Guest Editorial

Are the Tools of the Council of Europe Sufficient to Protect Human Rights, Democracy and the Rule of Law from Backsliding?

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Recent years have seen a trend towards populism, nationalism and authoritarianism which has resulted in a backlash for human rights, democracy and the rule of law. The trend has also affected member states of the Council of Europe (CoE), from the Russian Federation to Turkey and from Hungary to Poland or Serbia, to mention just a few examples. Some explicitly or implicitly see themselves as 'illiberal democracies', deliberately departing from the values of the CoE. What can be said about the resilience of the institutions of the CoE? Have they been able to counter the trend of backsliding by using the variety of tools at their disposal? An additional challenge has been brought about by the COVID-19 pandemic which has led to sweeping restrictions of basic human rights in practically all member states of the CoE. Again, the question needs to be asked whether the response by the CoE has been adequate to prevent disproportionate restrictions and ensure a speedy return to normality.

The CoE and its key human rights document, the European Convention on Human Rights (ECHR), have just celebrated 70 years of existence. In the course of its history it has seen many challenges, among them the Greek dictatorship in the 1960s. Based on findings of its human rights body, the organisation was ready to suspend this member state which led to a temporary withdrawal of Greece from the CoE. The organisation has also experienced a doubling of membership, largely due to the accession of formerly Communist-ruled

countries after the end of the Cold War. Related to the dissolution of the Soviet Union and of the former Yugoslavia, it also experienced several wars with the most severe human rights violations on its territory. However, the focus here is on the recent challenges as they emanate mainly from the trend to authoritarianism and illiberal democracies.

The annual reports on the state of democracy, human rights and the rule of law of 2017 and 2018 by the former Secretary General of the CoE, Thorbjørn Jagland, based on the findings of the CoE bodies, pointed to the challenges by populism and emphasised the role of domestic institutions which were found to be under threat.¹ In his last report of April 2019, Secretary General Jagland pleaded to the member states to reinforce the CoE to prepare it for future challenges. He mentions in particular that some populist and nationalist forces refuse to recognise the supremacy of the European Court of Human Rights (ECtHR) and calls on member states to become more proactive in upholding legal standards. In view of the fact that standards of the CoE are questioned in several member states, the Secretary General calls for a more coordinated action of its organs. The Commissioner for Human Rights, in particular, should have full access to all conflict zones and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) should be able to monitor conditions of deprivations of liberty at short notice and report to the Secretary General and the Committee of Ministers on a confidential basis. He also called to strengthen the financial integrity of the CoE by a special fund and other measures to secure their proper functioning.² Indeed, after the Russian Federation had blocked access to its territory for most of the bodies of the CoE and frozen its financial contribution in reaction to the suspension of the voting rights of its deputies in the Parliamentary Assembly (PACE), the CoE had a hard time in continuing its operations, which ended only after a face-saving compromise with Russia in June 2019.³ Even before, the

- 1 Council of Europe, Report by the Secretary General, Thorbjørn Jagland, 'State of Democracy, Human Rights and the Rule of Law, Populism – How Strong are Europe's Checks and Balances?', 2017: <<https://edoc.coe.int/en/an-overview/7345-pdf-state-of-democracy-human-rights-and-the-rule-of-law.html>> and the same, 'State of Democracy, Human Rights and the Rule of Law, Role of institutions, Threats to Institutions', 2018: <<https://rm.coe.int/state-of-democracy-human-rights-and-the-rule-of-law-role-of-institutio/168086coc5>>.
- 2 Council of Europe, Report by the Secretary General, Thorbjørn Jagland, 'Ready for Future Challenges – Reinforcing the Council of Europe', April 2019: <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168093af03>>.
- 3 The respective decision euphemistically was entitled, 'Strengthening the Decision-Making of the Parliamentary Assembly Concerning Credentials and Voting', see Resolution 2287 (2019) of 25 June 2019; see L R Glas, 'Russia Left, Threatened and Won: Its Return to the Assembly Without Sanctions' (Strasbourg Observers, 2 July 2019): <<https://strasbourgobserv>>.

work of the CoE has been weakened by the zero-growth budget policy of its member states since 2014.

