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The climate crisis and the rule of law

Committee Opinion[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Norbert KLEINWAECHTER, Germany, European Conservatives Group and Democratic Alliance

A. Conclusions of the Committee

1. The Committee on Legal Affairs and Human Rights welcomes the report prepared by the rapporteur of the Committee on Social Affairs, Health and Sustainable Development, Ms Edite Estrela (Portugal, SOC) and supports the proposed draft resolution and recommendation.

2. The report rightly focuses on the threats to the rule of law related to the climate crisis and the latest developments concerning tackling this phenomenon at European level. It also focuses on Council of Europe's existing instruments which might prove useful in promoting "climate resilience", while ensuring respect for the rule of law, democracy and human rights. Once again, it encourages member States of the Council of Europe to act in line with the Paris Agreement's preferred objective, amounting to an increase in average temperatures of 1.5°C. Moreover, its idea to establish, under the committee's auspices, a parliamentary network, whose task would be to foster the mutual enrichment of ideas and to set up regular opportunities for parliamentarians in Europe and on other continents to pool their experience, should be welcomed.

3. The committee does nevertheless wish to propose some amendments to further strengthen the draft resolution and draft recommendation. In particular, one of the proposed amendments is aimed at stressing the role of the European Court of Human Rights ("the Court") and its case law on States' "positive obligations" in environmental cases, which is crucial from the perspective of respect for the rule of law. Moreover, it is proposed to add more detailed references to the notion of "the rule of law", on which the Assembly has reflected in detail in particular in its Resolution 1594 (2007) "The principle of the 'Rule of Law'" and in Resolution 2187 (2017) "Venice Commission's Rule of Law Checklist". Although there is no clearly established and widely accepted definition of this concept, the European Commission for Democracy through Law (Venice Commission) has agreed that the latter should be defined by its "ingredients", which are listed in its "Report on the rule of law"[2] and the "Rule of Law Checklist"[3]. As these are the most recent documents of a Council of Europe expert body dealing with this issue, the Assembly shall refer to them.

4. The committee stresses that it does not wish to elaborate in detail in the present opinion on some of the legal issues mentioned in the report. The legal issues related to Council of Europe's response to climate change are covered by a report of the Committee on Legal Affairs and Human Rights on "Addressing issues of criminal and civil liability in the context of climate change" (Rapporteur: Mr Ziya Altunyaldiz, Turkey, NR).

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1. Reference to committee: Doc. 14972, Reference 4475 of 29 November 2019, Reporting Committee: Committee on Social Affairs, Health and Sustainable Development. See Doc. 15353. Opinion approved by the committee on 17 May 2021.
2. CDL-AD(2011)003rev. of 4 April 2011, study No. 512/2009.
3. Study No. 711/2013, CDL-AD(2016)007 of 18 March 2016.

B. Proposed amendments:

Amendment A (to the draft resolution)

At the end of paragraph 2, add the following sentence:

"The Assembly also recalls that although the European Convention on Human Rights (ETS No. 5, "the Convention") does not contain an explicit right to a healthy environment, the European Court of Human Rights has established, though its case law, that in certain circumstances, States Parties have positive obligations to adopt reasonable and adequate measures to protect the rights of individuals if their well-being might be affected by environmental damage".

Amendment B (to the draft resolution)

In paragraph 3, replace the words "pursuant to commitments it made" by the following words:

"pursuant to commitments taken up by Council of Europe member States".

Amendment C (to the draft resolution)

In paragraph 3, replace the second sentence by the following sentence:

"The Assembly underlines that any measures aiming at equipping our societies to cope with the impact and the threats of global warming must adhere to the principles of the rule of law".

Amendment D (to the draft resolution)

After paragraph 3, insert the following paragraph:

"The Assembly recalls the reflection it has undertaken on the notion of the rule of law, in particular in Resolution 1594 (2007) "The principle of the 'Rule of Law'" and in Resolution 2187 (2017) "Venice Commission's Rule of Law Checklist". It reiterates that its core elements are legality, including a transparent, accountable and democratic process for enacting law, legal certainty, prohibition of arbitrariness, access to justice before independent and impartial courts, including judicial review of administrative acts, respect for human rights, and non-discrimination and equality before the law, which are to be respected at all times".

Amendment E (to the draft resolution)

In paragraph 4.1. replace the words "adopt" by the following words:

"promote the rule of law and to employ a transparent, accountable and democratic legislative process for implementing".

Amendment F (to the draft recommendation)

After paragraph 5.3, add the following paragraph:

"strengthen co-operation with other international organisations, in particular the United Nations, the World Health Organisation, and the European Union, in order to consolidate efforts in tackling climate crisis issues".

C. Explanatory memorandum by Mr Norbert Kleinwächter, rapporteur for opinion

1. Climate change has now become a global concern of humankind and has to be addressed by the Council of Europe and its member States, without delay. By acceding to the 1992 United Nations Framework Convention on Climate Change, member States of the Council of Europe committed themselves to achieve stabilisation of greenhouse gas (GHG) concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Moreover, by ratifying the 2015 Paris Agreement, member States of the Council of Europe (with the exception of Turkey) have committed themselves to limit global warming to well below 2, preferably to 1.5 degrees Celsius, compared to pre-industrial levels. Therefore, they have undertaken a legal commitment to limit GHG emissions in order to tackle climate change and must now take the necessary actions, while respecting the core Council of Europe values, – the rule of law, human rights and democracy, which are interlinked. The Council of Europe has a

wide range of legal instruments which may be useful in coping with climate crisis, while fully ensuring respect for the rule of law, and they have been identified and exposed by the rapporteur of the Committee on Social Affairs, Health and Sustainable Development (see section 3 of her report). Some of them have been examined in detail by the Committee on Legal Affairs and Human Rights[4].

