

matically have to be subjected to a special preventive control procedure in order to be applicable at all. Moreover, the exercise of control power would have to be regulated by organic law and would thus again be dependent on an adequate implementation by sub-constitutional legislation.

Yet even with deficient implementation by organic laws, the proposed wording could partly assimilate the preventive effect to the incidental constitutionality review as already established in the Draft New Constitution. The result would be a suspensive effect on any legislative curtailment of the CC's constitutionality review power itself, so that such curtailment could be checked by the CC before it could take effect. Taken together with all other provisions guaranteeing access to court, this could accomplish the mechanisms required for a fully developed judicial protection of fundamental rights.

4 Conclusion

The considerations and proposals put forward here might seem as constitutional (or rule of law) perfectionism, driven by a search for watertight guarantees against authoritarian tendencies or fall-backs. Admittedly, the functioning of a constitution largely depends on people and their commitment to its spirit. A constitution cannot secure its functioning merely by itself as if it were a bloodless mechanism. However, what a constitution can try to do is to make it as difficult as possible to advance legalistic pretexts in support of political interests that aim at undermining the operation of the rule of law and the protection of fundamental rights.

Regina Kiener / Ivan Gunjic¹

Constitutionalising the Rule of Law: The Draft Constitution for a New Belarus in light of the Venice Commission's Rule of Law Checklist

Abstract

Constitution-making has increasingly become part of the rule of law movement. At the same time, the rule of law principle has been progressively differentiated in legal theory, confronting constitution drafters with widely differing concepts of the rule of law. The article compares the rule of law concepts that underlies the Draft Constitution for a New Belarus elaborated by democratic forces with the Rule of Law Checklist of the Venice Commission, demonstrating that the Draft not only reflects current European and international standards, but also develops them further.

1 Constitutionalising what, and how?

The protection and promotion of the rule of law is one of the central claims of drafters of modern constitutions.² In the last three decades, constitution-making has increasingly become part of the rule of law movement, a process facilitated by the adoption of a plethora of new constitutions after the end of the Cold War, on the one hand, and by the expanding role of transnational legal norms and associated institutions in the process of constitution-making, on the other hand.³ At the same time, the rule of law principle has become more and more differentiated in legal theory,⁴ confronting constitution drafters and their advisors with widely differing concepts of the rule of law.

1 The authors would like to thank Julie Frei, M.Law, and Natascha Kords, B.Law, for the formal revision of the manuscript.

2 See Article 1(1) of the Chad Constitution of 4th May 2018; Section 3(2) of the Thailand Constitution of 6th April 2017; Articles 50(1), 51(b)(2), and 56(6) of the Nepal Constitution of 20th September 2015; Articles 3 and 7 of the Kosovo Constitution of 15th June 2008.

3 T. Ginsburg, *Constitutional Advice and Transnational Legal Order*, in G. Shaffer, T. Ginsburg, T. C. Halliday (eds.), *Constitution-Making and Transnational Legal Order*, 2019, pp. 26–54.

4 See P. Alvazzi del Frate, A. Torini, *Rule of Law between the Seventeenth and Nineteenth*

The Draft Constitution for a New Belarus ("People's Constitution") – elaborated by the Public Constitutional Commission under the overall direction of Anatoli Liabedzka, Representative for the Constitutional Reform of Sviatlana Tsikhanouskaya, and supported by democratic forces of the country (in the following referred to as Draft Constitution)⁵ – was developed with substantial external support. For one thing, a panel of international experts coming from different constitutional traditions closely assisted the drafting process. For another, a set of existing international legal standards has been made available in the drafting process, most notably, the Rule of Law Checklist of the Venice Commission. In this article, we aim to trace the rule of law concept underlying the Draft Constitution with reference to the Checklist. An analysis of how the rule of law principle is implemented in the Draft not only provides for a better understanding of the Draft Constitution, but also serves as a case study on how the Rule of Law Checklist can be operationalised in constitution-making.

2 The Venice Commission's Rule of Law Checklist: Genesis and significance

While the principle of the rule of law plays a fundamental role in the Council of Europe (CoE),⁶ the concept has never been defined in a binding manner within the legal order of the CoE, neither by the Parliamentary Assembly nor by the Committee of Ministers or the European Court of Human Rights.⁷ The variance in terminology and different understandings resulted in considerable legal un-

⁵ *Centuries*, in G. Amato, B. Barbisan, C. Pinelli (eds.), *Rule of Law vs Majoritarian Democracy*, 2021, pp. 11–24; L. Laché, *Rule of Law Metamorphoses in the Twentieth Century*, in *ibid.*, pp. 25–42. See also T. Bingham, *The Rule of Law*, 2010; B. Z. Tamanaha, *The Rule of Law: History, Politics, Theory*, 2004; L. Heuschling, *Etat de droit, Rechtsstaat, Rule of Law*, 2002.

