Time for the gloves to come off?

The response by the Parliamentary Assembly of the Council of Europe to rule of law backsliding

1. Introduction

Since 1997, monitoring has been the formal mechanism by which the Parliamentary Assembly of the Council of Europe (PACE or the Assembly) 'helps ... member States to fulfil their promises to uphold the highest democratic and human rights standards'.[1] This rapporteur-based, peer review procedure, which entails different levels of scrutiny across the 47 states, has also been the Assembly's only tool to respond to (or seek to prevent) decay in the rule of law and human rights, broadly termed 'rule of law backsliding'.[2] This is due to PACE's abiding reluctance to resort to sanctions such as excluding a country's delegation, which has resulted in monitoring becoming *the* battleground over how to deal with backsliding states. Unsurprisingly, then, perceptions of the procedure differ wildly: its proponents see it as a 'progressive, necessary step … [and] helping hand' to errant states,[3] while its detractors deplore it as a 'bludgeon',[4] a form of 'full-scale political surveillance',[5] an 'insult' to those subjected to it.[6]

These opposing perspectives are starkly evident in Assembly debates on the four states on which this article focuses: Hungary, Poland, Turkey and Azerbaijan. These states committed on their accession to the Council of Europe (CoE) to uphold its values, yet none is regarded as a full democracy. According to the Economist Intelligence Unit,[7] for example, Azerbaijan is 'authoritarian', and Turkey is a 'hybrid regime', indicating, inter alia, a lack of judicial independence, weak rule of law and government pressure on the opposition and civil society. Hungary and Poland, the two European Union (EU) member states among our selection, are classed as 'flawed democracies', meaning that, among other weaknesses, media freedom is infringed and there are 'significant weaknesses in other aspects of democracy, including problems in governance'.[8] Their inclusion in our analysis thus allows us to explore the Assembly's response to backsliding in states that occupy different points on the autocracy-democracy continuum.

---

[1] Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe, *Monitoring Committee: Work Overview,* AS/Mon/Inf(2020)12, 15 June 2020, 2.
[2] L Pech and KL Scheppele, 'What is Rule of Law Backsliding? (*Verfassungsblog*, 2 March 2018): <https://verfassungsblog.de/what-is-rule-of-law-backsliding/>.
[3] Michael Aastrup Jensen, debate: 'Request for the opening of a monitoring procedure in respect of Hungary', 25 June 2013, Doc. AS(2013)CR22 (henceforth 'Hungary debate 2013').
[4] José María Beneyto, ibid.
[5] Robert Walter, ibid.
[6] Theodora Bakoyannis, ibid.
[7] Economist Intelligence Unit, *Democracy Index 2020: In sickness and in health?* (EIU, 2021).
[8] Ibid, 57.

Among the two EU member states, Hungary evaded being brought under the most rigorous form of scrutiny by PACE, known as full monitoring, with a vote in 2013—a decision which the Plenary of the Assembly has not revisited at the time of writing; whereas Poland, in 2020, became the first EU country to be placed under full monitoring. With respect to the two non-EU member states, Turkey became, in 2017, the first state to have full monitoring *re*opened following the failed coup attempt in 2016 and the government's subsequent crackdown against alleged opponents.[9] Azerbaijan, finally, has been under full monitoring since acceding to the CoE in 2001, and stands out for its open contempt for the organisation, exposed through the 'caviar diplomacy'[10] scandal which revealed that several Assembly members had been bribed by the Azerbaijani government. Indeed, all four states have pushed back against the monitoring procedure, and while we acknowledge that they may not be representative of every country under this most intense form of scrutiny, there is evidence of more widespread criticism, which 'puts into question the very existence of the monitoring procedure'.[11]

This article proceeds as follows: section 2 traces the development of the monitoring procedure and examines its distinctively public and exposing nature. It narrates how PACE, having eschewed the application of sanctions in response to rule of law backsliding, has used—or failed to use—monitoring to counter such threats in the four above-mentioned states, at a time when the scandal-ridden Assembly was at its lowest ebb. Through analyses of verbatim records of PACE debates over the past decade, Section 3 elucidates how proponents and opponents of monitoring have framed their arguments in a bitter contest about the future of democracy and the rule of law in Europe. The political dynamics of the procedure—the tools and tactics used, and alliances within and between party groups and country blocs—are discussed in section 4. We conclude, in section 5, that this deeply contested procedure cannot bear the weight of expectation now placed upon it and requires fundamental reappraisal, alongside the possible use of sanctions, to meet the severity of the challenge.

2. The Development, Nature and Use of Monitoring by the Assembly

Our discussion of monitoring as, effectively, the sole means for PACE to tackle rule of law backsliding starts with an account of the procedure's development over time (2.1) and the characteristics that distinguish it from other CoE monitoring mechanisms and that have made it uniquely contentious (2.2). This is a prelude to analysing the political turbulence of the last decade, which has seen the Assembly losing authority and relinquishing some of its powers (2.3). We proceed to examine how the weakened Assembly has confronted key decision-making moments in respect of (possible) monitoring of the four states under review (2.4).

[9] Resolution 2156 (2017), The functioning of democratic institutions in Turkey, 25 April 2017.
[10] European Stability Initiative, *Caviar Diplomacy. How Azerbaijan Silenced the Council of Europe,* 24 May 2012.
[11] Monitoring Committee, The progress of the Assembly's monitoring procedure (June 2012–September 2013), Report, Doc. 13304, 16 September 2013, para 380.

2.1 The Evolution of the Assembly's Monitoring Procedure

The Parliamentary Assembly, established in 1949, is the CoE's deliberative body. It is composed of delegations of national parliamentarians (324 in total) who meet quarterly in plenary sessions in Strasbourg. Prior to 1997, the Assembly had no mechanism to monitor states' compliance with their obligations as members of the CoE. This changed with the accession of Eastern and Central European and former Soviet states from the early 1990s. As Klein notes, after 1990, the CoE did not insist on states fully complying with European standards in respect of the rule of law, human rights and democracy, but 'pinned its hopes on the therapeutic effects of admission'.[12] In 1993, the Parliamentary Assembly took the first step towards verifying these anticipated effects by asking its (then) Political Affairs Committee and Committee on Legal Affairs and Human Rights (Legal Affairs Committee) to monitor the honouring of states' commitments and report to the Assembly at six-month intervals.[13] This process was institutionalised with the creation of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee) in 1997.[14] This is one of nine PACE committees,[15] and has 93 members appointed by the (currently) five political groups in the Assembly.[16]

Monitoring works in four ways, which vary in their frequency and intensity—and, as we shall see, in their perceived intrusiveness. The first and most rigorous form is the full monitoring procedure, which now involves regular visits by two co-rapporteurs from different political groups to conduct a dialogue with the national authorities, as well as occasional plenary debates in the Assembly, in order to ensure that 'a state's progress and problems are honestly assessed'.[17] States that progress sufficiently move to the second form of monitoring, the 'post-monitoring dialogue', a less intensive rapporteur-based procedure to monitor outstanding concerns.[18] Both these procedures generate regular reports whose findings and recommendations are based, inter alia, on the co-rapporteurs' fact-finding visits, the conclusions of inter-governmental monitoring bodies of the CoE, and any relevant opinions of the Venice Commission.

In the mid-2000s, the Monitoring Committee assumed a third function, now known as the 'periodic review'. Originating from a concern to be 'genuinely even-handed' between states,[19] the periodic review process covers all (currently 33) states that are not under full monitoring or engaged in post-monitoring dialogue. It has gone through several incarnations. From 2006,

[12] E Klein, 'Membership and Observer Status' in *The Council of Europe: Its Laws and Policies*, S Schmahl and M Breuer (eds), (Oxford University Press 2017) 59.
[13] Ibid, 59-60.
[14] Resolution 1115 (1997), Setting up of an Assembly committee on the honouring of obligations and commitments by member states of the Council of Europe (Monitoring Committee), 29 January 1997.
[15] See <https://pace.coe.int/en/pages/committees> accessed 7 April 2021.
[16] These are: EPP/CD, the Group of the European People's Party; SOC, the Socialists, Democrats and Greens Group; EC/DA, the European Conservatives Group and Democratic Alliance; ALDE, the Alliance of Liberals and Democrats for Europe; and UEL, the Group of the Unified European Left.
[17] As of April 2021, this applies to 11 states: Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Republic of Moldova, Poland, Russian Federation, Serbia, Turkey and Ukraine.
[18] This applies to three states: Bulgaria, Montenegro and North Macedonia.
[19] Monitoring Committee, The progress of the Assembly's monitoring procedure (January–December 2018), Report, Doc. 14792, 7 January 2019, para 148.

the Committee prepared 'periodic reports' on the states concerned every three years.[20] These reports consisted largely of collated findings of different CoE monitoring mechanisms and were acknowledged as having had limited impact.[21] Hence, in 2014, the Monitoring Committee undertook to carry out more substantial periodic reviews, in batches of states grouped alphabetically.[22] However, these were not accompanied by resolutions and still passed 'almost unnoticed'.[23] To increase their political weight, the Monitoring Committee decided in 2019 to base the order and frequency of periodic review reports on substantive (at that point, unpublished) criteria, and to debate specific resolutions per country.[24] In a further refinement, in November 2020, the Committee decided to vote for two or three states per year to come under periodic review; these will be chosen from a shortlist of five prepared by its Chair, based on findings by the Assembly and other CoE monitoring bodies and 'questions raised by members of the committee, … civil society and the media'.[25] While the publication of these selection criteria is a welcome step towards greater transparency, the wide discretion left to the Chair, coupled with the fact that the Monitoring Committee members will be voting behind closed doors, leaves ample room for politicisation. It remains to be seen whether these reforms, taken as a whole, will succeed in creating impact from the periodic review process where none has so far been evident. We return to this question in section 5.