PACE, which has a major role in upholding the values of the CoE, went through a major crisis when it had to deal with a corruption scandal in its own ranks, confirmed by the report of an Investigation Body set up for that purpose in April 2018. Consequently, the Assembly excluded a number of its members and declared zero tolerance of corruption in the future. A European NGO had an important role in alerting the CoE of these problems, which shows the important role of civil society.⁴

After the agreement with the Russian Federation, PACE committees were given access to the Russian Federation again, which also made a change in its criminal code which allowed the Committee of Ministers to declare the decision in *Anchugov and Gladkov* as executed. This had been the first case which the Russian Constitutional Court had declared could not be implemented for lack of conformity with the Russian constitution.⁵ In April 2020, Ilgar Mammadov was finally acquitted by the Supreme Court of Azerbaijan after the country had ignored for years a pertinent judgment by the Court. In this case the Committee of Ministers for the first time had made use of Article 46–4 to refer a case back to the Court to decide whether the state party has failed to fulfil its obligation to execute the judgment leading to a clear decision by the Grand Chamber of the Court in 2019 to this effect.⁶ The ECtHR certainly is the key pillar of the ECHR system. However, it also is a victim of its success, having to

ers.com/2019/07/02/russia-left-threatened-and-has-won-its-return-to-the-assembly-without-sanctions/>.

- 4 European Stability Initiative, 'Caviar Diplomacy Part 1' (2012), 'The European Swamp (Caviar Diplomacy Part 2): Prosecution, Corruption and the Council of Europe' (2016) and 'Caviar Democracy' (2016), all available at: <<https://www.esiweb.org/publications/>>; see also Council of Europe, Independent investigation body on the allegation of corruption within the Parliamentary Assembly, Report of 15 April 2018: <<http://assembly.coe.int/Communication/IBAC/IBAC-GIAC-Report-EN.pdf>>.
- 5 *Anchugov and Gladkov* App no 1157/04 (ECtHR, 4 July 2013); Committee of Ministers, Resolution CM/ResDH(2019)240 on Execution of judgments of 25 September 2019. See also the critique by G Bohush and A Padskocimaite, 'Case Closed, But What About the Execution of the Judgment? The Closure of *Anchugov and Gladkov v Russia*' (EJIL:Talk!, 30 October 2019): <https://www.ejiltalk.org/case-closed-but-what-about-the-execution-of-the-judgment-the-closure-of-anchugov-and-gladkov-v-russia/>.
- 6 See *Proceedings under Article 46 § 4 in the case of Ilgar Mammadov v Azerbaijan* App no 15172/13 (ECtHR, 29 May 2019) and K Dzehtsiarou, 'How Many Judgments does One Need to Enforce a Judgment? The First Ever Infringement Proceedings at the European Court of Human Rights' (Strasbourg Observers, 4 June 2019): <<https://strasbourgobservers.com/2019/06/04/how-many-judgments-does-one-need-to-enforce-a-judgment-the-first-ever-infringement-proceedings-at-the-european-court-of-human-rights/>>.

struggle with high numbers of applications. Too many judgments remain un-executed, testing the authority of the Committee of Ministers in charge of overseeing their execution. Accordingly, the now completed Interlaken process, resulting in the Copenhagen Declaration on the Reform of the European Convention of Human Rights System of 2018, had a focus on increasing its efficiency but also ensuring the execution of its judgments.⁷

The CoE, in particular its Parliamentary Assembly, has been active in addressing the democratic backlash in some member states which have tried to bring their judicial institutions under political control with the help of legal opinions, studies and reports produced by the Venice Commission for Democracy through Law. This Commission, established 30 years ago, has gained a high reputation for its competence on constitutional and other legal issues. However, some of its opinions in cases like Turkey, the Russian Federation, Hungary or Poland have shown only very limited results. There is a need for stronger political backing of the recommendations of the Venice Commission by the Committee of Ministers and beyond the CoE, for example by the European Union (EU), as far as EU members states are concerned. The EU Commission is increasingly making use of the possibility of the infringement procedure. So far, the judgments of the European Court of Justice have been respected.

New challenges emerge constantly like the new Polish campaigns against the so-called 'LGBTI ideology'. As a result, some 100 Polish municipalities and local governments declared themselves 'free from LGBT-ideology'. This is reminiscent of similar campaigns and laws in the Russian Federation against 'propaganda of homosexuality' under the pretext of the protection of traditional values. The ECtHR in *Bayev* explicitly criticised the gay propaganda laws as did other bodies of the CoE, so far without success as the Russian Constitutional Court in the past had found those laws in conformity with the Russian constitution.⁸

With regard to the COVID-19 crisis, the CoE has been quick to issue a tool kit for member states on respecting human rights, democracy and the rule of law in crises that affect hygiene and health, providing basic guidance and explaining also the procedure for notifications of a state of emergency under Article 15

7 Council of Europe, Committee of Ministers, Copenhagen Declaration of 13 April 2018, paras 20 *et seq.*: <https://www.echr.coe.int/Documents/Copenhagen_Declaration_ENG.pdf>.