⁶ For the latest text before the publication of this book, as of 14 July 2022, see Annex II, pp. 287–350.

⁷ Acceptance of the principle of the rule of law is a prerequisite of membership in the CoE, see Articles 3 and 4 of the *Statute of the CoE*, 5 May 1949, ETS No. 1. The CoE has issued numerous resolutions, reports and action plans which refer to the rule of law and which member states must also respect, see Parliamentary Assembly, Resolution 1594 (2007), 23 November 2007; Committee of Ministers, CM(2008)170, 27 November 2008. The preamble to the European Convention on Human Rights refers to the rule of law as part of the common European heritage; the European Court of Human Rights (ECtHR) confirmed in a number of judgments that the rule of law is a fundamental guiding principle in the application and interpretation of the Convention, see *ECtHR, Golder v. United Kingdom*, 21 February 1975, No. 4451/70, § 34; *Engel v. the Netherlands*, 8 June 1976, No. 5100/71, § 69; *Amsur v. France*, 25 June 1996, No. 19776/92, § 50.

⁸ E. Polgár, *In search of a Standard: References to the Rule of Law in the Case-Law of the European Court of Human Rights*, ICL Journal 14/1 (2020), pp. 43–69, at 52.

certainty in member states when implementing rule of law-related principles and policies. Against this background, the Parliamentary Assembly of the CoE tasked the European Commission for Democracy through Law, commonly known as the Venice Commission, with a study aimed at identifying a consensual and practical definition of the rule of law, and its core elements.⁸

The Venice Commission is an independent body of constitutional law experts. It was established in 1990 as an intergovernmental institution within the CoE to provide technical assistance to the former communist states of Eastern and Central Europe in drafting democratic constitutions.⁹ At present, the Commission has 61 members, including all 46 member states of the CoE. Until March 2022, Belarus used to be an associate member, a status currently suspended.¹⁰

In 2011, the Venice Commission adopted a study on the rule of law, which was supplemented in 2017 by an expanded and annotated checklist, known as the Rule of Law Checklist.¹¹ The Checklist builds on existing documents of international organisations, whilst developing them significantly further at the same time.¹² The benefit of the Checklist is to substantiate the concept of the rule of law as mentioned in numerous CoE documents, to make its implementation and application operational and to align review mechanisms with rational and broadly legitimised benchmarks.¹³

Despite its non-binding character, the Checklist is of utmost importance within the realm of the CoE and beyond. It was formally endorsed by the Parliamentary Assembly, the Committee of Ministers, and the Congress of Local and Regional

⁸ Parliamentary Assembly, *op. cit.*, para. 6.2.

⁹ See G. Buquichio, S. Granata-Menghini, *Conseil de l'Europe: Commission de Venise*, in S. Poillot-Peruzzetto, D. Simon (eds.), *Encyclopédie juridique Dalloz: Répertoire de droit européen*, 2014, pp. 1–14; P. P. Craig, *Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy*, U.C. Irvine Journal of International, Transnational and Comparative Law 2/5 (2017), pp. 57–85; J. Jowell, *The Venice Commission: Disseminating Democracy through Law*, Public Law 2001, pp. 675–83.

¹⁰ Committee of Ministers, CM/Del/Dcc(2022)1429/2.5, 17 March 2022.

¹¹ Venice Commission (hereinafter "VC"), *Report on the Rule of Law*, CDL-AD(2011)003rev, 4 April 2011; VC, *Rule of Law Checklist*, CDL-AD(2016)007rev, 18 March 2016.

¹² See A. Drzemczewski, *The Council of Europe and the Rule of Law: Introductory remarks regarding the Rule of Law Checklist established by the Venice Commission*, HRLJ 37 (2017), pp. 179–83; M. Fuchs, *Die Vermessung der Rechtsstaatlichkeit: Die "Rule of Law-Checklist" der Venedig-Kommission des Europarats*, EuGRZ 45 (2018), pp. 237–44; J. Polakiewicz, J. K. Kirchmayr, *Sounding the Alarm: The Council of Europe As the Guardian of the Rule of Law in Contemporary Europe*, in A. von Bogdandy et al. (eds.), *Defending Checks and Balances in EU Member States*, 2021, pp. 361–82, at 363 et seqq.; Q. Querimi, *Operationalizing and Measuring Rule of Law in an Internationalized Transitional Context: The Virtue of Venice Commission's Rule of Law Checklist*, Law and Development Review 13/1 (2020), pp. 59–94, at 61 et seqq.

¹³ Fuchs, *op. cit.*, pp. 243 et seqq.

