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Copenhagen Declaration, appreciation and follow-up

Report[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Ms Thorhildur Sunna ÆVARSDÓTTIR, Iceland, Socialists, Democrats and Greens Group

Summary

The Copenhagen Declaration, which deals with the reform of the system of the European Convention on Human Rights, was adopted at a ministerial conference organised by the Danish chairmanship of the Committee of Ministers on 12 and 13 April 2018.

The Declaration is to be welcomed for its reaffirmation of the States Parties' commitment to the Convention and their recognition of its contribution to democracy, human rights and the rule of law in Europe. It also correctly describes ineffective national implementation of the Convention and the caseload of the European Court of Human Rights as the system's main problems.

Certain aspects of the Declaration are, however, problematic. It fails to propose concrete solutions to the system's problems and contains ideas about dialogue that may be incompatible with the Court's independence.

The Parliamentary Assembly should continue to play a principled role in promoting effective implementation of the Convention.

1. Reference to committee: Bureau decision. Reference 4373 of 23 April 2018.

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A. Draft recommendation[2]

1. The Parliamentary Assembly takes note of the Declaration adopted at the conference on the European human rights system in the future Europe, organised in Copenhagen on 12 and 13 April 2018 by the Danish chairmanship of the Committee of Ministers.

2. The Assembly recalls its own previous work on the reinforcement and reform of the system of the European Convention on Human Rights (ETS No. 5, "the Convention"), notably Resolution 1726 (2010) "Effective implementation of the European Convention on Human Rights: the Interlaken Process", Resolution 1856 (2012) "Guaranteeing the authority and effectiveness of the European Convention on Human Rights" and Resolution 2055 (2015) "The effectiveness of the European Convention on Human Rights: the Brighton Declaration and beyond".

3. The Assembly welcomes the reaffirmation in the Copenhagen Declaration by the States Parties of their commitment to the Convention, to the fulfilment of their obligations thereunder and to the right of individual application as a cornerstone of the system. It shares their recognition of the fact that the Convention has made an extraordinary contribution to the protection and promotion of human rights and the rule of law in Europe and continues to play a central role in maintaining democratic security and improving good governance.

4. The Assembly is also appreciative of the fact that the Copenhagen Declaration as adopted largely reflects the approach advocated by the Assembly in its declaration adopted by the Standing Committee on 16 March 2018. In particular, it fully agrees that ineffective national implementation "remains the principal challenge confronting the Convention system" and that the caseload of the European Court of Human Rights ("the Court") "still gives reason for serious concern". It also welcomes the States' reaffirmation of their "strong commitment to the full, effective and prompt execution of judgments".

5. The Assembly is nevertheless greatly concerned about the fact that a founding member of the Council of Europe saw fit to submit a draft declaration that would have put in question some of the fundamental principles on which the Convention system depends. This is all the more disappointing for the fact of apparently being motivated by purely domestic considerations, regardless of their consequences for Europe's core human rights protection mechanism. The Assembly trusts that future chairmanships of the Committee of Ministers will take a more constructive and supportive approach towards the Convention and the Court.

6. Despite the significant progress made in refining the initial draft text in order to arrive at the final, adopted version, the Assembly nevertheless has certain concerns with regard to the Copenhagen Declaration, in particular the following:

6.1. whilst recognising that ineffective national implementation and inadequate execution of Court judgments are still the main problems facing the Convention system, the Declaration proposes very little that can be called new by way of solutions;

6.2. the Declaration still contains vaguely defined and conceptually problematic ideas about "dialogue" between the States Parties and the Court, including on the interpretation of Convention rights, which could be developed in ways that would threaten the Court's independence;

6.3. the Declaration fails adequately to appreciate and encourage the role and contributions of other stakeholders and actors, including the Assembly, national parliaments, the Council of Europe Commissioner for Human Rights and civil society.

7. The Assembly therefore calls on the Committee of Ministers to:

7.1. take concerted and effective action to address the problems of ineffective national implementation of the Convention, including inadequate execution of Court judgments, notably on the basis of recommendations contained in Assembly Resolutions 1726 (2010), 1856 (2012) and 2055 (2015) and Recommendations 1991 (2012) and 2070 (2015), and in the intergovernmental expert reports prepared in the course of the Interlaken reform process;

7.2. avoid any statements or actions that might undermine the independence of the Court when exercising its jurisdiction under Article 32 of the Convention, and call on States Parties to seek to influence the Court's interpretation of the Convention only in the course of judicial proceedings, including through third-party interventions;

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2. Draft recommendation adopted unanimously by the committee on 23 April 2018.

