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Human Rights and Europe

Second Edition

Ralph Beddard

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HUMAN RIGHTS AND EUROPE

A Study of the Machinery of Human Rights Protection of the Council of Europe

by

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PREFACE

The second edition of Human Rights and Europe, like the first, is written for students of international law and for others who are eager to learn about the European Convention of Human Rights. New chapters have been added to cover the jurisprudence of the Commission and the Court, because any attempt to look at the Convention now, without examining the work of these bodies, would be pointless. The task of covering this material adequately, in the space available, was awesome. Full discussion of the decisions of the Commission and Court would fill a work of several volumes. What I have tried to do is to give a description of the kind of decisions which these bodies are called upon to make and comment upon some areas of development which may be of interest. The rights are dealt with in three chapters under the headings of personal rights, the individual in his community and the individual and the law. It is hoped that such treatment will put the rights contained in the Convention and its Protocols into the natural context of European life and be a useful springboard for further discussion. Since the book is intended as an introduction which will serve to excite the interest of the student, I have decided not to break up the text with notes. At the end of each chapter, however, are included suggestions for further reading which, in most cases, relate to material contained in the chapter and particularly contain references to the cases and applications mentioned therein.

It is my belief and hope that the book will encourage students and others to turn with interest to the fuller and more comprehensive treatises on this subject.

Southampton
March 1980

Ralph Beddard

ABBREVIATIONS

Brownlie	Basic Documents on Human Rights, I. Brownlie, Oxford
C.D.	Collected Decisions of the European Commission of Human Rights, Volumes 1–46. Council of Europe
C.F.D.T.	La Confédération Française Démocratique au Travail
D.R.	Decisions and Reports of the European Commission of Human Rights, Volumes 1–14. Council of Europe (replaces Collected Decisions, above)
ECSC	European Coal and Steel Community
EEC	European Economic Community
E.H.R.R.	European Human Rights Reports
F.R.G.	Federal Republic of Germany
ILO	International Labour Organisation
ORTF	Office de Radio-Télévision Française
Y.B.	The Yearbook of the European Convention on Human Rights, Volumes 1–21, Martinus Nijhoff, The Hague

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Chapter 1

THE EUROPEAN CONVENTION AND THE INDIVIDUAL

The European Convention for the Protection of Human Rights and Fundamental Freedoms can be described as one of the greatest achievements of the Council of Europe. The Convention, signed first in 1950 and now in force, to some extent or another, in 19 of the 21 member countries of the Council, is held as a standard of achievement in its own right of a unifying Europe. If the criterion of success is to be signing and ratification of a treaty and the bringing into being of complicated machinery of judicial adjudication then the European States do indeed rank high in the international "league table."

The European Convention is important to the student of international law in the contribution it makes to the status of the individual in the international legal system. More than 240 million persons in Europe may bring before the European Commission of Human Rights allegations that their rights have been violated. Fourteen out of the 19 contracting States have accepted the optional declaration allowing this individual petition. These applications will be considered by the Commission and well-founded ones will be passed to the Court of Human Rights or the Committee of Ministers of the Council of Europe for a decision on violation.

One of the explanations for the success of the Convention is that European States make up a culturally identifiable unit and their likemindedness has meant easier agreement on what are considered to be basic human rights. There has been, however, a noticeable lack of success or enthusiasm in extending the list to include more sophisticated rights and freedoms where, it might be thought, Europe should lead the way.

Thirteen Articles of the Convention, together with three in the First Protocol, contain the rights which the Contracting Parties undertake to secure for everyone within their jurisdiction. Four further rights are contained in the Fourth Protocol to the Convention which came into force in 1968 but which has, so far, been ratified only by 11 States and not by the United Kingdom. The rights and freedoms take as their starting point the Universal Declaration of Human Rights of the United Nations although the drafting processes have produced some provisions defined in ways which render them wider or more restricted than the parent instrument.

The Convention's provisions broadly cover the individual's personal life, his need to live his life to the full, as he sees it, and the rights which he has when he finds himself in conflict with the authorities and the law.

Life is to be protected by the law and the European citizen is to be brought up in the privacy of his own home surrounded by his family and his possessions. He should be educated according to the wishes of his parents and allowed, when he is of age, to marry and found a family of his own. The Fourth Protocol would also give him freedom of movement, to choose his place of residence and the right to leave any country and to enter his own. He is not to be expelled from the State of which he is a national, either alone or collectively. Although the Convention does not guarantee his right to work, it protects him from forced or compulsory work, slavery and servitude.