Authorities, along with a commitment to its consistent use.¹⁴ Its significance is further reinforced by numerous references in judgments of the European Court of Human Rights, and not least by the fact that several bodies outside the CoE refer to the Checklist, most notably the European Commission.¹⁵

3 The Checklist's rule of law concept

The Rule of Law Checklist advocates a material concept of the rule of law that comprises "a system of certain and foreseeable law, where everyone has the right to be treated by all decision-makers with dignity, equality and rationality and in accordance with the laws, and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures".¹⁶ A formalistic notion of the rule of law that would merely require that any government action must be authorised by legislation is thus rejected. The Checklist also combines insights from different legal spheres based on the Anglo-Saxon Rule of Law, the French *Etat de droit* and the German *Rechtsstaatlichkeit* concepts,¹⁷ embedding them in concrete requirements arising from international treaties, recommendations, practice of international bodies, as well as doctrine.

The Checklist consists of three parts. The first part sets out the purpose and scope of the document and discusses the links between the rule of law, democracy, and human rights. The core of the Checklist is its second part ("Benchmarks"), where the central principles of the concept are listed and further differentiated. These are (1) legality, (2) legal certainty, (3) prevention of abuse of power, (4) equality before the law and non-discrimination, and (5), access to justice. The third part lists selected standards referring to these principles. The benchmarks of the Checklist make clear that it is designed to assess constitutional reality. Significant parts of the Checklist not only address constitutional provisions but also sub-constitutional law, presupposing a differentiated legal order. In addition, the Checklist – albeit mainly directed at assessing legal safeguards – includes complementary benchmarks relating to the practical implementation of law.¹⁸ Since we focus on the Draft Constitution and not on the overall legal order, we will mainly discuss the most pertinent parameters of the Checklist.

4 Implementation of the rule of law in the Draft Constitution

4.1 Overview

The Draft Constitution explicitly mentions the term "rule of law" on two occasions. Article 1 stipulates that Belarus is a unitary democratic social state "based on" (para. 1) and "safeguarding" the rule of law (para. 4). The rule of law is thus constructed as a core principle of the Draft. It is further secured by the entrenchment clause in Article 162 para. 1, which ensures that the state's foundation on the rule of law principle cannot be overridden by constitutional amendments. In addition, "rule of law" is introduced as the heading of Article 5, which deals with certain aspects of the principles of legality and legal certainty. A mere textual reading of the Draft Constitution might suggest that its rule of law concept is limited to the (narrow) scope set out in Article 5. However, this conclusion is not compelling, given that the Draft embraces a comprehensive understanding of the rule of law, as will be shown below. The heading of Article 5 should therefore rather be seen as limiting the rule of law's function as a substantive barrier to constitutional change within the meaning of paragraph 1 of Article 162, and not as a conclusive definition of the concept.

4.2 Legality

The benchmark "legality" entails three groups of parameters according to the Rule of Law Checklist. The first group relates to the status of law as such, requiring recognition of supremacy and compliance with the law and specifying the relationship between different legal norms (4.2.1). The second set of parameters addresses law-making and the enforcement of law, including provisions on which institution ought to be supreme in law-making, and according to what principles law should be made (4.2.2). The last group concerns the implications of emergency situations for the legal order (4.2.3).

4.2.1 Status of law

State action must be in accordance with and authorised by law. The Draft Constitution recognises the supremacy of the law by stating that the Constitution has supreme legal force and direct effect (Article 5 para. 2), and that all public and private legal entities must act within this framework (para. 3). Human rights and freedoms are binding on public authorities and directly applicable. The state must provide for efficient mechanisms for human rights promotion and protection (Article 10 para. 4). Compliance with the law is secured by a broad range of provisions on the administration of justice, *inter alia*, by the prohibition for courts to apply norms that contradict higher legal acts (Article 124 paras. 1 and 2). Subordinate normative legal acts that are recognised to be inconsistent with another higher

14 Parliamentary Assembly, Resolution 2187 (2017), 11 October 2017; Committee of Ministers, CM/Del/Dec(2016)1263, 9 September 2016, item 10.1; Congress of Local and Regional Authorities of the Council of Europe, Resolution 408(2016), 21 October 2016.

15 See European Commission, COM(2019) 343 final, 17 July 2019.

16 VC, *Rule of Law Checklist*, op. cit., paras. 15 and 18.

17 Fuchs, op. cit., 243.

18 See VC, *Rule of Law Checklist*, op. cit., para. 25.

legal act by the judiciary lose legal force (Article 5 para. 4; Article 124 para. 3; Article 129 para. 3).

