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Keeping political and criminal responsibility separate

Committee Opinion[1]
Committee on Political Affairs and Democracy
Rapporteur: Mr Dirk Van der MAELEN, Belgium, Socialist Group

A. Conclusions of the committee

1. The Committee on Political Affairs and Democracy welcomes the draft resolution presented by the Committee on Legal Affairs and Human Rights to the extent that it aims to develop guiding principles for distinguishing between legitimate criminal responsibility of politicians and unacceptable criminalisation of political decision-making. These principles are addressed to the legislative bodies and other competent authorities of member States.

2. The committee congratulates the European Commission for Democracy through Law (Venice Commission) on the excellent opinion and comparative analysis it provided on the matter. The opinion focused on ministerial criminal responsibility and its conclusions should be faithfully reflected in the principles to be adopted by the Assembly.

3. At the same time, the committee cannot agree with the approach followed in the draft resolution to the extent that it is proposed to apply those guiding principles to concrete cases in a single member State. It understands that this was the choice of the majority of the Committee on Legal Affairs and Human Rights.

4. Nevertheless, the Committee on Political Affairs and Democracy is of the opinion that, whereas this choice can be reflected in the explanatory memorandum of the report, which is the sole responsibility of the rapporteur of the Committee on Legal Affairs and Human Rights, it cannot commit the whole Assembly. The latter should not substitute itself for the national competent authorities in the member States which it calls on to respect and implement the proposed principles. Furthermore, there is a country-specific monitoring procedure for Ukraine and the mandate of the Monitoring Committee's co-rapporteurs covers the issues raised in the draft resolution in question.

B. Proposed amendments

Amendment A (to the draft resolution)

In the draft resolution, replace paragraph 3.5 with the following text:

> *"national provisions on "abuse of office" should be interpreted narrowly and applied with a high threshold, by reference to additional criteria such as, in cases involving economic interests, intent of personal gain; they should only be invoked against politicians as the last resort and the level of sanctions should be proportional to the legal offence, and should not be influenced by political considerations;"*

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1. Reference to the committee: Doc. 12749, Reference 3819 of 25 November 2011. Reporting committee: Committee on Legal Affairs and Human Rights. See Doc. 13214. Opinion approved by the committee on 24 June 2013.

Amendment B (to the draft resolution)

In the draft resolution, delete paragraph 4.

Amendment C (to the draft resolution)

In the draft resolution, before paragraph 5.1, insert the following sub-paragraph:

> *"urges governing majorities in member States to refrain from abusing the domestic criminal justice system for the persecution of political opponents;"*

Amendment D (to the draft resolution)

In the draft resolution, replace paragraph 5.3 with the following sub-paragraph:

> *"urges the competent authorities of those member States which have been condemned for violation of Article 18 of the European Convention of Human Rights (prohibition of misuse of power in restricting the rights and freedoms) to take specific measures to ensure the effective independence of the judiciary and speedily and comprehensively execute the relevant judgements of the European Court of Human Rights;"*

C. Explanatory memorandum by Mr Van der Maelen, rapporteur for opinion

1. I welcome the work carried out by the rapporteur of the Committee on Legal Affairs and Human Rights, Mr Pieter Omtzigt, to the extent that it aims to develop guiding principles (standards) for distinguishing between legitimate criminal responsibility of politicians and unacceptable criminalisation of political decision-making, indeed a challenging task. The proposed principles are addressed to the legislative bodies and other competent authorities of member States. The latter are respectively invited to abolish or redraft broad abuse-of-office criminal law provisions and to interpret and apply with caution and restraint special impeachment procedures for ministerial criminal responsibility.

2. In this respect, both the main rapporteur's work and its outcome, namely the draft resolution adopted by the Committee on Legal Affairs and Human Rights, correspond to the motion for a resolution which constitutes the basis of the report, namely the need to develop "clear European standards … on the delimitation of criminal and political responsibility" (Doc. 12749).

3. I congratulate the Venice Commission on the excellent opinion and comparative analysis it provided on "the relationship between political and criminal ministerial responsibility", upon the request of the Committee on Legal Affairs and Human Rights (document CDL-AD(2013)001). Its conclusions should be faithfully reflected in the principles to be adopted by the Assembly.

4. At the same time, whereas I understand that concrete case studies can be used as examples to illustrate the need to elaborate "clear European standards" or guiding principles in the field, I fail to understand why the rapporteur applied the proposed principles only to three cases in two member States in his explanatory memorandum and, even more, why the draft resolution adopted by the Committee on Legal Affairs and Human Rights refers only to two cases in one single member State.

5. It is not my intention to enter into the merits of whether or not the principles of the separation of political and criminal responsibility have been violated in the cases of former Ukrainian Prime Minister Julia Tymoshenko and former Ukrainian Interior Minister Yuri Lutsenko, or in the case of former Icelandic Prime Minister Geir Haarde. But I cannot understand, from a methodological point of view, the choice made not simply to mention these cases as examples illustrating the problem and the need to establish guiding principles on the distinction between political and criminal responsibility, or even as a source of inspiration for proposing certain principles, but actually to apply such principles to these cases only.

