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Conclusions of the Ad Hoc Assembly relating to the draft treaty setting up a European Political Community (Judical Institutions, Human Rights, European Civil Service)

Opinion[1]
Committee on Legal Affairs and Human Rights
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1. I

Judicial Institutions

The question of judicial institutions — for which the Committee on Legal and Administrative Questions would prefer the title " Judicial Organs "—is the subject of only one paragraph of the Directives adopted by the Ad Hoc Assembly, namely paragraph 5 of Chapter I relating to the integration in the Political Community of the European Coal and Steel Community and the European Defence Community.

This paragraph states : " The judicial powers of the Community shall be assigned to the Court of Justice provided for the E. C. S. C. and the E. D. C. "

The Report of the Constitutional Committee, however, contains a fairly long Resolution, namely Resolution IV, which the Ad Hoc Assembly does not appear to have-has time to discuss and on which at any rate it made no comments.

This Resolution is accompanied by a Report from M. von Merkatz. It contains the following main points :

1. The Court of the Coal and Steel Community is accepted as the judicial organ of the future European Political Community, whereas the Consultative Assembly of the Council of Europe, in its Recommendation 36 of 27th September, 1952, had proposed that there should be created a European Court of Justice whose jurisdiction would include " all claims and complaints for which jurisdiction has been or shall have been conferred on it by restricted Communities of which at least three members are members of the Council of Europe ".
2. Rules are enunciated on the subject of concurrent jurisdictions between the Court of the Restricted Community and the Court of Human Rights when and if that Court is established.
3. Eighteen categories of cases are listed which the Court of the Community shall be competent to hear, in accordance with the provisions of the E. C. S. C. and E. D. C. treaties.
4. Certain rules are proposed concerning the establishment of special Chambers provided for in the Protocol on the Statute of the Court of Justice of the Coal and Steel Community.
5. Certain amendments are suggested with regard to the rules included in the above Protocol concerning the composition and operation of the Court of Justice.

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Your Committee on Legal and Administrative Questions has reserved for special consideration the proposals concerning the relations between the Court of Justice of the Restricted Community and the Court of Human Rights. These proposals were considered in relation with all the provisions devoted by the Constitutional Committee to the protection of Human Rights.

With regard to the other points, your Committee wishes to make the following comments :

1. It would seem that in the intervening period neither the Constitutional Committee as a whole nor the Ad Hoc Assembly has had time for a thorough discussion of the proposals of the Sub-Committee on judicial Institutions, which are of great interest.

It may, therefore, be useful at this stage to underline the considerable importance of the subject; indeed, one can hardly conceive a stable political society which should not possess effective judicial control to ensure the observance of the rule of law. This control is provided by the procedural rules of the judiciary whereby all who are subject to the law must find the essential guarantees of the competence and independence of their judges.

2. The opposition of the Constitutional Committee to the transfer of the judicial powers conferred upon the Court common to the Coal and Steel Community and to the Defence Community is partly explained by the fact that in September last the Committee on Legal and Administrative Questions had envisaged the establishment of several restricted Communities composed of different States, whereas the Constitutional Committee is concerned only with the Community of the six Powers, which, in the Committee's view, must gradually add to its original competence in matters of coal, steel and defence similar powers in political and, eventually, economic, social and other fields. According to the first conception, the organs of the Restricted Communities would as far as possible be set up within the corresponding organs of the Council of Europe. Some of the organs, such as the Secretariat, would be common to the Council of Europe and the specialised institutions. The European Court of Justice would in the same way be common to the Council of Europe and the Restricted Communities, and the establishment of as many Courts as there were Communities would be avoided. If, on the other hand, there is in future to be only one group of States forming one or more Restricted Communities within the Council of Europe, the existence of a special Court of Justice for that Community side by side with a possible European Court does not give grounds for such objections, and the need for a European Court of the Fifteen appears less imperative.