In international law, the principle of legality requires full domestic implementation of binding international law (*pacta sunt servanda*).¹⁹ The Draft specifies the relationship between international and domestic law, opting for a monistic system where the Constitution has supreme legal force (Article 5 para. 2) and international treaties take precedence over legislation (paras. 5 and 6). Ratification of international treaties that do not comply with constitutional law is prohibited (para. 7), likewise the accession of Belarus to international organisations if the country thereby loses its independence and full international legal capacity (Article 6 para. 4). Counterbalancing the concept of "supreme legal force" laid down in paragraph 2 of Article 5, constitutional law may not be interpreted in a way that restricts or violates human rights recognised in international law and treaties to which Belarus is a party (Article 51 para. 1). In addition, public authorities are bound by decisions of international organisations on individual human rights applications (Article 18 para. 3). Binding provisions of international law form a substantive barrier to constitutional change (Article 162 para. 2).²⁰

4.2.2 Law-making and enforcement

Unlimited powers of the executive, *de jure* or *de facto*, are a central feature of absolutist and dictatorial systems.²¹ In contrast, the Draft sets up a regime of separation of powers that includes the Soim (the legislative), the President and the Government (the executive) and the ordinary courts as well as the Constitutional Court (the judiciary).²² The supremacy of the legislature is ensured by two means. On the one hand, the Constitution requires that procedures of public authorities are regulated by statutory law,²³ on the other, the Draft refrains from conferring discretionary law-making powers to the executive. Normative legal acts issued by the President outside of his/her exclusive constitutional powers must be countersigned by the head of Government (Article 97 para. 3), whose institutional position is closer to the Soim than that of the President.²⁴ While the President can return laws to the Soim with comments and proposals, his/her decision can be overruled

19 VC, *Rule of Law Checklist*, op. cit., paras. 47 et seq.

20 For a comparative perspective see W. Sadurski, *Constitutionalism and the Enlargement of Europe*, 2012, pp. 99 et seqq.

21 VC, *Rule of Law Checklist*, op. cit., para. 49.

22 Chapters 5–7, 9 and 10 of the Draft Constitution for Belarus (hereinafter "Draft Constitution").

23 Articles 88, 98, 100(6), 109(4), 125(6), 129(5), 130(2), 131(5), 143(3), 148(2), 153(2), and 158(6) of the Draft Constitution; see the exception in Article 139(1) regarding the Human Rights Commissioner.

24 Notably, the head of Government is appointed by the Soim (Article 102), as opposed to the President who is elected by popular vote (Article 90). The Government also depends on the confidence of Parliament (Article 103(3) and (4)).

by the majority of deputies (Article 86). From the outset, significant international treaties must be ratified and denounced by the Soim. When the Constitutional Court is called upon to decide on a treaty's constitutionality, ratification is not permitted until a decision of the Court (Article 82). The Soim's involvement in the denunciation of international treaties is in line with international trends in state practice and is consistent with the principles of the rule of law and democracy.²⁵

The law-making procedure by the legislature is aligned with the principles of transparency, accountability, inclusiveness, and democracy. The Draft distinguishes between two types of statutory laws. Organic laws (which solely regulate fundamental issues, see Article 81 para. 3) must be adopted by a majority of the Soim's total number of deputies and cannot be amended in expedited procedures. Regular laws, on the other side, are not subject to any special requirements (Article 85 para. 2; Article 84 para. 3). The procedure for submitting draft laws must be laid down in an organic law (Article 83 para. 3) and should ensure the participation of each political group proportionately to the number of its members in all Soim activities (Article 88). Draft legislation is considered in three readings during three different sessions of the Soim, each at least two days apart, and must be preceded by public consultations with sufficient time to prepare and submit recommendations (Article 84 para. 1). The Soim publishes draft constitutional laws for public discussion (Article 160 para. 1).²⁶ Moreover, all state bodies are obliged to maintain an open, transparent, and regular dialogue with citizens and their associations, to conduct broad consultations with stakeholders, and to ensure maximum openness and citizen involvement in their decision-making processes (Article 32 paras. 3 and 4).

The effective implementation of law is ensured through various mechanisms of oversight and sanction. The Soim establishes a body that exercises control over the implementation of laws and resolutions (Article 79 para. 1). Furthermore, the head of Government must submit an annual report on the implementation of the Government's program to the Soim, and on individual parts of the program at the request of the Soim (Article 105 para. 2). The uniform implementation of law by the bodies of local self-government is supervised by the Government (Article 107 para. 1). The Commissioner for Human Rights contributes to the improvement of legislation and practices in the human rights field (Article 138 para. 1.2). Execution of law relating to law enforcement agencies and detention facilities is supervised by the Prosecutor's Office (Article 130 para. 1). Next to these oversight mechanisms, the Draft envisages legal liability for interference in the activities of state institutions, most notably the judiciary, as well as for the improper execution of decisions by the Constitutional Court.²⁷

25 See VC, *Report on the Domestic Procedures of Ratification and Denunciation of International Treaties*, CDL-AD(2022)001, 25 March 2022, paras. 287 et seqq.

