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COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Provisional version

Committee on Legal Affairs and Human Rights

Venice Commission's "Rule of Law Checklist"

Report*

Rapporteur: Mr Philippe MAHOUX, Belgium, Socialist Group

A. Draft resolution

1. The Parliamentary Assembly congratulates the Venice Commission, which for almost 30 years now has been doing remarkable work in the fields of constitutional law, the functioning of democratic institutions, fundamental rights, electoral law and constitutional justice, and has played a decisive role in the adoption and implementation of constitutions true to Europe's constitutional heritage. The Assembly works in close co-operation with the Venice Commission, regularly consulting it for opinions, the quality and authority of which make a major contribution to the Assembly's work.

2. The Parliamentary Assembly reiterates its steadfast commitment to the three founding principles of the Council of Europe: the rule of law, democracy and human rights. In its Resolution 1594 (2007) on "The principle of the Rule of Law" it invited the Venice Commission to reflect in depth on the concepts of "rule of law" and "*prééminence du droit*". The Assembly welcomes the practical follow-up given to that initiative by the Venice Commission, which found – beyond the question of a formal definition – that there was a consensus as to the core elements covered by the terms *Rule of Law*, *Rechtsstaat* and *État de droit*, namely: legality, legal certainty, the prohibition of arbitrariness, access to justice, respect for human rights, non-discrimination and equality before the law.

3. The Assembly welcomes the Rule of Law Checklist, which helps to introduce a new, uniform benchmark for measuring compliance with one of the founding principles of the Council of Europe. The Assembly is pleased that the Committee of Ministers and the Congress of Local and Regional Authorities have already endorsed it. The Rule of Law Checklist is based largely on the standards developed by the Council of Europe, making them accessible and functional, enabling respect for the rule of law to be measured in a detailed, objective, transparent and fair manner.

4. It is a most relevant and valuable monitoring and prevention instrument with which to identify and analyse situations of concern. Regular and systematic use of the Rule of Law Checklist will make it possible to analyse the situation in different countries in a uniform, objective manner. Indeed, applying it to certain member States the Assembly notes that there are serious threats to the rule of law even in the Council of Europe. Where the findings of an analysis using the Rule of Law Checklist give rise to concerns, it should trigger a firm reaction on the part of all those involved in promoting and strengthening the principles of the rule of law.

5. Indeed, the Assembly views the Venice Commission's Rule of Law Checklist as a practical tool not only for the Council of Europe but also for other national and international stakeholders, be they national or local State institutions, other international organisations or NGOs.

6. The Assembly decides:

6.1. to endorse the Venice Commission's Rule of Law Checklist;

* Draft resolution adopted unanimously by the committee on 29 June 2017.

6.2. to use it systematically in its work, particularly in the preparation of reports of the Committee on Legal Affairs and Human Rights and the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), in order to accurately identify any structural and systemic problems in the Council of Europe's member States;

6.3. to invite the national parliaments and government bodies, including the relevant ministries, when assessing the need for and the content of legislative reform, to refer systematically to the Rule of Law Checklist;

6.4. to invite the international and regional organisations, including the Council of Europe as a whole and the European Union, to refer regularly to the Rule of Law Checklist in their relevant work. In this connection the Assembly congratulates the Secretary General of the Council of Europe on having taken the Rule of Law Checklist into account in his 2017 annual report on the situation of democracy, human rights and the rule of law in Europe, and urges him to do so systematically in all his future annual reports;

6.5. to encourage civil society to use the Rule of Law Checklist to objectively assess respect for the rule of law.

7. The Assembly also calls upon all the member and observer States of the Venice Commission to play an active part in its work and co-operate with it in defending and promoting the rule of law in a spirit of constructive dialogue, especially when the Venice Commission examines issues that concern them directly.

B. Explanatory memorandum by Mr Philippe Mahoux, rapporteur

1. Introduction

1. I should like to begin by stressing the excellent cooperation that exists between our Assembly and the Venice Commission. It has often been said, but it is worth repeating that the Assembly is the Venice Commission's best 'client'. We regularly request its opinion on numerous subjects. In my capacity as institutional representative of the Committee on Legal Affairs and Human Rights to the Venice Commission, it is my privilege to attend meetings and take part in its work on a regular basis. That is why I can vouch for the close cooperation between us and for the quality, the seriousness and the promptness with which the Venice Commission responds to our requests.

1.1. Procedure

2. On 21 June 2016 Mrs Marina Kaljurand, Minister of Foreign Affairs of Estonia, who was President of the Committee of Ministers at the time, Mrs Herdis Kjerulf Thorgeirsdottir, Vice-President of the Venice Commission, and Mrs Anne Brasseur, former President of the Parliamentary Assembly, took part in an exchange of views before the Committee on Legal Affairs and Human Rights to present and discuss the Rule of Law Checklist[1] newly adopted by the European Commission for Democracy through Law (the "Venice Commission"). Following that exchange of views the Committee prepared a draft resolution entitled "Rule of Law Checklist"[2] with the intention of submitting it to the Parliamentary Assembly for adoption.

3. The Bureau of the Assembly submitted the matter to our Committee for report on 25 November 2016 and I was appointed rapporteur on 13 December 2016. The Committee then proceeded to hold a hearing on 26 January 2017, with the participation of Mr Kaarlo Tuori, First Vice-President of the Venice Commission, and Ms Sarah Cleveland, Member of the Venice Commission.