Man needs to live in society, and in the highly populated region of Western Europe a glance at literature will show what rights in this sphere the individual would demand. The Convention secures for him the freedom of thought, conscience and religion and the right to manifest his religion and beliefs. Freedom of expression is a right befitting the effective political democracies to which the Convention is dedicated whereas, in fact, it has been found that modern technology has rendered such protection no easy thing. The "common heritage of political traditions" requires the rights of assembly and association and the latter right of association, of course, must now include

the right to form and belong to trade unions. Finally, in this context, the First Protocol secures the right to free elections by secret ballot.

Liberty and security are valued next to life itself and the Convention's provisions protecting the individual from arbitrary arrest and imprisonment are, as we shall see, much cited by individual petitioners. The European prisoner, when lawfully detained, is not to be tortured nor inhumanly treated or punished and he must be brought to trial expeditiously for offences which were offences at the time they were committed. The concept of a fair trial is, to many, the very heart of justice and it is not surprising that much of the jurisprudence of the European Commission centres on the interpretation of Article 6 which embraces it.

Article 14 of the Convention declares 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, political or other opinion, national or social origin, association with a national minority, property, birth and other status." This has not been interpreted by the Commission and the Court to impose absolute equality. Different treatment has been held to be acceptable when there is objective and reasonable justification. Article 14 is violated, however, the Court has said, "when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised."

Originally it was held that since non-discrimination was to be applied in "the enjoyment of the rights and freedoms set forth" in the Convention, it could not operate independently but only in relation to the violation of one of the other rights and freedoms. Later, however, the Commission and Court revised this view and held that there could be a violation of Article 14 in association with another Article of the Convention even though that other Article had not itself been violated. The non-discrimination provision is relevant also to the limitations which States may impose, under the Convention, to certain of the rights and freedoms. So, for example, although the freedom to

manifest your religion or beliefs may be limited for the protection of public order, health or morals, etc., the law imposing these limitations must not be discriminatory.

It will have been noticed that these rights contain no innovations and their equivalents are to be found in the majority of constitutions and Bills of Rights. It is indeed of passing interest to note that the European Convention was used as a model by the United Kingdom in the early 1950s in drawing up constitutions for some of the newly independent African States.

A former Secretary to the European Commission, Mr. A. B. McNulty, in reviewing the results achieved under the Convention up to 1971 remarked:

> "It is a reasonable deduction that the Commission has substantially established itself in the confidence both of the public and of the parties to the Convention. It is particularly this basis for co-operation between the Commission and Governments, rather than a relationship of prosecutor and accused, which has brought this about and generally made the Convention workable at this first stage of its existence."

It is, and always has been, obvious that winning the confidence of the parties and the public was a first step in any attempt to establish judicial determination of the protection of human rights. The last 27 years have not been free of difficulties, however, and the confidence of the parties was won, particularly in the early days, by very careful treading on the part of the Commission. There are cases which, if presented to the Commission today, would probably make greater progress than they did at the time of application. However, a Commission leaning heavily in favour of governments would have lost the confidence of the public. This is not borne out by the increasing number of applications which the Commission receives from individual petitioners and by the greater seriousness of the subject-matter with which a large proportion of these petitions deal. That the Commission and Court work, is very easy to show; that the protection of human rights in Europe is success-

ful, is a much more difficult question to answer. The solution, of course, cannot be found in a book of this size nor indeed in any work which considers only the working of the European Commission and Court. Human rights is not a study for the lawyer alone but also for the sociologist, economist and politician, not to mention the theologian, philospher and ecologist.

What we shall attempt to do here, accepting that the machinery of the European Convention has now been established, is to seek an answer to this question: how far, if at all, is it contributing to the quality of life of the European citizen? Is its contribution likely to increase and, if so, might this mean that the confidence of States is to be put to the test or that the faith of the individual will dwindle? After nearly 30 years should not the Parliamentary Assembly of the Council of Europe perhaps consider taking further steps into the sacred territory or should they withdraw?