8 *Bayev and Others v Russia* App nos 67667/09 and 44092/12 (ECtHR, 20 June 2017), see D Bartenev, 'LGBT Rights in Russia and European Human Rights Standards' in L Maelksoo and W Benedek (eds), *Russia and the European Court of Human Rights. The Strasbourg Effect* (Cambridge University Press, 2018) 335 *et seq.* and Committee of Ministers meeting of 4–6 December 2018, CM/Notes/1331/H46-24: <<https://rm.coe.int/09000016808fe080>>.

ECHR.⁹ The practice of member states is shown to be quite different, as some, like Romania, have scrupulously notified their restrictions of Articles of the ECHR while others, some of them with greater restrictions like Hungary, refrained from doing so. However, this did not prevent the Secretary General from expressing her concern about the measures taken in Hungary.¹⁰ While the state of emergency in Hungary was lifted in June 2020, special powers and, in particular, the decrees issued by the government on the basis of the emergency law without subsequent approval by the Parliament remain. In the context of the measures taken in the health crisis, the President of PACE talked about red lines which must be respected and in particular addressed Hungary for taking advantage of the Corona situation to take measures which were grossly disproportionate.¹¹

The deteriorating situation of migrants during the health crisis, for example in refugees in camps in Greece, but also the problem of pushbacks and of growing police brutality on the so-called Balkan route, were highlighted by the Commissioner for Human Rights¹² while the Committee for the Prevention of Torture paid a rapid reaction visit to Greece to investigate the treatment of migrants in March. They were locked in, in overpopulated camps, with insufficient health and legal services. The Commissioner highlighted the impact of the pandemic also on other vulnerable groups and called for a renewed impetus to strengthen the role of human rights. Her annual activity report provides a good overview of the major human rights problems present on the European continent.

The Special Representative of the Secretary General on Migration and Asylum has gained in importance recently. For example, with regard to reports on

9 Council of Europe, *Respecting Democracy, Rule of Law and Human Rights in the Framework of the COVID-19 Sanitary Crisis. A Toolkit for Member States*, SG/Inf(20120)11 of 7 April 2020: <<https://www.coe.int/en/web/congress/covid-19-toolkits>>.

10 Council of Europe, 'Secretary General writes to Victor Orbán Regarding COVID-19 State of Emergency in Hungary', Press Release of 24 March 2020: <<https://www.coe.int/en/web/portal/-/secretary-general-writes-to-victor-orban-regarding-covid-19-state-of-emergency-in-hungary>>.

11 Council of Europe, 'PACE President on COVID-19: Let's not Normalize the Abnormal', Press Release of 24 April 2020: <<https://www.coe.int/en/web/portal/-/pace-president-on-covid-19-let-s-not-normalise-the-abnormal>>.

12 Council of Europe, Commissioner for Human Rights, 'Pushbacks and Border Violence Against Refugees Must End', Press Release of 19 June 2020: <<https://www.coe.int/en/web/portal/-/pushbacks-and-border-violence-against-refugees-must-end>>. See, for example, L Tondo and D Boffey, 'EU "Covered Up" Croatia's Failure to Protect Migrants from Border Brutality' (The Guardian, 15 June 2020): <<https://www.theguardian.com/global-development/2020/jun/15/eu-covered-up-croatias-failure-to-protect-migrants-from-border-brutality>>.

pushbacks at the Greek and Croatian borders, he has published together with the EU Fundamental Rights Agency a note on the fundamental rights of refugees, asylum applicants and migrants at European borders, reminding member states of their obligations under relevant CoE instruments and European law.¹³ This cooperation with the EU and sometimes also OSCE bodies can be considered as good practice to strengthen the effectiveness of the recommendations or advice, but again it would need stronger political backing.

Freedom of expression and the safety of journalists were affected by measures taken in several countries under the pretext of fighting fake news in the COVID-19 crises. For example, the Hungarian government issued a decree criminalising the spread of distorted truth which the government considered as obstructing or preventing an effective coronavirus response as defined by itself. The Commissioner for Human Rights, however, issued a statement emphasising the essential role of journalists in providing reliable information, countering disinformation and keeping decision-makers accountable to the public.¹⁴

The European Commission on Racism and Intolerance (ECRI) plays an important role in promoting anti-discrimination measures providing guidance for member states. However, if they do not implement the recommendations, there is little that can be done to enforce them.

