklist could be a very important tool to assist in the qualitative measurement of rule of law indicators in the context of the SDGs.

15. All these parameters require, for their consideration, sources of verification. For legal parameters, these will be the texts in force, as well as the legal assessments thereof by the Venice Commission, Council of Europe monitoring bodies and other institutional sources. For factual parameters, multiple sources will have to be used, including institutional ones such as the CEPEJ and the European Union Fundamental Rights Agency.

16. The assessment of the state of the Rule of Law in a given country can have manifold purposes. The checklist is meant to serve as a possible tool for a variety of actors who may decide to carry out such assessment: parliaments and other state authorities when addressing the need and content of legislative reform, civil society, and international organisations, including regional ones – notably Council of Europe and European Union. Assessments have to take into account the whole context, and avoid any mechanical application of specific elements of the checklist.

17. It is not within the mandate of the Venice Commission to proceed with Rule of Law assessments in given countries on its own initiative; however, it is understood that when the Commission deals with Rule of Law issues within the framework of the preparation, upon request, of an opinion relating to the Rule of Law in a given country, it will base its analysis on the parameters of the checklist.

18. The checklist is mainly directed at assessing legal safeguards. However, the proper implementation of law is a crucial aspect of the Rule of Law and must therefore be assessed. That is why the checklist includes factual benchmarks, which are complementary and not exhaustive.

19. The realisation of the Rule of Law is a process of achieving successive levels in a progressive manner: the more basic the level, the greater the demand for it. Full achievement of the Rule of Law remains an ongoing task, even in the well-established democracies. Against this background, it should be clear that the parameters of the checklist do not necessarily all have to be cumulatively fulfilled in order for a final assessment on compliance with the Rule of Law to be positive. The assessment will need to take into account which parameters are not met, to what extent, in what combination etc.

20. Full implementation of the Rule of Law is utopic since and all countries may fall short of some aspects of it. This implies that the issue has to be kept under constant review.

21. The checklist is neither exhaustive nor final: it aims to cover the core elements of the Rule of Law. The checklist could change over time, and be developed to cover other aspects or to go into further detail. New issues could arise that would lead to completing it.

22. Rule of Law and human rights are interlinked, as the next chapter will explain. The Rule of Law would just be an empty shell without permitting access to human rights. In addition, the Rule of Law and many human rights (such as fair trial, freedom of expression, etc.) overlap. The checklist will expressly deal with human rights only when they are linked to specific aspects of the Rule of Law.⁴

23. Since the Venice Commission is a body of the Council of Europe, the checklist will put the emphasis on the legal situation in Europe, as expressed in particular in the case-law of the European Court of Human Rights and of the Court of Justice of the European Union. The Rule of Law is however a universal principle, and this document will also refer, where appropriate, to developments at universal level as well as in other regions of the world, in particular in part III enumerating international standards.

B. The Rule of Law in an enabling environment

24. The Rule of Law is a concept of universal validity. The “need for universal adherence and implementation to the Rule of Law at both the national and international levels” was endorsed by all Members States of the United Nations in the 2005 Outcome Document of the World Summit (§ 134). In its 2014 New Framework to Strengthen the Rule of Law, the European Union recalls that “the principle of the Rule of Law has progressively become a dominant organisational model of modern constitutional law and international organisations /.../ to regulate the exercise of public powers” (pp. 3-4). In an increasing number of cases States refer to the Rule of Law in their national constitutions.

25. The Rule of Law is also linked to democracy. Democracy relates to the involvement of the people in the decision-making process in a society; human rights seek to protect individuals from arbitrary and excessive interferences with their freedoms and liberties; the Rule of Law focuses on imposing limits on and independently reviewing the exercise of public powers.

26. The Rule of Law has thus become “a global ideal and aspiration”,⁵ which has to be interpreted in a similar way everywhere. This, however, does not mean that its implementation has to be the same regardless of the concrete juridical, historical, political, social or geographical context. The main components or “ingredients”⁶ of the Rule of Law are constant though open for adaptations resulting from changes of the legal and/or factual environment. The manner in which they are realised may however differ from one country to another depending on the local context. This context may also determine the relative weight of each of the components.

27. The Venice Commission recognises that the approach taken depends on the constitutional order and traditions of any particular country.

28. Historically, the Rule of Law was developed as a means to restrict state (governmental) power. Human rights were merely seen as negative rights against intrusions by holders of this power. In the meantime the perception of human rights has changed in many states as well as in European and international law, also due to influences resulting from the Rule of Law. Indeed, there are several differences in the details, but nonetheless there is a trend to expand the scope of civil and political rights, especially by acknowledging positive obligations of the state to guarantee effective legal protection of human rights. This is particularly relevant when private actors infringe human rights of citizens. Relevant terms are “positive obligations to protect”, “horizontal effects of fundamental rights” or “Drittwirkung der Grundrechte”.

⁴ On the issue, see in particular the Report on the Rule of Law adopted by the Venice Commission, CDL-AD(2011)003rev, § 59-61. The report also underlines (§ 41) that “[a] *consensus* can now be found for the necessary elements of the Rule of Law as well as those of the Rechtsstaat which are not only formal *but also substantial or material*” (emphasis added).

⁵ *Rule of Law. A Guide for Politicians*, HIL, Lund/The Hague, 2012, p. 6.

⁶ Venice Commission Report on the Rule of Law, CDL-AD(2011)003rev, § 37.

29. The European Court of Human Rights has already acknowledged positive obligations in several fields, for instance related to Art. 8 ECHR.⁷ In several decisions the Court has developed specific positive obligations of the state by combining Art. 8 ECHR and the Rule of Law.⁸ Even though positive obligations to protect could not be solely derived from the Rule of Law in these cases, the Rule of Law - principle creates additional obligations of the state to guarantee that their citizens have access to effective legal means to enforce the protection of their human rights, in particular in situations when private actors infringe these rights. Thus the Rule of Law creates a benchmark for the quality of laws protecting human rights: Legal provisions in this field – as always in the scope of the rule of law – have to be clear and predictable, non-discriminatory, etc. and they must be applied by independent courts under procedural guarantees equivalent to those applied in conflicts resulting from interferences into human rights by public authorities. The Rule of law requires equivalent benchmarks in public-private and private-private human rights constellations.

30. Another contextual element is the legal system at large. Sources of law which enshrine legal rules, thus granting legal certainty, are not identical in all countries.

31. Countries may also use different means and procedures - for example related to the fair trial principle - in criminal proceedings (adversarial system as compared to inquisitorial system, right to a jury as compared to a system where decisions in criminal cases are usually taken by judges). Material means that are instrumental in guaranteeing fair trial, such as legal aid and other facilities, may also differ and may depend on the financial resources of the country concerned.

32. The distribution of powers among the different State institutions may also impact the context in which this checklist is considered. The distribution of powers among state institution should be well-balanced through a system of checks and balances. The exercise of legislative and executive power should be reviewable for its constitutionality and legality by an independent and impartial judiciary. A well-functioning judiciary whose decisions are effectively implemented, is of the highest importance for the maintenance and enhancement of the Rule of Law.

33. At the international level, the demands and implications of the Rule of Law reflect the particularities of the international legal system. In many respects that system is far less developed than national constitutional and legal systems. Apart from special systems like that of the European Union, which have already moved away from international law in a supranational direction, international systems have no permanent legislator, and for most cases no judiciary with obligatory jurisdiction, while the democratic characteristics in decision-making are still very weak.

34. The European Union's supranational nature led it to develop the concept of Rule of Law as a general principle of law applicable to its own legal system, which is now enshrined in particular in Article 2 of the Treaty on European Union (TEU) and the Preamble to the Charter of Fundamental Rights. The Rule of Law as defined in European Union law includes the supremacy of law, the separation of powers, judicial review, (procedural) fundamental rights, including the right to a judicial remedy, as well as the principles of equality and proportionality. Measures against corruption are also considered crucial for ensuring the Rule of Law, as stated explicitly in the field of external relations.

35. The contextual elements are however not limited to legal factors. The presence (or absence) of a shared political and legal culture within a society, and the relationship between such culture and the legal order also help to determine to which extent and at which level of concreteness the various elements of the Rule of Law have to be explicitly expressed in the written sources of law. Thus, for instance, national traditions in the area of dispute settlement

⁷ See for example ECtHR, *Centro Europe 7 and di Stefano v. Italy*, 38433/09, 7 June 2012, § 134, 156.

⁸ See ECtHR, *Sylvester v. Austria*, 36812/97 and 40104/98, 24 April 2003, § 63; *P.P. v. Poland*, 8677/03, 8 January 2008, § 88.

and conflict resolution will have an impact upon the concrete guarantees of fair trial offered in a country. It is important that in every state a robust political and legal culture supports particular Rule of Law mechanisms and procedures, which should not be considered as static but should be constantly checked, adapted and improved. After all, the Rule of Law can only flourish in a country whose inhabitants feel commonly responsible for the implementation of the concept, making it an integral part of their own legal, political and social culture.

36. The practical and factual challenges that the maintenance of the Rule of Law is confronted with also differ among states, and among levels of protection (international level, EU level, national level etc.). The lack of sufficient means and adequate institutions and structures may hamper effective implementation.

II. BENCHMARKS

A. Legality (supremacy of the law)¹

a) *Legality in the narrow sense*

Do public authorities act on the basis of, and in accordance with the law?²

- i. Are all powers of the public authorities defined by law?³
- ii. Are the procedures the public authorities have to follow established by law?
- iii. May public authorities operate without a legal basis? Are such cases duly justified?
- iv. Do public authorities ensure the effective legal protection of positive obligations to protect human rights on the basis of laws?

A basic requirement of the Rule of Law is that the powers of public authorities must be defined by law. In so far as legality addresses the actions of public officials, it requires also that they seek authorisation to act and that they subsequently act within the powers that have been conferred upon them, and consequently respect procedural as well as substantive law. The rule of law also requires that public authorities actively safeguard that private actors, especially powerful private actors, respect fundamental rights of their citizens. Such positive obligations shall be laid down in statutory laws of the state.

Law covers not only statutes but also, where appropriate, judge-made law,⁴ such as common-law rules. All law must be accessible and foreseeable.⁵

b) *Supremacy of the law*⁶

- i. Is conformity of legislation with the Constitution ensured?
- ii. Is legislation adopted when required by the Constitution?
- iii. Does the action of the executive branch conform with the Constitution and other legislation?⁷
- iv. Are regulations adopted when required by legislation?
- v. Are the actions and decisions of private entities subject to the law?
- vi. Is judicial review of the conformity of the acts and decisions of the executive branch of government with the law possible?
- vii. Does such judicial review also apply to the acts and decisions of independent agencies and private actors performing public tasks?
- viii. Are effective legal remedies against violations of rights by private actors guaranteed by statutory law?