6. Firstly, such an approach can create the impression that these are the only cases in Europe where the principles of the separation of political and criminal responsibility have been violated. But this was surely not the intention of the rapporteur and of the Legal Affairs Committee. Secondly, as regards the cases of Tymoshenko and Lutsenko, the only ones which are referred to in the draft resolution, I find problematic the fact that these cases are also closely followed by the co-rapporteurs of the Monitoring Committee on Ukraine. Indeed, a debate under urgent procedure was held last year precisely on these cases, the report was entrusted to the Monitoring Committee co-rapporteurs on Ukraine and the Assembly adopted Resolution 1862 (2012) whereby it clearly expressed its concerns. The long and detailed analysis of these two cases by the

rapporteur of the Committee on Legal Affairs and Human Rights and, in particular, its conclusions on the application of the guiding principles he proposes in general to these specific cases may undermine the work and mandate of the co-rapporteurs of the Monitoring Committee who are in constant dialogue with the Ukrainian authorities on the same matters.

7. I would have found it more appropriate if the report and the draft resolution had been limited to defining the guiding principles or standards and left to specific reports, either ongoing, such as country-specific monitoring reports, or future reports to be initiated, to deal with the application of the general, guiding principles to specific cases in one or more member States.

8. That said, I understand that the choice of the case studies of Ukraine and Iceland was approved by the majority of the Committee on Legal Affairs and Human Rights and therefore the rapporteur accomplished his mission as his committee asked him to do.

9. Nevertheless, as rapporteur for opinion on behalf of the Committee on Political Affairs and Democracy, I believe that, whereas this choice can be reflected in the explanatory memorandum of the report, which is the sole responsibility of the rapporteur of the Committee on Legal Affairs and Human Rights, it cannot commit the whole Assembly. The latter should not substitute itself to the national competent authorities in the member States which it calls on to respect and implement the proposed principles, not, at least, in a resolution resulting from a thematic report which is meant to establish these principles. As said above, these principles could be applied to specific cases, at a second step.

10. In view of the above-mentioned considerations, of mainly a methodological nature, I suggest Amendments B and C, which should be read in conjunction. More specifically, Amendment B proposes deleting reference in the resolution to two specific cases in Ukraine and Amendment C proposes instead addressing, in similar terms, the authorities of all member States. Thus, it is clear that the problem of distinguishing between legitimate criminal responsibility and unacceptable criminalisation of political decision-making is not only relevant to Ukraine (or Iceland, according to the explanatory memorandum), but is or may be a problem elsewhere in Europe. If accepted, the authorities of all member States would be urged to refrain from using their criminal justice system for the persecution of political opponents.

11. For similar reasons, I also suggest Amendment D. Instead of simply asking Ukraine to ensure "the effective independence of the judiciary" and execute "the relevant judgments of the European Court of Human Rights", I propose to address similar recommendations to the authorities of those member States which have been (or might be in future) condemned for violation of Article 18 of the European Convention on Human Rights (ETS No. 5, "the Convention").

12. More specifically, Article 18 provides that "the restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed". Thus, in prohibiting the "misuse of power", Article 18 of the Convention is of direct relevance to the subject matter of the report. The European Court of Human Rights has found a violation of Article 18, in conjunction with Article 5.1.*c*, in three cases: the cases of Lutsenko and Tymoshenko against Ukraine[2] and the case of Gusinskiy against Russia,[3] concluding in all three of them that detention of the applicants pursued another purpose than that for which detention is prescribed by law.

13. Therefore the amendment I propose aims to draw attention to cases where "misuse of power" was asserted by the European Court of Human Rights and is equally addressed to the Ukrainian and Russian authorities, as far as existing case law is concerned, without excluding the need to execute similar future judgments of the Court with respect to other member States.

14. Last but not least, when it comes to what should be the main objective of the report, namely defining criteria for distinguishing between legitimate criminal responsibility of politicians and unacceptable criminalisation of political decision-making, I have an objection when it comes to sub-paragraph 3.5 of the draft resolution. Indeed, paragraph 3 proposes guiding principles "in line with the conclusions of the Venice Commission". However, the Venice Commission's report is not as restrictive as the draft resolution and underlines that in some member States the problem is not that government ministers are held criminally responsible too often but rather too rarely (see paragraph 107 of the report). For that reason, the Venice

2. *Lutsenko v. Ukraine*, Application No. 6492/11, judgment of 3 July 2012 and *Tymoshenko v. Ukraine*, Application No. 49872/11, judgment of 30 April 2013.
3. *Gusinskiy v. Russia,* Application No. 7027/01, judgment of 19 May 2004.

Commission, although it considers that national provisions on “abuse of office” can be “problematic”, does not exclude their use but recommends that they should be “interpreted narrowly and applied with a high threshold” (see paragraphs 113 and 114).

15. Sub-paragraph 3.4 of the draft resolution, read in conjunction with sub-paragraph 3.5, as the latter stands now, may give the impression that “abuse of office” provisions must be excluded. In particular, sub-paragraph 3.5 gives a very restrictive interpretation of the Venice Commission’s report and does not explain why politicians should only be criminally liable in the exercise of their office when they act “for personal gain” or “violate fundamental rights of others”. Would the criterion of “personal gain” be retained if the politicians were favouring a political party, friends doing business or a non-governmental organisation, without retaining money for themselves? And why should there be no mention of other criteria, such as those listed in paragraph 102 of the Venice Commission’s report?

16. Therefore, I propose Amendment A with a view to aligning the text of the resolution to that of the Venice Commission’s report (namely paragraphs 114 and 115). I suggest mentioning the need to refer to “additional criteria” when provisions on “abuse of office” are drafted or applied and I propose reference to “personal gain” in cases involving economic interests only as an example, rather than making an exhaustive list. I hope that if this amendment is accepted, it will be clearer that our Assembly, as much as it does not wish to see politicians being victims of abuse of the law, neither does it wish to see politicians above the law.