PACE has stronger tools at its disposal like the reports by its Committees on various subjects of concern. For example, its report and resolution 2230 (2018) on the persecution of LGBTI people in the Chechen Republic of Russia gave a very strong statement of the facts and produced resultant recommendations.¹⁵ The Parliamentary Assembly also awarded its prestigious Vaclav Havel prize to the director of the last human rights office in Chechnya run by the Russian NGO Memorial, Oyub Titiev, which at the time had to serve trial on obviously fabricated charges by the Chechen authorities.¹⁶ Although this might have improved his chances of early release, the situation for LGBTI people on the

13 EU Fundamental Rights Agency/Council of Europe, 'Note on Fundamental Rights of Refugees, Asylum Applicants and Migrants at European Borders': <https://fra.europa.eu/sites/default/files/fra_uploads/fra-coe-2020-european-law-land-borders_en.pdf>.

14 Council of Europe, Commissioner for Human Rights, 'Support a Free, Independent and Safe Press', Press Release of 30 April 2020: <<https://www.coe.int/en/web/commissioner/-/support-a-free-independent-and-safe-press>>.

15 Parliamentary Assembly, Resolution 2230 (2018) of 27 June 2018 on Persecution of LGBTI People in the Chechen Republic (Russian Federation): <<https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24962&lang=en>>.

16 See Parliamentary Assembly, 'PACE Reviews Progress of States Under Monitoring in 2019': <<http://www.assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=7782&lang=2&cat=8>>.

ground did not improve significantly as can be seen from subsequent new persecutions.

The Parliamentary Assembly also can put certain member states under its monitoring procedure which has been carried out by PACE in the case of Turkey in December 2017, when Turkey was still under a state of emergency. At present there are ten countries under a full monitoring procedure and three countries in a post-monitoring dialogue.¹⁷ The purpose is the monitoring of obligations and commitments engaged into with regard to accession to the CoE. This tool allows for constructive dialogue with the countries concerned provided there is good will on their side.

The Secretary General of the CoE should better use her powers and authority to react to the various challenges towards the realisation of human rights and democracy based on the facts established by the bodies of the CoE. In this context, she should make better use of her powers of inquiry in Article 52 ECHR, for example with regard to measures taken under a state of emergency. Article 52 entitles the Secretary General to request explanations from member states on how their internal law ensures the effective implementation of the Convention.

This short overview shows that the CoE has a large variety of tools at its disposal to address backsliding in human rights and democracy. It has excellent instruments in order to collect information on the situation on the ground and it also makes use of high-quality expertise to provide relevant advice. However, with the exception of the judgments of the ECtHR, these tools have no binding effect and therefore demonstrate problems of implementation. The procedure before the Court itself will normally take too long in order to address structural problems which also cannot be resolved by interim measures in urgent cases, which raise issues of imminent harm of an irreparable nature. Inter-state applications as in the Greek case to address the deteriorating human rights situation in a particular country may only be expected in the most serious cases. The actual danger related to illiberal democracies and authoritarian regimes, however, is one of a creeping decline which sometimes remains under the radar of the highest political bodies like the Committee of Ministers, to be addressed by more resolute political measures. The sanctions against the Russian Federation in the case of the annexation of Crimea and the war in Donbass have also shown the limits of its power of enforcement.

17 Parliamentary Assembly, 'Václav Havel Human Rights Prize 2018 Awarded to Oyub Titiev': <<http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=7218&lang=2&cat=37>>.

However, the CoE could strengthen its important role if it would develop procedures for a more coordinated response using the combined force of its various tools. This coordinated approach, combined with a strong leadership within the organization, could strengthen the efficiency of its responses to the ongoing backsliding of pluralist democracy, human rights and the rule of law. The continuation of an annual report identifying the challenges and providing some oversight on what the CoE has done to address the problems appears to be crucial. The Commissioner for Human Rights already has an important early warning function as it is usually the first to sound the alarm on new challenges and works closely with human rights defenders. The Secretary General should fully use its oversight powers and be an active voice of the conscience of the organisation. However, the CoE in the spirit of its values and commitments also needs stronger political and financial backing from its member states for the implementation and execution of the findings, decisions and recommendations of its bodies.