Conformity with superior law has to be ensured. Whereas the necessity for judicial control of the acts and decisions of the executive and other bodies performing public tasks is universally recognised, national practice is very diverse on how to ensure conformity of legislation with the Constitution. While judicial review is an effective means to reach this

goal, there may also be other means to guarantee the proper implementation of the Constitution for ensuring respect for the Rule of Law, such as a priori review by a specialised committee.⁸

c) *Relationship between international law and domestic law*

Does the domestic legal system ensure that the state abides by its binding obligations under international law, in particular human rights law? Are there clear written rules on the implementation of these obligations in domestic law?⁹

The principle pacta sunt servanda is the way in which international law expresses the principle of legality. It does not deal with the place given to international customary or conventional law in the internal legal order, but a state “may not invoke the provisions of its internal law as justification for its failure to perform a treaty”¹⁰ or to respect customary international law. Even if the principle pacta sunt servanda does not need to be enshrined in national law, it is useful to refer to it in the Constitution, as is the case, for example, in the Czech Republic¹¹ and Poland (both countries provide for the respect of binding international law in general).¹²

The principle of the Rule of Law does not impose a choice between monism and dualism, but pacta sunt servanda applies whatever the national approach – monist or dualist – of the relationship between international and internal law. At any rate, full domestic implementation of international law is crucial.

d) *Legislative powers of the executive*

- i. Is the supremacy of the legislature ensured, in the sense that general and abstract rules touching on the rights or duties of individuals are included in an Act of Parliament – legislation - or a regulation based on that Act, save for limited exceptions provided for in the Constitution?¹³
- ii. Which are these exceptions? Are they limited in time? Is there an effective remedy against abuse?

Unlimited powers of the executive are, de jure or de facto, a central feature of absolutist and dictatorial systems. Modern constitutionalism has been built against such systems and therefore ensures supremacy of the legislature.¹⁴

An independent regulatory power of the executive exists in a number of states¹⁵. It should however be limited in scope and not be used for improper purposes.

- iii. Are the objectives, contents, scope [and duration] of the delegation of power explicitly defined in a legislative act?

A delegation should not be a long-term transfer of substantial legislative powers. This principle is to be found e.g. in the German¹⁶ and Italian¹⁷ Constitutions,¹⁸ and is also reflected in Article 290.1 of the Treaty on the Functioning of the European Union, which states that “[t]he essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.” A delegation should not be a long-term transfer of substantial legislative powers.

[Recent times have seen the development of programmatic legislation, which essentially provides for objectives or for the definition of a duty or a mandate. This is in particular the case in European Union law as well as in the internal implementing legislation. Even if submitted to the above-mentioned conditions, such legislation gives more latitude to the executive branch of government than “traditional” legislation.]

e) *Law-making procedures*

Is the process for enacting law transparent, accountable and democratic?

- i. Are there clear constitutional rules on the legislative procedure?¹⁹ Has Parliament the power to amend proposals made by the executive?
- ii. Is the adoption of legislation preceded by of a public parliamentary debate and are laws provided with adequate motivation and explanation (e.g. explanatory reports)?²⁰
- iii. Does the public have access to draft legislation as soon as it is submitted to Parliament?²¹
- iv. Where appropriate, are investigations and studies made before adopting legislation (e.g. on the human rights and budgetary impact of laws)?²²
- v. Is there legislative participation in the process of making, incorporating, approving and implementing international treaties?

The Rule of Law would be without real substance in an undemocratic framework. Democracy cannot be ensured without transparency and accountability: democracy is not the exercise of power at the majority's pleasure outside any legal framework, but must follow inclusive procedures, in order to ensure the legitimacy and acceptance of the decisions taken as well as confidence in the process.

[The approval, incorporation and implementation of international treaties should not lead to an excessive extension of the legislative powers of the executive to the detriment of Parliament, but respect the general division of powers between these two branches of government.]

or: "In some countries, the approval of all or some international treaties is considered a task not to be left the executive alone, but also to be applied by the legislature."

f) *Exceptions in emergency situations*

- i. Are there specific provisions applicable to emergency situations (war or other public emergency threatening the life of the nation)? Are derogations to human rights possible in such situations? Are there rights which cannot be derogated from even in emergency situations? Are derogations proportionate, that is limited to the extent strictly required by the exigencies of the situation, including in time?²³
- ii. What is the procedure for determining an emergency situation? Is there parliamentary control and judicial review of the existence and duration of an emergency situation?

The security of the State and of its democratic institutions, and the safety of its officials and population, are vital public and private interests that deserve protection and may lead to a temporary derogation from human rights and to an extraordinary division of powers. However, emergency powers have been abused by authoritarian governments to stay in power, to silence the opposition and to restrict human rights in general. The limitation in time and scope of such powers is therefore essential. Only a vital democracy and a fully guaranteed, effectively supervised Rule of Law constitute a legal, political and social climate in which State security and public safety may be secured.²⁴ This implies parliamentary control and judicial review of the existence and duration of a declared emergency situation.

The relevant provisions of the International Covenant on Civil and Political Rights, of the European Convention on Human Rights and of the American Convention on Human Rights are rather similar.²⁵ They provide for the possibility for derogations, to be distinguished from mere limitations of the rights guaranteed, in the sense that they imply a temporary adjustment of the states' obligations under the treaty in exceptional circumstances. Derogations are in particular not possible from "the so-called absolute rights: the right to life, the prohibition of torture and inhuman or degrading treatment or punishment, and of slavery,

and the *nullum crimen, nulla poena principle*".²⁶ Item II.A.f.i summarises the requirements of these treaties.

g) *Duty to implement the law*

- i. Are there effective remedies against non-implementation of legislation?
- ii. Are the obstacles to the implementation of law analysed *ex ante* and *ex post*?
- iii. Do laws provide sanctions for non-obedience of the law?²⁷
- iv. Is there a solid and coherent system of law enforcement by public authorities to enforce these sanctions?

Although full enforcement of the law is rarely possible, a fundamental requirement of the Rule of Law is that the law must be followed. This means that state bodies effectively implement laws. The very essence of the Rule of Law would be put into question if law appeared only in the books but was not duly applied and enforced.²⁸ The duty to implement law is twofold, since it implies obedience to the law by individuals and the duty to enforce the law by the state.

*In other words, obstacles to the effective implementation of the law can occur not only due to the illegal or negligent action of the authorities. It may also reside in the behaviour of the individuals, due to the quality of legislation which makes it difficult to implement.. 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 *ex ante* and *ex post* legislative evaluation has to be performed when addressing the issue of the Rule of Law.*

*Obstacles to the proper implementation of legislation may also result from the fact that it defines no or insufficient sanctions (*lex imperfecta*), as well as from an insufficient or selective enforcement of sanctions.*

- h) Private actors in charge of public tasks : does the law guarantee that non-state entities which have overtaken former public tasks and whose actions and decisions have a similar impact on ordinary people as those of public authorities are subject to the requirements of the Rule of Law in a manner comparable to those of public authorities?²⁹

There are a number of areas where hybrid (state-private) actors or private entities exercise powers that have traditionally been the domain of state authorities. Such situations often involve a transnational element. The Rule of Law must apply to such situations in the same way as to the classical exercise of public tasks by national public bodies.

B. Legal certainty

a) *Accessibility of the laws*

Are all legislative acts published before entering into force? Are they easily accessible, e.g. free of charge via Internet or in an official bulletin?

b) *Accessibility of court decisions*

Are court decisions accessible to the public?³⁰

As law can be established, elaborated upon and clarified by court decisions, its accessibility is also part of legal certainty. Publication is a central feature of accessibility, but it is sufficient, at least for lower court decisions, that they are made available to the public on request.

c) *Foreseeability of the laws*

Are the effects of laws foreseeable?³¹ Are the laws written in an intelligible manner? Does new legislation clearly state whether previous legislation is repealed or amended? Are amendments incorporated in a consolidated version of the law?

*Foreseeability means not only that the law must, where possible, be proclaimed in advance of implementation and be foreseeable as to its effects: it has to be formulated with sufficient precision and clarity to enable legal subjects to regulate their conduct in conformity with it.*³²

The necessary degree of foreseeability depends however on the nature of the law. Precaution in advance of dealing with concrete dangers has now become increasingly important; this evolution is legitimate due to the multiplication of the risks resulting in particular from the changing technology. However, in the areas where the precautionary approach of laws apply, such as risk law, the prerequisites for state action are outlined in terms that are considerably broader and more imprecise, but the Rule of Law implies that the principle of foreseeability is not set aside.

d) *Stability and consistency of law*

Are laws stable and consistently applied?³³

Instability and inconsistency of legislation or executive action may affect a person's ability to plan his or her actions. However, stability is not an end in itself: law has also to adapt to changing circumstances. Of course law can be changed, but should do so with due participation, notice and without adversely affecting legitimate expectations (see section g below).

e) *Consistency of case-law*

[Are there major contradictions in the case-law of the courts and notably of constitutional and supreme courts, or between them? Are there mechanisms that aim to ensure the consistency of the case-law, including informal mechanisms of consultation and formal special chambers to promote uniformity of interpretation? Are there obligations to indicate when contradictions exist or modifications of the case-law are made?]

Consistency of the law, including case-law, is an important aspect of its foreseeability and of legal certainty.

f) *Accessibility of information on governmental and administrative acts*

Is government and administrative information accessible in principle to the public?³⁴

Transparency and accessibility of public action should not be limited to legislation and the legislative process, it is a general aspect of a pluralistic, democratic society.³⁵

g) *Legitimate expectations*

Is respect for the principle of legitimate expectations ensured? Are public authorities under a duty to honour them?

The principle of legitimate expectations is part of the general principle of legal certainty in European Union law, derived from national laws, e.g., the United Kingdom's. It also expresses the idea that public authorities should not only abide by the law but also by their promises and raised expectations. According to the legitimate expectation doctrine, those who act in good faith on the basis of law as it is [or is legitimately thought to be],

*should not be frustrated in their expectations. This doctrine applies not only to legislation but also to individual decisions by public authorities.*³⁶

h) Non-retroactivity

Is retroactivity of criminal legislation prohibited? To what extent is there also a general prohibition on the retroactivity of other laws?³⁷ Are there exceptions, and, if so, under which conditions?

i) Do the nullum crimen sine lege and nulla poena sine lege principles apply?

People have to know in advance the consequences of their behaviour. This implies foreseeability (above II.B.c) and non-retroactivity of criminal legislation. In civil and administrative law, retroactivity may also negatively affect rights and legal interests. Outside the criminal field, a retroactive limitation of the rights of individuals or imposition of new duties may be permissible, but only if in the public interest and in conformity with the principle of proportionality (including temporally).

*j) Is respect of res judicata ensured?*³⁸

- i. Is respect for the ne bis in idem principle ensured?*
- ii. May final judicial decisions be revised?*
- iii. If so under which conditions?*

*The quashing of final judgments without cogent reasons of public interest is incompatible with the principle of legal certainty.*³⁹

C. Prohibition of arbitrariness and misuse (or abuse) of power⁴⁰

a) General prohibition of arbitrariness and misuse of power

Is there a general prohibition of arbitrariness and misuse of power (détournement de pouvoir) by public authorities? If yes, what is the legal source of this guarantee (Constitution, statutory law, case-law)?

