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Europeanization through norm promotion by the Council of Europe in the case of Ukraine

DR. VIRA RATSIBORYNSKA³

UNIVERSITY OF STRASBOURG,

FRANCE

VIRA.RATSIBORYNSKA@ETU.UNISTRA.FR

Abstract: *The Council of Europe plays an important role in democracy promotion in the Eastern neighbourhood. As a "changer of norms" the Council of Europe can have an important impact on the rule of law, the approximation of national legislation to the EU legislation, the electoral code and democracy in the Eastern Partnership countries. Ukraine, being a member of the Council of Europe since 1995, has accepted the legally binding mechanisms of the Council in order to adhere to the practices of this international organization in the adaptation of domestic norms to EU rules and standards. Ukraine's absorption capacity however remains limited due to high adoption costs for the country and the non-proactive conditionality mechanisms of the Council of Europe. Such a limited capacity of a country to conform to EU norms represents a challenge for the normative power of the Council of Europe and undermines its role in the promotion of democracy in the Eastern Partnership countries.*

Key words: the Council of Europe, monitoring, conditionality, Europeanization, Ukraine

1. THE COUNCIL OF EUROPE, A NORM PROMOTER IN THE EU AND ITS NEIGHBOURHOOD

„Building a Europe while avoiding to create new dividing lines" is the challenge of the 21st century and the most important mission of the Council of Europe¹. This historic mission stems from the unique position of the Council, the one and only pan-European political organisation that brings together almost all countries on the continent on an equal footing. This gathering is centred around and based on shared values and principles and binds the countries to each other through shared commitments and obligations.

The Council of Europe, founded in 1949, is the oldest intergovernmental and parliamentary organisation of the continent. It has 47 Member States, 16 of them from Central and Eastern Europe that have been integrated into the Council since the historic events of 1989-1990.

The vocation of the organisation is multifaceted. It works on the greater part of the issues that concern the European society: Human rights, judicial cooperation, local and regional powers, social issues, culture etc.

The Council of Europe is the only European organisation whose purpose and reason for existence is a clear commitment to defend democracy. The Statute of the Council of Europe defines important provisions and its ratification requires all Member States to reaffirm their

³ A former graduate of the College of Europe and Sciences Po, Vira Ratsiborynska obtained a doctoral degree from the University of Strasbourg. Dr. Ratsiborynska's research interests include the external relations of the European Union with its Eastern neighbours, e.g. in energy, trade, geopolitics, border management, conflict management and peacekeeping.

commitment to "the principles of individual freedom, political freedom and the rule of law, which form the basis of all true democracy".⁴

The main direction of the activity of the Council of Europe consists in defending and strengthening political pluralism and human rights and to develop multilateral cooperation on a political, judicial and social level. This function is particularly important with regard to the enlargement of the European Union as the Council of Europe contributes to the implementation of the Copenhagen criteria by its Member States. It should be noted that the European Union is a signatory of the 17 conventions of the Council of Europe that are included in the Community acquis.

1a. The Council of Europe and its Europeanization role for the Eastern European countries

With regard to the countries of Central and Eastern Europe the Council of Europe was given the task to help these countries to implement and consolidate their political, legislative and constitutional reforms. The 16 countries of Central and Eastern Europe integrated during the enlargement of the Council of Europe - including Ukraine - in fact subscribe to a number of commitments that lead them to strengthen democratic reforms and to integrate into the European structures.

The Central and Eastern European countries also wanted to firmly anchor themselves in the Western structures. Joining the Council of Europe has been seen by them as only a first step in a process whose long-term goal is the EU and NATO membership. It is for this reason that the Council of Europe has sometimes been described as the "ante-chamber of the European Union".⁵

The objective of the Council of Europe in this context is to make available to these countries the organisation's expertise in all aspects concerning the functioning of institutions and a truly democratic society. This "democratic engineering" path is not intended to impose ready-made models, but to share with the partner countries the experience and the expertise to help them advance to the EU and NATO membership.