7.3. engage fully all stakeholders in the Convention system, including the Assembly, in the reform process, and ensure that their roles and contributions are recognised and encouraged as part of the overall package of measures intended to reinforce the Convention system.

8. The Assembly resolves to continue following the process of reform of the Convention system, with a view to protecting its fundamental principles, including the independence of the Court, reinforcing the role of national parliaments and holding States Parties to account for the fulfilment of their obligations.

B. Explanatory memorandum by Ms Thorhildur Sunna Ævarsdóttir, rapporteur

1. Introduction

1. The Danish Chairmanship of the Committee of Ministers organised a "meeting of ministers of justice on the European human rights system in the future Europe", which took place in Copenhagen on 12 and 13 April 2018. The outcome of this conference was the Copenhagen Declaration. The conference was the fifth in a series that began in Interlaken (Switzerland) in 2010 and continued at Izmir (Turkey) in 2011, Brighton (United Kingdom) in 2012 and Brussels (Belgium) in 2015. The so-called "Interlaken Process", launched following the report of the Group of Wise Persons that was commissioned after the adoption of Protocol No. 14 to the European Convention on Human Rights (CETS No. 194) in 2004 and in response to alarming delays in the Protocol's entry into force, has seen the entry into force of Protocol No. 14 and its creatively vigorous implementation by the European Court of Human Rights ("the Court"), and produced two further protocols, Nos. 15 (CETS No. 213) and 16 (CETS No. 214) (of which the latter will enter into force on 1 August 2018), several non-binding Committee of Ministers' instruments and numerous expert reports with recommendations concerning all aspects of the system of the European Convention on Human Rights (ETS No. 5, "the Convention").

2. The Parliamentary Assembly, at its Standing Committee meeting on 16 March 2018, adopted a declaration on the first draft Copenhagen Declaration as published by the Danish authorities on 5 February.[3] In its declaration, the Assembly recalled that the effectiveness of the system of the Convention depended on the proper functioning of each of its constituent parts, which in turn depended primarily on the attitude and conduct of the States Parties. The Assembly was deeply concerned that the draft Copenhagen Declaration put into question certain fundamental principles of the Convention system, in particular the universality of rights protected by the Convention; the independence of the Court; the scope of the Court's jurisdiction over all matters concerning the interpretation and application of the Convention; and the States Parties' obligation to implement the Court's judgments. The Assembly concluded by calling on the States Parties to maintain a focus on the Court's excessive caseload and its principal cause, inadequate national implementation of the Convention in many States, as the targets of intergovernmental work. It also called for the States Parties to ensure that the Court is sufficiently resourced to discharge its function, including through an extraordinary injection of funds to allow it to absorb its backlog of applications.

2. The Copenhagen Declaration as adopted

3. The Copenhagen Declaration, as finally adopted following two months of intense negotiations between the States Parties, no longer contained many of the provisions of the initial draft that had so alarmed the Assembly, along with many other stakeholders and interested parties in civil society, including the Council of Europe Conference of International Non-Governmental Organisations, and academia. From a radical and potentially destructive challenge to key fundamental principles of the Convention system, the text had evolved towards a more supportive and constructive position, although still not without certain problematic elements.

4. The Declaration's preambular statements of commitment and appreciation are now strong and unequivocal. Previously ambiguous references to improving "balance" in the Convention system have been properly clarified, and the importance of national implementation is given its due weight. The preamble also places the Declaration in the wider context of the Interlaken Process, whose next step, expected before the end of 2019, will be a stock-taking of the measures taken so far, after which the Committee of Ministers will decide whether "more profound changes are necessary".

5. The Declaration then continues to address the issue of "shared responsibility", meaning "the link between the role of the Court and the States Parties", which "aims at achieving a balance between the national and the European levels, and an improved protection of rights, with better prevention and effective remedies at national level". The implications in earlier drafts that "shared responsibility" and "balance" implied or even required an inappropriately deferential Court are no longer apparent, and the resulting threats to the Court's independence have dissipated.

