The Struggle of Strasbourg

The Council of Europe's Response to Rule of Law Backsliding and Serious Violations of Fundamental Principles

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This year's Winter Session of the Parliamentary Assembly of the Council of Europe (PACE) saw three distinct yet interrelated developments. On Tuesday, the Assembly decided to open a monitoring procedure with regard to Poland on behalf of the ongoing rule of law backsliding. On Wednesday, the Assembly decided to ratify the credentials of the Russian delegates which had previously been challenged both on procedural and on substantive grounds. Still on Wednesday, the Assembly backed the proposal for the introduction of a new 'complementary joint procedure', together with the Committee of Ministers, in response to violations of fundamental principles underlying the work of the organisation.

Monitoring

The so-called post accession monitoring is a legacy of the 1990s with the Council of Europe's enlargement towards the east. Up until then, it was more or less taken for granted that Member States, once accepted to the organisation, would not fall short of the standards necessary for admission. In the turbulent times after the fall of the iron curtain, however, a number of Member States were admitted to the organisation although it was clear that at the time of accession, they did not yet fulfil all the criteria necessary for admission. Hence the necessity to provide for a post accession monitoring by PACE (and, in fact, also by the Committee of Ministers). Later on, the PACE monitoring procedure was made applicable to all Member States, whether old or new, in order to avoid discrimination.

It should be underlined that by this widening of application, the procedure has significantly changed its character. Originally, it was intended to help the newly created democracies in middle and eastern Europe to achieve the standards of the organisation, whilst today, its purpose is to prevent cases of regression. In this latter aspect, the PACE monitoring procedure (which is in the hands of the 'Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe') has certain overlaps with the procedures to be described below, namely, Article 8 of the Statute and the challenging of credentials.

With regard to Poland, it should be noted that the country was *not* subject to PACE monitoring in the immediate aftermath of its accession. The country's rule of law backsliding, which has found broad coverage on this blog as far as EU reactions are concerned, was responded by the Council of Europe primarily through Opinions of the Venice Commission. The new move to include Poland into the PACE monitoring sends a strong political signal of disapproval and concern about the country's development. At the same time, the currently ongoing Article 7 TEU procedure shows the interrelatedness between the PACE monitoring procedure and breaches of fundamental principles. We will come back to this later.

As far as Russia is concerned, the country was equally not subjected to PACE monitoring immediately after its accession. This is somewhat astonishing, given the grave concerns that existed at the time of admission regarding the country's preparedness to fulfil the obligations flowing from its membership in the Council of Europe. Today, the country is under PACE monitoring. As a result of the conflict between Russia and the Council of Europe following the annexation of Crimea in 2014 and the Russian non-participation in PACE sessions from 2016 to midt-2019, the country

temporarily suspended its co-operation in the monitoring procedure and resumed its activities only last year after the re-admission of the Russian delegation to PACE (for background information, see here and here).

Council of Europe Reactions to Violations of Fundamental Principles

It is a characteristic of the Council of Europe that its founding treaty, the Statute (or Treaty of London), has remained unchanged in substance since 1953. Given the Statute's only rudimentary nature, large parts of the organisation's activities find their basis in legal texts lower in rank than the founding treaty (or 'secondary law', to use EU terminology). This might raise questions about the relationship between those texts and existing Statutory provisions. An example to this effect concerns the way in which the organisation responds to serious violations of its fundamental principles, as enshrined in Article 3 of the Statute.

Article 8 of the Statute vests the Committee of Ministers with the power, in cases of serious violations of Article 3 of the Statute, either to suspend a Member State from its rights of representation or to exclude the country from the organisation altogether. In the past 70 years, the Committee of Ministers never made use of these powers. There was only one situation where a country came near to expulsion. However, Greece, after the *coup d'état* of the colonels, prevented being expelled by declaring to leave the organisation on its own motion in 1969.

