INTERNATIONAL ENCYCLOPAEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS

Case Law 10

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B. COUNCIL OF EUROPE

B. Council of Europe

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a. Background note

Origins and Membership

The Council of Europe is the continent's oldest political organization, founded in 1949. It:

- groups together 46 countries, including 21 countries from Central and Eastern Europe,
- has application from 1 more country (Belarus),
- has granted observer status to 5 more countries (the Holy See, the United States, Canada, Japan and Mexico),
- is distinct from the 25-nation European Union, but no country has ever joined the Union without first belonging to the Council of Europe,
- has its headquarters in Strasbourg, in north-eastern France.

Aims

The Council was set up to:

- defend human rights, parliamentary democracy and the rule of law,
- develop continent-wide agreements to standardize member countries' social and legal practices,
- promote awareness of a European identity based on shared values and cutting across different cultures.

Since 1989, its main job has become:

- acting as a political anchor and human rights watchdog for Europe's post-communist democracies,
- assisting the countries of central and eastern Europe in carrying out and consolidating political, legal and constitutional reform in parallel with economic reform,
- providing know-how in areas such as human rights, local democracy, education, culture and the environment.

Political Aims

The Council of Europe's Vienna Summit in October 1993 set out new political aims. The Heads of State and Government cast the Council of Europe as the guardian of democratic security – founded on human rights, democracy and the rule of law. Democratic security is an essential complement to military security, and is a pre-requisite for the continent's stability and peace.

During the Second Summit in Strasbourg in October 1997, the Heads of State and Government adopted an action plan to strengthen the Council of Europe's work

in four areas: democracy and human rights, social cohesion, the security of citizens and democratic values and cultural diversity.

Today, the Organization continues to grow while at the same time increasing its monitoring to ensure that all its members respect the obligations and commitments they entered into when they joined.

Structure

The main component parts of the Council of Europe are:

- the Committee of Ministers, composed of the 46 Foreign ministers or their Strasbourg-based deputies (ambassadors/permanent representatives), which is the Organization's decision-making body.
- the Parliamentary Assembly, grouping 630 members (315 representatives and 315 substitutes) from the 46 national parliaments.
- the Congress of Local and Regional Authorities, composed of a Chamber of Local Authorities and a Chamber of Regions.
- the 1800-strong secretariat

Some Practical Achievements

- 196 legally binding European treaties or conventions many of which are open to non-member states on topics ranging from human rights to the fight against organised crime and from the prevention of torture to data protection or cultural co-operation.
- Recommendations to governments setting out policy guidelines on such issues as legal matters, health, education, culture and sport.

The Pan-European Dimension

Since November 1990, the accession of 21 countries of central and eastern Europe (the most recent being Serbia and Montenegro in April 2003) has given the Council of Europe a genuine pan-European dimension, so that it is now the organization that represents Greater Europe.

The European Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention') is the concrete expression at European level of a collective guarantee for some of the rights set out in the Universal Declaration of Human Rights of 10 December 1948.

This collective guarantee is based not only on the contracting parties' resolve to uphold a number of universal values but also on their common interest in safeguarding democratic security throughout Europe and securing the foundations of an ever closer union among European states.

The Convention is designed to ensure that states respect human rights, the rule of law and the principles of pluralist democracy. Acceptance of the Convention,

b. The European Commission on Human Rights

1. Chronological List

1. Twenty-one detained persons

v.

the Federal Republic of Germany

1. APPLICATIONS NO. 3134/67, 3172/67 AND 3188 TO 3206/67 (JOINED)

DECISION OF 6 APRIL 1968

I. *Forced or compulsory labour* (Article 4, paragraph (2), of the Convention) – *work required to be done in the ordinary course of detention* (Article 4, paragraph (3) (a) of the Convention) – *work performed on behalf of private firms – manifestly ill-founded.*

II. *Civil rights and obligations* (Article 6, paragraph (1), of the Convention) – *independent interpretation of that notion – obligations imposed by the authorities in the exercise of public powers – application incompatible with the provisions of the Convention.*

The Facts

I. *Whereas*, the common elements of all above applications as presented by the applicants' lawyer may be summarised as follows:

1. The applicants are German citizens who are, or have been, serving sentences of imprisonment (Gefängnis), severe imprisonment (Zuchthaus) or preventive detention (Sicherungsverwahrung) in various German prisons. The applicant in Application No. 3188/67 is the minor daughter of a prisoner but the term 'applicant' when used in the following text with regard to detention refers to her father. All applicants are represented by Mr. X., a lawyer practising at Unna.

The applicants' complaint is directed – except in Application No. 3195/67 which also includes a procedural complaint – exclusively against the fact that they were refused adequate remuneration for the work which they had to perform during their detention and that no contributions under the social security system were made for them in this respect by the prison authorities.

