

## **RECENT DEVELOPMENTS IN THE EUROPEAN SYSTEM OF HUMAN RIGHTS**

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### **1. Introduction**

The European system of human rights is one of the highly structured mechanisms to pursue human rights at the regional level. The Council of Europe, established principally to realise 'democracy', 'human rights' and 'rule of law' among the member states, provides the major legal framework for the protection of human rights in Europe. The Council has adopted two major treaties on human rights, one is the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 and the other one is the European Social Charter 1961<sup>1</sup>. The former ensures civil and political rights and the latter provides for social and economic rights. However, fundamental changes have taken place in the human rights mechanism established under the 1950 European Convention with the entry into force of the Eleventh Protocol in 1998. A revised Charter of Social Rights, adopted by the Council in 1996 came into force in 1999. This will strengthen the supervision mechanism already established under the European Social Charter 1961.

The European Union (EU), another significant player in the region, proclaimed a Charter of Fundamental Rights in 2000 in order to internalise human rights norms in its regime established principally to harmonise trade policies within the member states of the West. The two powerful organisations, the Council and the Union, are vying with each other for the promotion of human rights observance in the countries, many

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<sup>1</sup> See, for the European Convention of Human Rights and Fundamental Freedoms, 1950 and the Eleventh Protocol, Malcolm D. Evans, 'Blackstone's International Law Documents', Third Edition, 1996, Blackstone Press, London, pp.43-54, 64-73. For the European Social Charter, 1961 see, Brownlie, Ian (ed), Basic Documents on Human Rights, Second Edition, Oxford University Press, 1981, pp. 301-319.

of which are members of both the organisations.

The recent developments in these two organisations, therefore, provide interesting insights into the nature and trends of human rights practices in Europe. One of the major objectives of this article is to examine the recent reformations in the human rights practices of these two organisations, even though attempts will be made to highlight the institutional and constitutional problems that may emerge from the existence of two systems with overlapping jurisdictions. This article does not deal with all the relevant aspects of human rights in Europe. In particular, this article examines the changes brought about by the Eleventh Protocol and compares the relative effectiveness of the new system with the abolished one. It explores the changes brought about by the 1996 revised Social Charter that came into force in 1999. Especial attention has also been given to the Charter of Fundamental Rights 2000, adopted by the European Union. This article examines the implications of this Charter in the light of the already existing compliance mechanism under the European Union.

## **2. The European Convention of Human Rights, 1950**

The European Convention of Human Rights, adopted in 1950 provides the basic legal framework for the protection of human rights in Europe. Almost eleven Protocols have so far been adopted to extend the number of rights guaranteed by the regime and to develop a more effective compliance system within the regime.

The original Convention guarantees a good number of civil and political rights. These are: the right to life (Article 2), prohibition from torture and inhumane or degrading treatment or punishment (Article 3), freedom from slavery or forced or compulsory labour (Article 4), right to liberty and security of person (Article 5), right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (Article 6), prohibition of retroactive

criminal legislation (Article 7), right to respect for private and family life (Article 8), freedom of thought, conscience and religion (Article 9), freedom of expression (Article 10), freedom of peaceful assembly and association (Article 11), the right to marry and found a family (Article 12).

If one of the rights set forth in the Convention is violated, the injured person shall have an effective remedy before a national authority (Article 13). The Convention also contains a non-discrimination clause providing that the enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as, sex, race, colour, language, religion etc, (Article 14).

A number of subsequent Protocols have extended the horizon of rights by adding new rights to the already existing catalogue of rights. The First Protocol (1952) has added a right to property (Article 1), the right to education (Article 2), and the undertaking by the State Parties to hold free and secret elections at reasonable intervals (Article 3). The Fourth Protocol (1963) prohibits deprivation of liberty for failure to comply with contractual obligations (Article 1). It guarantees the right to free movement (Article 2) and bars forced exile of nationals (Article 3) and the collective expulsion of aliens (Article 4). The Sixth Protocol (1983) abolishes the death penalty. The Seventh Protocol (1984) guarantees that an alien must not be expelled from the place of resident without the due process of law (Article 1). It also provides for a right of appeal in criminal proceedings (Article 2), for compensation in cases of miscarriage of justice (Article 3). It ensures the right not to be subjected to double jeopardy (Article 4). It also provides for the equality of rights and responsibilities between spouses, between them and their relations with children (Article 5).

