THE COUNCIL OF EUROPE: TIME FOR REFORM

Switzerland is celebrating the 50th anniversary of its membership in the Council of Europe. This organisation makes an indispensable contribution in the field of human rights. At the same time, critics say that the Council of Europe is not sufficiently effective, too disordered on matters of substance, and has too many redundancies with other international organisations. Since 2010, the Council of Europe and its most visible institution, the European Court of Human Rights, have been undergoing reform. The success of these reforms will also determine the continuing relevance of the Council of Europe for Europe and Switzerland.

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Fifty years ago, Switzerland joined the Council of Europe: Federal Councillor Didier Burkhalter (right) speaks to the Secretary General of the Council of Europe, Thorbjørn Jagland (left). Strasbourg, 23 April 2013.

More efficiency, more political relevance, and more visibility: These are the aims of the reform that the Council of Europe has been undergoing since 2010. These reforms are to enable the organisation – primarily charged with advancing human rights, pluralist democracy, and the rule of law – better to achieve its statutory goal: Bringing Europe closer together through discussion of questions of common concern, conclusion of agreements, and common action. In the current reform process, the Council of Europe is concentrating on four areas: More effectiveness, more efficiency, concentration on its core business, and better coordination with other international organisations. Among other reasons, these adaptations have become

necessary because the Council of Europe has been undergoing a transformation for the past 20 years. The integration of countries from the former Eastern Bloc has enhanced its political relevance. At the same time, this shift has watered down its standards. Since the Council of Europe has mainly a supporting role, it can only exert limited pressure on countries that are lagging behind in meeting their obligations.

In the past years, the European Court of Human Rights (ECtHR) has also come in for criticism. As the most visible face of the Council of Europe, tasked with assuring compliance with the European Convention on Human Rights (ECHR), it has become a credible watchdog – in what has been a

very positive development. However, the downside has been a rapidly mounting number of lawsuits brought at the ECtHR, which has overwhelmed the capabilities of this institution. Thus, the ECtHR has become a victim of its own success. The first reforms of the Council and of the Court have already been implemented and are having positive effects. Much remains to be done, however. Switzerland supports the reform measures. As a non-member of the EU, it has a particular interest in a functioning Council of Europe.

The Council of Europe: Structure and focus

As an organisation, the Council of Europe is based on the principle of federalism. It aims to resolve the collective problems of the European societies by means of inter-state cooperation. The origins of the Council go back to the early years of the Cold War. Founded in 1949, its aim was to unite the Western European states and help to strengthen their democratic values. After the fall of the Iron Curtain, the Council of Europe expanded eastwards. Its membership has increased from only 23 members in 1989 to 47 member states today. Of all European countries, only Belarus and Kosovo are not members of the Council of Europe.

Since the 1990s, the focus of the Council of Europe has been on human rights, the rule of law, and democracy. The topical range of these three issues is interpreted broadly and includes election monitoring, combating racism, preservation of the joint cultural heritage, and fostering education as well as counterterrorism and the

campaign to end the death penalty. The Council of Europe thus constitutes a forum for matters of importance to all of Europe. It also has an important role to play in the creation of pan-European standards and legal instruments. In recent years, for instance, it has dealt with cybercrime. In 2004, the Council approved what still remains the only international politically binding instrument in this area.

The central decisionmaking and control body of the Council of Europe is the Committee of Ministers. The foreign ministers of the member states meet once a year. In between meetings, their tasks are carried out by ambassadors. The Committee of Ministers has an important function in setting standards and can approve conventions. These legally binding international treaties are primarily intended to harmonise national legislation and to make international cooperation easier. The member states are not obliged to join conventions. Thus, their effectiveness depends on the political will of the states. The Committee of Ministers verifies compliance with the commitments that the states have taken on. It can raise complaints in case of breaches and, in extreme cases, suspend countries. Furthermore, the Committee decides on working programmes and thus guides the activities of the Council of Europe. Usually, a two-thirds majority is required for decisionmaking.

The Parliamentary Assembly of the Council of Europe (PACE) is a consultative body. MPs from all member states meet four times a year. One of the PACE's tasks is to facilitate political debates between European MPs, to carry out elections monitoring, or to propose conventions. It has a key electoral role: It selects the Secretary General and the judges at the ECtHR. The PACE also has a control function: Unlike those of the Committee of Ministers, its investigations are public. The secretary general has an important function as head of the secretariat that supports the bodies in fulfilling their goals. He is also responsible for public communications.

