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Democracies facing the Covid-19 pandemic

Committee Opinion[1]
Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee)
Rapporteur: Ms Yuliya LOVOCHKINA, Ukraine, Socialists, Democrats and Greens Group

A. Conclusions of the Committee

1. The Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee) welcomes the report by Mr Ian Liddell-Grainger (United Kingdom, EC/DA) on behalf of the Committee on Political Affairs and Democracy and, on the whole, endorses the draft resolution and recommendation which have been proposed.

2. While the Monitoring Committee fully shares the conviction that no public health emergency should be allowed to destroy democratic acquis, it stresses the importance of looking at the specific national context in which emergency measures have been introduced in the different countries. In consequence, it points out that the assessment of compliance of these measures with democratic standards can only be done against the background of the particular legal order and democratic environment in the given country prior to and during the pandemic. This is illustrated in the report of the Committee on Political Affairs and Democracy by the wide range, and often vastly different mechanisms that different member States have deployed to deal with the pandemic and to ensure the continued functioning of the democratic institutions. The Monitoring Committee is best equipped to proceed with such assessments in the framework of the parliamentary monitoring procedure.

3. The Monitoring Committee shares the observation that the Covid-19 pandemic caught many countries off guard, finding the existing state-of-emergency mechanisms and overall legal framework in their countries often ill adapted to deal with the specificities of a global health emergency. Being forced to adopt and implement measures to address the pandemic at short notice, countries with more polarised political climates, including from forthcoming elections, encountered increased political tensions which in turn often affected public acceptance of some of the emergency measures. The Committee therefore highlights the importance for all member States to develop now, on the basis of a wide consensus among all political stakeholders, an adequate constitutional and legal framework to deal with global health emergency situations in line with Council of Europe standards and their membership obligations. The Monitoring Committee is best equipped to follow progress in this respect in Council of Europe member States.

4. In this perspective, the Monitoring Committee intends to elaborate a common approach and define criteria based on Council of Europe democratic standards which would allow for a harmonised evaluation of emergency solutions applied in different countries while taking into consideration their specific national contexts. To that end, the committee commits to devoting a special chapter on compliance of emergency measures with democratic standards in its forthcoming reports prepared under the monitoring procedure, in the framework of post-monitoring dialogue and in periodic reviews. In this way it hopes to provide an exhaustive overview of the different ways in which member States reacted to the emergency, identify possible shortcomings and come up with recommendations for the future.

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1. Reference to committee: Bureau decision, Reference 4512 of 26 June 2020. Reporting committee: Committee on Political Affairs and Democracy. See Doc. 15157. Opinion approved by the committee on 5 October 2020.

5. The Monitoring Committee points out that such an overall assessment will be possible thanks to the recent modification of the its working methods, which has broadened the scope and format of periodic reviews. As a result, all member States, without exception, will be subject to the monitoring of their membership obligations.

6. The Monitoring Committee shares the conclusion that parliamentary oversight and control are crucial in emergency situations. The conduct of regular democratic elections that are in line with European standards is at the basis of parliamentary democracy and essential to ensure the legitimacy of the democratic process. The committee agrees that, as a rule, elections should not take place in emergency situations. At the same time, it is concerned about the democratic deficit resulting from lengthy postponement of election processes if pandemic conditions endure. It notes the efforts of a number of States to implement special measures to allow the democratic process to take place under pandemic conditions. It equally notes that, in a highly competitive political climate as a result of the elections, such efforts have in a number of countries been perceived as being driven by ulterior motives and contentious.

7. In addition, the Monitoring Committee notes that in a number of countries the legal conditions for postponing already scheduled elections are unclear or inadequate, especially when a full state of emergency is not declared or when a wide consensus among all electoral stakeholders is lacking. The committee therefore urges all member States to introduce, well before the next elections take place, and in wide consensus between all political forces, the necessary legislation and criteria for the postponement of elections as well as the specific conditions and measures to be implemented to allow them to go ahead under pandemic conditions.