1.2. Genesis of the Rule of Law Checklist

4. The very existence of this list is in fact the fruit of a thought process set in motion by our Assembly in 2007.[3] Indeed, whilst the notion of the rule of law / *prééminence du droit* regularly appears in major political documents produced by the Council of Europe, as well as in numerous conventions and recommendations, the Council of Europe has not defined it in any text, nor created a special monitoring mechanism in this regard. Thus, having been invited by our Assembly to examine in depth the concepts of "*Rule of Law*" and "*prééminence du droit*", the Venice Commission embarked upon a study "*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*".[4] The Venice Commission decided not to let the idea that the concept of the Rule of Law might be indefinable deter it.[5] In its study the Venice Commission privileged a more operational approach,[6] concluding – beyond the question of a formal definition – that a consensus exists on the core elements of the Rule of Law, the *Rechtsstaat* and the *État de droit*, which are not only formal but also substantive or material. 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.[7]

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[1] CDL-AD(2016)007, Venice Commission's "Rule of Law Checklist", Study No. 711/2013. Adopted by the Venice Commission at its 106th plenary session on 12 March 2016.
[2] Doc. 14110.
[3] See Resolution 1594 (2007). "The principle of the Rule of Law" and Doc. 11343, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Jurgens. The Committee of Ministers also took part in this process by publishing a document entitled "The Council of Europe and the Rule of Law - An overview", CM(2008)170, 21.11.2008.
[4] CDL-AD(2011)003rev. "Report on the Rule of Law", Study No. 512/2009, adopted by the Venice Commission at its 86th plenary session on 25 and 26 March 2011.
[5] CDL-AD(2011)003rev, § 68 and ff. The report concluded: "*we believe that the rule of law does constitute a fundamental and common European standard to guide and constrain the exercise of democratic power.*"
[6] This agrees with the conclusions of our Assembly, which considered in its Resolution 1594 (2007) - and in the corresponding report - that a formalistic interpretation of the terms "rule of law" and *"prééminence du droit"* runs contrary to their very essence.
[7] CDL-AD(2016)007, §18 and CDL-AD(2011)003rev, §41.

5. Wishing to make the concept of the Rule of Law operational, and faced with the lack of practical tools for ensuring that it was respected,[8] the Venice Commission continued its work by drawing up a checklist of the criteria that make up the Rule of Law.

6. This report will present that checklist and, in the light of that list, examine two current situations which – to different degrees – present a serious threat to the Rule of Law. The analysis will be based very specifically on the criteria defined in the checklist and on the substantive work done by the Venice Commission in respect of the two situations mentioned. It is important not only that we show our support for the Rule of Law Checklist in abstract terms but also that we make use of it as a practical tool in our work in the Assembly.

2. Rule of Law Checklist: a monitoring and prevention instrument

7. The Rule of Law Checklist provides a functional means of assessing respect for the Rule of Law in a given State, using objective criteria. The Venice Commission agreed that the adoption of a checklist was an effective and objective means of monitoring respect for this fundamental principle. The Rule of Law Checklist is part of an effort to improve the assessment of respect for the principle of the Rule of Law also undertaken at European Union level, with the introduction in 2014 of a machinery for dealing with systemic problems affecting the Rule of Law in the member States, and by the United Nations, with the publication in 2011 of the "Rule of Law Indicators" and the adoption by the General Assembly in 2012 of the declaration of the high-level meeting on the Rule of Law at the national and international levels. It is important to note that the "Rule of Law Indicators" do not have the same practical scope or use the same method as the Rule of Law Checklist.[9]

8. While the rule of law concept exists in its own right, it is also closely interlinked with the other two founding principles of the Council of Europe: democracy and human rights. Preserving and fostering human rights, democracy and the rule of law is nowadays seen as "*as a single objective, the core objective of the Council of Europe*".[10] The Venice Commission affirms that "*The Rule of Law would just be an empty shell without permitting access to human rights. Conversely, the protection and promotion of human rights are realised only through respect for the Rule of Law*".[11] As for democracy, it is an inherent element of the rule of law.[12] However, not every State based on the principles of the rule of law is necessarily democratic. The two concepts are interdependent, overlapping in part but each having characteristics of its own. This report thus offers us an opportunity to reaffirm our unconditional support for those three principles, including the Rule of Law, "*which form the basis of all genuine democracy*" (as enshrined, for example, in the Preamble to the Statute of the Council of Europe and in Article 3 thereof, which makes it a condition of accession for new members). In addition, the European Court of Human Rights has ruled that the rule of law is a concept inherent in all the Articles of the Convention on Human Rights (ECHR).[13]

9. As explained earlier, the principal aim of the Venice Commission is to set in place a tool for assessing the Rule of Law in a given country from the viewpoint of its constitutional and legal structures, the legislation in force and the existing case-law.[14] The very essence of the rule of law and therefore of its constituent elements cannot be reduced to a purely legal dimension. In that regard Ms Kjerulf-Thorgeirsdottir warns us that it would be wrong to apply the components of this checklist in a mechanical manner. The political and historical context, the constitutional order and cultural traditions must also be taken into account.

10. The Rule of Law Checklist is an instrument designed to help make an assessment that is:

- thorough: taking in each of the principal dimensions of the rule of law;
- objective and transparent: making explicit reference to national and international standards;
- fair: because the criteria and the standards taken into account are the same no matter which country is being assessed.