Finally, the fourth aspect of the procedure overseen by the Monitoring Committee stems from a recognition that the Assembly may need to respond to rapid erosion of the rule of law and democracy in a state not under full monitoring. Previously, such urgent concerns could only be dealt with through a request for (re)opening full monitoring—an all or nothing option for which is difficult to secure a political majority. In order to allow PACE to be more nimble-footed, the Monitoring Committee's terms of reference were expanded in 2013 to empower it, on the basis of a motion for a resolution tabled by Assembly members, to prepare a report at any time on 'the functioning of democratic institutions' in any state.[26] This mechanism has been used only once, in respect of Poland in 2020.

This precipitated the decision to bring Poland under full monitoring after an egregious delay of four years after delegates had first called for action (see 2.4). Indeed, the system is chronically slow: it commonly takes two years from the Monitoring Committee being tasked with preparing a report to a final resolution being adopted in the Assembly—and it can take even longer, due

[20] Resolution 1515 (2006), Progress of the Assembly's Monitoring Procedure (May 2005–June 2006), 29 June 2006, para 10.
[21] Monitoring Committee, Doc. 13304 (n 11) para 87.
[22] Resolution 2018 (2014), The progress of the Assembly's monitoring procedure (October 2013–September 2014), 2 October 2014, para 21.4.
[23] Monitoring Committee (n 19) para 150.
[24] Resolution 2261 (2019), The progress of the Assembly's monitoring procedure (January–December 2018), 24 January 2019, para 14. See also Resolution 2325 (2020), The progress of the Assembly's monitoring procedure (January–December 2019), 30 January 2020, para 5.1, which amends Resolution 1115 (1997) (n 14) accordingly.
[25] Monitoring Committee, Decision on revised internal working methods for the selection by the Monitoring Committee of countries for periodic review on the honouring of membership obligations, Doc. AS/Mon(2020)14FINAL, 13 November 2020.
[26] Resolution 1936 (2013), Harmonisation of regulatory and para-regulatory provisions of monitoring and post-monitoring dialogue procedures, 31 May 2013, paras 5 and 7.4.

to changes in rapporteurships, difficulties in scheduling fact-finding visits, and lack of secretariat resources.[27]

2.2 The Unique Nature of the Assembly's Monitoring within the CoE

The Parliamentary Assembly's monitoring procedure has a unique character within the CoE's architecture.[28] It is carried out by parliamentary rapporteurs (assisted by the Monitoring Committee secretariat) whose public reports are in turn debated in the Plenary of the Assembly; the latter adopts resolutions addressed to member states, and sometimes recommendations aimed at the Committee of Ministers (CM, the CoE's intergovernmental body). At that (intergovernmental) level, monitoring operates differently: it is undertaken by bodies composed of independent experts with clearly delineated treaty-based or thematic mandates (such as gender-based violence or discrimination).[29] Unlike PACE's four-tier monitoring procedure, these independent bodies review all states cyclically and on an equal footing (with some possibilities for urgent inquiries). These features make inter-governmental monitoring far less politicised than the Assembly's. Another form of CoE monitoring is that undertaken by the CoE Commissioner for Human Rights, who does country monitoring (in addition to thematic inquiries). Their reports, like the Assembly's, are public; however, the broad mandate vested in an individual Commissioner with only a small office precludes the sustained focus on backsliding states that PACE monitoring affords. For its part, the Venice Commission is an expert body advising member states on constitutional matters, whose opinions, while public, are generally seen as technical and apolitical. Indeed, our analysis of the debates about the four countries reviewed in this article shows that the Venice Commission appears to enjoy almost universal respect, including among delegates from backsliding states.

Only the Assembly, then, conducts monitoring which is inherently political, persistent, covers potentially all aspects of governance in a state, and plays out publicly once a matter is put before the Plenary. These features of the procedure leave backsliding states nowhere to hide from the full glare of the Assembly's scrutiny. This may explain why some states under full monitoring have criticised it as being punitive, politicised and unfair[30]—a dramatic shift in rhetoric from the lofty commitments made upon their accession to the CoE.[31] When national delegations to PACE were asked for their views of the procedure in 2013, Russia went so far as to suggest that country-based monitoring should be abolished and replaced by thematic

[27] Monitoring Committee, The functioning of democratic institutions in Poland, Report, Doc. 15025, 6 January 2020, para 2.

[28] For an overview of the CoE's various monitoring mechanisms, see PACE, Legal Affairs Committee, 'Overview of core Council of Europe human rights monitoring mechanisms and related activities', Doc. AS/Jur/Inf(2020)03, 22 January 2020.

[29] The (lesser known) confidential, consensus-based monitoring by the Committee of Ministers based on the latter's 1994 *Declaration on Compliance with Commitments accepted by member states of the Council of Europe*—originally designed to oversee new members' path towards full compliance with the Council of Europe's acquis—has today de facto ceased to operate. See A Drzemczewski, 'Human Rights in Europe: An Insider's Views' (2017) 2 *European Human Rights Law Review* 134, 137.

[30] See, e.g., Monitoring Committee, The progress of the Assembly's monitoring procedure (October 2013–September 2014), Report, Doc. 13595, 15 September 2014, Appendix 1: Activity report of the ad hoc Sub-Committee on the Functioning of the Parliamentary Monitoring Procedure, paras 2.2 and 2.4.

[31] See, e.g., Opinion 190 (1995), Application by Ukraine for membership of the Council of Europe, 26 September 1995, para 11; and Opinion 193 (1996), Application by Russia for membership of the Council of Europe, 25 January 1996, paras 6-7.

reporting—a move apparently motivated by a wish to dilute the focus on particular states.[32] Ukraine ventured that monitoring was 'seen by our countries as a ... punishment', and insisted that it must be applied to all states equally.[33] States that resent being under full monitoring have also complained about the lack of a clear exit route, suggesting that 'new commitments have been added to the list established upon accession', making the process appear 'endless'.[34] As we shall see, these criticisms recur in respect of debates about all four of the states examined in this article.

Defenders of the procedure have acknowledged these criticisms—recall that the periodic review was introduced to avoid any appearance of double standards. They have also echoed the concern about the apparent endlessness of full monitoring, which must track not only the fulfilment of commitments entered into at the time of a state's accession, but also new issues. This was raised by the Chair of the Monitoring Committee in 2011,[35] and seems even more true today, given that some states—namely Albania, the Republic of Moldova, Russia and Ukraine—have been under full monitoring for 25 years.

Nevertheless, defenders of rigorous scrutiny through monitoring have hit back at states that argue for the procedure to be weakened and deplored their narrow view of its purpose. They argue that commitments are not limited to formal steps, such as the adoption of a specific law, but ought to effectively safeguard democratic principles.[36] As one rapporteur argued, with a degree of irony:

> [I]t is possible to close the monitoring procedure, but it depends on the country itself. If the parliamentary elections are systematically flawed, if basic freedoms are restricted and human rights are violated – should we look for a 'better' monitoring procedure to accommodate these deficiencies and compromise on our values?[37]

The same rapporteur rejected the idea of replacing country-based with thematic monitoring. The latter are less weighty, he argued, being the product of rapporteurs examining many countries as compared to the co-rapporteurs of the Monitoring Committee, who are appointed for five years and maintain continuous dialogue with the authorities in a single state.[38] Indeed, the Monitoring Committee is the only PACE committee with a mandate that is principally country-focused. It is telling that the Monitoring Committee has, in addition, been empowered to undertake thematic monitoring since 2014—but has chosen not to do so.[39]

---

[32] Monitoring Committee (n 11) para 397.
[33] Ibid, para 392.
[34] Monitoring Committee (n 30) para 2.3.
[35] Monitoring Committee, The progress of the Assembly's monitoring procedure (June 2010–May 2011), Report, Doc. 12634, 6 June 2011, para 83.
[36] Ibid.
[37] Monitoring Committee (n 11) para 404.
[38] Ibid, para 399.
[39] Resolution 2018 (2014) (n 22) para 19. In November 2020, the Monitoring Committee's terms of reference were amended to stipulate that the Bureau of the Assembly may instruct the Committee to prepare a report on a cross-country thematic issue. See Resolution 2350 (2020), Modification of the Assembly's Rules of Procedure, 20 November 2020, para 3.1.2.

