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Establishment of a collective guarantee of essential freedoms and fundamental rights

Report

Committee on Legal Affairs and Human Rights

Rapporteur: Mr Pierre-Henri TEITGEN, France

1. PREAMBLE

1. The Committee on Legal and administrative Questions has examined the draft Resolution which recommends to Member States of the Council of Europe the establishment of a collective guarantee of essential freedoms and fundamental rights.

2. On the preliminary question of the usefulness of such a collective guarantee, the Committee replied in the affirmative, considering that this guarantee would demonstrate clearly the common desire of the Member States to build a European Union in accordance with the principles of natural law, of humanism and of democracy; it would contribute to the development of their solidarity and would fulfil the longing for security among their peoples.

3. Having reached a conclusion on the preliminary question, the Committee then examined in turn the two fundamental problems, namely:

3.1. What are the rights and freedoms which the Member States of the Council of Europe should in common guarantee to all persons residing within their territories?

3.2. How can the collective guarantee operate?

2. RIGHTS AND FREEDOMS TO BE GUARANTEED

4. The Committee unanimously agreed that for the moment, only those essential rights and fundamental freedoms could be guaranteed which are, to-day, defined and accepted after long usage, by the democratic regimes. These rights and freedoms are the common denominator of our political institutions, the first triumph of democracy, but also the necessary condition under which it operates. That is why they must be the subject of the collective guarantee.

5. Certainly, "professional" freedoms and "social" rights, which have in themselves a fundamental value, must also, in the future, be defined and protected; but everyone will understand that it is necessary to begin at the beginning and to guarantee political democracy in the European Union, and then to co-ordinate our economies, before undertaking the generalisation of social democracy.

6. In approaching the general problem of the definition of rights and freedoms which are to be guaranteed (a question presented to the Assembly by the Committee of Ministers in their letter of 14th August 1949) the Committee considered that it was preferable (as much from a desire to co-ordinate the activity of the Council of Europe with that of the United Nations, as by reason of the moral authority and technical value of the document in question) to make use, as far as possible, of the definitions set out in the "Universal Declaration of Human Rights" approved by the General Assembly of the United Nations. It thus based itself, as far as possible, on this document.



7. It has always been understood that in referring to one or other Article of the Declaration of the United Nations with the object of defining this or that freedom better, the Resolution adopted by the Committee did not mean to refer to all the provisions of the Article in question, but only to those specifying the conduct of freedom provided for in this Resolution. Thus when the Committee writes: "The Member States undertake to ensure for all persons residing in their territories: "... (10) the right to marry and to found a family, in accordance with Article 16 of the United Nations Declaration", it limits the guarantee to the right to marry without including "equal rights as to marriage, during marriage and at its dissolution", which are also covered by Article 16 of the United Nations Declaration.

8. That is how the Committee has drawn up the list of rights and freedoms which are to be covered by the collective guarantee. This list appears in Article 2 of the draft Resolution. The texts of the respective Articles, or parts of Articles, of the United Nations Declaration to which reference has been made are given in the Appendix.

9. The inclusion in the list of guaranteed rights and freedoms of the "family" rights, which are represented by:

- a. freedom from all arbitrary interference in family life;
- b. the right to marry and to found a family;
- c. the prior right of parents to choose the kind of education to be given to their children, raised, within the Committee, various objections based on the fact that in these cases no rights regarded as essential for the functioning of democratic institutions were at stake, so that it was preferable to exclude them from the guarantee and to limit the latter solely to these essential rights. This argument did not prevail, since the majority of the Committee thought that the racial restrictions on the right of marriage made by the totalitarian regimes, as also the forced regimentation of children and young persons organised by these regimes, should be absolutely prohibited.

10. The extension of the guarantee to cover the right to own property was also criticised. Certain members of the Committee thought that there was no reason to differentiate between the right to own property and the other social and economic rights, and that it would be preferable, therefore, to exclude it from the guarantee, since in principle the latter did not cover rights of this nature. In the opinion of other members of the Committee, it would not be possible at present to confer on any international organisation the protection of the right to own property, because it would not be possible to make such an organisation responsible for evaluating the legitimacy of the charges and the restrictions of various kinds which, according to the economic or social conditions of a country, might be imposed on private property, on account of its social function or general utility. The majority of the Committee, however, considered that, having regard to the importance of the part played by the right to own property for the independence of the individual and of the family, it was desirable to include it in the list of guaranteed rights.

