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Digest of (1982) EuGRZ Parts 1-24

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DIGEST OF (1982) EuGRZ PARTS 1-24*

Editor's note: This section is intended to give the reader a very brief overview of recent judicial decisions pertaining to human rights, reported in the German-language law journal EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT. The area surveyed will consist of various international courts and commissions with jurisdiction embracing human rights matters, as well as the highest appellate courts of various nations.

FREEDOM OF EXPRESSION

1. The Italian Constitutional Court (Corte Costituzionale), Rome, denies journalists the right to withhold the names of their informants. 28 January 1981, No. 1/1981 = 9 EuGRZ 504 (1982).

Article 372 of the Italian Penal Code imposes sanctions on anyone who withholds or provides false information during a criminal proceeding. The lower courts had created an exception to Article 372 on behalf of journalists, which allowed them to withhold the names of their informants. The lower courts reasoned that the exception was needed to guarantee the press' freedom to gather and disseminate reliable information.

The Constitutional Court disagreed, stating that because no exception to Article 372 was expressed in the Penal Code, the lower courts could not create one for journalists. Consequently, journalists do not have a right to withhold the names of their informants in criminal proceedings.

FREEDOM OF THE PRESS

2. The Swiss Federal Supreme Court (Schweizerisches Bundesgericht), Lausanne, rules that only a neutral, third-party judge has the authority to unseal items placed under a protective seal, and that the seizure of newsphotographs is not unconstitutional. 1 July 1981, p. 773/80 = 9 EuGRZ 29 (1982).

During a criminal investigation the Zurich District Attorneys' Office brought in a newsphotographer for questioning. They also seized several negatives and a photograph that were found in the photographer's studio. The seized items were placed under a protective seal at the photographer's request; however, the District Attorneys' Office ordered an immediate unsealing. The State Attorneys' Office for the Canton of Zurich declined his appeal, with instructions entitling the photographer to be present at the time of the unsealing.

In his petition to the Swiss Federal Supreme Court, the photographer asserted that the indiscriminate seizure of the negatives and photograph was unconstitutional because it violated the freedom of the press, and that the District Attorneys' Office decision to unseal the seized items usurped the statutory of the judiciary.

* For the first Digest of EuGRZ see 1 HRLJ pp. 429 ff. (1980)

The Court agreed with the photographer's second argument, ruling that the proper authority for determining whether sealed items are to be unsealed is that of a neutral judge and not that of the authority conducting the investigation. The Court reasoned that only a neutral judge could impartially balance the interests of the owner of the sealed property with the public's interest in competent criminal investigations.

As to the photographer's other assertion, the Court held that as the Zurich Code of Criminal Procedure (StPO) does not allow journalists to withhold information under the freedom of the press doctrine, there is also no right to withhold negatives or photographs. Therefore, the seizure of the negatives and photographs in the instant case was not unconstitutional.

FREEDOM OF BROADCASTING

3. The German Federal Constitutional Court (Bundesverfassungsgericht), Karlsruhe: The significance of freedom of broadcasting on the legal employment status of free lance workers in the broadcast industry. 13 January 1982, 1 BvR 848/77 et al. = 9 EuGRZ 181 (1982).

In a number of recent cases, German labor courts have granted job security benefits to free lance workers involved in various phases of broadcast productions, even though the workers did not meet the statutory "continuous employment" requirement needed to receive these benefits. The courts based their decisions on the constitutional right to freedom of broadcasting (Article 5 (1) (2) of the Basic Law), which forbids any outside influences on the choice, content, or presentation of broadcast programs. Because the free lance workers in these cases were involved in these three phases, and because free lance workers are more vulnerable to outside influences than employees with job security, the courts felt that they would be violating Article 5 (1) (2) if they did not grant job security benefits in these cases.

The Federal Constitutional Court rejected the labor courts' position because it failed to take into account the broadcast institutions' rights in selecting and employing people to work on the various phases of broadcast productions, which is also encompassed by the freedom of broadcasting. The Constitutional Court admonished the labor courts to take into account the rights of employers as well as those of employees in determining rights under the freedom of broadcasting. The Court then instructed the labor courts to balance the right to freedom of broadcasting with the social principals that underly the labor statutes in future decisions of this nature.

PARENTS' RIGHT TO ENSURE THEIR CHILDREN'S EDUCATION

4. The German Federal Constitutional Court (Bundesverfassungsgericht), Karlsruhe, declines to grant parents an unrestricted right to information from the schools. 9 February 1982, 1 BvR 845/79 = 9 EuGRZ 66 (1982).

The petitioner, a father of five, claimed that his parental rights were being violated by § 13 (2) BremSchulVwg, which gave school counselors the right to withhold certain information from parents. The Court ruled that the statute was constitutional because it was limited to those exceptional cases in which giving parents information might lead to physical or mental injury to the child.

