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DRAFT PRINCIPLES ON FREEDOM AND NON-DISCRIMINATION
IN THE MATTER OF POLITICAL RIGHTS

Note by the Secretary-General

As requested in operative paragraph 2 of resolution 4 (XVIII), which the Commission adopted at its eighteenth session, the Secretary-General transmitted to the Governments of States Members of the United Nations and of the specialized agencies the text of the draft principles on freedom and non-discrimination in the matter of political rights drawn up by the Sub-Commission on Prevention of Discrimination and Protection of Minorities (E/CN.4/Sub.2/213, para. 370), as well as the suggestions made by the Commission on the Status of Women (E/CN.6/L.336), so that they could submit their comments on the substance of the draft principles and the form in which such principles should be embodied.

The comments of the Government of the Federal Republic of Germany are transmitted to the Commission herewith.

Comments

1. The Government of the Federal Republic of Germany has noted with great interest the initiative taken by the Commission on Human Rights, at its 18th session, to submit to the members of the United Nations and of their Specialized Agencies, for their comments, the text of the draft principles on freedom and non-discrimination in the matter of political rights drawn up by the Sub-Commission on Prevention of Discrimination and Protection of Minorities at its 14th session. The Government of the Federal Republic has carefully examined the draft as well as the amendments thereto as adopted by the Commission on the Status of Women, at its 16th session, and has come to the following conclusions:
2. Basically, the Federal Government welcomes the idea to gain recognition for these principles within the framework of the United Nations.
3. The existing German laws widely ensure political freedom of action. While the general principles, if declared binding in their present form, would conform with most of the provisions of German law, they may possibly conflict with others. However, a clarification of the points in question, which would be greatly appreciated by the Federal Government, may well serve to remove these minor difficulties. Specifically, the Government of the Federal Republic of Germany would like to comment as follows:

Ad II and III:

Nos. II and III do not list measures against unconstitutional activities. It is, however, presumed that the general saving clause in the second sentence of No. XII, i.e., the phrase "... and of meeting the just requirements of the general welfare in a democratic society", constitutes an adequate legal basis for them. The procedure against unconstitutional activities has been laid down in articles 9 para. 2 and 21 para. 2 of the German Basic Law.

Some doubts exist as to the second sentence of No. III:

In a way, principle No. III is also contrary to No. IIa. Since the freedom of peaceful assembly and association is declared essential to the enjoyment of political rights there is no reason to grant these rights to all persons as long as principle No. IIa rightly provides that only nationals shall be entitled to unrestricted political equality.

Article 11 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, which holds as national law in the Federal Republic of Germany, gives all persons the right on certain conditions to assemble peacefully and to associate freely with others. Article 16, however, gives the contracting parties to this Convention the possibility to impose restrictions on the political activities of aliens with respect to the freedom of assembly and association. This right cannot be relinquished.

Ad IV:

A provision on the forfeit of the right to vote as a result of a conviction on criminal charges is missing; such a provision should also be embodied in No. XI.

Ad Va:

The principle of the equality of suffrage - laid down in article 38 of the Basic Law - is restricted in the electoral laws of the Federation and the Laender by so-called prohibitive clauses which, in order to prevent a dispersion of votes in Parliament (due to the presence of an overabundance of splinter parties), admit to Parliament only such parties as have obtained a certain percentage of the total popular vote or a certain number of direct mandates. The Federal Constitutional Court has repeatedly decided in its judgments that up to a certain limit prohibitive clauses serve the public interest by preventing a dispersion of votes in Parliament.

It is assumed that these prohibitive clauses must also be recognized as limitations in the sense of principle No. XII.

Ad VIb:

The principle that no witness (in scrutiny proceedings) shall be compelled to state how he voted conforms with the opinion prevailing in German jurisdiction.

Ad VIIId:

Reference is made to the comments on Nos. II and III.

As far as civil servants are concerned the general principles are in need of certain restrictions. In his political activities a civil servant has to maintain the degree of moderation and restraint required

by his position in relation to the community and by the duties of his office (Section 35 para. 2 of the Skeleton Law on Civil Service Legislation (Beamtenrechtsrahmengesetz - BRRG) and Section 53 of the Law Concerning the Federal Civil Service (Bundesbeamtengesetz - BBG)).

Ad IX:

The necessity to replace the words "duties or personal interests" by the words "financial or professional interests" does not seem cogent because the proposed new wording would cover a possible conflict between personal and public interests only insofar as the personal interests are of a financial nature.

Ad X:

These principles apply to nationals. In the Federal Republic, article 33 paras. 2 and 3 of the Basic Law provides that all nationals shall be eligible, on equal terms, to hold public office. Section 4 of the Skeleton Law on Civil Service Legislation (BRRG) and Section 7 of the Law Concerning the Federal Civil Service (BBG) likewise provide that, as a rule, only Germans within the meaning of article 116 of the Basic Law may be appointed to the civil service.

Article 137 of the Basic Law conforms to the principle under Xb. Legal provisions on incompatibility are contained in Section 33 of the BRRG, in Sections 28 and 57 of the BBG, in the corresponding Laender legislation and, for the elections to the Bundestag, also in the Law Concerning the Legal Status of Members of the Civil Service Elected to the Bundestag, dated 4 August 1953 (Federal Law Gazette 1953 I, p. 777).

Ad XI:

The suggestion to insert the words "equal for all nationals" in principle No. XIb is welcomed. However, the words "which stem from the nature of the duties of the office", which specify the prerequisites for qualification, should also be retained.

Reasonable qualifications for appointment within the meaning of XIb are contained in the regulations concerning civil service careers. In this connection, particular attention is drawn to the Third Title (Sections 1 - 16) of the BRRG, to Sections 15 - 25 of the BBG, to the corresponding Laender legislation governing the civil service, and to the ordinances concerning civil service careers.

Ad XII:

This principle contains, in its second and third sentences, a general legal reservation (see also comments on Nos. II and III).

There may, however, be some doubt as to whether this provision covers an institution such as the forfeiture of basic rights under article 18 of the Basic Law, i.e. the deprivation of basic rights by court action.

Considering the obvious purpose of the provision this seems to be the case, but a clarification of the point in question would appear desirable.

4. The Federal Government would deem it feasible and desirable to have these principles embodied in a multilateral agreement.
5. In this connection, it would be of interest to learn of the prospects, as seen by the Secretariat, for the adoption of the draft International Covenants on Human Rights drawn up within the framework of the United Nations.