11. The Resolution adopted by the Committee specifies that the regime of guaranteed freedoms should prevent any discrimination based on membership of a national minority. After having heard a Report by M. Lannung on the problem of the wider protection of the rights of national minorities, the Committee unanimously recognised the importance of this problem. It decided that, since its task was to draw up a list, not of fundamental rights, which must be defined in a general declaration, but only of those which appeared suitable for inclusion in an immediate international guarantee, it should adhere to the fundamental rights set out in Article 2 of the draft Resolution. The Committee, however, decided that the present Report should contain a mention of its approval in principle of M. Lannung's declarations, and should draw the attention of the Committee of Ministers to the need for a subsequent examination of the problem, with a view to defining more exactly the rights of national minorities.

12. It should be added that, in recommending a collective guarantee not only of freedom to express convictions, but also of thought, conscience, religion and opinion, the Committee wished to protect all nationals of any Member State, not only from "confessions" imposed for reasons of State, but also from those abominable methods of police enquiry or judicial process which rob the suspected or accused person of control of his intellectual faculties and of his conscience.

13. Article 3 of the draft Resolution contemplates the undertaking by the Member States to respect the fundamental principles of democracy in all good faith, and particularly, in their metropolitan territory, to hold, at reasonable intervals, free elections by universal suffrage and secret ballot "so that governmental action and legislation may accord with the expressed will of the people". An Amendment to delete this final phrase was rejected by the Committee, since it was considered that this was not a theory of political philosophy and therefore a subject of dispute, but rather a fundamental requirement of democracy.

14. After having drawn up the list of the rights and freedoms which should be guaranteed, the Committee approved the principle of international law according to which each State reserves the right to organise the exercise within its territories of the guaranteed freedoms (Art. 4), but it also formulated the principles by which this right is to be governed:

- a. prohibition of any arbitrary discrimination (Art. 5);
- b. prohibition of any restriction on a guaranteed freedom for motives based, not on the common good or general interest, but on reasons of State (Art. 6).

15. On the proposal of M. Rolin, the Committee recommended that the collective guarantee should aim at ensuring that the laws of each State and their application were in accordance with the "general principles of law recognised by civilised nations", principles which, under Article 38 (1. C) of the Statute of the Permanent Court of International Justice, constitute one of the bases of the *jus gentium* (Art. 7).

16. M. Callias would have liked to word Article 5 of the draft Resolution in such a way that it would expressly authorise the States, signatory to the proposed Convention, to take special measures to deal with those who, under pretext of expressing their opinions, have resort to violence, or else try to provoke it. The Committee considered that the text of Article 6 of the draft Resolution covered this point.

17. As regards the question of whether or not the rights set out in Article 2 of the draft Resolution should be guaranteed by each State, not only to all persons residing within its metropolitan territory but also to all persons residing within its overseas territories or in its colonial possessions, the majority of the Committee replied in the affirmative. Certain reservations were made on this point by some members of the Committee, who were not able to appreciate exactly the difficulties which this solution might raise. Another suggestion was that the victim of a wrongful act should be entitled to bring it to the notice of the Commission of Enquiry, it being understood that they would be parties to the investigation of their petition, and that the Commission's findings would be published in such a way as to make them known to the public. This publicity alone would, in most cases, in the view of the supporters of this suggestion, suffice to cause Parliament to intervene and would thus ensure redress for the situation complained of.

3. OPERATION OF THE COLLECTIVE GUARANTEE

18. After a long debate, the Committee rejected as completely insufficient a Proposal granting the victim of a violation of the Convention a simple right of petition, whether to the Committee of Ministers or to a Commission of Enquiry. It is in fact well known that any authority which, in such circumstances, receives a petition, may quite likely decide to ignore it.

19. After this the Committee decided that the guarantee should include a judicial ruling preceded by a preliminary investigation of the complaint, followed, if necessary, by an enquiry, and then an attempt at conciliation, to be carried out by a special Commission.

20. All persons or corporate bodies, who are victims of a violation of the Convention, may petition the Commission, but the latter need not immediately refer it to the Court; the complaint will, if the Commission so decides, only be submitted to the Court for a judicial decision after a preliminary investigation of the case and after an attempt at conciliation has been made. A minority of the Committee considered that the Council of Europe should, for its part, limit itself to ensuring that all its members respect the principles of democracy. If this nullifying condition is fulfilled, the democratic peoples should be entitled to settle their own affairs as they think best. This result might be attained, in the view of the minority, by limiting to Member States the right, to bring another Member State before an international tribunal for the violation of any one of the recognised fundamental freedoms. This solution would, they consider, obviate the abuses and dangers which might arise from proceedings instituted by private individuals.

