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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**DRAFT COMMENTS**

**ON RECOMMENDATION 2235 (2022) OF THE PARLIAMENTARY  
ASSEMBLY OF THE COUNCIL OF EUROPE  
ON CHALLENGES TO SECURITY IN EUROPE: WHAT ROLE FOR THE  
COUNCIL OF EUROPE?**

**IN VIEW OF THE REPLY OF THE COMMITTEE OF MINISTERS**

**On the basis of comments by**

**Mr Nicos ALIVIZATOS (Member, Greece)  
Mr Iain CAMERON (Member, Sweden)**

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*\*This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

## I. Introduction

1. At the 1439<sup>th</sup> meeting of the Ministers' Deputies held on 6 July 2022 the Committee of Ministers of the Council of Europe decided to communicate to the Venice Commission the Parliamentary Assembly of the Council of Europe (PACE) [Recommendation 2235\(2022\)](#) entitled "Recent challenges to security in Europe: what role for the Council of Europe?"
2. Mr Alivizatos and Mr Cameron acted as rapporteurs for the Venice Commission's comments.
3. *These comments were adopted by the Venice Commission at its XXX Plenary Session (Venice, XXX).*

## II. Scope of the comments

4. In its Recommendation, the Parliamentary Assembly invites the Committee of Ministers to:
  - 5.1. set up a Democratic Resilience Initiative which, building on the work of bodies and mechanisms which already exist within the Council of Europe, will monitor democratic developments in member States, and form the basis for enhanced political dialogue to help member States address situations of concern;
  - 5.2. enhance the exchange of best practice in all areas relating to democracy and democratic governance;
  - 5.3. establish a mechanism to monitor developments related to civil society, freedom of association, and civil participation and engagement in Council of Europe member States;
  - 5.4. consider strengthening and expanding the Council of Europe's activities relating to confidence building measures and conflict prevention, including in its civil society and cross-border co-operation dimensions;
  - 5.5. convene a Fourth Summit of Heads of State and Government of the Council of Europe, which would address, *inter alia*, the promotion of democratic security, how to counter the backsliding of democracy, ways to rejuvenate democracy and spur citizen engagement, and the setting up of a Council of Europe early warning mechanism to address threats to the rule of law, democratic standards and human rights protection.
5. The Venice Commission does not intend to comment in detail the institutional proposals made by the Assembly, in particular the establishment of a "Democratic Resilience Initiative". However, the important question to be asked is how, and to what extent, they may add value to the existing "European security architecture". This means not only the existing Council of Europe institutional framework, in particular PACE bodies, but also the work of other relevant international organisations and sub-regional organisations such as the European Union. While duplication or overlapping of mandates should obviously be avoided, there may be room for new initiatives, bearing in mind that the work of some existing bodies, operating by consensus, may have become difficult or even impossible in practice.
6. On the basis of its previous work, the Commission will rather focus on the concept of security and its interrelation with the three pillars of the Council of Europe: democracy, human rights and the rule of law.<sup>1</sup>

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<sup>1</sup> On the interrelations between democracy, human rights and the rule of law, see See Venice Commission, Rule of Law checklist, [CDL-AD\(2016\)007](#), I.B.

### III. Analysis

#### A. Definition and terminology

7. There are a variety of concepts of security, which are used for a variety of different purposes, descriptive and normative.<sup>2</sup> Protection of national security cannot be seen in a narrow sense of protection of the institutions and borders of the state from military interventions from hostile powers and internal threats. It must also include the protection of the fundamental values of the State. For a liberal democratic State, this means democracy, the rule of law and human rights, which are also the three pillars of the Council of Europe. So whatever term is used, it is necessary to build in respect for these three values.

8. The Recommendation and Resolution of the PACE (Nos 2235 & 2444(2022) respectively) are centred on the concept of “democratic security”. Importantly, this term was used in the declaration of the Heads of State and Governments, at the 1993 Vienna summit: at the time, transition from authoritarian rule to democracy in Eastern European countries was far to be completed and the Council of Europe was anticipating methods for integrating former socialist countries in its ranks. The term also reminds the German words *streitbare* or *wehrhafte Demokratie* used in cold war times to prevent anti-democratic groups and persons from abusing their rights.

9. Most of Europe has lived in freedom and dignity since 1989, while enjoying both the intellectual and the material achievements of civilisation. Never in the past had this happened at such a large scale. However, tragic events, such as the war in the Balkans and now the Russian aggression against Ukraine, show that the requirement of “democratic security” remains on the order of the day. The Parliamentary Assembly has notably organised a High Level Panel on “Upholding democratic security in Europe” in June 2022.<sup>3</sup>

10. Nevertheless, the Venice Commission would propose to refer to an alternative concept which would at the same time take into consideration the priorities of the moment, that is security but also the need for a new political impetus aiming “to rejuvenate the functioning of democracy and promote democratic resilience” (these are the words of para. 3 of the draft Recommendation), and also put the emphasis on Europe’s and the Council’s achievements in the past few decades. This alternative concept could be defined as “**democracy and freedom in security**” (δημοκρατία και ελευθερία εν ασφαλεία), thus reconciling security with the three pillars of the Council of Europe. This alternative term would have the following advantages:

