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ΤΟ ΘΕΜΑ:

Η παρούσα εργασία έχει ως αντικείμενο τα συνταγματικά δικαιώματα των κρατουμένων, όπως αυτά κατοχυρώνονται στο Σύνταγμα της Ελλάδας.
Θα αναφερθούμε τόσο στους κρατούμενους, οι οποίοι εκτίουν στερητική της ελευθερίας ποινή, όσο και στους υπόδικους, καθώς επίσης και στις συνθήκες κράτησης των ατόμων αυτών στα σωφρονιστικά καταστήματα της χώρας.
Επίσης, θα ερευνήσουμε το θέμα και από τη σκοπιά του Διεθνούς και Ευρωπαϊκού Δικαίου, μέσα από αποφάσεις του Ευρωπαϊκού Δικαστηρίου των Δικαιωμάτων του Ανθρώπου (ΕΔΔΑ), που αποτελούν τρανταχτά παραδείγματα παραβίασης των θεμελιωδών δικαιωμάτων των κρατουμένων, όπως αυτά κατοχυρώνονται στην Ευρωπαϊκή Σύμβαση Δικαιωμάτων του Ανθρώπου (ΕΣΔΑ) και κατ' επέκταση, των θεμελιωδών δικαιωμάτων, όπως αυτά κατοχυρώνονται στο Σύνταγμα.

Στο εισαγωγικό μέρος της εργασίας θα τεθούν οι ιστορικές και προερμηνευτικές βάσεις, καθώς η μεθοδολογία που ακολουθείται για την ανάπτυξη των επιμέρους δικαιωμάτων.
Συγκεκριμένα, θα δοθούν οι βασικές έννοιες που μας απασχολούν στην παρούσα εργασία, όπως ‘’συνταγματικά δικαιώματα’’, ‘’φυλάκιση’’, ‘’ποινή’’ .
Έπειτα, θα οριοθετηθεί η ‘’γενική σχέση’’ μέσα στην οποία υπάρχει το δικαίωμα στον πυρήνα του και θα διακριθεί η ‘’ειδική κυριαρχική σχέση’’ , μέσα στην ιδιαίτερη νομική κατάσταση της οποίας εντάσσεται και η φυλάκιση και γενικότερα οποιαδήποτε κατάσταση συνάγεται από το καθεστώς των κρατουμένων.

Στο πρώτο μέρος της εργασίας θα αναλυθούν τα συνταγματικά δικαιώματα των κρατουμένων, ένα προς ένα, με πρώτο την ανθρώπινη αξιοπρέπεια, η οποία ανάγεται και στην καταστατική αρχή του ελληνικού Συντάγματος. Σε κάθε δικαίωμα θα γίνεται μια γενική περιγραφή του περιεχομένου του και στη συνέχεια οι περιορισμοί που τυχόν αυτό υφίσταται , εντασσόμενο στην ειδική κυριαρχική σχέση της φυλάκισης. Στο τέλος κάθε ανάλυσης δικαιώματος θα γίνεται και αναφορά στην σχετική νομολογία (όπου υπάρχει).

Στο δεύτερο μέρος της εργασίας θα επιχειρηθεί μια απεικόνιση της ελληνικής πραγματικότητας, όπως αυτή διαγράφεται στα πορίσματα και τις εκθέσεις της Διεθνούς Αμνηστίας, καθώς επίσης και από αποφάσεις του ΕΔΔΑ που καταδικάζουν την Ελλάδα για παραβίαση θεμελιωδών δικαιωμάτων .

ΕΙΣΑΓΩΓΗ

❖ *Ιστορική ανασκόπηση:* Αν και τα ατομικά και κοινωνικά δικαιώματα αποτελούν αυτονόητα κεκτημένα στη σημερινή πραγματικότητα, χρειάστηκαν αιώνες για την κατοχύρωσή τους. Αν και στην αρχαία Ελλάδα υπήρχε διάχυτη η έννοια της ελευθερίας, ουσιαστικά , τόσο η ελευθερία, όσο και τα υπόλοιπα θεμελιώδη δικαιώματα καθιερώθηκαν αιώνες μετά. Έχοντας τις ρίζες τους στην Αγγλία από τον 13ο αιώνα και έπειτα (Magna Charta Libertatum 1215, Petition of Rights 1628, Habeas Corpus Act 1679, Bill of Rights 1688) κατοχυρώθηκαν συνταγματικά για πρώτη φορά στις ΗΠΑ, στο σχέδιο Συντάγματος της πολιτείας της Καρολίνας ,το 1669 και μετέπειτα στη Γαλλία το 1789 (Declaration des droits de l'homme et du citoyen)[1].

Στο διεθνές δίκαιο, κατοχύρωση – σταθμό των ατομικών δικαιωμάτων αποτελεί τόσο η Διακήρυξη των Δικαιωμάτων του Ανθρώπου , του 1948, στο πλαίσιο του Οργανισμού Ηνωμένων Εθνών (ΟΗΕ) . Σταθμό επίσης αποτελεί και η Ευρωπαϊκή Σύμβαση των Δικαιωμάτων του Ανθρώπου (ΕΣΔΑ) , το 1950, στο πλαίσιο του Συμβουλίου της Ευρώπης. Η ΕΣΔΑ κυρώθηκε από την Ελλάδα για πρώτη φορά με το ν. 2325/1953 (ΦΕΚ Α' 68)[2], και αργότερα με το ν.δ. 53/1974.

Τέλος, όλα τα ελληνικά συνταγματικά κείμενα, από το σχέδιο του Ρήγα Βελεστινλή – Φεραίου (1797) έως και σήμερα, με το ισχύον Σύνταγμα του 1975/86/01 κατοχυρώνουν τα ατομικά και κοινωνικά δικαιώματα.

❖ *Συνταγματικά Δικαιώματα:*

Συνταγματικά δικαιώματα είναι τα παρεχόμενα στα άτομα και ως μέλη του κοινωνικού συνόλου θεμελιώδη, πολιτικά, κοινωνικά και οικονομικά δικαιώματα, τα οποία αποτελούν τις κατά την αντίληψη του συντακτικού νομοθέτη βασικές εξειδικεύσεις της ανθρώπινης αξίας και των οποίων το αμυντικό περιεχόμενο στρέφεται κατά της κρατικής και κάθε άλλης εξουσίας, το προστατευτικό περιεχόμενο στρέφεται μόνο προς το κράτος αξιώνοντας την παροχή βοήθειας για την απόκρουση κάθε απειλής, το δε εξασφαλιστικό, εφόσον αναγνωρίζεται, στρέφεται επίσης προς το κράτος, αξιώνοντας την παροχή των απαραίτητων μέσων για τη άσκηση του δικαιώματος[3].

Τα συνταγματικά δικαιώματα έχουν χαρακτηριστεί μέτρο πολιτισμού των κρατών[4], τίτλος που δε θα πρέπει να θεωρηθεί υπερβολικός, δεδομένου ότι κάθε δημοκρατική πολιτεία που θέλει να θεωρείται πολιτισμένη οφείλει να κατοχυρώνει ένα ελάχιστο, minimum πλαίσιο αναγνώρισης των θεμελιωδών – συνταγματικών δικαιωμάτων. Αυτό άλλωστε επιβάλλει και το κοινωνικό κράτος

[1] Δαγτόγλου Π.Δ., ΄΄Συνταγματικό Δίκαιο, Ατομικά Δικαιώματα Α'΄΄(2005), σελ. 21 επ.
[2] Δαγτόγλου Π.Δ., ΄΄Συνταγματικό Δίκαιο, Ατομικά Δικαιώματα Α'΄΄(2005), σελ 33 επ.
[3] Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ', (2008), σελ. 93
[4] Δαγτόγλου Π.Δ., ΄΄Συνταγματικό Δίκαιο, Ατομικά Δικαιώματα Α'΄΄(2005), σελ. 10

δικαίου και ειδικότερα του κοινωνικού ανθρωπισμού, που ανάγει τον ‘’υπήκοο σε ‘’πολίτη’’ . Ο κοινωνικός ανθρωπισμός, ως εξέλιξη του κοινωνικού κράτους δικαίου, αποσκοπεί ακριβώς στην κατοχύρωση των δικαιωμάτων όχι του μεμονωμένου ανθρώπου, αλλά του ανθρώπου ως μέλος της κοινωνίας, με καταστατική αρχή το απαραβίαστο της ανθρώπινης αξίας. Άλλωστε, στα πλαίσια του κοινωνικού ανθρωπισμού, η εξουσία που δίνεται στον κοινωνικό άνθρωπο μέσα από την κατοχύρωση των δικαιωμάτων του δεν αποτελεί και παραχώρηση εξουσίας από άνθρωπο εις άνθρωπο, αλλά εξουσία στο άτομό του. [5]

Τα συνταγματικά δικαιώματα αποτελούν ενότητα, ένα ενιαίο σύστημα βασιζόμενο στην ανθρώπινη αξία. Με βάση το άρθρο 5παρ.1 Σ, τα δικαιώματα κατατάσσονται αντίστοιχα σε ατομικά, κοινωνικά και πολιτικά. [6]
Επίσης, κάθε δικαίωμα, ως ενιαίο σύνολο, αποτελείται από το αμυντικό, προστατευτικό και το εξασφαλιστικό τους περιεχόμενο. Τόσο το αμυντικό, όσο και το προστατευτικό τους περιεχόμενο αναγνωρίζεται από το Σύνταγμα, ενώ το εξασφαλιστικό περιεχόμενο αναγνωρίζεται σε συγκεκριμένες μόνο περιπτώσεις.
Το αμυντικό περιεχόμενο στρέφεται κατά απειλών προερχομένων τόσο από την κρατική όσο και από την ιδιωτική εξουσία, το προστατευτικό περιεχόμενο στρέφεται κατά απειλών προερχομένων από συνανθρώπους αξιώνοντας από το κράτος συνδρομή στην απόκρουση αυτών των κινδύνων , ενώ το εξασφαλιστικό-διασφαλιστικό στρέφεται αποκλειστικά προς το κράτος αξιώνοντας διαφύλαξη από άλλους κινδύνους και βελτίωση της θέσης του ανθρώπου[7]. Παραδοσιακά, τα δικαιώματα κατατάσσονται σε τρεις κατηγορίες: στην πρώτη κατηγορία, τα αμυντικά-ατομικά (status negativus), τα οποία εξαναγκάζουν το κράτος να απέχει από κάθε ενέργεια, υποχρεώνουν το κράτος σε παράλειψη και συνιστούν τον απόλυτο χαρακτήρα των δικαιωμάτων, που ως προς τον αμυντικό τους χαρακτήρα ισχύουν erga omnes. Η δεύτερη κατηγορία, το status activus των πολιτικών δικαιωμάτων , αξιώνει συμμετοχή στην άσκηση δημόσιας εξουσίας, με την έννοια ότι ο πολίτης δεν αρκείται πια στο ρόλο του παραλήπτη κρατικών παροχών αλλά ζητάει να συν-προσδιορίσει και να συν-διαμορφώσει την κρατική λειτουργία. Στην τρίτη κατηγορία, τέλος, τα κοινωνικά δικαιώματα (status positivus-socialis) ανήκουν τα δικαιώματα που αξιώνουν από το κράτος την πράξη, συνιστάμενη στην παροχή στοιχειωδών βιοτικών αγαθών ή υπηρεσιών, υπηρετώντας έτσι το αγαθό της κοινωνικής δικαιοσύνης και αποτελώντας έκφραση του κοινωνικού κράτους. [8]
Η διάκριση όμως αυτή, στην σύγχρονη έννομη τάξη του κοινωνικού ανθρωπισμού, θεωρείται ανεπαρκής και ελαχίστης σημασίας. Πέρα από τις διάφορες διαιρέσεις τους, τα θεμελιώδη δικαιώματα ανεξαρτήτως του αν ονομάζονται ‘’πολιτικά’’, ‘’ατομικά’’ ή ‘’κοινωνικά’’, παραμένουν μεταξύ τους

[5] Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ’, (2008), σελ. 101-102
[6] Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ’, (2008) σελ. 126
[7] Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ’, (2008), σελ.138 επ.
[8] Δαγτόγλου Π.Δ., ΄΄Συνταγματικό Δίκαιο, Ατομικά Δικαιώματα Α’΄΄(2005), σελ. 67 επ.

‘’μονίμως παραπληρωματικά’’[9]. Ανάμεσα στις τρεις αυτές κατηγορίες, υπάρχει στενή αλληλεξάρτηση[10].

❖ *Φορείς δικαιωμάτων:*

Φορείς των συνταγματικών δικαιωμάτων είναι καταρχήν όλοι οι άνθρωποι, με την έννοια ότι, όπως στο αστικό δίκαιο ικανότητα δικαίου έχουν όλα τα φυσικά πρόσωπα, έτσι και στο χώρο των συνταγματικών δικαιωμάτων ικανότητα να είναι υποκείμενα δικαιωμάτων αναγνωρίζεται σε όλα τα φυσικά πρόσωπα. Η ικανότητα αυτή διαφέρει και πρέπει να διακρίνεται από την ικανότητα αυτοτελούς άσκησης ενός δικαιώματος, η οποία αντιστοιχεί στην δικαιοπρακτική ικανότητα του αστικού δικαίου.

Στο ελληνικό Σύνταγμα, κάποια δικαιώματα παρέχονται σε όλους τους ευρισκομένους στο έδαφος στο οποίο εκτείνεται η ελληνική συνταγματική τάξη ανεξαιρέτως, ενώ κάποια άλλα κατοχυρώνονται μόνο υπέρ των Ελλήνων πολιτών ή και στους αλλοδαπούς υπό τον όρο της αμοιβαιότητας (άρθρο 28 Σ). Πάντως, τα ανεπιφύλακτα δικαιώματα καθώς και τα μητρικά δικαιώματα (π.χ ανθρώπινη αξία, ισότητα, ζωή , υγεία) δεν μπορούν να αναγνωριστούν υπό τον όρο της αμοιβαιότητας.