21. The solution would be different in the case where a Member State intervenes in the affair, since, after failure to achieve conciliation, it could insist on a legal ruling.

22. Having accepted that the Court may consider an individual complaint, if forwarded to it by the Commission, it was necessary, in order to give effect to the guarantee, to decide upon the creation of an appropriate European Court, since the Permanent Court of International Justice may consider a complaint only when brought by a State.

23. Anxious, however, not to set itself up in opposition either to European legal order and general international order, or to the proposed European Court and the existing Permanent Court, the Committee agreed that the States concerned might also, if they preferred, refer a matter to the Court of International Justice, in accordance with their reciprocal agreements. Any possible conflicts of jurisdiction must be regulated by the Convention.

24. The Commission shall not deal with an individual complaint until after the plaintiff has exhausted "all other means of redress within a State". Long practice in international procedure has defined the meaning of this expression as being a resort to the ordinary legal channels, to the exclusion, for example, of a request for re-trial of the case.

25. Certain members of the Committee stated categorically that they were of the opinion that the institution of the Commission of enquiry and of conciliation should be combined with that of the European Court. They would not agree to the creation of a Commission completely independent of the Court and even wished that the members of the Commission should be appointed by the Court. In order to give effect to their observations, it is recommended that the Commission should be placed under the general supervision of the Court (Art. 28).

26. The jurisdiction of the Court shall extend to all violations of the obligations defined by the Convention, whether they are the result of legislative, executive or judicial acts (Art. 24). The Committee observes in this connection that the Court will not in any way operate as a Supreme Court of Appeal having jurisdiction to review any errors of law or of fact which are alleged against the judgment in question. The Court would have power to impugn a judicial decision, only if that decision had been made in disregard of the fundamental rights laid down in Article 2 of the draft Resolution, which is based on Articles 9, 10, and 11 of the United Nations Declaration.

The Committee, bearing in mind that the proposed text is not a draft Convention which will settle the problem in all its details, but merely a draft Resolution indicating the general lines' of the desired convention, submits to the Assembly the following resolution, subject to such further oral explanations as may be given by the Rapporteur.

3.1. Section I

Art. 1. — The Consultative Assembly of the Council of Europe recommends the Committee of Ministers to cause a draft Convention to be drawn up as early as possible, providing a collective guarantee, and designed to ensure the effective enjoyment by all persons residing within their territories of the rights and fundamental freedoms referred to in the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations, and set forth in Article 2 below.

Art. 2. — In this Convention, the Member States shall undertake to ensure to all persons residing within their territories:

1. Security of person, in accordance with Articles 3, 5 and 8 of the United Nations Declaration;
2. Exemption from slavery and servitude, in accordance with Article 4 of the United Nations Declaration;
3. Freedom from arbitrary arrest, detention, exile, and other measures, in accordance with Articles 9, 10 and 11 of the United Nations Declaration;
4. Freedom from arbitrary interference in private and family life, home and correspondence, in accordance with Article 12 of the United Nations Declaration;
5. Freedom of thought, conscience and religion, in accordance with Article 18 of the United Nations Declaration;
6. Freedom of opinion and expression, in accordance with Article 19 of the United Nations Declaration;
7. Freedom of assembly, in accordance with Article 20 of the United Nations Declaration;
8. Freedom of association, in accordance with Article 20 (paragraphs 1 and 2) of the United Nations Declaration;
9. Freedom to unite in Trade Unions, in accordance with paragraph i of Article 23 of the United Nations Declaration.
10. The right to marry and to found a family, in accordance with Article 16 of the United Nations Declaration;

11. The prior right of parents to choose the kind of education to be given to their children, in accordance with paragraph 3 of Article 26 of the United Nations Declaration;
12. The right to own property, in accordance with Article 17 of the United Nations Declaration.

Art. 3. — The Convention shall include an undertaking by Member States to respect the fundamental principles of democracy in all good faith, and in particular, as regards their metropolitan territory :

1. to hold at reasonable intervals free elections, by universal suffrage and secret ballot, so that governmental action and legislation may accord with the expressed will of the people;
2. to take no action which will interfere with the right of criticism and the right to organise a political opposition.

Art. 4. — Subject to the provisions laid down in Articles 5, 6 and 7, every Member State, signatory to the Convention, shall be entitled to establish the rules by which the guaranteed rights and freedoms shall be organised and protected within its territory.