6. The Declaration's next section deals with "Effective national implementation – the responsibility of States". It is symbolically significant that this section has been moved up the text from its less prominent place in earlier drafts. The Declaration acknowledges that ineffective national implementation "remains the principle challenge confronting the Convention system" and that "the overall human rights situation in Europe depends

3. AS/Per (2018) 03, 16 March 2018.

on States' actions and the respect they show for Convention requirements", which echoes the language of the Assembly's statement. The role of parliaments is recognised, alongside those of the government and administrative authorities, the judicial system and civil society. Amongst the policy recommendations are a call on governments to ensure, "with appropriate involvement of national parliaments", that policies and administrative practice are Convention compliant.

7. Execution of Court judgments, logically, comes after national implementation, and is described as "a key obligation". Again, the ambiguities of earlier drafts have been removed, with the States reiterating their "strong commitment to the full, effective and prompt execution of judgments" and calling on States to take further measures to strengthen domestic capacity to execute judgments effectively and rapidly. Regrettably, neither the role of national parliaments nor the contribution of the Assembly receives its due recognition.

8. The role of the Court is examined in the next section. Some of the most alarming and objectionable elements of the initial draft Copenhagen Declaration related to this issue, and it is reassuring to see that the combined wisdom of the States Parties has led to their deletion. Elaborate and repetitive disquisitions promoting an exaggerated interpretation of the principle of subsidiarity have been excised, including one that would have made application of the Convention subject to States' "constitutional traditions and in the light of national circumstances". Whilst the Declaration does still include a somewhat lengthy discussion of subsidiarity and the margin of appreciation, this is far more in line with the legal mainstream and consistent with the Court's case law. It could, however, be criticised for relying on extracts from Court judgments that have been taken out of context, something that the Court itself warns against in its opinion on the first draft of the Declaration.[4] Also of particular note is that the provisions in earlier drafts that sought to limit the Court's role with respect to immigration and asylum cases have been completely expunged.

9. The next section, "Interaction between the national and European level – the need for dialogue", contains the nexus for what were many other problematic parts of the earlier drafts. Most of the material that would have called on the Court to take into account political positions expressed by ill-defined actors in various non-judicial fora, which would have undermined its judicial independence and hence its credibility and authority, has gone. A clear echo remains, however, in the mention of «a constructive and continuous dialogue between the States Parties and the Court on their respective roles in the implementation and development of the Convention system, including the Court's development of the rights and obligations set out in the Convention», whose practical and legal implications are not made clear. The Assembly should counsel States to act with the utmost caution and restraint, should they be minded to pursue this idea any further, including by way of the suggested "informal meeting" to discuss "general developments in the jurisprudence of the Court". The proper context for States to discuss jurisprudential issues with the Court is in the course of judicial proceedings, including – as mentioned in the Declaration – through third-party interventions.

10. The fact that the Court's caseload "still gives reason for serious concern" is acknowledged in the following section, with a core challenge being the backlog of Chamber cases (i.e. cases that are prima facie admissible and non-repetitive, potentially raising serious human rights issues requiring full judicial examination). The Declaration also recognises the constant problem of repetitive cases and the need to resolve the underlying systemic and structural problems at domestic level. Regrettably, nothing new is proposed to address these issues; for example, the idea of financial penalties for a State's persistent failure to resolve systemic or structural problems that have been the subject of repeated Court judgments seems to remain anathema, unless it is concealed behind the call "to consider the most effective means to address the challenge". Potentially of concern is the call on the Court "to continue to explore all avenues to manage its caseload, … including through procedures and techniques aimed at processing and adjudicating the more straightforward applications under a simplified procedure, *while duly respecting the rights of all parties to the proceedings*". The words I have italicised are crucial: the Court must not diminish applicants' (or States') procedural rights or the transparency of its procedures in its efforts to resolve its caseload. In this respect, I recall the Court's practice of not giving reasons for inadmissibility decisions taken by Single Judges, which took five years to change despite persistent criticism from applicants and their representatives. Finally, an earlier provision that appeared to propose the removal of inter-State and conflict-related cases from the Court's jurisdiction was rejected; the final Declaration instead calls for exploration of ways to handle such cases more effectively, "without thereby limiting the jurisdiction of the Court". It would have been preferable also to clarify that the right of individual application in conflict-related cases will not be limited.