26 These arrangements are in line with international standards; see VC, *Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: A Checklist*, CDL-AD(2019)015, 24 June 2019.

27 Articles 122(1), 129(4), 137(2), 142(5) and 147(3) of the Draft Constitution.

4.2.3 Emergency law

Although emergency authority can be required for the protection of the state and its population, it has considerable potential for abuse.²⁸ The Draft provides for strict limits on the duration, circumstance, and scope of such authority.²⁹ The decision to declare martial law by the President in response to a military threat or, in the event of other disasters, to declare a state of emergency by the Government must be submitted to the Soim within two days (Article 95 para. 1; Article 104 para. 1.6). Subsequently, the Soim convenes for an extraordinary session within 24 hours where it can approve, revoke, or extend the decision. A state of emergency may not exceed 90 days and can be extended only once.³⁰ If the Soim is unable to convene during martial law, the President can issue decrees with the force of law on the proposal of the Government. However, such decrees must be approved by the Soim, or they cease to be valid after 90 days (Article 97 para. 5).

To the extent required, the exercise of human rights and freedoms may be suspended in accordance with national and international law, except for absolute rights, such as the right to citizenship and the freedom of conscience (Article 53).³¹ Under martial law or in a state of emergency, electoral and martial law as well as the Constitution cannot be amended.³² No early elections can be held during this period either (Article 72 para. 3), which is in line with international standards.³³

4.3 Legal certainty

On a fundamental basis, legal certainty depends on the fact that laws and court decisions are accessible.³⁴ The Draft provides that laws and regulations must be published in all official languages before adoption (Article 5 para. 8), that is both in Belarusian and Russian (Article 7 para. 1). Article 36 sets out a corresponding right of access to public information, which entails the right to complete, reliable and timely information about the activities of state bodies, posted in standard open data formats. Court decisions must be published too and be based on concrete and detailed arguments. In cases considered in a closed session, the operative part of the decision must be published (Article 123 para. 5; Article 129 para. 2).

28 VC, Rule of Law Checklist, *op. cit.*, para. 51.

29 For further details on the applicable international standards, see VC, *Report – Respect for Democracy Human Rights and Rule of Law during States of Emergency – Reflections*, CDL-PI(2020)005rev, 26 May 2020.

30 Articles 77(3), 87(2) and 104(1.6) of the Draft Constitution.

31 For similar arrangements, see Article 15 ECHR, 4 November 1950, ETS 5; Article 4 ICCPR, 16 December 1966, 999 UNTS 171.

32 Articles 64(4), 84(4), and 162(4) of the Draft Constitution.

33 See VC, *Report on Electoral Law and Electoral Administration in Europe*, CDL-AD(2020)023, 8 October 2020, para. 10.

34 VC, Rule of Law Checklist, *op. cit.*, para. 57.

The protection of legitimate expectations based on the law is an integral part of legal certainty.³⁵ Good faith in the prior legal regime is protected in the draft by the fact that these norms remain in force until declared invalid or brought in accordance with the new Constitution (Article 164 para. 1).³⁶ Legal certainty also implies that people must be informed in advance of the consequences of their behaviour and that final judgements are respected.³⁷ The Draft prohibits the retroactivity of legislation unless it mitigates or abolishes the liability of citizens (Article 17 para. 2; Article 86 para. 6) and sets out the *nullum crimen and nulla poena* principles (Article 17 para. 1). Court rulings that have come into force are binding and Constitutional Court decisions are non-appealable (*res iudicata*).³⁸

4.4 Prevention of abuse of power

Unfettered discretion by public authorities violates the rule of law. The Checklist requires the restriction and review of any such discretion and that public authorities give reasons for their decisions.³⁹ Checks against abuse of power are provided in the Draft Constitution mainly by four means. First, the Draft provides for a clear separation of powers between the main state authorities, underpinned by a close-knit system of rules on incompatibility, immunity, and independence. The Draft also establishes a variety of additional state institutions that supplement the system of checks and balances between the three main state branches: On the one hand, it provides for two organs complementary to the judiciary, the Prosecutor's Office and the Bar Association.⁴⁰ On the other hand, the Draft establishes a number of specialised regulatory and oversight bodies that are insulated from the three main state branches, so-called "Fourth Branch" institutions. They include the Commissioner for Human Rights responsible for the promotion and protection of human rights, and the Public Service Ethics and Anti-Corruption Committee in charge of preventing and investigating corruption.⁴¹

The second mechanism aims to prevent the abuse of law-making power by raising the barriers for legislative amendments: Electoral rules must be adopted in two

35 *Ibid.*, para. 61.