In order to ensure the observance of the human rights guaranteed under the Convention, the High Contracting Parties established two mechanisms. First, a European Commission of

Human Rights and Second, a European Court of Human Rights (ECHR) (Article 19). The Eleventh Protocol has abolished these two institutions and a Court of Human Rights on permanent basis with compulsory jurisdiction has replaced these institutions. We will however, examine the role and functions of these two previous institutions in order to compare the impacts of recent changes brought about by the Eleventh Protocol.

Of the two mechanisms, the Commission provided 'institutional mechanism' for the correction of violations of human rights while the 'Court' provided 'formal legal mechanism' for the resolution of disputes arising out of the violation of human rights guaranteed by the Convention. As it appears from the Convention, the framers of the Convention put primary emphasis on the 'Commission' in resolving the human rights violations, failing which, the 'Court' was given a secondary role in the matter. This is probably because the framers had thought that most of the violation cases could be resolved by friendly settlement between the parties without having recourse to any formal method of dispute resolution. The doors of the Court were closed to the individuals, groups and NGOs. Only member states and the Commission had access to the Court under the previous system (Article 44, original Convention). Individual's petition could reach before the Court only if the Commission or a State Party had so wished. Therefore, the abolished mechanism was mostly institutional in nature in the sense that it provided individual petitioners an institutional forum for the resolution of their grievances.

The Commission consisted of a number of members equal to that of the High Contracting Parties (Article 20). The members were elected by the Committee of Ministers for a period of six years (Articles 21, 22). The Commission was empowered to receive (1) inter-state complaint and (2) individual petition<sup>2</sup>. Under Article 24, High Contracting Parties could refer to the

Commission, through the Secretary General of the Council of Europe, any alleged breach of the provisions of the Convention by another High Contracting Party. Under Article 25, the Commission could receive petition from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties. However, an individual had to prove three things. First, that the State Party concerned had recognised the competence of the Commission in receiving such petition (Article 25.1). Second, that the petitioner had exhausted all domestic remedies (Article 26) and third, that the petition had been submitted within six months from the date of the final decision by the domestic authority (Article 26). Under Article 27 (3) the Commission could reject a petition filed in contravention of these requirements.

Even after the acceptance of a petition, the Commission could reject it under Article 29 if in the course of examination, it found that one of the grounds of non-acceptance provided for in Article 27 had been established. These grounds were: (a) anonymous petition (b) a matter which had already been examined (c) a petition incompatible with the provisions of the Convention, manifestly ill-founded or an abuse of the right of petition. The Commission under Article 30 could strike a petition out of its list of cases where (a) the applicant did not pursue his petition (b) the matter had been resolved or (c) for any other reason established by the Commission, it was no longer justified to continue the examination of the petition.

Had the Commission accepted a petition, it could proceed in a number of ways. Under Article 28 (1) (a), in order to ascertain facts, it could undertake an examination of the petition, and if needed could carry out an investigation with the assistance of the parties. In the investigation, the states concerned had the

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2 See, for further details: Steiner, J. Henry and Alston, Philip, *International Human Rights in Context: Law, Politics and Morals*, Oxford University Press, 1996, pp. 583-598.

obligation to furnish all necessary facilities to the Commission. At the same time, under Article 28 (1)(b), the Commission could place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matters on the basis of respect for human rights defined in the Convention. If the Commission could succeed in affecting a friendly settlement, the matter would be reported to the States concerned, Committee of Ministers and to the Secretary General.

If the examination of the petition had not been completed in accordance with Article 28, 29 or 30, the Commission would send a report to the Committee of Ministers stating its opinion on the alleged violation together with any proposals it thought fit (Article 31). If the question was not referred to the Court under Article 48, within a period of three months from the date of the transmission of the report to the Committee of Ministers, the Committee of Ministers could decide whether there had been a violation of the Convention. In affirmative cases, the Committee of Ministers could prescribe measures that the state concerned was required to undertake within a given period of time. If the state concerned failed to take satisfactory measures within the prescribed period, the Committee of Ministers would decide what effect should be given to its original decision (Article 32).

The European Court of Human Rights consisted of a number of judges equal to that of the members of the Council of Europe for a period of nine years (Article 38). The member of the Court would be elected by the Consultative Assembly (Article 39) from candidates with high moral character having qualifications for appointment to high judicial office or were jurisconsults of recognised competence (Article 39). However, the Court suffered from a number of drawbacks. As we have already noticed, the doors of the Court were open only to the High Contracting Parties and the Commission (Article 44). A

major criticism was that while a state could take a matter before the Court against an individual, the injured individual had no such remedy against the alleged state. The Court's jurisdiction was not automatic. The concerned party had to either recognise the competence of the court in the matter or consent to it (Articles 46, 48). The court could only deal with a case that the Commission had failed to resolve by friendly settlement (Article 47). In addition, such cases had to be brought before the Court within three months from the date of the transmission of the report by the Commission to the Committee of Ministers (Articles 31, 48). Although the concerned parties were under an obligation to abide by the decisions of the Court, the Committee of Ministers had the responsibility to supervise the execution of the Court's decision (Articles 53, 54).