[8] J.E. Helgesen, "*The principle of Rule of Law and its Practical Implications*", International Conference, *The role and significance of the "Rule of Law Checklist"*, European Commission for Democracy Through Law in cooperation with the Constitutional Court of Armenia, Yerevan, Armenia, 20-22 October 2016, p.4.
[9] The indicators focus on three institutions: the police, the judicial apparatus and prisons, and there is a marking or percentage system for each indicator.
[10] "The Council of Europe and the Rule of Law – an overview", CM(2008)170, 21.11.2008, §23.
[11] Venice Commission's "Rule of Law Checklist", §31.
[12] CDL-AD(2011)003rev, §26.
[13] *Stafford v. the United Kingdom* judgment, Application no. 46295/99, 28 May 2002, § 63.
[14] Rule of Law Checklist, § 24.

3. Presentation of the different criteria

3.1. Legality

11. State action is subject to the rule of law and respect for the law. In other words the action of the State must be in conformity with the law and authorised by it.

12. In addition, there is scrutiny of the relationship between international law and domestic law, in order to make sure the national legal system respects the obligations entered into under international law. The other sub-categories concern the legislative powers of the executive and their limitation, the legislative procedure and any exceptions in urgent situations, in order to evaluate the limits of exceptional measures that derogate from the normal level of protection afforded to citizens. Lastly, the principle of legality or lawfulness also imposes the duty to implement the law and applies to private actors vested with public service missions.

3.2. Legal certainty

13. This encompasses the accessibility of the law and of judicial decisions; the foreseeability of the law and the stability and consistency of the law and respect for people's legitimate expectations.

14. This criterion also includes non-retroactivity of the law, especially criminal law, and the application of the principles of *nullum crimen, nulla poena sine lege* (no crime or punishment without law) and *res judicata* (the inalterability of judicial decisions).

3.3. Prevention of abuse of office

15. Like the criterion of legal certainty, the prevention of the abuse of office is a problem our Assembly has addressed. In 2013 the Parliamentary Assembly adopted Resolution 1950 (2013) on "Keeping political and criminal responsibility separate".[15] In order to prevent abusive criminal proceedings against politicians, the Assembly's Resolution states that the provisions of criminal law must be clear, precise and interpreted narrowly.[16]

3.4. Equality before the law and non-discrimination

16. The prohibition of discrimination on any ground such as sex, sexual orientation, presumed race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status (Article 14 ECHR) is essential. Compliance with this provision also requires the legislation itself to respect the principle of equality: "it must treat similar situations equally and different situations differently".[17] This equality must not be merely formal. Affirmative action (both necessary and proportionate) may be authorised in limited circumstances so as to guarantee substantively equal treatment.[18]

17. The assessment sub-criteria here are non-discrimination, equality in law and equality before the law.

3.5. Access to justice

18. This criterion mainly covers the monitoring of the independence and impartiality of the justice system itself (the judiciary), of judges individually, of the prosecuting authorities and of the Bar, but also the right to a fair trial, starting with the right of access to justice and the presumption of innocence. The list of criteria also mentions the essential components of constitutional justice.

19. The Parliamentary Assembly has regularly stressed the need to protect and guarantee the independence and impartiality of the judiciary. Two examples are its Resolution 2077 (2015) on Abuse of pre-trial detention in States Parties to the European Convention on Human Rights and its Resolution 2098 (2016) on Judicial corruption: urgent need to implement the Assembly's proposals.[19]

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[15] Resolution 1950 (2013) of the Parliamentary Assembly, 28.06.2013 (see Doc. 13214, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Omtzigt). The report includes case studies on the Tymoshenko and Lutsenko cases in Ukraine and and on Iceland's former Prime Minister Geir Haarde.
[16] Resolution 1950 (2013), note 27, points 3.3 - 3.6.
[17] Rule of Law Checklist, §70.
[18] Idem, §73.
[19] Resolution 2077 (2015) and Recommendation 2081 (2015) on Abuse of pre-trial detention in States Parties to the European Convention on Human Rights, Doc. 13863, report of the Committee on Legal Affairs and Human Rights,

20. As the Venice Commission explains, the Rule of Law Checklist is neither exhaustive nor final.[20] While it does aim to cover what are considered to be the core elements of the Rule of Law, it is not carved in stone. The checklist could change over time as new problems arise, or to develop certain points in greater detail.[21] In addition, the Venice Commission takes care to point out that assessments "have to take into account the whole context, and avoid any mechanical application of specific elements of the checklist".[22]

4. Specific case studies

21. I believe it is interesting to illustrate the relevance of the Rule of Law Checklist by examining two situations of concern, albeit on different levels, in Poland and Turkey, in respect of which the Venice Commission recently adopted useful opinions.