An exercise of power that leads to substantively unfair, unreasonable, irrational or oppressive decisions would violate the notion of the Rule of Law.

b) Legal limits to discretionary power

Are there clear legal limits to discretionary power?⁴¹

It is contrary to the Rule of Law for legal discretion granted to the executive to be formulated 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.

c) Are there mechanisms to prevent, correct and sanction abuse or misuse of discretionary powers (détournement de pouvoir)? When discretionary power is given to officials, is there a judicial or any other independent control of the way this power is exercised?

Abuse of discretionary power should be controlled by judicial and/or other review. Access to an ombudsperson or another form of non-contentious jurisdiction is also a means to address misuse of powers.

d) Are reasons required for decisions by public authorities, in particular when they affect the rights of individuals? Is the failure to state reasons a valid ground for challenging such decisions in courts?

The obligation to give reasons should not only concern judicial, but also administrative decisions, as recognised by the Charter of Fundamental Rights of the European Union.⁴²

- e) *Are there general rules aimed at preventing a decision to be taken by a public official in a situation of conflict of interest?*
- f) *Are there specific rules aiming at preventing a decision to be taken by a public official in a situation where a conflict of interest may arise?*

A conflict of interest may arise from a situation in which the public official has a private interest liable to influence, or appear to influence, the impartial and objective performance of his or her official duties.⁴³

Preventing conflicts of interest is an important element of the fight against corruption, It is addressed in international conventions and soft law.⁴⁴

- g) *Are measures foreseen against corruption of public officials and are they effective?*
 - i. *What is defined as corruption?*
 - ii. *What kind of sanctions is provided for in case of corruption?*
 - iii. *Is the prohibition of corruption implemented effectively?*
- h) *Do bodies exist to combat corruption?⁴⁵ Are they independent from the executive and the legislature?*

Corruption leads to arbitrariness and misuse of powers and therefore undermines the very foundations of the Rule of Law. A number of international conventions and other instruments aim at preventing and fighting it.⁴⁶

D. Equality before the law and non-discrimination

a) Equality before the law

- i. *Does the national legal order clearly provide that the law applies equally to every person (equality before the law)?⁴⁷ Does it provide that differentiations have to be objectively justified, on the basis of a reasonable aim, and in conformity with the principle of proportionality?⁴⁸*
- ii. *Is there an effective remedy against discriminatory or unequal interpretation and administration/application of legislation?⁴⁹*

The Rule of Law requires a “universal subjection” of all to the law (Dicey). It implies that law should be equally applied, and consistently implemented. Equality is however not merely formal but should result in substantively equal treatment. To reach that end, differentiations may have to be admitted and may even be required. For example, affirmative action is a way to ensure substantial equality.⁵⁰

The principle of equal application of the law, because of its broad area of application and complex character, would in many cases be subject to non-implementation in the absence of an effective legal remedy.

b) Equality in law

- i. *Is there a constitutional principle that prohibits legislation (including regulations) from violating the principle of equality (equality in law)?⁵¹*
- ii. *May legislation violating the principle of equality be challenged in the court?*

Law and its implementation must respect to principle of equality; equal implementation of laws which deal unequally with similar cases contradicts the Rule of Law.

c) *Non-discrimination*

- i. Is there a constitutional provision prohibiting discrimination?
- ii. Is there legislation providing for tools to guarantee non-discrimination?

The principle of non-discrimination requires that any unjustified unequal treatment under the law be 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.

- iii. *Are exceptions to the principle of equality permissible under national law?⁵² In particular, are there individuals or groups with special legal privileges? Are these exceptions and/or privileges based on a legitimate aim and in conformity with the principle of proportionality?*

For example, rules on parliamentary immunities, and more specifically on inviolability, "should ... be regulated in a restrictive manner, and it should always be possible to lift such immunity, following clear and impartial procedures. Inviolability, if applied, should be lifted unless when this is justified with reference to the case at hand and proportional and necessary in order to protect the democratic workings of parliament and the rights of the political opposition".⁵³

E. Access to justice

1. Independence and impartiality

a. Independence of the judiciary

- i. *Are there sufficient constitutional and legal guarantees of judicial independence? Are the basic principles of judicial independence, including judicial appointments, tenure and discipline and removals?⁵⁴*

Independence means that the judiciary is free from external pressure, and is not controlled by the other branches of government, in particular the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers. Judges should not be subject to political influence or manipulation.

The European Court of Human Rights underlines four elements of judicial independence: the manner of appointment, the term of office, the existence of guarantees against outside pressure - including in budgetary matters - and the question whether the body presents an appearance of independence and impartiality.⁵⁵

- ii. *Are judges appointed on a permanent basis or until retirement age? Are grounds for removal clearly prescribed in law? Are there legal remedies for the individual judge against a dismissal decision?⁵⁶*

Whatever the method used for judges' appointment, limited and - still more - renewable terms in office will make them dependent on the authority which appointed them.

Disciplinary sanctions should be limited to intentional offences and gross negligence, and only imposed by court decision.⁵⁷ Legislation providing for other possibilities for dismissal would permit disguised sanctions.

- iii. *Is the appointment and promotion of judges set out and based on relevant factors, such as ability, integrity and experience?⁵⁸ Are such principles laid down in law?*

It is important that appointment, promotion and removal of judges should not be based upon political or personal considerations, and the system should be constantly monitored to ensure that this is so.

- iv. *Under which conditions is it possible to transfer judges to another court? Is the consent of the judge to the transfer necessary?*

Transfer of judges without their consent to another court could be a kind of disguised sanction, but it could be lawfully applied as a sanction.⁵⁹

- v. *Is there an independent judicial appointments council grounded in the Constitution?⁶⁰ If yes, does it ensure adequate representation of judges at all levels?⁶¹ In particular, may judges appeal to the judicial council for violation of their independence?*

"[I]t is an appropriate method for guaranteeing the independence of the judiciary that an independent judicial council have decisive influence on decisions on the appointment and career of judges". Judicial councils "should have a pluralistic composition with a substantial part, if not the majority, of members being judges."⁶² That is the most efficient way to ensure that the decision on the selection and career of judges be independent from the government and administration.⁶³ There may however be other acceptable ways to appoint an independent judiciary. Conferring a role to the executive is only permissible in countries where these powers are restrained by legal culture and traditions, which have grown over a long time, whereas the involvement of Parliament carries a risk of politicisation.⁶⁴

- vi. *Is the financial autonomy of the Judiciary guaranteed? In particular, are sufficient resources allocated to the courts, and is there a specific article in the budget relating to the judiciary, excluding the possibility of reductions by the executive, except if this is done in the same way for the whole civil service?*

Sufficient resources are essential for ensuring independence of justice not only from other state institutions, but also from private (wealthy) parties, in order that they perform their duties with the integrity and efficiency which are essential to the fostering of public confidence in justice and the Rule of Law.⁶⁵ The possibility for the executive to reduce the budget of the judiciary would be a way to put it under pressure.

- vii. *Are the grounds for disciplinary measures clearly defined and are the threshold for sanctions limited to intentional offences and gross negligence?⁶⁶*

The disciplinary system should fulfil the requirements of procedural fairness by way of a fair hearing and the possibility of appeal or appeals.

- viii. *Are the tasks of the prosecutors mostly limited to the criminal justice field?⁶⁷*

Allowing the public prosecutor's office to interfere in judicial cases outside its role in the criminal justice system – e.g. under the model of the "Prokuratura" – gives it in practice a power to put into question the work of the judiciary, whose independence is then endangered.⁶⁸

- ix. *Is the judiciary perceived as independent? What is the public's perception about possible political influences or manipulations in the appointment and promotion of the judges/prosecutors, as well on their decisions in individual cases?*

- x. *[If it exists, does the judicial council effectively defend judges against undue attacks?]*
- xi. *Do the judges systematically follow prosecutors' requests ("prosecutorial bias")?*
- xii. *Are there fair and sufficient salaries for judges?*

These factual benchmarks (i-l) deal, first of all, with the perception of the independence of the judiciary (e-f). The prosecutorial bias is an example of absence of independence, which may be encouraged by the possibility of sanctions in case of "wrong" judgments. Finally, fair and sufficient salaries are a concrete aspect of financial autonomy of the judiciary. They are a means to prevent corruption, which may endanger the independence of the judiciary not only from other branches of government, but also from individuals.⁶⁹

b. Independence of individual judges

It is not sufficient to ensure independence of the judiciary from the legislative and executive branches of government. Independence must also be guaranteed to each judge inside the judiciary.

- i. *Are judicial activities subject to the supervision of the executive, higher courts, court presidents or other public bodies?*

The possibility of appeal is a common element of the judicial system, but must be the only way to correct errors made by judges when applying the law. It is not acceptable to submit judges to a hierarchical power like civil servants. Such supervision would go against the Rule of Law⁷⁰.

- ii. *Does the Constitution guarantee the right to a competent judge ("natural judge pre-established by law")⁷¹.*

"The guarantee can be understood as having two aspects. One relates to the court as a whole. The other relates to the individual judge or judicial panel dealing with the case. ... It is not enough if only the court (or the judicial branch) competent for a certain case is determined in advance. That the order in which the individual judge (or panel of judges) within a court is determined in advance, meaning that it is based on general objective principles, is essential".⁷² This leads to the following questions.

- iii. *Does the law clearly determine which court is competent? Does it set rules to solve any conflicts of competence?*
- iv. *Does the allocation of cases follow objective and transparent criteria? Is the withdrawal a judge from a case of excluded other than in the case of recusal?⁷³*

c. Impartiality of the judiciary⁷⁴

- i. *Are there specific rules providing for the impartiality of the judiciary?⁷⁵*

The classical formula, as expressed for example by the case-law of the European Court of Human Rights, is that "justice must not only be done, it must also be seen to be done".⁷⁶ This implies objective as well as subjective impartiality.

- ii. *What is the public's perception of the impartiality of the judicial system?*
- iii. *Is there financial and administrative corruption in the judiciary? What is the public's perception on this issue? Are specific measures in place against corruption in the judiciary (e.g. declaration of assets)?*

Impartiality of the judiciary must be ensured in practice as well as in the law.