### **3. Developments in the European Convention of Human Rights: 1998 Eleventh Protocol**

A number of significant changes have been brought about by the 1998 Eleventh Protocol in the compliance mechanism established by the original European Convention of Human Rights. Major features of the new mechanism have been discussed below.

#### ***Permanent Court***

The newly established Court functions on a permanent basis (Article 19, the Eleventh Protocol). The judges work full time (Article 21, Eleventh Protocol). Under the original Convention judges would be appointed for nine years. But under the Eleventh Protocol the judges are appointed for a period of six years (Article 40, original Convention; Article 23, Eleventh Protocol). The members of the Court under the original Convention, would be elected by the Consultative Assembly (Article 39, original Convention). But under the Eleventh Protocol, the judges are appointed by the Parliamentary

Assembly.

### ***Three-Tier Court***

The abolished Court consisted of a Chamber composed of nine judges. A judge who was a national of the State Party concerned could sit as an ex officio member of the Chamber (Article 43, original Convention). But the new system establishes a three tier Court consisting of a 'Committee of three judges', a 'Chamber of seven judges' and a 'Grand Chamber of seventeen judges' (Article 27 Eleventh Protocol). A Committee of three judges may, by a unanimous vote, decide inadmissible or strike out an individual application submitted under Article 34 of the Eleventh Protocol, where such a decision can be taken without further examination (Article 28, Eleventh Protocol). If no such decision is taken by the Committee, a Chamber decides on the admissibility and merits of individual applications submitted under Article 24 of the Eleventh Protocol. A Chamber decides on the admissibility and merits of inter-state applications submitted under Article 33 of the Eleventh Protocol.

A Chamber may at any time refer to the Grand Chamber a pending case that raises a serious question affecting the interpretation of the Convention or the Protocols thereto (Articles 30, 31, Eleventh Protocol). A Chamber may also refer a case to the Grand Chamber, if the resolution of such a case by the Chamber may have a result inconsistent with the judgement previously delivered by the Court (Article 30, Eleventh Protocol).

### ***Friendly Settlement by the Court***

The abolished Court had no power to try for the friendly settlement of cases. Indeed, the Commission which was also abolished by the Eleventh Protocol, had the power to try to settle violation cases by friendly negotiations among the parties concerned (Article 28, original Convention). However, the Court established by the Eleventh Protocol has got the power to resolve a violation case by friendly settlement (Article 38 (b),



Eleventh Protocol).

***The Door of the New Court is open to Individuals, NGOs and Groups***

Under the original Convention, the High Contracting Parties and the Commission had the right to bring a case before the Court (Article 44, original Convention). Individuals had no right to go to the Court directly. Individual petitions were sent directly to the Commission which, if thought appropriate, would send the petitions to the Court.

Although Article 5 of the Ninth Protocol (1990) which entered into force in 1994, allowed individual's to refer a case to the Court, the scope was limited. A person could refer a case to the Court only after 'having lodged the complaint with the Commission'. Moreover, such cases were subject to a screening process. A panel of three judges together with judges of the concerned parties would allow an individual petition in rare cases, i.e., a case raising serious question affecting the interpretation or application of the Convention (Article 5.2, Ninth Protocol). However, under the new arrangement, any person, non-governmental organisations or group of individuals, claiming to be the victims of a violation, by one of the High Contracting Parties, of the rights set forth in the Convention or the Protocols thereto, may file an application with the Court.

**The Jurisdiction of the New Court is Compulsory**

Under the previous system, the Court had jurisdiction only if the parties concerned recognised by declaration its compulsory jurisdiction ipso facto or gave consent (Articles 46, 48). Under the new arrangement, court's jurisdiction is automatic as the High Contracting Parties undertake not to hinder in any way the effective exercise of the right of individuals to approach the Court (Article 34, Eleventh Protocol). However, one still has to prove two things: First, that he has exhausted the domestic remedies and second, the petition has been filed within six

months from the date of final decision (Article 35).