Your Committee on Legal and Administrative Questions considered that it was not its task to make a choice between these two conceptions in regard to the specialised institutions.

3. Even on the assumption that, in conformity with the proposals of the Constitutional Committee, the European Political Community were to confer juridical competence on an autonomous judicial organ, it would seem unlikely that these functions could be assumed by the Court of the Coal and Steel Community as at present constituted. Not only does this Court consist exclusively of nationals of the Member States of the Coal and Steel Community but, in accordance with the last paragraph of Article 19 of the Protocol on the Statute of the Court of Justice : " a party may not invoke the nationality of a judge, or the absence from the bench or from one division of a judge of its own nationality, in order to request a change in the composition of the court or of one of its divisions ". Such a system is in flagrant opposition to common practice in international arbitration or judicial settlements.

It is true that the Constitutional Committee in its Report conceives the Court of Justice as " a ' domestic Court ', established in a new setting, since it is the Court of Justice of a supranational Community, to which rights of sovereignty have already been assigned in certain specified spheres ".

In other words, both the Constitutional Committee and the authors of the Protocol on the Statute of the Court of Justice regard the Court as a federal institution similar to the Supreme Court of the United States, the Swiss Federal Tribunal or the German Reichsgericht. The question may, however, be asked whether this is not simply a theoretical viewpoint, whether it corresponds to political realities and whether it can reasonably be hoped that the community spirit engendered by a community with restricted objectives is as yet sufficiently powerful to make the allegiance of a judge to his own national State a matter of secondary importance, and to give public opinion unreserved confidence in his independence?

Most of the members of the Committee on Legal and Administrative Questions belonging to States which are parties to the Coal and Steel Community have expressed the view that public opinion had not reached such a stage in their countries. They therefore continue to prefer a system whereby the judges who are nationals of the Member States of the Communities would be joined by a number of judges who are not nationals of those States, as would be the case if a European Court of Justice were set up.

As a minimum, they expressed the wish that during a transitional period the aforementioned provision of the Protocol on the Statute of the Court of Justice should not be applied in the case of any dispute in which a State is interested, either as defendant or plaintiff, or as an intervening party, and that it be replaced by a provision similar to that appearing in Article 3 of the Statute of the International Court of Justice.

On this point, as indeed on all those which are the exclusive concern of the members of the future Political Community, the members of the Committee who are not nationals of these States did not feel that it was appropriate for them to express an opinion.

4. The list of the various cases for which competence is conferred on the Court of Justice by the Treaties instituting the Coal and Steel and Defence Communities shows the very diverse nature of the cases which the Court of Justice may be called upon to hear. The Constitutional Committee is undoubtedly correct in emphasing that such competence could with difficulty be conferred on an international court. But the same can be said of a national court, and it appears somewhat bold to confer simultaneously on the same Court the powers of an international tribunal, a court of cassation, a criminal court, a civil or commercial court, a court-martial and a disciplinary tribunal.

The Constitutional Committee already alludes in paragraph 5 of the Report to the existence of lower courts. However, in this connection it has only been able to quote some of the provisions of the Treaty establishing the European Defence Community and the Jurisdictional Protocol appended thereto. It would appear that the whole subject should be reconsidered with the aim of restricting the competence of the supreme judicial organ of the Community to questions of real importance.

5. The proposals of the Constitutional Committee concerning the creation of separate Divisions did not give rise to any observations, except that, in paragraph 6, it would appear to be desirable to fix not only the maximum but also the minimum number of judges composing the Chambers in order to avoid having Chambers with a single judge.