Corruption leads to arbitrariness and misuse of powers and therefore undermines the very foundations of the Rule of Law. This is particularly true for corruption in the judiciary, [which should be the body safeguarding the Rule of Law in the last instance].⁷⁷

Declaration of assets is mentioned as a means of fighting corruption because it can highlight any conflict of interest and possibly lead to scrutiny of any unusual income.

d. The prosecution service

Autonomy of the prosecution service

- i. *Does the office of the public prosecution have sufficient autonomy within the state structure? Does it act on the basis of the law and not of political expediency?⁷⁸*

There is no common standard either about appointment of public prosecutors the authority which has to appoint public prosecutors, nor about the internal organisation of the public prosecution service. However, sufficient autonomy must be ensured to shield prosecutorial authorities from political influence or orders. In conformity with the principle of legality, the public prosecution service must act only on the basis, and in accordance with the law.⁷⁹ This does not prevent the law from giving prosecutorial authorities some discretion when deciding whether to initiate a criminal procedure or not (opportunity principle).⁸⁰

Autonomy of the prosecutors

- ii. *Is termination of office permissible only when the prosecutor reaches the retirement age, or for disciplinary purposes, or, alternatively, are the prosecutors appointed for a relatively long period of time without the possibility of renewal?⁸¹ Are these matters and the grounds for dismissal of prosecutors prescribed by law?⁸² Are there legal remedies for the individual prosecutor against a dismissal decision?⁸³*
- iii. *Is the appointment, transfer and promotion of prosecutors based on objective factors, in particular ability, integrity and experience, and not on political considerations? Are such principles laid down in law?*

The same concerns apply in the context of the prosecution service as apply to the judiciary,⁸⁴ including the importance of addressing law as well as practice.⁸⁵

Legal remedies

- iv. *Is there a legal remedy for the alleged victim if a prosecutor decides not to prosecute?⁸⁶ In case he or she decides not to prosecute, is the prosecutor obliged to provide reasons, in order to enable the alleged victim to appeal?*
- v. *Is there judicial review of prosecutors' actions which affect human rights, such as search or detention?⁸⁷*

As in other fields, the existence of a legal remedy open to individuals whose rights have been affected is essential to ensuring that the law is respected.

- vi. *Are there fair and sufficient salaries for prosecutors?⁸⁸*

Here again,⁸⁹ a sufficient remuneration is an important element of autonomy and a safeguard against corruption.

- vii. *Is there a perception that prosecutorial policies allow selective enforcement of the law?*

Bias on the part of public prosecution service could lead to improper prosecution, or to selective prosecution, in particular of those in or close to power. This would jeopardise the implementation of the legal system and is therefore be a danger to the Rule of Law. Public perception is essential in identifying such a bias.

e. Independence of the bar

- i. Is there a recognised, organised and independent legal profession (bar)?⁹⁰*
- ii. Is there a legal basis for the functioning of the bar, based on the principles of independence, confidentiality and loyalty, and the avoidance of conflicts of interests?*
- iii. Is access to the bar regulated in an objective and sufficiently open manner?*
- iv. Are there efficient and fair disciplinary procedures at the bar?*

The bar plays a fundamental role in assisting the proper functioning of the judicial system. It is therefore crucial that it is organised so as to ensure its independence and proper functioning. This implies that legislation provides for the main features of its independence and that access to the bar is sufficiently open to make the right to legal counsel effective. Efficient and fair disciplinary proceedings are necessary to ensure the independence of the bar.

- v. What is the public's perception about the bar's independence?*

2. Fair trial⁹¹

a. Access to courts

Do citizens have an effective access to courts?

- a) Locus standi: Does an individual have an easily accessible and effective opportunity to challenge an act that interferes with his/her rights?⁹²*
- b) Is the right to defence guaranteed, including through effective legal assistance?⁹³ If yes, what is the legal source of this guarantee?*
- c) Is legal aid accessible to parties who do not have sufficient means to pay for legal assistance, when the interests of justice so require?⁹⁴*

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

- d) Are formal requirements,⁹⁵ time-limits⁹⁶ and court fees reasonable?⁹⁷*

This question addresses a number of procedural obstacles which may jeopardise access to justice. Excessive formal requirements may lead to well-grounded cases being declared inadmissible. Their complexity may further necessitate recourse to a lawyer even in straightforward cases with little financial impact. Simplified standardised forms easily accessible to the public could facilitate the applicable procedures.

Very short time-limits may in practice prevent subjects of law from exercising their rights. High fees may discourage a number of individuals, especially those with a low income, from bringing their case to court.

- e) Is access to justice easy in practice?⁹⁸*

Responses to the preceding questions concerning procedural obstacles, should enable a preliminary conclusion to be made regarding how access to court is guaranteed. However, a complete reply has to include a factual assessment, which should on its turn take account of the public's perception.

- f) *Is suitable information on the functioning of the judiciary available to the public?*

The judiciary should not be perceived as remote from the public and surrounded of mystery. The availability, in particular on the internet, of clear information on how to bring a case to court is a way to guarantee a better proximity with the public.

b. Presumption of innocence⁹⁹

- a) *Is the presumption of innocence clearly guaranteed by law?*
- b) *Are there clear rules on the burden of proof?*
- c) *Are there legal safeguards which aim at preventing other branches of government from making statements on the guilt of the accused?¹⁰⁰*

The presumption of innocence is essential in ensuring the right to a fair trial. In order for the presumption of innocence to be guaranteed, the burden of proof has to be on the prosecution.¹⁰¹ What has to be avoided is that other branches of government by purpose or unintentionally exercise influence on the competent judicial authority by prejudging the assessment of the facts.

c. Other aspects of the right to a fair trial

- a) *Is equality of arms guaranteed by law? Is it ensured in practice?¹⁰²*
- b) *Is the right to remain silent and not to incriminate oneself nor members of one's family ensured by law?¹⁰³*
- c) *Are there rules excluding unlawful evidence?¹⁰⁴*
- d) *Are judicial decisions made without undue delay?¹⁰⁵ Is there a remedy against undue lengths of proceedings?¹⁰⁶*
- e) *Is the right to access to court documents and files for litigants ensured?¹⁰⁷*
- f) *Is the right to be heard guaranteed?¹⁰⁸*
- g) *Are judgments well-reasoned?¹⁰⁹*
- h) *Are hearings and judgments public except for the cases provided for in Article 6.1 ECHR?*

All aspects of the right to a fair trial developed above may be inferred from the right to a fair trial as defined in Article 6 ECHR and elaborated in the case-law of the European Court of Human Rights.

- i) *Are appeal procedures available?*

The right to appeal against a judicial decision is expressly guaranteed by Article 2 Protocol 7 ECHR and Article 14.5 ICCPR in the criminal field, and by Article 8.4.h ACHR in general. This is a general principle of the Rule of Law guaranteed by domestic legislation - albeit more systematically for criminal than for other cases -, often at constitutional level, since any court whose decisions cannot be appealed would run the risk of acting arbitrarily.

- j) *Are court notifications delivered properly and in due time?*

These are again procedural aspects which ensure that legal subjects are properly involved in the whole judicial process.

d. Effectiveness of judicial decisions

- a) *Are judgments effectively implemented?*¹¹⁰
- b) *Are complaints for non-implementation of judgments before national courts and/or the European Court of Human Rights frequent?*
- c) *What is the perception of the effectiveness of judicial decisions by the public?*

Judicial decisions are essential to the implementation of the Constitution and of legislation. The right to a fair trial and the Rule of Law in general would be devoid of any substance if judicial decisions were not implemented. The questions above are examples of elements for the assessment of their implementation.

3. Constitutional justice (if applicable)

In countries which provide for constitutional review (by specialised constitutional courts or by supreme courts), the following questions should be asked:

- a) *Do individuals have effective access to constitutional justice against general acts, i.e. may individuals request constitutional review of the law by direct action or by constitutional objection in ordinary court proceedings?*¹¹¹ *What "interest to sue" is required on their part?*
- b) *Do individuals have effective access to constitutional justice against individual acts which affect them, i.e. many individuals request constitutional review of administrative acts or court decisions through direct action or by constitutional objection?*¹¹²

*The Venice Commission is in favour of a full judicial review of constitutionality. However, it does not consider it is an element of the European constitutional heritage that has to be followed by all countries. What is essential is the effective guarantee of the conformity of governmental action, including legislation, with the Constitution. There may be other ways to ensure such conformity. For example, Finnish law provides at the same time for a priori review of constitutionality by the Constitutional Law Committee and for a posteriori judicial control in case the application of a statutory provision would lead to an evident conflict with the Constitution. In the specific national context, this has proven sufficient.*¹¹³

Full judicial review of constitutionality is indeed the most efficient means to ensure respect for the Constitution, and includes a number of aspects which are detailed above. First, the question of locus standi is very important: leaving the possibility to ask for a review of constitutionality only to the legislative or executive branch of government may severely limit the number of cases and so the scope of the review. Individual access to constitutional jurisdiction has therefore been developed in a vast majority of countries, at least in Europe.¹¹⁴ Such access may be direct or indirect (by way of an objection raised before an ordinary court, which refers to the constitutional court).¹¹⁵ Second, there should be no limitation of the kinds of acts which can be submitted to constitutional review: it must be possible for (general) normative as well as for individual (administrative or judicial) acts. However, an individual interest may be required on the part of a private applicant.

- a) *Is Parliament obliged, when adopting new legal provisions, to take into account the arguments used by the Constitutional Court or equivalent body?*

- b) *Does Parliament, within reasonable time, fill legal gaps identified by the Constitutional Court?*
- c) *Where judgments of ordinary courts are repealed in constitutional complaint proceedings, are the cases re-opened and settled by the ordinary courts taking into account the arguments used by the Constitutional Court?¹¹⁶*

The right to a fair trial imposes the implementation of all courts' decisions, including the constitutional jurisdiction's ones. The mere cancellation of legislation going against the Constitution is not sufficient to eliminate every effect of a violation, and would be at any rate impossible in case of unconstitutional legislative omission.

This is why this document underlines the importance of Parliament adopting legislation in line with the decision of the Constitutional Court or equivalent body.¹¹⁷ What was said about the legislator is also true for courts: they have to remedy the cases where the constitutional jurisdiction found unconstitutionality, on the basis of the latter's arguments.

- d) *If constitutional judges are elected by Parliament, is there a requirement for a qualified majority¹¹⁸ and other safeguards for a balanced composition?¹¹⁹*

"The legitimacy of a constitutional jurisdiction and society's acceptance of its decisions may depend very heavily on the extent of the court's consideration of the different social values at stake, even though such values are generally superseded in favour of common values. To this end, a balance which ensures respect for different sensibilities must be entrenched in the rules of composition of these jurisdictions".¹²⁰ A qualified majority implies a political compromise and is a way to ensure a balanced composition when no party or coalition has such a majority.