2. I would thus like to propose a few amendments to the draft resolution and draft recommendation, in order to add some legal clarifications, in particular as regards the role of the European Court of Human Rights in dealing with environmental matters and the concept of the rule of law, and to promote co-operation with other international organisations.

Amendment A (to the draft resolution)

This amendment aims at stressing the role of the European Court of Human Rights in protecting the human rights and fundamental freedoms of individuals affected by environmental damage. This issue is already mentioned in the report by Ms Estrela (see paragraph 27). However, in the context of climate crisis and the rule of law, it has to be pointed out that in its case law concerning Article 2 (right to life) and Article 8 (right to respect for private and family life), the Court has further developed its theory of "positive obligations" imposing on States Parties to the Convention the obligations to adopt relevant legislative and administrative frameworks and to provide information about environmental risks.[5] The fulfilment of these obligations is crucial in a State governed by the rule of law principle.

Amendment B (to the draft resolution)

The aim of this amendment is to clarify that the commitments taken up by the member States of the Council of Europe under the two international treaties – the United Nations Framework Convention on Climate Change and the Paris Agreement – are legally binding on those States and not on the Assembly as such, since the Assembly, not being a subject of international law, is a party to neither of those instruments.

Amendment C (to the draft resolution)

The aim of the amendment is to stress the need to respect the rule of law when taking relevant measures in the context of climate crisis and to delete the reference to its elements, which are now correctly listed in the proposed amendment D below.

Amendment D (to the draft resolution)

The Assembly has reflected on the notion of the rule of law on several occasions, in particular in Resolution 1594 (2007) "The principle of the 'Rule of Law'"[6] and in Resolution 2187 (2017) "Venice Commission's Rule of Law Checklist".[7] Following Resolution 1594 (2007), the Venice Commission was invited to reflect on the concepts of "Rule of Law" and the French "prééminence du droit" and "État de droit".

In March 2011, the Venice Commission adopted its "Report on the rule of law", in which it did not support a purely formalistic concept of the rule of law, merely requiring that any action of a public official be authorised by law. It found that "rule of law in its proper sense is an inherent part of any democratic society" and it "requires everyone to be treated by all decision-makers with dignity, equality and rationality and in accordance with the law, and to have the opportunity to challenge decisions before independent and impartial courts for their unlawfulness, where they are accorded fair procedures".[8] According to the Venice Commission, there is a consensus on both the formal and the substantive core elements of the concepts of "Rule of Law", "Rechtsstaat" and "État de droit".[9] These are: (1) legality; (2) legal certainty; (3) prohibition of arbitrariness; (4) access to justice before independent and impartial courts, including judicial review of administrative acts; (5) respect for human rights; and (6) non-discrimination and equality before the law. Moreover, in March 2016 the Venice Commission adopted the "Rule of Law Checklist" (which was endorsed by the Committee of

4. See Doc. 15362.
5. For more information, see Factsheet Environment and the European Convention on Human Rights, prepared by the Press Unit of the Court, April 2021.
6. See the report by Mr Erik Jurgens (Netherlands, SOC), Doc. 11343, 6 July 2007.
7. See the report by Mr Philippe Mahoux (Belgium, SOC), Doc. 14387, 17 July 2017.
8. CDL-AD(2011)003rev, op. cit., paragraph 16.
9. Ibidem, paragraph 41.

Ministers, the Congress of Local and Regional Authorities and the Assembly in its Resolution 2187 (2017)), in which it further expanded on the concrete "ingredients" of the rule of law concept. The Venice Commission specifies nonetheless that while these "ingredients" are constant, the way in which they are applied may differ from one country to another depending on the local context.[10]

Therefore, the aim of this amendment is to refer to the recent works of the Venice Commission and the Assembly and to refer to their understanding of the rule of law. The current wording of paragraph 3 of the draft resolution refers to a definition from the Report of the United Nations Secretary General on "The rule of law and transitional justice and post-conflict societies" of 2004 (see paragraph 5 of Ms Estrela's report) and does not reflect the current state of scientific reflection on the concept of the rule of law. Some of the elements mentioned in the current wording of paragraph 3 refer to the Venice Commission's benchmarks (legal certainty, avoidance of arbitrariness and equality before the law), while others – directly or indirectly to their components (supremacy of the law, accountability to the law, fairness in its application, separation of powers, participation in decision making and transparency). Moreover, some ingredients mentioned by the Venice Commission are not mentioned at all in the draft resolution (non-discrimination, access to justice and respect for human rights). It is therefore proposed to refer to the wording used by the Venice Commission, this being the Council of Europe's own specialised authority on rule of law issues.

Amendment E (to the draft resolution)

This amendment aims at including the respect for the rule of law as a central aspect the Assembly should stress in this report. As the existing paragraph 4.5. also points out, member States of the Council of Europe might be prone to using emergency measures for responding to the climate crisis situation. However, any political measures should adhere to the principles of legality and follow democratic processes, and the Assembly should emphasise this central aspect.

Amendment F (to the draft recommendation)

The purpose of this amendment is to emphasise the need to strengthen Council of Europe's co-operation with other international organisations in tackling issues related to climate crisis. As the report by Ms Estrela refers to several initiatives taken by the United Nations, the World Health Organisation and the European Union, the Committee of Ministers could further explore ways of exchanging information with these organisations in order to avoid duplication of work and waste of resources.

10. Paragraph 34 of the "Rule of Law Checklist".