2.3 Monitoring during Turbulent Times

In the past decade, the Assembly's monitoring procedure has operated in a tempestuous context. PACE reached its lowest ebb with the revelation that current and former members, including its (then) President Pedro Agramunt, had worked in favour of the Azerbaijani government in exchange for cash and gifts—a long-held suspicion confirmed in 2018 by an independent investigatory body set up by PACE itself.[40]

Where once Assembly members demonstrated leadership on issues such as the abolition of the death penalty and European complicity in the CIA's programme of 'extraordinary renditions' of terrorism suspects, some delegates have, in recent years, shown themselves to be 'in the pocket' of governments.[41] The former Commissioner for Human Rights, Nils Muižnieks, laments what he identifies as the Assembly's political enfeeblement:

> [The Assembly] used to ... push the Committee of Ministers to go further. It no longer does that … [PACE has] abdicated what used to be its leading role pushing for a stronger response from the Council of Europe and upholding standards.[42]

This frailty, Muižnieks argues, is exemplified in PACE's muted response to rule of law backsliding and other serious violations of states' obligations. The Assembly has different tools at its disposal to respond to such instances. These include *internal* measures such as 'depriving or suspending the exercise of some of the rights of participation or representation' of a national delegation,[43] and non-ratification or annulment of the credentials of a national parliamentary delegation.[44] The ultimate sanction for PACE is to propose to the CM that the state in question be expelled from the CoE. We will refer to these penalising measures using the generic term 'sanctions'—a term not used in the Assembly's Rules of Procedure but referred to in PACE texts.[45]

In the past two decades, sanctions have only been used in response to one development, and took the mildest possible form. In April 2014, PACE condemned Russia's occupation of Ukrainian territory and annexation of Crimea,[46] and took the limited step of suspending the voting rights of the Russian delegation as well as its right to be represented in various PACE leadership bodies and participate in election observation missions.[47] Yet the Assembly stopped short of suspending the delegation's credentials, in order to keep dialogue open—a gesture that fell flat, since the Russian parliament decided not to send a delegation to PACE

[40] Council of Europe, Report of the Independent Investigation Body on the allegations of corruption within the Parliamentary Assembly, 15 April 2018.
[41] P Leach 'The Parliamentary Assembly of the Council of Europe' in *The Council of Europe: Its Laws and Policies*, S Schmahl and M Breuer (eds), (Oxford University Press 2017) 166, 167-169.
[42] Interview, 17 July 2019.
[43] Rule 10.1.c, PACE Rules of Procedure.
[44] Rule 10.1.b. Under Rule 8.2, the substantive grounds on which credentials may be challenged are: serious violation of the basic principles of the CoE [as set out in its Statute]; or persistent failure to honour obligations and commitments and lack of cooperation in the Assembly's monitoring procedure.
[45] Strengthening the decision-making process of the Parliamentary Assembly concerning credentials and voting, Report, Doc. 14900, 6 June 2019.
[46] Resolution 1990 (2014), Reconsideration on substantive grounds of the previously ratified credentials of the Russian delegation, 10 April 2014, para 4.
[47] Ibid, para 15.

from 2016 to 2019. While this was effectively a 'self-induced suspension of representation',[48] in response to PACE's limited sanction, Russia nevertheless went on to provoke a budgetary crisis at the CoE in 2017 by cancelling its annual payment of some €33 million. In June 2019, in what is widely regarded as a capitulation,[49] the Assembly voted to ratify the credentials of the Russian delegation without imposing any internal sanctions.[50]

During the same session, the Assembly effectively 'amputated itself'[51] by giving up its (already contested[52]) power to autonomously suspend a delegation's rights to vote, to speak and to be represented in the Assembly in the context of a challenge to, or reconsideration of, its credentials, leaving only a limited range of participation rights that can be taken away.[53] Nor are PACE's remaining powers of sanction safe from further 'amputation', requiring only a simple majority to be revoked.[54] Moreover, the use of these sanctions now seems an ever more remote prospect. This is because a new 'complementary procedure between the CM and the Parliamentary Assembly in response to a serious violation by a member State of its statutory obligations' foresees that these two bodies, together with the Secretary General of the CoE, would act in concert in considering sanctions.[55] It is premature to assess the likely effectiveness of this new procedure. Yet, strikingly, when voting down a renewed challenge, on substantive grounds, of the Russian delegation's credentials in January 2021,[56] the Assembly failed to even mention the possibility of imposing internal sanctions.[57] This omission

[48] K Dzehtsiarou and D Coffey, 'Suspension and Expulsion of Members of the Council of Europe: Difficult Decisions in Troubled Times' (2019) 68(2) *International and Comparative Law Quarterly* 443, 458.

[49] L Glas, 'Russia Left, Threatened and Won: Its Return to the Assembly Without Sanctions' (*Strasbourg Observers*, 2 July 2019): <https://strasbourgobservers.com/2019/07/02/russia-left-threatened-and-has-won-its-return-to-the-assembly-without-sanctions/>.

[50] Resolution 2292 (2019), Challenge, on substantive grounds, of the still unratified credentials of the parliamentary delegation of the Russian Federation, 26 June 2019, para 7.

[51] A Drzemczewski, 'The (Non-) Participation of Russian Parliamentarians in the Parliamentary Assembly of the Council of Europe: An Overview of Recent Developments' (2020) 20(20) *Revista do Instituto Brasileiro de Direitos Humanos* 48, 53.

[52] Ibid, footnote 22. In 2018, a confidential document prepared for the CM's attention by the CoE's Directorate of Legal Advice and Public International Law, stated (at para 59) that 'any decision entirely suspending participatory and/or representation rights of a parliamentary delegation can only be taken by the CM'. Like Drzemczewski, we view this argument as 'erroneous' and note that the document was prepared without consultation with the Assembly and was never officially transmitted to it.

[53] Resolution 2287 (2019), Strengthening the decision-making process of the Parliamentary Assembly concerning credentials and voting, 25 June 2019, para 10.

[54] Rule 41.1.c. of PACE's Rules of Procedure.

[55] Committee of Ministers, Complementary procedure between the Committee of Ministers and the Parliamentary Assembly in response to a serious violation by a member State of its statutory obligations, Appendix, CM/Del/Dec(2020)1366/1-app, 5 February 2020. At the time of writing, the Assembly cannot trigger the complementary procedure, pending required Rule changes due to be discussed at PACE's January 2021 session.

[56] Resolution 2363 (2021), Challenge, on substantive grounds, of the still unratified credentials of the parliamentary delegation of the Russian Federation, 28 January 2021. This move came just days after the Assembly amended its Rules of Procedure to set out, therein, the conditions for initiating and dealing with a proposal for the complementary joint procedure; Resolution 2360 (2021), Modification of the Assembly's Rules of Procedure – follow-up to Resolution 2319 (2020) on the Complementary joint procedure between the Committee of Ministers and the Parliamentary Assembly in response to a serious violation by a member State of its statutory obligations, 26 January 2021.

[57] L Glas, 'They did it again: Russia's continued presence in the PACE' (*Strasbourg Observers*, 23 February 2021): <https://strasbourgobservers.com/2021/02/23/they-did-it-again-russias-continued-presence-in-the-pace/>.

may indicate the Assembly's extreme trepidation about inflaming its relationship with Russia in particular, but it may also indicate that PACE has abandoned its former role as a 'first responder' to rule of law transgressions more generally, thus vindicating Nils Muižnieks' observation above. This, in turn, would suggest that 'complementarity' will effectively mean moving at the pace of the most cautious actor—traditionally, the CM, which is seen to often be 'unwilling or incapable … to take a principled "open stand" when confronted with major human rights violations in Member States.'[58]

All the signs are, then, that the Assembly is becoming ever less equipped to do what it has never done before; that is, to use sanctions in respect of *any* state in relation to rule of law backsliding. This justifies our focus below on the one tool that the Assembly *has* been prepared to consider, including in our four countries: monitoring.

2.4 PACE Monitoring of Rule of Law Backsliding in Hungary, Poland, Turkey and Azerbaijan

The Monitoring Committee first contemplated the use of full monitoring as a response to rule of law backsliding in 2011, when a cross-party group of delegates, excluding the European Democrat Group (EDG, now the European Conservatives Group and Democratic Alliance (EC/DA)), requested the opening of a full monitoring procedure in respect of Hungary. Their motion for a resolution[59] deplored 'serious setbacks' regarding the rule of law, since Victor Orbán's Fidesz party had assumed power the year before. Despite passing a resolution expressing 'serious and sustained concerns' about the 'sheer accumulation of reforms that aim to establish political control of most key institutions while in parallel weakening the system of checks and balances' in Hungary, the Assembly voted in 2013 against opening monitoring and resolved instead to take stock of progress in due course.[60] The Bureau of the Assembly (consisting inter alia of representatives of all political groups and committees, and responsible for coordinating PACE's activities) had opposed opening monitoring. The Monitoring Committee, having initially endorsed the call for opening full monitoring, changed its position by voting in favour of an amendment which rejected the option.[61] These positions were deplored by one Unified European Left (UEL) delegate as being motivated by a wish to 'help political allies'.[62] The 2013 decision set the course for Hungary to evade this level of scrutiny in the years to come. In 2015, having assessed the situation, PACE even decided to discontinue the 'special examination' which had followed the 2013 resolution.[63] Subsequent resolutions, passed in 2017[64] and 2018,[65] condemned Hungary, but without the Assembly