III. SELECTED STANDARDS

General Rule of Law Standards

1. Hard Law

Council of Europe, European Convention on Human Rights (1950)
<http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005>

European Union (EU), Charter of Fundamental Rights of the EU (2009)
http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2010.083.01.0389.01.ENG

United Nations (UN), International Covenant on Civil and Political Rights (1966) (ICCPR) <http://www.unhcr.org/refworld/pdfid/3ae6b3aa0.pdf>

Council of Europe, Statute of the Council of Europe, Preamble (1949)
<http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/001>

OAS, American Convention on Human Rights ('Pact of San Jose') (1969)
http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm

African Union (AU), Constitutive Act
http://www.au.int/en/sites/default/files/ConstitutiveAct_EN.pdf

African Union (AU) Charter on Democracy, Elections and Governance (2007), Article 3
http://www.au.int/en/sites/default/files/AFRICAN_CHARTER_ON_DEMOCRACY_ELECTIONS_AND_GOVERNANCE.pdf

2. Soft Law

a) Council of Europe

Council of Europe Committee of Ministers, 'The Council of Europe and the Rule of Law', CM(2008)170
http://www.coe.int/t/dghl/standardsetting/minjust/mju29/CM%20170_en.pdf

The European Commission for the Efficiency of Justice's Evaluation of European Judicial Systems project
http://www.coe.int/t/dghl/cooperation/cepej/series/Etudes6Suivi_en.pdf

b) European Union

EU, Justice Scoreboard (ongoing annual reports)
http://ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm

Communication from the European Commission to the European Parliament and the Council, 'A new EU Framework to strengthen the Rule of Law', COM(2014) 158 final/2.
http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf

Council of the EU, Conclusions on fundamental rights and rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental Rights of the European Union (2013)
http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/137404.pdf

EU Accession Criteria ('Copenhagen Criteria')

http://europa.eu/rapid/press-release_DOC-93-3_en.htm?locale=en

c) Other International Organisations

Organization for Security and Co-operation in Europe, Decision No. 7/08, 'Further strengthening the rule of law in the OSCE area' (2008).

<http://www.osce.org/mc/35494?download=true>

Organization of American States (OAS), Inter-American Democratic Charter (2001),

http://www.oas.org/OASpage/eng/Documents/Democractic_Charter.htm

3. Rule of Law Indicators

World Justice Project Rule of Law Index

http://worldjusticeproject.org/sites/default/files/files/wjp_rule_of_law_index_2014_report.pdf

Vera-Altus Rule of law Indicators

http://www.altus.org/pdf/dimrol_en.pdf

The United Nations Rule of Law Indicators

http://www.un.org/en/events/peacekeepersday/2011/publications/un_rule_of_law_indicators.pdf

World Bank's World Governance Indicators

<http://info.worldbank.org/governance/wgi/index.aspx#home>

A. Legality

1. Hard Law

ECHR Articles 6ff, in particular 6.1, 7, 8.2, 9.2, 10.2 and 11.2

EU, Charter of Fundamental Rights of the EU (2009), Article 49 (concerning criminal offences and penalties)

http://www.europarl.europa.eu/charter/pdf/text_en.pdf

UN, ICCPR Articles 14ff, in particular 14.1, 15, 18.3, 19.3, 21; 22.3

UN, International Covenant on Civil and Political Rights (1966), Article 4 (emergency derogations must be strict), 15 (nullum crimen, nullum poena)

<http://www.unhcr.org/refworld/pdfid/3ae6b3aa0.pdf>

UN, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990), Articles 16(4), 19

<http://www2.ohchr.org/english/bodies/cmw/cmw.htm>

Rome Statute of the International Criminal Court (1998), Article 22

http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

AU Charter on Democracy, Elections and Governance (2007), Article 10

http://www.au.int/en/sites/default/files/AFRICAN_CHARTER_ON_DEMOCRACY_ELECTIONS_AND_GOVERNANCE.pdf

OAS, American Convention on Human Rights ('Pact of San Jose') (1969), Article 27
http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm

2. Soft Law

UN, Universal Declaration of Human Rights (1948), Article 11(2) (concerning criminal offences and penalties)

<http://www.un.org/en/documents/udhr/index.shtml>

Organization of American States (OAS), American Declaration of the Rights and Duties of Man (1948), Article XXV (protection from arbitrary arrest)

<http://www.oas.org/dil/1948%20American%20Declaration%20of%20the%20Rights%20and%20Duties%20of%20Man.pdf>

Commonwealth (Latimer House) Principles on the Accountability of and the Relationship Between the Three Branches of Government (1998), Principles II, VIII

<http://www.cmja.org/downloads/latimerhouse/commprinthreearms.pdf>

Charter of the Commonwealth (2013), Sections VI, VIII

<http://thecommonwealth.org/sites/default/files/page/documents/CharteroftheCommonwealth.pdf>

Association of Southeast Asian Nations (ASEAN) Human Rights Declaration (2012), para 20(2)

<http://www.asean.org/news/asean-statement-communiques/item/asean-human-rights-declaration>

B. Legal certainty

1. Hard Law

ECHR Articles 6ff, in particular 6.1, 7, 8.2, 9.2, 10.2 and 11.2

OAS, American Convention on Human Rights ('Pact of San Jose') (1969), Article 9

http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm

AU, African Charter on Human and People's Rights (Banjul Charter) (1981), Article 7(2)

<http://www.unhcr.org/refworld/pdfid/3ae6b3630.pdf>

League of Arab States (LAS), Arab Charter on Human Rights (Revised) (2004), Article 16

<http://www.refworld.org/docid/3ae6b38540.html>

2. Soft Law

UN, Universal Declaration of Human Rights (1948), Article 11

<http://www.un.org/en/documents/udhr/index.shtml>

UN, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels (2012), para 8

http://www.unrol.org/article.aspx?article_id=192

ASEAN, Human Rights Declaration (2012), para 20(3)

<http://www.asean.org/news/asean-statement-communiques/item/asean-human-rights-declaration>

C. Prohibition of arbitrariness

1. Hard Law

a) General

UN, International Covenant on Civil and Political Rights (1966), Article 17 (interference with freedoms)

<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

UN, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990), Articles 14 (interference with freedoms), 15 (deprivation of property)

<http://www2.ohchr.org/english/bodies/cmw/cmw.htm>

UN, Convention on the Rights of the Child (1989), Article 37(b) (arbitrary arrest or detention)

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

AU, African Charter on Human and People's Rights (Banjul Charter) (1981), Article 14

<http://www.unhcr.org/refworld/pdfid/3ae6b3630.pdf>

b) Corruption

Council of Europe, Criminal Convention against Corruption,

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

Council of Europe, Criminal Convention on Corruption,

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

Council of Europe, Additional Protocol to the Criminal Law Convention on Corruption

<http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/191>

UN, Convention Against Corruption (2003)

<http://www.unodc.org/unodc/en/treaties/CAC/>

OAS, Inter-American Convention against Corruption (1996)

<http://www.oas.org/juridico/english/treaties/b-58.html>

2. Soft Law

a) General

Council of Europe Committee of Ministers, 'The Council of Europe and the Rule of Law', CM(2008)170, section 46

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

UN, Universal Declaration of Human Rights (1948), Articles 9, 12, 17

<http://www.un.org/en/documents/udhr/index.shtml>

Commonwealth (Latimer House) Principles on the Accountability of and the Relationship Between the Three Branches of Government (1998), Principle VII

<http://www.cmja.org/downloads/latimerhouse/commprinthreearms.pdf>

ASEAN Human Rights Declaration (2012), paras 11-12, 21 (arbitrary deprivations of life, property)

<http://www.asean.org/news/asean-statement-communicues/item/asean-human-rights-declaration>

b) Corruption

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

D. Equality before the law and non-discrimination

1. Hard Law

a) Council of Europe
ECHR (1950), Article 14

b) European Union

Charter of Fundamental Rights of the EU (2009), Articles 20-21

http://www.europarl.europa.eu/charter/pdf/text_en.pdf

c) Other international organisations

UN, International Covenant on Civil and Political Rights (1966), Articles 2, 14(1), 26 (equality before courts and tribunals)

<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

UN, International Convention on the Elimination of All Forms of Racial Discrimination (CEDR) (1969), especially Article 5

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>

UN, Convention Against Corruption (2003)

<http://www.unodc.org/unodc/en/treaties/CAC/>

UN, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990), Articles 1, 7, 18

<http://www2.ohchr.org/english/bodies/cmw/cmw.htm>

UN, International Covenant on Economic, Social and Cultural Rights (1966), Article 3

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>

UN, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979)

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>

UN, Convention on the Rights of Persons with Disabilities (CRPD) (2006)
<http://www.un.org/disabilities/convention/conventionfull.shtml>

UN, Convention on the Rights of the Child (1989), Article 2
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

International Committee of the Red Cross and Red Crescent Societies,
Geneva Conventions (1949), Common Article 3
<https://www.icrc.org/ihl/WebART/375-590006>

AU, African Charter on Human and People's Rights (Banjul Charter) (1981),
Articles 3, 19
<http://www.unhcr.org/refworld/pdfid/3ae6b3630.pdf>

AU Charter on Democracy, Elections and Governance (2007), Article 8
http://www.au.int/en/sites/default/files/AFRICAN_CHARTER_ON_DEMOCRACY_ELECTIONS_AND_GOVERNANCE.pdf

OAS, American Convention on Human Rights ('Pact of San Jose') (1969),
Articles 3, 24
http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm

LAS, Arab Charter on Human Rights (Revised) (2004), Articles 2, 9
<http://www.refworld.org/docid/3ae6b38540.html>

2. Soft Law

Council of Europe, Recommendation CM/Rec(2007)7 of the Committee of Ministers
to member states on good administration, Article 3
<https://wcd.coe.int/ViewDoc.jsp?id=1155877>

UN, Universal Declaration of Human Rights (1948), Articles 1, 2, 6-7, 16-17, 22-23
<http://www.un.org/en/documents/udhr/index.shtml>

UN Declaration of the High-level Meeting of the General Assembly on the Rule of
Law at the National and International Levels (2012), sections 12, 14
http://www.unrol.org/article.aspx?article_id=192

UN Human Rights Committee, General Comment No. 32 (2007), Article 14: Right to
equality before courts and tribunals and to a fair trial
<http://www1.umn.edu/humanrts/gencomm/hrcom32.html>

The Commonwealth, Harare Commonwealth Declaration (1991), para 4
<http://thecommonwealth.org/sites/default/files/history-items/documents/Harare%20Commonwealth%20Declaration%201991.pdf>

The Commonwealth, Singapore Declaration of Commonwealth Principles (1971),
Principle 6
<http://thecommonwealth.org/sites/default/files/history-items/documents/Singapore%20Declaration.pdf>

ASEAN, Human Rights Declaration (2012), paras 2, 7-9
<http://www.asean.org/news/asean-statement-communicues/item/asean-human-rights-declaration>

OAS, American Declaration of the Rights and Duties of Man (1948), Articles II, XVII

<http://www.oas.org/dil/1948%20American%20Declaration%20of%20the%20Rights%20and%20Duties%20of%20Man.pdf>

OAS, Inter-American Democratic Charter (2001), Article 9
http://www.oas.org/OASpage/eng/Documents/Democractic_Charter.htm

South Asian Association for Regional Cooperation (SAARC), Charter of Democracy (2011)
<http://saarc-sec.org/SAARC-Charter-of-Democracy/88/>

