

Understanding the Rule of Law

This reading item is based on the Rule of Law Checklist of the Venice Commission [CDL-AD(2016)007 European Commission for Democracy through Law (Venice Commission) Rule of Law Checklist Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016)] (edited by Zsuzsa Szakály).

INTRODUCTION AND LEARNING OUTCOMES

*The concept of the Rule of Law is dynamic, so the exact definition for eternity is a task of great challenge. However, the elements of Rule of Law were examined in several different ways. The Venice Commission created a **checklist** for the elements of the Rule of Law, so the task is to choose a state, and examine every question in the structure of the state. In the end, it will give a list of factors to determine the level of the Rule of Law in the examined state. It could help to gather a comprehensive view of the question of the Rule of Law.*

Learning outcomes

1. Understanding the concept of Rule of Law
2. Have the ability to examine the status of Rule of Law in a state

Keywords: Rule of Law, legal certainty, legality, misuse of powers, equality before the law, access to justice, constitutional justice, independence of the judges, fair trial, non-retroactivity, res judicata

Estimated time: 1-2 hours

Recommended Reading

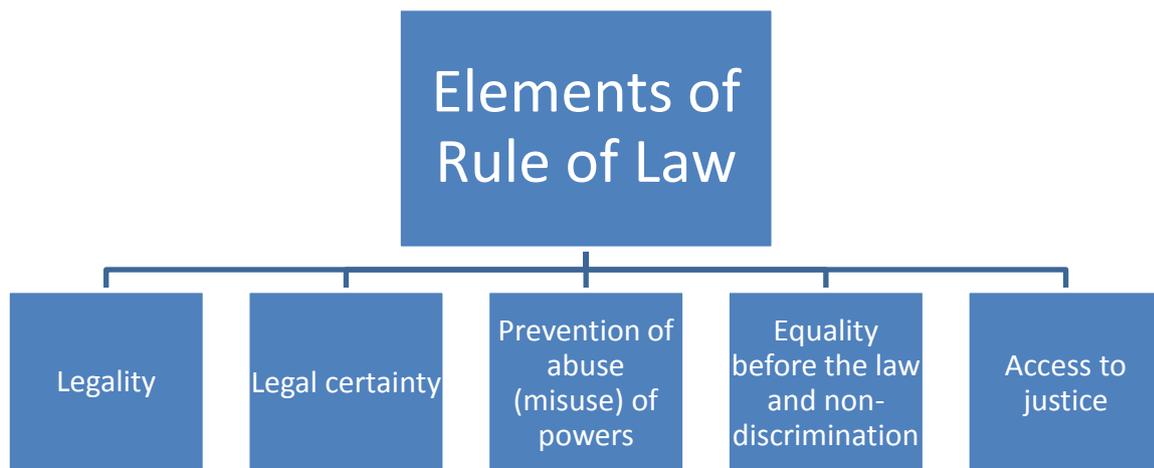
1. Rule of Law Checklist of the Venice Commission [CDL-AD(2016)007 European Commission for Democracy through Law (Venice Commission) Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016)]
2. Ricardo Gosalbo-Bono: The Significance of the Rule of Law and its Implications for the European Union and the United States, University of Pittsburgh Law Review, Volume 72, Issue 2, Winter 2010,
3. 3. Albert Venn Dicey, Introduction to the Study of the Law of the Constitution (LF ed.) [1915]
4. Laurent Pech: The Rule of Law as a Constitutional Principle of the European Union

Motto:

„The problems (...) start with the very word,”

(R. van Caenegem)

ELEMENTS OF THE RULE OF LAW



A. Legality

1. Supremacy of the law

Is supremacy of the law recognised?

- i. Is there a written Constitution?
- ii. Is conformity of legislation with the Constitution ensured?
- iii. Is legislation adopted without delay when required by the Constitution?
- iv. Does the action of the executive branch conform with the Constitution and other laws?
- v. Are regulations adopted without delay when required by legislation?
- vi. Is effective judicial review of the conformity of the acts and decisions of the executive branch of government with the law available?
- vii. Does such judicial review also apply to the acts and decisions of independent agencies and private actors performing public tasks?
- viii. Is effective legal protection of individual human rights vis-à-vis infringements by private actors guaranteed?

2. Compliance with the law

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

- i. Are the powers of the public authorities defined by law?
- ii. Is the delineation of powers between different authorities clear?
- iii. Are the procedures that public authorities have to follow established by law?
- iv. May public authorities operate without a legal basis? Are such cases duly justified?
- v. Do public authorities comply with their positive obligations by ensuring implementation and effective protection of human rights?
- vi. In cases where public tasks are delegated to private actors, are equivalent guarantees established by law?