11. The selection of candidates for judge at the Court and the election of judges are examined in the next section. This is an issue of particular interest for the Assembly, on which the Convention confers responsibility for the election of judges, and which has for many years worked to ensure that national selection procedures

4. Opinion on the draft Copenhagen Declaration, European Court of Human Rights, 19 February 2018.

for candidates are open, fair and transparent. The election procedure in the Assembly has also been strengthened over time, including by the setting-up of a special committee on the election of judges to the Court, whose members are required to have a legal background. More recently, the Committee on the Election of Judges has also engaged with the Advisory Panel that assists States in putting forward only candidates who meet the requirements of the Convention. Whilst I have no doubt that the Assembly remains resolved to seek constantly to improve its own procedures and to encourage States to enhance theirs, the States Parties should be careful to respect the Assembly's prerogatives under the Convention, which were deliberately established as bulwarks of the Court's judicial independence from the States Parties.

12. The two following sections address various issues, including European Union accession to the Convention and ratification of Protocols Nos. 15 and 16. I fully support the Declaration's calls for EU accession.

13. The final provisions of the Copenhagen Declaration call for further action, including for the Parliamentary Assembly “to give full effect” to it. In this respect, I regret the Danish chairmanship's failure to involve the Assembly in the drafting of the Declaration, despite the Assembly having led the campaign for a human rights convention in 1949 and its being a Convention body (electing the judges) that has for decades played a politically important role in promoting the Convention and its effective implementation by member States, including by enhancing the contribution of national parliaments. The President of the Assembly may have been invited to speak at the Copenhagen Conference, but by that stage the text of the Declaration had already been finalised. If the member States are serious about engaging stakeholders such as the Assembly, as well as, for example, the Council of Europe Commissioner for Human Rights (who also has a specific Convention role) and civil society (especially applicants' representatives), in the reform process, that process should be made more open and inclusive throughout, including when drafting important declarations. Nevertheless, the States Parties can be assured that the Assembly will continue to support and defend the Convention system, enhance its own contribution to it and encourage all relevant national authorities to fulfil their obligations.

3. Conclusions

14. The Copenhagen Declaration as adopted is very different from the first draft that was proposed by the Danish Chairmanship two months earlier. One obvious conclusion that can be drawn from this is that most member States do not share the Danish Government's concerns about the Convention system and the Court's case law; or if they do, they either recognise that the enormous advantages of the current Convention system to both individual rights and the maintenance of freedom, democracy, peace and security in Europe outweigh the occasional inconveniences of certain judgments, or were not prepared to accept the radical, potentially damaging measures being proposed in response to those concerns (or both). In any case, the outcome is that the member States have reaffirmed, at high level, their commitment to the Convention system, their will to implement their obligations under the Convention and their recognition of the role of the Court as an independent judicial body interpreting and applying Convention rights. This must be welcomed, even if in an ideal world, it would all have gone without saying.

15. The Declaration is not without its faults, however, even if these are now relatively minor. It recognises that ineffective national implementation and inadequate execution of Court judgments are still the main problems but offers little that can be called new by way of solutions. It still contains vaguely defined but nevertheless conceptually problematic ideas about “dialogue” between the States Parties and the Court, including on the interpretation of Convention rights, that could be developed in ways that would threaten the Court's independence.

16. More generally, traces remain of the fundamental problem underlying the initial draft, which was an apparent failure to appreciate the complexity, subtlety and delicacy of the Convention system. Boilerplate statements about the Court's independence and the role of other actors, including the Assembly and civil society, do not entirely conceal the Declaration's roots in a text that sought to give a preponderant influence to the States Parties, in a way that would have drastically unbalanced and reduced the effectiveness of the system as a whole. Whilst, as noted above, the worst of that damage has been averted, the Assembly and other stakeholders should be wary to ensure that the Copenhagen Declaration is not abused in future to justify positions or action that are inconsistent with the essential principles of the Convention system, to the detriment of human rights protection in Europe.