E. Access to justice

1. Hard Law

ECHR (1950), Article 6

Charter of Fundamental Rights of the EU (2009), Articles 41, 47, 48, 50
http://www.europarl.europa.eu/charter/pdf/text_en.pdf

UN, International Covenant on Civil and Political Rights (1966), Articles 9, 14
<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

UN, International Convention on the Elimination of All Forms of Racial Discrimination (1969), Article 6
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>

UN, Convention on the Rights of the Child (1989), Articles 12(2), 40
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

UN, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), Articles 16, 18
<http://www2.ohchr.org/english/bodies/cmw/cmw.htm>

Rome Statute of the International Criminal Court (1998), Article 55
http://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

OAS, American Convention on Human Rights ('Pact of San Jose') (1969), Articles 8, 25
http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm

LAS, Arab Charter on Human Rights (Revised) (2004), Articles 7, 9
<http://www.refworld.org/docid/3ae6b38540.html>

LAS, The Riyadh Arab Agreement for Judicial Cooperation (1983), Articles 3-4
<http://www.refworld.org/docid/3ae6b38d8.html>

2. Soft Law

a) Council of Europe

Council of Europe Commission for Democracy through Law (Venice Commission), 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)

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Venice Commission, Report on Judicial Appointments, CDL-AD(2007)028
<http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282007%29028-e>

Council of Europe, Recommendation CM/Rec(94)12 of the Committee of Ministers to member states on the Independence, Efficiency and Role of Judges (1994)
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Council of Europe, 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>

Council of Europe, 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.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2719990&SecMode=1&DocId=366374&Usage=2>

Council of Europe, Recommendation CM/Rec(2012)11 of the Committee of Ministers to member states on the role of public prosecutors outside the criminal justice system
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Council of Europe, Recommendation No. R(2000)21 of the Committee of Ministers to member States on the freedom of exercise of the profession of lawyer
<https://wcd.coe.int/ViewDoc.jsp?id=380771&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>

b) European Union

European Network of Councils for the Judiciary, Dublin Declaration on Standards for the Recruitment and Appointment of Members of the Judiciary (2012)
http://www.encj.eu/images/stories/pdf/GA/Dublin/encj_dublin_declaration_def_dclarat ion_de_dublin_recj_def.pdf

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European Association of Judges, Judges' Charter in Europe (1997)
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c) United Nations

UN, Universal Declaration of Human Rights (1948), Articles 8, 10
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<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/148/94/PDF/G1314894.pdf?OpenElement>

UN Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels (2012), para 13
http://www.unrol.org/article.aspx?article_id=192

UN Office on Drugs and Crime Judicial Group on Strengthening Judicial Integrity, The Bangalore Principles of Judicial Conduct (2002)
http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf

UN OHCHR, Principles relating to the Status of National Institutions (The Paris Principles) (1993), section 2 (Composition and guarantees of independence and pluralism)
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>

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<http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>

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http://www.iap-association.org/getattachment/34e49dfe-d5db-4598-91da-16183bb12418/Standards_English.aspx

d) The Commonwealth of Nations

Charter of the Commonwealth (2013), section 7

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Commonwealth (Latimer House) Principles on the Accountability of and the Relationship Between the Three Branches of Government (2003), Principles III-VI
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Harare Commonwealth Declaration (1991), para 4
<http://thecommonwealth.org/sites/default/files/history-items/documents/Harare%20Commonwealth%20Declaration%201991.pdf>

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<http://www.cmja.org/downloads/limassolconclusionwithannexe.pdf>

e) Other International Organisations

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OAS, American Declaration of the Rights and Duties of Man (1948), Articles XVII, XXVI
<http://www.oas.org/dil/1948%20American%20Declaration%20of%20the%20Rights%20and%20Duties%20of%20Man.pdf>

OAS, Inter-American Democratic Charter (2001), Articles 2-4
http://www.oas.org/OASpage/eng/Documents/Democratic_Charter.htm

African Union (AU), Constitutive Act (2000), Article 4(m)
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SAARC, Charter of Democracy (2011)
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f) Non-Governmental Organisations

Justice Sector Benchmarks – A User's Guide for Civil Society Organizations (American Bar Association Rule of Law Initiative – Arab Council for Judicial and Legal Studies)
<http://www.albersconsulting.eu/justicebenchmarks.html>

¹ The principle of legality is explicitly recognised as an aspect of the Rule of Law by the European Court of Justice, see ECJ, C-496/99 P, *Commission v. CAS Succhi di Frutta*, 29 April 2004, § 63.

² The reference to « law » for acts and decisions affecting human rights is to be found in a number of provisions of the European Convention on Human Rights, including Article 6.1, 7 and Articles 8.2, 9.2, 10.2 and 11.2 concerning restrictions to fundamental freedoms. See, among many other authorities, ECtHR *Amann v. Switzerland*, 27798/95, 16 February 2000, § 47ff; *Slivenko v. Latvia*, 48321/99, 9 October 2003, § 100; *X. v. Latvia*, 27853/09, 26 November 2013, § 58; *Kurić and Others v. Slovenia*, 26828/06, 12 March 2014, § 341.

³ Discretionary power is, of course, permissible, but must be controlled. See below ch. II.3.

⁴ Law “comprises statute law as well as case-law”, ECtHR *Achour v. France*, 67335/01, 29 March 2006, § 42; cf. *Kononov v. Latvia* [GC], 36376/04, 17 May 2010, § 185.

⁵ ECtHR *The Sunday Times v. the United Kingdom (No. 1)*, 6538/74, 26 April 1979, § 46ff. On the conditions of accessibility and foreseeability, see, e.g., ECtHR *Kurić and Others v. Slovenia*, 26828/06, 26 June 2012, § 341ff; *Amann v. Switzerland*, 27798/95, 16 February 2000, § 50; *Slivenko v. Latvia*, 48321/99, 9 October 2003, § 100. The Court of the European Union considers that the principles of legal certainty and legitimate expectations imply that “the effect of Community legislation must be clear and expectable to those who are subject to it”: ECJ, 212 to 217/80, *Amministrazione delle finanze dello Stato v. SRL Meridionale Industria Salumi and Others*, 12 November 1981, § 10; or “that legislation be clear and precise and that its application be foreseeable for all interested parties”: CJEU, C-585/13, *Europäisch-Iranische Handelsbank AG v. Council of the European Union*, 5 March 2015, § 93; cf. ECJ, C-325/91, *France v Commission*, 16 June 1993, § 26. For more details, see ch. II.2 (legal certainty)

⁶ On the hierarchy of norms, see CDL-JU(2013)020, Memorandum – Conference on the European standards of Rule of Law and the scope of discretion of powers in the member states of the Council of Europe (Yerevan, Armenia, 3-5 July 2013).

⁷ This results from the principle of separation of powers, which also limits the discretion of the executive: cf. CM(2008)170, The Council of Europe and the Rule of Law, § 46.

⁸ The Venice Commission is in principle favourable to full review of constitutionality, but a proper implementation of the Constitution is sufficient: cf. CDL-AD(2008)010, Opinion on the Constitution of Finland, § 115ff. See especially the section on Constitutional Justice (ch. II.E.3).

⁹ Cf. Article 26 (*pacta sunt servanda*) and Article 27 (internal law and observance of treaties) of the 1969 Vienna Convention on the Law of Treaties; CDL-STD(1993)006, The relationship between international and domestic law, § 3.6 (treaties), 4.9 (international custom), 5.5 (decisions of international organisations), 6.4 (international judgments and rulings); CDL-AD(2014)036, Report on the Implementation of Human Rights Treaties in Domestic Law and the Role of Courts, § 50.

¹⁰ Article 27 of the Vienna Convention on the Law of Treaties.

¹¹ Article 1.2 of the Constitution.

¹² Article 9 of the Constitution.

¹³ See e.g. CDL-AD(2012)026, § 79; CDL-AD(2014)010 § 167ff (about the excessive use of emergency ordinances). Unwritten constitutional rules must be considered as “Constitution” in this sense.

¹⁴ ECtHR *Sunday Times*, above note 5.

¹⁵ See e.g. Article 37 of the French Constitution; Article 114.4 of the Romanian Constitution; Article 185.3 of the Swiss Constitution.

¹⁶ Article 80.

¹⁷ Article 76.

¹⁸ See also, e.g., Article 92 of the Constitution of Poland which provides for similar limitations to legislative delegation, however without any limitation of duration.

¹⁹ On the need to clarify and streamline legislative procedures, see e.g. CDL-AD(2012)026, § 79; cf. CDL-AD(2002)012, Opinion on the draft revision of the Romanian Constitution, § 38ff.

²⁰ According to the European Court of Human Rights, exacting and pertinent review of (draft) legislation, not only *a posteriori* by the judiciary, but also *a priori* by the legislature, makes restrictions to fundamental rights guaranteed by the Convention more easily justifiable: ECtHR *Animal Defenders International v. the United Kingdom*, 48876/08, 22 April 2013, §106ff.

²¹ This is a specific aspect of access to government information, item II.B.f.

²² ECtHR *Hatton v. the United Kingdom*, 36022/97, 8 July 2003, § 128: “A governmental decision-making process concerning complex issues of environmental and economic policy such as in the present case must necessarily involve appropriate investigations and studies in order to allow them to strike a fair balance between the various conflicting interests at stake.” See also *Evans v. the United Kingdom*, 6339/05, 10 April 2007. About the absence of real parliamentary debate since the adoption of a statute, which took place in 1870, see *Hirst (No. 2) v. the United Kingdom*, 74025/01, 6 October 2005, § 79. In Finland, the instructions for law-drafting include such a requirement.

²³ Cf. Article 15 ECHR (“derogation in time of emergency”); Article 4 ICCPR; Article 27 ACHR. For an individual application of Article 15 ECHR, see ECtHR *A. and Others v. the United Kingdom*, 3455/05, 19 February 2009: a derogation to Article 5 § 1 ECHR was considered as disproportionate. On emergency powers, see also CDL-STD(1995)012, Emergency Powers; CDL-AD(2006)015, Opinion on the Protection of Human Rights in Emergency Situations.

²⁴ CDL-AD(2006)015, § 33.

²⁵ Article 15 ECHR; Article 4 ICCPR; Article 27 ACHR.

²⁶ CDL-AD(2006)015, § 9. On derogations under Article 15 ECHR, see more generally CDL-AD(2006)015, §. 9ff, and the quoted case-law.

²⁷ On the need for effective and dissuasive sanctions, see e.g. CDL-AD(2014)019, § 89; CDL-AD(2013)021, § 70.

²⁸ The need for ensuring proper implementation of the legislation is often underlined by the Venice Commission: see e.g. CDL-AD(2014)003, § 11: “the key challenge for the conduct of genuinely democratic elections remains the exercise of political will by all stakeholders, to uphold the letter and the spirit of the law, and to implement it fully and effectively”; CDL-AD(2014)001, § 85.

