



Strasbourg, 28 March 2011

Study No. 512 / 2009

CDL-AD(2011)003
Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

REPORT

ON THE RULE OF LAW

**Adopted by the Venice Commission
at its 86th plenary session
(Venice, 25-26 March 2011)**

on the basis of comments by

Mr Pieter van DIJK (Member, Netherlands)
Ms Gret HALLER (Member, Switzerland)
Mr Jeffrey JOWELL (Member, United Kingdom)
Mr Kaarlo TUORI (Member, Finland)

Table of contents

I.	Introduction	3
II.	Historical origins of Rule of law, Etat de droit and Rechtsstaat.....	3
III.	Rule of law in positive law	5
IV.	In search of a definition	8
V.	New challenges.....	13
VI.	Conclusion	13
	Annex: Checklist for evaluating the state of the rule of law in single states	15

I. Introduction

1. The concept of the “Rule of Law”, along with democracy and human rights,¹ makes up the three pillars of the Council of Europe and is endorsed in the Preamble to the European Convention on Human Rights.
2. It is also enshrined in a number of international human rights instruments and other standard-setting documents.
3. The present study takes as a background Resolution 1594 (2007) of the Parliamentary Assembly of the Council of Europe on “The principle of the rule of law” (see in particular par. 6.2 which refers to the Venice Commission). Its purpose is to identify a consensual definition of the rule of law which may help international organisations and both domestic and international courts in interpreting and applying this fundamental value. This definition should therefore be of a nature that allows of practical application.
4. Although the terminology is similar, it is important to note at the outset that the notion of “Rule of law” is not always synonymous with that of “Rechtsstaat”, “Estado de Direito” or “Etat de droit” (or the term employed by the Council of Europe: “prééminence du droit”). Nor is it synonymous with the Russian notion of “Rule of the laws/of the statutes”, (*verkhovenstvo zakona*), nor with the term “pravovoe gosudarstvo (“law governed state”).²
5. This report aims to reconcile the above notions, and especially the notions of “Rule of Law”, “Rechtsstaat” and “Etat de droit”.³
6. *The present report was adopted by the Venice Commission at its 86th plenary session (25-26 March 2011).*

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

7. The qualities embodied in the notion of rule of law have been propounded for centuries and go back to antiquity. Plato said that “the law is the master of government and the government is his slave”.⁴ The modern concept of the rule of law was brought to attention in particular by the British constitutional lawyer Professor A.V. Dicey in his *Introduction to the Study of the Law of the Constitution* (1885).⁵
8. Dicey believed that there were two principles which were inherent in the non-codified British constitution. The first, and primary principle, was the “sovereignty or supremacy of Parliament” (thus endorsing the notion of representative government as the main feature of a democratic state). The second principle, which tempered the first (but in the UK context could not override it) was the rule of law.
9. Dicey therefore saw the rule of law as a constraint (although not ultimate control) of the theoretically unlimited power (in the British context) of the state over the individual. For him the rule of law principle resulted from the existing common (judge-made) law over the years (and was not necessary therefore to be codified in any written constitution). For Dicey the rule of law had three core features: First, that no person should be punished but for a breach of the law,

¹ Statute of the Council of Europe (ETS No. 001), in particular its Preamble and Article 3.

² Hiroshi Oda, “The Emergence of Pravovoe Gosudarstvo (Rechtsstaat) in Russia” 25 *Review of Central and East European Law* 1999 No. 3, 373.

³ For an account of the difference in origins and concept between Rechtsstaat, Rule of Law and Etat de droit see M. Loughlin, *Foundations of Public Law* (2010), chap.11.

⁴ For an account of its origins in the ancient world see M. Loughlin, *Swords and Scales* (2000), chap. 5; B. Tamanaha, *On the Rule of Law: History, Politics and Theory* (2004), chap. 1.

⁵ 10th ed.1959 with an introduction by E.C.S.Wade, London, MacMillan, chap.4.

which should be certain and prospective, so as to guide peoples' actions and transactions and not to permit them to be punished retrospectively. He believed that discretionary power would lead to arbitrariness. Secondly, that no person should be above the law and that all classes should be equally subjected to the law. Thirdly, that the rule of law should emanate not from any written constitution but from the "common (judge-made) law".

