

1995

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Recommended Citation

Roth, Françoise, and Claudia Martin. "Drzemczewski Discusses The System in Motion." *Human Rights Brief* 2, no. 2 (1995): 7, 12.

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Drzemczewski Discusses The System in Motion

by Françoise Roth and Claudia Martin

Andrew Drzemczewski is the Council of Europe's Secretary of the Committee of experts for the improvement of procedures for the protection of human rights. The Committee was in charge of the technical preparation of the draft of Protocol No. 11, the amending protocol to the European Convention for the Protection of Human

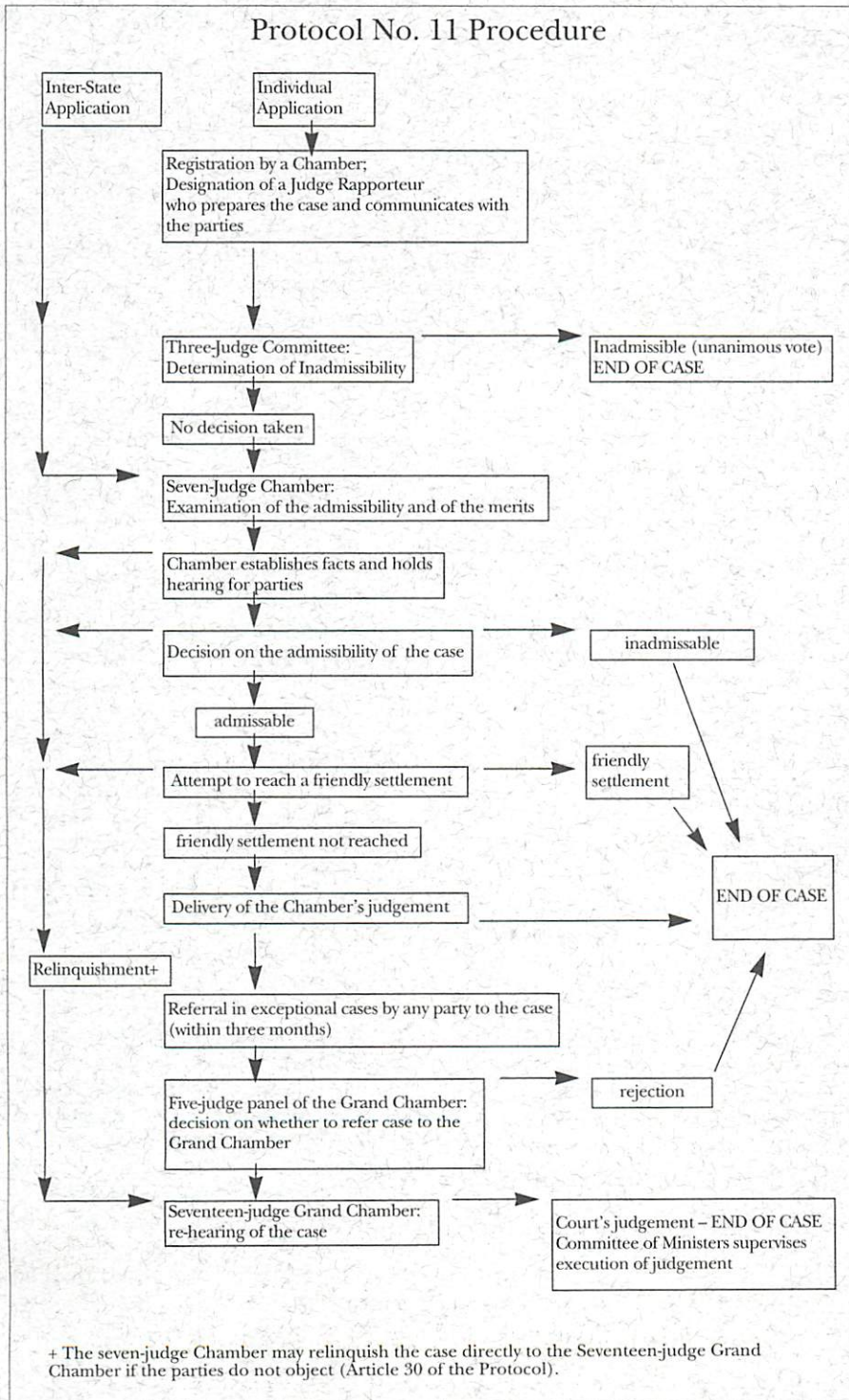
Rights and Fundamental Freedoms. In a telephone interview, Mr. Drzemczewski offered the following views on the European system for the protection of human rights.

Q. What are the requirements for a country to ratify the European Convention?

A. Before ratifying the Convention, a country should make sure that its legal system conforms with the requirements of the Convention. Hungary is a typical example. It joined the Council of Europe on November 6, 1990, but needed almost two years to ratify the Convention, which was done on November 5, 1992. Hungary set up an inter-departmental commission within the Ministry of Justice that scrutinized Hungarian law and practice in relation to the requirements of the European Convention and case-law of the Commission and Court. They notably modified their draft code on criminal procedure to take into account possible incompatibility with the Convention and the case-law thereunder. The work of this inter-departmental commission was then approved by the Parliament. It is only then that the Convention was ratified and the control mechanism fully recognized.