This path is the introduction of a system of pluralist democracy, respect for human rights and the principles of the rule of law. It is precisely by progressing along this path that these countries will be integrated step-by-step into the structures of the European Union.

1b. Role of the monitoring in the norm promotion of the Council of Europe

On this path of the countries of Central and Eastern Europe towards the EU the monitoring by the Council of Europe which means the control of the execution of the contractual obligations by the Member States with a view to ensure that these obligations are observed remains a priority for the organisation.

By democratizing the political life in these countries the Council of Europe uses "soft power" techniques and non-coercive means such as intangible resources like the positive reputation of the state, the exemplary nature of government politics and the attractiveness of the culture in order to serve the common interests of the Council of Europe and these countries.

The monitoring of the Council of Europe is based on the model of cooptation: its aim is to have its norms and standards adopted throughout all European countries. If a Member State

⁴ Council of Europe, *Statute of the Council of Europe* (5 May 1949), available at: <http://conventions.coe.int/Treaty/en/Treaties/html/001.htm>

⁵ Parliamentary Assembly of the Council of Europe, *Communication from the Committee of Ministers*, Council of Europe, document 9052, 23 April 2001, Strasbourg.

refuses to submit to this process, different sanctions can be applied to limit the country's powers within the institution or to even exclude it in order to discredit its behaviour and to deprive it of a part of its "soft power".⁶ By this conditionality mechanism inside of the Council of Europe, judicial and political instruments are spread and European values are standardized in the Member States of this organisation. The contribution of the Council of Europe to the Europeanization of non-member states of the EU is also achieved by the activity of its bodies – one of their control functions relates to the obligation of the Member States.

In this process the bodies of the Council of Europe like the Parliamentary Assembly and Committee of Ministers contribute to the normative activities of the Council of Europe by giving recommendations to the Member States to encourage the governments to adopt common policies or to implement certain measures concerning specific issues. The Parliamentary Assembly of the Council of Europe which consists of members of the national parliaments promotes the normative activities of the organisation through its resolutions and recommendations. While not legally binding these texts can change situations by giving them a political impulse.⁷

The Council of Europe also formulates a report on each country based on the results of its monitoring and observes the ongoing political and social reforms. These reports are then used by the European Union as a source of information; their findings are used by the European Commission and the Council of the European Union. Before preparing the conclusions of their own reports the European Commission consults with the Council of Europe. In this way they evaluate the progress in the country which is the subject of the report. Thus monitoring strongly supports the evaluation of a candidate state for membership in the European Union.

1c. Conditionality as a tool of a norm promotion by the Council of Europe

Conditionality plays an important role for the functioning of this organisation. The Council of Europe distinguishes itself from other international organisations in that members have to conform to the initial criteria and to fulfil their obligations. All Member States have to fulfil their obligations as laid down in the solemn Statute of the Council of Europe, the European Convention on Human Rights and other international conventions.

Article 3 of the organisation's Statute that dates back to 1949 states that all members of the Council of Europe accept the principles of the rule of law and the principle that all persons within its jurisdiction enjoy the human rights and fundamental freedoms. The accession of a state to the organisation necessarily means that the state in question is subject to the Statute of the Council of Europe. Moreover, the parties to the Statute confirm their commitment to "genuine democracy" based on precisely the aforementioned values in the preamble of this organization.

They must comply with the principles, standards and values relating to political pluralism, human rights and the rule of law. The obligation to sign the European Convention on Human Rights and to accept without delay its control mechanisms is also fundamental.

If a Member State fails to meet its obligations the Council of Europe provides for sanctions up to an exclusion of the state. The two key bodies that are responsible for the internal control of all these procedures are the Committee of Ministers and the Parliamentary Assembly. And although the final decision on accepting, rejecting or terminating the presence of a Member

⁶ DE VEL, G. (1997) *L'Union européenne et les activités du Conseil de l'Europe*. Bruxelles : L'Union européenne et les Organisations internationales, Editions de l'Université de Bruxelles.