4.1. Poland: concerns about the laws governing the Constitutional Court

22. To understand the legitimacy of our concerns regarding Poland a brief reminder of the facts is needed. On 25 June 2015 the Polish Parliament (*Sejm*) enacted a law on the Constitutional Court, article 137 of which provided for Parliament, before the end of the legislature, to elect judges to replace all those whose term of office would come to an end in 2015, including those whose term of office would end after the end of the legislature then in place. The law entered into force on 30 August 2015. On 8 October 2015, a few weeks before the 2015 legislative elections in Poland, which the *Prawo i Sprawiedliwość* (Law and Justice) party won, the outgoing legislature appointed 5 judges to fill seats in the Constitutional Court that would become vacant respectively on 6 November and 2 and 8 December 2015 (two of the five seats concerned were not due to be vacated until after the end of the outgoing legislature).[23] The President of Poland refused to swear in the five newly appointed judges. However, on 19 November the new *Sejm* elected on 25 October 2015 amended the law on the Constitutional Court in urgent proceedings, introducing the possibility of annulling the appointments proposed by the previous legislature and giving itself the power to appoint five new judges, including the three judges lawfully appointed by the previous legislature. These new appointments were announced on 2 December 2015,[24] one day before the hearing of the Constitutional Court that was to rule on the constitutionality of the legal basis for the election of the judges in October. The same day, the President of Poland swore in the five judges appointed by the new legislature. On 3 December 2015 the Constitutional Court declared the legal basis for the appointment of two of the judges elected on 8 October 2015 (the two who were to take up office in December 2015) unconstitutional, but validated the legal basis for the election of the other three judges by the previous legislature to fill the vacancies left in November 2015; according to the Constitutional Court the President should also have agreed to swear in the three judges concerned.

23. Following the annulment by the Constitutional Court on 9 December 2015 of amendments to the law of 19 November 2015 on the Constitutional Court, aimed at reducing the term of office of the President of the Court, on 22 December 2015 the *Sejm* adopted a law amending the law on the Constitutional Court, which contained controversial provisions on procedure before that Court. On 7 January 2016 the Constitutional Court decided that it did not have jurisdiction to invalidate the resolutions of the *Sejm* on the November 2015 election of the judges. In its judgment of 9 March 2016 the Constitutional Court found the law of 22 December 2015 unconstitutional. It reached that decision based directly on the Constitution, rather than applying the disputed law, which would have prevented its proper functioning. The Prime Minister, however, who is responsible for publication in the Official Gazette, refused to publish the judgment, arguing that the Constitutional Court had not been correctly composed in the light of the disputed amendments. Thereafter no other decisions of the Constitutional Court were published in the Official Gazette; most of its decisions were not published until August and December 2016.[25] In its opinion,[26] prepared at the request of the Minister of Foreign Affairs of Poland and adopted on 11-12 March 2016, the Venice Commission found that the amendments (which the Court had found unconstitutional) would have compromised not only the rule of law but also the functioning of the democratic system, stressing that refusal to publish the judgment of 9 March

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rapporteur: Mr Pedro Agramunt; Resolution 2098 (2016) and Recommendation 2087 (2016) on Judicial corruption: urgent need to implement the Assembly's proposals, Doc. 13824 and addendum, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Kimmo Sasi.

[20] Rule of Law Checklist, §30.

[21] Idem.

[22] Idem., § 27.

[23] European Commission Recommendation of 27/07/2016 regarding the rule of law in Poland: http://ec.europa.eu/justice/effective-justice/files/recommendation-rule-of-law-poland-20160727_en.pdf.

[24] See European Commission recommendation.

[25] The judgments of 9 March and 11 August 2016 have not been published in the Official Gazette to this day (20 April 2017).

[26] CDL-AD(2016)001.

would not only be contrary to the rule of law but would be an unprecedented step that would further deepen the constitutional crisis.

24. On 22 July 2016 the *Sejm* adopted a new law on the Constitutional Court. The Secretary General of the Council of Europe asked the Venice Commission to examine the law. It was published in the Official Gazette on 1 August 2016 (before the Venice Commission adopted its opinion). On 11 August 2016 the Constitutional Court declared several provisions of the law unconstitutional. The Prime Minister once again refused to publish the Constitutional Court's decision. In its opinion[27] the Venice Commission concluded that the new law did not resolve the constitutional crisis but prolonged it by obstructing the Constitutional Court, which could not play its constitutional role as the guardian of democracy, the rule of law and human rights.

25. The very next day after the term of office of the President of the Court, Mr Andrzej Rzepliński, on 19 December 2016, three new laws, two of which were dated 30 November 2016 – the law on the organisation of and procedure before the Constitutional Court and the law on the status of the judges of the Constitutional Court – together with a law of 13 December 2016 on transitional provisions, were published in the Official Gazette and most of their provisions entered into force the same day. They integrally replaced the existing law on the Constitutional Court. Based on this new legislation, on 20 December 2016 the President of the Republic appointed Mrs Julia Przyłębska, the judge with the longest experience in the judicial system in general, interim President of the Constitutional Court (where she had been a judge since 2 December 2015). The next day the new acting President appointed the three judges to the Constitutional Court, who had been elected by the new Sejm on a legal basis that had been found unconstitutional[28] and the names of the three 'October' judges elected by the previous Sejm disappeared from the Web site[29] of the Constitutional Court. Then the acting President of the Court convened the General Assembly of the Court responsible for nominating the candidates for a new President of the Court, which, with 14 judges out of 15 present, nominated two candidates for the post, one of whom was the acting President. That election was controversial and was challenged in legal circles: only 6 judges had voted in favour, 7 had refused to take part in the vote and one had considered it null and void.[30] On 21 December 2016 the President of the Republic appointed Mrs Przyłębska President of the Constitutional Court. At the same time one of the judges, Mr Andrzej Wróbel, decided to return to his post in the Supreme Court[31] and he was replaced by a new judge appointed by the *Sejm* on 24 February 2017.[32] At the beginning of January 2017 the new President ordered the Vice-President of the Court, Mr Stanisław Biernat, to take his holidays with immediate effect, claiming that he was legally obliged to use up all his holiday entitlement before leaving the Court,[33] thereby affecting the majority vote in the Court. Furthermore, in January 2017 the Prosecutor General – who is the Minister of Justice –instituted proceedings to examine the validity of the election of three Constitutional Court judges elected by the previous legislature.[34]

