Resolution 21 (1950)

Amendment of Article 15 of the Statute

Parliamentary Assembly

The Assembly,

Considering that the implementation of its Recommendation AS (2) 74, § 5 (ii), of 18th August 1950(no: 10 of the printed Compilation) requesting that Article 15 of the Statute be amended, so that theconclusions of the Committee of Ministers may assume the character of decisions taken by mutualagreement among the Members, and to be carried out by the Members, may raise certain difficultiesof a constitutional character within the Member States,

Requests the Committee on Legal and Administrative Questions to examine the implications of thisRecommendation[1],

Requests the President of the Assembly to transmit, if necessary, directly the conclusions of theCommittee to the Committee of Experts for the reform of the Statute of the Council of Europe.

See Doc. AS (2) 148, Report.

1. Recommendation 10 of the Assembly[2] seems to aim at recommending the attribution to take Committee of Ministers of power to take, on certain undefined questions, decisions which, without theintervention of any national legislative or executive authority, will be automatically binding onadministrative or judicial State officials, and possibly also on the nationals of the various MemberStates, even if that should entail a modification of their own legislation.

2. The wording appears to be taken from Articles 13 and 14 of the Constitution of the Organisationfor European Economic Co-operation which runs as follows:

> 2.1. "In order to achieve its aim as set out in Article 11 the Organisation may take decisions forimplementation by Members."
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> 2.2. "Unless the Organisation otherwise agrees for special cases, decisions shall be taken by mutualagreement of all the Members. The abstention of any Members declaring themselves not to beinterested in the subject under discussion shall not invalidate decisions, which shall be binding forthe other Members."

3. It would nevertheless seem necessary to omit "by mutual agreement" as being ambiguous. As M.Adam has pointed out in his work on O. E. E. C. (Paris 1949, page 196), this terminology was usedby the Combined War Boards, where the necessity of an agreement being reached between the Statesdirectly concerned and the organism was foreseen before a decision could be implemented. In thepresent case, it is synonymous with a unanimous vote, and offers the disadvantage of investing theActs of the international organ with a contractual character, and thus exposing them to the risk ofunilateral denunciation.

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1. OPINION OF THE COMMITTEE ON LEGAL AND ADMINISTRATIVE QUESTIONSregarding Recommendation N° 10, adopted by the Consultative Assembly, on 18th August 1950.
2. Recommendation No 10 (Extract from Document AS (2) 74) runs as follows:"The Assembly,Considering that it is necessary that Article 15 of the Statute should be so amended that theconclusions of the Committee of Ministers may carry the weight of decisions reached by mutualagreement between Member States, which will be implemented by Member States, Recommends that the Committee of Ministers take all necessary measures to this end."

4. The question put by the Consultative Assembly would therefore have to be understood as follows:"Is it desirable that the (unanimous) decisions of the Committee of Ministers should be made bindingupon States, and enforceable by their subordinate authorities ?"

5. In the opinion of the Working Committee of the Legal Committee an affirmative reply to thequestion as thus stated could not be contemplated without a profound, even radical, transformationof the Council of Europe. It is true that States have frequently modified their national legislation byway of international conventions. But the transfer to an extra-national and supra-national authorityof power to legislate on certain questions would only be conceivable within a federal framework, andthat would certainly imply a reform of the constitution in all the countries. Furthermore, in such ahypothetical case, the legislative federal authority is not exclusively represented by the delegates ofthe national governments, but includes an Assembly representative of the wider communityconstituted by the whole of the populations of the Member States. It certainly seems that we have notyet got as far as this. In the absence of this federal organisation the internal law of States makes itimpossible for matters within the scope of the national parliaments to be withdrawn entirely fromtheir control.

6. On the other hand, there seems to be nothing in the constitutional law of any country which wouldbe inconsistent with a convention under which an international organ would be given the right totake decisions in matters which fall within the scope of the executive power in every country.

7. For instance, the Universal Postal Convention, whose object is confined to the organisation andimprovement of postal services, was able, in its Article 23, to give mandatory force, without the needfor ratification by the States, to proposals supplementing or modifying the Convention, passed eitherunanimously or by a two-thirds majority, or again by an absolute majority of votes, according to thedifferent cases.

8. In other words the Committee sees no reason why the decisions of the Committee of Ministers shouldnot be validly operative in matters which might legitimately be the subjects of Executive Agreements(agreements in simplified form), having regard to the necessity, in British law, for an Act ofParliament in case of any question affecting private rights (cf. Oppenheim & Lauterpacht,International Law 7th Edition, London, 1946, p. 38 and the references quoted in Note 6).

9. There does not seem to be any objection to suck a contingency being expressly provided for in Article15 of the Statute, but an amendment of that article is not indispensable, seeing that it is quite possiblefor mandatory force to be given to executive decisions of the Council by means of private conventionswithout any reform of the Statute.

10. These decisions might etiher take the form of a regulation, or they might apply the principlesincluded in the Convention to specific eases. In order to realise the full importance which the right totake such decisions would imply, it suffices to point out that, once the principles had been adopted, itwould be possible to render enforceable the decisions of the Committee of Ministers fixing, forinstance, the number of refugees to be given asylum in each country, or the quota of immigrants, orthe quota of goods to be admitted free of duty.

11. It would not be possible even for executive decisions, drawn up within the framework of theprovisions indicated above, to be made enforceable in most countries. No doubt some of them have,either in their constitution (France), or in their jurisprudence (the Netherlands), recognised thesuperiority of international law over municipal law. But they are still the exceptions; and it is to bedoubted, for that matter, whether, even in these countries, the required validity would be attributednot only by the courts, but by the Administration, to the decisions of an international executiveauthority. It certainly appears that in most States, if not in all, the direct enforceability of thedecisions could not be contemplated unless officials of a central European administration werestationed within their territory - and that brings us back to the federal hypothesis which is at presentunattainable.