2. They applied unsuccessfully to the authorities concerned with the execution of sentences (Strafvollzugsbehörden), the competent Court of Appeal (Oberlandesgericht) and finally to the Federal Constitutional Court

(Bundesverfassungsgericht). By letter of . . . December, 1966, the judge rapporteur informed the applicants' lawyer that the constitutional appeal (Verfassungsbeschwerde) appeared to be unfounded for the following reasons:

A prisoner, although not losing completely his fundamental rights and freedoms by virtue of his particular status, did not have the right freely to enter into a labour contract and thus had no claim to remuneration and the prison authorities, in retaining the money paid by private firms for work carried out by prisoners, did not interfere with the prisoner's possessions;

the principle of equality was not violated since there were essential differences between the situation of a free worker and that of a working prisoner which excluded a comparison and a claim for equal treatment;

the Federal Constitutional Court could only abolish the existing system of prison labour but could not impose on the legislative branch another system with better remuneration as was, in fact, the applicants' aim. In any case, the obligation of prisoners to work was long established in German law and had been confirmed in its existing form by Article 12, paragraph 4, of the Basic Law;

the question raised by the applicants whether the essential aspects of the execution of prison sentences must be regulated by a proper act of legislation rather than by administrative rules appeared to be irrelevant in the present cases since, in the absence of such legislative provisions a decision declaring the existing administrative rules to be unconstitutional would have the result that prisoners would be entitled to no remuneration;

there was in the applicants' submissions no appearance of violation of the dignity of man (Article 1, paragraph 1, of the Basic Law), of the essential content of fundamental rights (Article 19, paragraph 2) or of the provision providing for a forefeit of fundamental rights in certain specific circumstances (Article 18 of the Basic Law). Nor did the protection of marriage and family guaranteed by Article 6 of the Basic Law require a full remuneration for prison work; any hardship arising for the family could be dealt with under the system of public relief;

the applicants' allegation that the Court of Appeal 'apparently had . . . not at all taken into account their lawyer's submissions', was not a sufficient basis for a complaint that they had not been granted a fair hearing;

with regard to the applicants' claim to be included in the social insurance system, it appeared that the Court of Appeal had only rejected this claim as being outside its competence and a matter to be examined by the Social Courts. Therefore the constitutional appeal in this respect did not raise any constitutional issue but was, in fact, only directed against this finding based on the application of legal provisions of a non-constitutional character.

After the applicants' lawyer had submitted certain further arguments in reply to the considerations of the judge rapporteur, a committee of three judges of the Federal Constitutional Court dismissed, on . . . December, 1966, the constitutional appeals as being clearly ill-founded (offensichtlich unbegründet).

3. On 9 and 12 June 1967, the applicants' lawyer submitted to the Commission a statement setting out their complaints in the following terms:

'While serving his sentence, the applicant was required to perform forced and compulsory labour according to Article 4, paragraph (3), of the Convention, taken in conjunction with Article 5. This took the form of work for private firms. In other words, he was obliged to work under a contract which these firms had concluded with the state. The firms contracting either on a piece price or on an hourly basis (Unternehmerbetriebe bzw Arbeitsvertragsbetriebe) always paid the prison the full wage, in accordance with Rulle 11 of the Rules on the Prison Labour Administration (Arbeitsverwaltungsordnung). But of this wage, which amounted to about 20–30 DM a day, the applicant received at the most 1 DM, in accordance with Rule 21, paragraph 2; his right to remuneration for his labour was denied him by virtue of Rule 21, paragraph 9, and the rest of the earnings received by the prison went to the Treasury in accordance with Rule 93 of the Service Rules on the Execution of Sentences (Dienst- und Vollzugsordnung).

These arrangements with regard to prisoners' labour are highly objectionable, for the following reasons:

As prison experts in the Federal Republic of Germany have observed, the enterprises in which prisoners such as the applicant are employed bear the immoral stamp of traffic in persons, which in its crudest form differs not a whit from slavery. In these experts' view the labour contract system exploits prisoners' labour in the same way as the system of sweated slave labour followed by cotton planters in the USA in the last century.

On this point reference is made to the article by John Gahlen, Regierungsamtmann, in 'Blätter für Strafvollzugskunde', Beilage Heft 5, September 1966, pages 4–5.

This shows that the fundamental provision of Article 4, paragraph (1), of the Convention, prohibiting slavery, is violated.

By denying the right to payment for labour, the execution of prison terms in the Federal Republic amounts to partial civil death, which was already unlawful under Article 10 of the Prussian Constitution of 31 January 1850, and which infringes the principle of human dignity laid down in Article 1 of the German Basic Law.