[58] Drzemczewski (n 51) 51.
[59] Serious setbacks in the fields of the rule of law and human rights in Hungary, Motion for a resolution, Doc. 12490, 25 January 2011.
[60] Resolution 1941 (2013), Request for the opening of a monitoring procedure in respect of Hungary, 25 June 2013, para 14.
[61] Request for the opening of a monitoring procedure in respect of Hungary, 25 June 2013, Vote on Amendment 2.
[62] Nikolaj Villumsen, Hungary debate 2013 (n 3).
[63] Resolution 2064 (2015), Situation in Hungary following the adoption of Assembly Resolution 1941 (2013), 24 June 2015, para 3.
[64] Resolution 2162 (2017), Alarming developments in Hungary: draft NGO law restricting civil society and possible closure of the European Central University, 27 April 2017.
[65] Resolution 2203 (2018), The progress of the Assembly's monitoring procedure (January-December 2017) and the periodic review of the honouring of obligations by Estonia, Greece, Hungary and Ireland, 25 January 2018.

reconsidering monitoring. As of February 2021, a periodic review report on Hungary is under preparation.[66]

Poland's descent into rule of law backsliding began with the victory of the Law and Justice Party (PiS) in October 2015, and unfolded in a similarly rapid fashion to Hungary. By January 2016, all political groups bar the EC/DA proposed that the Assembly hold an urgent debate on Poland; despite being supported by the Assembly's Bureau, their request failed in the Plenary.[67] Drzemczewski attributes this 'surprise' decision to a letter circulated within the Assembly by the speakers of the Polish Parliament shortly before the vote, which urged delegates to await a pending (and ultimately very critical) Venice Commission opinion relating to the independence and proper functioning of the Constitutional Tribunal.[68] Days after this abortive move, delegates resorted to the only other option for subjecting Poland to scrutiny—tabling a motion for a resolution, using the urgent mechanism created in 2013 as the fourth dimension of the monitoring procedure.[69] Strikingly, it took four years for their motion to result in a resolution (2.1)—a delay linked to frequent changes of rapporteurs[70] and fear of the report being seen to influence the 2019 Polish parliamentary elections.[71] Delegates lamented this delay, especially since the EU had (itself belatedly) taken action with the opening of an Article 7 procedure by the European Commission in December 2017.[72] When the draft resolution finally *did* come before the Assembly in 2020, a last minute amendment paved the way for putting Poland under full monitoring—support for which was strengthened by delegates' disquiet over the adoption, days earlier, of the 'muzzle act' which threatens judges with disciplinary action inter alia for criticising the authorities.[73]

In contrast to the protracted nature of the Assembly's consideration of Poland, in Turkey, it was dramatic events, the attempted coup d'état of July 2016 and the government's subsequent crackdown, that triggered an extraordinary 'current affairs' debate[74] at the Assembly's next plenary session in October.[75] The Assembly could have gone further, by

[66] Reports under preparation in the committees of the Parliamentary Assembly of the Council of Europe, Doc. AS/Inf(2021)05, 17 February 2021, 60.
[67] Proposal for debates under urgent procedure and on current affairs, Doc. AS(2016)CR01, 25 January 2016.
[68] A Drzemczewski, 'Erozja praworządności i niezawisłości sądów w Polsce od 2015 roku: reakcja Rady Europy - za mało, za późno?' in *Liber Amicorum in honour of Mirosław Wyrzykowski,* A Bodnar and A Ploszka (eds) (Wolters Kluwer 2020) 389.
[69] The functioning of democratic institutions in Poland, Motion for a resolution, Doc. 13978, 4 February 2016.
[70] See (n 27).
[71] Maryvonne Blondin, debate: The functioning of democratic institutions in Poland, 28 January 2020 provisional version [final document number might become available prior to publication] (henceforth 'Poland debate 2020').
[72] E.g. Frank Schwabe and Andreas Nick (Spokesperson for the EPP/CD), ibid.
[73] E.g. Krzysztof Truskolaski, ibid.
[74] The Assembly can exceptionally hold an 'urgent' debate or a 'current affairs' debate on matters not on its agenda. Urgent debates on a single country are particularly unusual, which makes them an important indicator of the Assembly's concern. Importantly, unlike current affairs debates, they give delegates the opportunity to vote on a resolution.
[75] A Donald and A-K Speck, 'Wholehearted? Half-hearted? The response from the Parliamentary Assembly of the Council of Europe to recent developments in Turkey', Conference paper presented at the FU Berlin/Hertie School of Governance Workshop on 'Responses to the Decay of the Rule of Law

holding an urgent debate, which would have given delegates the opportunity to vote on a resolution. Criticising this seemingly weak response, a member of the Socialists, Democrats and Greens (SOC) group argued that the Assembly had diminished itself, adding: 'The gloves need to come off'.[76] By April 2017, the gloves did come off, and the Assembly resolved to put Turkey back under full monitoring due to 'serious concerns' such as the mass detention of opposition politicians and journalists, and the bypassing of parliament through emergency decree laws.[77] The worsening situation of opposition politicians drew further condemnation in resolutions passed following urgent debates in January 2019[78] and October 2020,[79] and remains under scrutiny by the Legal Affairs Committee.[80]

Azerbaijan, under full monitoring since 2001, presents no key decision-making moment, but rather successive reports deploring wide-ranging abuses of the rule of law and human rights. In evidence, too, is the vulnerability of the procedure to political influence, which was exposed by the fact that four out of six co-rapporteurs who monitored Azerbaijan between 2012 and 2017 were later found by the independent corruption investigation to have breached the Codes of Conduct of the Monitoring Committee and for PACE rapporteurs.[81] Similar allegations were confirmed in respect of a rapporteur for the Legal Affairs Committee.[82] Despite allegedly allocating €30 million to buy influence,[83] the Azerbaijani regime's only clear-cut 'victory' in the Assembly was its successful lobbying in 2013 against a hard-hitting report by SOC member Christoph Strässer, which demanded the release of 85 presumed political prisoners—an 'outrageous' event, which is acknowledged to have left a stain on the Assembly's reputation.[84]

3. An Assembly Divided: Framing Arguments in the Plenary

The debates on the four states under review exemplify the high stakes involved in the public scrutiny that comes with PACE monitoring. In this section, we analyse the framing of argumentation in the Plenary of the Assembly, exposing the diametrically opposed views of the opponents (3.1) and proponents (3.2) of monitoring regarding the legitimacy and perceived impact of the procedure to counter rule of law backsliding.

---

and Human Rights Protections in Turkey: Exceptional or Symptomatic?', Freie Universität Berlin, 30 August 2019: <https://bit.ly/36NqAGnf>.

[76] Yves Cruchten, Current affairs debate: Situation in Turkey in the light of the attempted coup d'État, 13 October 2016, Doc. AS(2016)CR34 (henceforth 'Turkey current affairs debate').

[77] Resolution 2156 (2017) (n 9) para 38.

[78] Resolution 2260 (2019), The worsening situation of opposition politicians in Turkey: what can be done to protect their fundamental rights in a Council of Europe member State?, 24 January 2019.

[79] Resolution 2347 (2020), New crackdown on political opposition and civil dissent in Turkey: urgent need to safeguard Council of Europe standards, 23 October 2020.

[80] Should politicians be prosecuted for statements made in the exercise of their mandate?, report under preparation by the Legal Affairs Committee, Doc. AS/Inf(2021)05 (n 66) 15.

[81] Corruption Investigation Report (n 40) paras 77 and 582-609.

[82] Ibid, paras 597-609.

[83] Ibid, paras 205, 722.

[84] Stefan Schennach, debate under urgent procedure: Reported cases of political prisoners in Azerbaijan, 30 January 2020, provisional version [final document number might become available prior to publication].

3.1 Opponents of Monitoring

We observed above that some states under full monitoring (or, in Hungary's case, faced with that possibility) perceive it as punitive, humiliating and counterproductive. This view emerges with remarkable consistency in debates about Hungary, Poland, Turkey and Azerbaijan, in which pro-government delegates—and their allies—assign no value to the procedure whatsoever. The tendency is to dispute *any* criticism of the state's actions and push back against *all* exceptional treatment, imputing both ignorance and bad faith to proponents of monitoring.

Here, we identify four ways in which opponents of the procedure frame their arguments:

3.1.1 'You Don't Understand our Reality'

Those resisting monitoring have accused their critics of being blind to the pressures they face, both historical and proximate. Delegates sympathetic to the Polish and Hungarian governments have labelled opponents in the Assembly as ignorant about the countries' recent history, which purportedly justified drastic changes to the judicial system: as one PiS delegate argued, 'You have no idea what [you are] talking about. Most of you haven't gone through communism'.[85] For their part, pro-government Azerbaijani delegates and their allies have repeatedly invoked the conflict with Armenia over Nagorno-Karabakh as a reason why the country should be spared scrutiny. Turkish politicians, meanwhile, have alluded to both internal and external pressures—from coup plotters to the war in neighbouring Syria—to insist that monitoring would be inappropriate.