8. Furthermore, the committee highlights the potential risk linked to the non-observation of national elections by the ad hoc Committees of the Parliamentary Assembly, should the travel restrictions continue. Indeed, some countries may feel tempted to reject any possible criticism of the electoral process referring to the lack of observation by international monitors. At the same time the committee recognises that a number of measures implemented to allow elections under pandemic conditions, such as increased use of postal and internet voting, lessen the impact of the observation of voting on election day. This development strengthens the importance of long-term observation of election preparation and the political environment in which elections take place, which have been, and continue to be, important areas of attention of the Monitoring Committee. The Assembly should explore the possibilities of strengthening its long-term election observation capacities using the competence and tools offered by the Monitoring Committee and its rapporteurs.

9. The Monitoring Committee emphasises that it has continued its monitoring of member States despite difficult conditions, through opportunities offered by new technologies. At the same time, it underscores that country visits and direct contacts between rapporteurs and national stakeholders are essential elements of the political dialogue that is the monitoring procedure.

10. While having focused on the continuation of the functioning of democratic institutions at the national level, the committee considers it equally important that these processes are maintained, in line with European standards, at the international level. All international parliamentary bodies, including the Assembly, should put in place an appropriate framework to ensure their continuation and proper functioning in the context of a pandemic and other emergency situations.

11. In the light of the above conclusions, the committee proposes the following amendments to the draft resolution.

B. Proposed amendments

Amendment A (to the draft resolution)

After paragraph 5, insert the following paragraph:

The Assembly is aware that the compliance of emergency measures with democratic standards cannot be assessed in abstraction from the specific country's constitutional framework and legal order, as well as democratic practice. While no internal context can justify departure from the democratic process and principles, the specific national context should be taken into account when evaluating a country’s conformity with its commitments and obligations.

Amendment B (to the draft resolution)

After paragraph 11 insert the following paragraph:

The observation of elections should continue to be an important tool for the assessment of the electoral process. Given the possible limitations of the presence of international observers, as well as the increased use of alternative voting mechanisms to replace in-person voting, as a result of pandemic conditions, the Assembly should develop alternative modalities for the assessment of elections. The Assembly underscores that the assessment of the electoral process goes well beyond the physical observation on election day(s).

C. Explanatory memorandum by Ms Yuliya Lovochkina, rapporteur for opinion

1. Introduction

1. The pandemic crisis has had a great impact on the functioning of all pillars of democratic institutions, namely pluralism, rule of law and human rights in Council of Europe member States. The need to introduce emergency measures aimed at increasing health safety has become a challenge with a potential to put democratic processes at risk. Now that following the first wave of the Covid-19 pandemic, the majority of European countries are confronted with the second wave, it is the right time to draw first conclusions, take stock of different ways of dealing with the crises and identify measures which would make it possible to better handle future crises in the framework of democratic structures.

2. The Parliamentary Assembly's Monitoring Committee is well placed to undertake this task. Indeed, it is important, while assessing the response given to the emergency in different countries, to take into account their specific political and legal contexts. The same measures may be considered as very controversial in one country and fully acceptable in another, depending on the presence or lack of political consensus, confrontational policies and past experiences.

3. Obviously, the above comment can by no means be interpreted as to justify any violation of our principles and norms on the pretext of "internal consensus". However, in the absence of fully encompassing internationally recognised democratic standards in the area, the assessment of compliance with Council of Europe values and principles has to be done – to some extent – on an individual basis. This is the field of competence of the Monitoring Committee, which on a permanent basis follows the situation in member States with regard to conformity with their commitments and obligations.

4. In addition to the 11 countries which are under the full monitoring procedure, there are three countries engaged in the post-monitoring dialogue. As a result of the committee's recent reflection on its working methods, and the change in the format and selection of countries for periodic reviews, all Council of Europe member States are now subject to periodic comparable monitoring scrutiny. This will enable the Monitoring Committee to have an overview of different solutions all over Europe.

5. It is important to elaborate common harmonised assessment criteria and the committee intends to reflect on this. It has already agreed to devote one chapter in all forthcoming reports – be it full monitoring or post-monitoring reports or periodic reviews – on the ways that a given country handled the crisis as regards the functioning of democratic institutions and the measures taken in that respect.

6. That said, the committee stresses the need for the elaboration of democratic standards wherever appropriate which would guide the countries confronted with possible future crises without putting the democratic acquis in Council of Europe member States at risk. In this context, the committee welcomes the work done so far by the various Council of Europe entities and in particular, the toolkit offering guidance to member States on "Respecting democracy, rule of law and human rights in the framework of the Covid-19 sanitary crisis", issued by the Secretary General in April 2020.

