

Andrew Z. Drzemczewski

European Human Rights
Convention in
Domestic Law

A Comparative Study

Clarendon Press

EUROPEAN HUMAN
RIGHTS CONVENTION
IN DOMESTIC LAW
A Comparative Study

ANDREW Z. DRZEMCZEWSKI

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**EUROPEAN HUMAN RIGHTS CONVENTION
IN DOMESTIC LAW**

Preface

This work is a revised version of a thesis which I submitted in 1980 for the degree of Doctor of Philosophy in the University of London. I wish to acknowledge the help of two persons: my original supervisor of studies Mr Cedric Thornberry, formerly a lecturer in law at the London School of Economics and Political Science and presently an official with the United Nations, for his guidance and advice, as well as Professor James Fawcett, former President of the European Commission of Human Rights, who kindly agreed to become my supervisor of studies upon the departure of Mr Thornberry from the LSE. I am especially grateful and deeply indebted to Professor Fawcett for his sympathetic guidance.

I carried out much of the background research for this book while in receipt of a University of London Postgraduate Studentship. I also received a Council of Europe Human Rights Fellowship to readapt and update the thesis for publication. I wish to express my gratitude for this financial assistance.

As a matter of presentation, I had the choice of quoting passages from the texts of constitutions, statutes, and court decisions in their original languages or alternatively to do so in respect of at least the more commonly used languages, such as French, Spanish, and German. After some hesitation, I decided to use English language translations as far as possible, with occasional reference to texts written in French. The reason for this narrow approach is twofold: my inability to appreciate the significance of certain passages reproduced *verbatim* in foreign languages, and because most of the materials which I consulted in Strasbourg were made available to me in English and French, the two official languages of the Council of Europe.

Although a person with limited linguistic abilities should not normally attempt to embark upon a comparative study of this type, the need for at least some general overview of the domestic status of the Convention in *all* the member states of the Council of Europe was felt to outweigh this consideration. As a consequence, I have made occasional reference to primary source materials which I have been unable to read myself, although their content has been checked — as far as possible — by obtaining

cross-references written in other languages, or by obtaining explanations and translations of passages. The following have helped the author in this way: Mrs A.-M. Medrano-Drzemczewski, Mr S. Bein, Mrs J. Dinsdale, and Mr W. Strasser. In addition, while writing this book I received advice and help from many. I should like to thank in particular Professor C. K. Boyle, Mr H. Danelius, Mr J. Færkel, Professor J. A. Frowein, Mrs M. Gassner-Hemmerlé, Professor P.-H. Imbert, Mr O. Jacot-Guillarmod, Mr P. Lemmens, Professor H. Miehsler, Mr E. Myjer, Professor C. A. Nørgaard, Professor T. Opsahl, Mr J.-D. Pinheiro Farinha, Professor P. Van Dijk, Professor Ph. Vegleris, and Professor L. Wildhaber.

Earlier drafts of certain portions of this book appeared in the 1980 and 1981 issues of the *ICLQ* as well as in the 1977 and 1979 issues of *LIEI*.

This book is dedicated to my wife Anne-Marie, my mother, and my two sons, Peter and Alexis.