10. Dicey's third feature of the rule of law cannot survive a modern society, and although the first feature (legality and certainty) and the second feature (equality) are core to the concept, Dicey's view of legal certainty was not universally accepted to the extent that he believed that any discretionary power would inevitably lead to the "arbitrary" exercise of power.⁶

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

12. From the middle of the twentieth century, the rule of law became reconciled to discretionary power. Discretion was accepted, but nevertheless should be constrained by the letter and purpose of the power-conferring law, as well as by other elements of the rule of law, such as that everyone have access to fair procedures before an impartial and independent court, and that the law be applied consistently, equally and in a manner that is not arbitrary or devoid of reason.

13. The *Rechtsstaat* concept focuses, by definition, much more on the nature of the state. Whereas the rule of law emerged from courtrooms, the *Rechtstaat* emerged from written constitutions.⁷ The main theorist of this notion was Robert von Mohl (1831). The *Rechtsstaat* was defined in opposition to the absolutist state, with unlimited powers conferred on the executive. Protection against absolutism had to be provided by the legislature rather than by the courts alone.

14. The French approach can be foreseen in the Declaration of the Rights of Man and the Citizen (1789). The notion of *Etat de droit* (which followed the positivistic concept of *Etat legal*) puts less emphasis on the nature of the state, which it considers as the guarantor of fundamental rights enshrined in the Constitution against the legislator. As developed at the beginning of the 20th Century by Carré de Malberg, the *Etat de droit* connotes (judicial) constitutional review of ordinary legislation.⁸

15. The rule of law has been variously interpreted, but it must be distinguished from a purely formalistic concept under which any action of a public official which is authorised by law is said to fulfil its requirements. Over time, the essence of the rule of law in some countries was distorted so as to be equivalent to "rule by law", or "rule by the law", or even "law by rules". These interpretations permitted authoritarian actions by governments and do not reflect the meaning of the rule of law today.⁹

16. The rule of law in its proper sense is an inherent part of any democratic society and the notion of the rule of law requires everyone to be treated by all decision-makers with dignity,

⁶ On the issue, see Jeffrey Jowell, "The Rule of Law and its Underlying Values", in *The Changing Constitution*, edited by Jeffrey Jowell and Dawn Oliver, 7th edition, Oxford University Press 2011; Kaarlo Tuori, *The Rule of Law and the Rechtsstaat*, in *Ratio and Voluntas*, Ashgate 2011, chap. 7, pp. 8 ff; Erik O. Wennerström, *The Rule of Law and the European Union*, Uppsala: Iustus Förlag 2007, pp. 61 ff.

⁷ Wennerström, p. 50.

⁸ See in particular Wennerström, pp. 73 ff.

⁹ See the 3 volume work on the rule of law by Serhiy Holovaty, *The Rule of Law*. Kyiv, Phoenix Publishing House (2006) LXIV,1747 (Vol. 1: The Rule of Law: From Idea to Doctrine; Vol. 2: The Rule of Law: From Doctrine to Principle; Vol. 3: The Rule of Law: The Ukrainian Experience).

equality and rationality and in accordance with the law, and to have the opportunity to challenge decisions before independent and impartial courts for their unlawfulness, where they are accorded fair procedures. The rule of law thus addresses the exercise of power and the relationship between the individual and the state. However, it is important to recognise that during recent years due to globalisation and deregulation there are international and transnational public actors as well as hybrid and private actors with great power over state authorities as well as private citizens. The rule of law should constrain the actions of these bodies as well as the traditional public authorities at state level.

III. Rule of law in positive law

a. International law

17. The concept of the *rule of law* can be found at the national as well as at the international level.¹⁰ The most important documents in this respect are international treaties. This paragraph will first address the texts drafted by several international and supranational organisations (a) before turning to examples of national law (b).

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

- the Preamble to the Statute of the Council of Europe, which underlines the “devotion” of member states “to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy”;
- the Preamble to the European Convention on Human Rights, which states that “the governments of European countries ... are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law”.

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

20. However, neither the rule of law (or the *Rechtsstaat*, or the *Etat de droit*) is defined in these texts.

21. For example, when addressing the issue of “the rule of law as part of the core mission of the Council of Europe”, the Committee of Ministers of the *Council of Europe* quoted a number of documents referring to such concept, but it also noted that “the foregoing overviews are not sufficient to allow the drawing up of a list of key rule of law requirements accepted by the Council of Europe, let alone a definition”.¹¹ This leads the document to state that “the Organisation works pragmatically on a daily basis to promote and strengthen the rule of law in and among its member states”. However, this pragmatic and ad hoc approach appears to be giving way to a consensus on including, in the rule of law, specific reference to requirements such as the prohibition of arbitrariness, the right to seek redress from independent judges in open courts, legal certainty and equality of all before the law.¹²

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

23. More can be found in the case-law of the European Court of Human Rights. The Court considers that the rule of law is a concept inherent in all articles of the Convention (and uses

¹⁰ See R. McCorquodale, ed. *The Rule of Law in International and Comparative Context*, British Inst of International and Comparative Law (2010).