36 Note that the English wording of Article 164(1) is somewhat contradictory: "Laws and other regulations or parts thereof that were in force on the territory of the Republic of Belarus prior to the adoption of this Constitution, are valid *insofar as they do not contradict the Constitution*, and shall remain in force until they are declared invalid or until they are brought in accordance with the provisions of the Constitution." [emphasis added].

37 VC, Rule of Law Checklist, *op. cit.*, paras. 62 et seq.

38 Articles 17(3), 123(7), and 129(2) of the Draft Constitution.

39 VC, Rule of Law Checklist, *op. cit.*, paras. 64–8.

40 Chapters 11 et seq. of the Draft Constitution.

41 Chapters 13–16 and Articles 63, 125 and 158 of the Draft Constitution. For further details on the concept of a "Fourth Branch", see F. Wibert, *The Rise of the Un-elected: Democracy and the New Separation of Powers*, 2007; M. Loughlin, *Foundations of Public Law*, 2010, at pp. 448–56.

subsequent convocations of the Soim separated by regular elections (Article 64 para. 5). The structure and procedures of the Constitutional Court can only be changed after the Court has ruled on their constitutionality (Article 129 para. 5). Third, the Draft provides for a right of resistance against tyranny and oppression from anyone who encroaches on the foundations of the constitutional order and the exercise of democratic human rights if there are no available legal means. Notably, citizens have the right to disobey orders and instructions known to be unlawful (Article 2 para. 5; Article 49). As a fourth mechanism, the Draft ties fundamental rights restrictions to a comprehensive set of rules, which require public authorities to follow established legal procedures, and to base their decision on an exhaustive list of public interests as well as in accordance with certain substantive principles, such as the proportionality rule (Article 52).

4.5 Equality before the law and non-discrimination

Legislation must treat similar situations equally and different situations differently and ensure equality with respect to any ground of potential discrimination.⁴² The Draft Constitution prohibits discrimination, enshrines the principle of equal treatment, and obliges the state to promote equality. The prohibition of discrimination covers a broad range of discriminatory behaviour, including indirect discrimination as well as discrimination based on perceived personal characteristics or circumstances. Restrictions on human rights and freedoms must not be discriminatory either (Article 27; Article 52 para. 1). Equality before the law and equal protection by the law are explicitly guaranteed in the Draft. In addition, the Draft obliges the state to actively promote gender equality, gender education and upbringing, and to take special measures to ensure full and effective equality for vulnerable groups (Article 28). Persons with disabilities are guaranteed comprehensive assistance in the exercise of human rights and freedoms, and participation in the processes of adopting laws and programs affecting their rights. Furthermore, the state must provide them with their essential needs, such as employment and accessibility to social infrastructure (Article 43). The Draft thus implements the scope of international treaties such as the UN Conventions on the Elimination of All Forms of Discrimination against Women (CEDAW) and on the Rights of Persons with Disabilities (CRPD), both ratified by Belarus.⁴³

4.6 Access to justice

The supremacy of the law and the resulting checks on state power cannot be upheld without an independent, accessible, and effective judiciary.⁴⁴ The Checklist

42 VC, Rule of Law Checklist, *op. cit.*, para. 70.

43 CEDAW, 18 December 1979, 1249 UNTS 1; CRPD, 13 December 2006, 2515 UNTS 3.

44 See E. Schmidt-Aßmann, *Rechtsstaat und Gerichtsschutz*, in J. Urbanik, A. Bodnar (eds.), *Исправление: закон в time of Constitutional Crisis*, 2021, pp. 651–63.

thus places great emphasis on ensuring access to justice, which is measured with reference to three parameters: Independence and impartiality of judicial authorities (4.5.1), guarantee of a fair trial (4.5.2), and specific requirements for constitutional justice (4.5.3).

4.6.1 Independence and impartiality

The independence and impartiality of the courts is ensured in the Draft Constitution both institutionally and as an individual right.⁴⁵ The key body for judicial administration is the National Council of Justice, which is composed of an equal number of representatives of the judiciary on the one hand, and of representatives of academia, bar associations and public organisations on the other.⁴⁶ Council members exercise their mandate for five years on a permanent basis and can only be released early on “similar” grounds as judges, the eligibility criteria and the procedure for electing members of the National Council are determined by law (Article 125 paras. 1–4).

In view of the general rule of law orientation of the Draft, it is striking that the provisions on the structure of the National Council of Justice do not follow international standards, but rather contradict them in four essential points: First, these standards would require that the Council is composed of a majority of judges elected by their peers, guaranteeing the widest possible representation of courts and instances, as well as diversity of gender and regions.⁴⁷ Second, the number of the Council members should be indicated in the Constitution.⁴⁸ Third, the Draft should contain provisions on the composition and selection of the Council’s chair, given its position in decision-making with an even number of Council members.⁴⁹ While the members of the National Council have the right to return to the position they held before being elected to the Council or to an equivalent position (Article 125 para. 4), the Draft finally does not explicitly prohibit re-election, which

45 Articles 16(1), 119(2) and 123(3) of the Draft Constitution. See also Article 119(4) on prohibition of special courts, Articles 120(2) and 122(1) to (3) on judicial incompatibilities and immunities, and Article 126 on financial independence of courts.