²⁹ Cf. Article 124 of the Constitution of Finland: "A public administrative task may be delegated to others than public authorities only by an Act or by virtue of an Act, if this is necessary for the appropriate performance of the task and if basic rights and liberties, legal remedies and other requirements of good governance are not endangered."

³⁰ ECtHR *Fazlyiski v. Bulgaria*, 40908/05, 16 April 2013; *Ryakib Biryukov v. Russia*, 14810/02, 17 January 2008, in particular § 30ff; cf. *Kononov v. Latvia*, 36376/04, 17 May 2010, § 185.

³¹ ECtHR *Sunday Times v. the United Kingdom (No. 1)*, 6538/74, 26 April 1979, § 46ff; *Rekvényi v. Hungary*, 25390/94, 20 May 1999, § 34ff.

³² ECtHR *The Sunday Times v. the United Kingdom (No. 1)*, 6538/74, 26 April 1979, § 49.

³³ The Venice Commission has addressed the issue of stability of legislation in the electoral field: Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev, II.2; Interpretative Declaration on the Stability of the Electoral Law, CDL-AD(2005)043.

³⁴ Council of Europe Convention on Access to Official Documents (CETS No. 205); Recommendation R(2002)2 of the Committee of Ministers to member states on access to official documents; cf. Recommendation 854 (1979) of the Parliamentary Assembly on access by the public to government records and freedom of information. See also ECtHR *Youth Initiative for Human Rights v. Serbia*, 48135/06, 25 June 2013, § 22ff.

³⁵ CETS No. 205, Preamble, fourth paragraph.

³⁶ For example, individuals who have been encouraged to adopt a behaviour by Community measures may legitimately expect not to be subject, upon the expiry of this undertaking, to restrictions which specifically affect them precisely because they availed themselves of the possibilities offered by the Community provisions: ECJ, 120/86, *Mulder v. Minister van Landbouw en Visserij*, 28 April 1988, § 21ff. In the case-law of the European Court of Human Rights, the doctrine of legitimate expectations essentially applies to the protection of property as guaranteed by Article 1 of the First Additional Protocol to the European Convention on Human Rights: see e.g. ECtHR *Anhaeuser-Busch Inc. v. Portugal* [GC], 73049/01, 11 January 2007, § 65; *Gratzinger and Gratzingerova v. the Czech Republic* [GC] (dec.), 39794/98, 10 July 2002, § 68ff; *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom*, 21319/93, 21449/93, 21675/93, 21319/93, 21449/93 and 21675/93, 23 October 1997, § 62ff.

³⁷ See Article 7.1 ECHR, Article 15 ICCPR, Article 9 ACHR, Article 7.2 of the African (Banjul) Charter on Human and Peoples' Rights [ACHPR] for criminal law; Article 28 of the Vienna Convention on the Law of Treaties for international treaties.

³⁸ Article 4 Protocol 7 ECHR, Article 14.7 ICCPR, Article 8.4 ACHR (in the penal field); on the respect of the principle of *res judicata*, see e.g. ECtHR *Brumărescu v. Romania*, 28342/95, 28 October 1999, § 62; *Kulkov and Others v. Russia*, 25114/03, 11512/03, 9794/05, 37403/05, 13110/06, 19469/06, 42608/06, 44928/06, 44972/06 and 45022/06, 8 January 2009, § 27; *Duca v. Moldova*, 75/07, 3 March 2009, § 32. The Court considers respect of *res judicata* as an aspect of legal certainty. Cf. *Marckx v. Belgium*, 6833/74, 13 June 1979, § 58.

³⁹ Cf. The Council of Europe and the Rule of Law - An overview, CM(2008)170, 21 November 2008, § 48.

⁴⁰ Protection against arbitrariness was mentioned by the European Court of Human Rights in a number of cases. In addition to those quoted in the next note, see e.g. *Husayn (Abu Zubaydah) v. Poland*, 7511/13, 24 July 2014, § 521ff; *Hassan v. the United Kingdom*, 29750/09, 16 September 2014, § 106; *Georgia v. Russia (I)*, 13255/07, § 182ff (Article 5 ECHR); *Ivinović v. Croatia*, 13006/13, 18 September 2014, § 40 (Article 8 ECHR). For the Court of Justice of the European Union, see e.g. ECJ, 46/87 and 227/88, *Hoechst v. Commission*, 21 September 1989, § 19; T-402/13, *Orange v. European Commission*, 25 November 2014, § 89. On the limits of discretionary powers, see Appendix to Recommendation of the Committee of Ministers on good administration, CM/Rec(2007)7, Article 2.4 ("Principle of lawfulness"): "[Public authorities] shall exercise their powers only if the established facts and the applicable law entitle them to do so and solely for the purpose for which they have been conferred".

⁴¹ CM(2008)170, The Council of Europe and the Rule of Law, § 46; ECtHR *Malone*, 8691/79, 2 August 1984, § 68; *Segerstedt-Wiberg and Others v. Sweden*, 62332/00, 6 June 2006, § 76 (Article 8).

⁴² Cf. item II.E.2.c.g and note 109.

⁴³ CM/Rec(2000)10 on codes of conduct for public officials, Article 13.

⁴⁴ United Nations Convention against Corruption, in particular Article 8.5; CM/Rec(2000)10, Articles 13ff; cf. CM/Res (97) 24 on the twenty guiding principles for the fight against corruption.

⁴⁵ 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*.

⁴⁶ See for example the United Nations Convention against Corruption; [Criminal Law Convention on Corruption](#) (CETS 173); [Civil Law Convention on Corruption](#) (CETS 174); [Additional Protocol to the Criminal Law Convention on Corruption](#) (CETS 191); CM/Rec(2000)10 on codes of conduct for public officials; CM/Res (97) 24 on the twenty guiding principles for the fight against corruption.

⁴⁷ For example, Article 1.2 Protocol 12 ECHR makes clear that "any public authority" - and not only the legislator - has to respect the principle of equality. Article 26 ICCPR states that "All persons are equal before the law and are entitled without discrimination to the equal protection of the law". "The principle of equal treatment is a general principle of European Union law, enshrined in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union": CJEU, C-550/07 P, *Akzo Nobel Chemicals and Akros Chemicals v Commission*, 14 September 2010, § 54.

⁴⁸ A distinction is admissible if the situations are not comparable and/or if it is based on an objective and reasonable justification: See *Hämäläinen v. Finland*, 37359/09, 26 July 2014: "The Court has established in its case-law that in order for an issue to arise under Article 14 there must be a difference in treatment of persons in relevantly similar situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment (see *Burden v. the United Kingdom* GC, no. [13378/05](#), § 60, ECHR 2008)".

⁴⁹ Cf. Article 13 ECHR; Article 2.3 ICCPR; Article 25 ACHR; Article 7.1.a ACHPR.

- ⁵⁰ Cf. Article 1.4 and 2.2 of the International Convention on the Elimination of All Forms of Racial Discrimination (CEDR); Article 4 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Article 5.4 of the Convention on the Rights of Persons with Disabilities (CRPD).
- ⁵¹ Cf. e.g. CDL-AD(2014)010, § 41-42; CDL-AD(2013)032, Opinion on the Final Draft Constitution of the Republic of Tunisia, § 44ff: equality should not be limited to citizens and include a general non-discrimination clause.
- ⁵² See note 48.
- ⁵³ CDL-AD(2014)011, Report on the Scope and Lifting of Parliamentary Immunities (§ 200); ECtHR *Cordova v. Italy*, No. 1 and No. 2, 40877/98 and 45649/99, 30 January 2003.
- ⁵⁴ CDL-AD(2010)004, § 22: “The basic principles ensuring the independence of the judiciary should be set out in the Constitution or equivalent texts”.
- ⁵⁵ See in particular ECtHR *Campbell and Fell v. the United Kingdom*, 28 June 2014, 7819/77 and 7878/77, § 78.
- ⁵⁶ CDL-AD(2010)004, § 33ff; cf. CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, § 49ff; for constitutional justice, see “The Composition of Constitutional Courts”, Science and Technique of Democracy No. 20, CDL-STD(1997)020, p. 18-19. CDL-AD(2010)004, § 43.
- ⁵⁷ See item II.E.1.a.vii.
- ⁵⁸ Cf. CM/Rec(2010)12, § 44.
- ⁵⁹ Cf. CDL-AD(2010)004, § 43.
- ⁶⁰ The Venice Commission considers it appropriate to establish a Judicial Council having decisive influence on decisions on the appointment and career of judges: CDL-AD(2010)004, § 32.
- ⁶¹ “A substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself”: CDL-AD(2007)028, § 29.
- ⁶² CDL-AD(2010)004, § 32.
- ⁶³ Cf. Recommendation (94)12 of the Committee of Ministers on the Independence, Efficiency and Role of Judges (Principle I.2.a), which reflects a preference for a judicial council but accepts other systems.
- ⁶⁴ CDL-AD(2007)028, Report on Judicial Appointments, § 44ff. “The trend in Commonwealth countries is away from executive appointments and toward appointment commissions, sometimes known as judicial services commissions.: http://www.biicl.org/documents/689_bingham_centre_compendium.pdf.”
- ⁶⁵ CM/Rec(2010)12, § 33ff; CDL-AD(2010)004, § 52ff.
- ⁶⁶ “Judges... should enjoy functional – but only functional – immunity (immunity from prosecution for acts performed in the exercise of their functions, with the exception of intentional crimes, e.g. taking bribes)”: CDL-AD(2010)004, § 61.
- ⁶⁷ Recommendation CM/Rec(2012)11 of the Committee of Ministers to member states on the role of public prosecutors outside the criminal justice system; CDL-AD(2010)040, § 81-83; CDL-AD(2013)025, Joint Opinion on the draft law on the public prosecutor’s office of Ukraine, § 16-28.
- ⁶⁸ CDL-AD(2010)040, § 71ff.
- ⁶⁹ Cf. CDL-AD(2012)014, Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, § 81.
- ⁷⁰ CM/Rec(2010)12, § 22ff; CDL-AD(2010)004, § 68ff; CM/Rec(2000)19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system, § 19; CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010), § 72.
- ⁷¹ CDL-AD(2010)004, § 78; see e.g. European Commission on Human Rights, *Zand v. Austria*, 7360/76, 16 May 1977, D.R. 8, p. 167; ECtHR *Fruni v. Slovakia*, 8014/07, 21 June 2011, § 134ff.
- ⁷² CDL-AD(2010)004, § 79.
- ⁷³ On the allocation of cases, see CM/Rec(2010)12, § 24; CDL-AD(2010)004, § 73ff.
- ⁷⁴ Article 6.1 ECHR; Article 14.1 ICCPR; Article 8.1 ACHR; Article 7.1.d ACHPR.
- ⁷⁵ See e.g. ECtHR *Micallef v. Malta* [GC], 17056/06, 15 October 2009, § 99-100.
- ⁷⁶ See e.g. ECtHR *De Cubber v. Belgium*, 9186/80, 26 October 1984, § 26; *Micallef v. Malta*, [17056/06](http://www.biicl.org/documents/17056_06_micallef_v_malta.pdf), 15 October 2009, § 98; *Oleksandr Volkov v. Ukraine*, 21722/11, 9 January 2013, § 106.
- ⁷⁷ See ch. II.3.
- ⁷⁸ See in particular CM/Rec(2000)19, § 11ff; CDL-AD(2010)040, § 23ff.
- ⁷⁹ See ch. II.A.a.
- ⁸⁰ CDL-AD(2010)040, § 7, 53ff.
- ⁸¹ CDL-AD(2010)040, § 34ff, 47ff.
- ⁸² CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service § 39.
- ⁸³ CDL-AD(2010)040, § 52.
- ⁸⁴ See item I.E.1.a.ii.
- ⁸⁵ See item I.E.1.a.iii.
- ⁸⁶ Such a right may be inferred from the procedural aspects of Articles 2, 3 and 8 ECHR (combined, if necessary, with Article 13) ECHR: see for example ECtHR *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, 47848/08, 17 July 2014 (Article 2); *Khashiyev and Akayeva v. Russia*, [57942/00](http://www.biicl.org/documents/57942_00_khashiyev_and_akayeva_v_russia.pdf) and [57945/00](http://www.biicl.org/documents/57945_00_khashiyev_and_akayeva_v_russia.pdf), 24 February 2005, § 177, 183 (Articles 2 and 3); *Đurđević v. Croatia*, 52442/09, 19 July 2011, § 83ff; *Labita v. Italy*, 26772/95, 6 April 2000, § 130ff (Article 3); *M.C. v. Bulgaria*, 39272/98, 4 December 2003, § 153 (Articles 3 and 8); *Remetin v. Croatia* (No. 2), 7446/12, 24 July 2012, § 95ff (Article 8); CDL-AD(2010)040, § 41.
- ⁸⁷ See in particular Article 5.4 ECHR, Article 9.4 ICCPR and Article 7.6 ACHR ; see also Articles 6 and 13 ECHR; CM/Rec(2000)19, § 31.
- ⁸⁸ CDL-AD(2010)040, § 69.
- ⁸⁹ See item II.E.1.a.xii for judges.