¹¹ See The Council of Europe and the Rule of Law - An overview - CM(2008)170, 21 November 2008, para. 22.

¹² *Ibid.*, paras. 29-30. See also, G. Palombella and N. Walker, *Relocating the Rule of Law*, Hart Publishing, 2009.

not only the terms “prééminence du droit”, but also “Etat de droit” in French).¹³ The case-law of the European Court of Human Rights, as summarised in the already mentioned report drafted in the framework of the Swedish Chairmanship of the Committee of Ministers (CM(2008)170), applies the notion of the rule of law to a number of issues, with a rather formal approach, starting from the principle of legality in the narrow sense, but developing various aspects of (procedural) due process and legal certainty as well as separation of powers, including the judiciary, and equality before the law.¹⁴ In *Golder v. UK* (1975) 1 EHRR 524, the Court stated (at para.34), “one can scarcely conceive of the rule of law without there being the possibility of having access to the courts. See also *Philis v. Greece* (1991) para.59.) The reference to the rule of law by the Court as inherent in all articles of the Convention gives it, however, a substantive nature too.¹⁵

24. In the *United Nations*, the notion of the rule of law, which appeared in the Preamble to the Universal Declaration of Human Rights (1948), is used to promote a number of principles which vary according to the specific context. A comparison between two reports drafted at short intervals (2002 and 2004) shows this variety of approach; the first one insists for example on the elements of an independent judiciary, independent human rights institutions, defined and limited powers of government and fair and open elections, whereas the second focuses, in a more classical way, on the elements of quality of legislation, supremacy of law, equality before the law, accountability to the law, legal certainty, procedural and legal transparency, avoidance of arbitrariness, separation of powers, etc.¹⁶ A 2005 Resolution of the UN Human Rights Commission focuses on the elements of the separation of powers, the supremacy of law and the equal protection under the law.¹⁷

25. A broad definition of the rule of law was offered by former UN Secretary-General Kofi Annan. In his 2004 report he says: “The ‘rule of law’ [...] refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”¹⁸

26. Amongst regional organisations other than the Council of Europe, it is worth mentioning in particular the OSCE. The main elements of this organisation’s doctrine in the field were summarised in a document on the *OSCE Commitments relating to the rule of law*.¹⁹ According to the 1990 Copenhagen document (2), “the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression”. “Democracy is an inherent element of the rule of law”(3). The document on OSCE Commitments relating to the rule of law then quotes various commitments of the participating states on independence of the judiciary and legal practitioners, and impartial operation of the

¹³ ECtHR *Stafford v. United Kingdom*, 28 May 2002, para. 63.

¹⁴ As regards « accordance with the law » the Court generally only demands that a state power finds support in a legal norm. However, the Court has begun stressing the link between democracy and the rule of law, requiring that a statute set out the framework of certain discretionary state powers to restrict human rights ». See, as regards surveillance, *Iordachi and Others v. Moldova*, 10 February 2009.

¹⁵ See the extensive list of cases of the Court in which the rule of law is cited set out by Holovaty (above, note 9), pp.1169-1214. And see his summary of the cases at pp.1215-1220.

¹⁶ Wennerström, pp. 23ff ; see UN Secretariat Documents A/57/275 and S/2004/616.

¹⁷ HR Res. 2005/32 *Democracy and the rule of law*.

¹⁸ The rule of law and transitional justice in conflict and post-conflict societies. Report of the Secretary-General, Doc. S/2004/616, 23 August 2004, see para. 6.

¹⁹ http://www.osce.org/documents/odhr/2009/01/36062_en.pdf.

public judicial service, as well as on the administration of justice. The Helsinki Ministerial Council Decision No. 7/08 on “*Further strengthening the rule of law in the OSCE area*” encouraged the participating States to strengthen the rule of law, inter alia, in the following areas: independence of the judiciary, effective administration of justice, right to a fair trial, access to a court, accountability of state institutions and officials, respect for the rule of law in public administration, the right to legal assistance and respect for the human rights of persons in detention; prevention of torture and other cruel, inhuman or degrading treatment or punishment; awareness-raising and education on the rule of law for the legal professions and the public; provision of effective legal remedies and access to the same; adherence to rule of law standards and practices in the criminal justice system; and the fight against corruption.