3.1.2 'You Are Punishing Us Unfairly Due to Political Motives'

Stronger opposition still to scrutiny through monitoring has been packaged in attacks against other delegates' alleged political biases. Delegates from Turkey's ruling Justice and Development Party (AKP) have repeatedly alleged that the Assembly has been 'hijacked by ... anti-Turkey representatives'.[86] Monitoring is thus characterised as 'an efficient tool to target and punish certain member States'.[87] Foreign Minister Mevlüt Çavuşoğlu, addressing the Assembly in October 2016, went so far as to say to a proponent of reopening monitoring that: 'People in Turkey think that you are with the coup plotters when you speak as you do'.[88]

Striking a similar tone, a PiS delegate accused the co-rapporteurs advocating the opening of monitoring in respect of Poland of letting themselves be 'manipulated into political games initiated by the [Polish] opposition'.[89] She was supported in this view by a delegate from Hungary's governing Fidesz party, who deplored the report as being 'subjective, politicised and biased'.[90] Hungarian delegates had used the same language seven years earlier when resisting the move to open monitoring in respect of their own country as an 'unjust and illegal' move.[91]

---

[85] Dominik Tarczyński, Poland debate 2020 (n 71).
[86] Zafer Sirakaya, ibid.
[87] Emine Nur Günay, ibid.
[88] Address by Mevlüt Çavuşoğlu, Minister for Foreign Affairs of Turkey (and former PACE President), Doc. AS(2016)CR32, 12 October 2016.
[89] Iwona Arent, Poland debate 2020 (n 71).
[90] Zsolt Csenger-Zalán, ibid.
[91] Tamás Gaugi Nagy, Hungary debate 2013 (n 3).

In its most glaring form, this rejection of any special scrutiny has been underpinned by denigration of the European institutions that have dared to utter criticism as being guided by foreign forces seeking domination. One Azerbaijani delegate accused 'the great powers' of using international organisations to wage 'a secret war against Azerbaijan … under the cover of human rights and democracy'.[92]

3.1.3 'Monitoring is a Tool of Liberals and Socialists to Attack Traditional European Values'

Driving the allegations of bad faith to yet another level, members of the Polish and Hungarian ruling parties have found outspoken allies in Conservatives from the UK in invoking a 'culture war', according to which monitoring is a tool to achieve 'conformism with social liberal ideas' in opposition to conservativism.[93] During the crucial 2013 debate in which Hungary evaded monitoring, ruling party members and their allies sought to justify constitutional amendments that the co-rapporteurs had called 'contentious and divisive' by reference to 'traditional European values' endorsed by most Hungarians.[94] The (then) Chair of the Legal Affairs Committee, a UK Conservative, invoked these 'traditional values' to argue that the call for monitoring was a 'proxy for anguish' among liberal delegates over an amendment which imposed a constitutional ban on same-sex marriage.[95]

Those on the conservative side of this culture war have also imputed criticism of reforms in Hungary to anti-democratic tendencies and an unwillingness to accept the rule of a party that had secured a two-thirds majority in parliament.[96] This argument was echoed in the debate that led to the opening of monitoring in respect of Poland, in which a PiS delegate claimed popular support for contentious justice 'reforms'.[97]

At stake in this culture war is perceived to be nothing less than the future of Europe, which, according to the conservative camp, should be politically diverse rather than homogenous, even if that means accommodating 'post-liberal democracies'[98] and rule by a single dominant party. The argument that Europe should accommodate political strongmen has been replicated in respect to Turkey; one UK Conservative member defended President Erdoğan's right to 'clamp down' on alleged opponents in the aftermath of the failed coup, adding: '[He] has asked for more powers … Let him have his powers'.[99] Opponents of monitoring further portray the impugned regimes as being under threat from 'global networks' wielding nefarious influence, especially the Open Society networks created by philanthropist George Soros.[100]

---

[92] Rafael Huseynov, debate: The functioning of democratic institutions in Azerbaijan, 23 June 2015, Doc. AS(2015)CR22 (henceforth 'Azerbaijan debate 2015').
[93] Edward Leigh, Poland debate 2020 (n 71).
[94] Idem, Hungary debate 2013 (n 3).
[95] Christopher Chope, ibid.
[96] Edward Leigh, debate: Situation in Hungary following the adoption of Assembly Resolution 1941 (2013), 24 June 2015, Doc. AS(2015)CR24 (henceforth 'Hungary debate 2015'). See also Mike Hancock, Hungary debate 2013 (n 3).
[97] Dominik Tarczyński, Poland debate 2020 (n 71).
[98] Zsolt Németh, debate: The progress of the Assembly's monitoring procedure (January–December 2017) and the periodic review of the honouring of obligations by Estonia, Greece, Hungary and Ireland, 25 January 2018, Doc. AS(2018)CR08 (henceforth 'monitoring debate 2018').
[99] Ian Liddell-Grainger, Turkey current affairs debate (n 76).
[100] Zsolt Németh, debate under urgent procedure: Alarming developments in Hungary: draft NGO law restricting civil society and possible closure of the European Central University, 27 April 2017, Doc. AS(2017)CR16 (henceforth 'Hungary debate 2017').

Delegates from Hungary and Poland in particular have rejected the notion that established democracies are superior to the states under (the prospect of) monitoring. A PiS delegate expressed his contempt for repeated outbursts of civil unrest in France, observing that: 'We don't have burning cars in a war zone, we don't have riots ... So, please, take care of yourself. We are good'.[101] This perspective descends into a relativist argument that, since all states have problems, full monitoring of any single state is arbitrary—and even self-defeating if it devalues the currency of the procedure.[102]

3.1.4 'Monitoring is Inherently Confrontational and Should not Happen At All'

The opponents of full monitoring regard it as counterproductive not only where it targets the 'wrong' countries, but also because it is seen as inherently confrontational and the antithesis of genuine efforts to extend a helping hand to young or struggling democracies. In the debates on our four countries, delegates made this argument not only in respect of their own country, but also in defence of others. For example, a Hungarian Jobbik delegate appealed for Azerbaijan to be spared from the 'pressurising, blackmailing or making excessive criticisms' that allegedly come with monitoring, and instead be given time to 'mature in their development'.[103]

According to this viewpoint, the Assembly should not be 'a watchdog that bites [its] companions'.[104] As long as states are cooperating with the CoE, it is argued, rigorous monitoring is simply unnecessary. A UK Conservative delegate put this view bluntly when defending his Hungarian colleagues: 'If the Hungarian Government was being intransigent and sticking two fingers up to us, I could understand the case for monitoring, but that is not the case.'[105] Moreover, the argument continues, monitoring should be reserved only for 'urgent' cases because, if used disproportionately, it could 'prompt the rejection of this institution'.[106] The risk of driving countries away was also invoked in the case of Turkey, with a Hungarian delegate arguing in 2017 that 'symbolically stigmatising' Turkey by reopening monitoring could lead it to 'retreat from the Council of Europe, as Russia has retreated'.[107] Indeed, the reopening decision *was* a key contributor to Turkey rescinding its status as a *grand payeur*, or major contributor, to the organisation's budget. As former Commissioner Nils Muižnieks recalls:

> The [Turkish government was] furious because they saw themselves as a big, important country... They were almost a founding member [of the Council of Europe]. To reopen monitoring was a bridge too far.[108]

[101] Dominik Tarczyński, Poland debate 2020 (n 71).
[102] Robert Walter, Hungary debate 2013 (n 3).
[103] Márton Gyöngyösi, Azerbaijan debate 2015 (n 92).
[104] Luca Volontè, Hungary debate 2013 (n 3). Mr Volontè, an Italian member of the EPP/CD group, was subsequently prosecuted for allegedly accepting more than €2 million in bribes from Azerbaijan.
[105] Christopher Chope, Hungary debate 2013 (n 3).
[106] Jean-Charles Allavena, ibid.
[107] Zsolt Németh, debate: The functioning of democratic institutions in Turkey, 25 April 2017, Doc. AS(2017)CR12.
[108] Interview, 17 July 2019.

3.2 Proponents of monitoring

How, then, have the advocates of monitoring responded to these arguments? We shall see below that they have been uncompromising in defending the procedure against the charge that it is punitive and instead promoted it as the Assembly's principal means of defending democracy, the rule of law and human rights.

In response to the first argument of the opponents of monitoring, that the pressures they face are misunderstood, proponents acknowledge the existence of such pressures, but reject any attempt to use them as an alibi for rule of law backsliding. In a 2015 debate on Azerbaijan, for example, a French member of the European People's Party (EPP/CD) group ventured that: 'The conflict with Armenia has become a useful argument for Baku to put off any attempts at democratisation and to justify various coercive measures in the name of stability'.[109]

Pro-monitoring delegates likewise resist the second argument, i.e. that they seek to punish states by subjecting them to the procedure. In debates on all four countries, they have insisted that monitoring is not a sanction. For example, addressing herself to the Polish delegation in 2020, co-rapporteur Þórhildur Sunna Ævarsdóttir recalled that Poland was part of the 'democratic family' of the CoE, adding: '[P]lease don't mistake our concern for animosity... The motivation behind our concern is love.'[110] Elsewhere, in respect of Turkey, reopening of the monitoring procedure was described as a way to 'stand up for the citizens of Turkey'.[111]

This defence of the procedure has been developed in response to the third conservative 'frame' by delegates who have proposed a richer concept of 'democracy' than one solely based on electoral majority. They reject attempts to use a narrower notion of democracy as a trump card over rule of law and human rights concerns. Accordingly, democracy requires not only free elections, but also effective checks and balances and the protection of minority rights, 'so as to avoid the dictatorship of the majority'.[112] The expunging of minority rights, shrinking of civic spaces, and assaults on the independence of the judiciary cannot, according to this perspective, be justified in pursuit of a politically heterogenous Europe. In this sense, advocates of monitoring seem to recognise the existence of a culture war which, for some, constitutes an existential struggle between liberal democracies and the 'dark shadow'[113] of populism. One Swedish delegate, later co-rapporteur for Poland in 2020, spoke in chilling terms about this threat in the 2017 debate on Hungary:

> That shadow ... is terrifying. Democracy is being systematically dismantled and aggressive populist ideas are growing stronger. ... If we do not push back ..., a new era will start in Europe—a darker era.[114]

A year later, a Greek parliamentarian debating Hungary reiterated that full monitoring would be 'a tool with a serious impact' in face of 'dark vision of fascism'.[115] It is all the more striking

[109] Nicole Duranton, Azerbaijan debate 2015 (n 92).
[110] Poland debate 2020 (n 71).
[111] Michael Jensen, Turkey current affairs debate (n 76).
[112] Claude Kern, monitoring debate 2018 (n 98).
[113] Azadeh Rojhan Gustafsson, Hungary debate 2017 (n 100).
[114] Ibid.
[115] Ioanneta Kavvadia, monitoring debate 2018 (n 98).

that, despite these dire warnings, the Assembly has not, since 2013, considered this 'strongest option available'[116] for Hungary, as it finally did for Poland in 2020.