The Parliamentary Assembly, by contrast, established its own mechanism of reacting to violations of fundamental principles. At the beginning of each year, national delegations must submit the credentials of their members for ratification by the Assembly. Under the PACE Rules of Procedure (RoP), there are two distinct reasons for challenging the still unratified credentials of a national delegation: either on procedural grounds (Rule 7 PACE RoP) or on substantive grounds (Rule 8 PACE RoP). The latter provision, as far as relevant, reads as follows:

> *'8.2. The substantive grounds on which credentials may be challenged are:*
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> *8.2.a. serious violation of the basic principles of the Council of Europe mentioned in Article3 of, and the Preamble to, the Statute; or*
> *8.2.b. persistent failure to honour obligations and commitments and lack of co-operation in the Assembly's monitoring procedure.'*

Given the fact that these provisions find no direct equivalent in the Statute but are based solely on the competence of PACE to adopt its rules of procedure (Article 28.a of the Statute), one might wonder whether this practice is compatible with the competence of the Committee of Ministers under Article 8 of the Statute to suspend a Member State from its rights of representation. In other words, is Article 8 of the Statute to be read in a sense that *only* the Committee of Ministers may decide on suspending the rights of representation? Or does it leave room for manoeuvre by the Parliamentary Assembly? The fact that the Assembly continued with its practice in early 2020, even after the conflict concerning the Russian representation in 2019, indicates that the main actors in the Council of Europe adhere to the second reading: the competence of the Committee of Ministers should be understood as being non-exclusive.

It is interesting to note, however, that the Assembly when ratifying the Russian credentials even went so far to hold that Rules 8.2.a or 8.2.b of the PACE RoP are *not applicable* (para. 10). This is difficult to understand, given the fact that the main source of criticism by the Assembly – the annexation of Crimea – remained unchanged. While undoubtedly, some positive developments have taken place since the Russian re-admission to the Assembly in 2019 (such as a prisoners' swap between Russia and Ukraine), new reasons for concern have arisen, especially regarding President Putin's proposal for a precipitous and far-reaching constitutional amendment. Tiny Kox, speaking on behalf of the Monitoring Committee, defended the position that Rules 8.2.a or 8.2.b of the PACE RoP should be regarded as being not applicable arguing that the procedure on ratification of credentials must not pre-empt the ongoing monitoring procedure. Furthermore, since the credentials of the Russian delegation had been ratified by PACE in June 2019, he

argued that the standard to be applied was whether there had been a deterioration, as compared to the previous situation, which was certainly not the case. Still, in the Resolution as finally adopted by the Assembly, a sentence was added which had not been contained in the original draft resolution: 'The Assembly recalls its position on the illegal annexation of Crimea by the Russian Federation' (para. 6).

For the sake of completeness, it should be noted that the Russian credentials had also been challenged on formal grounds, on behalf *inter alia* of the inclusion of Crimea in the past general elections. In this regard, the Venice Commission had mainly paved the way by an Opinion adopted in December 2019 arguing that inclusion of a contested territory into nationwide general elections could only impact their legitimacy where the participation had influenced the outcome of the elections. The Assembly adopted this approach.

The Proposal for a New Complementary Joint Procedure

When the Russian delegation was re-admitted to PACE in June 2019, it was agreed that a new procedure should be put in place in order to avert shortcomings of the existing procedures. Admittedly, the coexistence of the powers of the Committee of Ministers and of PACE to exclude delegations may lead to the somewhat paradoxical situation that a given country is represented in the Committee of Ministers while having no delegation in the Assembly. This was the situation in the case of Russia, although it must be stressed that the Russian non-participation was *not* the result of PACE excluding Russia from its work but, conversely, resulted from the decision of the Russian side not to submit credentials for ratification from 2016 to mid-2019. Still, the Russian foreign minister Lavrov argued that more than half of the ECtHR judges lacked legitimacy as they had not been elected with the participation of Russian delegates in PACE (which is responsible for electing the ECtHR judges). The situation became even worse when Russia started, from mid-2017 onwards, to withhold its contributions to the Council's budget, without there being any legal basis. There are many voices arguing that this was an attempt (successful, in the end) to blackmail the Council of Europe.

Be that as it may, it is hard to deny that the degree of confrontation between Russia and the Council of Europe had reached a level that did not allow for constructive dialogue any longer. Therefore, the new procedure that was envisaged after the Russian re-admission to PACE pursued a twofold goal: on the one hand, it should make sure that the Council of Europe speaks with one voice when confronted with cases of violations of fundamental principles; on the other hand, the new procedure should lead to a constructive dialogue, rather than to confrontation. The French presidency in the second half of 2019 put particular emphasis on the development of such procedure. The result consists in the 'complementary joint procedure' the contours of which were approved by the Parliamentary Assembly. Since for the establishment of a joint procedure, an agreement is necessary between PACE and the Committee of Ministers, the text as now agreed by the Assembly is only a first step and requires acceptance by the Committee of Ministers.