26. The constitutional crisis in Poland raises serious issues regarding the rule of law. The most relevant standards to be examined here are the independence of the judiciary and the guarantee of constitutional justice where it exists (i.e. respect for the Constitutional Court's status as the supreme arbiter, and the obligation for the other branches of government to abide by its decisions; having said that, the Rule of Law Checklist does not actually require the existence of a constitutional court, but where one exists it must be the supreme and independent guarantor of respect for the Constitution).

[27] CDL-AD(2016)026.
[28] According to the law on the status of Constitutional Court judges (section 5), a judge takes up office after taking an oath before the President of the Republic and, subsequently, the President of the Court is obliged to assign cases to him and help create the requisite conditions for him to carry out his duties. Under section 11.5 of the law on the organisation of and procedure before the Constitutional Court, only judges who have taken an oath before the President of the Republic may take part in the General Assembly that nominates the candidates for the post of President of the Court.
[29] See article by Marek Domagalski. *Trybunał pod nową władzą* in "Rzeczpospolita", p. C3, 21 December 2016.
[30] See, *inter alia*, the position of the Helsinki Foundation: http://www.hfhr.pl/posiedzenie-w-sprawie-wylonienia-kandydatow-na-prezesa-tk-nielegalne/.
[31] http://www.rp.pl/Sedziowie-i-sady/312199928-Sedzia-TK-Andrzej-Wrobel-rezygnuje.html#ap-1.
[32] http://www.polskieradio.pl/5/3/Artykul/1731797,Dr-hab-Grzegorz-Jedrejek-wybrany-na-sedziego-Trybunalu-Konstytucyjnego.
[33] http://www.tvn24.pl/wiadomosci-z-kraju,3/julia-przylebska-do-stanislawa-biernata-urlop-do-konca-kadencji,727069.html.
[34] http://trybunal.gov.pl/s/u-117/.

Criteria of the Rule of Law Checklist and reference questions	Relevant situations
A. Legality **A1. Supremacy of the law** **iv.** Does the action of the executive branch conform with the Constitution and other laws?	**iv.** The refusal of the Prime Minister to publish the decisions of the Constitutional Court is at odds with the Polish Constitution, article 10.2 of which explicitly provides that "the judicial power shall be vested in courts and tribunals".
vi. Is effective judicial review of the conformity of the acts and decisions of the executive branch of government with the law available?	**vi.** The oversight exercised by the Constitutional Court is ignored and/or rendered ineffective by the executive and the legislative branches.
A2. Compliance with the law	
i. Are the powers of the public authorities defined by law?	**i.** "*By adopting the Act of 22 July (and the Amendments of 22 December), the Polish Parliament assumed powers of constitutional revision which it does not have when it acts as the ordinary legislature, without the requisite majority for constitutional amendments.*" (CDL-AD(2016)026, § 127)
ii. Is the delineation of powers between different authorities clear?	**0ii.** According to the Venice Commission, *"Without any constitutional foundation, the Chancellery of the Prime Minister has purported to arrogate the power to control the validity of the judgments of the Constitutional Tribunal, by refusing to publish its judgments*" (CDL-AD(2016)026, § 126) and this "*constitutes arrogation of the power of constitutional review by the legislature.*" (CDL-AD(2016)026, § 129) Merging of the functions of Minister of Justice and Prosecutor General and attribution of new powers to that function without sufficient safeguards.
A4. Law-making powers of the executive Is the supremacy of the legislature ensured? **ii.** What are these exceptions? Are they limited in time? Are they controlled by Parliament and the judiciary? Is there an effective remedy against abuse?	The law on the Constitutional Court (amendments of 19 November 2015 and 22 December 2015, law of 22 July 2016, all declared unconstitutional) paralyses the Court's work. The legislation in force since 20 December 2016 has modified the presidency of the Court.
E. Access to justice **E1a.** Independence of the judiciary	**E1a.** The independence of the Constitutional Court is compromised by interference in its functioning. (see A2ii above)
E2. Fair trial **E2d.** Effectiveness of judicial decisions **i.** Are judgments effectively and promptly executed?	**i.** The Prime Minister's refusal to publish certain decisions of the Constitutional Court can deprive the judgments of legal effect.