Furthermore, the Council of Europe has other institutions that promote or monitor compliance with commitments, such as the office of the Commissioner for Human Rights, the European Commission against Racism and Intolerance, the European Commission for Democracy through Law (Venice Commission), the European Committee for the Prevention of Torture, and

the Group of States Against Corruption (GRECO). Additionally, in some member states, the Council of Europe has field offices that offer local support to the states in acting upon their commitments.

For 2013, the regular budget of the Council is approximately €240 million. These funds are allocated among the member countries according to a distribution key. There are additional projects and activities that are only funded by certain states. The member states and the EU voluntarily contribute €144 million for these budget items. Funding has remained level in recent years. Fiscal year 2014–15 will likely see the first real expenditure cut.

Human rights in the Council of Europe

Sixty years after it entered into force, the European Convention on Human Rights still remains the greatest achievement of the Council of Europe. It guarantees certain rights and liberties to anyone on the territory of the signatory states (cf. info box). Over time, ratification of the Convention has become a criterion for accession to the Council of Europe. All member states of the Council of Europe are subject to this convention, which is binding under international law. The ECtHR in Strasbourg has an important role in ensuring compliance with the convention.

Initially, the ECtHR had only limited authority. After a fundamental reform in 1998, its relevance increased. The court became a permanent tribunal that is in session all year round, with full-time judges. Since then, it has been possible to bring lawsuits concerning violations of the ECHR at the court directly from all member states. The instrument of individual application has become one of the court's most important institutions. The prerequisite for action at the ECtHR is that the applicant must have exhausted all domestic legal remedies in his or her country of origin.

Applications to the court have markedly increased since 1998. Currently, it receives more than 65'000 applications every year. This large number of applications, and specifically the many inadmissible ones, are causing problems for the overburdened ECtHR. A reform in 2010 was intended to remedy this situation by making it easier to dismiss inadmissible applications swiftly, imposing stricter criteria for admissibility, and expanding the control function of the Committee of Ministers. Thanks to

> ## The ECHR
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> The European Convention on Human Rights (ECHR) guarantees to anyone on the territory of the signatory states the following 13 basic rights and liberties; compliance is ensured by the ECtHR.
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> ▌ Right to life
> ▌ Prohibition of torture
> ▌ Prohibition of slavery and forced labour
> ▌ Right to liberty and security
> ▌ Right to a fair trial
> ▌ No punishment without law
> ▌ Right to respect for private and family life
> ▌ Freedom of thought, conscience, and religion
> ▌ Freedom of expression
> ▌ Freedom of assembly and association
> ▌ Right to marry
> ▌ Right to an effective remedy
> ▌ Prohibition of discrimination

these changes, the mountain of pending cases has already been slightly diminished (cf. illustration).

One major advantage of the Court of Human Rights is that political abuses are largely excluded. Appeals to the court are only permitted concerning specific matters of application of the law. The court offers people from member states the chance of legal redress against human rights violations by the state. It can sentence states to payment of damages. Its decisions are binding and have normative effect beyond the country in question for courts and jurisprudence in Europe. Occasionally, the Court of Human Rights is accused of aiming for unitary legal practice for all of Europe and of interfering in matters of national sovereignty. Occasionally, states fail to implement its decisions. In such cases, there are only limited means of sanctions.

The second important instrument for ensuring compliance with human rights standards is monitoring. The Committee of Ministers and the PACE monitor states' compliance with their commitments. Should the Committee of Ministers reprimand a member state, it must as a rule act upon this reprimand. However, member states have quite broad leeway when it comes to implementation, and frequently make use of this latitude. In such a case, the Council of Europe has only limited instruments for exerting pressure. Primarily, it can apply political pressure through various organs and representatives. In this process, the Commissioner for Human Rights has a particularly important

function. The Commissioner can point out problems and make them publicly known.

The challenge of reforms

Reforms of the Council of Europe aim to enhance its effectiveness, the division of labour with other organisations, its efficiency, and the focus of its activities. If one takes stock of the reforms since 2010, the balance is a positive one. Nevertheless, much remains to be done. The main challenge is raising effectiveness. This includes the need for the Council of Europe to motivate its member states more efficiently towards implementation of their commitments. Shortcomings in this area became particularly evident after the accession of the Eastern European states post-1989/1991. The assumption that simply reminding states of their commitments would suffice to bring them closer to the expected standards after accession proved to be over-optimistic.

Political pressure and public censure are the key means of compelling non-cooperative states to meet their obligations. It is currently unrealistic to hope for the creation of further and more acute instruments of pressure. Countries that come in for criticism often respond that the demands are exaggerated, unfounded, or jeopardise their national integrity. The goal of the Council of Europe should therefore be to maximise the credibility and political importance of statements made by its representatives. It therefore seems advisable to raise the profile of these instruments.