- *First*, on the scale of European fundamental values, it rates freedom and democracy on the highest rank and, primarily, before security. The message would thus be that *security is not placed on the same level as freedom, democracy and the rule of law; it is instead the means through which freedom, democracy and the rule of law are achieved and protected.*
- *Second*, as opposed to democratic security which is addressed as an aim to be attained exclusively by member-States, *freedom and democracy in security* are addressed to individuals as well: *European States and European citizens, you will be free citizens only on the condition that you live in security.*

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<sup>2</sup> See, e.g. Lucia Zedner, Security: Key Ideas in Criminology Series, London and New York: Routledge, 2009.

<sup>3</sup> <https://pace.coe.int/en/news/8755/pace-holds-a-high-level-panel-on-upholding-democratic-security-in-europe->

## B. Substance

### 1. Standards

11. This makes clear that security (in the narrow sense) should not be seen as a superior value to the Council of Europe's fundamental principles/values, or as something which must condition or limit the enjoyment of democracy, the rule of law or human rights. The Russian war of aggression against the Ukraine has, understandably, shifted focus in the public debate towards questions of defence. It is, however, vital not to see the values of freedom, democracy and the rule of law, on the one side, and security on the other side, as opposing values, where the former has to be compromised in favour of the latter. Where one compromises freedom against security, one will usually end up not only with less freedom but with less security too.

12. The maintenance of the internal and external security of the State is vital and essential for the protection of the other values and interests of the State.<sup>4</sup> For a state based on the rule of law, national security is a concept within, not outside of the law.<sup>5</sup> For a European state bound by the ECHR, the concept of national security is bound by the concept of a democratic society: limits can undoubtedly be made in privacy and the freedoms of expression and association on national security grounds, but only those limits which are "necessary in a democratic society".<sup>6</sup>

13. In particular, while specific measures restricting fundamental freedoms and democracy may be taken in emergency situations, this does not mean that these restrictions may be unlimited in scope.<sup>7</sup> The Venice Commission has addressed this issue in detail on the occasion of the COVID-19 crisis, concerning in particular the functioning of the Parliament – which must not be put out of play – and the postponement of elections.<sup>8</sup>

14. It is not the purpose of the present contribution to detail the content of human rights, democracy and the rule of law as developed in a whole *corpus* of Council of Europe conventions, recommendations and other soft law instruments, including those prepared by the Venice Commission.

15. What must be however underlined is that overstepping the limits imposed by these instruments can make national security a potent weapon for the government of the day to unduly restrict human rights and freedoms, to undermine normal mechanisms of democratic accountability and therefore to jeopardise the implementation of the rule of law.

16. The Venice Commission will moreover put the emphasis on two issues which must be particularly considered to ensure democracy and freedom in security. This is just exemplary and, once again, the Commission emphasises that security is not to be opposed to the three pillars of the Council of Europe but, on the contrary, an element of their implementation.

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<sup>4</sup> Venice Commission, Study on the democratic oversight of the security services, [CDL-AD\(2015\)010](#), § 1.

<sup>5</sup> See Venice Commission, Rule of Law checklist, [CDL-AD\(2016\)007](#), .§ 51, and reference, § 117; Venice Commission, [CDL-AD\(2015\)011](#), Report on the Democratic Oversight of Signals Intelligence Agencies, § 14, 27, 86, 93-94, 129.

<sup>6</sup> Articles 8.2, 10.2, 11.2 ECHR.

<sup>7</sup> On derogations to the European Convention on Human Rights, see Article 15 of the Convention; Rule of Law checklist, § 51.

<sup>8</sup> Venice Commission, Respect for democracy, human rights and the rule of law during states of emergency: reflections, [CDL-AD\(2020\)014](#); Interim Report on the measures taken in the EU member States as a result of the Covid-19 crisis and their impact on democracy, the Rule of Law and Fundamental Rights, [CDL-AD\(2020\)018](#).

17. First, the proper functioning of parliamentary mechanisms has to be ensured. Since parliamentary accountability in general requires a high level of transparency to operate effectively, whereas national security tends to require that certain issues are kept secret in the national interest, which could lead to put parliamentary mechanisms *de jure* or *de facto* out of play, a balance should be ensured. In particular, accountability of the executive is essential to prevent threats to security and the role of the opposition must be guaranteed.<sup>9</sup>

18. Second, judicial independence is fundamental too. It is not by chance that access to justice is the element of the Rule of Law checklist which has been developed most in detail.<sup>10</sup>

19. Defence in the narrow sense is not part of the mandate of the Council of Europe, but the Council has repeatedly shown it is competent to discuss and adopt soft law standards in the area of security in the broader sense. Thus, the Venice Commission has identified best practices as regards the democratic control over the armed forces, and the most important principle here is civilian control over the armed forces.<sup>11</sup>