46 At the first constitutional meeting of the National Council after the Constitution enters into force, both groups of representatives make up only one-third of its members each. The remaining third is elected by the Soim from among international experts on the proposal of the President, see Article 169(1) of the Draft Constitution.

47 See Consultative Council of European Judges (CCJE), *Opinion No. 24 (2021): Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems*, CCJE(2021)11, 5 November 2021, paras. 27 et seq.

48 VC, *Joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft law on amending and supplementing the constitution with respect to the Superior Council of Magistracy*, CDL-AD(2020)001, 20 March 2020, para. 50.

49 See *ibid.*, paras. 64 et seq.; CCJE, *op. cit.*, para. 35.

can affect their independence. The ground for the early release of members ("similar" to judges) also seems too ambiguous.⁵⁰

The National Council is responsible, among other issues, for the appointment, promotion and disciplining of judges (Article 125 paras. 5 and 6). Candidates for judicial office must have high moral qualities as well as the necessary education and professional skills and are selected and promoted based on merit. They are appointed for an unlimited term of office and can only be removed under specific circumstances set out in an exhaustive list. The decision to terminate the power of a judge is taken by the National Council and is subject to judicial review (Articles 121 and 122). Judges' powers notably can be terminated for the non-declaration of property, which they must disclose to the Public Service Ethics and Anti-Corruption Committee (Article 122 para. 4.10; Article 151 para. 1.4).

The Draft provides for the independence and impartiality of the prosecution services and bar associations. The Prosecutor General is nominated by the President and appointed by the Soim for a single five-year term. The Prosecutor General appoints and supervises subordinate prosecutors. The procedure for the appointment and dismissal of prosecutors, as well as their status and guarantees of independence must be established by organic law. In the manner provided by law, the Soim can appoint a special prosecutor who reports directly to it (Article 131). The organisation and administration of the Bar, which provides legal assistance and ensures access to justice, is carried out by independent self-governing associations of lawyers (Article 132). The decision to grant or deprive lawyers of the right to practice law is taken by an independent body of the Bar according to requirements prescribed by law and is subject to judicial review (Article 133). The lawyer-client relationship is also protected (Article 134).

4.6.2 Fair trial

Access to court, the prerequisite for a fair trial, is guaranteed in the Draft through three main means. First, the Draft guarantees access to the courts as such. Individuals have the right to file constitutional complaints and to appeal to international organisations for human rights protection (Article 18). Local self-government units are entitled to judicial protection (Article 117). Court decisions may be appealed by each party except in cases determined by law (Article 123 para. 8). Second, the Draft provides for access to information about legal proceedings. Every person accused of a crime or deprived of his/her liberty has the right to be informed in a language he/she understands (Article 15 para. 3; Article 16 para. 3). State authorities are obliged to provide each person with the opportunity to get acquainted with materials affecting his/her rights and legitimate interests, including

⁵⁰ See VC, *Opinion on the law on amending and supplementing the Constitution of the Republic of Moldova*, CDL-AD(2018)003, 19 March 2018, para. 53; CCJ/E, *op. cit.*, paras. 36 et seqq.

collected information in relation to him/her (Article 36 para. 3). Access to (free) legal assistance is ensured (Article 19; Article 132 para. 3).

Other essential components of a fair trial in the Draft include the right of every person to judicial protection of their honour, dignity, and business reputation (Article 16 para. 2). Legal proceedings must be carried out based on the principle of equality and within a reasonable time frame. In criminal proceedings, every accused person has the right to question and call witnesses under the same conditions as the prosecution (Article 16 para. 1 and 5; Article 123 para. 2) and unlawfully obtained evidence has no legal force (Article 17 para. 1). The burden of proof is shifted to the prosecution. Defendants have the right to remain silent, ensuring the presumption of innocence (Article 16 para. 4; Article 17 para. 1). Finally, no person may be held in custody for more than 48 hours pending a court order (Article 15 para. 2).

4.6.3 Constitutional justice

The Constitutional Court is composed of 15 judges appointed by the Soim for a single term of nine years.⁵¹ One third of the Court's composition is renewed every three years. The State President, as well as the Chairpersons of the Soim and the Supreme Court must nominate at least two candidates each per vacancy. Candidates must be Belarusian citizens with an impeccable reputation, a higher legal education, universally recognised legal achievements, and at least 15 years of working experience in the legal profession. The powers of a Constitutional Court judge may be terminated in the same manner as members of the regular judiciary, except that the decision on early termination by the National Council of Justice can only be appealed to the Constitutional Court (Article 127 para. 7). The structure and procedures of the Constitutional Court are regulated by organic law, which can only be changed after the Court has ruled on the amendments' constitutionality (Article 129 para. 5).