E3. Constitutional justice	
iii. Are Parliament and the executive obliged, when adopting new legislative or regulatory provisions, to take into account the arguments used by the Constitutional Court or equivalent body? Do they take them into account in practice?	**iii. and iv.** The Constitutional Court examined the law of 22 July 2016 and declared several of its provisions unconstitutional. That decision was ignored (not published in the official Gazette).
iv. Do Parliament or the executive fill legislative/ regulatory gaps identified by the Constitutional Court or equivalent body within a reasonable time?	
vi. If Constitutional Court judges are elected by Parliament, is there a requirement for a qualified majority, and other safeguards for a balanced composition?	**vi.** No qualified majority required for the election of Constitutional Court judges (according to the Constitution), new President of the Court elected on the basis of a questionable procedure; Vice-President of the Court obliged to take holidays; election of three acting judges challenged seven years after their election.[35]

27. The unconstitutional appointment of certain judges of the Constitutional Court threatens the credibility and the stability of the Polish legal system. Any verdict pronounced by these judges is open to challenge by the courts below, seriously jeopardising the supremacy of constitutional justice, which the executive does not appear to respect in any event. The Venice Commission concluded its opinion in these terms: "*By prolonging the constitutional crisis they [Parliament and the government] have obstructed the Constitutional Tribunal, which cannot play its constitutional role as the guardian of democracy, the rule of law and human rights*".[36]

4.2. The measures taken under the state of emergency in Turkey

28. Venice Commission member Sarah Cleveland explained in her presentation to our Committee that the current situation in Turkey 'vividly highlights' the utility of the Rule of Law Checklist.[37] The Parliamentary Assembly, for its part, decided in its Resolution 2156 (2017) to reopen the monitoring procedure in respect of Turkey until its "serious concerns" regarding respect for human rights, democracy and the rule of law "are addressed in a satisfactory manner".

29. Following the attempted coup of 15 July 2016 a state of emergency was declared on 20 July 2016 and was subsequently renewed. On 21 July 2016 notification of a derogation from the ECHR under Article 15 was received. The Assembly firmly condemned the attempt to overthrow the democratically elected institutions and expressed its support for the Turkish people. As the ad hoc Sub-Committee of the Committee on Political Affairs and Democracy rightly pointed out following its visit to Turkey, it is not a question of criticising the fact that the Turkish authorities should identify and punish those responsible for the attempted coup.[38] However, the action taken should be framed within the rule of law and should remain within the limits imposed by the Constitution and by international law. The state of emergency, the effects of which should be strictly limited and temporary, should be lifted as soon as possible. This was also reiterated by the Venice Commission in its opinion on emergency decree laws.[39]

30. The Turkish authorities promulgated 21 "decrees with force of law" under the state of emergency.[40] Veritable purges took place, including what appear to be the arbitrary arrests of members of the judiciary, public officials, members of the armed forces, the police, the parliamentary opposition and journalists, in defiance of the presumption of innocence and the right to defence.[41] The following few figures give an idea of the scale of the repression: 150,000 people were dismissed, almost 4,000 members of the judicial system

[35] *Statement* of the President of the Venice Commission regarding the Constitutional Court in Poland, 16.01.2017.
[36] Opinion of the Venice Commission CDL-AD(2016)026, §128.
[37] Sarah H. Cleveland, hearing before the Committee on Legal Affairs and Human Rights, 26 January 2017.
[38] AS/Pol (2016) 18rev, Committee on Political Affairs and Democracy Ad hoc Sub-Committee on recent developments in Turkey Report on the fact-finding visit to Ankara (21-23 November 2016) on the basis of a memorandum prepared by Mr Mogens Jensen, Denmark, Socialist Group, Chairperson of the ad hoc Sub-Committee.
[39] CDL-AD(2016)037, Turkey - Opinion on Emergency Decree Laws Nos. 667-676 adopted following the failed coup of 15 July 2016, adopted by the Venice Commission at its 109th Plenary Session, 9-10 December 2016.
[40] Details of the content of the decrees may be found in the last report of the Monitoring Committee (adopted on 8 March 2017).
[41] See the Assembly's report "Securing access of detainees to lawyers" Doc. 14267, rapporteur: Mrs Marietta Karamanli.

were suspended, 177 media outlets were shut down and over 150 journalists were placed in detention, and around 2,100 schools, student hostels and universities were closed. The Monitoring Committee's report likened the impact of these mass purges to "civil death" for the people concerned and expressed concern that the measures would have "*a dramatic and prejudicial long-term effect on Turkish society, which would need to find adequate means and mechanisms to overcome this trauma*".[42]

31. 11 MPs, members of the HDP party, including its Co-Chairs, are currently in pre-trial detention.[43] Our Assembly expressed concern over the lifting of the parliamentary immunity of a large number of MPs in its resolutions 2121(2016) on "The functioning of democratic institutions in Turkey" and 2127(2016) on "Parliamentary immunity: challenges to the scope of the privileges and immunities enjoyed by members of the Parliamentary Assembly".[44]

32. To be as concise as possible, like Mrs Cleveland in her presentation I shall confine myself here to examining the criteria in the Rule of Law Checklist which are particularly relevant to the state of emergency, namely, legality and access to justice, including the independence of the judiciary. But it should be noted that other measures, and in particular the constitutional reform, raise some equally disturbing questions.