6. Finally, various observations were made with regard to the proposals submitted by the Constitutional Committee on the Statute of the Court of Justice.

a. As regards the number of judges, if the competence of the Court is to remain as at present provided in the Treaty, seven judges could not possibly be sufficient. This number should therefore be increased as soon as the Treaties instituting the Coal and Steel and Political Communities are ratified, since this extends the competence of the Court.

b. In the matter of the qualifications of the judges, your Committee remains of the opinion that, in view of the extremely delicate nature of the legal questions with which the Court of the Community will have to deal, it should be made obligatory for these judges to have legal training and not merely practical knowledge acquired in the course of an administrative career.

c. On the question of the appointment of the judges, it appears from information which the Committee has received that, in providing for collaboration between the Parliament of the Community and the Governments, the Constitutional Committee did not reject the possibility of the replacement of the latter by the Executive of the Community. With this reservation, the Committee showed its preference for a system whereby the judges would be elected by the Parliament of the Community from a list of persons nominated by the Governments, each Government submitting three names. The mere approval by the Parliament of an appointment made by the Governments would be an empty, formality.

d. The principle put forward by the Committee, that the salary of a judge should not be reduced during his term of office, is assuredly worthy of approval. It should, however, be understood that this principle does not exempt magistrates from liability to taxes imposed by the Community at such time as its authorities may consider it necessary to adopt the course for which provision is made in Article 41 of the Convention on the status of the European Defence Forces.

e. Finally, with regard to the proposal not to appoint the judges for life and not to impose any age-limit, your Committee supports the first of these suggestions, although it desires to emphasise that it is not consistent with the conception of the Community's Court of Justice as constituting a « domestic » court, since national judges normally end their career only on reaching the age-limit. It does, however, seem desirable that an age-limit should be mentioned in the Treaty. In the absence of such a provision there is a danger that judges may remain in office far beyond a reasonable age. Moreover, the obstacle to re-election provided by age should confer, at least on those judges whose age makes it impossible for them to be re-elected, that measure of independence which would- be theirs owing to the absence of any possibility of such preoccupations.

2. II

Human Rights

The question of Human Rights does not appear to have been considered by the Ad Hoc Assembly. It is, however, mentioned in five places in the Resolutions of the Constitutional Committee :

1. Resolution II, para. 2, clause 2 : " The Community has the following mission and general aims : to assist in protecting human rights and fundamental freedoms in the Member States. "

2. Resolution II, para. 26 : " The Community and each of the Member States shall guarantee to every person under their jurisdiction the rights and freedoms laid down in the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November, 1950, and in the Protocol thereto signed in Paris on 20th March, 1952. The Community shall have the necessary competence to ensure the maintenance of these rights and freedoms in Member States, under the conditions laid down in the Statute. "

3. Resolution II, para. 33 : " The following may apply for membership of the Community :

   the Member States of the Council of Europe;

   an y other European State regarded as capable of complying with the principle that every person under its jurisdiction shall enjoy human rights and fundamental. freedoms. "

4. Resolution III, para. 27 : " Every Member State of the Community shall be required to uphold and maintain human rights as defined in the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4th November, 1950, and in the Protocol signed on 20th March, 1952. Acceptance of the Community's Statute shall automatically involve unreserved adherence to the clause conferring compulsory jurisdiction on the European Court of Human Rights. The Community shall be assimilated to the signatory States of the European Convention for the protection of human rights and fundamental freedoms in respect of the judicial mechanism (Committee and Court) provided by that Convention. The European Executive Council may institute proceedings before the Committee and the Court, according to the procedure laid down in the Convention, in order to maintain constitutional order, democratic institutions and fundamental human freedoms, in case the latter should be gravely and persistently menaced in the territory of any of the Member States of the Community. The European Executive Council shall be further authorised to afford direct assistance within the scope of the treaties in force, if invited to do so by the competent constitutional authorities of the Member States concerned. "