The Draft provides for multiple ways to initiate a procedure before the Constitutional Court (see Article 128 para. 1). Most notably, individuals are granted the right to lodge constitutional complaints on their constitutional rights and freedoms (individual access).⁵² Moreover, the Draft Constitution provides for a concentrated model of constitutional review of normative legal acts.⁵³ If ordinary courts have doubts regarding the conformity of a normative act with the Constitution, they may refer the question to the Constitutional Court (referral procedure).

⁵¹ For the special arrangements for the first appointment, see Article 168 of the Draft Constitution.

⁵² Articles 18(2) and 128(1.5) of the Draft Constitution. For further details on the applicable international standards, see VC, *Revised Report on Individual Access to Constitutional Justice*, CDL-AD(2021)001, 22 February 2021.

⁵³ Normative legal acts are general laws and rules that have the force of law, including international treaties, see *ibid.* para. 27.

ture).⁵⁴ Various state branches are entitled to lodge constitutional complaints on issues such as the compliance of laws, regulations and international treaties with the Constitution (abstract review of normative acts), disputes concerning their powers, and the President's removal from office if he/she violates the law or commits a crime (Article 128 para. 1). The Constitutional Court verifies questions submitted to national referendum and gives opinions on the legal force of referenda and the conformity of draft constitutional amendments with the Constitution (Article 66 paras. 2 and 3; Article 160 para. 2). It also has the right to continue considering appeals even if they are withdrawn and can suspend the entry into force of normative legal acts when considering their constitutionality (Article 128 paras. 2 and 3).

5 Conclusion

The analysis of the Draft Constitution for Belarus through the lens of the Rule of Law Checklist of the Venice Commission offers several insights regarding the rule of law concept underlying the Draft. First and foremost, the Draft assigns outstanding significance to the rule of law by constructing it as a core principle. The explicit stipulation of the concept in the Draft and its reinforcement by an entrenchment clause ensure that the state's foundation on the rule of law principle cannot be overridden, not even by constitutional amendments.

In substance, the Draft embraces the Venice Commission's rule of law concept. It recognises the supremacy of the law and secures compliance with the law through a broad range of provisions on the effects of law and on the administration of justice. As regards the relationship between international and domestic law, the Draft provides for a well-balanced equilibrium, opting for a monistic system in which international and constitutional law are mutually limiting, both taking precedence over legislation. The supremacy of the legislature is secured and a transparent, accountable, inclusive and democratic law-making process is provided for, with oversight and sanction mechanisms to ensure effective implementation of laws. Emergency authority is strictly limited in terms of duration, circumstances, and scope. The principle of legal certainty is also respected. Laws and court decisions must be accessible to the citizens, and legitimate expectations in the prior legal regime protected. Retroactivity of legislation is prohibited and court rulings that have come into force are binding. Abuse of power is prevented by several separation of powers mechanisms, *inter alia*, by the establishment of several Fourth Branch institutions and by barriers for legislative amendments, by a right to resistance, and by comprehensive rules on restrictions of fundamental rights. The Draft Constitution prohibits discrimination, enshrines the principle of equal treatment, and obliges the state to promote equality. Access to justice is ensured through the

⁵⁴ Articles 124(4) and 128(1.3) of the Draft Constitution.

guarantee of an independent and impartial judiciary and a fair trial. In addition, the Draft establishes a concentrated model of constitutional review of normative legal acts. Despite this overall positive assessment, however, there is room for improvement, especially with regard to the constitutional structure of the National Council of Justice, which is hardly in line with international standards.

Summarising, the Draft Constitution englobes formal as well as substantive elements of the rule of law: it reflects current European and international standards and implements them in the Belarusian context, as circumscribed in the preamble of the Draft. At the same time, the Draft develops the standards further, namely by (1) introducing innovative elements of constitutional design, such as Fourth Branch institutions, (2) providing mechanisms that limit legislative power, such as the Constitutional Court's competence to block changes to its structure and procedures, and above all by (3) stipulating the rule of law principle and reinforcing it with an entrenchment clause.

Obviously, no constitution can comprehensively realise the rule of law principle. It can, however, set out the basic features that seek to respect, protect, and fulfil the rule of law. The Draft Constitution serves as an excellent example of how this aim can be pursued in accordance with international standards. Not only can future constitution drafters draw inspiration from it, but the Draft is equally instructive for established legal systems – and the people who make them up – as it presents innovative tools to defend the values that underpin the rule of law.