The effectiveness of the Council of Europe can also be raised through the consolidation of existing agreements. This includes expanding their area of applicability and pushing for ratification. The 212 agreements concluded so far have been ratified by vastly divergent numbers of states. There are only very few conventions that have been ratified by all member states in the Council of Europe. For instance, the protocol on the abolition of capital punishment, one of the constitutive documents of the Council of Europe, has yet to be ratified by all member states.
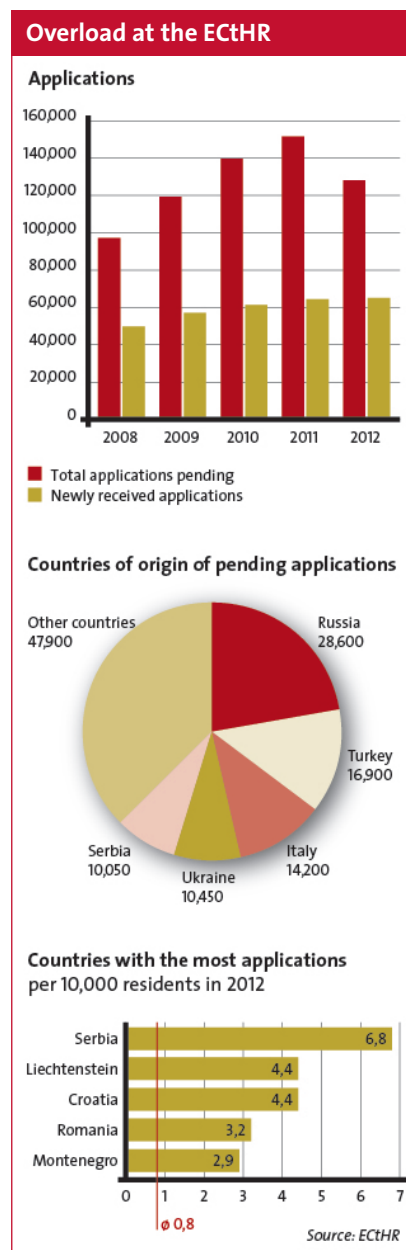
There is a need for coordination with other international organisations. In particular, well-matched coordination between the Council of Europe and the EU is indispensable for avoiding duplication. In recent years, the EU has continuously expanded its activities and has become active in areas that have hitherto been regarded as

coming under the purview of the Council of Europe. Examples include the European Union Agency for Fundamental Rights, the EU's Special Representative for Human Rights, or the EU's cultural policy. However, cooperation between the Council of Europe and the EU has become relatively efficient. Frequently, EU funding and the Council of Europe's know-how are mutually complementary, as in the case of their engagement in North Africa, where the focus is on support for the rule of law. An additional milestone was the recent conclusion of negotiations over the EU's accession to the ECHR. After ratification by the EU states, the EU will recognise the ECtHR as the highest European instance in matters of human rights. In future, after appeal to the highest EU court, the European Court of Justice, EU citizens will be able to submit complaints to the ECtHR. In principle, the Council of Europe's activities are regarded with a great deal of goodwill by many European countries. Its federalist nature makes it attractive, as the countries can act relatively independently in its framework.

Cooperation with the OSCE is a more difficult matter. Despite increased efforts, the level of collaboration remains unsatisfactory for now. There are recurrent problems with coordination in the areas of human rights or election monitoring. It would be advisable for the two organisations to concentrate more on their respective areas of competence. While the strengths of the Council of Europe are in setting and monitoring of standards, the OSCE has advantages when it comes to work on the ground.

One anticipated measure for enhancing the efficiency of the Council of Europe is an internal streamlining process. The Secretariat has already introduced initial steps. The introduction of a two-year budget helps to improve the planning of activities. On the other hand, regular evaluations have yet to be sufficiently adopted to provide for an efficient internal organisation. Its areas of activity and the impact of its work must be reviewed more rigorously.

In order to avoid becoming bogged down in topical matters, the Council of Europe plans to concentrate even more on the triad of human rights, democracy, and the rule of law in the future. In view of the budget cuts, an objective focus on such activities seems reasonable. One example is the already mentioned Venice Commission, which supports states in matters relating to the rule of law. Its work enjoys widespread

Overload at the ECtHR

Applications

- Total applications pending
- Newly received applications

Countries of origin of pending applications

Other countries 47,900
Russia 28,600
Turkey 16,900
Italy 14,200
Ukraine 10,450
Serbia 10,050

Countries with the most applications
per 10,000 residents in 2012

Serbia 6,8
Liechtenstein 4,4
Croatia 4,4
Romania 3,2
Montenegro 2,9

ø 0,8

Source: ECtHR

acclaim. However, the process of concentration also involves risks. On the one hand, there is the danger that useful activities will be eliminated without substitution. On the other hand, the Council must remain capable of taking on certain new activities despite limited financial means. For instance, the engagement of the Council of Europe in North Africa in the framework of its neighbourhood policy is undisputed and is regarded as useful by the member states.