Criteria of the Rule of Law Checklist and reference questions[45]	**Relevant situations**
A. Legality **A1. Supremacy of the law**	
iv. Does the action of the executive branch conform with the Constitution and other laws?	**iv.** In the context of the implementation of the state of emergency: - The Government circumvented the proper legislative procedure by issuing urgent legislative decrees impinging on parliamentary prerogatives. Only 5 of the 21 decrees were approved by Parliament in keeping with the constitutional requirement that parliamentary approval be obtained within 30 days of their publication. (Monitoring Committee report, § 24)
vi. Is effective judicial review of the conformity of the acts and decisions of the executive branch of government with the law available?	**vi.** Under the provisions of the Constitution, the Constitutional Court (CC) cannot verify the conformity of legislative decrees with the Constitution. Nor can the CC pronounce judgment on the merits of proposed amendments to the Constitution.
A5. Law-making procedures	
A6. Exceptions in emergency situations	
i. Are there specific national provisions applicable to emergency situations? Are derogations to human rights possible in such situations under national law? What are the circumstances and criteria required in order to trigger an exception?	**i.** The declaration and implementation of a state of emergency are defined and regulated by the Constitution and the law of 1983 on the state of emergency. However, the amendments to the Constitution adopted by Turkey's Grand National Assembly on 21 January 2017, and which were

[42] For more details concerning the repression and the measures taken under the state of emergency, read the report of the Monitoring Committee (adopted on 8 March 2017).
[43] See the report of the Monitoring Committee (8.03.2017), §94.
[44] See also CDL-AD(2016)027 Venice Commission, Opinion No. 858/2016 "on the suspension of the second paragraph of Article 83 of the Constitution (parliamentary inviolability)".
[45] The information shown in this table is based on the following reference documents *inter alia*: Opinion No. 865/2016 Turkey Opinion on emergency decree laws nos. 667-676 adopted following the failed coup of 15 July 2016 CDL-AD(2016)037, 12.12.2016 (English only); Opinion No. 875/2017, Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017, CDL-AD(2017)005, 13.03.2017 (English only); Opinion No. 872/2016 on the measures provided in the recent emergency decree laws of Turkey with respect to freedom of the media CDL-AD(2017)007, 13.03.2017; the latest report of the Monitoring Committee, 8.03.2017.

	submitted to a national referendum on 16 April 2017, provide for the President alone to have the power to decide to declare a state of emergency and promulgate decrees having the force of law on matters related to the state of emergency. (CDL-AD(2017)005, § 73)
ii. Are derogations proportionate, that is limited to the extent strictly required by the exigencies of the situation, in duration, circumstance and scope?	**ii.** The duration of the state of emergency (CDL-AD(2017)007, § 12 and CDL-AD(2016)037, § 40) and the scale of the purges raise important questions as to proportionality. In particular the permanent character of the measures taken by urgent legislative decree poses a problem (CDL-AD(2017)007, § 15). The Venice Commission also reiterates that there must always be a strict and genuine link between the reasons justifying the state of emergency and the measures taken through the emergency decree laws, and considers that in the current context "*this is not always the case, which is very problematic*" (CDL-AD(2017)007, § 18).
iii. Are the possibilities for the executive to derogate from the normal division of powers in emergency circumstances also limited in duration, circumstance and scope?	**iii.** Structural legislative changes of a permanent nature by legislative decrees affecting the distribution of the powers of the State (in particular amendments affecting safeguards in matters of criminal justice, procedures authorising phone tapping, mass shutdowns of media and so on) (CDL-AD(2016)037 §§151-176; CDL-AD(2017)007, § 51) or actions of a permanent nature affecting individuals (dismissals or permanent suspensions, dissolution of organisations, confiscation of assets, etc.).
iv. Are there parliamentary control and judicial review of the existence and duration of an emergency situation, and the scope of any derogation thereunder?	**iv.** The declaration of the state of emergency was duly validated by the Turkish Parliament. The Constitution provides for emergency legislative decrees to be submitted to Parliament for approval. However, Parliament did not interrupt its summer recess, so there was no parliamentary oversight for two months after the state of emergency was declared. Although Parliament is supposed to examine any urgent decree within a month, in practice that deadline is largely ignored. The Constitution does not state explicitly that urgent legislative decrees which are not validated by Parliament are null and void. (CDL-AD(2016)037, §46-54) The scope of the derogations made exceeds the reality of the emergency because the measures taken consist of legislative amendments and individual measures of a permanent nature. (CDL-AD(2016)037, §78-90) Absence of judicial review/redress: The Constitution rules out any review by the Constitutional Court of the declaration of the state of emergency. The Court cannot examine the urgent decrees, but it could examine the laws ratifying them. For the time being no appeal has been lodged with the Court. What is more, the Constitutional Court has not yet determined whether it has the power to examine individual applications concerning the conformity of the legislative decrees implementing the state of