20. Similarly, the Venice Commission has identified best practices as regards the democratic control over the security sector (police, security and intelligence agencies). A variety of different mechanisms and institutions exist to compensate for, or supplement, deficient parliamentary or judicial control powers.<sup>12</sup>

## 2. Assessment

21. As regards an assessment of compliance with these standards, there are a variety of methods. The Rule of Law checklist proposes the following approach, which the Venice Commission recommends following:

26. Assessing whether the parameters have been met requires sources of verification (standards). For legal parameters, these will be the law in force, as well as, for example, in Europe, the legal assessments thereof by the European Court of Human Rights, the Venice Commission, Council of Europe monitoring bodies and other institutional sources. For parameters relating to the practice, multiple sources will have to be used, including institutional ones such as the CEPEJ and the European Union Agency for Fundamental Rights.<sup>13</sup>

22. NGO material is often invaluable but can be attacked for its lack of impartiality. The same accusation can obviously be levelled against reports and material produced by the political opposition in a state.

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<sup>9</sup> Venice Commission, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist, [CDL-AD\(2019\)015](#); Report on the role of the opposition in a democratic Parliament, [CDL-AD\(2010\)025](#).

<sup>10</sup> Venice Commission, Rule of Law checklist, [CDL-AD\(2016\)007](#), II.E; see also Report on the Independence of the Judicial System Part I: The Independence of Judges, [CDL-AD\(2010\)004](#); Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, [CDL-AD\(2010\)040](#).

<sup>11</sup> See e.g. Venice Commission, Study on the democratic oversight of the security services, [CDL-AD\(2015\)010](#); Report on the democratic control of the armed forces, [CDL-AD\(2008\)004](#); Study on the democratic oversight of signals intelligence agencies, [CDL-AD\(2015\)011](#); Council of Europe Commissioner for Human Rights, Democratic and Effective Oversight of National Security Services (2015).

<sup>12</sup> See, for example, on collection of data and surveillance, Rule of Law checklist, [CDL-AD\(2016\)007rev](#), II.F.2.

<sup>13</sup> Rule of Law checklist, [CDL-AD\(2016\)007](#), § 26.

23. It is important to apply a holistic approach – assessing the totality of a state’s mechanisms of controls and remedies, and examining not simply the law on the books, but also how controls and remedies work in practice. This makes for a more complicated assessment of compliance; it is not a simple binary determination of respect/not respect, or the application of rigid criteria resulting in accurate “scores”: as the Venice Commission underlined in its Rule of Law Checklist, which remains a key tool for the assessment in question, “the assessment needs to take into account which parameters are met or not met, to what extent, in what combination etc. The issue must be kept under constant review.”<sup>14</sup>

24. One way of trying to achieve a degree of objectivity in assessing compliance with law standards aimed at ensuring, for example, democratic accountability or effective access to justice is to involve independent academics in each Council of Europe state and ask them to place their own state’s laws, practices and institutions on a scale running from “no cause for concern” through “some cause for concern” to “extreme cause for concern”. Such an exercise, for example, was completed with some success as regards the measures taken in European states to counter the Covid-19 pandemic.<sup>15</sup> A similar exercise could be done, using the above standards, for “backsliding” democratic institutions, allegedly overly powerful/out-of-control police and security forces, lack of impartiality or accessibility of justice in the courts, lack of conformity of the electoral process with international standards, etc. This could help the Council of Europe monitoring bodies identifying whether red lines have been crossed and ringing the alarm bell in the sense that democracy and freedom in security are not ensured.

#### IV. Conclusion

25. The Venice Commission supports the initiative of the Parliamentary Assembly of the Council of Europe to address the issue of democratic security. It suggests employing an alternative term: “democracy and freedom in security”.

26. The Venice Commission does not take a position on the institutional proposals made by the recommendation. The issue is whether, and to what extent, they may add value to the existing “European security architecture”.

27. For a state based on the rule of law, security (in the narrow sense) is a concept within, not outside of the law. It should not be seen as a superior value to the Council of Europe’s pillars - democracy, human rights and the rule of law - but as a means to ensure the consolidation of these pillars, which on their turn have to be respected to ensure security.

28. The assessment of democratic security – or democracy and freedom in security - implies to apply a holistic approach, addressing both legal parameters and those relating to practice. Such assessment could help the Council of Europe monitoring bodies identifying whether red lines have been crossed and ringing the alarm bell in the sense that democracy and freedom in security are not ensured.

29. The Venice Commission is ready to contribute to the assessment of the situation of specific states vis-à-vis democracy and freedom in security – not only when commenting specific pieces of legislation, but also in a more global way.

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<sup>14</sup> Rule of Law Checklist, Introduction, § 29.

<sup>15</sup> Democracy Reporting International, Extraordinary or extralegal responses? The rule of law and the COVID-19 crisis, May 2021, <https://democracyreporting.s3.eu-central-1.amazonaws.com/images/3168Extraordinary%20or%20extralegal%20responses%20-%20The%20rule%20of%20law%20and%20the%20COVID-19%20crisis.pdf>.