27. The *OECD* also attempted a definition, according to which “the rule of law is composed of the following separate fundamental elements, which must advance together: [1] The existence of basic rules and values that a people share and by which they agree to be bound (constitutionalism). This can apply as much to an unwritten as to a written constitution. [2] The law must govern the government. [3] An independent and impartial judiciary interprets the law. [4] Those who administer the law act consistently, without unfair discrimination. [5] The law is transparent and accessible to all, especially the vulnerable in most need of its protection. [6] Application of the law is efficient and timely. [7] The law protects rights, especially human rights. [8] The law can be changed by an established process that is itself transparent, accountable and democratic.”²⁰

28. In the *European Union*, the concept of rule of law is enshrined not only in the Preamble to the Treaty on European Union (TEU), but also in its Article 2, according to which “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, *the rule of law* and respect for human rights, including the rights of persons belonging to minorities”. It also appears as a basis of the EU’s external action²¹ as well as in the Preamble to the Charter of Fundamental Rights of the European Union. In French, the term *Etat de droit* is used, whereas the German version uses *Rechtsstaatlichkeit*. Here too, the notion is not defined. The concept of *rule of law* has been used in the European Union to encompass a number of meanings, including formal notions such as the supremacy of law, but also substantive notions such as respect for fundamental rights and notions specific to European Union law, such as fair application of the law, effective enjoyment of Community rights, protection of the legitimate expectation, and even anti-corruption (in external relations).²²

30. Other international bodies have frequently endorsed the rule of law. For example, the Commonwealth of Nations’ *Latimer House Principles* (2003) require that “Judiciaries and parliaments should fulfil their respective but critical roles in the promotion of the rule of law in a complementary and constructive manner.” The International Commission of Jurists (ICJ) has systematically studied the rule of law over the years and adopts a notion of the rule of law as a fundamental principle for the protection of individuals from the arbitrary power of the state and which empowers human dignity. The International Bar Association has, similarly, adopted the rule of law as a core concept for all practising members of the legal profession.²³

b. National law

29. In national legislation, the term *Rechtsstaat* is found in a number of provisions of the German Fundamental Law, in particular for what concerns the constitutional order of the Länder and the European Union.²⁴ Moreover, the substantive interpretation of the *Rechtsstaat* has

²⁰ Equal Access to Justice and the Rule of Law, OECD Development Assistance Committee (DAC). Mainstreaming Conflict Prevention (2005).

²¹ Article 21 TEU.

²² Wennerström, see in particular the tables at pp. 160, 218-219, 289-290 and 302.

²³ F. Neate (ed). *The Rule of Law: Perspectives from Around the Globe*, IBA; LexisNexis (2009).

²⁴ Articles 28 and 23.

gained ground in Germany, both in the doctrine of constitutional law and in the practice of the Constitutional Court.²⁵

30. In the United Kingdom, the notion of the *rule of law* is an important constitutional principle, recognised as a constraint on governmental action and the exercise of power. It is applied by the courts and the Constitutional Reform Act of 2005 makes an explicit mention of the notion of the rule of law by stating that “This Act does not adversely affect - (a) the existing constitutional principle of the rule of law, or - (b) the Lord Chancellor’s existing constitutional role in relation to that principle.”

31. The notion of the rule of law (or of *Rechtsstaat*/*Etat de droit*) appears as a main feature of the state in a number of constitutions of former socialist countries of Central and Eastern Europe (Albania, Armenia, Belarus, Bosnia and Herzegovina, Croatia, the Czech Republic, Estonia, Georgia, Hungary, Moldova, Montenegro, Romania, Serbia, Slovakia, Slovenia, “the former Yugoslav Republic of Macedonia”, Ukraine) it is more rare in old democracies (Andorra, Finland, Germany, Malta, Norway, Portugal, Spain, Sweden, Switzerland, Turkey). It can be mostly found in preambles or other general provisions. There are, however, more concrete provisions in Spain, according to which “the Courts control the power to issue regulations and to ensure that the rule of law prevails in administrative action”; courts as well as prosecutors are subject to the rule of law.²⁶ In Switzerland, “the state’s activities shall be based on and limited by the rule of Law”.²⁷

