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Draft Convention for the Protection of Human Rights and Fundamental Freedoms

Report
Committee on Legal Affairs and Human Rights
Rapporteur: Sir David MAXWELL FYFE, United Kingdom

A. Draft Recommendation

The Consultative Assembly of the Council of Europe having been acquainted by the Committee of Ministers with a draft Proposal for the safeguarding of Human Rights and Fundamental Freedoms, which has been drawn up with due regard to the draft submitted by the Consultative Assembly to the Committee of Ministers, expresses a favourable opinion of the proposed draft; but strongly urges the Committee of Ministers to complete of modify the text as drawn up in the following manner :

Preamble

Whereas the Members of the General Assembly of the United Nations have proclaimed the Universal Declaration of Human Rights approved by the General Assembly on 10th December, 1948 :

And whereas the Declaration was proclaimed to the end, among others, that every organ of society should by progressive measures, national and international, strive to secure the universal and effective recognition and observance of the Rights therein declared, both among the peoples of the Member States themselves and among the peoples of territories under their jurisdiction :

And whereas the High Contracting Parties are the Governments of European Countries, like-minded and having a common heritage of political traditions, ideals, freedom and the rule of law, and accordingly are in a position to lake a first step towards the collective enforcement of certain of the Rights stated in the Universal Declaration and to re-state them in a form suitable for that purpose :

And whereas the aim of the Council of Europe is the achievement of greater unity between its Members, who are the High Contracting Parties, and one of the methods by which that aim is to bc-pursued is by agreement and common action in legal and administrative matters and in the maintenance and further realisation of Human Rights and Fundamental Freedoms :

Now, therefore, the High Contracting Parties, re-affirming their profound belief in those Fundamental Freedoms which arc the foundation of justice and peace in the world and arc best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of Human Rights upon which they depend.

Declare and agree as follows :

Paragraph I

Insert in the draft an Article numbered 10 A worded as follows :

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. Such possessions cannot be subjected to arbitrary confiscation. The present measures shall not however be considered as infringing, in any way, the right of a State to pass necessary legislation to ensure that the said possessions are utilised in accordance with the general interest.

Paragraph II

Insert in the draft an Article numbered 10 B worded as follows :

Every person has the right to education. The function assumed by the state in respect of education and of teaching may not encroach upon the right of parents to ensure the religious and moral education and teaching of their children in conformity with their own religious and philosophical convictions.

Paragraph III

Insert in the draft an Article numbered 14 A worded as follows :

The High Contracting Parties undertake to respect the political liberty of their nationals and in particular, with regard to their home territories, to hold free elections at reasonable intervals by secret ballot under conditions which will ensure that the government and legislature shall represent the opinion of the people.

Paragraph IV

Article 25 of proposed draft to be worded as follows :

1. The Commission may receive petitions, addressed to the Secretary-General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights recognised in this Convention, which petitions shall be drafted and signed by counsel, or by persons of similar appropriate legal qualifications. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

2. Nevertheless, the High Contracting Parties may at the time of accepting the Convention declare that they exclude the jurisdiction of the Commission of Enquiry as regards private petitions in which they are concerned, involving any article or articles referred to in such a declaration; save that no state may exclude petitions based on articles 2, 3, 4 (paragraph 1), or 7, from the jurisdiction of the Commission of Enquiry. Such a declaration can only be made for a maximum of three years ; it may only be renewed by means of an express statement made before the expiry of three years from the deposition of the article of ratification in accordance with Article 66.

Paragraph V

In the third line of Section (1) of Article 56 of the Draft Convention, replace the figure « nine » by the figure « eight ».

Paragraph VI

(a) Delet e paragraph 4 of Article 63; and

(b) Add a paragraph 3. to Article 64 with the following wording :

" Any State may also, at the time of its signature of this Convention or the deposit of its instrument of ratification or accession, make a declaration, in accordance with the procedure laid down under Article 25 of this Convention, restricting for all or any of the territories to wich the Convention is applied the competence of the Commission to take cognizance of the petitions of persons, non-governmental organisation, or groups of individuals. "

B. Explanatory Memorandum

1.

The work of the Committee on Legal and Administrative Questions has fallen into three parts :

a. The Committee has dealt with the draft Convention of Human Rights sent to the Consultative Assembly by the Committee of Ministers;

b. A joint Sub-Committee of the Legal Committee and the Committee on Social Questions has been appointed to deal with refugees;

c. a Sub-Committee of the Legal Committee has been dealing with questions relating to the creation of closer relations between Member States.

1.1. The Draft Convention for the Protection of Human Rights and Fundamental Freedoms

The Committee felt that it was important that they,, and the Assembly in due course, should express their general approval of the Convention submitted by Lhe Commill.ee of Ministers.