Q. Do the organs of the Council of Europe have a say before a country can ratify the European Convention in determining whether or not it satisfies all of the Convention's requirements?

A. There are formal procedures and material conditions imposed upon a state before it becomes a member of the Council of Europe. The Committee of Ministers must decide by a two-thirds majority if a country can become a member-state of the Council of Europe. It looks at three conditions: pluralistic democracy, respect for human rights, and the rule of law. Before it takes any decision, it asks the Parliamentary Assembly for an opinion. The Court and Commission certainly do not involve themselves, as such, in this process because they only have jurisdiction once the Convention has been ratified. However, some of the judges and members of the Commission may, in their individual capacity, be asked as "eminent lawyers" to help the Parliamentary Assembly to estimate whether the country satisfies the requirements. Some of them may also be asked in their individual capacity to go to the country concerned and provide advice on an informal basis. Such was recently the case in Lithuania, which will satisfy the Convention requirements in 1995.



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the Committee of Ministers would be limited to the supervision of the Court's judgements. They also argued that a single Court system would offer the advantage of avoiding the two-fold examination of facts, admissibility, and merits of the present mechanism, and of simplifying the procedure and therefore shortening the length of proceedings by some eighteen months to two years.

Main features of the New System

The new Court will be permanent and will sit in committees, Chambers (set up on an ad hoc basis), and a Grand Chamber to decide the cases (*see chart, page 7*). Three-judge committees will have the power to declare cases inadmissible. The Chambers will then examine issues of admissibility and the merits of the cases. They may relinquish jurisdiction in favor of the Grand Chamber at any time so long as they have not rendered judge-

ment, but only if the parties to the case do not object. This latter point was the result of political compromise. The jurisdiction of the Committee of Ministers, however, will be limited to the supervision of the Court's judgements.

Following a judgement, only parties to the case may request a re-hearing from the Grand Chamber, which will reexamine the case if it "raises a serious question affecting the interpretation or application of the Convention or the protocols ...or a serious issue of general importance" (Article 43 of Protocol No. 11). This was basically aimed at insuring the consistency of the Court's case-law.

In addition, the right of individual petition before the Court will be guaranteed without any restriction, provided that the petition satisfies the criteria for admissibility.

The adoption of Protocols No. 9 and No. 11 can certainly be seen as a "reaffirmation of the commitment by Council of

Europe members to securing human rights" (Jeremy McBride, *A New European Court of Human Rights*, Interights Bulletin, Vol.8 No.2, p.48). It could be argued, however, that setting up a rigid and highly sophisticated procedure could curtail the ability of the system to deal with massive and gross violations of human rights. Moreover, with the states of Central and Eastern Europe ratifying the Convention, the European system for the protection of human rights faces a new dimension as these countries are at an early stage in the consolidation of their democratic governments. ☹

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Before 1989, every country that joined the Council of Europe had fully accepted the control mechanism of the Convention, i.e., the right to individual application before the Commission and the compulsory jurisdiction of the Court. As a consequence, when the new countries applied, in order to be "democratic," they had to accept the same standard. In practice now, although a country can legally ratify the Convention without making the optional declarations, in fact politically, it is inconceivable for a state not to make a commitment to do so when joining the Organization.

Q. Does the Court use differing standards when deciding violations of human rights in different countries, in Turkey or Northern Ireland, for example?

A. The Court has no double standard. However, the fact that the Commission came out with a friendly settlement concerning allegations of torture with respect to Turkey at a time when the Court's jurisdiction had not been accepted by Turkey, and the fact that the Committee of Ministers, unsatisfactorily in the eyes of most outside observers, took into account political considerations, may indeed put into disrepute the Convention mechanism. I think that there are defects in our system that one

has to accept because intricate, non-judicial, mechanisms exist.

Perhaps a positive aspect needs underlining. In the only case to-date concerning the finding of a violation of Article 3 of the Convention, *Ireland v. U.K.*, the Attorney General of the defendant state promised that the five interrogation techniques will never be used again.

I suspect that Protocol No. 11 is the end of a long process rather than something that will take off or again be amended in the near future.

Q. The new control mechanism established by Protocol No. 11 is very jurisdictional and rigid. How do you think the Council of Europe will deal with gross or consistent violations of human rights under such a system?

A. There would be a technical finding of the violation by the Court. This would be objective in terms of political and other considerations not coming into play. There would be a clear situation where, if the court were to find a country in violation of the Convention, it would be for

the Committee of Ministers, the political organ, to decide what to do with the country that is not prepared to abide by the Court's findings (i.e., suspend or exclude it from the Organization). It may also have to take up certain functions, like those of the Inter-American Commission on Human Rights, in relation to matters not discussed in the negotiation process. The juridical system, as such, does prevent major, gross violations from occurring, but the assumption is that you are in a democratic state. But assuming that something very bad occurs, it may or may not be helpful. Time will tell.

Q. How do you see Protocol No. 11 in the evolution of the Organization?

A. I suspect that Protocol No. 11 is the end of a long process rather than something that will take off or again be amended in the near future. We are going into uncharted waters. The Council of Europe is going to go through a difficult period of trying to maintain high, sophisticated human rights standards. Protocol No. 11 will have to be the anchor which holds the Organization down to certain democratically accepted, civilized standards. If it fails, the Organization may well have to change the nature of its existence as we understand it. This is our challenge for the next millennium. ☹