32. The notion of the rule of law is however often difficult to find in former socialist countries which experienced the notion of *socialist legality*. The classical Marxist approach is based on the idea of the withering of the state and therefore of the law which emanates from it. It is well known that the practice in the Soviet system led on the contrary to the hypertrophy of the state. The 1936 Soviet Constitution (Article 113), for example, stated that “Supreme supervisory power over the strict execution of the laws by all People’s Commissariats and institutions subordinated to them, as well as by public servants and citizens of the U.S.S.R, is vested in the Procurator of the U.S.S.R.” Apart from the specific role of the general prosecutor (Procurator), what had to be retained was “strict execution of the laws”. Here there was no general concept of the rule of law, but a much narrower notion of strict execution of the laws, based on a very positivistic approach. This forbade going beyond the first stage of the definition of the rule of law, “rule by law”, or “rule by the law”.²⁸ This conception may still be enshrined in practice and prevent the development of a more comprehensive definition of the rule of law; law is more easily conceived as an instrument of power than as a value to be respected. In other words, especially in new democracies, the values of the rule of law still need “sedimentation”, that is that they have to become part of day to day practice²⁹ and, in the words of Valery Zorkin, “legal awareness”.³⁰

IV. In search of a definition

33. The divergences of the meanings given to the notion of the rule of law - as well as of *Rechtsstaat* - may lead to doubting its usefulness as a fundamental concept in public law.³¹ However, it needs to be understood and therefore be defined, both because it appears in many

²⁵ Kaarlo Tuori, *The Rechtsstaat*, p. 12.

²⁶ Articles 106, 117 and 124 of the Constitution.

²⁷ Article 5.1 of the Constitution (“Le droit est la base et la limite de l’autorité de l’Etat” / « Grundlage und Schranke staatlichen Handelns ist das Recht »).

²⁸ See the analysis of S. Holovaty (above, note 9) at pp. 1655-65.

²⁹ On the rule of law’s sedimentation, see Kaarlo Tuori, *The “Rechtsstaat” in the Conceptual Field - Adversaries, Allies and Neutrals, Associations Vol. 6 (2002) Number 2*, pp. 201-214, 212.

³⁰ VD Zorkin, “Rule of Law and Legal Awareness”, in Francis Neate (ed.) *The Rule of Law: Perspectives from Around the Globe (2009)* pp. 43-54.

³¹ This is for example the point of view of Martin Loughlin, as expressed in document CDL-DEM(2009)006 (*The rule of law in European jurisprudence*), p. 3.

legal texts, and because the rule of law is accepted as a fundamental ingredient of any democratic society.

34. Looking at the legal instruments, national and international, and the writings of scholars, judges and others, it seems as if there is now a consensus on the core meaning of the rule of law and the elements contained within it.

35. Perhaps the following definition by Tom Bingham covers most appropriately the essential elements of the rule of law.

“all persons and authorities within the state , whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts”.³²

36. This short definition, which applies to both public and private bodies, is expanded by 8 “ingredients” of the rule of law. These include: (1) Accessibility of the law (that it be intelligible, clear and predictable); (2) Questions of legal right should be normally decided by law and not discretion; (3) Equality before the law; (4) Power must be exercised lawfully, fairly and reasonably; (5) Human rights must be protected; (6) Means must be provided to resolve disputes without undue cost or delay; (7) Trials must be fair, and (8) Compliance by the state with its obligations in international law as well as in national law.

37. Bingham’s requirement that laws must be publicly made, taking effect in the future deals with the nature of law and legal decision-making, requiring, like Dicey, that laws themselves should be accessible and clear and prospective. However, in expanding on that definition Bingham makes it clear that, although, unlike Dicey, he recognises that discretion on the part of public officials is necessary in our complex society, discretion should not be unconstrained, and should not permit arbitrary or unreasonable decisions (the nature of law is thus infused with both procedural and substantive content).

38. Bingham’s statement that all persons and authorities should be “bound by” the law speaks both to members of the public and private entities, who are expected to comply with the law and to public officials (who are expected both to comply with the law in the sense of not exceeding their powers, and also, to apply the law equally, and regardless of the status of the object of the law’s implementation or any threats or inducements offered to the decision-maker).