3. Relationship between international law and domestic law

Does the domestic legal system ensure that the State abide by its binding obligations under international law?

In particular:

- i. Does it ensure compliance with human rights law, including binding decisions of international courts?
- ii. Are there clear rules on the implementation of these obligations into domestic law?

4. Law-making powers of the executive

Is the supremacy of the legislature ensured?

- i. Are general and abstract rules included in an Act of Parliament or a regulation based on that Act, save for limited exceptions provided for in the Constitution?
- 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?
- iii. When legislative power is delegated by Parliament to the executive, are the objectives, contents, and scope of the delegation of power explicitly defined in a legislative act?

5. Law-making procedures

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

- i. Are there clear constitutional rules on the legislative procedure?
- ii. Is Parliament supreme in deciding on the content of the law?
- iii. Is proposed legislation debated publicly by parliament and adequately justified (e.g. by explanatory reports)?
- iv. Does the public have access to draft legislation, at least when it is submitted to Parliament? Does the public have a meaningful opportunity to provide input?
- v. Where appropriate, are impact assessments made before adopting legislation (e.g. on the human rights and budgetary impact of laws)?
- vi. Does the Parliament participate in the process of drafting, approving, incorporating and implementing international treaties?

6. Exceptions in emergency situations

Are exceptions in emergency situations provided for by law?

- i. Are there specific national provisions applicable to emergency situations (war or other public emergency threatening the life of the nation)? Are derogations to human rights possible in such situations under national law? What are the circumstances and criteria required in order to trigger an exception?
- ii. Does national law prohibit derogation from certain rights even in emergency situations? Are derogations proportionate, that is limited to the extent strictly required by the exigencies of the situation, in duration, circumstance and scope?
- 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?
- iv. What is the procedure for determining an emergency situation? Are there parliamentary control and judicial review of the existence and duration of an emergency situation, and the scope of any derogation thereunder?

7. Duty to implement the law

What measures are taken to ensure that public authorities effectively implement the law?

- i. Are obstacles to the implementation of the law analysed before and after its adoption?
- ii. Are there effective remedies against non-implementation of legislation?
- iii. Does the law provide for clear and specific sanctions for non-obedience of the law?
- iv. Is there a solid and coherent system of law enforcement by public authorities to enforce these sanctions?
- v. Are these sanctions consistently applied?

8. Private actors in charge of public tasks

Does the law guarantee that non-State entities which, fully or in part, have taken on traditionally public tasks, and whose actions and decisions have a similar impact on ordinary people as those of public authorities, are subject to the requirements of the Rule of Law and accountable in a manner comparable to those of public authorities?

B. Legal certainty

1. Accessibility of legislation

Are laws accessible?

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

2. Accessibility of court decisions

Are court decisions accessible?

- i. Are court decisions easily accessible to the public?
- ii. Are exemptions sufficiently justified?

3. Foreseeability of the laws

Are the effects of laws foreseeable?

- i. Are the laws written in an intelligible manner?
- ii. Does new legislation clearly state whether (and which) previous legislation is repealed or amended? Are amendments incorporated in a consolidated, publicly accessible, version of the law?

4. Stability and consistency of law

Are laws stable and consistent?

- i. Are laws stable, to the extent that they are changed only with fair warning?
- ii. Are they consistently applied?

5. Legitimate expectations

Is respect for the principle of legitimate expectations ensured?

6. Non-retroactivity

Is retroactivity of legislation prohibited?

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

7. Nullum crimen sine lege and nulla poena sine lege principles

Do the nullum crimen sine lege and nulla poena sine lege (no crime, no penalty without a law) principles apply?

8. Res judicata

Is respect of res judicata ensured?

- i. Is respect for the ne bis in idem principle (prohibition against double jeopardy) ensured?
- ii. May final judicial decisions be revised?
- iii. If so, under which conditions?

C. Prevention of abuse (misuse) of powers

Are there legal safeguards against arbitrariness and abuse of power (détournement de pouvoir) by public authorities?

- i. If yes, what is the legal source of this guarantee (Constitution, statutory law, case-law)?
- ii. Are there clear legal restrictions to discretionary power, in particular when exercised by the executive in administrative action?
- iii. Are there mechanisms to prevent, correct and sanction abuse of discretionary powers (détournement de pouvoir)? When discretionary power is given to officials, is there judicial review of the exercise of such power?
- iv. Are public authorities required to provide adequate reasons for their decisions, in particular when they affect the rights of individuals? Is the failure to state reasons a valid ground for challenging such decisions in courts?

D. Equality before the law and non-discrimination

1. Principle

Does the Constitution enshrine the principle of equal treatment, the commitment of the State to promote equality as well as the right of individuals to be free from discrimination?

