Parliamentary Assembly
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Opinion 251 (2004)[1]

Draft Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention

Parliamentary Assembly

1. The Parliamentary Assembly attaches the utmost importance to the proper functioning of the European Court of Human Rights, which is still the only international tribunal accessible to persons within the territory of the High Contracting Parties to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter "the Convention"). It therefore welcomes any changes liable to facilitate or improve such proper functioning, provided that the right of individual application, which is its raison d'être, continues to be guaranteed.

2. Moreover, in the last few years, it has adopted a number of recommendations aimed at improving the Convention (Recommendation 1649 (2004) on candidates for the European Court of Human Rights; Recommendation 1535 (2001) on structures, procedures and means of the European Court of Human Rights; Recommendation 1429 (1999) on national procedures for nominating candidates for election to the European Court of Human Rights; Recommendation 1295 (1996) on the procedure for examining candidatures for the election of judges to the European Court of Human Rights).

3. In this respect, the Assembly recalls its Recommendation 1649 (2004), cited above, which proposed including an explicit provision on gender balance in Article 22 of the Convention and requested that, as far as possible, none of the candidates put forward should need to be replaced by an ad hoc judge.

4. It also recalls its Recommendation 1606 (2003) on areas where the European Convention on Human Rights cannot be implemented, in which it recommended that the Committee of Ministers create the post of public prosecutor at the European Court of Human Rights responsible for bringing cases of mass violations of human rights before the Court, and that it entrust this task to the Council of Europe Commissioner for Human Rights.

5. Finally, in its Recommendation 1477 (2000) on execution of judgments of the European Court of Human Rights, it recommended amending the Convention to introduce a system of astreintes (fines for a delay in the performance of a legal obligation) to be imposed on states that persistently fail to execute a Court judgment, but it welcomes the proposals to enable the Committee of Ministers to refer judgments back to the Court for further explanation or indication of how the judgment should be executed.

6. The Assembly regrets that none of the aforementioned recommendations have to date been accepted by the Committee of Ministers.

7. In connection with draft Protocol No. 14, as regards the possibility of creating additional posts of judge, it considers that this would create inequalities between countries, and questions the expediency of such a measure. The terms of office of such additional judges have not been specified, and this omission at least should be rectified.

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1. Assembly debate on 28 April 2004 (13th Sitting) (seeDoc. 10147, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr McNamara; and Doc. 10162, opinion of the Committee on Equal Opportunities for Women and Men, rapporteur: Ms Cliveti). Text adopted by the Assembly on 28 April 2004 (13th Sitting).

8. As far as judges' terms of office are concerned, the Assembly wholeheartedly backs the proposal for a non-renewable nine-year term, which is the duration it had itself proposed

9. In connection, however, with the age at which judges should cease to hold office, namely, at 70, the current wording of Article 3 of draft Protocol No. 14 maintains an apparent contradiction between paragraphs 2 and 3 of Article 23 of the Convention, implying that they can remain in office beyond the age of 70 and hear new cases.

10. In connection with the various formations of the Court, the Assembly welcomes the proposals as an improvement on the present practice regarding the category of persons "chosen by the President of the Court from a list submitted in advance" by the High Contracting Party, where the judge sitting in respect of this party is unavoidably detained. But the Assembly still considers such ad hoc judges as lacking legitimacy unless approved by the Assembly.

11. The Assembly cannot accept the proposal to add a new admissibility criterion to Article 35 (individual applications) of the Convention because it is vague, subjective and liable to do the applicant a serious injustice, and would exclude only 1.6% of existing cases. In addition, it may have the unintentional effect of discriminating against female applicants to the Court, by, for example, putting a premium on financial disadvantages suffered.

12. However, should the Committee of Ministers insist on adding a new admissibility criterion, then, in keeping with the spirit of the Convention and the Assembly's desire to encourage member states to incorporate the Convention and its protocols into their domestic legislation, it would recommend that the Court be empowered to declare an application inadmissible if it is satisfied that the application has been duly examined by a domestic tribunal in accordance with the provisions of the Convention and the protocols thereto.

13. Whilst welcoming the third party intervention provided for in Article 14 of draft Protocol No. 14, which stipulates that the Council of Europe Commissioner for Human Rights can submit written comments and take part in hearings, the Assembly nevertheless considers that this is insufficient to cope with cases of alleged mass violations of human rights and therefore proposes that the Council of Europe Commissioner for Human Rights be empowered to bring such cases before the Court.

14. Consequently, the Assembly recommends that the Committee of Ministers make the following amendments, which it deems essential, to draft Protocol No. 14:

14.1. in Article 1: add the following words at the end of paragraph 3 of Article 20: ", as well as the length of their term of office";

14.2. in Article 2: add the following words to paragraph 1 of Article 22: "containing at least one candidature from a person of each gender" after the words "Contracting Party";

14.3. in Article 3: merge paragraphs 2 and 3 of Article 23, to read as follows: "The terms of office of judges shall expire when they reach the age of 70. They shall, however, continue to deal with such cases as they already have under consideration.";

14.4. in Article 7: in paragraph 5 of Article 26, after the words "by that Party", add the words: ", containing at least one candidature from a person of each gender, and approved by the Parliamentary Assembly,";

14.5. in Article 9: delete the following words from paragraph 3 of Article 28: "including whether that Party has contested the application of the procedure under paragraph 1.b";

14.6. in Article 13: replace paragraph 3 of Article 35 by the following text:"The Court shall declare inadmissible any individual application submitted under Article 34

a. if it considers the application to be incompatible with the provisions of the Convention or the protocols thereto;

b. if it considers that the application is manifestly ill-founded or an abuse of the right of application; or

c. if it is satisfied that the application has been duly examined by a domestic tribunal in accordance with the provisions of the Convention and the protocols thereto."

14.7. in Article 14: add a paragraph 4 to Article 36 to read as follows: "The Council of Europe Commissioner for Human Rights may bring before the Court cases of alleged mass violations of human rights.";

14.8. in Article 17: add the following sentence to the end of paragraph 4 of Article 46: “The applicant shall have the same possibility.”;

14.9. in Article 17: replace paragraph 5 of the new Article 46 with the following paragraph: “5. If the Court finds a violation of paragraph 1, it may impose a monetary penalty on the state concerned and refer the case to the Committee of Ministers for consideration of any further measures to be taken to ensure compliance with the judgment. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall decide on the further handling of the case in conformity with the Court’s findings.”

15. The Assembly stresses that the proposals for reform of the control system of the Convention will only be effective if the Committee of Ministers provides for the additional budgetary resources required for their implementation.

16. The Assembly is appreciative of the role which it, its Committee on Legal Affairs and Human Rights and individual parliamentarians have been able to play in the dialogue with the Steering Committee for Human Rights on the reform of the control system of the Convention, but it nevertheless considers that it is hardly compatible with the importance of the proposals put forward to give the Assembly only two weeks to prepare its opinion on draft Protocol No. 14.

17. Finally, the Assembly urges the Committee of Ministers to submit requests for opinions on draft treaties to the Parliamentary Assembly at least three months before the meeting of the Committee of M inisters at which the text is to be examined and to take account of this three-month period in the deadlines assigned to the steering committees responsible for their preparation.