



Explanatory Report to Protocol No. 5 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending Articles 22 and 40 of the Convention

Strasbourg, 20.I.1966

I. Protocol No. 5 to the European Convention for the Protection of Human Rights and Fundamental Freedoms was prepared within the framework of the Council of Europe by the Committee of Experts on Human Rights. It was opened for signature on 20 January 1966.

II. This document contains the text of the explanatory report and of the commentary of the Committee of Experts on Human Rights, which publication was authorised by the Committee of Ministers at the 169th Meeting of the Ministers' Deputies in April, 1968.

General considerations

1. Article 22 of the Convention provides for a system whereby the terms of office of approximately half the members of the Commission are renewed every three years; but, when new members of the Commission were elected on the occasion of new ratifications of the Convention, their terms of office did not fit in to this system and the aim of this provision was not achieved.

A similar problem has arisen in relation to the Court. Thus, under Article 40 of the Convention, the terms of office of four judges expired in 1962, those of four others expired in 1965 and those of seven others expired in 1968; the terms of office of two judges elected in respect of new Members of the Council of Europe will expire in 1970 and 1972.

2. In the circumstance, the Court, and later the Commission, proposed that the Convention should be amended :

i) to regulate the periods of future terms of office of members of the Court and the Commission in order to ensure the renewal – as nearly as possible – of one-third of the total membership of the Court every three years and of one half of the membership of the Commission every three years;

ii) to make provision whereby, in the case of the Court, on the accession of additional States to the Council of Europe, and in the case of the Commission, on the ratification of the Convention by other States, further members of these organs would be elected for periods which would be co-terminous with those of one group of the existing members and fit into the system set forth in the preceding sub-paragraph.

3. The Committee of Ministers expressed approval in principle of the proposed amendment to Article 40 and instructed the Committee of Experts on Human Rights to prepare appropriate provisions.

4. The Committee of Experts considers, like the Court and the Commission, that Articles 22 and 40 should be amended. The Committee of Experts is of the opinion that this should be effected by putting into force the draft Protocol No. 5 containing new texts of Articles 22 and 40, which it has drawn up at its 11th Meeting, held from 6th to 10th October, 1964.

5. Nothing in the proposed amendments would interfere with the terms of office of the present members of the Court or the Commission. The new arrangements would be applicable to elections held after the amending Protocol, in which they are embodied, enters into force.

Commentary

Preamble

6. The first paragraph of the Preamble, as submitted by the Committee of Experts, conformed to the text approved by the Committee of Ministers in the document entitled Model Final Clauses (SG(62)4) and was drafted in the form of an inter-State Agreement. The Committee of Ministers, however, decided to put it into the form of an intergovernmental Agreement in order to follow the precedents of the Convention itself and of the First and Fourth Protocols.

Article 1

(amending Article 22 of the Convention)

7. This article governs elections of members of the Commission.

The Committee of Ministers may decide, before an election takes place, that one or more of the terms of office of those to be elected shall be for such period not less than three and not more than nine years as the Committee may determine, so that they will expire on the same date as the terms of office of some of the members already elected. This will enable the Committee of Ministers to put into effect the intention underlying Article 22, that is to say, that as nearly as possible one half of the membership of the Commission should be renewed every three years. The new provision will also be applicable to the term of office of a member elected following a further ratification of the Convention; the term of office of such new members can be fixed to expire at the same time as one of the groups of members already in office.

8. Some experts expressed hesitation about the provision enabling the Committee of Ministers to fix the duration of the terms of office on the ground that there was a danger that this might tend to interfere with the independence of the members of the Commission. In reply, it was pointed out that the Committee of Ministers would have to act in accordance with the purpose of this provision, clearly set forth in the recitals in the Preamble and in the introductory words to the operative part of the amending Article: "in order to ensure that, as far as possible, one half of the membership of the Commission shall be renewed every three years".

9. It was also pointed out that complete impartiality would be ensured because, when more than one term of office is involved and the provision is applied, it would be decided by the Committee of Ministers, before the election, to fix one or more terms of office for periods other than six years and only after the election has taken place would the Secretary General allocate, by drawing lots, the different terms of office to the members thus elected.

10. It was decided that it was unnecessary to include the term "re-election" in the amending text as the word "election" covered both the case of a member elected following a further ratification of the Convention and the case of a member elected or re-elected on the expiration of the term of office of a present member.

Article 2

11. Article 2 of the Protocol relates solely to the numbering of the paragraphs in Article 22 of the Convention.

12. In the course of their consideration of the draft Protocol, it was suggested to the Committee of Experts that the provisions of Article 22, paragraph (4) of the Convention should be amended. They provide that members who have been replaced should nevertheless continue to deal with cases which they already have under consideration. Their application has been found difficult in practice in long drawn out proceedings, and it was not always practicable for a retired member of the Commission to continue to deal with cases under consideration at the time of his retirement. It was proposed that the word "shall" should be replaced by the word "may" in this paragraph.

13. The Committee of Experts noted that such an amendment might necessitate a similar amendment to Article 40 (4) concerning retired members of the Court, which is drafted on the same lines as Article 22 (4). The Court requested the experts not to make any amendment to Article 40 (4).

14. The Committee came to the conclusion that such amendments might upset the continuity of the membership of the Court or the Commission in the course of their respective examinations of a case. In these circumstances, and as the Commission had resolved the practical difficulties with which it had been faced in cases already examined by it, and should be able to do so for the future without any amendment of the Convention being necessary, the Committee of Experts was of the opinion that Article 22, paragraph (4) should not be amended in the way suggested.

Article 3

(amending Article 40 of the Convention)

15. This article provides for the election of members of the Court in a way similar, *mutatis mutandis*, to that adopted for the election of members of the Commission (see paragraphs 7 to 10 above).

16. In the case of the Court, it is the Consultative Assembly which may fix terms or office between six and twelve years for judges in order to ensure that, as far as possible, one-third of the membership of the Court shall be renewed every three years. The new provision also applies to elections of judges on the accession of a new Member State to the Council of Europe, in order that they may fit into the new pattern.

Article 4

17. Article 4 of the Protocol relates solely to the numbering of the paragraphs in Article 40 of the Convention and requires no comment.

Article 5

18. Article 5 conforms to the text of the Model Final Clauses approved by the Committee of Ministers, except it is drafted in the form of an intergovernmental Agreement, in accordance with the decision recorded in paragraph 6.