### ***Third Party Intervention***

In the previous arrangement, a third party could intervene only as a matter of procedural requirement, and in rare cases<sup>3</sup>. But under the new arrangement, 'third party intervention' is a feature of the Convention. The new arrangement allows a High Contracting Party, one of whose nationals is an applicant, the right to submit written comments, and to take part in hearings. In the interest of the proper administration of justice, the Court may invite any High Contracting Party, which is not a Party to the proceedings or any person concerned who is not the applicant, to submit written comments or take part in hearings (Article 36, Eleventh Protocol).

## **4. The Role of the European Court of Human Rights (ECHR) As a Supranational Body.**

The European Court of Human Rights, as a supranational body, has played significant role in reshaping the behaviour of the organs of the member states. The decision of the Court often requires the member states to annul their administrative decisions, to reform their domestic laws, or even to declare void the judgements given by the higher courts of the member states for being inconsistent with the provisions of the Convention or the Protocols.

In the Sunday Times V. The United Kingdom 1979<sup>4</sup>, the European Court of Human Rights reversed the decision of the House of Lords of the United Kingdom. A distillers company, between 1958-1961, manufactured drugs containing thalidomide. The drug was used as sedatives for expectant mothers many of whom gave birth to children suffering severe deformities. The parents went to court, on behalf of their deformed children for compensation claiming negligence of the

<sup>3</sup> Rules of the Court were revised in 1983. According to the Rules 30 and 33 of the Revised Rules individual applicants have the right to participate and be represented in proceedings before the Court.

<sup>4</sup> The Sunday Times V. The United Kingdom, (no. 1), judgement of 26 April, 1979 (Series A no. 30). This case has been discussed in length in Brownlie, Ian, *supra*, pp. 266-300.

company. A number of newspapers published articles regarding the suffering of hundreds of people including the negligence of the company. On the request of the Attorney-General, the Queen's Bench Division of the High Court granted injunction restraining the Sunday Times from publishing a draft article which touched upon the negligence of the company including the legal remedies available to the injured parties. The Court of Appeal later vacated the injunction. However, on appeal, the House of Lords restored the injunction again. The House of Lords relied on the 'pressure principle' and on the 'prejudgement principle'. Lord Reid argued, *inter alia*, that publication of the draft article by the Sunday Times would amount to 'contempt of court' as the matter was pending before the court. The publication would allow a prejudgement by the public. It would also create pressure on one of the parties to negotiate the case unfavourably<sup>5</sup>.

When the matter was brought to the European Commission on Human Rights, it found that the decision of the House of Lords amounted to a violation of the right to freedom of expression granted in Article 10 of the 1950 Convention. The European Court of Human Rights, agreed with the Commission, and concluded that there was a violation of Article 10. The European Court emphasised that the restraint was not proportionate to the legitimate aim pursued, neither was it necessary in a democratic society for maintaining the authority of the judiciary. More importantly, the Court emphasised the right of the public to receive information and the obligation of the media to impart information on matters of public importance in the light of Article 10 of the Convention. Thus, the decision of the House of Lords was reversed by the European Court of Human Rights.

In Ireland V. United Kingdom. 1978<sup>6</sup> the British government

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<sup>5</sup> Borwnlie, Ian, *ibid*, pp.277-278.

<sup>6</sup> Ireland V. The United Kingdom, Judgement of 18 January 1978 (Series A no. 25)

detained some suspects without trial for a long period of time and during interrogation used inhumane techniques. The British government relied on the derogative provision under Article 15 of the Convention. The European Court of Human Rights concluded that internment without trial did not amount to a violation of the right to liberty under Article 5 of the Convention but the interrogation techniques used amounted to 'inhumane and degrading treatment' under Article 3 of the Convention. However, in the course of the proceeding the then British Prime Minister declared in the Parliament that the relevant interrogation techniques would not be used further<sup>7</sup>. Thus, the administrative decision of the member-state was changed due to the intervention of the European Court of Human Rights.

In Golder V. The United Kingdom, 1975<sup>8</sup> the European Court of Human Rights required the British government to reform its penal law. Mr. Golder, a prisoner in a British Jail, wanted to consult a solicitor and institute a civil proceeding. But the authority refused his prayers as no such provisions had been available in the Prisoner's Rules 1964. The European Court of Human Rights decided that a violation of Article 6 of the Convention guaranteeing the right to a fair trial took place. As a result of the decision of the European Court of Human Rights, the government had to reform the Prisoner's Rules to provide the right to consult a solicitor and a right to institute civil proceeding.

These cases illustrate how the European Court of Human Rights regulates the behaviour of state parties in human rights matters. Indeed, the workload of the Court has increased since its inception in 1959. The Court receives around 136 international phone calls and 757 letters a day. As of December 2000, about 15,858 registered applications have resulted in

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<sup>7</sup> Following the announcement by the Prime Minister, the practice of the government was abandoned.