5. Resolution IV, para. 1, sub-paras. 3 and 4 : " Disputes arising within the Community which fall under the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms must be submitted to the Community's Court of Justice. If the Court of Justice of the Community finds that a dispute regarding a question of law coming under the European Convention affects at the same time both the relations between Member States and the Community and relations between Member States as such, it will give final judgment on the matter (in conformity with the principle laid down in Articles 87 E. C. S. C. and 122 E. D. C). Should this not be the case, the Community's Court of Justice will renounce jurisdiction, thus enabling the parties to bring the matter before the judicial authorities provided for in the European Convention for the Protection of Human Rights and Fundamental Freedoms. "

In considering all these Resolutions, your Committee noted that, as regards the incidence of the European Convention on the Treaty instituting the European Political Community, the Constitutional Committee gave consideration to the following four points :

1. the obligation on Member States of the Community to accept all the provisions of the European Convention;

2. the conferring on the , Executive Council of the Community of the right to intervene before the Commission or the Court of Human Rights;

3. the eligibility to become Members of the Restricted Community of States which, although not Members of the Council of Europe, are deemed to be able to ensure respect for Human Rights and Fundamental Freedoms, in accordance with the European Convention on Human Rights, signed in Rome.

4. The need for Members of the Restricted Community, and doubtless for their nationals, to avoid bringing before the organs of the Convention on Human Rights complaints against another Member without having first obtained from the Court of the Coal and Steel Community a ruling that it is not qualified to assume jurisdiction.

After careful consideration of these proposals, your Committee on Legal and Administrative Questions reached the following conclusions :

1. The Committee welcomes the importance attached by the Constitutional Committee not only to the observance of Human Rights, but also to the supervisory functions of the Court provided for in the Rome Convention. The Committee raises the question, however, whether the Constitutional Committee might not request Members of the future Political Community to subscribe also to the declaration envisaged in Article 25 of the Rome Convention, whereby the Commission shall be competent to consider petitions addressed to the Secretary-General of the Council of Europe by any individual or by non-governmental organisations.

2. Th e question of the part to be played by the Executive Council of the Community in ensuring that its Members abide by the Convention raises greater difficulties.

Above all, your Committee believes that there can be no question, as matters stand at present, of the Community itself becoming party to the Rome Convention. Not only would this give rise to technical difficulties, since under its Article 66 only Member States of the Council of Europe may accede to the Convention, but accession to the Convention entails responsibilities which it does not seem possible for the Community to assume, since its Members have not conferred upon it any powers concerning the protection of human rights and fundamental freedoms.

Moreover, the rôle assigned by the Constitutional Committee to the Community, or more precisely to its Executive Council, appears to be confined to the right to institute proceedings before the Commission and the Court in the event of the human freedoms being " gravely and, persistently menaced in the territory of any of the Member States of the Community ".

Even if it is limited to the question of the right of intervention being granted to the Executive Council, the proposal of the Constitutional Committee, however attractive it may appear raises certain difficulties which must bë clearly stated. The Convention on Human Rights provides that the Commission may receive petitions either from the signatory States (Art. 24) or from private individuals or groups (Art. 25), and that either the Commission or a signatory State may bring a case before the Court (Art. 48). The Political Community does not come into any of these categories; it could not properly intervene, therefore, unless the Parties to the Rome Convention were to adopt a new Protocol to this effect. Negotiations for the inclusion of such a Protocol do not appear to be impossible, but would they not further complicate and delay the coming into force of the Convention and its existing Protocol? This would certainly be regrettable.

It may be asked whether this disadvantage might not at least find compensation in the fact that added force would thereby be imparted to the Convention. This, however, is doubtful, since in the event of a " grave violation " of human rights there is reason to hope that the victims of such violations or else one of the signatory States would take the initiative of bringing the case before the Commission without waiting for the violation to become sufficiently " persistent" to enable the Community to intervene.

3. Similarly, it does not seem possible to adopt the proposal that States which are not Members of the Council of Europe should be permitted to enter the Political Community, provided they prove themselves capable of complying with the provisions of the Convention on Human Rights.