To the end of December 1978 just over 8,000 cases have been through the machinery before the Commission as described in Chapter 3. Thirteen applications have been brought by States against other States, although manifesting only five situations of international disagreement. The number of applications every year is now between 300 and 400. An increase was to be noted in the years 1971 and 1972 caused mainly by a large number of similar applications by East African Asians against the United Kingdom. The applications registered since 1975 have decreased from 466 to 335 in 1978. One reason for this decrease is that the Secretariat no longer registers applications until adequate details of the facts complained of have been supplied by the applicant. In fact the Secretariat has revealed that it opens provisional files for more than six times as many applications as are eventually registered. Most of the communications received from individuals are hopeless of success or are not pursued further by their writers. Out of a total of over 8,000 individual petitions since 1955 some 630 have been communicated to governments for their observations, while from those a little over 200 applications have been admitted.

The writers on the Convention will point out that this is not a sum of the success of the Convention. Its mere existence, and the prestige with which it is regarded, put pressure on States to avoid acting against its provisions while in many States it has become part of the municipal law, and decisions of domestic courts have also to be considered. On the other hand, that prime object of the Convention was to set up international machinery to protect human rights in Europe, there has been no shortage of complaints and the question is bound to be asked whether that machinery in its operation or whether the jurisprudence being accumulated by the Commission and Court, does in fact provide a means whereby an individual can gain respite from oppressive acts of his Government or of the Government under whose jurisdiction he finds himself.

The cases

In practical terms, therefore, what have the decisions of the European Commission and Court produced? It has been stated that there have been 13 inter-State applications alleging violation of the Convention. In 1956 and 1957 Greece brought two applications concerning alleged mistreatment of prisoners in Cyprus. These cases were later withdrawn by request of both governments following a political settlement of the Cyprus problem. Since neither country recognised the right of individual petition at that time, there was no right of action to the victims to continue the fight for relief after the Commission had agreed to withdrawal, even though it had been established that there had been mistreatment. It is doubtful whether European public opinion would approve of the withdrawal of such a case today. The first of two similar cases brought by Ireland against the United Kingdom in 1971 and 1972 alleging similar behaviour by the British authorities in Northern Ireland was eventually referred by the Republic Government to the Court, which held a violation of Article 3 of the Convention for activities characterised as inhuman and degrading. Cyprus, after independence, became a Contracting Party to the Convention and between 1974 and 1977 lodged three applications

against Turkey complaining of violations of the Convention brought about by Turkish intervention in Cyprus. The Committee of Ministers decided in 1979 that there had been violations of the Convention but that the protection of human rights could be brought about only by the resumption of peace and confidence between the two Cyprus communities. It therefore urged the parties to resume intercommunal talks. Five applications were submitted against Greece between 1967 and 1970 by Denmark, Norway, Sweden and the Netherlands alleging, *inter alia*, violation of Articles 3 and 7 of the Convention and Article 3 of the First Protocol. No friendly settlement was reached and while the report of the Commission was with the Committee of Ministers, the Greek Government withdrew from the Council of Europe and denounced the Convention. The new Greek Government ratified the Convention again in 1974 and, after it had furnished information to the Commission concerning the remedies available to victims of prosecution under the former régime, the parties agreed to close proceedings in those applications which were still pending. The final inter-State application to examine was brought by Austria against Italy in 1960 and concerned criminal proceedings leading to conviction of six young men for the murder of a customs officer in the German speaking South Tyrol. The Commission, upheld by the Committee of Ministers, concluded that there had been no violation but recommended that clemency be afforded to the prisoners. In fact, by this time, the youngest had been pardoned.

The inter-State procedure was bound to be founded for the greater part on unfriendliness in the relations between States, and the cases, in the main, bear this out. The Greek case, however, was brought by States with little economic or cultural contact with Greece and was occasioned by the seriousness of the violations. The application by *Ireland* v. *United Kingdom* seemed to a great extent to be politically motivated while the *Cyprus* v. *Turkey* application is a direct result of hostilities between the two parties. However, since one of the objects of the Convention is to publicise atrocities, motive is not entirely