RESPECT FOR PRIVATE LIFE

5. The German Federal Constitutional Court (Bundesverfassungsgericht), Karlsruhe, rules that a statute which discriminates against transsexuals under the age of twenty-five is unconstitutional. 16 March 1982, 1 BvR 938/81 = 9 EuGRZ 467 (1982).

§ 8 (1) (1) of the Transsexual Code (TSG) did not allow transsexuals under the age of twenty-five to change either their given name or their gender classification. The Court said that this provision conflicted with Article 3 (1)¹ of the Basic Law, and that § 8 (1) (1) TSG would be null and void when a transsexual under the age of twenty-five had already undergone a sex-change operation and had complied with all the other provision of the TSG.

MINORITY LANGUAGE

6. The Swiss Federal Supreme Court (Schweizerisches Bundesgericht), Lausanne: Freedom of speech and the use of the Romanish Language in official petitions. 7 May 1982, P 1295/81 = 9 EuGRZ 317 (1982).

The district court rejected petitioner's complaint because it was not written in a language officially recognized by the district. The Swiss Federal Supreme Court disagreed, stating that because Romanisch was the language spoken by nearly half of the inhabitants of the district, it should be accepted in legal proceedings. To do otherwise would deny citizens who spoke Romanish as their primary language their freedom of speech.

EQUALITY OF THE SEXES

7. The Swiss Federal Supreme Court (Schweizerisches Bundesgericht), Lausanne, underscores the equality of the sexes in education. 12 February 1982, P 1473/81 and P 1482/81 = 9 EuGRZ 348 (1982).

In the Canton of Waadt, girls had to meet stricter standards than boys, including scoring higher on admission tests, in order to be admitted to middle school. The authorities claimed this was necessary in order to keep the ratio of girls to boys admitted to the school the same as the ratio of girls to boys of the same age in the surrounding area. The Court rejected the Canton's argument and held that the admissions policy violated Article 4 (1) BV, which guarantees the equality of the sexes in family, education and work.

FREEDOM OF ASSOCIATION

8. The Austrian Supreme Constitutional Court (Verfassungsgerichtshof), Vienna: Prohibiting the formation of an association. 12 March 1982, B 532/80 = 9 EuGRZ 354 (1982).

The Austrian Minister of the Interior prohibited the formation of an association whose stated purpose was to restore Christian morality to the country, on the grounds that the association's articles of incorporation were verbose political tracts, and that the purpose of the association could not be determined from the

¹ Article 3 (1) of the Basic Law: "All persons shall be equal before the law." (Translation from CONSTITUTIONS OF NATIONS, Peaslee, Vol. III.).

articles. This, the Minister argued, violated the "clarity of purpose" requirement of §§ 4 (2) and 6 (1) of the Association Code. The Austrian Supreme Constitutional Court overturned the Minister's decision. The Court reasoned that although the association's articles of incorporation were verbose, the purpose of the association and the means of achieving that purpose were discernable, and thus the prohibition was a violation of the right to freedom of association.

PUBLIC HEARINGS

9. The Swiss Federal Supreme Court (Schweizerisches Bundesgericht), Lausanne, upholds an exception to public hearings in criminal proceedings. 15 January 1982, p. 436/81 = 9 EuGRZ 109 (1982).

In this case, the defendant below, who was eighteen years of age, argued that Article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms guaranteed him the right to have his criminal hearing open to the public. The Swiss Federal Supreme Court disagreed because the defendant was under the age of twenty, and therefore within the protection of the "interests of juveniles" exception to Article 6. The Court felt that the possible adverse effects on the defendant's later life if the proceedings were to be open to the public outweighed the public's right to information, and for this reason upheld the lower court's decision to hold closed proceedings.

10. The Italian Constitutional Court (Corte Costituzionale), Rome, finds the exclusion of the public in juvenile cases to be constitutional. 10 February 1981, No. 17/1981 = EuGRZ 504 (1982).

The Italian Code of Criminal Procedure mandates closed hearings in juvenile cases. The Italian Constitutional Court upheld this provision, stating that the statute writers had weighed the interests of the public's right to information with the interest of society in protecting juvenile offenders when they drafted the statute.

11. The Italian Constitutional Court (Corte Costituzionale), Rome. The prohibition of press reports concerning records in connection with non-public proceedings is constitutional. 10 February 1981, No. 16/1981 = 9 EuGRZ 505 (1982).

"Press reports of a criminal proceeding or of documents concerning a proceeding that has been closed to the public is illicit and is punishable." However, journalists are allowed to report on the preliminary investigation and the crime for which the accused is being tried before the main proceeding begins, so long as the reports are objective, impartial, and don't prejudice the rights of the accused.

RIGHT TO A COURT

12. The Swiss Federal Supreme Court (Schweizerisches Bundesgericht), Lausanne: Decree on Corrective detention. 15 June 1982, P 19/81 = 9 EuGRZ 392 (1982).