Κατά κανόνα, τα οικονομικά και τα δικαιώματα του κοινωνικού χώρου παρέχονται όχι μόνο στους ημεδαπούς αλλά και στους αλλοδαπούς. Αντίθετα, τα πολιτικά και διασφαλιστικά δικαιώματα που περιέχουν αξίωση διεκδίκησης ή εξασφάλισης υπηρεσίας ή παροχής, αναγνωρίζονται κατά κανόνα μόνο στους Έλληνες. Υποκείμενα, τέλος, των συνταγματικών δικαιωμάτων είναι και τα νομικά πρόσωπα, ικανότητα που δεν καλύπτει βεβαίως δικαιώματα που εκ φύσεως προσιδιάζουν μόνο σε φυσικά πρόσωπα. Τα νομικά πρόσωπα δημοσίου δικαίου δεν θεωρούνται υποκείμενα συνταγματικών δικαιωμάτων, διότι μια τέτοια αναγνώριση δικαιωμάτων ‘’κατά του εαυτού τους’’ δεν είναι δυνατή και κρύβει αντίφαση[11].

❖ *Γενική και ειδική σχέση – θεσμικές εγγυήσεις, οριοθετήσεις και περιορισμοί:*

Η εφαρμογή των θεμελιωδών δικαιωμάτων διακρίνεται σε γενική και ειδική (θεσμική).

[9] Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ’, (2008),σελ. 124, όπου υποσημ. 110, Βλάχος, ‘’Κοινωνιολογία των δικαιωμάτων του ανθρώπου, σελ.108.
[10] Δαγτόγλου Π.Δ., ΄΄Συνταγματικό Δίκαιο, Ατομικά Δικαιώματα Α’΄΄(2005), σελ. 74 επ.
[11] Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ’, (2008), σελ.114

Η γενική σχέση μπορεί να διακριθεί σε γενική κυριαρχική σχέση , δηλαδή γενική σχέση κράτους και πολιτών, και γενική διαπροσωπική σχέση, δηλαδή τη γενική σχέση των πολιτών μεταξύ τους. Στο πλαίσιο της γενικής σχέσης, τα συνταγματικά δικαιώματα οριοθετούνται και δεν επιτρέπεται ο περιορισμός τους. Η γενική σχέση αποτελεί τον πυρήνα του δικαιώματος και αφορούν την κτήση τους, οπότε και το δικαίωμα δεν μπορεί να περιοριστεί, αλλιώς καταλύεται και το περιεχόμενό του. Οι οριοθετήσεις έχουν ευρύ χαρακτήρα, εφαρμόζονται σε όλα τα δικαιώματα και αφορούν όλους τους φορείς. Είναι ρυθμίσεις ‘’οροφής’’, προσδιορισμοί του ανώτατου, ευρύτατου περιεχομένου του συνταγματικού δικαιώματος[12].

Στα άρθρα 5 και 25 του Συντάγματος προβλέπονται ως γενικές οριοθετήσεις α) τα δικαιώματα των άλλων, β) το Σύνταγμα, γ) τα χρηστά ήθη, δ) η απαγόρευση καταχρηστικής άσκησης και ε) η κοινωνική οριοθέτηση. Από τη συστηματική ερμηνεία αυτών των άρθρων προκύπτει πως το Σύνταγμα θέτει τρεις βασικές οριοθετικές ρήτρες, την ρήτρα της νομιμότητας, την ρήτρα της κοινωνικότητας και την ρήτρα της χρηστότητας. Καθεμία από αυτές αναλύεται σε μερικότερες αρχές και ισχύουν ως γενικές για όλα τα δικαιώματα[13]. Κατά την αντίθετη άποψη [14], όμως, οι ρήτρες του άρθρου 5 παρ.1 του Συντάγματος δεν εφαρμόζονται και στα υπόλοιπα ατομικά δικαιώματα, παρά μόνο στην προσωπική ελευθερία, στην ρύθμιση της οποίας ρητά αναφέρονται, αφού, ακόμα και αν θεωρηθούν τα δικαιώματα αυτά ως ειδικότερες εκφάνσεις του γενικού δικαιώματος ελευθερίας, υπάρχει η σχέση ειδικού προς γενικό, οπότε το ειδικό υπερισχύει. Η άποψη αυτή παραβλέπει όπως ότι το ειδικό υπερισχύει μόνο εφόσον είναι αντίθετο με το γενικό και θεωρεί τις ρήτρες αυτές όχι οριοθετήσεις αλλά περιορισμούς.

Κάθε δικαίωμα είναι άμεσα συνυφασμένο με ένα θεσμό. Το σύνταγμα δεν προστατεύει ή κατοχυρώνει μόνο δικαιώματα, αλλά και θεσμούς. Έτσι, με τον όρο ‘’θεσμική εγγύηση’’ γίνεται αντιληπτή η συνταγματική εγγύηση, η οποία αποβλέπει βασικά, όχι στην προστασία του εκάστοτε φορέα του ατομικού δικαιώματος, αλλά στη διασφάλιση του συνταγματικά κατοχυρωμένου θεσμού[15]. Η θεσμική εφαρμογή των συνταγματικών δικαιωμάτων είναι η εφαρμογή τους στο επίπεδο μερικότερης έννομης σχέσης ή θεσμού, είτε ως προς το γενικό, είτε ως προς το θεσμικό τους περιεχόμενο, όπως προσδιορίζεται από τη σχέση αιτιώδους συνάφειας δικαιώματος και θεσμού[16]. Οι μερικότερες έννομες σχέσεις στις οποίες εφαρμόζεται ο θεσμός αποτελούν τις ειδικές σχέσεις, οι οποίες χωρίζονται αντίστοιχα σε ειδικές κυριαρχικές σχέσεις (σχέσεις μεταξύ κράτους-πολιτών) και σε ειδικές διαπροσωπικές σχέσεις (σχέσεις των κοινωνών μεταξύ τους).

[12] Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ’, (2008), σελ. 56
[13] Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ’, (2008), σελ.170 επ.
[14] Χρυσογόνου Κ, ‘’Ατομικά και Κοινωνικά Δικαιώματα’’, Β’Έκδοση, (2002), σελ. 83-84
[15] Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ’, (2008), σελ.40
[16] Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ’, (2008), σελ.56

Οι ειδικές σχέσεις είναι ο χώρος των περιορισμών του δικαιώματος. Αποτελούν μερικότερους χώρους (που ίσως πηγάζουν από την ίδια γενική σχέση) μέσα στους οποίους είναι δυνατή η επιβολή περιορισμών[17].
Ο περιορισμός , δηλαδή η συρρίκνωση του περιεχομένου του δικαιώματος, ο οποίος προκαλείται από μια ανθρωπογενή ενέργεια[18], για να είναι επιτρεπτός και νόμιμος, πρέπει να γίνεται καταρχήν στο πλαίσιο της ειδικής σχέσεως και να συνδέεται με αιτιώδη συνάφεια με τον αντίστοιχο θεσμό ˙ αλλιώς, δεν συνιστά νόμιμο και επιτρεπτό περιορισμό του δικαιώματος αλλά προσβολή. Επίσης, θα πρέπει να προβλέπεται είτε από ορισμένη συνταγματική διάταξη, είτε από το νόμο, εφόσον υπάρχει επιφύλαξη υπέρ αυτού (άρθρο 25 παρ. 1δ' Σ)[19]. Ισχύει δηλαδή η αρχή nulla restrictio sine lege constitutionale certa. Επίσης, ισχύει και η αρχή της αναλογικότητας, που σημαίνει ειδικότερα πως ο περιορισμός πρέπει να είναι κατάλληλος και αναγκαίος για την επίτευξη του συγκεκριμένου αποτελέσματος και δε θα πρέπει να ξεπερνά το όριο της λογικής επιβάρυνσης. Πέρα από τα ρητώς αναφερόμενα στο Σύνταγμα όρια των περιορισμών των συνταγματικών δικαιωμάτων, γίνεται δεκτό ότι περιορισμούς των περιορισμών (Schranken – Schranken) αποτελούν και η αρχή του αιτιώδους των περιορισμών, η απαγόρευση καταχρηστικής επιβολής περιορισμών, η συμφωνία προς τη δημοκρατική τάξη , η δικαιολόγηση από λόγους δημοσίου συμφέροντος [20](χωρίς αυτό να σημαίνει πως δικαιολογείται η υποχώρηση ατομικών δικαιωμάτων κάθε φορά που θίγεται το δημόσιο συμφέρον) και ο πυρήνας του δικαιώματος (με την έννοια της απροσπέλαστης περιοχής του δικαιώματος)[21].

❖ *''Τριτενέργεια'':*

Τριτενέργεια είναι η προς τα πρόσωπα κατευθυνόμενη και κυρίως από την κρατική εξουσία πραγματοποιούμενη αμυντική νομική ενέργεια των θεμελιωδών δικαιωμάτων , η οποία εξασφαλίζει την ακώλυτη άσκησή τους, εξαναγκάζοντας τις απειλητικές αντικοινωνικές δυνάμεις να απέχουν από κάθε προσβολή της ανθρώπινης αξίας[22].
Η τριτενέργεια είναι αδόκιμος όρος, γιατί αναφέρεται στην διαπροσωπική ενέργεια, η οποία δεν αποτελεί ιδιαίτερο νομικό χώρο, αλλά καλύπτεται και αυτή από το Σύνταγμα. Η τριτενέργεια είναι κατασκευή της παραδοσιακής θεωρίας, η οποία διαχωρίζει το δημόσιο-συνταγματικό δίκαιο από το ιδιωτικό δίκαιο. Επειδή όμως το σύγχρονο κοινωνικό κράτος οφείλει να προστατεύει τα θεμελιώδη δικαιώματα από τους τρίτους, η λεγόμενη τριτενέργεια περιέχεται στην

[17] Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ', (2008), σελ. 52-53
[18] Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ', (2008), σελ.184
[19] Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ', (2008), σελ.202
[20] ΣτΕ 2611/2004, σχολιασμός Ρήγα Νικολία
[21] Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ', (2008), σελ. 207
[22] Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ', (2008), σελ. 79

προστατευτική υποχρέωση του κράτους. Επομένως, το πρόβλημα της τριτενέργειας δεν υφίσταται στη σημερινή μορφή του σύγχρονου κοινωνικού προστατευτικού κράτους[23]. Τα συνταγματικά δικαιώματα ισχύουν αυτοδικαίως και στον ιδιωτικό χώρο και συνεπώς τόσο στις κυριαρχικές όσο και στις διαπροσωπικές σχέσεις.

❖ *Η ποινική σχέση ως ειδική κυριαρχική σχέση:*

Χαρακτηριστικό παράδειγμα ειδικής κυριαρχικής σχέσης είναι η ποινική σχέση. Στο Σύνταγμα προβλέπονται πολλοί περιορισμοί συνταγματικών δικαιωμάτων στο πλαίσιο της ποινικής σχέσης. Η ποινική σχέση αποτελεί πράγματι μερικότερο πεδίο δοκιμασίας των συνταγματικών δικαιωμάτων.
Η ποινική σχέση, ως ειδική, δεν αφορά όλους αλλά συγκεκριμένους φορείς, εκείνους που παραβαίνουν τον ποινικό κώδικα ή εμπλέκονται καθ' οποιονδήποτε τρόπο στην ποινική διαδικασία. Η ποινική σχέση είναι κατά βάση παροδική, με εξαίρεση την ισόβια κάθειρξη[24].
''Φυλάκιση'' είναι ο αναγκαστικός εγκλεισμός του καταδικασμένου σε ένα περίκλειστο και αυστηρά επιτηρούμενο χώρο ομαδικής συμβίωσης[25]. Η φυλάκιση επιβάλλεται και επιτηρείται από κρατικά όργανα[26], αποτελεί δηλαδή ειδική κυριαρχική σχέση κράτους-πολίτη. Στην έννοια της φυλάκισης υπάγονται, εκτός από την έκτιση της στερητικής της ελευθερίας ποινής, η προσωρινή κράτηση, η πειθαρχική ποινή για στρατιωτικούς καθώς και η προσωποκράτηση οφειλέτη σύμφωνα με τις διατάξεις του ΚΕΔΕ[27]. Στις περισσότερες περιπτώσεις η φυλάκιση είναι αποτέλεσμα εμπλοκής του καταδικασθέντος στην ποινική διαδικασία, είτε με την έννοια της στερητικής της ελευθερίας ποινής, είτε της προσωρινής κράτησης, υποβάλλοντάς τον έτσι σε μια ειδική κυριαρχική σχέση με το κράτος, την ειδική κυριαρχική ποινική σχέση.

Οι φυλακές είναι κατεξοχήν χώρος δοκιμασίας των ανθρωπίνων δικαιωμάτων , αλλά και του ιδίου του κράτους δικαίου[28]. Τα συνταγματικά δικαιώματα των κρατουμένων αναπόφευκτα υπόκεινται σε περιορισμούς ή σε δυσκολία, μέχρι και αδυναμία ασκήσεως , εξαιτίας της ιδιαίτερης αυτής θέσης στην οποία αυτοί βρίσκονται. Σύμφωνα με το άρθρο 4παρ.1 Σωφρ.Κ κατά την εκτέλεση της ποινής δεν περιορίζεται κανένα άλλο ατομικό δικαίωμα των κρατουμένων εκτός από το δικαίωμα στην προσωπική ελευθερία ˙ η παρ.2 του ιδίου άρθρου ορίζει πως λόγω της κράτησής τους οι κρατούμενοι δεν εμποδίζονται στην ελεύθερη ανάπτυξη της

[23] Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ', (2008), σελ. 80
[24] Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ', (2008), σελ.61
[25] Μανιτάκη Αντώνη, ''Τα συνταγματικά δικαιώματα των κρατουμένων και η δικαστική προστασία τους'', ΠοινΧρον, ΛΘ', σελ.164
[26] Χρυσογόνου Κ, ''Ατομικά και Κοινωνικά Δικαιώματα'', Β'Εκδοση, (2002), σελ.205
[27] Βλ. νομολογία, ΣτΕ 2611/2004 και ΣτΕ 250/2008 για προσωποκράτηση για χρέη προς το Δημόσιο.
[28] Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ', (2008), σελ. 365

προσωπικότητας τους και την άσκηση των δικαιωμάτων που τους αναγνωρίζει ο νόμος, αυτοπροσώπως η με αντιπρόσωπο. Ποινή στερητική της ελευθερίας, δεν σημαίνει στέρηση της ελευθερίας γενικά του ανθρώπου , ούτε αφαίρεση της γενικής ικανότητάς του να είναι διάδικος, και γενικά να είναι υποκείμενο δικαίου, φορέας αστικών, πολιτικών και κοινωνικών δικαιωμάτων[29]. Ωστόσο, πέρα από τις διακηρύξεις, πρέπει να αναγνωριστεί πως, στην πράξη, και άλλα δικαιώματα των κρατουμένων δοκιμάζονται, οπότε το κρίσιμο ζήτημα δεν είναι η τυπική αναγνώριση των φυλακισμένων ως φορέων συνταγματικών δικαιωμάτων, αλλά η ανεύρεση και η διατύπωση των επιπτώσεων που έχει στην άσκηση η απόλαυση των συνταγματικών δικαιωμάτων το νομικό γεγονός της στερητικής της ελευθερίας τους ποινής, καθώς και η πραγματική κατάσταση του εγκλεισμού στις φυλακές. Με άλλα λόγια, ποιους και πόσους περιορισμούς δικαιολογεί η φυλάκιση και ποιο είναι το κριτήριο των περιορισμών αυτών[30].

