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THE NEW SINGLE COURT OF HUMAN RIGHTS

I. Introduction

One of the activities of the Council of Europe[2] which has been most successful in terms of bringing about real change to the lives of the citizens of Europe is the enforcement of one of the most known international documents - the European Convention for the Protection of Human Rights and Fundamental Freedoms[3] (commonly referred to as the European Convention on Human Rights- ECHR). The Convention, which next year has its 50th anniversary, can be termed as a real milestone in the history of human rights protection. It has developed through the adoption of numerous Protocols[4] some of which have added to the rights protected by the Convention, others of which have altered the procedural aspects of the Convention's operation.

The rights protected by the Convention and Protocols include the classical human rights such as the right to a fair trial in Article 6, the right to liberty and security of the person in Article 5; and the liberal freedoms which include the right to freedom of expression provided for in Article 10 and the right to freedom of assembly and association in Article 11.

The protection of human rights is stated as the Council's first aim. The ECHR and its application on a national level is the indication of the achievement of this goal in raising the profile of human rights on an international scale. The realisation of this aim has been successful only because of the mechanisms provided in the Convention for enforcing the rights.

It is this system of remedying grievances which was subjected to radical reform by the Eleventh Protocol to the Convention, which has entered into force on 1st November 1998.[5] In general, Protocol No 11 to the European Convention on Human Rights (ECHR) establishes a full-time, single permanent Court of Human Rights (the Court) to replace the Convention's original enforcement machinery. It is appropriately situated in the new, magnificent, glass-panelled Human Rights Building behind the Palais de l'Europe in Strasbourg.

It is recognised that the protection of individual human rights through the mechanisms as provided in the original form in the Convention has proved to be the optimum method to attain its objectives. However, as the Chairman of the Informal Ministerial Conference on Human Rights stressed,[6] the Convention risked becoming a victim of its own success. The length of time of individual proceedings, back-log of cases, the mix of executive powers in the judicial process necessitated the need of reform. This need was increased by socio-political changes taking place in Europe.

What will be dealt with in this short article is not an analysis of the substantive rights of the ECHR but a brief review of the reform to its control mechanisms, which in essence lie at the crux of the Convention itself. Due to lack of space only the salient points of this reform are considered. A list of reference works can be found at the end for further reading.

Given the ever increasing number of applications submitted before the enforcement organs of the Convention and the increasing number of Member States, the important question is whether this new reformed system is better able than its founding international document in protecting human rights particularly as regards managing the enormous work-load and reducing the time required for a final judgement to be reached.

II. Weakness of the Original System

Work load

The primary reason for reform was, ironically, the intensive use of this system of protection of rights. The system became more widely known in the Member States. The judgements were given particular importance on a local level and this attracted the attention of the citizens. All this served as an impetus for increased usage of the system.

The pressure of work upon the Commission of Human Rights (hereunder referred to as the Commission) and the Court is evident in the huge number of applications being reviewed.[7] The overload of work inevitably caused backlog of cases. The Commission and the Court did not have capacity to deal with the incoming claims. One contributing factor was that the judges were only employed part-time.

The result of this enormous workload was that the Commission and the Court

were not able to perform their tasks within an appropriate length of time. This was in stark contrast to the exacting view taken by the Court of Article 6(1) of the ECHR, according to which Member States' courts must deliver judgement within "a reasonable time".

Procedure of Judicial Nature

The original structure of enforcement of the ECHR was formed by the elaborate interplay of the Commission, the Court and the Committee of Ministers. A close look at the proceedings raised another weakness: this arrangement lacked a pure judicial mechanism. In practice it was difficult to accept any aspect of the procedure before the Commission and the Committee as being truly judicial.

Admittedly, the Court was and still is a genuine international court which reaches decisions after a an open public, adversarial process of written and oral argument. This, however, cannot be said of the other two organs.

Proceedings before the Commission were confidential and took place in camera. According to the old Article 31(2) the report of the Commission was transmitted to the Committee of Ministers and to the State concerned, though initially, not to the petitioner. If an application was declared admissible by the Commission, the Committee of Ministers took the final decision if the case was not referred to the Court.