The Assembly's failure to apply the procedure for Hungary shows that the fourth contention of its opponents—that full monitoring should be used sparingly, if at all—has sometimes prevailed over counter-arguments. The decision on Hungary was lamented by a Swiss delegate, who warned during the 2013 debate that reserving monitoring for the worst imaginable situations would mean downplaying other serious deficiencies:

> Are the criteria to be as excessive as loss of life before we can launch a monitoring procedure? ... What strikes me about the situation in Hungary is that we seem to be trivialising violations of human rights—freedom of expression violations, racism and even anti-Semitism.[117]

Such abuses can, the delegate added, be the harbingers of yet worse violations, not only in the state concerned but also elsewhere. Notwithstanding the formal nature of monitoring as a state-by-state procedure, then, its proponents view it in a more interconnected fashion. As one delegate argued in 2017: '[W]e cannot possibly be credible in our criticism of countries such as Turkey or Russia if we look away from developments in Hungary.'[118] Perhaps in response to PACE's inertia regarding Hungary, pro-monitoring delegates made a point of portraying Poland in 2020 as a 'test case'[119] for the Assembly's credibility in dealing with 'broken democracies',[120] since regressive reforms *any*where undermined the CoE's very values and principles *every*where. In this sense, monitoring is perceived as a 'core business'[121] of the Assembly on which its credibility hangs. Foregoing its use would leave the ground to the EU and other international players; '[t]hat will weaken our Organisation, which cannot be the Assembly's wish.'[122]

Yet, PACE evidently *has* no common wish; rather, it is a polarised institution in which delegates articulate divergent visions of Europe's future—and the role of the Assembly and the monitoring procedure in shaping it. The extent of divisions in the Assembly is apparent from the tone of the debates. Opponents of monitoring have no compunction about mudslinging against other states and are frequently contemptuous of the procedure as a means to tackle rule of law backsliding. Some have gone so far as to suggest that the Assembly should cease monitoring altogether, leaving it instead to the Venice Commission,[123] purportedly out of concern for PACE's stretched budget.[124] A former Chair of the Monitoring Committee deplored such suggestions, insisting that:

> Countries must go through monitoring and post-monitoring in order to join the club of countries that are 100% democratic. There is no alternative; it is a *sine qua non*… It is

[116] Frank Schwabe, Poland debate 2020 (n 71).
[117] Luc Recordon, Hungary debate 2013 (n 3).
[118] Tobias Billström, Hungary debate 2017 (n 100).
[119] Momodou Malcolm Jallow and Iulian Bulai, Poland debate 2020 (n 71).
[120] Mr Georgios Katrougkalos, ibid.
[121] Marina Schuster, Hungary debate 2013 (n 3).
[122] Mailis Reps, ibid.
[123] Robert Walter, ibid.
[124] Zsolt Csenger-Zalán, monitoring debate 2018 (n 98).

> important that this activity is ... not the subject of blackmail concerning the Organisation's funding.[125]

We have seen that while the Assembly took the bold step of reopening full monitoring in respect of Turkey and—after a long delay—opening full monitoring in respect of Poland, it has not even debated it in respect of Hungary since 2013. To explore the reasons for this mixed picture, the next section analyses the ways in which the argumentation set out above has translated into politics on the floor—and in the backrooms—of the Assembly, in which states and party groups have coordinated either to intensify scrutiny or frustrate it.

4. Gaining Influence in the Assembly

From the point of inception of an Assembly text[126] until the final vote in the Plenary, there is no shortage of opportunities to gain political influence. A motion for a resolution can be strangled at birth by being either rejected by the Bureau,[127] or merged with an ongoing rapporteurship, thereby diminishing its force. Political bargaining also extends to which committee is tasked with preparing a report,[128] and whether other committees are seized for an opinion. At the committee stage, things may get even more political: the appointment of rapporteurs can predetermine the outcome of an often years-long monitoring process. Their draft texts form the basis of discussion in the committee(s) and ultimately in the Plenary. Their explanatory memoranda, which contain their substantive analyses of the situation in the countries concerned, are not voted on and cannot be amended; the only way for delegates to register objection is by means of rarely used dissenting opinions.[129] Amendments can, however, be tabled in respect of the politically more salient draft resolutions, as well as draft recommendations to the CM—and they can decisively reshape these texts. Delegates fight hard over rival amendments at the committee stage, knowing that, once the matter reaches the Plenary, voting tends to be in line with the positions taken on the amendments by the committee that prepared the texts.

These political fault lines emerge from the verbatim records of plenary debates, in which delegates occasionally refer to the bargaining that takes place in committees. The process is otherwise opaque, since the Monitoring Committee meets *in camera*, and other committees, too, can restrict the attendance of observers.[130] Moreover, as a rule, the minutes of committee meetings are not in the public domain.[131] This imposes limitations on the ability of researchers to fully appreciate the political machinations that, cumulatively, determine the outcome of debates about monitoring.

---

[125] Cezar Florin Preda, ibid.

[126] A rapporteur mandate may stem from a motion for a resolution (Rule 25.2 of PACE's Rules of Procedure) or a previous Assembly resolution.

[127] The Bureau comprises the President of the Assembly, the 20 Vice-Presidents, the Chairpersons of the six political groups and the nine committee Chairpersons.

[128] Rule 26 of PACE's Rules of Procedure.

[129] Rule 50.4 of PACE's Rules of Procedure.

[130] Rule 48.3 of PACE's Rules of Procedure.

[131] Rule XVI.i, Additional provisions relating to documents, Complementary texts.

Despite this constraint, much can be gleaned about the process from an analysis not only of verbatim records, but also compendia of amendments and voting results. What emerges, in particular, is the significance of the role of rapporteurs (4.1) and the varied means that political and country alliances use to exert influence (4.2). The risk of politicisation is ever present, and requires a strong secretariat to mitigate it by acting as a guardian of the procedure (4.3).

4.1 The Power of Rapporteurship

The rules determining the 'life cycle' of an Assembly report give rapporteurs considerable power to 'set the tone'—from conciliatory to condemnatory—and yield influence over the breadth and depth of review.

Azerbaijan presents a glaring example of the politicisation of rapporteurship. The 2018 corruption report reveals, for example, how a Belgian Alliance of Liberals and Democrats for Europe (ALDE) member, Alain Destexhe, used his position as Chair of the Legal Affairs Committee to manoeuvre himself to become the rapporteur on Azerbaijan's 2014 crackdown against dissenting voices, which coincided with the country's Chairmanship of the CoE.[132] Once appointed, Mr Destexhe engaged in conduct which betrayed the fact that he had come under improper influence by the Azerbaijani regime, inter alia breaking protocol by excluding secretariat members from a meeting he held with President Aliyev, while initially refusing to meet NGOs.[133] Subsequently, he made last minute changes to the draft resolution, which watered down the criticism of Azerbaijan.[134] In fact, his texts were so doctored in the regime's interest that a group of delegates from various countries and political groups went so far as to express a dissenting opinion, warning that the Assembly could not address the 'grave concerns' at stake 'as long as we keep publishing reports which fail to name the root causes'.[135]

Rapporteurs have also exerted influence in more subtle ways. The rapporteur on Hungary in 2015, UK Conservative Robert Walter, presented a draft resolution that was apparently met with approval by Hungarian ruling party members, who tabled no amendments.[136] In the Plenary debate, Mr Walter opposed successive amendments that aimed to strengthen and update the resolution, most of which were proposed by the two committees that had been seized for opinion and would normally be accorded more weight than amendments proposed by individual members.[137] In the same debate, Walter insisted that his mandate was limited to following up on specific areas identified in the 2013 resolution in which the Assembly, having rejected the full monitoring option, resolved to keep Hungary under review. Accordingly, he spoke against amendments lamenting the spread of racism and extremism and the removal of checks and balances which had marred the 2014 general elections, even where they

[132] Corruption Investigation Report (n 40) para 117.
[133] Ibid, paras 118-20.
[134] Ibid, paras 122-3.
[135] Azerbaijan's Chairmanship of the Council of Europe: what follow-up on respect for human rights?, Report, Doc. 14397, 18 September 2017, Appendix 1. In fact, no fewer than three dissenting opinions were expressed to Alain Destexhe's report.
[136] Monitoring Committee, Situation in Hungary following the adoption of Assembly Resolution 1941 (2013), Report, Doc. 13806, 8 June 2015. See also compendium of amendments, Doc. 13806, 23 June 2015.
[137] Robert Walter, Hungary debate 2015 (n 96).

emanated from reports of other CoE bodies and the OSCE. This narrow conception of his mandate helped pave the way for the Assembly to lift its special examination of Hungary in 2015, meaning that, despite multiplying concerns about rule of law backsliding, the country has since only been subject to the routine periodic review process.