During the period of imprisonment the prison authorities in the Federal Republic consider prisoners' labour and the product thereof as state property. Thus not only do they deny particular legal rights; they prevent the prisoner from acquiring such rights or property by labour and they bring about the opposite of his rehabilitation. In this way the prisoner is stripped of his own legal personality; this is unconstitutional expropriation, and as far as the question of wages is concerned it is clear that a state of slavery is created.

In the Federal Republic the prison regulations are in the form of service instructions issued not by the legislative power but merely by administrative authorities. In the absence of any legislative authority, the resultant

denial of basic rights infringes Section 2 of the Fundamental Law, for the legislative provisions of the Criminal Code and the Code of Criminal Procedure cover no more than the actual deprivation of freedom.

The prison authorities charge their costs up to the prisoner to such an extent as to strip him bare. This ignores the safeguards otherwise applicable to seizure as well as the prohibition of certain forms of set-off contained in Article 393 of the Civil Code. Any private individual who acted in this way would immediately expose himself to prosecution for aggravated extortion (schwerer Sachwucher) as laid down in Article 302 (e) of the Criminal Code, which is punishable by up to 3 years' penal servitude.

Many states have regulations which provide for the remuneration of prisoners' labour in the same way as that of free workers. Even under the Prussian prison regulations of 24 October 1837 (since superseded), prisoners had to be paid 50 per cent of their wages. Under Section 89 of the UN standard minimum rules on the treatment of prisoners of 1955–1957 the applicant should have been paid for his labour while in detention pending investigation. That did not happen. Even before his guilt was established he was denied any proper remuneration or any legal right in respect of his labour.

In the light of the Convention this cannot be in accordance with human rights and fundamental freedoms. The Preamble to the Convention refers to the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10 December 1948, Article 6 of which reads:

> "Everyone has the right to recognition everywhere as a person before the law."

It is therefore quite clear that such recognition must be granted wherever the individual concerned happens to be, whether at liberty or in captivity, in prison, penal servitude or preventive detention. He must not be sentenced or subjected to civil death, even partial. But those provisions of the service instructions mentioned above which concern remuneration for prisoners' labour and service are in fact tantamount to slavery. The applicant's treatment while under arrest is therefore not in accordance with the Convention.

The applicant claimed remuneration for his work from the prison authorities and obtained a decision from the competent Court of Appeal and, finally, a decision by the Federal Constitutional Court in Karlsruhe dated 15 December 1966, which declared his constitutional appeal (Verfassungsbeschwerde) to be unfounded and denied him his proper wage.

The applicant has thus exhausted domestic remedies in the Federal Republic of Germany, and the way is therefore clear for the present application.

In conclusion reference should be made to Convention No. 105, BGBL (German Law Gazette) 1959, Part II, pp. 441 *et seq.*, of the General

Conference of the International Labour Office, which was ratified by the Federal Republic on 20 April 1959. In that Convention the Federal Government undertakes to abolish forced and compulsory labour and not to resort to it in any form, certainly not in the form of social discrimination.

"Discrimination" means distinct treatment, denial of rights, humiliation or exclusion. The treatment of the prisoner is tantamount to social discrimination in the sense of exclusion from society. In certain special cases courts in the Federal Republic have stated that the offender has so far transgressed against the constitutional order that he may no longer share the blessings of a constitutional state. This is nothing more or less than social discrimination, which is contrary to Section 25 of the Basic Law under which the general rules of international law are applicable in the Federal Republic.

It is requested that action be taken to ensure the applicant's remuneration for the work performed by him during his detention, at the rate paid to free workers for comparable services less 4.50 DM a day for costs incurred and less the remuneration already received by him, and for him to be insured retroactively and for the past and the future under the social security laws of the Federal Republic on the basis of the full wage mentioned above.'

4. In his further submissions the applicants' lawyer further elaborated his arguments in favour of an adequate remuneration for prison labour. For this purpose he also quotes from articles and books of other authors on the subject. His arguments may be summarised as follows:

the opinion that prisoners have a right to full remuneration for their labour is supported by the historical development of the prison system in Amsterdam where in 1595 and 1597, the first penitentiaries for men (Zuchthaus) and for women (Spinnhaus) were built. Detention in these houses served the purpose of rehabilitation of the prisoners and did not affect their civil rights status. The prisoners received a reward for orderly work which was partly put at their disposal and partly set aside for their maintenance after release. Later on in Germany the services of prisoners were leased out to private contractors who only sought to exploit them;

in comparison with the present rules concerning the remuneration of prisoners the Prussian prison regulations of 1837 (Instruktion vom 24.10.1837 für die Inspektoren, Aufseher und Wärter der gerichtlichen Gefangenen-Anstalten in Preussen) were much more favourable to the prisoners as they provided that the prisoners should receive half of the remuneration for their labour;