Επειδή ακριβώς η στέρηση της ελευθερίας ως ποινή αποτελεί περιορισμό του δικαιώματος, αυτοδικαίως οδηγούμαστε στην, ήδη αναπτυχθείσα, θεωρία της ειδικής κυριαρχικής σχέσης. Σύμφωνα με αυτή, ορισμένα άτομα βρίσκονται σε μία ιδιαίτερη σχέση με το κράτος, ένεκα της οποίας έχουν αυξημένες υποχρεώσεις απέναντί του και τους παρέχεται ελαττωμένη προστασία, με την έννοια της επιβολής περιορισμών στην άσκηση των δικαιωμάτων τους, οι οποίοι περιορισμοί απορρέουν ακριβώς από το καθεστώς στο οποίο βρίσκονται. Ιδιαίτερα μάλιστα για τους κρατουμένους, υποστηρίζεται ότι αναγνωρίζονται ‘’περιορισμοί που απορρέουν από το σωφρονιστικό σύστημα’’ διότι ‘’ο θεσμός της ποινής προκύπτει από το Σύνταγμα (αρθρο 7 παρ.1) ‘’.
Κατά της άποψης αυτής έχουν διατυπωθεί αντιρρήσεις, με επικρατούντα κυρίως τα εξής επιχειρήματα[31] :
Α) η θεωρία της ειδικής κυριαρχικής σχέσης ανάγει αυθαίρετα μια πραγματική κατάσταση σε έννομη σχέση, συνάγοντας από αυτή πρόσθετους περιορισμούς των ατομικών δικαιωμάτων και ελευθεριών για ορισμένη κατηγορία πολιτών. Έκτιση κάποιας ποινής σε φυλακές και εγκλεισμός σε αυτές δεν συνεπάγεται νομικά ούτε υπονοεί ειδική σχέση εξουσίασης ή ιεράρχησης, μεταξύ διεύθυνσης φυλακών και φυλάκων και φυλακισμένων. Οι φυλακισμένοι είναι απλώς χρήστες της δημόσιας υπηρεσίας των φυλακών και η διεύθυνση των φυλακών υπάλληλοι της υπηρεσίας αυτής.
Β) Η θέση του κρατουμένου είναι η μόνη στην οποία το άτομο περιέρχεται αναγκαστικά σε μια νομότυπη εκδήλωση της ρυθμισμένης από το νόμο κρατικής εξουσίας˙ αντίθετα, κανένα από τα άτομα των λοιπών κατηγοριών (π.χ. δημόσιοι υπάλληλοι, στρατιωτικοί) δεν καταλαμβάνει τη θέση του εξαναγκαζόμενου προς τούτο. Δεν μπορεί λοιπόν τα άτομα των πιο πάνω κατηγοριών να εξομοιώνονται

[29] Μανιτάκη Αντώνη, ‘’Τα συνταγματικά δικαιώματα των κρατουμένων και η δικαστική προστασία τους’’, ΠοινΧρον, ΛΘ’, σελ.165
[30] Μανιτάκη Αντώνη, ‘’Τα συνταγματικά δικαιώματα των κρατουμένων και η δικαστική προστασία τους’’, ΠοινΧρον, ΛΘ’, σελ.167-168
[31] Αλεξιάδη Σ. ‘’Σωφρονιστική’’ (2001)

απέναντι στο νόμο ως προς την έκταση της άσκησης των ανθρωπίνων δικαιωμάτων τους[32].

Ως αντεπιχείρημα στην πιο πάνω θέση, θα μπορούσαμε να πούμε ότι ακριβώς επειδή η πραγματική κατάσταση ανάγεται σε νομική σχέση μέσα από την ποινική διαδικασία, ακριβώς και για αυτό οι περιορισμοί είναι νόμιμοι, αφού επιβάλλονται από το Σύνταγμα και άλλα νομοθετικά κείμενα (π.χ. ΠΚ, ΚΠοινΔ).

Οι θεωρητικοί που απορρίπτουν την θεωρία των ειδικών κυριαρχικών σχέσεων, υποστηρίζουν την θεωρία των σύμφυτων ή εγγενών περιορισμών.

Σύμφωνα με τη θεωρία αυτή, ο περιορισμός ορισμένων ανθρωπίνων δικαιωμάτων (πέραν της προσωπικής ελευθερίας, της κίνησης και διαμονής) αποτελεί σύμφυτο περιορισμό (inherent restriction) , δηλαδή ανταποκρίνεται στις εύλογες και κανονικές απαιτήσεις της έκτισης της ποινής φυλάκισης[33] . Η υπέρβαση του μέτρου των σύμφυτων περιορισμών είναι ανεπίτρεπτη. Ιδιαίτερη προσοχή πρέπει να δίδεται στην άσκηση της πειθαρχικής εξουσίας επί των κρατουμένων.

Η θεωρητική κατασκευή των « σύμφυτων» περιορισμών επιτρέπεται να γίνει παραδεκτή στην άσκηση των ανθρωπίνων εκείνων δικαιωμάτων που έχουν ως συστατικό στοιχείο του πυρήνα τους την προσωπική ελευθερία[34].

Έτσι, περιορίζονται αναπόφευκτα τα δικαιώματα για συμμετοχή σε ειρηνικές διαδηλώσεις έξω από τη φυλακή , για αλλαγή τόπου διαμονής , για εγκατάλειψη της χώρας και μετάβαση στο εξωτερικό[35] .

Για παράδειγμα, οι κρατούμενοι σε φυλακές δεν μπορούν να επικαλεστούν το δικαίωμα συναθροίσεως σε κλειστό χώρο, γιατί αυτό θα αντιστρατευόταν το νόημα της στερήσεως της ελευθερίας , ως ποινής. Η απαγόρευση συναθροίσεων των κρατουμένων είναι αναγκαία για την εκπλήρωση του δημοσίου συμφέροντος εκτίσεως ποινών[36].

Η θεωρητική κατασκευή των «σύμφυτων» περιορισμών δεν είναι ικανή να δικαιολογήσει στέρηση της άσκησης εκείνων των δικαιωμάτων των κρατουμένων για τα οποία συμπτωματικά μόνον έχει σημασία η ύπαρξη φυσικής ελευθερίας. Για παράδειγμα, δεν αποτελεί σοβαρή δικαιολογία για στέρηση του δικαιώματος του κρατούμενου να αλληλογραφεί ότι προς τούτο πρέπει να μεταβεί στο ταχυδρομικό γραφείο, ούτε ότι για να ψηφίσει πρέπει να μεταβεί στο εκλογικό τμήμα, ούτε στέρηση του δικαιώματος γάμου επειδή απαιτείται μετάβαση στο δημαρχείο ή την εκκλησία , ούτε του δικαιώματος στην εκπαίδευση επειδή η φυλακή δεν διαθέτει σχολείο[37].

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[32] Μανιτάκη Αντώνη, ‘’Τα συνταγματικά δικαιώματα των κρατουμένων και η δικαστική προστασία τους’’, ΠοινΧρον, ΛΘ’

[33] Γιωτοπούλου - Μαραγκοπούλου Αλίκης, ‘’Στερητική της ελευθερίας ποινή και Ανθρώπινα Δικαιώματα’’ στο ΙΜΔΑ: ‘’Αντεγκληματική πολιτική και Δικαιώματα του Ανθρώπου’’. Σελ. 87-88

[34] Αλεξιάδη Σ. ‘’Σωφρονιστική’’ (2001), σελ.358

[35] Αλεξιάδη Σ. ‘’Σωφρονιστική’’ (2001), σελ.358

[36] Δαγτόγλου Π.Δ., ΄΄Συνταγματικό Δίκαιο, Ατομικά Δικαιώματα Β’΄΄(2005), σελ. 846

[37] Αλεξιάδη Σ. ‘’Σωφρονιστική’’ (2001), σελ.359

Μια άλλη θεωρία προβάλλει ως δικαιολογητικό λόγο των περιορισμών των συνταγματικών δικαιωμάτων των κρατουμένων την επίτευξη « σωφρονιστικών» στόχων ή , με άλλα λόγια , τον σκοπό της ποινής. Τέτοιοι στόχοι ή σκοποί είναι η κοινωνική επανένταξη και αγωγή, η κοινωνική αποκατάσταση ή αναπροσαρμογή , η επανακοινωνικοποίηση , η κοινωνική άμυνα, η ανταπόδοση ή τιμωρία. Ως μειονέκτημα αυτής της άποψης προβάλλεται κυρίως το ότι εισάγει κριτήριο υποκειμενικό, ρευστό και αμφιλεγόμενο και εξαρτά τους περιορισμούς από την αποδοχή της μιας ή της άλλης θεωρίας περί σκοπών ποινής. Επιπλέον, όλοι αυτοί οι σωφρονιστικοί στόχοι – θεμελιώδη δικαιώματα του ατόμου , που δεν έχουν καμία σχέση με το ανθρώπινο δικαίωμα το οποίο περιορίστηκε με τη ποινή , δηλαδή την προσωπική ελευθερία. Μια τέτοια διαφοροποίηση του χαρακτήρα της ποινής από μέτρο κατά της προσωπικής ελευθερίας σε μέτρο κατά των άλλων ανθρωπίνων δικαιωμάτων συνιστά κατάφωρη παραβίασή τους[38].

❖ *Η ‘’ποινή’’ στη σύγχρονη έννομη τάξη:.*

Μετά από αλλεπάλληλες θεωρίες περί σκοπού της ποινής (η ποινή ως απόλυτη υπακοή, η ποινή ως ανταπόδοση[39] κ.ά.) η σύγχρονη ποινική θεωρία έχει στραφεί προς μια ανθρωπιστική προσέγγιση της ποινής.
Σύμφωνα με αυτή, κατά πρώτον η ποινή πρέπει να είναι ‘’ούσα’’ και ‘’δέουσα’’: ‘’ούσα’’ με την έννοια ότι αυτή επιβάλλεται από τα αρμόδια όργανα, όπως το άρθρο 96 παρ.1 του Συντάγματος[40] ορίζει ˙ και ‘’δέουσα’’ με την έννοια ότι αυτή η ποινή είναι η απολύτως αναγκαία, πρόσφορη και κατάλληλη σε κάθε περίπτωση. Η επιβολή μιας δέουσας ποινής κατά τρόπο, ώστε να μην είναι και ούσα ποινή συνιστά προσβολή στοιχειωδών κανόνων, και μάλιστα όχι μόνο εκείνων που επιτάσσουν ευθέως την εφαρμογή των ποινικών τύπων και διαδικασιών (άρθρο 6 ΕΣΔΑ) αλλά και εκείνων που προστατεύουν τα έννομα αγαθά (της ζωής, της προσωπικής ελευθερίας, της τιμής, όπως αυτά ορίζονται από το Σύνταγμα) που πλήττονται από την επιβολή κατά ανάρμοστο (μη-ποινικό) τρόπο μιας δέουσας ποινής[41].
Κατά δεύτερον, πρέπει να υπάρχει η αναγκαιότητα του στόχου και του μέσου και η αναλογική εφαρμογή αυτών σε κάθε ποινή, ειδικά την στερητική της ελευθερίας ποινή. Η άποψη του Γερμανικού Ομοσπονδιακού Συνταγματικού Δικαστηρίου κατά την οποία ‘’δεν ανήκει στην αποστολή του Κράτους η

[38] Αλεξιάδη Σ. ‘’Σωφρονιστική’’ (2001), σελ.363
[39] Ανδρουλάκη Κ. Νικόλαου, ‘’Ποινικό Δίκαιο, Γενικό Μέρος, Θεωρία για το έγκλημα’’.σελ. 37
[40] Κατά το άρθρο 96 παρ 1: *‘’Στα τακτικά ποινικά δικαστήρια ανήκει η τιμωρία των εγκλημάτων και η λήψη όλων των μέτρων που προβλέπουν οι ποινικοί νόμοι’’.*
[41] Ανδρουλάκη Κ. Νικόλαου, ‘’Ποινικό Δίκαιο, Γενικό Μέρος, Θεωρία για το έγκλημα’’.σελ 27

΄΄βελτίωση΄΄ των πολιτών του [42] ΄΄ δεν ανταποκρίνεται στον σκοπό της ΄΄κοινωνικής αναπροσαρμογής και βελτίωσης του δράστη΄΄ [43]. Αντίθετα, η αποστολή της σύγχρονης Πολιτείας έναντι των πολιτών της προσεγγίζεται μέσω μιας σειράς διατάξεων του ισχύοντος Συντάγματος, οι οποίες ισχύουν αυτοδικαίως και στους κρατουμένους (όπως το άρθρο 1 παρ. 3 , σύμφωνα με το οποίο ΄΄όλες οι εξουσίες πηγάζουν από το Λαό, υπάρχουν υπέρ αυτού και του Έθνους΄΄, το άρθρο 2 παρ.1 , σύμφωνα με το οποίο ΄΄ο σεβασμός και η προστασία της αξίας του ανθρώπου αποτελούν την πρωταρχική υποχρέωση της Πολιτείας΄΄, του άρθρου 25 παρ. 2, σύμφωνα με το οποίο ΄΄η αναγνώριση και η προστασία των θεμελιωδών και απαράγραπτων δικαιωμάτων του ανθρώπου από την Πολιτεία αποβλέπει στην πραγματοποίηση της κοινωνικής προόδου μέσα σε ελευθερία και σε δικαιοσύνη΄΄). Το ίδιο διαφαίνεται και από τις διατάξεις υπέρ της προστασίας δικαιωμάτων, καταστάσεων και αξιών των πολιτών-κρατουμένων (όπως στα άρθρα 5, 9, 13, 15, 16, 17, 22, 24 του Συντάγματος) αλλά και για τις από τις διατάξεις που εισάγουν περιορισμούς στην εν λόγω προστασία ενόψει άλλων, επίσης προστατευόμενων αξιών (όπως στο άρθρο 5 παρ. 1, σύμφωνα με το οποίο ΄΄εφόσον δεν προσβάλλει τα δικαιώματα των άλλων και δεν παραβιάζει το Σύνταγμα και τα χρηστά ήθη΄΄, ή στο άρθρο 11 παρ.2 ΄΄σοβαρός κίνδυνος για τη δημόσια ασφάλεια΄΄, ΄΄σοβαρή διατάραξη της κοινωνικοοικονομικής ζωής΄΄, ή στο άρθρο 14 παρ.3 ΄΄που προσβάλλουν ολοφάνερα τη δημόσια αιδώ΄΄, ή στο 17 παρ.1 ΄΄γενικό συμφέρον΄΄ ΄΄παρ. 2 ΄΄δημόσια ωφέλεια΄΄, ή στο άρθρο 18 παρ.3 ΄΄άμεσης κοινωνικής ανάγκης΄΄ κ.λ.π.΄΄[44].