2. Non-discrimination

Is respect for the principle of non-discrimination ensured?

- i. Does the constitution prohibit discrimination?
- ii. Is non-discrimination effectively guaranteed by law?
- iii. Do the Constitution and/or legislation clearly define and prohibit both direct and indirect discrimination?

3. Equality in law

Is equality in law guaranteed?

- i. Does the constitution require legislation (including regulations) to respect the principle of equality in law? Does it provide that differentiations have to be objectively justified?
- ii. Can legislation violating the principle of equality be challenged in the court?
- iii. Are there individuals or groups with special legal privileges? Are these exceptions and/or privileges based on a legitimate aim and in conformity with the principle of proportionality?
- iv. Are positive measures expressly provided for the benefit of particular groups, including national minorities, in order to address structural inequalities? Legislation must respect the principle of equality: it must treat similar situations equally and different situations differently and guarantee equality with respect to any ground of potential discrimination.

4. Equality before the law

Is equality before the law guaranteed?

- i. Does the national legal order clearly provide that the law applies equally to every person irrespective of race, colour, sex, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or status? Does it provide that differentiations have to be objectively justified, on the basis of a reasonable aim, and in conformity with the principle of proportionality?
- ii. Is there an effective remedy against discriminatory or unequal application of legislation?

E. Access to justice

1. Independence and impartiality

a. Independence of the judiciary

Are there sufficient constitutional and legal guarantees of judicial independence?

- 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?
- ii. Are judges appointed for life time or until retirement age? 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?
- iii. Are the grounds for disciplinary measures clearly defined and are sanctions limited to intentional offences and gross negligence?
- iv. Is an independent body in charge of such procedures?
- v. Is this body not only comprised of judges?
- vi. Are the appointment and promotion of judges based on relevant factors, such as ability, integrity and experience? Are these criteria laid down in law?
- vii. Under which conditions is it possible to transfer judges to another court? Is the consent of the judge to the transfer required? Can the judge appeal the decision of transfer?
- viii. Is there an independent judicial council? Is it grounded in the Constitution or a law on the judiciary? If yes, does it ensure adequate representation of judges as well as lawyers and the public?
- ix. May judges appeal to the judicial council for violation of their independence?
- x. Is the financial autonomy of the judiciary guaranteed? In particular, are sufficient resources allocated to the courts, and is there a specific article in the budget relating to the judiciary, excluding the possibility of reductions by the executive, except if this is done through a general remuneration measure? Does the judiciary or the judicial council have input into the budgetary process?
- xi. Are the tasks of the prosecutors mostly limited to the criminal justice field?
- xii. Is the judiciary perceived as independent? What is the public's perception about possible political influences or manipulations in the appointment and promotion of the judges/prosecutors, as well as on their decisions in individual cases? If it exists, does the judicial council effectively defend judges against undue attacks?
- xiii. Do the judges systematically follow prosecutors' requests ("prosecutorial bias")?
- xiv. Are there fair and sufficient salaries for judges?

b. Independence of individual judges

Are there sufficient constitutional and legal guarantees for the independence of individual judges?

- i. Are judicial activities subject to the supervision of higher courts – outside the appeal framework -, court presidents, the executive or other public bodies?
- ii. Does the Constitution guarantee the right to a competent judge ("natural judge pre-established by law")?

iii. Does the law clearly determine which court is competent? Does it set rules to solve any conflicts of competence?

iv. Does the allocation of cases follow objective and transparent criteria? Is the withdrawal of a judge from a case excluded other than in case a recusal by one of the parties or by the judge him/herself has been declared founded??

c. Impartiality of the judiciary

Are there specific constitutional and legal rules providing for the impartiality of the judiciary?

i. What is the public's perception of the impartiality of the judiciary and of individual judges?

ii. Is there corruption in the judiciary? Are specific measures in place against corruption in the judiciary (e.g. a declaration of assets)? What is the public's perception on this issue?

d. The prosecution service: autonomy and control

Is sufficient autonomy of the prosecution service ensured?

i. Does the office of the public prosecution have sufficient autonomy within the State structure? Does it act on the basis of the law rather than of political expediency?

ii. Is it permitted that the executive gives specific instructions to the prosecution office on particular cases? If yes, are they reasoned, in writing, and subject to public scrutiny?

iii. May a senior prosecutor give direct instructions to a lower prosecutor on a particular case? If yes, are they reasoned and in written form?

iv. Is there a mechanism for a junior prosecutor to contest the validity of the instruction on the basis of the illegal character or improper grounds of the instruction?

v. Also, can the prosecutor contesting the validity of the instruction request to be replaced?