according to German jurisprudence and legal literature, prison labourers do not have any right to wages because they are not employed on the basis of a free labour contract. For the same reason they do not come under the social insurance system (cf. decision of the Federal Social Court of 31 October, 1967) and, in particular, they receive no unemployment benefits after their discharge from prison. The result is that the prisoners, who in general have great

difficulty in obtaining employment after their discharge from prison, are likely to commit new offences;

in fact, the possibility has been considered by the Ministers of Justice of the Länder of including prisoners in social security schemes but the prison directors objected that the employers would then have to pay social security contributions in addition to wages. This argument shows that the present system of remuneration for prisoners only serves the profit of their employers;

private enterprises employing prisoners obtain profit from the prisoners' work, as they do not have to pay the normal contributions to social security schemes or taxes on their salary;

a particularly experienced prison official had stated during a congress of the Social-Democratic Party in 1965:

> 'The reward for the prisoners' labour should be so high that he is able to support his family and to compensate the victims of his crime.'

other authors had claimed, in connection with proposed new legislation on the execution of prison sentences, that remuneration for prisoners should be adapted to ordinary wages;

the Federal Ministry of Justice itself had proposed with respect to certain young offenders (Jugendarrestanten) that they should receive ordinary wages.

Reference is also made by the applicants' lawyer to the rules applied to the prisoners of Spandau who have been convicted by the Allied Forces at the Nuremberg Trials. These prisoners are not required to work but only do some garden work on a voluntary basis.

II. . . .

The Law

I. *As to the common complaints of all applicants*

Whereas the applicants complain that during the detention in prison they were subjected to forced and compulsory labour within the meaning of Article 4 of the Convention without receiving adequate payment and without being insured under the social security laws;

Whereas the Commission has examined this complaint first in the light of Article 4, paragraphs (2) and (3) (a), which read as follows:

> '(2) No one shall be required to perform forced or compulsory labour.
> (3) For the purpose of this Article the term "forced or compulsory labour" shall not include:
> (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;'

Whereas it is not contested in the present applications that the detention concerned was imposed by the competent courts in a lawful manner and whereas the work performed during this detention is therefore covered by Article 4, paragraph (3) (a), taken in conjunction with Article 5;

Whereas it is further to be observed that Article 4 does not contain any provision concerning the remuneration of prisoners for their work and, consequently, the Commission has in its constant jurisprudence rejected as being inadmissible any applications of prisoners claiming higher payment for their work (Applications No. 833/60, X. against Austria, Yearbook Vol. III, p. 440; No. 1854/63, R. against the Federal Republic of Germany, Decision of 28 September 1964; No. 2066/63, V. against Austria, Decision of 17 December 1965; No. 2413/65, X. against the Federal Republic of Germany, Collection of Decisions, Vol. 23, p. 8) or claiming the right to be covered by social security systems (Application No. 1451/62, G. against Austria, Decision of 23 July 1963).

Whereas the applicants complain particularly that part of the work required of them during their detention was performed on behalf of private firms under contracts concluded with the prison administration and whereas they allege that such labour contract system amounts to a state of slavery for the prisoners concerned;

Whereas, in this respect, it is to be observed that Article 4, paragraph (3) (a), which deals with the question of prison labour, contains nothing to prevent the state from concluding such contracts or to indicate that a prisoner's obligation to work must be limited to work to be performed within the prison and for the state itself; whereas it is true that this provision only refers to 'any work required to be done in the ordinary course of detention' ('tout travail requis normalement'); whereas, however, it appears from the preparatory work of Article 8, paragraph (3) (c) of the UN Covenant on Civil and Political Rights, which also served as the basis in drafting Article 4 of the European Convention, that the underlying reason for this term was the intention to provide a 'safeguard against arbitrary decision by authorities with regard to the work which might be required' (United Nations Document E/CN.4/SR.142.143); whereas, on the other hand, there is no indication in the preparatory work that the term 'normalement requis' is in any way related to the problem of prison labour carried out in conjunction with private enterprise;

Whereas, in fact, such forms of prison work were at the time of the drafting of the Convention, and are still now, widely prevailing in many member states of the Council of Europe; whereas in this respect the Commission refers to the comprehensive study of this subject which was undertaken by the United Nations, Department of Economic and Social Affairs (partly in co-operation with the International Labour Office), and published as a basic document ('Prison Labour', United Nations, 1955, ST/SOA/SO/5, Sales No.: 1955.LV.7) for the First UN Congress on the Prevention of Crime and the Treatment of Offenders, and to the work of this Congress; whereas it appears from this study that in 1955 the systems of prison labour described as 'lease', 'contract', and 'piece-price', each of which entails the presence of private enterprise interests, were still found in a number of states; whereas, within Europe, these systems