The Committee expressed some surprise that, from a comparison of this provision with Article 4 of the Statute of the Council of Europe and Article 4 of the United Nations Charter, the Constitutional Committee appears to be satisfied with a likelihood or material possibility, without insisting on tokens of proof of sincerity. Actually, this seems to be only a matter of drafting.

There is, however, a still more serious consideration. It is clear from paragraph 27 of Resolution III that, in the view of the Constitutional Committee, acceptance of the Community's Statute involves not only the obligation to uphold the binding provisions of the Convention, but also that of being subjected to control by the organs set up under the Rome Convention. This, however, is an impossibility for a non-Member State of the Council of Europe, since Articles 24, 25, 32, 44, 46, 48 and 53 of the Rome Convention permit intervention by its organs only in regard to one of the High Contracting Parties.

Unless the Rome Convention were to be considerably amended, then, a non-Member State of the Council of Europe could not be subjected to the procedures laid down in that Convention, whether or not that State is a Member of the Restricted Political Community.

Your Committee earnestly hopes that the Constitutional Committee will reconsider this question in the light of the above comments.

4. With regard to the proposals concerning concurrent jurisdictions between the Court of Human Rights and the Court of the Restricted Community, your Committee has observed that the Constitutional Committee is concerned with the possibility " of a dispute concerning internal affairs of the Community but having the appearance of a suit relating to human rights and fundamental freedoms ".

In this connection, the Report (p. 50) expresses the idea that " the status of the Community's Court should, so far as concerns matters within the Community's competence,. be the same in relation to the Court instituted by the Rome Convention as the status of a domestic tribunal of one of the Member States ".

This opinion should be compared with Article 26 of the Rome Convention, according to which: " The Commission may only deal with the matter after all domestic remedies have been exhausted, in accordance with to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken".

Your Committee on Legal and Administrative Questions has no objection to this principle being applied in the manner suggested. To this end, however, it would suffice to insert a clause in the Treaty of the Political Community stating-that for the purposes of Article 26 of the Rome Convention all remedies falling within the competence of the Court of Justice of the Community shall be regarded as domestic remedies.

The effect of such a provision would be to enable the defendant State, in related cases, to plead the necessity for the plaintiff Member State or national of the restricted Community, to appeal in the first place to the. Court of the Community, on the understanding that the Court of Human Rights would verify the justification of this plea.

The proposals of the Constitutional Committee, however, go much further. On the pretext that such cases might well arise, it suggests that any appeal relating to human rights as between Members of the Community should be compulsorily brought before the Court of the Community, which appears, in the majority of cases, to complicate matters unnecessarily. It also requests that decisions taken by the Court of the Community in matters for which it deems itself competent should be regarded as " final "—which is diametrically opposed to the concept of domestic remedies and might well lead to a veritable legal deadlock, since such à stipulation would not be binding on third States, who might therefore quite legitimately bring the same matter before the organs of the Convention on Human Rights.

It would therefore appear desirable for the Constitutional Committee to reconsider these proposals.

3. III

Basic principles of a European Civil Service

Such is the title of paragraph 26 of Resolution III of the Constitutional Committee which has not given rise to any comments by the Ad Hoc Assembly.

Under the terms of paragraph 26, the European Executive Council is required to draw up staff regulations for civil servants of the Community. Your Committee, however, has grave doubts as to the wisdom of this provision; it would surely be more in accordance with the practice generally followed by European States to incorporate in the law at least the basic principles for the protection of civil servants against arbitrary action.

As for the principles involved in such a service—if they are to be duly incorporated into the text of a Convention, it is not sufficient to provide that posts in the civil service shall be filled on the basis of free access to all applicants and on an equal footing. It is more important to grant immunity to civil servants and to compel Member States to respect their independence. On this point, the Constitutional Committee might do well to bear in mind Articles 100 and 105 of the United Nations Charter, taking into consideration that these provisions might well be reinforced in the light of the incidents which have recently occurred in the United Nations Secretariat.