vi. Is termination of office permissible only when prosecutors reach the retirement age, or for disciplinary purposes, or, alternatively, are the prosecutors appointed for a relatively long period of time without the possibility of renewal?

vii. Are these matters and the grounds for dismissal of prosecutors clearly prescribed by law?

viii. Are there legal remedies for the individual prosecutor against a dismissal decision?

ix. Is the appointment, transfer and promotion of prosecutors based on objective factors, in particular ability, integrity and experience, and not on political considerations? Are such principles laid down in law?

x. Are there fair and sufficient salaries for prosecutors?

xi. Is there a perception that prosecutorial policies allow selective enforcement of the law?

xii. Is prosecutorial action subject to judicial control?

e. Independence and impartiality of the Bar

Are the independence and impartiality of the Bar ensured?

i. Is there a recognised, organised and independent legal profession (Bar)?

ii. Is there a legal basis for the functioning of the Bar, based on the principles of independence, confidentiality and professional ethics, and the avoidance of conflicts of interests?

- iii. Is access to the Bar regulated in an objective and sufficiently open manner, also as remuneration and legal aid are concerned?
- iv. Are there effective and fair disciplinary procedures at the Bar?
- v. What is the public's perception about the Bar's independence?

2. Fair trial

a. Access to courts

Do individuals have an effective access to courts?

- i. Locus standi (right to bring an action): Does an individual have an easily accessible and effective opportunity to challenge a private or public act that interferes with his/her rights?
- ii. Is the right to defence guaranteed, including through effective legal assistance? If yes, what is the legal source of this guarantee?
- iii. Is legal aid accessible to parties who do not have sufficient means to pay for legal assistance, when the interests of justice so require?
- iv. Are formal requirements, time-limits and court fees reasonable?
- v. Is access to justice easy in practice? What measures are taken to make it easy?
- vi. Is suitable information on the functioning of the judiciary available to the public?

b. Presumption of innocence

Is the presumption of innocence guaranteed?

- i. Is the presumption of innocence guaranteed by law?
- ii. Are there clear and fair rules on the burden of proof?
- iii. Are there legal safeguards which aim at preventing other branches of government from making statements on the guilt of the accused?
- iv. Is the right to remain silent and not to incriminate oneself nor members of one's family ensured by law and in practice?
- v. Are there guarantees against excessive pre-trial detention?

c. Other aspects of the right to a fair trial

Are additional fair trial standards enshrined in law and applied in practice?

- i. Is equality of arms guaranteed by law? Is it ensured in practice?
- ii. Are there rules excluding unlawfully obtained evidence?
- iii. Are proceedings started and judicial decisions made without undue delay? Is there a remedy against undue lengths of proceedings?
- iv. Is the right to timely access to court documents and files ensured for litigants?
- v. Is the right to be heard guaranteed?
- vi. Are judgments well-reasoned?
- vii. Are hearings and judgments public except for the cases provided for in Article 6.1 ECHR or for in absentia trials?

viii. Are appeal procedures available, in particular in criminal cases?

ix. Are court notifications delivered properly and promptly?

d. Effectiveness of judicial decisions

Are judicial decisions effective?

i. Are judgments effectively and promptly executed?

ii. Are complaints for non-execution of judgments before national courts and/or the European Court of Human Rights frequent?

iii. What is the perception of the effectiveness of judicial decisions by the public?

3. Constitutional justice (if applicable)

Is constitutional justice ensured in States which provide for constitutional review (by specialised constitutional courts or by supreme courts)?

i. Do individuals have effective access to constitutional justice against general acts, i.e., may individuals request constitutional review of the law by direct action or by constitutional objection in ordinary court proceedings? What “interest to sue” is required on their part?

ii. Do individuals have effective access to constitutional justice against individual acts which affect them, i.e. may individuals request constitutional review of administrative acts or court decisions through direct action or by constitutional objection?

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?

iv. Do Parliament or the executive fill legislative/regulatory gaps identified by the Constitutional Court or equivalent body within a reasonable time?

v. Where judgments of ordinary courts are repealed in constitutional complaint proceedings, are the cases re-opened and settled by the ordinary courts taking into account the arguments used by the Constitutional Court or equivalent body?

vi. If constitutional judges are elected by Parliament, is there a requirement for a qualified majority and other safeguards for a balanced composition?

vii. Is there an ex ante control of constitutionality by the executive and or/legislative branches of government?

Questions for Self-Check

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| What are the elements of legal certainty? |
| What is equality before the law? |
| What are the factors of an independent judge? |
| What are the elements of rule of law? |
| What is the misuse of powers? |
| What is the concept of fair trial? |

Home Assignment

Create a list from the elements of Rule of Law, starting with the most important element in your view, to show the priorities of the elements according to your opinion.



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