

Introduction

Much has already been written about the Council of Europe's role as a platform for pan-European co-operation, but its law-making function has never been comprehensively studied. It is true that Professor Karl Carstens, one of the Federal Republic of Germany's first permanent representatives to the Council, published a book on Council law¹ in 1956, but this came soon after the organisation had been founded, and concentrated on interpreting its statutory law in the light of the preparatory work on its Statute, which had been adopted in 1949. Unfortunately, the book was never translated into other languages, but it still remains a standard work. Professor Izdebski's more recent work, in Polish, also deserves to be mentioned.²

This is why a comprehensive study of Council of Europe law is needed today. Unlike EU law, Council law is not a full-scale legal system, since it cannot be regarded as independent of international law – but it forms a coherent whole, based on the Council's founding charter, or Statute. Of course, it has changed greatly in the years since the Council was founded, partly because the Council itself has expanded and taken in new members, and partly because its standard-setting machinery has evolved radically, as new conventions have been added to its legal armoury.

Today, it often takes years to draft, adopt and sign a convention, and the ten founder members' speed in adopting the Treaty of London, which approved the Council's Statute, seems astounding by comparison. But the ground had been prepared by Winston Churchill's memorable speech at the University of Zurich on 19 September 1946, and above all by the Hague Congress in 1948.³ Churchill spoke of the need to "recreate the European fabric, or as much of it as we can, and provide it with a structure under which it can dwell in peace, safety and freedom", and went on:

We must build a kind of United States of Europe. ... If at first all the states of Europe are not willing or able to join a union we must nevertheless proceed to assemble and combine those who will and can. ... In this urgent work France and Germany must take the lead together. Great Britain, the British Commonwealth of Nations, mighty America – and, I trust, Soviet Russia, for then indeed all would be well – must be the friends and sponsors of the new Europe and must champion its right to live. Therefore I say to you 'Let Europe arise!'

Later, this speech was often misunderstood, though it still had considerable impact. In fact, the united Europe Churchill dreamed of was, for him and for

1. Carstens, K., *Das Recht des Europarats*, Berlin, Duncker und Humblot, 1956.

2. Izdebski, H., *Rada Europy*, Warsaw, Centrum Europejskie Uniwersytetu Warszawskiego, 1996.

3. See Bitsch, Marie-Thérèse (ed.), *Jalons pour une histoire du Conseil de l'Europe*, Bern, Peter Lang, 1997.

many leading British politicians, continental Europe, and neither Great Britain nor the former Soviet Union were part of it.

The Hague Congress, which met in May 1948, was chaired by Churchill and attended by close on 1 000 delegates, including the political elite of nineteen European states.⁴ In a political resolution, it called for the setting up of a parliamentary assembly to examine “the legal and constitutional problems involved in establishing a union or federation”, the adoption of a human rights charter and the establishment of a supreme court “to defend the rights of the human person and the principles of liberty”. This was the first step, and the next was to formalise those principles in a convention. Some of the Congress participants felt that the human rights charter should be an integral part of the new organisation’s statute,⁵ thus underlining its “constitutional” character. But the time was not ripe for this solution, which many states saw as threatening their sovereignty. This is why, unlike the Court of Justice of the European Communities (CJEC) and the International Court of Justice (ICJ), which are formally part of the organisations to which they belong, the European Court of Human Rights is not, strictly speaking, part of the Council of Europe, since the convention on which it is based is distinct from the Council’s Statute.

The Congress was already the scene of a clash between the all-out European federalists, led by France, and the others, led by Britain, who stopped short at intergovernmental co-operation. The split re-appeared when the Council of Europe’s Statute was being negotiated, and two rival conceptions emerged. On the one hand, France and Belgium wanted to base the new organisation on a genuinely parliamentary assembly with wide-ranging powers. On the other, Britain insisted on the powers of states, which were to be represented in the assembly by members bound by their governments’ instructions. Eventually, a compromise solution was agreed. The Assembly would consist of independent parliamentarians, but its function would be merely advisory. The main decision-making powers would lie with an intergovernmental Committee of Ministers. The organisation itself would have wide-ranging activities, but limited powers. This solution was embodied in the Treaty of London, which was signed at St James’s Palace in London on 5 May 1949 by ten states: Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom.

The organisation established by the Statute⁶ is thus an intergovernmental entity, in which states keep their sovereignty, but it still has some supra-

4. The Hague Congress was not a diplomatic conference, but a meeting of various European movements. On the Congress and the establishment of the Council of Europe, see Bitsch, Marie-Thérèse, *op. cit.*

5. Kennedy, M. and O’Halpin, E., *Ireland and the Council of Europe – From Isolation towards Integration*, Strasbourg, Council of Europe Publishing, 2000, p. 34.

6. We are basing our analysis on the annotated version of the Statute prepared by the Secretariat of the Parliamentary Assembly, *Rules of Procedure of the Assembly and Statute of the Council of Europe* (2002). The Secretariat’s notes explain certain provisions or describe later developments. They are not an integral part of the Statute and so have no legal value. The Statute itself is contained in Appendix I.

national elements: a parliamentary assembly, where members of national delegations are not bound by their governments' instructions or policies; voting rules that allow certain decisions to be taken by a majority, although others have to be unanimous; and a supranational court of last appeal, although its jurisdiction is limited to human rights protection.

This book sets out to present an overall picture of the Council's law-making activity. It will necessarily be incomplete – indeed, the Council's conventions are so wide-ranging that nothing short of an encyclopaedia would really suffice to cover them exhaustively. We shall, however, be paying considerable attention to its “constitutional” law, that is, its statutory law in the broad sense. The Council is organised and operates on the basis of the 1949 Statute, but that text on its own provides a bare outline. “Statutory” resolutions adopted by the Committee of Ministers, the Council's practice and the declarations made by heads of state and government have all amplified the rules governing its institutional structures, their powers and the relations between them.

As an organisation for intergovernmental co-operation, the Council of Europe plays a major part in harmonising the national laws of European states, as its vast “legislative” output makes plain. So far, it has adopted some two hundred conventions, all of them international treaties within the meaning of the Vienna Convention on the Law of Treaties.⁷ It is true that the effectiveness of some of them has been compromised, for example, when not enough states have signed or ratified them, or when multiple reservations or interpretative declarations have distorted their content. Some may also have inherent weaknesses, as where the wording is deliberately vague and states have plenty of room to interpret it, or where the parties insist on escape clauses. Nonetheless, the Council's extensive standard-setting work reflects its success on the legal plane.

Conventions are not the only instruments the Council uses to harmonise law, and the Committee of Ministers' recommendations to governments are sometimes considered more effective. Experience has also shown that discussion of national laws at the drafting stage is often enough to help harmonise them at European level.

Finally, Council of Europe law cannot be studied without considering its impact both on the Organisation's member States and on other European organisations. Thanks to the enlargement process launched immediately after the fall of the Communist dictatorships, the Council has succeeded in disseminating its values throughout Europe – proof that our war-torn continent has at last overcome its ideological divisions and recovered its unity. This has given the Council a genuinely pan-European dimension, and it now embodies the hope of a united greater Europe. But it also finds itself competing with other European organisations, some of them with markedly

⁷ We shall, however, be saying little about the most important of these, the European Convention on Human Rights, since the Council's “substantive” law is not really our concern here. In any case, the literature on the ECHR is abundant. The same applies to the European Social Charter.

greater resources. Today, it needs to assert its own special role in the building of Europe, while remaining open to co-operation with those other organisations, and particularly the EU, whose responsibilities and interests are increasingly coinciding with its own.