⁷ HALLER, B. (2006) *An Assembly for Europe –The Council of Europe's Parliamentary Assembly 1949–1989*. Strasbourg: Council of Europe Publishing.

State in the Council of Europe lies with the Committee of Ministers the Parliamentary Assembly must give prior agreement on the aforementioned decisions. It therefore plays an active role in this process and has an arsenal of additional sanctions against a recalcitrant state, such as limiting the powers of a national delegation or its non-renewal.⁸

Generally it is the Parliamentary Assembly which verifies compliance with the obligations of the Member States and the commitments made by the authorities of the member states when joining the Council of Europe. It must report regularly on the general development of the procedures for monitoring and report on each country that is subject to a control procedure. The Assembly may sanction non-compliance and co-operate with the monitoring processes by adopting recommendations, by refusing to ratify the credentials of a national parliamentary delegation or even by canceling ratified credentials. Resolution 1115, paragraph 12 provides the possibility for the Assembly to sanction persistent failure to honor the contractual obligations and commitments and any lack of cooperation in the monitoring process.⁹ It may refuse to ratify the credentials of a national parliamentary delegation or cancel previously ratified credentials (as it did for the Russian Federation in 2000 due to the conflict in Chechnya). Still, despite this function of the Parliamentary Assembly, "the role of the Assembly in normative terms is limited because its function is purely advisory; it may issue recommendations in various fields but is subject to prior approval by the Committee of Ministers; its essential use remains to be a broader European forum."¹⁰ Nevertheless, the monitoring reports of the Assembly are amongst the most valuable sources of information on compliance with human rights and democracy in the EU institutions.

2. UKRAINE AND ITS NORM ABSORPTION CAPACITY TO FOLLOW THE EUROPEANIZATION TRACK OF THE COUNCIL OF EUROPE

2a. Ukraine as a full right member of the Council of Europe

Ukraine is a full member of the Council of Europe since 1995 and is a signatory to several multilateral conventions. As fulfilling its obligations is the sine qua non condition to move towards European integration, the membership in the Council of Europe is a strategic imperative and a step towards democracy.

With Ukraine's ratification of most agreements required on the basis of the findings of the Parliamentary Assembly the obligation arises to adapt the country's national legislation to the norms and standards of the Council of Europe. The monitoring procedure was initiated once Ukraine had taken on obligations vis-à-vis the Council of Europe. The same applies with regard to the Committee on Legal Affairs and Human Rights.

Ukraine assumes the obligation to respect the principles of political pluralism, the rule of law and human rights. According to resolution 1115 of the Parliamentary Assembly on the creation of the Committee on issues of monitoring, the State needs to honour the values such as equality, social inclusion and tolerance.

Since 1995 Ukraine as a member of the Council of Europe undertook the obligations of maintaining the principles of the rule of law, of political pluralism and of defending human

⁸ Ibid.

⁹ Council of Europe, *Resolution 1115 of the Parliamentary Assembly*, available online at: <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta97/FRES1115.htm>

¹⁰ KLEBES, H. (2000) *Human rights and parliamentary democracy in the Parliamentary Assembly*, *Mélange à la mémoire de Rolv Rysdal*. Cologne: Carl Heymans Verlag.

rights and fundamental freedoms¹¹. Ukraine committed itself to follow these principles to such a level that it could be elevated into the rank of a state in which the government exercises its powers according to the rule of law. Since then it is obliged to improve its legal instruments in order to work towards their adaptation to the norms and standards of the Council of Europe.

In addition, Ukraine has also assumed obligations on the basis of Article 3 of the Statute of the Council of Europe and obligations stemming from Conclusion 190 of the Parliamentary Assembly in 1995. These are of a political as well as of legal nature. One of these obligations involved the guarantee of the independence of the judiciary, a complete reform of the Ukrainian legal system and others.