The Committee was a purely political body. Its members were not judicially independent but government representatives subject to governmental direction. Its proceedings were also confidential. The Member State was permitted to take part in the proceedings, but the individual applicant had no right to be heard.

The old structure was the result of the political compromise made in drawing up the Convention and without which the introduction of the machinery would certainly have been impossible. Although these defaults were a necessity at the inception of the Convention, there was no legal justification for their existence, and reform was called for.

Duplication of work

Another weakness was that in the working of all the enforcement machinery there was substantial overlap between the functions of the various organs. This meant that work performed by one organ was identical and often duplicated by

another organ. Both the Commission and the Court examined the admissibility of an application. If the Commission declared an application admissible, Member States could present their objections with respect to admissibility to the Court. More importantly, both the Commission and the Court examined the question of a breach of the Convention in the same manner.

Increase in Member States

One important consideration was that the enforcement system was created for a small number of Member States - ten or twelve. Currently the number of Member States parties stands at forty. It goes without saying that this factor radically challenged the control system. The capacity of the system was overloaded and decision-making process was being rendered more difficult with every new ratification increasing the membership of the Convention organs through more representatives.

III. The New System

While there was a general agreement between the Member States that a radical reform to the ECHR was unavoidable, consensus on the details took considerable time. In the preparatory sessions, the replacement of the Commission and the Court by one permanent court was the most debated issue in the preparatory discussions. On the other hand, unanimous agreement was reached on the abolition of the quasi-judicial competence of the Committee of Ministers. Due to the far-reaching modifications being proposed, it was finally decided that the Protocol would create a wholly new text for the Convention, while leaving the content and the order of the human rights guarantees in Article 1 to 18 intact.

Protocol 11 gives effect to the idea of merging the Commission and the Court and having a single court as the sole organ under the Convention.[8] It dissolves the Commission and reduces the function of the Committee of Ministers to monitoring the execution of the judgements of the Court.[9] Article 19 provides for a European Court of Human Rights which is to function on a permanent basis, operating full-time in Strasbourg as the sole judicial organ. The Court now consists of three-judge committees, seven-judge Chambers and a Grand Chamber with seventeen judges. The Court has a plenum which is responsible for administrative duties.[10]

Operation of the new procedure

As under the past system, individual applications and inter-State applications

will exist side by side. What is important is the abolition of the optional character of the individual's standing in proceedings before the Court. All applicants[11] will have direct access to the new Court. The new Article 34 explicitly confirms the individual's right to bring a case before the Court. So, the right of individual petition is now compulsory and the competence of the Court will apply to all the Member States.

As the secretariat of the Commission used to do, the registry of the Court will establish all necessary contacts with the applicants and, if necessary, request further information. Then the application will be registered by a Chamber of the Court and assigned to a judge-rapporteur. At this stage the complaint is subjected to a preliminary investigation. Any cases that are clearly unfounded will be sifted out of the system at an early stage and they will therefore be declared inadmissible.

The judge-rapporteur may refer the application to a three-judge committee, which may include the judge-rapporteur. The committee may, by a unanimous decision, declare the application inadmissible. The decision is final.[12]

When the judge-rapporteur considers that the application raises a question of principle and is not inadmissible or when the committee is not unanimous in rejecting the complaint, the application will be examined by a Chamber. This procedure is the equivalent of the system used before the Commission.

The Chamber composed of seven judges will decide on the merits of an application and, if necessary, its competence to adjudicate the case. The judge-rapporteur will prepare the case-file and establish contact with the parties. The parties will then submit their observations in writing. A hearing may take place before the Chamber.

The Chamber will also place itself at the parties' disposal with a view to a friendly settlement.[13] If no friendly settlement can be reached, the Chamber will deliver its judgement.

The Chamber, according to the new Article 30, is empowered to relinquish its jurisdiction to the Grand Chamber. It may decide proprio motu to refer a case to the Grand Chamber when it intends not to follow the Court's previous case-law or where the case raises a serious question affecting the interpretation of the Convention or its protocols. This procedure may be adopted on condition that none of the parties objects to it. The referral of a case involving questions of this kind is known to civil and common jurisdictions. [14]

Once the judgement of the Chamber has been delivered, the parties will have three months to request that the case be referred to the Grand Chamber for a re-hearing.[15] However, this procedure will be restricted to "exceptional cases", i.e. when a case raises a serious question concerning the interpretation or application of the Convention and its protocols or a serious issue of general importance. Article 43(2) requires a panel of five judges of the Grand Chamber to determine whether the request for a re-hearing is admissible.