4.2 Alliances Across Countries and Political Groups

Delegates have also used amendments as a tool of influence in debates on all four states under review—either to blunt criticism or sharpen it. The draft resolution that called for reopening monitoring in respect of Turkey in 2017 attracted a staggering 62 amendments; more than half of these were proposed by AKP members, all but two of which were defeated. In the 2020 debate on Poland that led to the opening of monitoring, 46 amendments were introduced to the draft resolution, three quarters of them by PiS delegates. The attempts by PiS to water down the criticism were singularly unsuccessful; only one of its amendments passed. By contrast, the pro-Fidesz amendments to the draft resolution which proposed placing Hungary under monitoring in 2013 were fewer in number but more successful: 20 out of 22 amendments sought to weaken it, 14 of which succeeded, including the all-important amendment which meant that Hungary escaped the procedure.[138]

Three factors may explain the comparable success of the pro-Fidesz amendments. First, they were more selective and carefully crafted in proposing alternative wording, rather than being wrecking amendments. For example, one amendment successfully replaced a sentence which regretted 'contentious and divisive' constitutional provisions with one which justified these provisions as being based on 'traditional European values', and having been adopted by a 'democratic two-thirds majority' in parliament.[139] This also shows, secondly, that in justifying the controversial reforms, the amendments mirrored exactly the rhetorical frames we identified in 3.1. It is almost as if their sponsors were, already in 2013, drafting the ideological defence for what one Hungarian delegate would later call 'post-liberal democracies'.[140] Thirdly, their sponsors were a pool of right-leaning (EPP/CD and EDG) delegates from several countries, many of whom were longstanding and experienced members of the Assembly.

The debates on Poland and Turkey tell a different story. The numerous amendments that sought to weaken or negate the respective resolutions to (re)open monitoring were scattergun in nature; some proposed pedantic changes to the language used, while others sought wholesale deletion of critical paragraphs.[141] Moreover, these amendments were, without exception, sponsored by ruling party delegates themselves, without support from allies from other national delegations.

In terms of how party groups have lined up in crucial votes in the Assembly, the strongest supporters of the more rigorous form of monitoring have been the left-leaning party groups,

[138] Request for the opening of a monitoring procedure in respect of Hungary, Compendium of amendments, Doc. 13229, 24 June 2013.
[139] Ibid, amendment 6.
[140] Németh (n 98).
[141] The functioning of democratic institutions in Poland, Compendium of amendments, Doc. 15025, 27 January 2020; The functioning of democratic institutions in Turkey, Compendium of amendments, Doc. 14282, 25 April 2017.

UEL and SOC, followed by the liberal ALDE group, while the strongest critics of the procedure can be found among the right-leaning parties. Conservative members of the EC/DA group were unanimous in opposing placing Hungary under monitoring,[142] and strongly resisted the move in respect of Turkey[143] and, to an even greater extent, Poland.[144] At the forefront of articulating the EC/DA position have been Conservatives from the UK, as witnessed by their prominent contributions to the debates on Hungary, Turkey and Poland analysed in section 3.1. They have been among the key ideological defenders of the illiberal reforms in these countries and, by the same token, detractors of the scrutiny that comes with monitoring procedure. Anti-EU sentiment prevalent within UK Conservatives has also seeped into debates in the Assembly, with one delegate expressing 'a strong affinity with the Hungarian prime minister's view of Europe'[145] and warning the CoE against 'enforced conformity' with liberalism as, he alleged, the EU had pursued.[146]

The EPP/CD's position, for its part, has been more fluid. The group overwhelmingly resisted monitoring of Hungary in 2013.[147] As regards Turkey in 2017, the group's collective position was to oppose reopening monitoring; yet, ultimately, fewer than half of EPP/CD delegates who voted supported that position.[148] By the time of the vote on Poland in 2020, the group supported the opening of monitoring, with all EPP/CD delegates who spoke (barring one Hungarian delegate) using strong language to condemn the PiS regime—a decisive factor in its defeat.[149] Thus, while the EC/DA and its predecessor appear to be opposed to monitoring as a matter of policy, the EPP/CD has instead taken a country-by-country approach, which has evolved over time.

More durable than party group alliances have been alliances formed between national delegations. This has been most pronounced in the way that Azerbaijani delegates have voted in favour of the Erdoğan regime in Turkey. Indeed, by January 2019, when support for Turkey had collapsed in the Assembly, it was *only* Azerbaijani delegates who voted with the AKP on the report on the repression of opposition politicians.[150] Azerbaijan's support for Turkey has been reciprocated; in fact, Azerbaijan has garnered support not only from Turkish ruling party delegates, but also from members of the Turkish opposition—even after the caviar diplomacy scandal had broken.[151] Mutual support has also been evident between Hungarian and Polish

[142] See (n 61).
[143] The worsening situation of opposition politicians in Turkey: what can be done to protect their fundamental rights in a Council of Europe member State?, 24 January 2019, Vote on amendments 51 and 55.
[144] The functioning of democratic institutions in Poland, 27 January 2020, Vote on Amendment 39.
[145] Edward Leigh, Hungary debate 2015 (n 96).
[146] Idem, Poland debate 2020 (n 71).
[147] The crucial amendment that blocked the opening of monitoring was supported by 73 out of the 80 EPP/CD members who voted (with five against and two abstentions). See (n 61).
[148] 26 EPP/CD delegates supported the amendment which would have spared Turkey from full monitoring, with 21 opposing it and nine abstaining. See Vote on Amendment 51 (n 142).
[149] The EPP/CD's vote on Amendment 39 was 32 in favour of opening monitoring, nine against (four of whom were PiS members) and five abstentions. See (n 144).
[150] The worsening situation of opposition politicians in Turkey: what can be done to protect their fundamental rights in a Council of Europe member State?, Vote on Resolution.
[151] See, e.g., Reported cases of political prisoners in Azerbaijan, 30 January 2020.

pro-government delegates, with PiS delegates opposing the critical resolution of Hungary in 2017 and Fidesz delegates voting against monitoring of Poland in 2020.[152]

What emerges from this section is that both party and country alliances go to great lengths to instrumentalise the procedures of the Assembly when it comes to monitoring, from the more hidden, earlier stages of tabling motions and appointing rapporteurs through to the public game of seeking to influence voting on the Assembly floor.

4.3 Countering Politicisation: the Secretariat

In this politicised environment, the secretariat of the Monitoring Committee is critically important, being a repository of knowledge and institutional memory. Throughout the life cycle of a rapporteur mandate, secretariat members perform a range of functions: they remind committee members of the rules governing the appointment of rapporteurs and research the brief of the rapporteur, including by committee hearings and country visits. The secretariat also prepares reports, draft resolutions and recommendations—texts that may well reach the committee (and ultimately the Plenary) without substantive alterations by the rapporteur. In the final stages, it assists the rapporteur in taking position on amendments, and prepares speaking notes for them.[153] In carrying out these functions, the secretariat fulfils what has elsewhere been described as the role of a 'technocratic norm guardian';[154] that is, through its administrative and interpretive functions, it provides a 'firewall' against attempts to manipulate the Committee's work, whether on the corridors or on the floor of the Assembly. The Destexhe affair noted in section 4.1 provides a rare example of the damage that can be done when a rapporteur breaks that firewall by circumventing the secretariat. The fact that this 'firewall' is formed of only four staff members responsible for rapporteurships across 47 states indicates the procedure's vulnerability to politicisation.

5. PACE's response to rule of law backsliding: *quo vadis?*

This article focused on the responses of PACE to rule of law backsliding in four states through its monitoring procedure over the past decade. Our concluding section looks ahead, and argues that, in view of its inherent institutional and political constraints, this procedure requires root and branch reappraisal if the Assembly is to rise to the challenge posed to the CoE's values by rule of law backsliding in the next decade.

There is no doubting the political attention the procedure attracts. PACE delegates go to remarkable lengths to frame the debate about monitoring and get their way in the Assembly. Azerbaijan's 30-million-euro expenditure is just the most extreme example of a state attempting to instrumentalise the Assembly, including the monitoring procedure, despite the

[152] See (n 61) and (n 144).

[153] These observations are based on the first-hand experience of Anne-Katrin Speck, who was Co-Secretary of the Committee on Legal Affairs and Human Rights in the Parliamentary Assembly in 2014-15.

[154] B Çalı and A Koch, 'Foxes Guarding the Foxes? The Peer Review of Human Rights Judgments by the Committee of Ministers of the Council of Europe' (2014) 14(2) *Human Rights Law Review* 301, 322.

uncertainty of success (Azerbaijan having 'won' only one vote in the past decade). The stakes are so high because, with sanctions de facto being regarded as unthinkable, monitoring is the sole *realistic* means for the Assembly to respond to rule of law backsliding, and hence the arena in which parliamentarians from all national and party alliances battle.