<sup>8</sup> Golder V. The United Kingdom, Judgement of 21 February 1975 (Series A no. 18)

judgements on merits. Other applications are completed at an earlier stage, by being declared inadmissible, being otherwise struck out or following a friendly settlement. Between January 1, 2000 and December 31, 2000 the Court delivered 695 judgements overall, 6769 applications were either struck out or declared inadmissible and 1082 were declared admissible. In the cases decided by the Court in 2000, it found that delayed administrative<sup>9</sup>, civil<sup>10</sup> and criminal<sup>11</sup> proceedings violated Article 6.1 of the Convention, lengthy detention on remand caused violation of Article 5.3 of the Convention<sup>12</sup>, ill-treatment in police custody amounted to a violation of Article 3 of the Convention<sup>13</sup>, death in police custody amounted to a violation of Article 2 of the Convention<sup>14</sup>, award of damages against newspaper for defamation resulted in the violation of Article 10 of the Convention<sup>15</sup>, conviction for refusal to answer police questions resulted in the violation of Articles 6.1 and 2 of the Convention<sup>16</sup>.

However, the new arrangement introduced by the Eleventh Protocol has made little progress in two respects. Firstly, as before, the execution of a judgement of the Court has still been left under the supervision of a political body i.e., the Committee of the Ministers (Article 46(2), Eleventh Protocol, Article 54, Original Convention). Secondly, when a case is referred from a Chamber to the Grand Chamber, the president of the trial Chamber and the judge who sat in respect of the State Party

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9 *Thery V. France*, No. 33989/96, 1 February 2000 [Section III], *Fernandes Magro V. Portugal*, No. 36997/99, 29 February 2000 [section III]

10 *Capoccia V. Italy*, No. 41802/98, 8 February 2000 [section III]; *Rodrigues Carolino V. Portugal* No. 36666/97, 11 January 2000 [section IV]

11 *Palmigiano V. Italy* No. 37507/97, 11 January 2000 [section II], *Majaia, V. Slovene*, No. 28400/95, 8 February 2000 [section I]

12 *Punzelt V. Czech Republic*, No.31315/96, 25 April 2000 (section 111)

13 *Buyukdag V. Turkey*, No. 28340/95, 21 December 2000 [section IV], *Egmez V. Cyprus*, No. 30873/96, 21, December 2000 [section IV]

14 *Velikova V Bulgaria*, No. 41488/98, 18 May 2000 [section IV]

15 *Bergens Tidende and Others V. Norway*, No. 26132/95, 2 May 2000 [section III]

16 *Quinn V. Ireland*, No. 36887/97, 21 December 2000 [section IV]

concerned are entitled to sit in the Grand Chamber again (Articles 27, 43 Eleventh Protocol). One of the reasons for these measures may be that the negotiating parties were not ready to minimize the political role of the Council in resolving human rights violation cases. The decision of the European Court of Human Rights, if not voluntarily obeyed by the state party concerned, depends ultimately on the Committee of Ministers for its enforcement. Such a situation explains the limitation of the European system of human rights established under the 1950 Convention. In the Greek Crisis, 1967<sup>17</sup> a *coup detat* took place in April, 1967 in Greece. The military government suspended major human rights relying on the derogative provision of Article 15 of the Convention claiming that the 'public emergency threatening the life of the nation' existed. On the application submitted by the Denmark, Sweden, Norway and Netherlands, the Commission found that gross violation of human rights took place and no situation of public emergency existed. The Committee of Ministers suspended the membership of Greece in April, 1970. Before such a decision could take effect, the military government of Greece defected from the Convention. The human rights violation could not be improved by the Convention mechanism until the military government left the power some few years later. Thus, the Greek case explains that in the absence of political willingness of the member-states, the mechanism can not effectively function.

### **5. The Revised European Social Charter, 1996**

The Council of Europe adopted a Social Charter in 1961 which came into force in 1965. The Charter contains a catalogue of 19 social and economic rights and principles. These are: right to earn one's living (Article 1), workers right to just conditions of work (Article 2), right to safe and healthy working conditions

17 This case was initiated by four petitions, No. 3321, 3322, 3323, 3344/67 by the Governments of Denmark, Sweden, Norway, and the Netherlands, on 20 September 1967. For details, See, Delmas-Marty, Mireille (ed), *The European Convention for the Protection of Human Rights: International Protection Versus National Protection*, Nijhoff Publishers, London, pp. 154-156.