Μόνο και μόνο η νομική κατάσταση των κρατουμένων δεν δικαιολογεί καθεαυτό τον περιορισμό των δικαιωμάτων τους. Αντίθετα, γεννάται αξίωση κατά της Πολιτείας να μην παρεμποδίσει, πρώτον, την άσκηση των δικαιωμάτων που ανήκουν στο status activus των κρατουμένων, και δεύτερον, να τους συνδράμει στην άσκηση εκείνων των δικαιωμάτων που ανήκουν στο στο status negativus τους. Σε τελική ανάλυση, το πρόβλημα δεν είναι πόσα δικαιώματα θα αναγνωριστούν στους κρατουμένους αλλά πόσα μπορούμε να τους στερήσουμε[45].

Ορίζοντας λοιπόν την μεθοδολογική βάση που θα ακολουθήσουμε και οριοθετώντας τις βασικές έννοιες των συνταγματικών δικαιωμάτων, της ειδικής κυριαρχικής σχέσης των κρατουμένων και τον σκοπό της ποινής, θα

[42] Ανδρουλάκη Κ. Νικόλαου, ΄΄Ποινικό Δίκαιο, Γενικό Μέρος, Θεωρία για το έγκλημα΄΄.σελ 47, από όπου και η απόφαση BVerG 22,219 του του Γερμανικού Ομοσπονδιακού Συνταγματικού Δικαστηρίου

[43] Ανδρουλάκη Κ. Νικόλαου, ΄΄Ποινικό Δίκαιο, Γενικό Μέρος, Θεωρία για το έγκλημα΄΄.σελ 47

[44] Ανδρουλάκη Κ. Νικόλαου, ΄΄Ποινικό Δίκαιο, Γενικό Μέρος, Θεωρία για το έγκλημα΄΄.σελ 49

[45] Αλεξιάδη Σ. ΄΄Σωφρονιστική΄΄ (2001), σελ.364-366

προχωρήσουμε στην ανάλυση των συνταγματικών δικαιωμάτων των κρατουμένων και τους περιορισμούς , καθώς και τη θεσμική προσαρμογή αυτών.

Α' ΜΕΡΟΣ : ΑΝΑΛΥΣΗ ΔΙΚΑΙΩΜΑΤΩΝ

1) Ανθρώπινη αξία (άρθρο 2 Σ)

Α) ***Γενικό περιεχόμενο :***

Ανθρώπινη αξία ως έννοια γένους είναι το σύνολο των γενικών υλικών, πνευματικών και κοινωνικών γνωρισμάτων του ανθρώπινου γένους. Άνθρωπος και ανθρώπινη αξία είναι όροι συνώνυμοι. [46] Κατά το αρ.2 παρ.1 « *Ο σεβασμός και η προστασία της αξίας του ανθρώπου αποτελούν την πρωταρχική υποχρέωση της Πολιτείας*». Πρόκειται για μια από τις λίγες φορές που το Σύνταγμα επιβάλλει ρητώς όχι απλά όρια, αλλά υποχρεώσεις στο κράτος[47].Η αρχή του απαραβίαστου της ανθρώπινης αξίας αποτελεί την καταστατική αρχή της νέας (με το Σύνταγμα 1975/86) ελληνικής έννομης τάξης. Η διάταξη του άρθρου 2 παρ.1 Σ ανάγεται σε συνταγματική αρχή και αυτοτελές δικαίωμα, και μάλιστα το ανώτατο μητρικό δικαίωμα το οποίο αποτελεί την πηγή των ανθρωπίνων δικαιωμάτων. Τους γενικούς συνταγματικούς προσδιορισμούς της ανθρώπινης αξίας αποτελούν η ελευθερία και η ισότητα και τις συνταγματικές εξειδικεύσεις της τα ανθρώπινα δικαιώματα[48].

Η «αξία του ανθρώπου» την οποία υποχρεούται κατά το Σύνταγμα να σέβεται και να προστατεύει η πολιτεία, είναι ο απαραβίαστος εκείνος πυρήνας της προσωπικότητας του ανθρώπου ως φυσικού υποκειμένου δικαίου που διακρίνει τον άνθρωπο αφενός από τα άλογα όντα και αφετέρου από τα αντικείμενα του δικαίου. Πράγματι η «αξία του ανθρώπου» συνεπάγεται την αναγνώριση του από τι δίκαιο ως υποκειμένου δικαίου, ως φορέα δηλαδή δικαιωμάτων και υποχρεώσεων[49].

Φορείς του δικαιώματος είναι όλα τα φυσικά πρόσωπα ανεξαρτήτως οποιασδήποτε διάκρισης , επομένως τόσο οι ημεδαποί όσο και οι αλλοδαποί και οι ανιθαγενείς.

Η κατοχύρωση της αξίας του ανθρώπου είναι απαραβίαστη. Δεν υπόκειται σε κανένα περιορισμό και σε καμία επιφύλαξη νόμου ούτε επιτρέπει εξαιρέσεις στο πλαίσιο ειδικών εξουσιαστικών σχέσεων. Η διάταξη του αρ.2 παρ.1 Σ δεν υπόκειται σε αναθεώρηση , ούτε αναστέλλεται η ισχύς της κατ' α.48, παρ.1 Σ. Η αξία του ανθρώπου αποτελεί το άκρο όριο οποιουδήποτε περιορισμού ατομικού δικαιώματος που επιτρέπει εκάστοτε το Σύνταγμα, είτε αυτός αναφέρεται στο περιεχόμενο είτε στους φορείς του δικαιώματος[50]. Το δικαίωμα αυτό είναι άμεσα συνυφασμένο με την απαγόρευση των βασανιστηρίων γενικότερα, όπως αυτή κατοχυρώνεται στο άρθρο 7 παρ.2 του Συντάγματος, σύμφωνα με το οποίο: *''Τα*

[46] Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ', (2008), σελ. 267
[47] Δαγτόγλου Π.Δ., ΄΄Συνταγματικό Δίκαιο, Ατομικά Δικαιώματα Α'΄΄(2005), σελ. 1324
[48] Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ', (2008), σελ.264
[49] Δαγτόγλου Π.Δ., ΄΄Συνταγματικό Δίκαιο, Ατομικά Δικαιώματα Β'΄΄(2005), σελ. 1325-1327
[50] Δαγτόγλου Π.Δ., ΄΄Συνταγματικό Δίκαιο, Ατομικά Δικαιώματα Β'΄΄(2005), σελ. 1328

βασανιστήρια, οποιαδήποτε σωματική κάκωση, βλάβη υγείας ή άσκηση ψυχολογικής βίας, καθώς και κάθε άλλη προσβολή της ανθρώπινης αξιοπρέπειας απαγορεύονται και τιμωρούνται, όπως νόμος ορίζει.''
Επίσης η προστασία της ανθρώπινης αξιοπρέπειας είναι το πρώτο άρθρο του Σχεδίου του Χάρτη Θεμελιωδών Δικαιωμάτων της Ευρωπαϊκής Ένωσης (2000), το οποίο αποτελεί ήδη το δεύτερο μέρος του υπό κύρωση σχεδίου Ευρωπαϊκού Συντάγματος.
Το δικαίωμα υπόκειται στις τρεις γενικές οριοθετικές ρήτρες (κοινωνικότητα, χρηστότητα, νομιμότητα).

Β) Εφαρμογή στους κρατούμενους :
Πρωταρχική μέριμνα των κρατουμένων αποτελεί η αναγνώριση της αξίας τους ως ανθρώπων και ως υποκειμένων δικαιωμάτων και υποχρεώσεων. Σύμφωνα με το άρθρο 2 παρ.1 ΣωφρΚ κατά τη μεταχείριση των κρατουμένων διασφαλίζεται ο σεβασμός της ανθρώπινης αξιοπρέπειας και ενισχύεται ο αυτοσεβασμός των κρατουμένων. Ο φυλακισμένος δεν παύει ούτε στιγμή να είναι πρόσωπο, φορέας ανθρώπινης αξίας και αξιοπρέπειας , προσωπικότητα με ηθική και κοινωνική διάσταση, την οποία δικαιούται να αναπτύσσει ελεύθερα και να αξιώνει «συμμετοχή στην οικονομική , κοινωνική και πολιτική ζωή» , εφόσον η άσκηση του δικαιώματος αυτού δεν ακυρώνει δεν αναιρεί τυπικά ή ουσιαστικά την στερητική της ελευθερίας ποινή. Πόσο μάλλον δικαιούται να απολαμβάνει των εννόμων αγαθών που προστατεύουν τα αρ.2 παρ.1 και 5 παρ.1 Σ αξίωση σεβασμού από τα όργανα της πολιτείας της αξίας του ως προσώπου , φορέα ελεύθερης βούλησης και αφηρημένης δυνατότητας αυτοκαθορισμού καθώς και αξίωση ανάπτυξης και καλλιέργειας της προσωπικότητας του[51]. Άρα, λοιπόν, το δικαίωμα στην ανθρώπινη αξιοπρέπεια και η συνεπώς η καταστατική αρχή του απαραβίαστου της ανθρώπινης αξιοπρέπειας δεν επιδέχεται κανένα επιτρεπτό περιορισμό στα πλαίσια της ειδικής κυριαρχικής σχέσης κράτους – κρατουμένων. Ωστόσο , στην πραγματικότητα δεν μπορεί να παραβλεφθεί η προσβολή που υφίσταται η ανθρώπινη αξία του κρατουμένου, τόσο λόγω του εξουσιασμού που ασκείται στην προσωπικότητα του από τους δεσμοφύλακες του, όσο και του στιγματισμού της ποινικής καταδίκης που επιφέρει συνέπειες μειωτικές για την προσωπικότητα του κρατουμένου και τον κοινωνικό αποκλεισμό του[52] .
Σημειωτέον η φυλάκιση δεν επιφέρει απώλεια των αστικών δικαιωμάτων(κληρονομικών, οικογενειακών δικαιωμάτων, συμβατικών υποχρεώσεων) του κρατουμένου, ο οποίος δικαιούται να τα ασκεί.

Γ) *Το δικαίωμα στο πλαίσιο της ΕΣΔΑ*
Άμεσα συνυφασμένο με την απαγόρευση των βασανιστηρίων, όπως αυτή κατοχυρώνεται στο Σύνταγμά μας στο άρθρο 7 παρ., και κατ ΄ επέκταση της

[51] Μανιτάκη Αντώνη, ''Τα συνταγματικά δικαιώματα των κρατουμένων και η δικαστική προστασία τους'', ΠοινΧρον, ΛΘ' σελ. 166
[52] Ανδρουλάκη Κ. Νικόλαου, ''Ποινικό Δίκαιο, Γενικό Μέρος, Θεωρία για το έγκλημα''.σελ 39 επ.

συνταγματικής επιταγής της προστασίας της ανθρώπινης αξιοπρέπειας, είναι το άρθρο 3 της ΕΣΔΑ, σύμφωνα με το οποίο : ''*ουδείς επιτρέπεται να υποβληθεί εις βασάνους ούτε εις πονάς ή μεταχείρισιν απανθρώπους ή εξευτελιστικάς''*. Η ΕΣΔΑ έχει κυρωθεί από τη χώρα μας και αποτελεί αναπόσπαστο μέρος του ελληνικού εσωτερικού δικαίου, όπως ορίζει το άρθρο 28 παρ.1 του Συντάγματος.

Το ΕΔΔΑ έχει παρατηρήσει σε πολλές περιπτώσεις ότι η απαγόρευση συμπεριφοράς που προσβάλλει την ανθρώπινη αξία είναι απόλυτη και δεν επιδέχεται εξαιρέσεις, ακόμα και σε περιπτώσεις καταπολέμησης του οργανωμένου εγκλήματος ή της τρομοκρατίας ή και στην περίπτωση που διακινδυνεύεται η εθνική ασφάλεια.

Για να θεωρηθεί ταπεινωτική μια μεταχείριση στο πλαίσιο του άρθρου 3 της ΕΣΔΑ, λαμβάνονται υπόψιν τα δεδομένα της εκάστοτε υπόθεσης , η διάρκεια της κακομεταχείρισης και τα ψυχικά και σωματικά αποτελέσματά της, καθώς επίσης και το φύλο, η ηλικία και η κατάσταση της υγείας του θύματος.

Η Ευρωπαϊκή Επιτροπή, για την πρόληψη των βασανιστηρίων και της απάνθρωπης ή ταπεινωτικής μεταχείρισης ή τιμωρίας ερμήνευσε αρκετά πλατιά τις έννοιες της απάνθρωπης και ταπεινωτικής μεταχείρισης, περιλαμβάνοντας σε αυτές καταστάσεις όπως π.χ. η κράτηση πολλών καταδίκων σε ένα μικρό κελί[53].

Δ) *<u>Νομολογία ΕΔΔΑ</u>*

Το ΕΔΔΑ κλήθηκε, δυστυχώς, πάρα πολλές φορές, να κρίνει αν υπάρχει παραβίαση του άρθρου 3 της ΕΣΔΑ και προσβολής της ανθρώπινης αξιοπρέπειας.