39. Bingham’s notion that everyone shall have the benefit of laws, implies access to justice in two senses: first, access to courts in order to claim the benefit of the laws, and secondly, that the procedures of those courts are fair and their decisions are made independently and impartially.³³

40. Drawing on that definition and on others based on very different systems of law and the state,³⁴ it seems 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 (materieller Rechtsstaatsbegriff). These are:

- (1) Legality, including a transparent, accountable and democratic process for enacting law
- (2) Legal certainty
- (3) Prohibition of arbitrariness

³² Tom Bingham, *The Rule of Law* (2010).

³³ Expanding on that definition, Bingham also believes that the rule of law must afford adequate protection to human rights (many of which, such as the right to a fair trial, have already been covered by his definition) and that the rule of law requires compliance by the state with its obligations in international as well as national law.

³⁴ For example, Zorkin’s definition of the rule of law set out in his chapter referred to above at note 26.

- (4) Access to justice before independent and impartial courts, including judicial review of administrative acts
- (5) Respect for human rights
- (6) Non-discrimination and equality before the law.

(1) Legality (supremacy of the law)

41. The importance of the principle of legality was underlined by Dicey. It first implies that the law must be followed. This requirement applies not only to individuals, but also to authorities, public and private. In so far as legality addresses the actions of public officials, it requires also that they require authorisation to act and that they act within the powers that have been conferred upon them.³⁵ Legality also implies that no person can be punished except for the breach of a previously enacted or determined law and that the law cannot be violated with impunity. Law should, within the bounds of possibility, be enforced.

42. The term "law", as used in this chapter, refers primarily to national legislation and common law. However, the development of international law as well as the importance given by international organisations to the respect of the rule of law lead to addressing the issue at international level as well: the principle *pacta sunt servanda* is the way in which international law expresses the principle of legality.³⁶

(2) Legal certainty

43. The principle of legal certainty is essential to the confidence in the judicial system and the rule of law.³⁷ It is also essential to productive business arrangements so as to generate development and economic progress.³⁸ To achieve this confidence, the state must make the text of the law easily *accessible*. It has also a duty to respect and apply, in a *foreseeable* and consistent manner, the laws it has enacted. Foreseeability means that the law must where possible be proclaimed in advance of implementation and be foreseeable as to its effects: it has to be formulated with sufficient precision to enable the individual to regulate his or her conduct.

44. The need for certainty does not mean that discretionary power should not be conferred a decision-maker where necessary, provided that procedures exist to prevent its abuse. In this context, a law which confers a discretion to a state authority must indicate the scope of that discretion. It would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion and the manner of its exercise with sufficient clarity, to give the individual adequate protection against arbitrariness.³⁹

45. Legal certainty requires that legal rules are *clear and precise*, and aim at ensuring that situations and legal relationships remain foreseeable. *Retroactivity* also goes against the principle of legal certainty, at least in criminal law (Article 7 ECHR), since legal subjects have to know the consequences of their behaviour; but also in civil and administrative law to the extent it negatively affects rights and legal interests. In addition, legal certainty requires respect for the principle of *res judicata*. Final judgements by domestic courts should not be called into

³⁵ Jeffrey Jowell, The Rule of Law and its underlying Values, in: Jeffrey Jowell/Dawn Oliver (Eds.), The Changing Constitution (note 6 above), p. 10.

³⁶ See Bingham, above note, who believes that "The rule of law requires compliance by the state with its obligations in international as well as national law" (chap.10).

³⁷ The Council of Europe and the Rule of Law - An overview, CM(2008)170 21 November 2008, see para. 51.

³⁸ See R. McCorquodale, in *The Rule of Law in International and Comparative Context* (above, note 10), chap. 3).

³⁹ The Council of Europe and the Rule of Law - An overview, CM(2008)170 21 November 2008, see para. 46.

question.⁴⁰ It also requires that final court judgments be enforced. In private disputes, enforcement of final judgments may require the assistance of the state bodies in order to avoid any risk of “*private justice*” contrary to the rule of law.⁴¹ Systems which allow for the quashing of final judgments without cogent reasons of public interest and for an indefinite period of time are incompatible with the principle of legal certainty.⁴²

46. In addition, Parliament shall not be allowed to override fundamental rights by ambiguous laws. This offers essential legal protection of the individual *vis-à-vis* the state and its organs and agents.⁴³

47. Legal certainty also means that undertakings or promises held out by the state to individuals should in general be honoured (the notion of the ‘legitimate expectation’).

48. However, the need for certainty does not mean that rules should be applied so inflexibly as to make it impossible to take into account the dictates of humanity and fairness.

