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Safeguarding and promoting genuine democracy in Europe

Committee Opinion¹

Committee on Legal Affairs and Human Rights

Rapporteur: Mr Vladimir VARDANYAN, Armenia, Group of the European People's Party

A. Conclusions of the committee

1. The Committee on Legal Affairs and Human Rights welcomes the report prepared by Ms Christine Dalloz (France, EPP/CD), rapporteur of the Committee on Political Affairs and Democracy, and broadly supports the proposed draft resolution.
2. The report describes the phenomenon of democratic backsliding across Europe, including during the ongoing health crisis, and identifies the structural components of “all genuine democracy”, as referred to in the Council of Europe Statute (ETS No. 1). In order to reverse the trend of democratic backsliding, it proposes that the Council of Europe member States strengthen and renew their commitment to the principles, rights and freedoms that are characteristic of a genuine democracy.
3. The committee shares the views expressed in the report and considers that the approach of identifying concrete elements of “genuine democracy”, based on human rights, political pluralism and the rule of law, is valuable for both member States and the Organisation. Member States will find in the report and the draft resolution a checklist of democratic values and principles they must respect to achieve genuine democracy, in line with European standards. The Council of Europe is encouraged to optimise its work related to these values, in order to increase the impact of its assistance to member States in this field.
4. The committee proposes to strengthen the draft resolution by putting more emphasis on the interdependence between democracy, human rights and the rule of law, and by referring explicitly to the case-law that the European Court of Human Rights has developed in relation to the notions of “effective political democracy” and “democratic society” contained in the European Convention on Human Rights. The committee also proposes to add some additional references to the Assembly’s previous work, in particular with regard to the impact of Covid-19 and the protection of human rights defenders.

B. Proposed amendments

Amendment A (to the draft resolution)

In paragraph 2, after the words “political liberty”, insert the following words:

“, other human rights”.

Amendment B (to the draft resolution)

In paragraph 4, second sentence, delete the words “other forms of democracy, including, in particular,”.

1. Reference to committee: [Doc. 14823](#), Reference 4441 of 12 April 2019, Reporting Committee: Committee on Political Affairs and Democracy. See [Doc. 15486](#). Opinion approved by the committee on 4 April 2022.



Amendment C (to the draft resolution)

After paragraph 5, insert the following new paragraph:

“The Assembly notes that the European Court of Human Rights has reiterated that democracy constitutes a fundamental element of the “European public order” and is indeed the only political model compatible with the European Convention on Human Rights. The Court has repeatedly held that democracy must be based on pluralism, tolerance, dialogue and a spirit of compromise.”

Amendment D (to the draft resolution)

In paragraph 6, replace the words “is heedful of” with the word “understands”.

Amendment E (to the draft resolution)

At the end of paragraph 7, add the following sentence:“

Recalling [Resolution 2338 \(2020\)](#) “The impact of the Covid-19 pandemic on human rights and the rule of law”, the Assembly also reiterates that the obligation to take measures to protect the life and health of populations cannot give States a free hand to trample on rights, suppress freedoms, dismantle democracy or violate the rule of law.”

Amendment F (to the draft resolution)

In paragraph 8.3, after the words “non-governmental organisations,” insert the following words:

“in accordance with [Resolution 2225 \(2018\)](#) “Protecting human rights defenders in Council of Europe member States;””.

Amendment G (to the draft resolution)

After paragraph 8.5.1, insert the following paragraph:

“establish effective and fair procedures for the resolution of electoral disputes, including judicial ones;”.

Amendment H (to the draft resolution)

Replace paragraph 8.6 with the following paragraph:

“guarantee an effective, impartial and independent judicial system which is key to the very existence of the rule of law, and to that end:

- abolish the ability of the executive or the legislature to arbitrarily appoint judges;*
- abolish the power of the executive or the legislature to transfer or dismiss judges;*
- ensure the administrative and financial independence of the judiciary;”.*

Amendment I (to the draft resolution)

After paragraph 8.6, insert the following paragraph:

“ensure full respect by the executive, the legislature and any other State authority for the rule of law, including the principles of legality, legal certainty and the obligation to abide by the judgments and decisions of the courts, especially those of constitutional courts, even when they do not agree with them;”.

C. Explanatory memorandum by Mr Vladimir Vardanyan, rapporteur for opinion

1. I would like to thank Ms Dalloz for her report, which usefully identifies the structural components of “genuine democracy” and underlines the need to strengthen and renew the commitment to democracy based on respect for fundamental rights and freedoms and the rule of law. I fully share her view, which is also reflected in the draft resolution, that the current developments undermining the democratic security, recent and ongoing armed conflicts, reviving the use of force as a tool of national and international policy and alarming democratic backslidings in Europe demonstrate more than ever the collective responsibility of all

Council of Europe member States in safeguarding and promoting genuine democracy. Ms Dalloz rightly underlined that only genuine democracies can ensure “the pursuit of peace based upon justice and international co-operation”, as advocated by the Statute of the Council of Europe (ETS No. 1). I would also like to recall that the European Convention of Human Rights (ETS No. 5) was designed as a system of collective enforcement of human rights and fundamental freedoms, as stated in its Preamble and further developed in the case law of the European Court of Human Rights.² The Convention’s collective character, which is well illustrated by the mechanism of inter-State applications,³ is founded on “a common heritage of political traditions, ideals, freedom and the rule of law” shared by European countries. I fully agree with the rapporteur’s invitation to the Parliamentary Assembly and our member States to renew their commitment to these common values, in order to reverse the trend of democratic backsliding and to build our common future in peace and greater unity.