7. The remarks below are of a general nature aimed at drawing attention to some important issues which will have to be taken into account in future monitoring reports.

2. Functioning of democratic institutions in times of crisis

8. A cursory overview obtained from the different hearings organised by the committee has made clear the vastly different legal and constitutional avenues taken by the individual member States in response to the pandemic and aimed at ensuring the proper functioning of their democratic institutions under pandemic

conditions. Some countries declared a full state of emergency (for example Estonia, Serbia), others applied different forms of sanitary emergency (Poland, Spain), while others regulated their response using emergency public order ordinances (Malta, the Netherlands). In many cases this also reflects the rapidly evolving pandemic for which member States had little time to prepare. In some member States with more polarised political climates, including from forthcoming elections, this led to increased political tensions which in turn affected the public acceptance of some of the emergency measures.

9. The importance for all member States to develop now, on the basis of a wide consensus among all political stakeholders, an adequate constitutional and legal framework to deal with global health emergency situations in line with Council of Europe standards and their membership obligations, cannot be emphasised enough. The Monitoring Committee is best equipped to follow progress in this respect and to develop a common approach and define criteria based on Council of Europe democratic standards which would allow for harmonised evaluation of emergency solutions applied in different countries while taking into consideration their specific national contexts.

10. While it is understood that the massive scale sanitary crisis that many Council of Europe countries have experienced and in many cases continue to experience, did not allow for the regular functioning of democratic institutions, one has to stress the need to maintain democratic safeguards and in particular a system of checks and balances. In other words, measures introduced with a view to securing public health cannot undermine the democratic mechanisms and processes which constitute the acquis of Council of Europe members States.

11. In this context, I fully agree with Mr Liddell-Grainger that the continuity of legitimate democratic institutions is of key importance during times of emergency and checks and balances must be maintained and that any state of emergency, and the extraordinary powers it confers must be limited in duration, circumstances and scope. The situation when the government has unfettered power without checks and balances is dangerous for the constitutional and legal order and could result in a considerable number of appeals to constitutional courts. Increased powers of the executive and suspension of certain rights and freedoms such as freedom of movement are only acceptable as long as they are lawful, limited in time, proportional to emergency requirements, and controlled by the legislative, In particular, any prolongation of a state of emergency should be subjected to the review of its necessity by parliament. In the Monitoring Committee's future work, these criteria will be used to assess compliance by our member States with democratic standards.

12. I also fully share the position of Mr Liddell-Grainger that parliaments must continue to play a triple role of representation, legislation and oversight during any state of emergency.

13. Any legislation enacted by the executive during a state of emergency or as a result of lawful derogation increasing the executive's powers, should also include clear time limits on the duration of exceptional measures. The rapporteurs of the Monitoring Committee will examine whether all the restrictive emergency measures have been repealed once the emergency has expired.

14. The Monitoring Committee will also try to determine whether the principle of necessity and proportionality has been observed in specific countries, in other words whether derogation from normal rules and procedures of the democratic decision-making process has not been abused. It should be pointed out that, as a general rule, fundamental legal reforms should be put on hold during a state of emergency.

15. I share Mr Liddell-Grainger's conviction that parliamentary scrutiny of the executive remains of key importance. The respective monitoring rapporteurs will pay particular attention to the way it was exercised in the countries under their responsibility.

16. It should be stressed however, that in order to be able to properly exercise its oversight function, a legislative body must be considered legitimate. In this context, the question of elections in all aspects of the electoral campaign and on voting day during emergency situations arises. I will look into this issue in more detail in the next chapter.

17. The Monitoring Committee will certainly examine to what extent the judiciary was operational during the crisis in specific countries. In particular it is important to see whether courts were able to examine the most serious and controversial human rights restrictions and whether constitutional courts – where they exist – were not prevented from functioning.

3. Elections under emergency conditions

18. In his explanatory memorandum, Mr Liddell-Grainger succinctly outlines the different concerns and aspects with regard to the holding of elections in a context of pandemic and other emergency situations. I share his findings and reflections and will limit myself to a small number of additional observations, which largely follow the points made under the previous section on the functioning of democratic institutions.