relevant. A much clearer guide to the practical effects of the Convention might be expected from consideration of the petitions of individuals. The first point is that a greater amount of benefit to the individual has often occurred in cases which have not, in fact, reached the stage where the Commission or Court has pronounced a violation. This may be either because a friendly settlement has been achieved through the mediation of the Commission, or because the Government has had its attention roused to the fact of a violation and wishes to comply with its international legal obligations. Very often a failure in domestic law is remedied by legislation and the matter is able to be withdrawn, with consent of all, from the Commission. In the early days a State would often wait before changing its law until it sensed a likely adverse report from the Commission, but now that States realise that the Commission rejects all but genuine cases the Convention's effects and influence can be remarked. This is, of course, the way, or an extension of the way, in which the Commission, as a conciliatory body, was intended to work. The Secretariat of the Commission works with a careful eye on the events taking place in the State concerned following the decision on admissibility. Where it seems likely that a government is not prepared to take notice of the Commission or the Court then little time for stalling tactics is granted. On the other hand where, as in the case of certain applications against Austria concerning "equality of arms" in appeal procedures, it was apparent to the Secretariat, and hence to the Commission, that the Government was concerned to remedy any shortcomings in the law, then the procedure before the Commission (or Sub-Commission according to the former procedure relevant in these cases) seems to have been kept at a slow pace. Indeed, in the majority of these cases, since the facts were ascertained, no Sub-Commission was formed. While having obvious advantages in providing a settlement agreeable to the Commission and the States, it is submitted that this can, if taken to extremes, have the result of providing little relief for the individual. In the Austrian cases the law was changed to allow those prisoners, whose sentences had been increased without their being repre-

sented, to be granted a rehearing if the facts of their case were such as to render them admissible under the European Convention. In most cases sentences were reduced, but in some of these applications the unjustly excessive period of imprisonment had been served before the rehearing could be held. In the *De Becker* case, the second case to reach the Court, the Belgian law was changed before the Court's decision was made and Mr. De Becker, and others in a like position, were granted relief. Members of the Evangelical-Lutheran Church of Sweden complained that parents of children belonging to the Church were prevented from giving their children appropriate religious instruction in accordance with their own denomination as the children were obliged to receive religious instruction of the Swedish Church at school. After admitting the case, the Commission adjourned consideration of the merits, hearing that a settlement seemed probable, and some time later the King-in-Council ordered that pupils of the Church should be exempted from compulsory religious education if their parents so requested. Similarly, it was noted in the applications of East African Asians against the United Kingdom, concerning the consequences of immigration restrictions, that throughout the course of the case the United Kingdom Government doubled the number of entry vouchers, issued 1,500 once-for-all vouchers and allowed into the country 25,000 United Kingdom passport holders who were expelled from Uganda. The Committee of Ministers felt that in many of the cases this disposed of the problems which gave rise to the application.

The *Boeckmans* case against Belgium provides an example where, in an isolated incident which would have amounted to a violation, the government made amends by giving compensation (in this case 65,000 Belgian francs) negotiated by the Sub-Committee as a friendly settlement to the case. Similarly in *Poerschke* v. *Federal Republic of Germany* the applicant's sentence was reduced to conditional release on probation following talks between the Sub-Commission and the parties. In the *Alam and Kahn* application against the *United Kingdom* an air ticket to Karachi was accepted as part of the friendly settlement

for what might have been a violation of Article 8 (right to family life), but the fact that new Immigration Appeals Tribunals had been set up was also a consideration in reaching the agreement.

A friendly settlement was also secured in the case of *Gyula Knechtl* v. *United Kingdom* in March 1972. The applicant had complained that, having had his leg amputated while serving a prison sentence in England, he was not allowed to consult a solicitor with a view to bringing an action in the courts for alleged negligence on the part of certain prison doctors and consultants. Under the terms of the settlement, the United Kingdom Government, while not admitting that the applicant's rights under the Convention had been violated, agreed to make an *ex gratia* payment of £750 to the applicant in settlement of his case before the Commission. This did not prejudice his right to continue his current action in the courts. The Commission also noted, in agreeing to the withdrawal of the case, a White Paper, *Legal Advice to Prisoners*, laid before Parliament on December 10, 1971. Again, the United Kingdom Government in the *Amekrane* case, while not admitting liability under the Convention, paid compensation to the value of £37,000. In the *Neubecker* and *Liebig* cases against the Federal Republic of Germany the applicants alleged that although criminal charges against them were dropped they were left to pay costs which raised an implication of guilt contrary to the presumption of innocence secured by the Convention. In both cases the authorities, in return for withdrawal, issued declarations that no finding of guilt should be derived from the conduct of the Courts and, in the *Liebig* case, paid the applicant's expenses incurred before the Courts and before the Commission. It was noted that the Federal Government intended to draw the attention of the judicial authorities in the Länder to the need for courts to respect the principle of presumption of innocence, when setting out reasons for decisions relating to expenses under the Code of Criminal Procedure.

In general, however, it is difficult to know what part, if any, the Commission's acceptance of an application plays in speeding up legislation. For instance, Immigration Appeals Tribunals