Abbreviations

<i>AFDI</i>	<i>Annuaire français de droit international</i>
<i>AJCL</i>	<i>American Journal of Comparative Law</i>
<i>AJIL</i>	<i>American Journal of International Law</i>
All ER	All England Law Reports
<i>ASDI</i>	<i>Annuaire suisse de droit international</i>
<i>ATF</i>	<i>Recueil officiel des arrêts du Tribunal Fédéral Suisse</i>
<i>Bgbl.</i>	<i>Bundesgesetzblatt</i> (Federal Law Gazette, Austria)
<i>Bgh.</i>	<i>Entscheidungen des Bundesgerichtshofes</i> (Decisions of the Federal Supreme Court, FRG)
<i>Bibliography</i>	<i>Bibliography Relating to the European Convention on Human Rights</i> (Council of Europe, Strasbourg, Feb. 1978)
<i>Boletín Oficial</i>	<i>Boletín Oficial de las Cortes/Congreso de los Diputados</i> (Official Bulletin of the Spanish Parliament)
<i>Bull. EC Suppl.</i>	<i>Bulletin of the European Communities, Supplement</i>
<i>Bulletin of the NJCM</i>	<i>Bulletin of the Netherlands Juristen Comité voor Mensenrecht</i>
<i>Bverfg.</i>	<i>Entscheidungen des Bundesverfassungsgerichts</i> (Decisions of the Federal Constitutional Court of the FRG)
<i>Bverwg.</i>	<i>Entscheidungen des Bundesverwaltungsgerichts</i> (Decisions of the Federal Administrative Court of the FRG)
<i>BYIL</i>	<i>British Yearbook of International Law</i>
<i>Cassin</i>	<i>René Cassin, Amicorum Discipulorumque Liber</i> (4 vols., International Institute of Human Rights, Paris, 1969-72)
<i>CDE</i>	<i>Cahiers de Droit Européen</i>
<i>CLR</i>	Cyprus Law Reports
<i>CMLR</i>	Common Market Law Reports
<i>CML Rev.</i>	<i>Common Market Law Review</i>

<i>Collected Texts</i>	<i>European Convention on Human Rights: Collected Texts</i> (Strasbourg, 1981)
<i>Collection</i>	<i>Collection of Decisions of National Courts Referring to the Convention on Human Rights</i> (1969, Human Rights Directorate of the Council of Europe, with supplements in 1970, 1971, 1973, and 1974)
<i>Coll. of Dec.</i>	<i>Collection of Decisions of the European Commission of Human Rights</i>
<i>D&R</i>	<i>Decisions and Reports</i> , European Commission of Human Rights
ECR	European Court Reports (Reports of the Court of Justice of the European Communities, Luxembourg)
EGZ	<i>Europäische Grundrechte Zeitung</i>
EHRR	European Human Rights Reports
<i>EL Rev.</i>	<i>European Law Review</i>
Evans, 'Written Communication'	Sir V. Evans, 'The Practice of European Countries where Direct Effect is Given to the European Convention on Human Rights in Internal Law', Written Communication, <i>Proceedings of the Colloquy about the European Convention on Human Rights in Relation to Other International Instruments for the Protection of Human Rights</i> , Athens, 21-2 Sept. 1978 (Council of Europe, 1979)
<i>FIDE Conference</i>	<i>L'Individu et le droit européen. The Individual and European Law. Die Einzelperson und das europäische Recht. FIDE VII</i> (1977), (Seventh International Congress for European Law, organized by the <i>Fédération internationale pour le droit européen</i> , in Brussels, 2-4 Oct. 1975)
HRLJ	<i>Human Rights Law Journal</i>
HR Rev.	<i>Human Rights Review</i>
ICJ Reports	International Court of Justice Reports
ICLQ	<i>International and Comparative Law Quarterly</i>
ILR	International Law Reports
IR	The Irish Reports (Republic of Ireland)

<i>IYIL</i>	<i>The Italian Yearbook of International Law</i>
<i>JDI</i>	<i>Journal de droit international</i>
<i>JORF</i>	<i>Journal officiel de la République Française</i>
<i>Journal of the ICJ</i>	<i>Journal of the International Commission of Jurists</i>
<i>JT</i>	<i>Journal des Tribunaux</i>
<i>Judicial Organisation</i>	Judicial Organisation in Europe (Council of Europe, 1975)
<i>LIEI</i>	<i>Legal Issues of European Integration</i> (Law Review of the Europa Institute, University of Amsterdam)
<i>LQR</i>	<i>Law Quarterly Review</i>
<i>MLR</i>	<i>Modern Law Review</i>
<i>National Reports</i>	V. Knapp, ed., <i>International Encyclopaedia of Comparative Law</i> (1972-), vol. i, <i>National Reports</i>
<i>NILR</i>	<i>Netherlands International Law Review</i>
<i>NJ</i>	<i>Nederlandse Jurisprudentie</i>
<i>NJW</i>	<i>Neue Juristische Wochenschrift</i>
<i>NYIL</i>	<i>Netherlands Yearbook of International Law</i>
<i>ÖJZ</i>	<i>Österreichische Juristen-Zeitung</i>
<i>Pas. Bel.</i>	<i>Pasicrisie Belge</i>
<i>Pas. Lux.</i>	<i>Pasicrisie Luxembourgeoise</i>
<i>PCIJ Rep.</i>	Permanent Court of International Justice Reports
<i>RBDI</i>	<i>Revue belge de droit international</i>
<i>R. des C.</i>	<i>Recueil des cours de l'Académie de droit international de la Haye</i>
<i>RDH/HRJ</i>	<i>Revue des droits de l'homme/Human Rights Journal</i>
<i>RDPSP</i>	<i>Revue de droit public et de la science politique en France et à l'étranger</i>
<i>RGDIP</i>	<i>Revue générale de droit international public</i>
<i>RHDI</i>	<i>Revue hellénique de droit international</i>
<i>RIDC</i>	<i>Revue internationale de droit comparé</i>
<i>Riv. DE</i>	<i>Rivista di diritto europeo</i>
<i>Riv. DI</i>	<i>Rivista di diritto internazionale</i>
<i>RMC</i>	<i>Revue du Marché Commun</i>