Although Article 43 refers to "referral" the procedure envisaged by Article 43 has little to do with a referral. It creates a form of appellate body since there is a re-hearing of the case. While the judgement of the Grand Chamber under Article 30 takes the place of the judgement of the seven-judge chamber, a decision taken pursuant to Article 43 does not. In essence, it reviews the finding reached by the seven-judge chamber so that the Grand Chamber effectively functions as an instance of review. The Chamber's judgement will become final when there is no further possibility of a referral to the Grand Chamber.

The Committee of Ministers will no longer have jurisdiction to decide on the merits of these cases and right to review decisions. However, as under the past system, it will retain its important role ands power, conferred by the Statute of the Council of Europe, of monitoring and supervising the enforcement of the Court's judgements.

IV. Evaluation of the New System

The Convention system is completely overhauled by Protocol 11. But, has the goal of remedying the defects inherent in the old system been reached ? Moreover, has the reform attained its objectives successfully ?

As a general positive note, one may submit that, after the elimination of the interplay of the three review organs in the old system the ECHR control mechanism has changed into a wholly judicial enforcement system which reflects the principle of separation of powers and the rule of law. Some specific points deserve particular comment.

One Court

The part-time monitoring institutions, the Commission and the Court have ceased to exist. The provision for legal protection by a single court will reduce the delays and prevent duplication of effort and work. Essentially it replaces the plurality of competencies which existed in the former system with a monistic

judicial structure. Only one examination is carried out - not two- to establish whether the application is admissible and the Convention violated.

Article 29(3) provides for a separate decision regarding the admissibility and merits of a complaint. Admittedly, this Article and the requirement in Article 45(1) that supporting reasons be provided for decisions on the admissibility of a complaint may create delays. This, however, is outweighed by the interests of justice which not only must be done to the applicants but must also be seen to be done.

The Court's assumption of the filter role of the Commission will avoid the Court being clogged with unreasonable applications. This would shorten proceedings. Moreover, the Court sitting permanently in Strasbourg, would enable the judges to dedicate their time wholly to decisions on applications.

The judgements of the new Court will be delivered by four or five different Chambers of seven judges each. Only in exceptional cases will there be a judgement by a Grand Chamber of seventeen. On this point, a valid submission was made by Schermers[16] that, for the development of the law one should prefer a Court of First Instance composed of judges from all European States operating in chambers and a Court of Appeal composed of seven or nine judges and charged only with the interpretation of the Convention.[17] Possibly this would constitute the last tier of the structure of the future Supreme Court of Human Rights in an amended ECHR.

Seven Judge Chambers

Article 27(1) provides for the reduction in the size of the Chambers from nine to seven judges. The increase in the number of Member States, will increase the differences in the background of the judges. These two factors can lead to insufficient representation on the Court because not all views would be adequately represented in a Chamber of seven. Nevertheless, mutual consultation between Chambers and by the usage of the referral system to the Grand Chamber would eliminate this problem. The small number of judges should make it possible to create more Chambers, increasing the capacity of the Court as a whole. This offers the possibility to tackle the problem of back-log of cases and promote the "efficiency" of the new Court.

Composition of the Grand Chamber

The national judge and the President of the Chamber concerned sitting in first instance in a Chamber of seven judges will always be able to sit in the Grand

Chamber of seventeen judges if the same case is treated "in appeal" when it is referred under Article 43.[18] Presumably this has been inserted so as to ensure consistency and uniformity of the main case-law of the new Court. However, notwithstanding the apparent valid reason for this amendment, usage of this provision may be objectionable.

In essence this procedure provides for an overlap in judicial personnel between the Grand Chamber and the Chamber which initially heard the case. Since both judges who are entitled to sit in the two proceedings will be well acquainted with the case, there is some danger that they may influence the Grand Chamber in a particular path. This may increasing the risk that the Grand Chamber will take the same path as the seven-judge Chamber before it. A judge who has taken a position in deciding a legal dispute is no longer fully independent and impartial in his position in the same dispute. Thus the likelihood of an independent and impartial review is diminished. If the Grand Chamber is to act on appeal from Chamber decisions, then the same rules for an appeal should have been applied to the hearing by the Grand Chamber.