Other obligations are taken into account within the framework of constitutional and judicial reforms. One of these obligations also concerns the adoption of a new constitution by Ukraine. The obligations of Ukraine concern precisely the key directions of the constitutional and judicial reforms, and the important agreements that provide the legal basis for integration into the European Union.

3. UKRAINE AS A LIMITED NORM ABSORBER OF THE COUNCIL OF EUROPE'S EUROPEANIZATION MECHANISM

Since 1995 Ukraine is subject to the Council of Europe's monitoring process which means that the co-rapporteurs of the Council of Europe often check the status of the normative promotion in Ukraine. In their reports they often conclude that the reforms are incomplete and that shortcomings remain especially in the rule of law, constitutional reforms and the judiciary which do not fully conform to the norms and standards of the Council of Europe.

In 2010-2013 the Council of Europe witnessed many shortcomings in the areas of the judiciary in Ukraine. The EU and the Council of Europe undertook many advisory actions "to strengthen impartiality of the judiciary and courts" in Ukraine and implemented common actions in order to strengthen the functioning of the judiciary system in Ukraine¹². Since 2010 two twinning projects were implemented by the EU and the Council of Europe: "Transparency and Efficiency of the judicial system of Ukraine" and "Accountability and effectiveness of Ukrainian judiciary functioning"¹³. Despite these undertakings by the Council of Europe and the EU in 2011-2013 Ukraine went through a major crisis in its judiciary as a state that did not comply with international legal norms and practices.

In 2012 Yulia Tymoshenko's trial and imprisonment were qualified as unacceptable by the Council of Europe and the EU due to the undemocratic standards shown. The ECHR recognized the trial as "politically motivated and unlawful"¹⁴. In January 2012 the Parliamentary Assembly in its resolution "The functioning of democratic institutions in Ukraine" strongly criticized Ukraine for its undemocratic practices and use of the judiciary for political purposes and referred to possible sanctions if the course of action would not be changed by the authorities¹⁵.

¹¹ PILAEV, I. (2003) *Rada Evropu v sugasnomu evrointegracijnomu prozesi (Council of Europe in the today's integration process)*. Kyiv: Vudavnugij dim jurudugna knuga (Publishing house of the law books).

¹² European Union External action Service (2011) *List of the EU-Ukraine Association agenda priorities for 2011-2012*, available at: http://eeas.europa.eu/ukraine/docs/2011_12_eu_ukraine_priorities_en.pdf

¹³ Council of Europe (2012) *Report by Thomas Hammarberg Commissioner for Human rights of the Council of Europe Comm DH (2012) 10*, available at: <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2075485&SecMode=1&DocId=1883332&Usage=2>

¹⁴ <http://en.interfax.com.ua/news/general/151561.html>

¹⁵ Council of Europe (2012) *The functioning of democratic institutions, Resolution 1862 (2012)*, available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=18068&lang=en>

The resolution stated: "The Assembly therefore invites the Monitoring Committee to follow the situation closely and to propose any further action to be taken by the Assembly as required by the situation, including with regard to the possible consideration of sanctions if the Assembly's demands are not met"¹⁶. The possible sanctions of the institution could have included depriving the whole country's delegation from the right to vote or even expelling the country from the Council¹⁷. These sanctions were not implemented by the institution, leaving room to maneuver to the Ukrainian authorities and the Ukrainian parliamentary delegation of the Council of Europe to comply with the expectations of the international community and to proceed with the necessary judiciary reforms in order to liberate Yulia Tymoshenko. The non-imposition of the sanctions by the Council of Europe however did not result in improvements with regard to Tymoshenko's case. Ukraine was still facing a systematic failure in its judiciary: the normative capacity of Ukraine to follow the Europeanization track of the Council of Europe remained limited.