<i>RMT</i>	<i>Rechtsgeleerd Magazijn Themis</i>
<i>RTDE</i>	<i>Revue trimestrielle de droit européen</i>
'Stocktaking'	'Stocktaking on the European Convention on Human Rights', a periodic note on the concrete results achieved under the Convention, by H. C. Krüger, Secretary to the European Commission of Human Rights (Strasbourg, 1982)
<i>TL</i>	<i>Topical Law</i> (Review of the Department of Law of the Polytechnic of North London)
<i>Vfgh.</i>	[<i>Sammlung der</i>] <i>Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes</i> (Collection of Decisions of the Austrian Constitutional Court)
<i>WLR</i>	<i>Weekly Law Reports</i>
<i>Yearbook</i>	<i>Yearbook of the European Convention on Human Rights</i>
<i>ZRV</i>	<i>Zeitschrift für ausländisches öffentliches Recht und Völkerrecht</i>

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Introductory Comments

A. The European Convention on Human Rights¹

1. Introduction

Signed in Rome on 4 November 1950, the European Convention for the Protection of Human Rights and Fundamental Freedoms came into force on 3 September 1953. As of 1982 all twenty-one member states of the Council of Europe have ratified this instrument.² The First Protocol, which came into force on 18 May 1954, has been ratified by eighteen states parties,³ while the Fourth Protocol, which came into force on 2 May 1968, has to date been ratified by thirteen member states.⁴

¹ For a list of books and articles on the Convention, see *Bibliography, passim*; and the select bibliography provided at the end of this book. The institutional machinery of this instrument is well known. Recent works in English on this subject include R. Beddard, *Human Rights and Europe* (1980), A. H. Robertson, *Human Rights in Europe* (1977), F. G. Jacobs, *The European Convention on Human Rights* (1975), and F. Castberg, *The European Convention on Human Rights* (1974). A valuable note on sources can be found in Robertson. Mention should also be made of the three recent international colloquies organized by the Council of Europe, in Rome (Nov. 1975), Athens (Sept. 1978) and Frankfurt (Apr. 1980). Current surveys of developments in Strasbourg are noted on a regular basis in three legal periodicals: *HRLJ*, *EL Rev.*, and *EGZ*.

² Austria, Belgium, Cyprus, Denmark, Federal Republic of Germany, France, Greece, Iceland, Ireland, Italy, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom. Liechtenstein ratified the Convention on 8 Sept. 1982.

³ i.e. all countries in n.2 above, with the exceptions of Liechtenstein, Spain and Switzerland.