2. I would, however, like to propose a few amendments to the draft resolution with a view to strengthening it and, in particular, putting more emphasis on the close nexus between democracy, human rights and the rule of law, the three pillars of our Organisation. In particular, I would like to pay tribute to the Court’s case law developed in relation to the concepts of “effective political democracy” and “democratic society”, to which the Preamble and other normative clauses of the Convention (Articles 8-11) refer to. According to the Preamble, fundamental freedoms “are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend”. The Court has stated that democracy is a fundamental feature/element of the “European public order” and the only political model compatible with the Convention.⁴ It has also pointed out several times that the Convention was designed to maintain and promote the ideals and values of a democratic society. In this context, it has identified through its case law certain rights and principles as being characteristic of an “effective and meaningful democracy” or as foundations of “democratic society” (freedom of expression, freedom of political debate, freedom of association and peaceful assembly, political pluralism, tolerance, dialogue, the right to free elections, the effective functioning of parliament).⁵ Most of these rights are already reflected in the draft resolution, but an explicit reference to the Court’s case law and the Convention would in my view underline their normative value and binding nature.

3. Moreover, I would like to put more emphasis on the connection between democracy, human rights and the rule of law. These principles are interlinked and cannot exist without one another. The Court usually refers to democracy or a democratic State “governed by the rule of law” as a single concept.⁶ Although the principles of the rule of law (including legality and legal certainty) are referred to in Ms Dalloz’s report, they could be further articulated in the draft resolution, with a view to stressing their connection with the concept of genuine democracy. For instance, the Court, the European Commission for Democracy through Law (Venice Commission) and the Assembly have all stressed the need for any State authority to respect the principles of the rule of law and the separation of powers and to abide by final judgments and decisions of the courts, especially those of constitutional courts.⁷ I would also like to underline that the independence of the judiciary is crucial to the very existence of the rule of law.

4. Finally, I would like to refer to previous work of the Assembly in relation to Covid-19 and the protection of human rights defenders, issues that are relevant to the present report and have recently been examined by the Assembly. I therefore propose to refer to [Resolution 2338 \(2020\)](#) “The impact of the Covid-19 pandemic

2. *Güzelyurtlu and Others v. Cyprus and Turkey*, Application No. 36925/07, judgment of 29 January 2019 (Grand Chamber), § 232.

3. See Article 33 of the Convention, which gives the possibility for a Contracting State to refer to the Court any alleged breach of the Convention by another Contracting State, including where the aim is to complain about systemic problems and uphold the European public order (see, for instance, “The Greek case”, European Commission of Human Rights report of 5 November 1969).

4. *United Communist Party of Turkey and Others v. Turkey*, Application No. 19392/92, judgment of 30 January 1998, § 45; *Selahattin Demirtaş v. Turkey (no. 2)*, Application No. 14305/17, judgment of 22 December 2020 (Grand Chamber), § 382.

5. *United Communist Party of Turkey and Others v. Turkey*, § 45; *Mugemangango v. Belgium*, Application No. 310/15, judgment of 10 July 2020 (Grand Chamber), § 67.

6. *Navalnyy v. Russia*, Application No. 29580/12 and others, judgment of 15 November 2018 (Grand Chamber), § 175; *Selahattin Demirtaş v. Turkey (no. 2)*, § 382; *Guðmundur Andri Ástráðsson v. Iceland*, Application No. 26374/18, judgment of 1 December 2020 (Grand Chamber), § 283.

7. *Xero Flor w Polsce sp.z o.o. v. Poland*, Application No. 4907/18, judgment of 7 May 2021, § 282-285; *Forcadell i Lluís and Others v. Spain (dec.)*, Application No. 75147/17, decision of 7 May 2019, § 36-38, 44-45. Venice Commission, CDL-AD(2017)003, Opinion on the Law of 16 October 2015 amending the Organic Law No. 2/1979 on the Constitutional Court, adopted by the Venice Commission at its 110th Plenary Session (10-11 March 2017), § 8; Rule of Law Checklist, CDL-AD(2016)007, § 10. Assembly [Resolution 2316 \(2020\)](#) “The functioning of democratic institutions in Poland”, § 6.

on human rights and the rule of law”, and [Resolution 2225 \(2018\)](#) “Protecting human rights defenders in Council of Europe member States”. I should like to add that the Committee on Legal Affairs and Human Rights is currently examining the impact of the Covid-19 restrictions for civil society space and activities.

