

OSCE Human Dimension Implementation Conference**Warsaw, 10 – 21 September 2018****Working Session 10****Contribution of the Council of Europe****THE COUNCIL OF EUROPE AND
THE RULE OF LAW**

The Council of Europe is home to most of the pan-European legal standards in the area of the Rule of Law. These binding and non-binding “Rule of Law standards” have been adopted by the Council of Europe and its bodies in such areas as the independence of justice (including constitutional justice), the proper functioning of state institutions, the combat against torture, the fight against corruption and related crimes, non-discrimination and equality before the law¹. All EU member states participated in the development of the Council of Europe “Rule of Law standards” which are therefore common to all European states.

In addition to the European Court of Human Rights, the Council of Europe has a number of monitoring and advisory bodies² which task is to monitor and support states in complying with and effectively implementing the “Rule of Law standards”. While the legal bases, working modalities and composition of these bodies are diverse, their recommendations constitute *sources of verification* for the implementation of the “Rule of Law standards” by member states.

¹ See, for instance, the Venice Commission Rule of Law Checklist ([http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e)).

² In addition to the European Court of Human Rights, the Secretary General (under Article 52 of the ECHR), the Commissioner for Human Rights, and the Parliamentary Assembly, these include (but are not limited to) the Venice Commission, the European Commission for the Efficiency of Justice (CEPEJ), the Consultative Councils of European Judges (CCJE) and Prosecutors (CCPE), the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), the Group of States against Corruption (GRECO), the European Commission against Racism and Intolerance (ECRI), the Group of Experts on Action against Trafficking in Human Beings (GRETA), Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), the Advisory Committee of the Framework Convention for the Protection of National Minorities (FCNM), Committee of Experts of the European Charter for Regional or Minority Languages, the Lanzarote Committee.

1. Developments of European human rights standards

The Steering Committee for Human Rights (CDDH), through its intergovernmental work, contributes to enhancing the protection of human rights by improving the effectiveness of the control mechanism of the European Convention on Human Rights and the implementation of the Convention at national and European levels.

To this end, the Committee of experts on the system of the European Convention on Human Rights (DH-SYSC) is tasked to ensure that information on the implementation of the Convention and execution of the Court's judgments is exchanged regularly and to assist member States in developing their domestic capacities and facilitate their access to relevant information. As to the recent achievements in this domain, in 2013 the CDDH elaborated a draft Protocol No. 16 to the Convention concerning advisory opinions (see paragraph 12.d) of the Brighton Declaration), which shall allow the highest domestic courts and tribunals to request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto. This [Protocol adopted](#) by the Committee of Ministers in July 2013 and opened for signature in October 2013, came into force on 1 August 2018.

The CDDH report on the longer-term future of the System of the European Convention on Human Rights was adopted by the [Committee of Ministers in March 2016](#). In its follow-up work, the CDDH shall focus, among others, on the challenges identified in the report concerning (i) the authority of the Convention: its implementation at national level; (ii) the authority of the Court; (iii) the authority of the Court's judgments (execution of judgments and its supervision); and (iv) the place of the Convention mechanism in the European and international legal order. Concerning the latter, a draft report is currently being prepared concerning the place of the European Convention on Human Rights in the European and international legal order, as well as the related challenges.

Moreover, the CDDH developed a Recommendation on Human Rights and business, building on the UN Guiding Principles for the Implementation of the UN "Protect, Respect and Remedy" Framework, which was adopted by the Committee of Ministers in March 2016. Important work has recently been carried out also on the protection and promotion of human rights in culturally diverse societies and on combating and preventing female genital mutilation and forced marriage.

Furthermore, for 2018-2019, the CDDH has been entrusted with preparing an analysis of the legal framework of the Council of Europe for the protection of social rights in Europe, identifying good practices and making proposals with a view to improving the implementation of social rights and to facilitating the relationship between the Council of Europe instruments and other instruments for the protection of social rights. Another task of this biennium is to prepare draft non-binding instruments (e.g. guidelines, guide to good practices, declaration, etc.) on the way of reconciling freedom of expression and other human rights and freedoms, in particular in culturally diverse societies, as well as on the protection and promotion of the civil society space.