The Committee has, however, considered it to be its duty to urge the Committee of Ministers to make certain additions or essential alterations which the former would like to see included. In drawing up these proposals, the Committee has taken into consideration those divergent opinions that had been brought to light within the Committee itself, as had no doubt been the case within the Committee of Ministers. The agreement reached by it on most points encourages the hope that the Committee of Ministers will rally to its suggestions and that the Draft Convention may be modified without any substantial delay being incurred.

1.1.1. Preamble

It was unanimously felt that a preamble in suitable terms would be a fitting beginning to the Convention.

1.1.2. Right of Property

The text agreed to by the Committee is that arrived at after examination by a Sub-Committee of the Legal Committee of last year. It represents an attempt to define the right as requested by the Assembly in September Î949, and endeavours to make the distinction between arbitrary confiscation and tho social conception of property which allows it to be used by regular legislation for the public good.

In the discussions of the Committee it was felt, on the one hand, that the text now submitted represented a fair definition of an essential right, arrived at after much discussion and the careful study mentioned above. On the other hand, certain members of the Committee felt that it was wrong to include this social right and exclude others such as the right to work and the right to rest and leisure, and had doubts as to the form in which the right was stated. The Committee, however, decided by a majority of 15 votes to 4 that the right should be included.

1.1.3. The Right of Parents as to their Children's Education

The present text is also, the result of examination in the Sub-Committee mentioned, and in last year's Legal Committee after this matter had been referred to them by the Assembly, and, mutatis mutandis, the same remarks apply. The decision in favour of the insertion of this right was by 17 votes to 3.

1.1.4. The Right to Free Elections

The insertion of this right in the draft sub' mitted to the Committee of Ministers by the Assembly in 1949 was the subject of unanimous agreement both in the Legal Committee and the Assembly. Moreover, the Chairman of last year's Legal Committee made strong representations to the Committee of Ministers that this right should be reinserted, reasons appearing in his letter of 24th June 1950.

Nevertheless, the present Committee has redefined the right of free elections in order, it is hoped, to meet the objections raised by the Committee of Experts and High Officials and to make it more acceptable to the Committee of Ministers, and the draft submitted is placed before the Assembly in that sense. The Committee approved the insertion of the re-defined right by 21 votes to 0 with 2 abstentions.

1.1.5. General Principles of Law

The Committee, while recognising the importance of the proposal that the European Commission and Court shoidd apply the general principles of law recognised among civilised states, as referred to in Article 38 of the Statute of the International Court, were of the opinion that the insertion of a specific clause to this effect was unnecessary, but wished to recommend to the Assembly that in transmitting the draft Convention to the Committee of Ministers the attention of the latter might be drawn to this point. It is anticipated that the Commission and the Court must necessarily apply such principles in coming to any decision.

1.1.6. Petitions, or Right of Individuals to seek a remedy directly in certain cases

The Committee felt considerable difficulty about the limitation of the right of the individual to petition the Commission, resulting from Article 25 as proposed by the Committee of Ministers. It was felt that the right could be enlarged without increasing the hesitations of the Governments which desired the limitation if the change were made. In tho first place, guidance would be obtained from Article 15 as to the rights from which even a state of war would not justify a departure. Secondly, it was considered that a state may if necessary at the time of adherence be entitled to indicate in advance the rights in respect of which it objected to petitions from individuals. The view embodying these proposals was unanimously approved. On the provision that the petitions should be signed by a lawyer there was a difference of views, and the proposal was carried by 15 votes to 7.

1.1.7. Effect of the Court's decisions

The Committee after giving full consideration to a suggestion to amend Article 50 of the Convention submitted by the Committee of Ministers which would have had the effect of enlarging the powers of the Court, decided by majorities to maintain the text of the Committee of Ministers.

1.1.8. Genocide

A proposal was first made to include an Article stating, that genocide whether committed in time of war or peace, is a crime under international law whose perpretators should be charged and punished. Although every speaker exin-es-sed his adhorrence of the crime, the Committee though that at present the subject could be more suitably dealt with by a motion in the Assembly.

1.1.9. Adherence to Court

Certain members of the Committee felt that the number of member states required under Article 56 to adhere before the Court was erected, was too high, and should be reduced to 8 instead of 9. After discussion the Committee unanimously decided to recommend the number 8 for the reasons that this number now constituted a majority of the member states.

1.1.10. Consequential amendments to Articles 63 and 64

As a result of the modifications made to Article 25, it is necessary to amend Articles 63 and 64 as shown in the Recommendation.

1.2. The Problem of Refugees

The Joint Sub-Committee on the problem of Refugees has arrived at certain conclusions, and will make its own report.

1.3. Closer Relations between Member States

The four matters referred to the Sub-Committee have been the subject of study, and a full Report will be made later.