	emergency. Since 23 January 2017 appeals may be lodged with an administrative commission (Commission of inquiry into state of emergency measures) against collective or individual dismissals and liquidations of organisations (decided by legislative decree via lists of names appended the urgent decrees) and the decisions of the commission may be challenged before the administrative courts. The commission, five members of which are to be appointed by the executive (while the quorum needed for decisions to be taken is only four) and any member of which may be removed by simple decision of the commission itself, has yet to be formed and made operational. "*It remains to be seen whether this commission, in view of its size, composition, duration of its mandate and principles of functioning, will be able to give individualised treatment to all cases, and issue reasoned decisions based on verifiable evidence*" (it will be composed of only seven members and have a two-year mandate in which to review over 130,000 dismissals and several thousand liquidations of private entities). (CDL-AD(2017)007, VIII esp. §88)
E. Access to justice **E1. Independence and impartiality**	**E1.** The independence of justice in Turkey was already a subject of serious concern prior to the attempted coup.[46] Since then the situation has deteriorated and has become truly alarming.
i. Are the basic principles of judicial independence, including objective procedures and criteria for judicial appointments, tenure and discipline and removals, enshrined in the Constitution or ordinary legislation?	**i.** Thousands of judges have been dismissed since the failed coup attempt. The dismissal decisions under legislative decree no. 667 are based on vague standards and a lack of objective procedures. (CDL-AD(2016)037, § 135-139)[47]
ii. Are grounds for removal limited to serious breaches of disciplinary or criminal provisions established by law, or where the judge can no longer perform judicial functions? Is the applicable procedure clearly prescribed in law? Are there legal remedies for the individual judge against a dismissal decision?	**ii.** Removals of judges are not limited to serious breaches of disciplinary or criminal law provisions. The Venice Commission particularly deplores the lack of individualised sanctions and objective evidence. (CDL-AD(2016)037, §136, §139, §140)
viii. Is there an independent judicial council?	**viii.** The Council of Judges and Prosecutors (HSYK), which ordered the removal of thousands of judges, is currently chaired by the Minister of Justice. The constitutional reform envisages doing away with the election of more than half the members of the HSYK by their peers, and reducing the number of members from 22 to 13. Four will be appointed by the President; the Minister of Justice and his undersecretary will be members *ex officio* and the remaining seven members will be appointed by Parliament. (CDL-AD(2017)005, § 114 and ff.)

[46] See, *inter alia*, Resolution 2121 (2016) on the functioning of democratic institutions in Turkey.
[47] See also Mrs Cleveland's presentation to the Committee.

33. Other criteria of the rule of law could have been examined here, such as section **C. Prevention of the abuse of authority**. The question of the existence of safeguards against arbitrariness and abuse of power by public authorities arises. Are public authorities required to provide adequate reasons for their decisions, in particular when they affect the rights of individuals? The mass dismissals and removals mentioned above, and the lack of judicial review of these decisions all point to the conclusion that they are not. Furthermore, according to the Venice Commission the amendments to the Constitution adopted by Turkey's Grand National Assembly on 21 January 2017, which were submitted to a national referendum on 16 April 2017, will lead, if approved, to an excessive concentration of power in the hands of the President, reduce Parliament's authority to oversee those powers and weaken the judiciary (CDL-AD(2017)005, especially § 109 and §§ 124 and ff.).

5. Conclusions

34. The Rule of Law Checklist obviates the need for argument over the definition of the concepts of Rule of Law / *prééminence du droit*, enabling us to focus on realities. The criteria defined by the Venice Commission make it possible for everyone to understand each other, above and beyond definitions. Theoretical debate, which can be interesting but sometimes (deliberately?) obstructive, can thus give way to discussion of the reality of compliance or otherwise with one of the pillars of the Council of Europe: the Rule of Law.

35. While the "Rule of Law Checklist" has already been endorsed by the Committee of Ministers, in September 2016,[48] and by the Congress of Local and Regional Authorities of the Council of Europe, in 0ctober 2016,[49] it is important that our Assembly should also support it. In so doing we will be making an active contribution to making it the reference instrument for monitoring and assessing respect for the rule of law, in the Council of Europe's Member States and beyond. The checklist will thus become a veritable "Council of Europe product".

36. The institutional and political support of the Parliamentary Assembly for the Rule of Law Checklist will not only help introduce a new, harmonised assessment standard, but will also be useful to our Assembly in its activities. The different assessment criteria identified by the Venice Commission can be used perfectly well in the work of our Committees, particularly the Monitoring Committee, and help us accurately identify structural and systemic problems in our Member States.

37. The Venice Commission's Rule of Law Checklist is a practical tool not only for the Council of Europe but also for all those involved in promoting and strengthening the principles of the Rule of Law, including the European Union, which has already expressed keen interest in the Checklist. I therefore share the opinion expressed by our former President, Anne Brasseur, who sees this Rule of Law Checklist as a potential "export product" of the Council of Europe. While our Member States will be the main users of the checklist, it could also be an important tool for other national or international players. The list is available to State institutions at the national and local level as well as to international institutions and civil society (NGOs, think-tanks, associations defending rights and citizens in general).

38. We parliamentarians ourselves must take them on board and refer to them in our work, both in the Parliamentary Assembly and in our national parliaments. We should also invite the Ministers of Justice but also other government institutions which have to evaluate the need for and the implications of legislative reforms, as well as civil society and international or regional organisations like the Council of Europe as a whole and the European Union, to refer systematically to the checklist. As Marina Kaljurand explained before our Committee, our ambition for this list could also be to offer it up for global use – "as a gift from the Council of Europe to any nation wishing to take their temperature vis-à-vis the rule of law", and also as a useful means of specifically aiming to enhance the rule of law by any action taken.

39. The political endorsement of our Assembly for the Rule of Law Checklist will also send a powerful message of support for the Venice Commission.

40. Defending the Rule of Law is more important than ever, as demonstrated by the two case studies presented as examples in this report. As Marina Kaljurand said, "*Preventing the erosion of the rule of law in our countries is our highest responsibility, especially at difficult times of crisis, when mushrooming populist forces try to coerce us into bending our principles*."

[48] Decision taken at the 1263rd meeting on 6 and 7 September 2016.
[49] Resolution 408 (2016) of the Congress of Local and Regional Authorities: "Rule of Law Checklist" adopted by the Venice Commission at its 106th Plenary Session (11 and 12 March 2016) / Rapporteur: Jakob WIENEN, Netherlands (L, EPP/CCE).