See: www.coe.int/cddh
www.coe.int/reformECHR

2. Defining the content and assessing the respect for the rule of law

The Venice Commission, the Council of Europe's body in charge of constitutional matters, addressed the issue of the rule of law with a double aim: first, to define its content and, second, to provide an instrument to assess its implementation.

This first led, in 2011, to the adoption of the report on the rule of law. This study explored at the outset the possibility of reading a consensual definition of the rule of law which may help international organisations in completing their task of disseminating this fundamental value.

In this report, rather than searching for a theoretical definition, the Venice Commission adopted an operational approach and concentrated on identifying the core elements of the rule of law. These are:

1. legality (supremacy of the law);
2. legal certainty;
3. prevention of abuse of powers;
4. equality before the law and non-discrimination
5. access to justice, including independence and impartiality of the judiciary and the right to a fair trial.

In order to make it possible to assess whether the principle of the rule of law is implemented in an objective, thorough, transparent and equal manner, the Venice Commission then drafted a the rule of law checklist, which it adopted in March 2016.

The rule of law checklist may be used by a variety of stakeholders: state authorities, international organisations, non-governmental organisations, scholars and citizens in general. Its first addressees are the States themselves.

In the rule of law checklist, the five core elements quoted above, or benchmarks, are sub-itemised into detailed questions to assess the degree of respect for the rule of law in any given country.

- The principle of legality is at the basis of every established and well-functioning democracy. It entails the supremacy of the law, namely the fact that the State action must be in accordance with and authorised by the law. The law should establish the relationship between the international and the national law and sets out the cases in which exceptional measures could be adopted to derogate the normal regime of protection of citizens' rights.
- Legal certainty involves the accessibility of the law. The law must be certain, foreseeable and easy to understand. Basic principles such as *nullum crimen sine lege/nulla poena sine lege*, or the non-retroactivity of the criminal law are bulwarks of the legal certainty.
- Preventing the abuses of powers means having in the legal system safeguards against arbitrariness; providing that the discretionary power of the officials is not unlimited, and it is regulated by law.
- Equality before the law is probably the principle that most embodies the concept of rule of law. It is paramount that the law guarantees the absence of any discrimination on grounds such as race, sex, colour, language, religion, political opinion, birth, political power etc. Similar situations must be treated equally and different situations differently. Positive measures could be allowed as long as they are proportionate and necessary.

- Access to justice implicates the presence of an independent and impartial judiciary and the right to have a fair trial. The independence and the impartiality of the judiciary are central to the public perception of the justice and thus to the achievement of the classical formula: “justice must not only be done, it must also be seen to be done”
- Finally, the checklist addresses some cases in which some particular actions and decisions can hinder and weaken the rule of law. It could be the case of corruption for example, with the presence of a weak criminal system to fight bribes, grafts and misuse of public money; but also of conflicts of interest between a public office and private gains. It could also be the case of collection of data and surveillance – targeted surveillance, strategic surveillance, and video surveillance - in a time when the increasing use of information technology has made them possible to an extent which was unthinkable in the past.

The assessment of the respect for the rule of law will not merely consist of counting the right answers to the questions put in the checklist: it is intended to provide a global overview of the situation, while focusing on the respect for the most important criteria.

See: www.venice.coe.int

3. Ensuring justice – Independence and efficiency of justice

The **European Commission for the efficiency of justice (CEPEJ)** aims to improve the efficiency and quality of the day-to day functioning of the justice systems of member states, thereby generating increased confidence of the citizens in the public service of justice, preventing appeals to the ECHR based on Article 6 and enabling a better implementation of the Council of Europe's relevant instruments (conventions and recommendations in the justice filed).