Art. 5. — The fundamental rights and freedoms enumerated above shall be guaranteed without any distinction based on race, colour, sex, language, religion, political or other opinion, national or social origin, affiliation to a national minority, fortune or birth.

Art. 6. — In the exercise of these rights, and in the enjoyment of the freedoms guaranteed by the Convention, no limitations shall be imposed except those established by the law, with the sole object of ensuring the recognition and respect for the rights and freedoms of others, or with the purpose of satisfying the just requirements of public morality, order and security in a democratic society.

Art. 7. — The object of this collective guarantee shall be to ensure that the laws of each state in which are embodied the guaranteed rights and freedoms as well as the application of these laws are in accordance with "the general principles of law as recognised by civilised nations" and referred to in Article 38 of the Statute of the International Court of Justice.

3.2. Section II

Art. 8. — To ensure the observance, in accordance with Articles 4, 5, 6 and 7, of the engagements subscribed to by the Member States, in application of Articles 2 and 3, the Convention will establish:

1. a European Court of Justice (hereinafter called ' the Court) ;
2. a European Commission for Human Rights (hereinafter called the Commission).

3.3. Section III

Art. 9. — There shall be as many members of the Commission as Member States, signatories to the Convention. Not more than one national of each State may be a member of the Commission.

Art. 10. — Members of the Commission shall be elected by the Committee of Ministers and by the Consultative Assembly of the Council of Europe, by an absolute majority of the Votes in each body.

Art. 11. — Any signatory State may appeal to the Commission regarding any alleged breach of the provisions of the Convention by another Member State.

Art. 12. — After all other means of redress within a State have been tried, any person, or corporate body, which claims to have been victim of a violation of the Convention by one of the signatory States, may lay the matter before the Commission in a petition presented through legal channels.

Art. 13. — The Commission shall then undertake:

1. an investigation of the petition with the assistance of the representatives of either party;
2. if necessary, an enquiry.

Art. 14. — The Commission shall reject petitions which are irregular or manifestly ill-founded'.

Art. 15. — If it does not reject the petition, the Commission shall try to effect a reconciliation of the opposing parties.

Art. 16. — If reconciliation fails, the Commission may publish a Report setting forth the facts of the case.

Art. 17. — The Commission may be consulted by the Committee of Ministers in regard to the application, in certain cases, of Articles 4, 5 and 8 of the Statute.

3.4. Section IV

Art. 18. — If reconciliation fails, the Commission may decide to refer the documents in the case to the Court to obtain a legal ruling.

Art. 19. — If reconciliation fails, any Member State, signatory to the Convention, may submit the matter to the Court for judicial decision. In that case, the Commission shall immediately pass the case over to the Court.

Art. 20. — The States concerned may also, if they prefer, petition the Permanent Court of International Justice, in accordance with their reciprocal agreements.

Art. 21. — The European Court shall consist of 9 members.

Art. 22. — It shall not include more than one national of each State.

Art. 23. — Members of the Court shall be elected by the Committee of Ministers and by the Consultative Assembly of the Council of Europe by an absolute majority of the Votes cast in each of these bodies.

Art. 24. — The jurisdiction of the Court shall extend to all violations of the obligations defined by the Convention, whether they result from legislative, executive or judicial acts.

Nevertheless, where objection is taken to a judicial decision, that decision cannot be impugned unless it was given in disregard of the fundamental rights defined in Article 2 by reference to Articles 9, 10 and 11 of the United Nations Declaration.

Art. 25. — The deliberations of the Court, like those of the Commission, shall be secret.

Art. 26. — The findings of the Court shall be pronounced in open session.

Art. 27. — These findings shall be transmitted to the Council of Europe, if necessary, for action.

Art. 28. — The Commission will function under the general supervision of the Court.

Appendix APPENDIX

Articles or parts of Articles of the United Nations Declaration referred to in the Resolution

ART. 3

Everyone has the right to life, liberty and the security of person.

ART. 4

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

ART. 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

ART. 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law.

ART. 9

No one shall be subjected to arbitrary arrest, detention or exile.

ART. 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of the justice of any criminal charge brought against him.

ART. 11

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

ART. 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

ART. 16

Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family.

ART. 17

1. Everyone has the right to own property, alone as well as in association with others.

2. No one shall be arbitrarily deprived of his property.

ART. 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, t either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

ART. 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart informaton and ideas through any media and regardless of frontiers.

ART. 20

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1. Everyone has the right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to an association.

ART. 23

Everyone has the right to form and to join trade unions for the protection of his interests.

ART. 26

Parents have a prior right to choose the kind of education that shall be given to their children.