⁹⁰ See Recommendation No. R(2000)21 of the Committee of Ministers to member states on the freedom of exercise of the profession of lawyer.

⁹¹ Article 6 ECHR, Article 14 ICCPR, Article 8 ACHR, Article 7 ACHPR. The right to a fair trial was recognised by the European Court of Justice, as "inspired by Article 6 of the ECHR": C-174/98 P and C-189/98 P, *Netherlands and Van der Wal v Commission*, 11 January 2000, § 17. See now Article 47 of the Charter of Fundamental Rights.

⁹² The degree of access afforded by the national legislation must also be sufficient to secure the individual's "right to a court", having regard to the principle of the Rule of Law in a democratic society. For the right of access to be effective, an individual must have a clear, practical opportunity to challenge an act that is an interference with his rights", ECtHR *Bellet v. France*, 23805/94, 4 December 1995, § 36; cf. ECtHR *M.D. and Others v. Malta*, 64791/10, 17 July 2012, § 53.

⁹³ Article 6.3.b-c ECHR, Article 14.3 ICCPR; Article 8.2 ACHR; the right to defence is protected by Article 6.1 ECHR in civil proceedings, see e.g. ECtHR *Oferta Plus SRL v. Moldova*, 14385/04, 19 December 2006, § 145. It is recognised in general by Article 7.1.c ACHPR.

⁹⁴ Article 6.3.c ECHR, Article 14.3.d ICCPR for criminal proceedings; the right to legal aid is provided up to a certain extent by Article 6.1 ECHR for civil proceedings: see e.g. ECtHR *A. v. the United Kingdom*, 35373/97, 17 December 2002, § 90ff; for constitutional courts in particular, see CDL-AD(2010)039rev, Study on individual access to constitutional justice, § 113.

⁹⁵ For constitutional justice, see CDL-AD(2010)039rev, § 125.

⁹⁶ For constitutional justice, see CDL-AD(2010)039rev, § 112; for time limits for taking the decision, see § 149.

⁹⁷ On excessive court fees, see e.g. ECtHR *Kreuz v. Poland (no. 1)*, 28249/95, 19 June 2001, § 60-67; *Weissman and Others v. Romania*, 63945/00, 24 May 2006, § 32ff; *Scordino v. Italy*, 36813/97, 29 March 2006, § 201; *Sakhnovskiy v. Russia*, 21272/03, 2 November 2010, § 69; on excessive security for costs, see e.g. ECtHR *Ait-Mouhoub v. France*, 22924/93, 28 October 1998, § 57-58; *Garcia Manibardo v. Spain*, 38695/97, 15 February 2000, § 38-45; for constitutional justice, see CDL-AD(2010)039rev, § 117.

⁹⁸ On the need for an effective right of access to court, see e.g. *Goldner v. the United Kingdom*, 4451/70, 21 January 1975, § 26ff; *Yagtzilar and Others v. Greece*, 41727/98, 6 December 2001, § 20ff.

⁹⁹ Article 6.2 ECHR; Article 15 ICCPR; Article 8.2 ACHR; Article 7.1.b ACHPR, .

¹⁰⁰ ECtHR *Allenet de Ribemont v. France*, 15175/89, 10 February 1995, § 32ff. On the involvement of authorities not belonging to the judiciary in issues linked to a criminal file, see CDL-AD(2014)013, *Amicus Curiae* Brief in the Case of *Rywin v. Poland* (Application Nos 6091/06, 4047/07, 4070/07) pending before the European Court of Human Rights (on Parliamentary Committees of Inquiry). On the issue of the systematic follow-up to prosecutors' requests (prosecutorial bias), see item II.E.1.a.xi.

¹⁰¹ "The burden of proof is on the prosecution": ECtHR *Barberá, Messegué and Jabardo v. Spain*, [10590/83](#), 6 December 1988, § 77; *Telfner v. Austria*, 33501/96, 20 March 2001, § 15; cf. *Grande Stevens and Others v. Italy*, [18640/10](#), [18647/10](#), [18663/10](#), [18668/10](#) and [18698/10](#), 4 March 2014, § 159.

¹⁰² See e.g. *Rowe and Davis v. the United Kingdom*, 28901/95, 16 February 2000, § 60.

¹⁰³ ECtHR *Saunders v. the United Kingdom*, [19187/91](#), 17 December 1996, § 68-69; *O'Halloran and Francis v. the United Kingdom*, [5809/02](#) and [25624/02](#), 29 June 2007, § 46ff, and the quoted case-law. On the incrimination of members of one's family, see e.g. International Criminal Court, Rules of Procedure and Evidence, Rule 75.1.

¹⁰⁴ See e.g. *Jalloh v. Germany*, 54810/00, 17 July 2006, § 94ff, 104; *Göçmen v. Turkey*, 72000/01, 17 October 2006, § 75; *O'Halloran and Francis v. the United Kingdom*, [5809/02](#) and [25624/02](#), 29 June 2007, § 60.

¹⁰⁵ Article 6.1 ECHR; Article 8.1 ACHR; Article 7.1.d ACHPR (« within reasonable time »).

¹⁰⁶ CDL-AD(2010)039rev, § 94. See e.g. ECtHR *Panju v. Belgium*, 18393/09, 28 October 2014 (the absence of an effective remedy in case of excessive length of proceedings goes against Article 13 combined with Article 6.1 ECHR).

¹⁰⁷ This right is inferred from Article 6.3.b ECHR: see e.g. *Foucher v. France*, 22209/93, 18 March 1993, § 36.

¹⁰⁸ Cf. ECtHR *Micallef v. Malta*, [17056/06](#), 15 October 2009, § 78ff; *Neziraj v. Germany*, 30804/07, 8 November 2012, § 45ff.

¹⁰⁹ "Article 6 § 1 (Article 6-1) obliges the courts to give reasons for their judgments": ECtHR *Hiro Balani v. Spain*, [18064/91](#), 9 September 1994, § 27; *Jokela v. Finland*, [28856/95](#), 21 May 2002, § 72; see also *Taxquet v. Belgium*, 926/05, 16 November 2010, § 83ff. Under the title "Right to good administration", Article 41.2.c of the Charter of Fundamental Rights of the European Union provides for "the obligation of the administration to give reasons for its decisions".

¹¹⁰ See e.g. *Hirschhorn v. Romania*, 29294/02, 26 July 2007, § 49; *Hornsby v. Greece*, 18357/91, 19 March 1997, § 40; *Burdov v. Russia*, [59498/00](#), 7 May 2002, § 34ff; *Gerasimov and Others v. Russia*, [29920/05](#), [3553/06](#), [18876/10](#), [61186/10](#), [21176/11](#), [36112/11](#), [36426/11](#), [40841/11](#), [45381/11](#), [55929/11](#), [60822/11](#), 1 July 2014, § 167ff.

¹¹¹ CDL-AD(2010)039rev, Study on individual access to constitutional justice, § 96.

¹¹² CDL-AD(2010)039rev, § 62, 93, 165.

¹¹³ CDL-AD(2008)010, Opinion on the Constitution of Finland, § 115ff.

¹¹⁴ There is only one (limited) exception in the Council of Europe member states with a constitutional jurisdiction: CDL-AD(2010)039rev, § 1, 52-53.

¹¹⁵ CDL-AD(2010)039rev, § 1ff, 54-55, 56 ff.

¹¹⁶ CDL-AD(2010)039rev, § 202; CDL-AD(2002)005 Opinion on the Draft Law on the Constitutional Court of the Republic of Azerbaijan, § 9, 10.

¹¹⁷ Cf. CDL-AD(2008)030, Opinion on the Draft Law on the Constitutional Court of Montenegro, § 71.

¹¹⁸ [CDL-AD\(2004\)043](#) Opinion on the Proposal to Amend the Constitution of the Republic of Moldova (introduction of the individual complaint to the constitutional court), § 18, 19; [CDL-AD\(2008\)030](#) Opinion on the Draft Law on the Constitutional Court of Montenegro, § 19; CDL-AD(2011)040, Opinion on the law on the establishment and rules of procedure of the Constitutional Court of Turkey, § 24.

¹¹⁹ CDL-AD(2011)010, Opinion on the draft amendments to the Constitution of Montenegro, as well as on the draft amendments to the law on courts, the law on the state prosecutor's office and the law on the judicial council of

Montenegro, § 27; CDL-AD(2012)024, Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, § 33; CDL-AD(2009)014, Opinion on the Law on the High Constitutional Court of the Palestinian National Authority, § 13; The Composition of Constitutional Courts, Science and Technique of Democracy No. 20, CDL-STD(1997)020, pp. 7, 21.

¹²⁰ CDL-STD(1997)020, p. 21.