In 2017, at least 25 member States have indicated that they had already directly used the last evaluation report of 45 judicial systems published by the CEPEJ to guide their reforms. This report has been widely disseminated to policy makers, justice professionals and the public. The CEPEJ has made available an interactive database, as an innovative tool for easily obtaining detailed and comparable information on the functioning of judicial systems. The European Commission was provided by the CEPEJ with information on 27 States enabling it to prepare the "EU Justice Scoreboard ". Recommendations were made to improve the system of judicial data collection in the Czech Republic, Cyprus and Georgia.

The SATURN Center has data on judicial timeframes by case categories in more than 30 states. New tools for judicial time management are being developed for all member States, including as regards the management of judicial time regulations for criminal cases in ECHR article 5 and 6, the way of weighting cases in courts and the setting up of dashboards for court management. New tools are being developed by the CEPEJ to improve the quality of judicial services as regards electronic case management systems, challenges posed by artificial intelligence and predictive justice, communication of courts vis-à-vis the media and the public. The CEPEJ also promotes mediation within the judicial system by developing concrete tools aimed notably to facilitate access to mediation, raise the awareness of the judicial professions, court users and the general public and develop training and qualification.

Good practices are disseminated through the European Prize "Crystal Scales of Justice" awarded to the Norwegian Judicial Administration for its project "Assistance to witnesses in Norwegian courts"; three other initiatives have been supported by a special mention of the jury.

The achievements and the methodology of the CEPEJ have been used to guide judicial reforms in many states and other beneficiaries, including through CEPEJ cooperation programmes (Albania, Azerbaijan, Latvia, Republic of Moldova, Slovakia, Turkey, Kosovo*³, Morocco, Tunisia, Jordan).

The CEPEJ was represented in 78 fora (23 States) on the functioning of justice.

See: www.coe.int/cepej

4. Strengthening the judicial professions

Unless the right training is provided for the legal professions, judicial systems cannot function effectively and will forfeit public trust. Therefore the Council of Europe attaches special importance to dialogue with members of the judicial service, who play a key role in promoting the rule of law and protecting fundamental rights and individual freedoms.

Reinforcing the independence and impartiality of judges

The **Consultative Council of European Judges (CCJE)** is the first body consisting solely of judges ever set up within an international organisation, and in this respect it is unique in Europe. It supports the Committee of Ministers in carrying out the priorities for safeguarding the status of judges in Europe and strengthening of the role of judges in Europe and advises on whether it is necessary to update the legal instruments.

The CCJE has already adopted 20 Opinions for the Committee of Ministers.

The CCJE may be called upon to provide practical assistance to help States comply with standards relating to judges. It addresses topical issues and, if necessary, visits the country concerned to discuss ways of improving the existing situation in legislative and practical terms.

Under the auspices of the CCJE, regular European Conference of Judges is held.

In 2017, European standards on the role of courts with respect to the uniform application of the law were developed through the CCJE's Opinion N°20(2017). Information related to the situation of the judiciary and judges in the member States has been updated by the CCJE, which has also formulated opinions on specific questions on the status of judges in Bulgaria and Poland. The main challenges to judicial independence and

³ This designation is without prejudice to positions on status, and is in line with UNSC 1244 and the ICJ Opinion on the Kosovo Declaration of Independence

impartiality in the member States were raised by the Bureau of the CCJE, following the proposal by the Secretary General of the Council of Europe in the framework of his Report on the "State of democracy, human rights and the rule of law in Europe - an imperative for the security of Europe" and contributing to the implementation of the Council of Europe's Plan of Action on strengthening judicial independence and impartiality.

See: www.coe.int/ccje

Co-operating with prosecutorial systems

The prosecuting authorities play a crucial role as the interface between governments, which are responsible for crime policy, and courts, which must be independent. Their functions and powers thus depend on a balance, which is not easily defined. The Council of Europe works to define such a balance in **Recommendation Rec. (2000)19 on the role of public prosecution in the criminal justice system**.