(Article 3), right to 'fair' remuneration (Article 4), right to freedom of association (Article 5), right to collective bargain (Article 6), children's right to special protection against the physical and moral hazards to which they are exposed (Article 7), employed women's right to special protection in the work during maternity (Article 8), right to facilities for vocational guidance (Article 9), right to facilities for vocational training (Article 10), right to benefit from measures entailing highest possible standard of health (Article 11), worker's right to social security (Article 12), right to social and medical assistance (Article 13), right to benefit from social welfare services (Article 14), disabled person's right to vocational training, rehabilitation, and resettlement (Article 15), family's right to social, legal and economic protection (Article 16), mother's and children's right to appropriate social and economic protection (Article 17), national of one state party has the right to engage in a gainful occupation in the territory of other member states on equal footing (Article 18), and migrant worker's right to protection and assistance in the territory of another contracting party (Article 19).

Three Protocols have been added to the 1961 European Social Charter respectively in 1988, 1991 and 1995. The 1988 Protocol has added four more social and economic rights<sup>18</sup>. These are: worker's right to equal opportunities and equal treatment in matters of employment (Article 1), worker's right to be informed (Article 2), worker's right to take part in the determination and improvement of working conditions (Article 3) and elderly person's right to social protection (Article 4).

The 1991 Protocol has introduced certain changes to strengthen the supervisory role of the 'Committee of Experts'<sup>19</sup>. These are: First, the Committee has been renamed as the 'Committee of Independent Experts' (Article 24, 1961 Charter; Article 2, 1991 Protocol). Second, their number has been increased from seven

<sup>18</sup> European Treaty Series-No. 128. European Social Charter (Additional Protocol), 5. V. 1988

<sup>19</sup> European Treaty Series - No. 142. European Social Charter (Protocol Amending) 21. X. 1991.

to nine (Article 25, 1961 Charter; Article 3, 1991 Protocol). Third, instead of being appointed by the Consultative Assembly, they are now elected by the Parliamentary Assembly (Article 25, 1961 Charter; Article 3, 1991 Protocol). Fourth, the Committee can review comments submitted by the international non-governmental organisations on the national reports of the state parties and may consult with the representatives of such organisations (Articles 1, and 4, 1991 Protocol). Fifth, the Committee of Independent Experts may seek additional information and clarification directly from the state parties (Article 2, 1991 Protocol). The 1995 Protocol has introduced a 'collective complaints system' allowing the national and international employers and trade unions as well as the international non-governmental organisation to submit complaints alleging unsatisfactory application of the Charter by the member states (Article 1, 1995 Protocol)<sup>20</sup>.

However, in 1996 the European Council adopted a revised Social Charter, which came into force in 1999<sup>21</sup>. The revised Charter includes broadly all the changes brought about by the three earlier Protocols to the 1961 Charter<sup>22</sup>. Almost thirty-one social and economic rights and principles have been guaranteed by the revised Charter. The revised Charter has also strengthened the undertakings of the state parties in two ways. First, under the 1961 Charter, state parties are required to choose five Articles out of seven Articles<sup>23</sup>. Now, under the 1996 revised Charter state parties are to choose six Articles out of nine given Articles<sup>24</sup>. Second, under the 1961 Charter state parties are to choose in total ten Articles or forty-five numbered paragraphs<sup>25</sup>. But under the 1996 revised Charter they are to

20 European Treaty Series-No. 158, European Social Charter (Additional Protocol), 9. XI. 1995.

21 European Treaty Series No. 163, European Social Charter (Revised), 1996, Strasbourg, 3. V.

22 Protocols of 1988, 1991 and 1995, discussed above.

23 See, Article 20 of the 1961 Charter. The seven Articles are: 1, 5, 6, 12, 13, 16 and 19

24 Article A, Part III of the Revised Charter, 1996, The nine given Articles are 1, 5, 6, 7, 12, 13, 13, 16, 19 and 20

25 Article 20 of the European Social Charter, 1961

26 Article A, Part III of the Revised Charter, 1996



choose sixteen Articles or sixty-three numbered paragraphs<sup>26</sup>.

Although both the Charters are in force for the time being, it is intended that the revised Charter will gradually replace the original 1961 Charter. The supervisory mechanisms established under both the Charters require state parties to submit periodical reports on the implementation of their obligations under the selected Articles or paragraphs of the respective Charters. Parties are allowed to implement their obligations by enacting laws, or by undertaking agreements or in any other suitable manner. Indeed, because of the pressure exerted by the supervisory mechanisms, state parties are required to reform their relevant laws i.e., workers and trade union related laws, health sector related laws, housing laws. The enactment of laws or reformation of old laws contribute to the improvement of the observance of social and economic rights within the member states.