Securing activities in controversial new topical areas is more problematic. One example is the Council's engagement on behalf of LGBT (lesbian, gay, bisexual, and transgender) rights. Although the Council of Europe has accumulated a great deal of know-how in this area, some Eastern European countries in particular are opposed

to activities in this area. Therefore, projects in this area are mainly funded from voluntary contributions. However, their realisation is frequently a difficult matter due to the lack of political support on the ground.

In connection with the newly introduced reforms, the secretary general of the Council of Europe has a key role. Norwegian Thorbjørn Jagland was elected in 2009 in order to implement reforms, and is engaged in this task. He is also trying to use the political clout of his office to establish a public presence, for instance, when a member state appears to be violating principles. For instance, he has criticised the constitutional reforms in Hungary as well as the controversial NGO law in Russia. Therefore, the 2014 election of a new secretary-general will determine the direction of future reforms. It would be advisable to elect a well-connected political heavyweight to the position. Only an individual with political authority can increase pressure on states that are in default while at the same time advancing the reforms of the organisation.

Switzerland and the Council of Europe

Switzerland can identify on many levels with the values and goals of the Council of Europe. Among its fundamental values are federalism and the protection of minorities. Protection of human rights is one of its foreign-policy priorities. However, Switzerland only joined the Council of Europe in 1963 following a parliamentary decision. When it was founded in 1949, the Federal Council of Switzerland had refused to join based on considerations of neutrality policy and signalled that an invitation would be unwelcome. At the time, there was the fear that the council of Europe would become the nucleus of supranational European political integration. Furthermore, in the 1950s, there was scepticism concerning the usefulness of the Council of Europe. After the European Economic Community (EEC) was founded in 1957, it became clear that the Council of Europe would retain its intra-state character. Therefore, Switzerland's policy of neutrality was no longer regarded as an obstacle to accession. However, Switzerland did not join the ECHR until 1974. In accordance with conventions at the time as well as Swiss practice, Berne wanted to fulfil all standards before accession. This was the case after the introduction of female suffrage in 1971, and after Switzerland had abolished the ban of the Jesuit order and the foundation of new convents in 1973.

Since the 1980s, Switzerland has established itself as a promoter of reform in the Council of Europe. It is still actively engaged today and among other things supported the ECtHR's reform process with a conference in Interlaken. From the Swiss point of view, an efficient Council of Europe supports the cause of functioning European cooperation and thus creates political stability. As a non-member of the EU, Switzerland also appreciates the Council of Europe as a contact forum and a place where it can influence the development of European standards as a full member. Against this background, it is caught up in a field of tension: On the one hand, Switzerland supports a stronger focus on three subject areas; on the other, it is beneficial for Berne if other matters are also discussed in Strasbourg and not only in Brussels.

Although awareness of the Council of Europe is limited in Switzerland too, the organisation is occasionally the focus of public interest. For instance, the role of Dick Marty, who at the time was a member of the Swiss Council of States, as the Council of Europe's special investigator for illegal CIA activities in Europe largely met with a positive response among the general public. However, sometimes, criticism from Council of Europe institutions regarding Switzerland also elicits mixed reactions. In 2012, the Commissioner for Human Rights published a report on Switzerland calling for stronger efforts to counteract racist and xenophobic tendencies. In this context, he also referenced problems in connection with popular referenda that potentially conflict with the ECHR. Also in 2012, the PACE criticised the Swiss tax laws. Decisions by the ECtHR have also repeatedly been debated, as most recently in April 2013, when the court found that the deportation of a delinquent Nigerian constituted a human rights violation. This criticism from Strasbourg has also given rise to antagonism. As in other countries, in Switzerland, too, the authority of the ECtHR is occasionally questioned, and sometimes one even hears calls for withdrawal from the ECHR and thus from the Council of Europe itself. However, such a withdrawal would be politically precarious. In doing so, Switzerland would embark on a path of political isolation in Europe.

For the future, it is crucial that the Council of Europe should continue on its course of reforms and not forget its strengths. The Council as well as its institutions must remain aware of their federalist roots and strengthen their credibility by consolidating their achievements. Only then can the Council of Europe succeed in remaining relevant and purposeful for Europe and Switzerland.

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