Relinquishing jurisdiction in favour of Grand Chamber

Article 30 prescribes that a Chamber has the power to relinquish jurisdiction and on its own initiative and only in exceptional circumstances to refer the case to the Grand Chamber. This power is a clear recognition that it is the first and foremost responsibility and the duty of the Court itself to ensure the quality and consistency of its case-law.

The Chamber may adopt this procedure, and relinquish jurisdiction in favour of a Grand Chamber, only on condition that none of the parties objects to it. Most likely, the parties will not object to the Chamber referring the case. Nonetheless, the fact is that should one of the parties of the case object, it appears that this would be time-consuming and hampering the procedure of the Court. The judges will have studied the case and would have already formed an opinion on relinquishing jurisdiction to the Grand Chamber. The need to first consult the parties means that the case must be postponed for some time. Then, once the permission of the parties is obtained it must again be put on the agenda. It is hoped that in practice the parties will not object if a Chamber has made it clear that it considers adjudication by the Grand Chamber to be appropriate or even necessary.

Referral to the Grand Chamber

Under Article 43 any party to the case may request that the case be referred to

the Grand Chamber only in exceptional cases. The legitimacy of this request is verified by a panel of five judges of the Grand Chamber, inter alia, on the ground of whether the case raises serious questions affecting the interpretation of the Convention. Many applicants will suppose that this will apply to their cases and it is expected that most applicants will request referral under Article 43 to the Grand Chamber. Only when this whole procedure of Article 43 is applied in practice will it demonstrate whether the workload on the panel of judges hampers the working of the ECHR enforcement system in general or not.

Finally, the rule that where a judgement has been issued will now only be reviewed in exceptional cases, certainly should help to reduce the total time required for an application to be completely determined.

V. Conclusions

Since the drafting of the European Convention on Human Rights the idea that supervision of the substantive rights should be handled to some extent by diplomatic organs has considerably been modified. The increase in the number of applications and the widening of the membership of the Council hindered the efficient working of the system. All these factors necessitated a radical revision of the monitoring structures of the Convention.

Through the creation of a new, full-time, single Court, the elimination of the separate examination of two institutions and the recognition of the right of individual petition, the new Convention, has effectively simplified and speeded-up the procedure, making way for greater efficiency and changing the machinery into a more accessible one. Protocol 11 to the ECHR has equipped the Court with new, improved human rights protection machinery. This is being operated and will be utilised to tackle the challenges arising in a changing Europe which will have to be faced during the next millennium.

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[2] Extensive information regarding the Council of Europe and human rights documentation is available via the internet from the Council of Europe web-site at http://www.coe.fr
[3] The European Convention on Human Rights was signed in Rome on November 4, 1950, and entered into force with its tenth ratification on September 3, 1953.
[4] Eleven so far.
[5] Protocol 11 to the Convention was adopted by the Committee of Ministers on 20 April 1994 and opened for signature by Member States on 11 May 1994. It was signed by all 40 Council of Europe Member States and ratified by all thirty nine Contracting States Parties to the ECHR.
[6] On November 1990, in Rome.
[7] Approximately 22500 applications were pending between 1975 and 1980, by the end of 1990 that figure had risen to over 50,000 applications. See *Survey of Activities and Statistics of the European Commission of Human Rights* 1993, Council of Europe.
[8] The idea was introduced on a political level by the Swiss government in the Ministerial Conference on Human Rights in Vienna in 1985.
[9] Article 46(2) et sequitur.
[10] Article 26 regulates the plenary Court.
[11] Article 34 refers to : any person, non-governmental organisation or group of individuals.
[12] Article 28.
[13] Articles 38 and 39.
[14] In the Maltese legal system, a similar procedure of referral is found in the Constitution in Article 46(3).
[15] Article 43(1).
[16] Mr Schermers was a member of the European Commission on Human Rights.
[17] See Schermers, *The Eleventh Protocol to the European Convention on Human Rights,* (1994) 19 ELRev 367, at 380-382.
[18] Article 27.