Explanatory notes⁸

Amendment C (to the draft resolution)

This amendment is intended to recall the Court’s case law on the notions of “effective political democracy” and “democratic society” contained in the Preamble and other normative clauses of the Convention. For the Court, democracy is the only political model compatible with the Convention and a fundamental element of the “European public order”. The Court has also stated that democracy must be based on pluralism, tolerance, dialogue and a spirit of compromise.⁹ In my view, the draft resolution should acknowledge the Court’s contribution to the definition of genuine democracy, which would in turn strengthen the normative value and binding nature of these principles.

Amendment E (to the draft resolution)

This amendment aims at adding a sentence to take account of the Assembly’s previous work on the impact of Covid-19 on human rights and the rule of law, which is mentioned in detail in the report (paragraphs 21-22). In paragraph 1 of [Resolution 2338 \(2020\)](#), the Assembly expressed the view that the States’ positive obligations under the Convention to take measures to protect the life and health of their populations in response to the pandemic could not give them a free hand to trample on rights, suppress freedoms, dismantle democracy or violate the rule of law. The Convention continues to apply and to set limits, even during states of emergency.

Amendment F (to the draft resolution)

This amendment is intended to strengthen the obligation to guarantee the safety of human rights defenders, by making an explicit reference to [Resolution 2225 \(2018\)](#) “Protecting human rights defenders in Council of Europe member States”. In this resolution, the Assembly called on member States to respect and protect the rights of human rights defenders, including against violations committed by non-State actors.

Amendment G (to the draft resolution)

This amendment aims to stress the importance of establishing effective remedies for the resolution of electoral disputes, in order to guarantee the right to fair elections and “the free expression of the opinion of the people in the choice of the legislature”, using the words of Article 3 of the Protocol to the Convention (ETS No. 9). According to the Court’s case law, the procedure in the area of electoral disputes must guarantee a fair, objective and sufficiently reasoned decision. In view of the fact that the right to free elections under Article 3 of the Protocol seeks to strengthen citizens’ confidence in parliament by guaranteeing its democratic legitimacy, the decision-making body in electoral disputes must provide sufficient guarantees of impartiality and its discretion must be sufficiently circumscribed by the provisions of domestic law.¹⁰ The Venice Commission, in its Code of Good Practice in Electoral Matters, has likewise stated that the failure to comply with electoral law must be open to challenge before an appeal body, ideally before a judicial body at last instance.¹¹

Amendment H (to the draft resolution)

As mentioned in Ms Dalloz’s report, an efficient, impartial and independent judicial system is an essential pillar of the rule of law and a prerequisite for the exercise of the right to a fair trial. This amendment is aimed at inserting this principle in the draft resolution and underlining the key role of an independent judiciary for the very existence of the rule of law. In this regard, the Court has held that in a democratic State, public confidence in the functioning and independence of the judiciary guarantees the very existence of the rule of law.¹² The Magna Carta of Judges (Fundamental Principles) adopted by the Consultative Council of

8. Explanatory notes for amendments C, E, F, G, H and I, proposed by the rapporteur in his original draft opinion.

9. *Karácsony and Others v. Hungary*, Application No. 42461/13 and others, judgment of 17 May 2016 (Grand Chamber), § 141 and 147.

10. *Mugemangango v. Belgium*, § 96-97, 109, 115.

11. Venice Commission, Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report.

12. *Ramos Nunes de Carvalho e Sá v. Portugal*, Application No. 55391/13 and others, judgment of 6 November 2018 (Grand Chamber), § 196.

European Judges in 2010 similarly states that the mission of the judiciary is to guarantee the very existence of the rule of law and, thus, to ensure the proper application of the law in an impartial, just, fair and efficient manner. While taking into account the current negative developments in some European countries where legislatures and mostly executives try to use their powers to transfer judges, remove them from office by reshaping judicial bodies or dismantling the existing ones, it is difficult to agree with the limitation of the rights of the executive or the legislature to appoint judges, since the constitutional settings of the vast majority of European states provide that judges (especially of the highest courts, namely Supreme Courts, Constitutional Courts) are elected by the parliaments or at least are formally appointed by the executive.

Amendment I (to the draft resolution)

While paragraphs 2 and 4 refer to the general link between genuine democracy and the rule of law, a specific reference to the main components of the rule of law (as explained in paragraphs 42-43 of the report) could be mentioned among the commitments that member States undertook when joining the Organisation and pointed out by the draft resolution. As I mentioned above, the Court, the Venice Commission and the Assembly have all stressed the need for any State authority to respect the principles of the rule of law and the separation of powers and to abide by final judgments and decisions of the courts, especially those of constitutional courts, even when they do not agree with them. This principle has a particular relevance in the context of the rule of law crisis examined by our Assembly or the Court in relation to some member States. In this connection, the State's respect for the authority of the courts is considered as an indispensable precondition for public confidence in the judiciary and for the rule of law in general.¹³

13. *Advance Pharma sp. z o.o. v. Poland*, Application No. 1469/20, judgment of 3 February 2022, § 332.