Recognising the essential role of the public prosecutor in the criminal justice system, and the important contribution to international cooperation played by the prosecutors, the Committee of Ministers decided in 2005 to create the **Consultative Council of European Prosecutors (CCPE)**. This consultative body to the Committee of Ministers has in particular a task to prepare opinions for the Committee of Ministers in order to facilitate and promote the implementation of Recommendation Rec. (2000)19 and to collect information about the functioning of prosecution services in Europe.

The CCJE has already adopted 12 Opinions for the Committee of Ministers. An Opinion on prosecutors and media is under way.

In 2017, European standards on the role of prosecutors in relation to the rights of victims and witnesses in criminal proceedings were developed through the CCPE's Opinion N°12(2017). The main challenges to judicial independence and impartiality in the member States were raised by the Bureau of the CCPE, following the proposal by the Secretary General of the Council of Europe in the framework of his Report on the "State of democracy, human rights and the rule of law in Europe - an imperative for the security of Europe" and contributing to the implementation of the Council of Europe's Plan of Action on strengthening judicial independence and impartiality.

See: www.coe.int/ccpe

Support to national implementation of European human rights standards at the national level

Member states increasingly relied on CoE support to ensure effective and coherent implementation of the European Convention on Human Rights at national level.

Tailor-made projects aimed at facilitating the execution of European Court's Judgments, notably through supporting criminal justice reforms and ensuring a harmonised application of European standards in national jurisdictions in Albania, Armenia,

Azerbaijan, Bosnia and Herzegovina, Georgia, Montenegro, Moldova, Serbia, “The former Yugoslav Republic of Macedonia”, Turkey, Ukraine and Kosovo*. Activities were carried out to maintain human rights dialogue and cooperation in the Russian Federation and Belarus.

Noteworthy achievements include judgments by the Constitutional Court of Montenegro establishing cases of ill-treatment in line with the case law of the European Court. Legal amendments in line with European standards were adopted in Armenia, Moldova and Ukraine. In Azerbaijan and Turkey, sustainable judicial training structures were strengthened, leading to in-depth human rights training of over 3000 judges and prosecutors.

2017 also saw the increased relevance of courses developed by the Human Rights Education for Legal Professionals (HELP). Property Rights, Reasoning of Criminal Judgments, Child-friendly Justice, Violence against Women and Domestic Violence were among the new topics addressed. As a result, some 2.500 legal professionals had their capacities and skills increased after successfully completing HELP courses organised with judiciary schools and bar associations in nearly all member states.

See: [human rights implementation](#)

Capacity building on independent judicial systems and strengthening the role of judicial professions

Capacity building on independent judicial systems and strengthening the role of the judicial professions aims to improve the independence, transparency and efficiency of the judicial systems in CoE member states. The activities of the European Union and Council of Europe Joint Programmes (EU-CoE JPs) aim to promote the conditions in which the rule of law and its principles are respected. They focus on the way in which the relevant structures and institutions operate, seeking to ensure that they respect the requirements of the rule of law and of the specific treaty obligations of the member states.

Capacity-building for judicial professionals and judicial systems is based on the CoE findings, in particular by the ECtHR, the Venice Commission, the CEPEJ, the CCJE and the execution of judgments of the ECtHR. It targets the beneficiary countries’ fulfillment of their accession commitments and the obligations arising out of their CoE membership. It is this CoE acquis regarding the rule of law principles, which makes it possible to pursue a high degree of consensus among member states and which has resulted in the CoE being recognised as the main organisation in the field of independent and efficient judiciary.

Co-operation activities organised by the CoE have led, inter alia, to the following results:

- a) providing legislative expertise to ensure that domestic regulations conform to the requirements of the rule of law (in particular the independence of the judiciary from executive and legislative powers);
- b) assisting in creating a legal framework for the functioning of legal professions, strengthening their role and status.