⁴ Austria, Belgium, Denmark, France, Federal Republic of Germany, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, and Sweden. See Chart Showing Signatures and Ratifications of Council of Europe Conventions and Agreements (Strasbourg, 15 Dec. 1981). In addition, the 2nd Protocol gives the Court of Human Rights jurisdiction to give advisory opinions under certain circumstances (ratified by all contracting states); the 3rd Protocol modified the procedure used by the Commission in examining applications by eliminating the system of sub-commissions, and the 5th Protocol modified the procedure for the election of members of the Commission and judges of the Court. There is also a separate agreement – adopted in 1969 – which guarantees certain immunities and facilities to persons participating in the proceedings before the Court and the Commission. This agreement came into force on 17 Apr. 1971 and has been ratified by the following fourteen member states: Austria, Belgium, Cyprus, Federal Republic of Germany, Ireland, Italy, Luxembourg, Malta, the Netherlands, Norway, Portugal, Sweden, Switzerland,

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The immediate aim of this instrument is to give practical effect to certain rights and freedoms and to provide collective international enforcement of them. They are enumerated in Articles 2 to 18 of the Convention, Articles 1 to 3 of the First Protocol and Articles 1 to 4 of the Fourth Protocol. It guarantees these rights to every individual, of whatever nationality within the jurisdiction of the contracting states (Article 1).⁵ The rights in the Convention are defined with some precision, although many of them are subject to limitations on grounds such as public order (*ordre public*), national security, public safety, the prevention of disorder or crime, and the protection of rights of others. In time of war or other public emergency threatening the life of a nation, a contracting party may take measures derogating from its obligations under the Convention, although no derogation is permitted from Article 2 (right to life) except in respect of deaths resulting from lawful acts of war, from Article 3 (torture, inhuman, degrading treatment or punishment), from Article 4(1) (slavery), or from Article 7 (prohibition of retroactive criminal offences or penalties) (Article 15).⁶ In addition, states are allowed to make reservations in respect of certain provisions with which domestic law does not conform, but reservations of a general character are not permitted (Article 64).⁷

Although the Convention does not contain any specific rules on how contracting parties are to implement it, Article 57 permits the Secretary General of the Council of Europe to request parties

the United Kingdom. These documents, as well as the Commission's rules of procedure (amended Dec. 1977), the Court's rules, and the Committee of Ministers' rules for the application of arts. 32 and 54 of the Convention, are reproduced in *Collected Texts*.

⁵ The application of the Convention can be extended by states to the territories for whose international relations they are responsible (art. 63).

⁶ For more details see R. Higgins, 'Derogation under Human Rights Treaties', 48 *BYIL* (1976/77), 281-320, esp. 288-315, J. Velu, 'Le Contrôle des organes prévus par la Convention européenne des Droits de l'Homme sur le but, le motif et l'objet des mesures d'exception dérogeant à cette Convention' in *Mélanges offerts à H. Rolin* (1964), 462-78, C. Warbrick, 'The Protection of Human Rights in National Emergencies' in F. E. Dowrick, *Human Rights. Problems, Perspectives and Texts* (1979), 69-106, and G. Trembley, 'Les situations d'urgence qui permettent en droit international de suspendre les Droits de l'Homme', 18 *CDE* (1977), 3-60.

⁷ On this subject see P.-H. Imbert, 'Reservations and Human Rights Conventions', VI *HR Rev.* (1981), 28-60, S. Marcus-Helmons, 'L'Article 64 de la Convention de Rome, et les réserves à la Convention européenne des Droits de l'Homme', XLV *RIDC* (1968), 7-26, and D. Brändle, *Vorbehalte und auslegende Erklärungen zur europäischen Menschenrechtskonvention* (doctoral dissertation, University of Zürich, 1978).

to provide explanations on how their domestic law ensures effective implementation of the Convention. To date, the Secretary General has availed himself of this possibility on three occasions – in 1964, 1970, and 1975.⁸

Furthermore, Article 60 specifies that the provisions of the Convention cannot be construed as limiting or derogating from any human rights norms already ensured by existing domestic law or under any other agreement ratified by member states.⁹

2. *A note on the review system*

The European Convention on Human Rights is generally regarded as the most effective and advanced international system for the protection of human rights in existence today, and this is largely due to the work of its supervisory organs.¹⁰ The three principal organs entrusted to interpret the Convention are the European Commission of Human Rights, the European Court of Human Rights, and the Committee of Ministers of the Council of Europe (Article 19).¹¹ Section III of the Convention, Articles 20–31, 33–7 (and also Article 48), contain provisions regarding the composition and activity of the Commission, while Section IV, Articles 38–56, regulates the composition and organization of the Court. Provisions relating to the organization and general functions of the Committee of Ministers are not as such contained in the Convention – Articles 14–21 of the Statute of the Council of Europe do so – although the Committee is provided a certain number of specific functions under the Convention,

⁸ See Council of Europe doc. H(67)2, 10 Jan. 1967, H(72)2, 13 Mar. 1972, and H(76)15, 15 Oct. 1976.