Στην υπόθεση Kmetty v. Hungary[54], όπου ο ενάγων κατηγορούσε την Αστυνομίας της Ουγγαρίας για κακομεταχείριση, ξυλοδαρμό από αστυνομικούς, παράνομη κατακράτηση και τραυματισμούς , το δικαστήριο έκρινε ότι υπάρχει παραβίαση του άρθρου 3 της ΕΣΔΑ γιατί η απαγόρευση αυτής της συμπεριφοράς είναι απόλυτη και δεν επιδέχεται εξαιρέσεις ακόμα και σε περιπτώσεις καταπολέμησης του οργανωμένου εγκλήματος. Σύμφωνα με την αιτιολογία του δικαστηρίου, το άρθρο 3 αποτελεί θεμελιώδη αρχή της Δημοκρατίας και δεν είναι δεκτικό εξαιρέσεων και περιορισμών, ακόμα και σε θέματα εθνικής ασφάλειας και καταπολέμησης οργανωμένου εγκλήματος. Το Δικαστήριο κατέληξε σε αυτό το συμπέρασμα και στην επιδίκαση αποζημίωσης στον ενάγοντα, ακόμα και αν τα αποδεικτικά στοιχεία (ιατρική γνωμάτευση, μάρτυρες) ήταν ανεπαρκή, ακριβώς για το λόγο ότι η ανθρώπινη αξιοπρέπεια είναι ανεπίδεκτη περιορισμού.

[53] Τσήτσουρα Α., ''Σύντομη ανασκόπηση του έργου της Ευρωπαϊκής Επιτροπής για την πρόληψη των βασανιστηρίων και της απάνθρωπης ή ταπεινωτικής μεταχείρησης ή τιμωρίας. Η συμβολή των μη κυβερνητικών οργανώσεων'' στο ΙΜΔΑ, ''Κρατούμενοι και Δικαιώματα του Ανθρώπου'', σελ.94

[54] European Court of Human Rights, Second Section, Kmetty v. Hungary, Application no 57967/OO (Judgement 16 December 2003, Strasburg), βλ. Παράρτημα

Στην υπόθεση Sadic Onder v. Turkey[55], ο ενάγων ισχυρίστηκε ότι, μαζί με άλλα 14 άτομα, οδηγήθηκε στις φυλακές από την αντι-τρομοκρατική Υπηρεσία της Τουρκίας, κατηγορούμενος ως μέλος της τρομοκρατικής ομάδας PKK. Ο ενάγων υποστηρίζει ότι κακοποιήθηκε κατά τη διάρκεια της μεταφοράς του στο κρατητήριο και κατά τη διαμονή του εκεί. Συγκεκριμένα , ισχυρίστηκε ότι ξυλοκοπήθηκε, αναγκάστηκε να γυμνωθεί και να υποστεί εξευτελισμό, αφού τον κρέμασαν από τα χέρια και τον βασάνιζαν, χτυπώντας το κεφάλι του στον τοίχο και υποβάλλοντας τον σε ηλεκτροσόκ. Επίσης, παρά τη θέλησή του, αναγκάστηκε να υπογράψει μία δήλωση ότι όντως είναι μέλος της τρομοκρατικής οργάνωσης, και για αυτό το λόγο δεν έτυχε της επιβαλλόμενης δικαστικής προστασίας. Κατά την παράνομη κατακράτησή του (για μια βδομάδα), αστυνομικός τον ανάγκαζε σε ιατρική περίθαλψη, ώστε να εξαφανιστούν τα αποδεικτικά στοιχεία του βασανισμού του.
Το Δικαστήριο δέχτηκε τους ισχυρισμούς του, παρά την έλλειψη αποδεικτικών στοιχείων , στηριζόμενο στο απαραβίαστο της ανθρώπινης αξιοπρέπειας κατά το άρθρο 3 ΕΣΔΑ. Αρκεί και η πιθανολόγηση των βασανιστηρίων για να υπάρξει παραβίαση, ακόμα και αν πρόκειται για την καταστολή της τρομοκρατίας . Όπως έκρινε το ΕΔΔΑ, η έλλειψη αποτελεσματικής έρευνας για τις κατηγορίες του ενάγοντα από τις αρμόδιες εθνικές αρχές αποτελεί παραβίαση του άρθρου 3 της ΕΣΔΑ.

Ακόμα, στην υπόθεση Henaf c. France[56], κατά την οποία ο ενάγων (κρατούμενος) αλυσοδέθηκε κατά τη διάρκεια της νύχτας στο κρεβάτι του νοσοκομείου στο οποίον είχε μεταφερθεί για μία ιατρική επέμβαση, το ΕΔΔΑ έκρινε ότι υπήρξε παραβίαση του άρθρου 3 της ΕΣΔΑ γιατί η επικινδυνότητα του κρατουμένου δεν δικαιολογούσε το μέτρο αυτό. Παραβιάστηκε, δηλαδή, το άρθρο 3 της ΕΣΔΑ από απόψεως παραβίασης της αρχής της αναλογικότητας.

Τέλος, η Ελλάδα έχει καταδικαστεί από το ΕΔΔΑ στις υποθέσεις Dougoz c. Greece και Peers c. Greece[57] για παραβίαση του άρθρου 3 της ΕΣΔΑ. Το Δικαστήριο έκρινε, μεταξύ άλλων, ότι οι συνθήκες κράτησης ενός Σύριου και ενός Άγγλου κρατουμένου αντίστοιχα ισοδυναμούσαν με εξευτελιστική μεταχείριση κατά το άρθρο 3 ΕΣΔΑ.
(Εκτενής αναφορά στις αποφάσεις αυτές θα γίνει στο Β' Μέρος της παρούσας εργασίας).

[55] European Court of Human Rights, Third Section, Sadic Onder v. Turkey, Application no 28520/95 (Judgement 8 January 2004, Strasburg), βλ. Παράρτημα
[56] European Court of Human Rights, Premiere Section, Henaf c. France, Requete no 65346/01 (Judgement 27 november 2003)
[57] European Court of Human Rights, Third Section, Dougoz c. Greece, Application no 40907/98 (Judgement 6 March 2001), European Court of Human Rights, Second Section, Peers c. Greece, Application no 28524/95 (Judgement 19 April 2001)

2)Ισότητα (άρθρο 4 Σ)

Α) Γενικό περιεχόμενο:

Το άρθρο 4 παρ.1 του Συντάγματος κατοχυρώνει την ισότητα μεταξύ των Ελλήνων και το ανάγει σε μητρικό δικαίωμα, που συμπληρώνει το δικαίωμα στην ελευθερία και την καταστατική αρχή του Συντάγματος, την ανθρώπινη αξιοπρέπεια.
Σύμφωνα με το άρθρο 4 παρ.1 του Συντάγματος : *''Οι Έλληνες είναι ίσοι ενώπιον του νόμου''*. Με τη διάταξη αυτή καθιερώνεται η συνταγματική αρχή της ισότητας, που αποτελεί χαρακτηριστικό παράδειγμα ταυτόχρονης συνταγματικής καθιέρωσης αντικειμενικής αρχής και θεμελιώδους δικαιώματος.
Η αρχή της ισότητας διαχέεται σε όλη την έννομη τάξη και εμφανίζεται σε όλους τους τομείς του δικαίου με ειδικότερες μορφές. Η αρχή της ισότητας, όπως και κατοχυρώνεται συνταγματικά, έχει κυρίως την έννοια της ίσης μεταχείρισης[58]. Ίση μεταχείριση σημαίνει μεταχείριση χωρίς προσωπικές προκαταλήψεις και διακρίσεις. Πρόκειται για επιταγή απρόσωπης και αντικειμενικής κρίσεως και απαγόρευση κάθε αυθαίρετης διάκρισης (λόγω φύλου, φυλής, ηλικίας, κοινωνικής θέσης κτλ). Η αρχή δεν σημαίνει την ίδια μεταχείριση όλων των περιπτώσεων ˙ ως προς αυτό είναι αναλογική αρχή[59]. Απαγορεύεται συνεπώς η ίση (αριθμητική) μεταχείριση ουσιωδώς ανόμοιων περιπτώσεων, γιατί και αυτή αποτελεί στην πραγματικότητα αυθαίρετη μεταχείριση, αφού αγνοεί υφιστάμενα ή στηρίζεται σε ανυπόστατα ή άσχετα κριτήρια[60].
Φορείς του δικαιώματος είναι οι Έλληνες και Ελληνίδες, καθώς και τα νομικά πρόσωπα. Αν και το άρθρο 4 Σ δεν κάνει λόγο για ισχύ του δικαιώματος υπέρ των αλλοδαπών, κάτι τέτοιο όμως πρέπει να γίνει δεκτό εφόσον οι διεθνείς συνθήκες που κύρωσε η χώρα μας το επιβάλλουν.
Διατάξεις που κατοχυρώνουν την ισότητα υπάρχουν και στην ΕΣΔΑ (άρθρα 20-21) αλλά και στο ΣχΕυρΣ Χάρτη των Θεμελιωδών Δικαιωμάτων της Ένωσης , σε ειδικό κεφάλαιο με τον τίτλο ''Ισότητα'' (άρθρα ΙΙ-80 έως 86).

Β) ***Εφαρμογή στους κρατούμενους :***
Και οι κρατούμενοι έχουν δικαίωμα να απολαμβάνουν τα δικαιώματα που απορρέουν από την αρχή της ισότητας. Σύμφωνα με το άρθρο 3 παρ. 1 ΣωφρΚ : *''Απαγορεύεται κάθε δυσμενής διακριτική μεταχείριση των κρατουμένων, ιδίως εκείνη που βασίζεται στη φυλή, το χρώμα, την εθνική και κοινωνική καταγωγή, το θρήσκευμα, την περιουσία ή τις ιδεολογικές πεποιθήσεις''*. Ωστόσο, δεν θα πρέπει να θεωρηθεί πως όλες οι διακρίσεις που λαμβάνουν χώρα εντός των φυλακών είναι αντισυνταγματικές ως αντίθετες στο άρθρο 4 του Συντάγματος. Δεδομένου ότι όλες οι περιπτώσεις των κρατουμένων δεν είναι όμοιες και, εφόσον

[58] Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ', (2008), σελ.298
[59] Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ', (2008),σελ. 305
[60] Δαγτόγλου Π.Δ., ΄΄Συνταγματικό Δίκαιο, Ατομικά Δικαιώματα Β'΄΄(2005), σελ. 1357

αντισυνταγματική είναι και η ισότητα στην μεταχείριση ανόμοιων περιπτώσεων, πρέπει να γίνει δεκτό πως οι διακρίσεις (με την έννοια της κατηγοριοποίησης των φυλακισμένων, αλλά και της ειδικής μεταχείρισης) που γίνονται προς όφελος και εξυπηρέτηση των κρατουμένων δεν είναι αντίθετες, αλλά σύμφωνες με το Σύνταγμα. Έτσι, οι κρατούμενοι κατηγοριοποιούνται και κατανέμονται σε διαφορετικού τύπου καταστήματα βάσει κριτηρίων που σχετίζονται με τη νομική τους κατάσταση (υπόδικος ή κατάδικος, βραχύχρονη ή μακρόχρονη ποινή) , τις ειδικές απαιτήσεις της μεταχείρισής τους, τις ιατρικές τους ανάγκες, το φύλο, την ηλικία. Δικαιολογημένη είναι επίσης και η ειδική μεταχείριση των αλλοδαπών κρατουμένων, εφόσον βέβαια γίνεται υπέρ τους, βάσει της διαφοράς γλώσσας, θρησκείας κτλ.

3) Φυσική ελευθερία και ελεύθερη ανάπτυξη της προσωπικότητας (άρθρο 5 παρ. 1 και 3 Σ)

Α) ***Γενικό περιεχόμενο :***

Ελευθερία είναι ο βάσει της βούλησης του ανθρώπου προσδιορισμός της υλικής και πνευματικής του δραστηριότητας. Η ελευθερία έχει τρεις διαστάσεις : την υλική (ή σωματική) , την κοινωνική και την πνευματική. Στην κοινωνική ανήκει η κύρια έκφραση της νομικής ελευθερίας με την έννοια της μη δουλείας ˙ η κατάσταση ελευθερίας είναι αντίθετη προς την κατάσταση δουλείας. Η στοιχειώδης αυτή έκφραση της ελευθερίας συνδέεται με αυτή την ίδια την αναγνώριση του ανθρώπου ως υποκειμένου δικαιωμάτων και υποχρεώσεων. Έτσι , το δικαίωμα στην ελευθερία ανάγεται σε μητρικό δικαίωμα, άμεσα συνυφασμένο με το δικαίωμα στην ανθρώπινη αξιοπρέπεια και το δικαίωμα στην ισότητα[61].

Το δικαίωμα στη φυσική ελευθερία και την ελευθερία σε όλες τις εκφάνσεις της κατοχυρώνει και η ΕΣΔΑ στα άρθρα 4 και 5[62]. Επίσης, στο ΣχΕυρΣ στο Χάρτη Θεμελιωδών Δικαιωμάτων Ευρωπαϊκής Ένωσης, η ελευθερία προστατεύεται επανειλημμένα (άρθρα I-2, I-3, I -42, ενώ ο τίτλος ΙΙ είναι αφιερωμένος στις ‘’Ελευθερίες’’).

Η υλική (ή σωματική και με αυτή την έννοια φυσική) διάσταση της προσωπικής ελευθερίας είναι η ελευθερία κίνησης και ενέργειας στο φυσικό χώρο, στο φυσικό περιβάλλον. Ελεύθερος άνθρωπος είναι εκείνος που μπορεί, που δεν εμποδίζεται από άλλους να μεταβεί όπου ο ίδιος επιθυμεί. Ελευθερία κίνησης στο φυσικό περιβάλλον και η στενά με αυτήν συνδεδεμένη ελευθερία εγκατάστασης ανήκουν στο στοιχειώδες περιεχόμενο της προσωπικής ελευθερίας stricto sensu.

Αυτή η μορφή ελευθερίας κατοχυρώνεται στο άρθρο 5 παρ. 3 του Συντάγματος, σύμφωνα με την οποία : *‘’Η προσωπική ελευθερία είναι απαραβίαστη. Κανένας*

[61] Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ’, (2008), σελ. 340 επ.

[62] Σύμφωνα με το άρθρο 4 παρ. 1 ΕΣΔΑ : *‘’ουδείς δύναται να κρατηθεί εις δουλείαν ή ειλωτείαν’’,* ενώ σύμφωνα με το άρθρο 5 παρ 1[α] ΕΣΔΑ : ‘’παν πρόσωπον έχει δικαίωμα εις την ελευθερίαν..’’.