The Government Council for the Canton of Zurich enacted a decree to adjust its cantonal law to conform with the recent modification of the Swiss Civil Code. As part of this decree, under the section on corrective detention, they created a Psychiatry Law Commission to handle appeals of decisions concerning such detentions. The Commission was chosen by the Government Council for a

specified time and it was the court of last resort for corrective detention appeals. It was composed of one law judge serving as chairman and two lay judges, one of whom had to be a psychiatrist. The Swiss Federal Supreme Court held that the Commission was a "court" in the sense meant by Article 5 (4)² of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

ACCESS TO COURTS/EFFECTIVE REMEDY

13. The Austrian Supreme Constitutional Court (Verfassungsgerichtshof), Vienna, rules that one week is not enough time in which to protest results of public referendums. 9 October 1981, G 50/81 = 9 EuGRZ 274 (1982).

"When the drafters of the Constitution empowered statute drafters with establishing a procedure for legal remedies, they meant for such procedures to conform to constitutional law and to be formulated in such a way that interested parties could exercise them." In the instant case, the Austrian Supreme Constitutional Court held the one-week time period for registering an objection to the results of a public referendum (measured from the date that the result is published) to be unconstitutional because one week did not afford all interested persons an equal opportunity to lodge a protest. The Court also noted that the time period included Saturdays, Sundays, and holidays which, in effect, shortened the time period even more.

14. The Italian Constitutional Court (Corte Costituzionale), Rome, rules that omitting a second factual proceeding in "inflagranti" proceedings is constitutional. 15 April 1981, No. 61/1981 = EuGRZ 505 (1982).

The Italian Code of Criminal Procedure provides a simplified "inflagranti" proceeding whereby the presiding court can rule immediately on offenses committed in the courtroom during a criminal proceeding. The Italian Constitutional Court stated that this procedure is legally justifiable, as the acts are committed before the court, and proof of the acts usually would be quite simple. This establishes a special situation that is not present in other criminal proceedings, and hence a second factual proceeding is unnecessary.

IMPARTIAL AND INDEPENDENT TRIBUNAL

15. The Swiss Federal Supreme Court (Schweizerisches Bundesgericht), Lausanne: Recusing a judge. 17 February 1982. P 765/81 = 9 EuGRZ 269 (1982).

In the instant case, a juvenile court judge who, in connection with recent juvenile disturbances, had co-signed an article calling for leniency and amnesty, was recused in a juvenile criminal case connected to that disturbance. The Swiss Federal Supreme Court ruled that although a judge has a right to express political opinions a judge may be recused by the Administrative Commission in cases where such expression might hinder an impartial judgment, under § 96 (4) of the Zurich Criminal Procedure Statute (recusal on account of bias) and Article 58 (1) BV.

² Article 5 (4) reads: "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

RIGHTS OF PERSONS IN DETENTION ON REMAND

16. The Swiss Federal Supreme Court (Schweizerisches Bundesgericht), Lausanne, disapproves of the handling of opened, censored letters in detention on remand. 21 October 1981, P 450/81 = 9 EuGRZ 32 (1982).

The Court found that the forwarding of opened mail from the investigating judge to prisoners in detention on remand (and from the prisoners to the judge) was violative of the prisoners' right to privacy. "The immersion into the private sphere, with which the handling of mail is intertwined, is even more oppressive when not only the investigating judge, but also other employees of the prison, with whom the prisoner is in daily contact, have the capacity to know the contents of his letters."

*(This section will be continued
in future volumes of the HRLJ.)*

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PENDING PROCEEDINGS

European Commission of Human Rights, (Eur.Comm.HR), Strasbourg

Decision of 6 December 1983 on the admissibility of the applications Nos. 9940-9944/82 (France, Norway, Denmark, Sweden and the Netherlands v. Turkey)

Inter-State applications v. Turkey / decision on admissibility

THE FACTS

"I. The applications

(full text)

The applications relate to the period between 12 September 1980 and 1 July 1982, the date of their introduction. The applicant Governments recall that the Government in office in Turkey on 1 July 1982 took power on 12 September 1980. They further state that the existing Turkish Parliament was then dissolved and its powers and duties were transferred to the National Security Council (NSC) by Act No 2324 of 27 October 1980 (Law on the Constitutional Order). Full executive power was transferred to the Chairman of the NSC. Any appeal seeking the annulment of enactments passed by the NSC was prohibited. A Constituent Assembly was later set up by Act No 2485 of 29 June 1981. However, under Art. 25 of this Act the NSC had competence to adopt, amend or reject the legislative proposals submitted by the Constituent Assembly.

The applicant Governments submit that the Law on the Constitutional Order of 27 October 1980 and a number of laws and decrees made under it abrogated the constitutional protection of fundamental rights. They allege breaches of:

- Arts. 9, 10 and 11 of the Convention;
- Arts. 5 and 6 of the Convention;