- c) strengthening high judicial councils and judicial academies, drafting training curricula and selecting lecturing staff; improving the transparency of judicial systems;
- d) improving transparency in the selection procedure of judges and prosecutors;
- e) putting in place or strengthening effective systems of free legal aid;
- f) strengthening the administration of justice through the training of judges, prosecutors, lawyers, as well as auxiliary court personnel (clerks, registrars) and bailiffs;
- g) improving the efficiency of court management through the introduction of pilot court management practices;
- h) providing technical advice on how to improve administration and the computerisation of courts;

Large-scale projects have been implemented in Armenia, Georgia, Turkey and Ukraine.

See: www.coe.int/t/dghl/cooperation/capacitybuilding/

Support for national prison and police systems

The CoE is supporting its Member states to address the challenges faced in their daily work and to promote more humane and efficiently managed **prisons** and human rights-based **policing** in line with the CoE and CPT standards.

In 2017 the Criminal Law Co-operation Unit (CLCU) provided assistance to 36 Member states through 16 projects and the CoE Budgetary Programme, where 7868 participants benefited from 428 activities.

Such assistance focused on a number of substantial areas: improvement of the provision of health care in prison, including mental health care; strengthening the professional capacity and the ethical values of prison staff; improvement of management of prisons, the pre-trial detention system and the rehabilitation of prisoners; addressing overcrowding, and issues related to violent and extremist prisoners.

As part of the Horizontal Facility for Western Balkans and Turkey (funded by the EU and the CoE), assistance was provided in the field of **prisons** and **police** to Bosnia and Herzegovina, Kosovo⁴, Montenegro, Serbia, and “the former Yugoslav Republic of Macedonia” and in the field of prisons to Albania.

Under the Partnership for Good Governance (PGG) (financed by the EU and the CoE), assistance was provided to Armenia on strengthening health care and human rights protection in prison, to Georgia on human rights and health care in prisons and other closed institutions, and to Ukraine in support to prison reform.

Furthermore, support to penitentiary reform was provided to Azerbaijan (JP EU/CoE), to Bulgaria on implementation of ECtHR judgments and CPT standards and

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recommendations (financed by the HRTF), to Romania to strengthen human rights and combating discrimination in **police** and **prison** systems (EEA Norway Grants mechanism) and to Bosnia and Herzegovina on reintegration of violent and extremist prisoners (VC- UK)

The CoE provided technical assistance under CoE Budgetary Programme to its Member states through multilateral and bilateral co-operation activities, facilitating a more positive, professional and efficient approach in the **prison** and **police** systems.

In the **police** field assistance was provided through bilateral co-operation activities to Albania, Georgia, Poland and Armenia to increase the professional capacity of police officers and the application of police ethics in practice.

The third conference of the **Independent Police Complaints Authorities' Network (IPCAN)** facilitated an exchange of views for ensuring respect for fundamental rights and freedoms while strengthening the fight against terrorism in the context of recent terrorist threat. The CLCU contributed to the expert seminar on "Policing of assemblies: use of force and accountability" organised by the Geneva Academy of International Humanitarian Law and Human Rights which confirmed importance of the adherence to human rights in police work daily work

In the **prison** field two multilateral meetings became important fora where senior Officials and professionals from Prison Administrations and other relevant institutions in CoE member states exchanged and promoted experiences and good practices through peer-to-peer discussion, encouraging new developments in their systems. The multilateral meetings focused respectively, on foreign prisoners and organization and management of prison health care.

Assistance was also provided to the Ministry of Justice, Transparency and Human Rights of Greece through a meeting on health care and medical ethics in prison to address the shortcomings identified by the CPT in its visit reports on Greece and to improve the protection of human rights of prisoners in line with CoE and CPT standards.