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

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

(3) Prohibition of arbitrariness

51. Although discretionary power is necessary to perform a range of governmental tasks in modern, complex societies, such power should not be exercised in a way that is arbitrary. Such exercise of power permits substantively unfair, unreasonable, irrational or oppressive decisions which are inconsistent with the notion of rule of law.

(4) Access to Justice before independent and impartial courts

52. Everyone should be able to challenge governmental actions and decisions adverse to their rights or interests. Prohibitions of such challenge violate the rule of law. Normally these challenges should be made to courts of law, but some countries allow alternative challenge to more informal tribunals, from which appeal may lie to a court.

53. The role of the judiciary is essential in a state based on the rule of law. It is the guarantor of justice, a fundamental value in a law-governed State.⁴⁴ It is vital that the judiciary has power to determine which laws are applicable and valid in the case, to resolve issues of fact, and to apply the law to the facts, in accordance with an appropriate, that is to say, sufficiently transparent and predictable, interpretative methodology.⁴⁵

⁴⁰ This does not exclude, of course, the right to apply to an international court complaining that the final domestic judgment is in violation of an international legal obligation.

⁴¹ The Council of Europe and the Rule of Law - An overview, CM(2008)170 21 November 2008, see para. 49.

⁴² The Council of Europe and the Rule of Law - An overview, CM(2008)170 21 November 2008, see para. 48.

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

⁴⁴ The Council of Europe and the Rule of Law - An overview, CM(2008)170 21 November 2008, see para. 39.

⁴⁵ Rule of Law Inventory Report, Hague Institute for the Internationalisation of Law, Discussion Paper for the High Level Expert Meeting on the Rule of Law of 20th April 2007, p. 16.

54. The judiciary must be independent and impartial. Independence means that the judiciary is free from external pressure, and is not controlled by the other branches of government, especially the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers. The judges should not be subject to political influence or manipulation.⁴⁶ Impartial means that the judiciary is not - even in appearance - prejudiced as to the outcome of the case.

55. There has to be a fair and open hearing, and a reasonable period within which the case is heard and decided. Additionally, there must be a recognised, organised and independent legal profession, which is legally empowered, willing and *de facto* able to provide legal service. As justice should be affordable, legal aid should be provided where necessary.

56. Moreover, there must be an agency or organisation, a prosecutor, which is also to some degree autonomous from the executive, and which ensures that violations of the law, when not denounced by victims, can be brought before the courts.⁴⁷

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

(5) Respect for human rights

58. Respect for the rule of law and respect for human rights are not necessarily synonymous. However, there is a great deal of overlap between the two concepts and many rights enshrined in documents such as the ECHR also expressly or impliedly refer to the rule of law.

59. The rights most obviously connected to the rule of law include: (1) the right of access to justice, (2) the right to a legally competent judge, (3) the right to be heard, (4) inadmissibility of double jeopardy (*ne bis in idem*) (Article 4 of Protocol 7 to ECHR), (5) the legal principle that measures which impose a burden should not have retroactive effects (6) the right to an effective remedy (Article 13 ECHR) for any arguable claim, (7) anyone accused of a crime is presumed innocent until proved guilty,⁴⁸ and (8) the right to a fair trial or, in Anglo-American parlance, the principle of natural justice or due process; there has to be a fair and open hearing, absence of bias, and a reasonable period within which the case is heard and decided. Additionally, there must be a recognised, organised and independent legal profession, which is legally empowered, willing and *de facto* able to provide legal service, and the decisions of which are implemented without undue delay.⁴⁹

60. Most of these rights (as well as the principle of independence and impartiality of the judiciary) are enshrined in Article 6 ECHR. However, other rights may also have rule of law connotations, such as the right to expression, which permits criticism of the government of the day (Article 10 ECHR) and even rights such as the prohibition on torture or inhuman or degrading treatment or punishment (Article 3), which may be linked to the notion of a fair trial.

(6) Non-discrimination and equality before the law

61. Dicey affirms the notion of equality through his requirement that, under the rule of law, there is a "universal subjection" of all to the law. He was in this context enunciating a notion of

⁴⁶ Thomas Carothers, *The Rule of Law Revival*, *Foreign Affairs* 77 (1998), 95 (96).

⁴⁷ Rule of Law Inventory Report, Hague Institute for the Internationalisation of Law, Discussion Paper for the High Level Expert Meeting on the Rule of Law of 20th April 2007, p. 16.

⁴⁸ Thomas Carothers, *The Rule of Law Revival*, *Foreign Affairs* 77 (1998), 95 (96).