Before commenting on some aspects, it should be underlined that the character of this new procedure is complementary. This is significant in two ways: First, it means that the Statute is merely supplemented, with the effect that there is no need for an amendment. As underlined by Rapporteur Frank Schwabe in his Report, the new procedure in no way inhibits the immediate application of Article 8 of the Statute (para. 15.ix), nor does it affect the Assembly's existing monitoring procedure (para. 15.ii). Second, the understanding of this new procedure once more confirms the above findings that Article 8 of the Statute is of a non-exclusive character. If it were otherwise, introducing a new *joint* procedure would necessarily require an amendment of the Statute.

The procedure as now approved by the Assembly consists of mainly three steps. The primary aim is to bring the Member State in line with Council of Europe standards, through a constructive dialogue and co-operation. The first step consists of a joint high-level mission to the Member State in question. The second step includes a joint Roadmap, to be prepared by the

Secretary General upon proposals by the Committee of Ministers and PACE and after consultations with the Member State concerned. Only in the event that the conflict could not be resolved, by means of a constructive and co-operative dialogue with the Member State, may the Committee of Ministers move to the third step, i.e. the application of Article 8 of the Statute.

As for the Council of Europe, both statutory organs – the Committee of Ministers and the Parliamentary Assembly – and the Secretary General are involved. Importantly, all three of them can initiate the procedure wholly independently of each other. This is significant, given the Committee of Ministers' reluctance so far to use its powers under Article 8 of the Statute. If the initiation of the procedure had been made dependent on a congruent vote both in the Committee and in the Assembly, its effectiveness would have been severely undermined. As stressed by Tiny Kox in the debate, it is the first time ever that the Committee of Ministers 'trusts the Parliamentary Assembly to hand over some of its power to us. For the first time, this Assembly will be able, in case of a blatant violation of the statute by a member state, to trigger the procedure that could eventually lead to the exclusion of a member state.'

Of course, the majorities that are necessary to move from one step to the other are crucial: On the one hand, they must not be so high as to render the whole procedure ineffective in practice. On the other hand, they must be high enough in order to prevent political abuse. Concerning the trigger of the procedure by PACE, the Schwabe Report proposed, for the tabling of a motion, the highest threshold foreseen in the PACE RoP (para. 22) and a double majority (two thirds of the votes cast plus no less than one third of the total number of members entitled to vote) for adoption (para. 31). This was intended to reflect the exceptional nature of the procedure. The Resolution as finally adopted endorsed this approach (paras. 5.1 and 5.4). With regard to the majorities in the Committee of Ministers, one has to be mindful of Article 20 of the Statute, providing for a number of options ranging from simple majority to unanimity. In cases not expressly addressed in the Statute, the majority to be applied is two-thirds of the representatives casting a vote plus a majority of the representatives entitled to sit on the Committee (Article 20.d of the Statute). In this regard, the Schwabe Report contained an interesting proposal: In order to move from step one to step two, a two thirds majority should be required in the Committee of Ministers for *stopping* the procedure, rather than for moving forward. The fear behind was that a minority of 16 (out of 47) Member States could endeavour to block the procedure (para. 41). By contrast, the Resolution as adopted by the Assembly provides that the Committee of Ministers 'should decide on moving to the second step of the procedure not later than four weeks after having consulted the Assembly and the Secretary General' (para. 6.2). In my view, such a decision requires an application of Article 20.d of the Statute, so one may wonder whether the risk of a minority of Member States blocking the procedure has been successfully avoided. This is not problematic by and of itself as the procedures existing so far will not be abrogated. It would be a Pyrrhus victory, however, if the new joint procedure entailed a blocking potential that would eventually lead to its ineffectiveness. The experiences in the EU with Article 7 TEU are not very promising in this context.

Another open question are the grounds on which the procedure may be triggered. Both the Schwabe Report (para. 34) and the Resolution (para. 4.2) underline the 'exceptional nature' of the procedure. But what does this mean in practice? Is the rule of law backsliding of Poland serious enough to allow triggering the procedure? Or is this a mere case for applying the PACE monitoring procedure? Would it be justifiable that while the EU has initiated a procedure under Article 7 TEU with regard to Poland, the Council of Europe shies away from applying the new joint procedure? With regard to Russia, is it realistic to hope that the country will engage in a 'constructive dialogue' on the sovereignty over Crimea? If not, would it make any sense to apply the new joint procedure to the situation of Crimea? On the other hand: What is the value of the new procedure if it is *not* applied in cases of blatant violations of international law? Those are only some of the questions that will need to be resolved in the

future. They show that the challenges that lie ahead are far from trivial. Still, with the complementary joint procedure, the Council of Europe has made a significant step in the right direction.

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