4. THE COUNCIL OF EUROPE AND UKRAINE: NON-PROACTIVE CONDITIONALITY, HIGH ADOPTION COSTS

In the vertical relations of the Council of Europe with Ukraine Europeanization is perceived as a top-down process that can influence Ukrainian policies through its "soft power" instruments and conditionality mechanisms. As seen before on the example of the Yulia Tymoshenko case, the domestic impact of the Council of Europe through these mechanisms remains rather limited.

"Soft power" instruments such as socialization and communication between different actors from the Council of Europe and Ukraine have a limited influence on the Ukrainian decision-makers while the Council of Europe's conditionality mechanism is applied rather softly on Ukraine as a member of this international organization.

During the period of crisis in Ukraine related to the Yulia Tymoshenko case the Council of Europe's conditionality measure – i.e. the possible application of sanctions by the Council of Europe against the parliamentary delegation of Ukraine in case of non-compliance with the Council of Europe's norms – did not directly affect the ruling elites or create enough domestic pressure on the ruling elites that they would start applying the required norms into practice. As shown on the Tymoshenko example the effectiveness of the Council of Europe's rule transfer via such a conditionality mechanism was limited; the domestic pressure caused by the application of potential sanctions against Ukraine through such the Council of Europe's conditionality was rather low.

In addition the factor of "cost-benefit" calculations with regard to the adoption of reforms in the field of the judiciary played an enormous role as well. The Ukrainian ruling elites and decision-makers during the Yanukovich regime were not willing to adopt the Council of Europe's rules and norms that would have constituted high adoption costs for them. As the Council of Europe didn't provide these elites with potential positive rewards that could have been beneficial for them and as the high adoption costs of the reforms in the judiciary exceeded the potential reward that this international organization could give to Ukraine – a reward that basically was limited to becoming "a good reputation member state" of the Council of Europe – the political motivation or will of the ruling elites to pursue judicial reforms remained very

¹⁶ Ibid

¹⁷ NIECZYPOR, K. (2012) *Ukraine: Council of Europe threatens with sanctions*, available at: <http://eastbook.eu/en/2012/01/material-en/information-material-en/ukraine-council-of-europe-threatens-with-sanctions/>

limited. Taking all this into account the Ukrainian ruling class did not perceive the reforms imposed by the Council of Europe in the field of the judiciary as appropriate: the liberation of the political opponent of Viktor Yanukovych – Yulia Tymoshenko – was not implemented into practice.

CONCLUSIONS

The Council of Europe's norm promotion in Ukraine is challenged by many factors, the most important one being the high adoption costs for the Ukrainian ruling elites to follow the Europeanization track of reforms in the areas of the rule of law or the judiciary. For this reason the success of the Council of Europe's Europeanization mechanism in Ukraine can increase with an increase in political will and motivation from the side of the Ukrainian decision-makers to follow the norm promotion mechanism of the Council. For that however a more proactive conditionality mechanism applied by the Council of Europe in Ukraine is needed. This more proactive conditionality can include a clearer attribution of rewards or positive incentives in response to improvements by Ukraine in the field of the judiciary. This can be combined with the best practice model – taking other Member States of the organization as role models can be used as a stimulant factor to endorse reforms in Ukraine. Imitation of and lesson-drawing from the best practice model in the judiciary can increase the norm absorption capacity of Ukraine that suffers from a lack of democratic practices in this field. A collective learning process via an exchange of best practices amongst the best and the worst Member States of the Council of Europe in following the Europeanization track of the norm promotion of the Council of Europe can play a positive role in the norm diffusion between them. Enhancing the socialization process with the actors that could directly increase the domestic pressure on the ruling elites and decision-makers in Ukraine could have a beneficial effect as well. That is why the linkage to the civil society in Ukraine can play a positive role and lead to a better norm absorption of the Council of Europe's rules there. By combining a more proactive conditionality of the Council of Europe with an increase of the political motivation of the decision-makers in Ukraine via a build-up of domestic pressure on them the Council of Europe could become an illustrative example for an international organization active in norm promotion in Eastern Europe.

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