⁴⁹ Rule of Law Inventory Report, Hague Institute for the Internationalisation of Law, Discussion Paper for the High Level Expert Meeting on the Rule of Law of 20th April 2007, p. 16.

formal equality, to the extent that laws, however unjust in practice, should be equally applied, and consistently implemented.

62. Formal equality is nonetheless an important aspect of the rule of law - provided that it allows for unequal treatment to the extent necessary to achieve substantive equality - and can be stretched without damage to the underlying principle to the notion of non-discrimination which, together with equality before the law, constitutes a basic and general principle relating to the protection of human rights. As underlined by the Council of Europe's 2008 document on the issue,⁵⁰ these two principles are human rights principles as much as they are rule of law principles, and the Court's case-law tends to apply the prohibition of non-discrimination without there being a special need to refer to it as a rule of law principle, although there is some recognition that equality in rights and duties of all human beings before the law is an aspect of the rule of law.

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

64. Equality before the law means that each individual is subject to the same laws, with no individual or group having special legal privileges.

V. New challenges

65. A challenge for the future is how the achievements of the rule of law can be preserved and further developed under circumstances where individuals are increasingly influenced by and linked to new modes of governance. This topic is not only related to international organisations but is also important in the sphere of public-private partnerships and in all fields which have previously been purely national but which have been transformed to being transnational. The rule of law must be tailored in a way that freedom for all will be ensured even in areas where hybrid (state-private) actors or private entities are responsible for tasks, which formerly have been the domain of state authorities. The substance of the rule of law as a guiding principle for the future has to be extended not only to the area of cooperation between state and private actors but also to activities of private actors whose power to infringe individual rights has a weight comparable to state power. Governmental actors at the national, transnational and international level all have to act as guarantors of the fundamental principles and elements of the traditional rule of law in these areas.

VI. Conclusion

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

67. Legal provisions referring to the rule of law, both at national and at international level, are of a very general character and do not define the concept in much detail.

68. This has led to doubting the very usefulness of addressing the rule of law as a practical legal concept. However, it is increasingly included in national and international legal texts and

⁵⁰ The Council of Europe and the Rule of Law - An overview, CM(2008)170 21 November 2008, see para. 53.

case-law, especially the case law of the European Court of Human Rights. However, we believe that the rule of law does constitute a fundamental and common European standard to guide and constrain the exercise of democratic power.

69. The aim of the present report has been to find a consensual definition which is outlined above, together with an identification of the core elements of the rule of law. Its object has been that the Council of Europe, the international organisation which has defined the rule of law as one of its three pillars, may contribute, among other organisations and institutions, to the practical implementation of this important principle through its interpretation and application vis-à-vis and in its member states.⁵¹

⁵¹ See Review of the rule of law situation: feasibility and methodology, DG-HL (2010) 21.

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

1. Legality (supremacy of the law)

- a) Does the State act on the basis of, and in accordance with the law?
- b) Is the process for enacting law transparent, accountable and democratic?
- c) Is the exercise of power authorised by law?
- d) To what extent is the law applied and enforced?
- e) To what extent does the government operate without using law?
- f) To what extent does the government use incidental measures instead of general rules?
- g) Are there exception clauses in the law of the State, allowing for special measures?
- h) Are there internal rules ensuring that the state abides by international law?
- i) Does the *nulla poena sine lege* system apply?

2. Legal certainty

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

3. Prohibition of arbitrariness

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

4. Access to Justice before independent and impartial courts

- a) Is the judiciary independent?
- b) Is the department of public prosecution to some degree autonomous from the state apparatus? Does it act on the basis of the law and not of political expediency?
- c) Are single judges subject to political influence or manipulation?
- d) Is the judiciary impartial? What provisions ensure its impartiality on a case-by-case basis?
- e) Do citizens have effective access to the judiciary, also for judicial review of governmental action?
- f) Does the judiciary have sufficient remedial powers?
- g) Is there a recognised, organised and independent legal profession?
- h) Are judgments implemented?
- i) Is respect of *res iudicata* ensured?

5. Respect for human rights

Are the following rights guaranteed (in practice)?

- a) The right of access to justice: Do citizens have effective access to the judiciary?
- b) The right to a legally competent judge
- c) The right to be heard
- d) *Ne bis in idem*

- e) Non-retroactivity of measures
- f) The right to an effective remedy
- g) The presumption of innocence
- h) The right to a fair trial

6. Non-discrimination and equality before the law

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