δεν καταδιώκεται ούτε συλλαμβάνεται ούτε φυλακίζεται ούτε με οποιονδήποτε άλλο τρόπο περιορίζεται, παρά μόνο όταν και όπως ορίζει ο νόμος''. Η διάταξη αυτή, τελεί υπό τη γενική επιφύλαξη του νόμου, χωρίς αυτό να σημαίνει πως ο νομοθέτης ή η κανονιστική διοίκηση είναι ελεύθεροι να θεσπίσουν οποιουσδήποτε περιορισμούς της ελευθερίας αυτής, καθώς υπόκεινται στους ''περιορισμούς των περιορισμών''. Η παρ. 4 του ιδίου άρθρου απαγορεύει τη λήψη ατομικών διοικητικών μέτρων που περιορίζουν σε οποιονδήποτε Έλληνα την ελεύθερη κίνηση ή εγκατάσταση στη χώρα, καθώς και την ελεύθερη έξοδο και είσοδο σε αυτήν, με εξαίρεση τις περιπτώσεις που επιβάλλονται ως παρεπόμενη ποινή με απόφαση ποινικού δικαστηρίου σε εξαιρετικές περιπτώσεις ανάγκης και μόνο για την πρόληψη αξιόποινων πράξεων, όπως νόμος ορίζει.
Φορείς του δικαιώματος είναι καταρχήν μόνο φυσικά πρόσωπα, αφού τα νομικά πρόσωπα στερούνται φυσικής-σωματικής υπόστασης, Έλληνες και αλλοδαποί, αφού το άρθρο 5 παρ. 3 Σ δεν διακρίνει σχετικά και βάσει διεθνών συνθηκών. Παράλληλα, η παρ. 2 του ίδιου άρθρου προβλέπει την προστασία της ελευθερίας όλων όσων βρίσκονται στην ελληνική επικράτεια ανεξάρτητα από την εθνικότητά τους.

Η ελεύθερη ανάπτυξη της προσωπικότητας ακολουθεί το δικαίωμα στη φυσική ελευθερία. Προσωπικότητα είναι ο ειδικός συνδυασμός των γενικών, πνευματικών και κοινωνικών γνωρισμάτων του ανθρώπινου γένους σε συγκεκριμένο άτομο[63]. Το Σύνταγμα, στο άρθρο 5 παρ. 1 κατοχυρώνει την ελεύθερη ανάπτυξη της προσωπικότητας ως εξής :*''καθένας έχει δικαίωμα να αναπτύσσει ελεύθερα την προσωπικότητά του και να συμμετέχει στην κοινωνική, οικονομική και πολιτική ζωή τις Χώρας, εφόσον δεν προσβάλλει τα δικαιώματα των άλλων και δεν παραβιάζει το Σύνταγμα ή τα χρηστά ήθη''*. Είναι και αυτό μητρικό δικαίωμα και τελεί σε σχέση γενικού προς ειδικό με όλες τις άλλες συνταγματικές διατάξεις που κατοχυρώνουν ανθρώπινα δικαιώματα. Το γενικό περιεχόμενο του δικαιώματος συνίσταται στο δικαίωμα αυτοκαθορισμού του ατόμου στις τρεις βασικές ελευθερίες (συμμετοχή στην οικονομική, κοινωνική και πολιτική ζωή)[64].
Φορείς του δικαιώματος στην προσωπικότητα είναι – όπως και στην φυσική ελευθερία- Έλληνες και αλλοδαποί. Τέλος, η ελευθερία εν γένει υπάγεται στις τρεις οριοθετικές ρήτρες (κοινωνικότητα, χρηστότητα, νομιμότητα).

Β) *<u>Εφαρμογή στους κρατούμενους:</u>*
Η στέρηση της ελευθερίας αποτελεί έντονο περιορισμό της ελευθερίας, ο οποίος απαντά συχνά και με διάφορες μορφές στην ποινική σχέση. Η ελευθερία προσαρμόζεται θεσμικά στο πλαίσιο της ποινικής σχέσης, στο πλαίσιο των ποινικών θεσμών, τους οποίους γνωρίζει και προστατεύει ο συντακτικός νομοθέτης. Το Σύνταγμα δεν αναφέρεται ρητά στον περιορισμό της ελευθερίας των κρατουμένων. Γνωρίζει όμως τη φυλάκιση ως ποινή (όπως π.χ. στο άρθρο 6

[63] Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ', (2008), σελ. 352
[64] Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ', (2008), σελ. 355 επ.

Σ) και τον θεσμό των φυλακών. Το ότι ο συντακτικός νομοθέτης δεν αναφέρεται ρητά στην ελευθερία των κρατουμένων δεν σημαίνει ότι δεν εφαρμόζεται. Το άρθρο 5 παρ. 1 Σ εφαρμόζεται και στο πλαίσιο του θεσμού των φυλακών, προσαρμοζόμενο αναλόγως στο θεσμό αυτό[65].

Το βασικό , όμως, συνταγματικό δικαίωμα που περιορίζεται στην περίπτωση των κρατουμένων είναι το δικαίωμα της φυσικής ελευθερίας που κατοχυρώνεται στο άρθρο 5 παρ. 3 του Συντάγματος. Ο περιορισμός του δικαιώματος αυτού συνίσταται στην στέρηση μίας μόνο έκφανσης της προσωπικής ελευθερίας, αυτής της κίνησης και διαμονής[66]. Ο κρατούμενος δεν μπορεί να κινείται και να διαμένει ελεύθερα εντός ή εκτός της χώρας.

Οι ποινές κατά της προσωπικής ελευθερίας αποκαλούνται ‘’στερητικές της ελευθερίας ‘’ για λόγους ιστορικούς, καθώς και σε παλαιότερες εποχές, κατά την έκτισή τους ο κρατούμενος στερούνταν εντελώς την προσωπική του ελευθερία σε όλη της την έκταση, φυσική, νομική και προσωπική. Σήμερα, μία τέτοια έκτιση της ποινής θα προσέβαλε μία σειρά από κατοχυρωμένα ανθρώπινα δικαιώματα, κυρίως όμως θα ήταν αντίθετη στην απαγόρευση υποβολής οποιουδήποτε ατόμου σε απάνθρωπη ή σκληρή μεταχείριση ή ποινή[67]. Θα ήταν ορθότερο, επομένως, να γίνεται λόγος για στερητική της ελευθερίας ποινή.

Ποια είναι όμως τα ελάχιστα όρια, ο πυρήνας του δικαιώματος της ελευθερίας , μέχρι τα οποία μπορεί να περιοριστεί η δυνατότητα φυσικής-σωματικής μετακίνησης του κρατουμένου στο χώρο των φυλακών, έτσι ώστε η ποινή να διατηρεί το χαρακτήρα της ως τέτοια και να μη μεταβάλλεται σε σκληρή και εξευτελιστική μεταχείριση;

Οποιεσδήποτε και αν είναι οι συνθήκες κράτησης, το άτομο πρέπει να διαθέτει ένα ελάχιστο όριο άθικτης προσωπικής ελευθερίας κίνησης κατά τόπο και κατά χρόνο[68]. Έτσι, ο Σωφρονιστικός Κώδικας προβλέπει πως τα ατομικά κελιά πρέπει να έχουν χωρητικότητα τουλάχιστον 35 κυβικών μέτρων ή 40 κυβικών μέτρων εφόσον πρόκειται για μητέρες που έχουν μαζί τα βρέφη τους (άρθρο 20 παρ. 2) · τα καταστήματα κράτησης πρέπει να διαθέτουν επαρκείς ανοικτούς χώρους αυλισμού και να εξασφαλίζουν άνετη κυκλοφορία και χώρους κίνησης (άρθρο 21) · επίσης, καθιερώνεται ένα ελάχιστο χρονικό όριο ελευθερίας (όχι απλώς ελεύθερου χρόνου στο πλαίσιο του ημερησίου προγράμματος της φυλακής αλλά χρόνου ελευθερίας κατά τη διάρκεια εκτέλεσης της ποινής), με τη θέσπιση ενός συστήματος αδειών εξόδου (άρθρα 54-55). Οι άδειες χορηγούνται βέβαια υπό τις εξής προϋποθέσεις : α) ο κατάδικος να έχει εκτίσει το ένα πέμπτο της ποινής του, β) να μην εκκρεμεί εναντίον του ποινική διαδικασία για αξιόποινη πράξη σε βαθμό κακουργήματος, γ) να εκτιμάται πως δεν υπάρχει κίνδυνος τελέσεως κατά τη διάρκεια της άδειας νέων εγκλημάτων, δ) να συντρέχουν λόγοι που

[65] Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ’, (2008), σελ. 364-365

[66] Μανιτάκη Αντώνη, ‘’Τα συνταγματικά δικαιώματα των κρατουμένων και η δικαστική προστασία τους’’, ΠοινΧρον, ΛΘ’ σελ. 164

[67] Αλεξιάδη Σ. ‘’Ανθρώπινα δικαιώματα-Ποινική Καταστολή, Δώδεκα Μελέτες’’(1990), σελ. 129-130

[68] Αλεξιάδη Σ, ‘’Σωφρονιστική’’ (2001) , σελ. 369

δικαιολογούν την προσδοκία πως δεν υπάρχει κίνδυνος φυγής και ότι ο κρατούμενος δε θα κάνει κακή χρήση της αδείας του. Άδειες προβλέπονται και από τον ΕυρΣωφρΚαν.
Επίσης, σύμφωνα με τον κανόνα 37 του ΕυρΣωφρΚαν του 1987, απαγορεύεται η παραμονή του κρατουμένου σε σκοτεινό κελί ως πειθαρχικό μέτρο. Από αυτό, συνάγεται ότι η παραμονή σε κελί ευάερο και ευήλιο επιτρέπεται ως πειθαρχικό μέτρο[69].

4)Το δικαίωμα στη ζωή (άρθρο 5 παρ. 2 Σ)

Α) Γενικό Περιεχόμενο:

Το άρθρο 5 παρ. 2 Σ κατοχυρώνει το δικαίωμα στη ζωή και αξίωση για προστασία της : *'' Όλοι όσοι βρίσκονται στην ελληνική Επικράτεια απολαμβάνουν την απόλυτη προστασία της ζωής, της τιμής και της ελευθερίας τους, χωρίς διάκριση εθνικότητας, φυλής, γλώσσας και θρησκευτικών ή πολιτικών πεποιθήσεων. Εξαιρέσεις επιτρέπονται στις περιπτώσεις που προβλέπει το διεθνές δίκαιο''*. Η προστασία της ζωής αποτελεί αντικειμενικό κανόνα δικαίου και ατομικό δικαίωμα, αφού, καίτοι δεν ανήκει στα ''κλασσικά'' ατομικά δικαιώματα, αναγνωρίζεται σε κάθε άνθρωπο ˙ είναι δε μητρικό δικαίωμα, το οποίο δεν υπόκειται σε οριοθετήσεις και περιορισμούς[70]. Το Σύνταγμα προβλέπει την απόλυτη προστασία της ζωής, αποκλείοντας έτσι οποιουδήποτε είδους εξαιρέσεις, εκτός των περιπτώσεων που προβλέπει το διεθνές δίκαιο. Άλλωστε, το δικαίωμα στην προστασία της ζωής προστατεύεται και σε επίπεδο διεθνούς δικαίου : στο άρθρο 2 της ΕΣΔΑ[71] και στο άρθρο ΙΙ-62 του ΣχΕυρΣ.
Φορείς του δικαιώματος στη ζωή είναι όλα τα φυσικά πρόσωπα, ημεδαποί, αλλοδαποί και ανιθαγενείς, ενώ τα νομικά πρόσωπα δεν έχουν κυριολεκτικά ζωή, αλλά δικαίωμα υπόστασης[72].

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[69] Αλεξιάδη Σ, ''Σωφρονιστική'' (2001), σελ. 355
[70] Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ', (2008), σελ. 387
[71] Σύμφωνα με το άρθρο 2 της ΕΣΔΑ: *''1.Το δικαίωμα εκάστου προσώπου εις την ζωήν προστατεύεται υπό του νόμου. Εις ουδένα δύναται να επιβληθεί εκ προθέσεως θάνατος, ειμή εις εκτέλεσιν θανατικής ποινής εκδιδομένης υπό δικαστηρίου εν περιπτώσει αδικήματος τιμωρουμένου υπό του νόμου δια της ποινής ταύτης. 2. Ο θάνατος δεν θεωρείται ως επιβαλλόμενος κατά παράβασην του άρθρου τούτου, εις ας περιπτώσεις θα επήρχετο συνεπεία χρήσεως βίας καταστάσης απολύτως αναγκαίας: α) δια την υπεράσπισιν οιουδήποτε προσώπου κατά παρανόμου βίας, β) δια την πραγματοποίησιν νομίμου συλλήψεως ή προς παρεμπόδισιν αποδράσεως προσώπου νομίμως κρατουμένου, γ) δια την καταστολήν, συμφώνως με τω νόμω, στάσεως ή ανταρσίας.''*
[72] Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ', (2008), σελ. 387-388

Β) *<u>Εφαρμογή στους κρατούμενους :</u>*

Εφόσον η προστασία της ζωής είναι απόλυτη, είναι αυτονόητο πως το σχετικό δικαίωμα απολαμβάνουν πλήρως και οι κρατούμενοι. Ο σεβασμός της ζωής τους είναι πρωταρχικής σημασίας και θα πρέπει το κράτος και οι σωφρονιστικές αρχές να μεριμνούν ώστε οι συνθήκες διαβίωσης στα καταστήματα κράτησης να είναι τέτοιες ώστε να εξασφαλίζεται η προστασία της ζωής των κρατουμένων.
Το Κράτος οφείλει να λαμβάνει όλα τα αναγκαία μέτρα για την διασφάλιση του δικαιώματος της ζωής από ιδιωτικές προσβολές. Εκτός από την απαγόρευση σωματικών ποινών και βασανιστηρίων (τα οποία θίγουν και την ανθρώπινη αξιοπρέπεια) στο δικαίωμα αυτό περιέχεται και η προστασία του κρατουμένου από βλάβες που θα μπορούσε να υποστεί η σωματική του ακεραιότητα από τους συγκρατούμενούς του. Ο ΣωφρΚ προβλέπει τον διαχωρισμό των κρατουμένων ανάλογα με την ποινή που εκτίουν, καθώς και τον διαχωρισμό των νεαρών κρατούμενων , των γυναικών και των υποδίκων και την κράτησή τους σε χωριστούς χώρους.
Δυστυχώς, βέβαια, η πραγματικότητα των φυλακών πολύ απέχει από το να χαρακτηριστεί προστατευτική της ζωής των κρατουμένων, αφού φαινόμενα, που αποτελούν καθημερινότητα των φυλακών (βιαιοπραγίες μεταξύ των κρατουμένων, παράνομη οπλοκατοχή, εμπόριο ναρκωτικών) τη θέτουν συνεχώς σε κίνδυνο.