So vehemently contested is PACE monitoring that it is portrayed as anything from a tool of punishment and debasement to a means by which parliamentarians can extend a 'helping hand' to their peers. The tone of debate on the floor of the Plenary has, as we saw, been bitter and debates have also alluded to divisions behind the closed doors of the Bureau of the Assembly and the Monitoring Committee.[155] Proponents of monitoring themselves invoke it in radically different ways: at one moment, it is no more than a routine 'mechanism in the Rules of Procedure to follow the situation in a country';[156] at another, it is nothing less than a bulwark against 'the dark vision of fascism'.[157]

In respect of the latter, it is doubtful that the Assembly's monitoring procedure can bear the weight of such expectation. The Assembly's scrutiny through monitoring is episodic, since even countries under full monitoring only come under the spotlight every two years, and the urgent dimension of monitoring has only been used once (in respect of Poland in 2020). Further, the Assembly, as a political venue, affords a platform for both backsliding states (and their allies) and those that seek to name and shame them—and the loudest and best organised voices may prevail at any given point. We have also seen the vulnerability to manipulation of the Assembly, exemplified by the caviar diplomacy scandal and Hungary's evasion of full monitoring. Recall, too, that the procedure can be excessively slow, as evinced by the four years of egregious rule of law backsliding before Poland was eventually brought under full monitoring. Not only that, but the quality and motivation of its key protagonists—the rapporteurs—has, at times, been highly dubious. Meanwhile, an overstretched secretariat can only do so much to mitigate these flaws.

It may come as little surprise, then, that the Assembly's authority is contested even among its own members. This is in contrast to the more apolitical Venice Commission, which enjoys almost universal respect in the Assembly and whose opinions have strongly influenced the wording of PACE resolutions.[158] Indeed, the Venice Commission's opinions are invoked not only by pro-monitoring delegates but also—selectively—by delegates from backsliding states, who would prefer scrutiny to be left entirely to the Commission. Yet, for all its authority, the Venice Commission's opinions have, in practice, prompted little or no action in our four states in the past decade.[159] With the Commission's mandate in respect of specific countries being limited to responding to requests for opinions, there is little it can do in the face of state inaction. By contrast, PACE has the autonomy and means to maintain public pressure on states. Yet this creates an ever-present tension: between insisting on states upholding the CoE standards and the risk that an uncompromising stance may cause backsliding states to

[155] E.g. Mailis Reps, Hungary debate 2013 (n 3); Maria Guzenina and Axel Fischer, Hungary debate 2015 (n 96).
[156] Reps (n 3).
[157] Recordon (n 117).
[158] See also E Turkut in this special issue.
[159] Ibid.

cease cooperation altogether. Drzemczewski uses the analogy of an elastic band to argue that:

> The opportunity must be seized to 'stretch' a member state to the limits of what is possible at a given moment of time, so as to ensure compliance with its human rights commitments, without the elastic band snapping...[160]

So, how far has the Assembly stretched the 'elastic band' through the use of monitoring? The clearest illustration of the risk of states disengaging is Turkey's decision, in 2017, to rescind its status as *grand payeur*, partly in retaliation for the Assembly's decision to re-open monitoring. Azerbaijan, too, has demonstrated its open contempt for the Assembly (and the CoE as a whole), President Aliyev stating that a critical PACE resolution in 2020 'has … no more value than a piece of paper'.[161] Poland's behaviour since January 2020[162] likewise shows that the elastic band of full monitoring is not strong enough to constrain the behaviour of states hellbent on eroding the rule of law.

Such disdain for monitoring is perhaps unsurprising. We recall that the procedure was initiated in an era when newly democratising states were eager to become part of the 'family' of states brought together by a shared commitment to the CoE's values—and hence willing to submit that commitment to the scrutiny of monitoring. That sense of collective endeavour has fractured: today, some CoE member states are in free fall away from previously cherished values. As a result, the monitoring procedure has to carry the weight of both the 'legacy' issues that have languished on the Monitoring Committee's agenda for more than two decades, and new, urgent threats to the rule of law and human rights. In this radically changed context, the procedure itself has been stretched beyond the role for which it was designed. The time is ripe for the Assembly to consider root-and-branch reform of monitoring—and this must, in turn, be grounded in evidence of how far the procedure has succeeded so far in its stated goal of safeguarding the highest standards in terms of democracy, the rule of law and human rights. Regrettably, such evidence has been lacking from debates in the Assembly, where any positive impact of the procedure is more asserted than demonstrated.

First, the Monitoring Committee should critically appraise the impact of the periodic review process (for the 33 countries presently not under full monitoring or engaged in post-monitoring dialogue) to assess whether it justifies the use of scarce secretariat and rapporteur resources. The Committee has acknowledged that periodic review reports have had little impact in the past fifteen years. To address this deficit, the procedure has been reformed to make it more targeted and higher profile. It is premature to assess the impact of these reforms; we submit that this assessment must address two questions: (i) does basing the selection of states for periodic review on substantive criteria suffice to ensure that the process is immune from politicisation?; and (ii) does the periodic review process fulfil the double imperative of shining a spotlight on states showing early warning signs of rule of law backsliding whilst also being of value in less problematic states? We doubt that these questions will be answered in the affirmative. We acknowledge the value of peer-review mechanisms in which all states 'in the

[160] Drzemczewski (n 29) 138.
[161] 'Ilham Aliyev received delegation led by Turkish Foreign Minister' (Official web-site of President of Azerbaijan Republic, 5 February 2020).
[162] See, e.g., European Commission, 'October infringements package: key decisions', 30 October 2020.

club' are subject to the same level of scrutiny. PACE's periodic review process, however, does not fit this bill, since it already excludes countries under other, more rigorous forms of monitoring. Moreover, even in respect of the 33 countries under this procedure, even-handedness does not seem guaranteed, given the risk of politicisation. Rather, the danger is that, by striving to appear even-handed, the Monitoring Committee will squander resources that could be devoted to dealing with serious—and multiplying—threats to the rule of law, human rights and democracy. We submit such threats in countries not under full monitoring or engaged in post-monitoring dialogue may be better addressed through more systematic use of the fourth aspect of monitoring, which is designed to deal with situations calling for an urgent response.

Secondly, in respect of the use of full monitoring, we submit that the speed and severity with which the rule of law is unravelling in Europe's democratic space requires the Assembly to sharpen its resolve and not be cowed by the pushback against the procedure. At the time of writing, there are two imminent tests of the Assembly's commitment to counter rule of law backsliding: to apply the full monitoring procedure rigorously with respect to Poland, and to finally revisit the issue of placing Hungary under full monitoring. Beyond that, we suggest that the Assembly should 'take the gloves off' by, for the first time, bringing its internal sanctions onto the table as a response to rule of law backsliding. When confronted by states like Azerbaijan and Turkey that have persisted with backsliding despite being under full monitoring, the Assembly needs to signal its readiness to employ all of its available tools, and stop regarding sanctions as unthinkable. Raising the stakes by, for instance, threatening to revoke the credentials of a state's PACE delegation not only has the potential to bring the worst backsliders into line, but might also reduce the perceived stigma of monitoring and make it less politically explosive. We acknowledge that this strategy carries the risk that states targeted by sanctions might respond negatively by 'playing the blame game'[163] and mobilising support for their illiberal agendas both domestically and among ideological allies—an effect that has, indeed, been observed in Turkey since the decision to reopen the full monitoring procedure.[164] Yet, we note also that the damage to the CoE's legitimacy and effectiveness caused by states that persistently violate its principles has led some commentators to propose that the organisation should consider the ultimate sanction of suspending or expelling such states, where that option is assessed as less detrimental than the status quo.[165] This form of risk assessment is one that, we submit, PACE itself should engage in when considering the less explosive option of deploying its internal sanctions as a lever to bring about better behaviour by particular states at particular times.

We are, however, pessimistic about the prospects of sanctions entering the debate in the Assembly. If anything, PACE has moved further away from flexing its muscles; recall how PACE has relinquished certain of its powers and made others subject to the CM's willingness to act in tandem with it. Still, PACE retains an autonomous power of sanction and should be prepared to use it. The Assembly cannot transcend the constraints that come with being a

[163] B Schlipphak and O Oliver Treib, 'Playing the Blame Game on Brussels: The domestic political effects of EU interventions against democratic backsliding' (2017) 24(3) *Journal of European Public Policy* 352.

[164] D Soyaltin-Colella, '(Un-)Democratic Change and Use of Social Sanctions for Domestic Politics: Council of Europe Monitoring in Turkey (2020) *International Political Science Review* 1. [advance online publication - volume and page numbers to follow]

[165] Dzehtsiarou and Coffey (n 48).

uniquely political voice within the CoE's monitoring mechanisms. The imperative is to seize the 'precious opportunities'[166] offered by peer-to-peer monitoring within a deliberative body of democratically elected representatives. After a decade of scandal, this is a prerequisite for the Assembly to reclaim its reputation as a guardian of the values of the Council of Europe.

[166] Monitoring Committee (n 35) para 64.