19. Democratic elections are the cornerstone of a representative democracy and ensure the democratic legitimacy of the parliamentary institutions. As highlighted in each monitoring procedure, the genuinely democratic nature of an election is determined not only by the conduct of the vote on election day but equally by the pre-electoral political environment and the existence of an equal playing field for all electoral contestants to campaign. All these aspects are affected in an emergency and therefore, as a rule, elections should not be organised under such conditions.

20. However, at the same time, given the importance of parliaments as "guarantors of democracy in times of crisis", as the rapporteur of the Committee on Political Affairs and Democracy rightfully states, it is important that the legitimacy of the parliament and its functions cannot be questioned. Therefore, in the context of a potentially long emergency period caused by a global pandemic, the organisation of elections, under strict and narrowly defined criteria and conditions to ensure their democratic nature, could be considered. This is especially of relevance when elections were already called for before the emergency arose.

21. A number of member States were confronted with this situation when the Covid-19 pandemic broke out, and their different reactions to this situation should be carefully analysed for lessons to be learned for similar future situations. For that purpose, the Monitoring Committee organised a hearing on "Membership obligations and the conduct of democratic elections in the context of the pandemic of Covid-19" which took place on 22 June with the participation of *inter alia* the Venice Commission. This hearing focused on three distinct case studies: Poland, North Macedonia and France.

22. In the case of Poland, the presidential election had already been called for 10 May 2020, before the outbreak of the Covid-19 pandemic. In the context of the highly polarised political climate in Poland no agreement could be reached between the ruling majority and the opposition about postponing the election or the conditions and criteria under which it could continue to take place. Initially the authorities stated that they wished to maintain the election on 10 May, a position that became increasingly more contentious and controversial given the risk for public health and safety of maintaining the election, as well as the fact that, as a result of the confinement measures in place, no meaningful election campaign could take place which led to an increasingly skewed and unequal playing field for the election contestants. As a result of the increasing controversy about the election, it was finally postponed by the authorities two days before they were to take place. However, the legal basis for this decision, which was based neither on a wide political agreement nor on a formal decision of the parliament, is questionable and could have led to legal challenges were it not for the fact that a consensual agreement was reached between the ruling majority and the opposition on the new dates for the election as well as on the manner and conditions in which it would be conducted. The presidential election eventually took place on 28 June and 12 July 2020. Being a member of the Parliamentary Assembly's election assessment mission during the first and second rounds of the presidential election in Poland, I would like to point out that despite the above-mentioned deficiencies the election were well-organised.

23. In North Macedonia early parliamentary elections had been called for on 19 April 2020 following the dissolution of the parliament on 16 February 2020. However, in a consensual decision between the opposition and the ruling majority these elections were postponed as a result of the Covid-19 pandemic. It was agreed that the election campaign could only take place after the state of emergency had been lifted. This took place on 23 June 2020 and elections were eventually organised on 15 July 2020.

24. France controversially held the first round of its local elections on 15 March 2020. The second round was originally planned for 22 March but was postponed *sine die* due to the rapidly developing Covid-19 health crisis, as well as what, for France, was a very low turnout during the first round as a result of the evolving pandemic. The second round eventually took place on 28 June 2020, after the confinement measures to contain the spread of the coronavirus had been lifted. All decisions regarding these elections – the holding of the first round, the postponement of the second round, as well as the new date for the second round – were based on consultation and consensus among the political stakeholders and guided by advice from the French Scientific Council. These decisions were therefore supported by French society, even if questions remain about the impact and political consequences of the long delay between the first and second rounds.

25. While an in-depth analysis of these case studies is beyond the scope of this opinion, two important observations should be made.

26. First of all, in many countries the legal framework for the postponement of already called elections when a state of emergency is not declared is inadequate or even lacking, especially when there is no consensus among the political stakeholders about the postponement of the elections. This issue has already been observed outside pandemic conditions within the ongoing monitoring procedures, most recently with regard to the 2019 local elections in Albania (see Venice Commission Opinion 959/2019 on "the powers of the President [of Albania] to set the dates of elections").