Εξαίρεση στο δικαίωμα της ζωής αποτελεί η θανατική ποινή, η οποία όμως δεν επιβάλλεται παρά μόνο στις περιπτώσεις που προβλέπονται από το νόμο για κακουργήματα που εκτελούνται σε καιρό πολέμου και σχετίζονται με αυτόν (άρθρο 7 παρ.3 Σ). Η θανατική ποινή πλήττει ανεπανόρθωτα το δικαίωμα στη ζωή και είναι απολύτως αντίθετη με τον ‘’κοινωνικό’’ σκοπό της ποινής . Για το λόγο αυτό και στον ΠΚ, όπου αναφέρεται η θανατική ποινή, εννοείται η ποινή της ισόβιας κάθειρξης[73].
Μία άλλη εξαίρεση από το δικαίωμα της ζωής των κρατουμένων προβλέπεται στις περιπτώσεις απόδρασης ή ανταρσίας (άρθρο 2 παρ. 2 γ’ ΕΣΔΑ). Η χρήση βία , σε αυτές τις περιπτώσεις, από αστυνομικά όργανα που καταλήγει στη θανάτωση του παρανομούντος-κρατούμενου δεν αντίκειται στο Σύνταγμα , εφόσον γίνεται είναι κατά τα λοιπά νόμιμη. Η άσκηση όμως κρατικής βίας και κρατικού καταναγκασμού στις περιπτώσεις αυτές μπορεί να γίνει δεκτή μόνο υπό τις εγγυήσεις της αρχής της αναλογικότητας, που συνάγεται κατά λογική αναγκαιότητα από την κατά άρθρο 25 παρ. 1 Σ υποχρέωση των αστυνομικών

[73] Ανδρουλάκη Κ. Νικόλαου, ‘’Ποινικό Δίκαιο, Γενικό Μέρος, Θεωρία για το έγκλημα’’.σελ. 5, από όπου κ. υποσ. 6 : *‘’Η ποινή του θανάτου καταργείται. Όπου στις κείμενες διατάξεις προβλέπεται για ορισμένη αξιόποινη πράξη αποκλειστικώς η ποινή του θανάτου, νοείται ότι απειλείται η ποινή της ισόβιας κάθειρξης. Αν η ποινή του θανάτου προβλέπεται διαζευκτικώς με άλλη ποινή, νοείται ότι απειλείται μόνο η τελευταία’’. (άρ. 33 παρ. 1 ν.2172/1993).*

οργάνων να διασφαλίζουν την ανεμπόδιστη άσκηση των δικαιωμάτων και να περιορίζουν τις νόμιμες προσβολές σε ένα minimum ενόψει και της βαρύτητας της απειλούμενης ή διαπραττόμενης αξιόποινης πράξης. Συνεπώς, η διακινδύνευση της ζωής, στις περιπτώσεις αυτές, γίνεται δεκτή μόνο όταν τηρείται η αρχή της αναλογικότητας και όταν δεν μπορεί να αποτραπεί με άλλο τρόπο άμεσος και σπουδαίος κίνδυνος που απειλεί άλλα ισόβαθμα ή υπέρτερα αγαθά[74].

5)Το δικαίωμα στην υγεία:

Α) Γενικό Περιεχόμενο:

Υγεία είναι η φυσική, σωματική και πνευματική κατάσταση του ανθρώπου, είναι ένα φυσικό αγαθό που ανάγεται στην υπόσταση του ανθρώπου και αποτελεί απαραίτητο συνακόλουθο της ζωής. Σύμφωνα με το άρθρο 5 παρ. 5 Σ, η οποία προστέθηκε με την αναθεώρηση του 2001 : *''Καθένας έχει δικαίωμα στην προστασία της υγείας και της γενετικής του ταυτότητας''.* Έτσι, η υγεία κατοχυρώθηκε ως αντικειμενική συνταγματική αρχή, αλλά και ως δικαίωμα κοινωνικό, με την ευρύτερη έννοια του όρου[75]. Βάσει του Συντάγματος, η υγεία ανάγεται σε υποχρέωση του Κράτους για μέριμνα υπέρ των πολιτών (άρθρο 20 παρ.3 Σ).

Το δικαίωμα στην υγεία είναι άμεσα συνυφασμένο με το άρθρο 5 παρ. 2 του Συντάγματος , όπου θεμελιώνεται και η απόλυτη προστασία της υγείας ˙ αλλά και με το άρθρο 7 παρ. 2 του Συντάγματος περί απαγορεύσεως των βασανιστηρίων. Το δικαίωμα στην υγεία περιλαμβάνει τόσο την σωματική (βασανιστήρια) όσο και την ψυχική. Πράξεις που επιφέρουν σωματική κάκωση και βλάβη της υγείας συντρέχουν και όταν δεν προκαλούν άμεσο πόνο. Άσκηση ψυχικής – ψυχολογικής βίας είναι ο κάθε είδους εκβιασμός. Προσβολή της ανθρώπινης αξιοπρέπειας αποτελούν και οι ιατρικές επεμβάσεις ή η θεραπευτική αγωγή χωρίς την συναίνεση του ασθενούς (εκτός από τις περιπτώσεις καταστάσεως ανάγκης και άμεσου και σπουδαίου κινδύνου της ζωής του[76].

Φορείς του δικαιώματος είναι όλα τα φυσικά πρόσωπα, ημεδαποί, αλλοδαποί και ανιθαγενείς.

Το δικαίωμα στην υγεία κατοχυρώνεται στην Ευρωπαϊκή Σύμβαση για τα Ανθρώπινα Δικαιώματα και τη Βιοϊατρική, η οποία κυρώθηκε από τη χώρα μας με το ν. 2619/1998, αλλά και στα άρθρα 35, 63 και 64 του Χάρτη Θεμελιωδών Δικαιωμάτων Ευρωπαϊκής Ένωσης[77].

Β) *Εφαρμογή στους κρατούμενους :*

[74] Δαγτόγλου Π.Δ., ΄΄Συνταγματικό Δίκαιο, Ατομικά Δικαιώματα Α΄΄΄(2005), σελ. 244
[75] Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ', (2008), σελ. 405
[76] Δαγτόγλου Π.Δ., ΄΄Συνταγματικό Δίκαιο, Ατομικά Δικαιώματα Α΄΄΄(2005), σελ. 256 επ.
[77] Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ', (2008), σελ. 407

Οι κρατούμενοι, λόγω της ιδιαίτερης θέσης στην οποία βρίσκονται και των εξαιρετικών συνθηκών υπό τις οποίες διαβιούν έχουν αυξημένη ανάγκη προστασίας των δικαιωμάτων τους στην υγεία και την σωματική και ψυχική ακεραιότητα. Είναι λοιπόν ανεπίτρεπτο να υφίστανται βασανιστήρια ή να τους επιβάλλονται απάνθρωπες και εξευτελιστικές πειθαρχικές ποινές (βλ. και άρθρο 3 ΕΣΔΑ[78]). Για την ειδική κυριαρχική σχέση των κρατουμένων προσβολή της υγείας θεωρείται και η ακατάλληλη και ανεπαρκής διατροφή, η παρατεταμένη απομόνωση του κρατουμένου, ο εγκλεισμός τους σε σκοτεινό και μικρής χωρητικότητας κελί ως πειθαρχική ποινή, η στείρωση κρατουμένου σεξουαλικού εγκληματία (αν και υπάρχει και η αντίθετη άποψη[79]).

Το δικαίωμα στην υγεία συνεπάγεται ότι κατά την κράτη λαμβάνονται όλα τα μέσα για την πρόληψη μετάδοσης νοσημάτων, αλλά και για την περίθαλψη των κρατουμένων. Σύμφωνα με το άρθρο 25 του ΣωφρΚ. , η διεύθυνση του καταστήματος κράτησης εξασφαλίζει στους κρατούμενους τους όρους υγιεινής στο κατάστημα, διατηρεί σε καλή λειτουργία όλες τις εγκαταστάσεις και παρέχει τα μέσα για την ατομική υγιεινή και καθαριότητα. Επίσης, τα ατομικά κελιά πρέπει να είναι ευάερα και ευήλια και να διαθέτουν εγκαταστάσεις θέρμανσης. Σύμφωνα με το άρθρο 27, η διεύθυνση παρέχει ιατροφαρμακευτική περίθαλψη αναλόγου επιπέδου με αυτό του υπόλοιπου πληθυσμού. Για τον καθένα τηρείται ατομικό δελτίο υγείας, γνώση του οποίου έχουν μόνο ο κρατούμενος και οι αρμόδιοι φορείς, καθώς το απόρρητο εξασφαλίζεται σε κάθε περίπτωση. Πρόνοια λαμβάνεται για την διατροφή των κρατουμένων, η οποία πρέπει να είναι κατάλληλη ενώ είναι δυνατόν να προβλεφθούν ειδικά διαιτολόγια όπου αυτό επιβάλλεται. Η ενδυμασία των κρατουμένων πρέπει να είναι ευπρεπής και καθαρή και σε καμία περίπτωση δεν επιτρέπεται να έχει εξευτελιστικό ή ταπεινωτικό χαρακτήρα. Σε περιπτώσεις σοβαρού προβλήματος υγείας είναι δυνατόν να δοθεί χάρη στον κρατούμενο.

Σύμφωνα, ακόμη, με το άρθρο 36 του ΣωφρΚ., τουλάχιστον μία ώρα καθημερινά διατίθεται στους κρατούμενους για σωματική άσκηση και άθληση για τη διατήρηση της φυσικής και ψυχικής τους υγείας. Κατάλληλοι χώροι για την άσκηση αυτού του δικαιώματος πρέπει να δημιουργηθούν και προβλέπονται προγράμματα άσκησης που επιβλέπονται από γυμναστές.

Σύμφωνα, τέλος, με το άρθρο 29 του ΣωφρΚ. απαγορεύεται η διενέργεια πειραμάτων στους κρατουμένους, ενώ κάθε ιατρική επέμβαση πρέπει να γίνεται κατόπιν συναινέσεως, εκτός αν ο κρατούμενος δεν είναι σε θέση να συναινέσει ή αρνείται και υπάρχει κίνδυνος για την υγεία του. Για τις περιπτώσεις όπου ο κρατούμενος κατέρχεται σε απεργία πείνας, το άρθρο 31 του ΣωφρΚ. προβλέπει τη διαρκή ιατρική του επίβλεψη και τη λήψη των αναγκαίων μέτρων σε περίπτωση κινδύνου της ζωής του.

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[78] Επειδή τα βασανιστήρια αποτελούν και κατάφωρη προσβολή της ανθρώπινης αξιοπρέπειας, η σχετική νομολογία του ΕΔΔΑ αναπτύχθηκε στο παραπάνω κεφάλαιο περί ανθρώπινης αξιοπρέπειας.

[79] Δαγτόγλου Π.Δ., ΄΄Συνταγματικό Δίκαιο, Ατομικά Δικαιώματα Α΄΄΄(2005), σελ. 257, όπου η συναίνεση του εγκληματία νομιμοποιεί την προσβολή της υγείας του.

6)Προσωπική Ασφάλεια (άρθρο 6 Σ)

Α) Γενικό Περιεχόμενο:

Η ελευθερία από καταδίωξη, σύλληψη και φυλάκιση κατοχυρώνεται στο άρθρο 6 του Συντάγματος, το οποίο ορίζει και τη νόμιμη διαδικασία. Η προσωπική ασφάλεια, σε συνδυασμό με το άρθρο 5 του Συντάγματος, συμπληρώνει το δικαίωμα στη φυσική ελευθερία. Η προσωπική ασφάλεια υπόκειται σε ‘’επιφύλαξη νόμου’’[80], χωρίς όμως να σημαίνει και ελευθερία του νομοθέτη να ορίζει περιορισμούς. Αντίθετα , ο νομοθέτης περιορίζεται με τη σειρά του από τρεις πηγές : πρώτον , το απαραβίαστο του πυρήνα της προσωπικής ελευθερίας, δεύτερον, από το ίδιο το Σύνταγμα που ορίζει ρητώς στο άρθρο 6 τις κύριες προϋποθέσεις της συλλήψεως και τη βασική διαδικασία και την ανώτατη διάρκεια της προσωρινής κράτησης – προφυλάκισης και , τρίτον, από τα άρθρα 7 και 8 του Συντάγματος, σύμφωνα με τα οποία απαγορεύεται η αναδρομικότητα ποινικού νόμου και κατοχυρώνεται η αρχή του φυσικού δικαστή.

Το περιεχόμενο του άρθρου 6 μπορεί να ανασταλεί στα πλαίσια της εφαρμογής του άρθρου 48 του Συντάγματος.

Φορείς του δικαιώματος στην προσωπική ασφάλεια είναι όλα τα φυσικά πρόσωπα, ημεδαποί, αλλοδαποί και ανιθαγενείς.

Σχετικά κατοχυρώνονται τα δικαιώματα των υποδίκων στο άρθρο 6 της ΕΣΔΑ.

Β) *Εφαρμογή στους κρατούμενους :*

Το άρθρο 6 του Συντάγματος αφορά αμέσως τους κρατουμένους, οι οποίοι δεν πρέπει να στερηθούν κανένα δικαίωμά τους και να ακολουθηθεί η νόμιμη διαδικασία πριν οδηγηθούν στην φυλακή.

Οι προϋποθέσεις για τη διαδικασία της σύλληψης και της προσωρινής κράτησης είναι η νομοθετική πρόβλεψή τους, η έκδοση αιτιολογημένου δικαστικού εντάλματος και η επίδοσή του κατά τη στιγμή της σύλληψης ή της προσωρινής κράτησης, η προσαγωγή στον ανακριτή και η μη υπέρβαση του ανώτατου ορίου διάρκειας της προσωρινής κράτησης.