See: <http://www.coe.int/en/web/criminal-law-coop>

5 Fight against corruption

The [Group of States against Corruption \(GRECO\)](#), the anti-corruption body of the Council of Europe, monitors states' compliance with the organisation's anti-corruption standards. GRECO aims to improve the capacity of its members to fight corruption by identifying deficiencies in national anti-corruption polices, with a view to prompting the necessary legislative, institutional and practical reforms, and by sharing good practices. Its membership is not limited to member states of the Council of Europe: in addition to all 47 Council of Europe member states, GRECO also counts the United States of America and Belarus as its members. In addition, it has a number of observers to its work (including OSCE/ODIHR and, more recently, the EU). GRECO's monitoring work is organised in evaluation rounds, with each evaluation round having specific themes (with recommendations emanating from these rounds being followed up by a special compliance procedure). In addition to the evaluation rounds, GRECO may carry out ad-hoc evaluations, if it receives reliable information that an institutional reform, legislative initiative or procedural change in one of its members may result in a serious violation of a Council of Europe anti-corruption standard. Ad-hoc evaluations were carried out for the first time in 2018 in respect of [Poland](#) and [Romania](#), both because of the judicial reforms taking place in these countries.

GRECO's Fourth Evaluation Round

[GRECO's Fourth Evaluation Round](#) (which was launched on 1 January 2012) focused on preventing of corruption in respect of members of parliament (MPs), judges and prosecutors. For MPs, GRECO targeted transparency of the legislative process and MPs' interactions with lobbyists and other third parties seeking to influence this process, as well as rules of conduct (and awareness of these rules), conflicts of interest, revolving doors, declarations of assets and interests and accountability mechanisms. For judges in turn, a majority of countries received recommendations on the recruitment, transfer or promotion of judges and court presidents. GRECO stressed that decisions in this respect should be taken on clear and objective, merit-based criteria. It also recommended several countries to strengthen the role of the judiciary in procedures for the recruitment, promotion and dismissal of judges, reduce the role of the head of state and require motivations for his/her decision be given, as well as to ensure that any decisions in those procedures could be appealed. For prosecutors, GRECO similarly assessed appointment and revocation procedures and looked at case management systems (in particular procedures for the assignment of cases and possibilities to remove cases from prosecutors). In addition, in various instances GRECO called – in respect of both judges and prosecutors – for the establishment of rules of conduct or improvements to existing rules, the provision of guidance, advice and training on integrity matters, the prohibition or restriction of certain activities (for example, a restriction on the simultaneous holding of a judicial office and an office in an executive or legislative body) and the supervision and enforcement of existing rules.

GRECO's Fifth Evaluation Round

GRECO's Fifth Evaluation Round (which was launched on 20 March 2017) focuses on preventing corruption and promoting integrity in central governments (top executive functions) and law enforcement agencies. Currently, 15 out of the 49 members of GRECO have undergone an evaluation in the fifth round, with recommendations pointing to the need for both groups to focus on building and streamlining their anti-corruption policies, based on risk analysis targeting their respective domains, and paying due attention to oversight and enforcement of those policies. To achieve that in central governments, emphasis is placed on transparency of activities (through improving consultation processes, implementation of access to information legislation and/or by regulating interactions with lobbyists). Furthermore, in several countries, improvements are to be made to the system of declarations of assets, income and interests (making sure that they are not by-passed by transferring property to spouses and relatives or simply failing to disclose some interests because the requirements of what constitutes them are unclear). For law enforcement, GRECO's recommendations stress in particular the need to strengthen internal oversight and whistleblower protection mechanisms. Both for persons with top executive functions and law enforcement officers, several countries are requested to take a closer look at conflicts of interest in relation to their side activities and to migration to the private sector. In those instances where codes of conduct are yet to be developed, they should become living documents, practicable and enforceable as well as coupled with compliance mechanisms. With that in mind, much attention is paid to raising awareness, training and guidance, making sure that they are regular and well owned by the targeted beneficiaries.