⁹ The scope and meaning of this article remain unclear: see brief reference to it in the case of *Schmidt and Dahlström*, Eur. Court HR, ser. B, vol. 19 (1977), at 108–9, and 152–3; comments by T. Opsahl, 'Substantive Rights' in *Proceedings of the Colloquy about the European Convention on Human Rights in Relation to Other International Instruments for the Protection of Human Rights*, Athens, 21–2 Sept. 1978 (Strasbourg 1979), 21–58, at 35–6; and P. J. Duffy, 'The Sunday Times Case: Freedom of Expression, Contempt of Court and the European Convention on Human Rights', *V HR Rev.* (1980), 17–53, at 25–6.

¹⁰ For a general overview see C. Zanghi, 'Effectiveness and Efficiency of the Guarantees of Human Rights Enshrined in the European Convention' in *Proceedings of the Fourth International Colloquy about the European Convention on Human Rights*, Rome 5–8 Nov. 1975 (Strasbourg 1976), 209–55 *passim*, and also written communication of A. H. Robertson, 257–62.

¹¹ Art. 19 of the Convention does not mention the Committee of Ministers of the Council of Europe, for this body already existed when the Convention entered into force. See arts. 30–2, 54, and 61.

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including the power of decision (Articles 31, 32, and 54).¹²

Although the special features of the review system instituted by the Convention have already provided an inexhaustible source of research, detailed examination, and appraisal by academics and practitioners alike, it is interesting to note that the Convention is a much less effective instrument than had originally been envisaged. In the words of A. H. Robertson:¹³

... the most important innovations which it was hoped that the Convention would contain were two: — the granting to individuals whose rights are denied, of direct access to an international organ capable of protecting them; and the institution of a juridical body on the international plane, competent to sit in judgment on the national governments. Unfortunately it was not politically possible at this juncture to obtain unanimous agreement of the acceptance of these two provisions. Each of them remains optional in the sense that it is not a necessary consequence of signature of the Convention, but depends on an express supplementary declaration by the State concerned.

As a consequence, even though the Convention mechanism is undoubtedly considered a unique precedent in international law — whereby an individual, whether he be a national or not of the state, is permitted to instigate international proceedings which may result in a judicial determination in his favour¹⁴ — until now only seventeen states¹⁵ have made declarations recognizing the competence of the Commission to receive such petitions lodged by ‘any person, non-governmental organization or individual’ claiming to be a victim of a violation of a right guaranteed in the Convention (Article 25), and nineteen states parties¹⁶ have accepted the Court’s facultative jurisdiction

¹² See A. H. Robertson, *Human Rights in Europe* (1977), 237–76.

¹³ ‘The European Convention for the Protection of Human Rights’, 27 *BYIL* (1950), 145–63, at 162.

¹⁴ For a short account of the individual’s position *vis-à-vis* tribunals exercising international jurisdiction, see I. Brownlie, *Principles of Public International Law* (1979), 577–93. Further references to this subject can be found there. For more thorough studies on the role played by the individual on the international plane see A. A. Cançado Trindade, *Developments in the Rule of Exhaustion of Local Remedies in International Law, with Particular Reference to Experiments on the International Protection of Individual Rights* (doctoral dissertation, University of Cambridge, 1978), *Les dimensions internationales des Droits de l’Homme* (ed. K. Vasak, 1978), and Vasak’s bibliography.

¹⁵ Austria, Belgium, Denmark, Federal Republic of Germany, France, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and the United Kingdom (including certain overseas territories).

¹⁶ As in n. 15 above, plus Cyprus and Greece.