## **6. Human Rights and the European Union (EU)**

The Treaty of Rome, 1957 created the European Economic Community (EEC) with a view to establishing a common market based on the four freedoms of movement--- of goods, people, services and capital. The Single European Act, 1986 and the Treaty on European Union, 1992 contributed further in the harmonisation of trade policies among the member states and in the creation of the European Union. The Community or the Union has never been indifferent to the development of human rights norms and principles under the European Human Rights Convention, 1950 and under the constitutions of the member states of the Community or the Union. Although the Community legal instruments do not contain a catalogue of human rights and fundamental freedoms, they express the commitment of the community toward the observance of the human rights in general<sup>27</sup>. The Preamble to the Single Act states

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<sup>27</sup> For the aims of the European Union, See Articles 2 and 3. The Treaty of European Union, 1992.

that the Contracting Parties are:

'Determined to work together to promote democracy on the basis of the fundamental rights recognised in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and in the European Social Charter, notably freedom, equality and justice<sup>28</sup>.

The first paragraph of Article 6 of the 1992 Treaty provides that 'the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law principles which are common to the Member States<sup>29</sup>. Paragraph 2 of the same Article asserts,

'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law<sup>30</sup>.

In 1997 the European Parliament, the Council and the Commission adopted the following Join Declaration:

1. The European Parliament, the Council and the Commission stress the prime importance they attach to the protection of fundamental rights, as derived in particular from the constitutions of Member States and the European Convention on Human Rights and Fundamental Freedoms.

2. In the exercise of their powers and in pursuance of the aims of the European Communities they respect and will continue to respect these rights<sup>31</sup>.

The European Court of Justice (ECJ) also expressed its commitments toward the observance of human rights in the

28 See, Preamble, The Single European Act, 1986.

29 See, Article 6(1), The Treaty of European Union, 1992 (Ex Article F).

30 Article 6(2), the Treaty of European Union, 1992

31 O.J. 1977, No. C. 103/1.

following way:

'Fundamental rights form an integral part of the general principles, the observance of which, the Court of Justice ensures in accordance with constitutional traditions common to the Member States and international treaties on which the Member States have collaborated or of which they are signatories'<sup>32</sup>

A number of attempts were made for the accession of the EU to the European Convention of the Protection of Human Rights and Fundamental Freedoms, 1950. However, these attempts did not succeed<sup>33</sup>. In December 2000 the Union rather adopted a Charter of Fundamental Rights<sup>34</sup>.

### **7. Developments in the European Union: Charter of Fundamental Rights, 2000.**

The Preamble to the Charter of Fundamental Rights 2000 notes that the Union is 'conscious of its spiritual and moral heritage' and the 'the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity'. The Charter of Fundamental Rights contains a catalogue of civil, political, social and economic rights many of which have been drafted in the light of the European convention of Human Rights and Fundamental Freedoms, 1950 and the European Social Charter, 1961.

The major civil and political rights include: right to human dignity (Article 1), right to life (Article 2), right to the integrity of the person (Article 3), prohibition of torture and inhuman or degrading treatment or punishment (Article 4), prohibition of

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<sup>32</sup> Court of Justice Case 4/73, [1974] E.C.R. [1974] 2 C.M.I.R. 338, Case 136/79 [1980] E.C.R. 2057 Judgement of May 26, 1980.

<sup>33</sup> The European Convention was conceived and drafted with a view to accession by sovereign states. An accession by the Union would require an amendment of the Convention, which would further require the ratification by the signatory states. See, Dr. Ludwig Kramer, Focus on European Environmental Law, Sweet & Maxwell, 1992 London, pp. 3-4.

<sup>34</sup> Charter of Fundamental Rights of the European Union, 2000, Official Journal of the European Communities, 18.12.2000, C 364/1.

slavery and forced labour (Article 5), right to liberty and security (Article 6), respect for private and family life (Article 7), protection of personal data (Article 8), right to marry and right to found a family (Article 9), freedom of thought, conscience and religion (Article 10), right to property (Article 17), equality before the law (Article 20) and non-discrimination (Article 21).

The major social and economic rights include: freedom to conduct a business (Article 16), workers right to information and consultation within the undertaking (Article 27), right of collective bargaining and action (Article 28), right of access to placement services (Articles 29), protection in the event of unjustified dismissal (Article 30), fair and just working conditions (Article 31), prohibition of child labour and protection of young people at work (Article 32), legal, economic and social protection of family and professional life (Article 33), social security and social assistance (Article 34), health care (Article 35) and access to services of general economic interests (Article 36). The charter also includes third generation rights such as, right to environmental protection (Article 37), and consumer protection (Article 38).