27. Secondly, consensus between all stakeholders with regard to the conditions and criteria for the possible postponement of an election, as well as the conditions and special measures that need to be in place for their conduct under emergency circumstances, is essential for public acceptance and trust in the democratic nature of the elections. Such consensus is understandably more difficult to obtain in the highly competitive political climate that exists before elections, especially if the political environment is very polarised.

28. All member States should therefore be urged to ensure that, based on consensus between all political stakeholders, an adequate legal framework is adopted that provides clear conditions and criteria for the postponement of elections, as well as for the conditions and mechanism under which elections can eventually be held in pandemic situations. By doing so member States will also fully comply with the principle of stability of electoral legislation, which stipulates that election legislation should not be changed six months before elections are called.

29. In this context the rapporteur wishes to stress that, while the conduct of elections under emergency conditions may be necessary to ensure the continuing legitimacy of the democratic institutions and their work, the conduct of referenda and plebiscites is not permissible, especially when they deal with Constitutional matters. A point in case is the so-called "All-Russian Vote" on the controversial amendments to the Constitution of the Russian Federation. Originally scheduled for 22 April, the "All-Russian Vote" was postponed until 1 July 2020 as a result of the Covid-19 pandemic. Several novel, and controversial, mechanisms were introduced to conduct the vote under pandemic conditions. In-person voting was allowed to take place over multiple days, from 25 June to 1 July 2020. In addition, during this period, makeshift polling stations were set up in parks and public spaces that did not fulfil the criteria for a polling station. These mechanisms affected the observation of the vote as well as the secrecy of the ballot, raising questions about, and affecting public trust in the voting process and outcome of the vote. This in turn negatively affects the democratic legitimacy of the Constitutional amendments which, *inter alia*, profoundly change the structure and balance of power in the Russian Federation.

30. The rapporteur of the Committee on Political Affairs and Democracy rightfully raises the importance of impartial international observation of elections, such as conducted by the Assembly, to assess the democratic nature of elections and increase the public trust in the results. The consequences of non-observation of elections by the Assembly, should the travel restrictions continue, should be considered. Indeed, some countries may feel tempted to reject any possible criticism of the electoral process because of the lack of observation by international monitors.

31. At the same time, it should be emphasised that a number of measures implemented to allow elections under pandemic conditions, such as increased use of postal and internet voting, lessen the impact and effectiveness of the observation of the voting on election day. This development strengthens the importance of the long-term observation of election preparation and the political environment in which elections take place, which have been, and continue to be, important areas of attention of the Monitoring Committee. The Assembly should explore the possibilities of strengthening its long-term election observation capacities using the competence and tools offered by the Monitoring Committee and its rapporteurs.

4. Anticipating future crises

32. In the previous chapters I have outlined the main issues which will be examined by the monitoring rapporteurs in the respective countries under their responsibility, as well as the concerns to be addressed. For obvious reasons these are just general ideas which will be further reflected upon and developed by the Monitoring Committee and its rapporteurs.

33. As mentioned above, the pandemic crisis caught many countries unprepared for this kind of challenge. In this context, I would like to commend the Secretary General of the Council of Europe for having reacted swiftly by issuing a toolkit offering guidance to member States with regard to respecting democracy, the rule of law and human rights in the framework of the Covid-19 crisis. The contribution by other Council of Europe bodies, in particular the Parliamentary Assembly, the Committee of Ministers and the Venice Commission was also most valuable.

34. However, there is still a need to elaborate democratic standards which would serve as a reference and guidance for Council of Europe member States should another emergency arrive. Once democratic standards in this area are clearly defined, the Monitoring Committee will follow their implementation and, more generally, member States' efforts to introduce specific legislative measures which will allow for better handling of similar crises in the future.

35. In this context the present parliamentary debate is a welcome first step in the pan-European debate on improved safeguards for the democratic process in any conditions.

36. In more general terms, I think that international parliamentary bodies including the Parliamentary Assembly, should also work out methods and procedures which would enable proper functioning, including monitoring during any possible future crises.

37. That said, I would like to stress that the work of the Monitoring Committee and its rapporteurs has not been suspended during the pandemic crisis. In particular, they were closely following developments in their respective countries and made public statements where appropriate. In several cases, they communicated with the authorities and held exchanges of views with different stakeholders via videoconference.