Article 51 of the Charter requires the member states, institutions and bodies of the Union, to 'respect the rights, observe the principles and promote the application thereof in accordance with their respective powers'. Therefore, the Commission and the European Court of Justice (ECJ) will play significant role in the future development of human rights Jurisprudence in Europe. Under the 1992 Treaty, the Commission has an obligation to investigate matters reported by the individuals, non-government organisation especially with regard to the member states. The Commission can deal with non-compliance matters under Article 226 (ex Article 169) of the Treaty of European Union, and is empowered to deliver a 'reasoned opinion' on the matter. If the state concerned fails to

comply with the 'reasoned opinion' within the period laid down by the Commission, the latter may bring the matter before the European Court of Justice. Even if the Commission, the Council or the European Parliament fail to act in infringement of the 1992 Treaty, member states and the individuals are entitled to bring a suit against such institutions or bodies (Article 232, ex Article 175).

The European Court of Justice can also review the legality of acts committed by the institutions in cases brought by the individuals or member states (Article 230, ex Article 173). In judicial review cases, member states and the organs of the EC are treated as 'privileged applicants and have direct access to justice. But the individuals and non-governmental organisations are considered as 'non-privileged' applicants and in order to have a 'legal standing' before the ECJ, they have to satisfy 'direct and individual concern test', which is generally very difficult to satisfy. However, in personal human rights violation cases, it may not be, that much difficult to prove one's direct and individual concern' compared to other matters.

With the adoption of the Charter, a number of developments are likely to take place that may fundamentally change or reshape the future human Rights practice in Europe. First, citizens of state parties, which are members of both the Council and the Union, may prefer the European Court of Human Rights for access to this court is more liberal. One has to prove 'right of standing' before the European Court of Justice which is not required in the European Court of Human Rights. Second, states with overlapping jurisdiction may experience contradictory judgements in similar human rights violation cases.

## **8. Conclusion**

In the recent past significant developments have taken place in the European System of Human Rights. As we have already observed, the Eleventh Protocol has brought about fundamental

changes in the compliance mechanism established under the European Convention on Human Rights and Fundamental Freedoms, 1950. While the original convention laid primary emphasis on the institutional model of dispute resolution, the Eleventh protocol has shifted the entire focus from the 'institutional model' to a 'contentious model' of dispute resolution. On the other hand, EU without being a party to the already existing system of human rights under the 1950 Convention, has proclaimed a Charter of Fundamental Rights in 2000. This Charter, if effectively enforced by the powerful mechanisms of the European Union, could bring significant developments in the human rights jurisprudence of Europe. Should the European Court of Justice decide to give effect to the provisions of Charter of Fundamental Rights, this could result in contradictory judgements on similar issues in states having overlapping jurisdictions of both the Council and the Europe. In most cases, civil and political rights are violated by state authorities. Therefore, determination by a superior court can help restore the civil and political rights violated in particular instances.

Although the civil and political rights are enforced under a court system, the social and economic rights are pursued under a 'supervisory system' based on the reporting of the state parties. The revised Social Charter, 1996 has, strengthened the supervisory mechanism by introducing a 'collective complaints system' which allows the national and international non-governmental organisations as well as the employers and trade union organisations to lodge complaints against the unsatisfactory implementation of the obligations of the Charter by the state parties. Social Charters of 1961 and 1996 have not established any court for the determination of violations by the state parties. This is because realisation of social and economic rights depends mostly on the social and economic development of a state party. The Charters have required the state parties to declare the social and economic rights as their 'policy

objectives' to be achieved progressively by the state parties. In addition, state parties undertake to consider themselves bound by a certain number of provisions of the Charters. This provides flexibility to the state parties to undertake legal obligations corresponding to their level of economic achievements. A supervisory body of independent experts makes suggestions on the reports submitted by the state parties. However, these reports, together with the comments of the non-governmental organisations, generate huge public pressure on the member states to conform their legal and administrative measures with the provisions of the social charters. Therefore, extra-legal forces such as public opinion, non-governmental organisations play strong role in the compliance mechanisms of the European social charters.

The fact that regional organisation, based on common socio-economic and political ideals, can develop strong regulation is aptly demonstrated by the recent developments in the European system of human rights. However, such a system is not free from weaknesses. The Greek crisis, as discussed in this article, shows that whatever may be the strength of a regional organisation, without the political willingness of a state party, the system can not effectively contribute to the improvement of human rights conditions.