Έτσι, όποιος συλλαμβάνεται για αυτόφωρο έγκλημα ή με ένταλμα προσάγεται στον αρμόδιο ανακριτή το αργότερο μέσα σε είκοσι τέσσερις ώρες από τη σύλληψη, με εξαίρεση την περίπτωση που η σύλληψη έγινε μέσα στον απολύτως αναγκαίο χρόνο για τη μεταγωγή του. Στη συνέχεια, ο ανακριτής οφείλει, μέσα σε τρεις μέρες από την προσαγωγή, να είτε απολύσει τον συλληφθέντα είτε να εκδώσει ένταλμα φυλάκισης, η προθεσμία αυτή παρατείνεται για δύο ημέρες, αν το ζητήσει αυτός που έχει προσαχθεί ή, σε περίπτωση ανωτέρας βίας που βεβαιώνεται αμέσως, με απόφαση του αρμόδιου δικαστικού συμβουλίου.

Μετά την πάροδο αυτών των προθεσμιών, κάθε υπάλληλος στον οποίο έχει ανατεθεί η κράτηση του συλληφθέντος οφείλει να τον απολύσει αμέσως.

[80] Δαγτόγλου Π.Δ., ΄΄Συνταγματικό Δίκαιο, Ατομικά Δικαιώματα Α’΄΄(2005), σελ. 280-281

Το ανώτατο όριο της προφυλάκισης ορίζεται με νόμο, αλλά δεν μπορεί να υπερβεί τα ανώτατα όρια που ορίζονται από το Σύνταγμα (ένα έτος για τα κακουργήματα και έξι μήνες για τα πλημμελήματα). Η παράταση αυτών των ορίων κατά έξι και τρεις μήνες αντίστοιχα γίνεται μόνο σε εντελώς εξαιρετικές περιπτώσεις και με απόφαση του αρμόδιου δικαστικού συμβουλίου. Η διαδοχική επιβολή αυτού του μέτρου απαγορεύεται.
Για την παράνομη σύλληψη και κράτηση προβλέπονται στο Σύνταγμα ποινικές και πειθαρχικές κυρώσεις του υπαίτιου κρατικού οργάνου, καθώς και αστική ευθύνη του κράτους αλλά και του υπαιτίου οργάνου[81].
Τέλος, το Σύνταγμα δεν επιτάσσει την ειδοποίηση συγγενούς η προσώπου της εμπιστοσύνης του συλλαμβανομένου επί συλλήψεως. Το δικαίωμα αυτό προβλέπεται όμως από την Ευρωπαϊκή Επιτροπή για την Πρόληψη των Βασανιστηρίων και της Απάνθρωπης ή Ταπεινωτικής Μεταχείρισης ή Τιμωρίας, η οποία, στο επίπεδο της αστυνομικής κράτησης, αποδίδει μεγάλη σημασία σε αυτό το δικαίωμα καθώς και στο δικαίωμα συνάντησης των κρατουμένων με δικηγόρο της εκλογής του[82]. Αν δεν υπάρχει δικηγόρος του κατηγορουμένου, ορίζεται αυτεπαγγέλτως από το Δικαστήριο, αν το ζητήσει ο κατηγορούμενος, σύμφωνα με το άρθρο 100 παρ. 3 ΚΠοινΔ.

Γ) *<u>Νομολογία ΕΔΔΑ</u>*
Δυστυχώς, παρά τις ρητές διατάξεις τόσο του Συντάγματος όσο και της ΕΣΔΑ, η Ελλάδα καταδικάστηκε από το ΕΔΔΑ για παράβαση του άρθρου 6 παρ. 1 της ΕΣΔΑ, που προβλέπει την πρόσβαση του κατηγορουμένου σε δικαστήριο σε εύλογο χρονικό διάστημα από την απαγγελία της ποινικής κατηγορίας, στην υπόθεση Portington v. Greece.[83]

<u>7) Η αρχή nullum crimen nulla poena sine lege (ncnpsl) :</u>

<u>Α) Γενικό Περιεχόμενο:</u>
Σύμφωνα με το άρθρο 7 παρ.1 Σ :''Έγκλημα δεν υπάρχει ούτε ποινή επιβάλλεται χωρίς νόμο που να ισχύει πριν από την τέλεση της πράξης και να ορίζει τα στοιχεία της . Ποτέ δεν επιβάλλεται ποινή βαρύτερη από εκείνη που προβλεπόταν κατά την τέλεση της πράξης'' . Έτσι, κατοχυρώνεται και συνταγματικά η θεμελιώδης αρχή του ποινικού δικαίου nullum crimen nulla poena sine lege .Οι προϋποθέσεις του ποινικού κολασμού που θέτει το άρθρου 7

[81] Ανδρουλάκη Κ. Νικ, ''Θεμελιώδεις Αρχές της Ποινικής Δίκης'', (1994), σελ 224 επ. , 292 επ.
[82] Τσήτσουρα Α., ''Σύντομη ανασκόπηση του έργου της Ευρωπαϊκής Επιτροπής για την Πρόληψη των Βασανιστηρίων και της Απάνθρωπης ή Ταπεινωτικής Μεταχείρισης ή Τιμωρίας. Η συμβολή των μη κυβερνητικών οργανώσεων'' στο ΙΜΔΑ, ''Κρατούμενοι και Δικαιώματα του Ανθρώπου'', σελ. 96
[83] Η υπόθεση αυτή, λόγω της σημασίας της, θα αναλυθεί στο Β' Μέρος της παρούσας εργασίας.

παρ.1 Σ είναι η τέλεση εγκλήματος (ως έγκλημα εδώ δεν νοείται μόνο ό,τι περιλαμβάνει ο σχετικός όρος στο χώρο του ποινικού δικαίου , αλλά κάθε απαγορευμένη και κατά συνέπεια
τιμωρούμενη πράξη , επομένως και διοικητικά και πειθαρχικά αδικήματα) , η ύπαρξη νόμου κατά το χρόνο ενέργειας και όχι του αποτελέσματος, και η πρόβλεψη στο νόμο της αξιόποινης πράξης και ο ορισμός των στοιχείων της , με την έννοια πως πρέπει να περιγράφεται σαφώς και να συνάγεται το κοινωνικό της νόημα . Η απαγόρευση της αναδρομικότητας καλύπτει μόνο τον δυσμενέστερο ποινικό νόμο , ενώ επιτρέπεται η αναδρομικότητα του ευμενέστερου . Η έννοια της ποινής είναι ευρεία και περιλαμβάνει, εκτός από τις κύριες, και παρεπόμενες ποινές του ΠΚ, και τις πειθαρχικές και διοικητικές ποινές[84] .
Φορείς του δικαιώματος του α.7 παρ.1 Σ είναι όλα τα φυσικά πρόσωπα , ημεδαποί, αλλοδαποί και ανιθαγενείς.
Το τεκμήριο νομιμότητας , το οποίο πηγάζει από την αρχή αυτή, αποτελεί θεμελιώδη αρχή του Ποινικού Δικονομικού Δικαίου (in dubio pro reo).[85]και κατοχυρώνεται στο άρθρο 6 παρ. 2 της ΕΣΔΑ. Μάλιστα, το ποινικό δίκαιο εξειδικεύει την αρχή αυτή και απαιτεί νόμο ‘’γραπτό’’(scripta), ‘’ορισμένο’’(stricta) και‘’ρητό ‘’(certa)[86].
Η αρχή nullum crimen nulla poena sine lege κατοχυρώνεται και στην ΕΣΔΑ, στα άρθρα 6 και 7.

Β) *<u>Εφαρμογή στους κρατούμενους :</u>*
Οι φυλακισμένοι προστατεύονται και αυτοί από την αρχή της μη αναδρομικότητας των νόμων. Έτσι, απαγορεύεται να εκτίσουν μεγαλύτερης διάρκειας ποινή από εκείνη που τους έχει επιβληθεί επειδή μεταγενέστερος νόμος προβλέπει βαρύτερη ποινή. Αντιθέτως, νόμοι που καταργούν το αξιόποινο ή καθιερώνουν ηπιότερη ποινή εφαρμόζονται αναδρομικά, εφόσον ισχύον κατά το χρόνο της εκδίκασης. Αν μεταγενέστερος νόμος χαρακτήρισε την πράκη όχι αξιόποινη , παύει και η εκτέλεση της ποινής.
Ειδικά για τις πειθαρχικές ποινές που επιβάλλονται στους κρατουμένους, το άρθρο 66 παρ. 1 του ΣωφρΚ. επαναλαμβάνει την αρχή nullum crimen nulla poena sine lege.

Γ) *<u>Νομολογία ΕΔΔΑ</u>*
Δυστυχώς, παρά τις ρητές διατάξεις τόσο του Συντάγματος όσο και της ΕΣΔΑ, η Ελλάδα καταδικάστηκε από το ΕΔΔΑ για παράβαση του άρθρου 6 παρ. 1 της ΕΣΔΑ, που προβλέπει την πρόσβαση του κατηγορουμένου σε δικαστήριο σε εύλογο χρονικό διάστημα από την απαγγελία της ποινικής κατηγορίας, στην

[84] Δαγτόγλου Π.Δ., ΄΄Συνταγματικό Δίκαιο, Ατομικά Δικαιώματα Α’΄΄(2005), σελ.315 επ.
[85] Ανδρουλάκη Κ. Νικ, ‘’Θεμελιώδεις Αρχές της Ποινικής Δίκης’’, (1994), σελ 190 επ.
[86] Ανδρουλάκη Κ. Νικόλαου, ‘’Ποινικό Δίκαιο, Γενικό Μέρος, Θεωρία για το έγκλημα’’, σελ 97 επ.

υπόθεση Portington v. Greece [87] .

8) Το δικαίωμα στον νόμιμο δικαστή

Α)Γενικό περιεχόμενο:

Το άρθρο 8 ορίζει πως ''Κανένας δεν στερείται χωρίς τη θέλησή του το δικαστή που του έχει ορίσει ο νόμος'', καθώς και ότι "δικαστικές επιτροπές και έκτακτα δικαστήρια, με οποιοδήποτε όνομα , δεν επιτρέπεται να συσταθούν" . Νόμιμος ή "φυσικός" δικαστής είναι ο οριζόμενος από το νόμο ως αρμόδιος για την εκδίκαση κατηγοριών υποθέσεων . Ο νόμος με τον οποίο ορίζεται ο φυσικός δικαστής πρέπει να μην έχει ατομικό χαρακτήρα και να ρυθμίζει την αρμοδιότητα αλλά και την σύνθεση του δικαστηρίου γενικά και αφηρημένα και κατά τρόπο αντικειμενικό . όπως ορθά τονίζει το ΣτΕ, η αρχή του φυσικού (νόμιμου) δικαστή…δεν αποτελεί μόνο ατομικό δικαίωμα αλλά και θεσμική εγγύηση λειτουργίας των δικαστηρίων'' [88]. Η εξουσία του νόμιμου δικαστή για την εκδίκαση συγκεκριμένης υπόθεσης απορρέει από την αρμοδιότητά του να δικάσει οποιαδήποτε άλλη υπόθεση της ίδιας κατηγορίας . Η πεμπτουσία της συνταγματικής προστασίας της αρχής του νόμιμου ή''φυσικού"'' δικαστή , βρίσκεται στην απαγόρευση του διορισμού ''ειδικού'' δικαστή για συγκεκριμένη υπόθεση, έτσι ώστε να προεξασφαλίζεται το περιεχόμενο της δικαστικής κρίσης . Για αυτό το λόγο, το Σύνταγμα απαγορεύει την αφαίρεση του δικαστή , τον οποίο ο νόμος ορίζει ως αρμόδιο[89] . Φορείς του δικαιώματος είναι φυσικά και νομικά πρόσωπα .

Β) Εφαρμογή στους κρατούμενους:

Αν και το Σύνταγμα απαγορεύει την σύσταση δικαστικών επιτροπών και εξαιρετικών δικαστηρίων , δεν συμβαίνει το ίδιο με τα ειδικά δικαστήρια , των οποίων σε ορισμένες περιπτώσεις προβλέπει και τη σύσταση . Ειδικό χαρακτήρα έχουν τα δικαστήρια ανηλίκων , τα Στρατοδικεία κ.ά. Ένα τέτοιο ειδικό δικαστήριο προβλέπεται στο άρθρο 87 ΣωφρΚ (Δικαστήριο εκτέλεσης ποινών) στο οποίο μπορούν να προσφεύγουν οι κρατούμενοι , μέχρι δε τη νομοθετική θέσπισή του τις σχετικές αρμοδιότητες εκτελεί το Συμβούλιο Πλημμελειοδικών του τόπου έκτισης τηςποινής. Οι κρατούμενοι, συνεπώς, απολαμβάνουν πλήρως το δικαίωμα του άρθρου 8 Σ .

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[87] European Court of Human Rights, Portington v. Greece, appl. 109/1997/893/1105, Judgement 23th September 1998 (Strasburg).

[88] Δαγτόγλου Π.Δ., ΄΄Συνταγματικό Δίκαιο, Ατομικά Δικαιώματα Β'΄΄(2005), από όπου και η απ. ΣτΕ 2152/1993, Ολ., ΤοΣ 1994, 117 (120).

[89] Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ', (2008), σελ.292.

9) Το δικαίωμα στην ιδιωτική και οικογενειακή ζωή (άρθρα 9, 9Α και 21 παρ. 1 Σ):

Α) Γενικό περιεχόμενο:

Η ιδιωτική σφαίρα αναφέρεται στην ιδιωτική (εν αντιθέσει με τη δημόσια) ζωή του ανθρώπου και μάλιστα τόσο στην ατομική όσο και στην οικογενειακή του ζωή αλλά και στον άμεσο βιοτικό του χώρο[90]. Το Σύνταγμα κατοχυρώνει το απαραβίαστο της ιδιωτικής ζωής στο άρθρο 9 παρ. 1 : *''Η ιδιωτική και οικογενειακή ζωή του ατόμου είναι απαραβίαστη''*. Συνεπώς, το Σύνταγμα κατοχυρώνει και το απαραβίαστο της οικογενειακής ζωής. Η συνταγματική αυτή κατοχύρωση είναι διφυής, αφού κατοχυρώνεται τόσο ως αντικειμενική συνταγματική αρχή και ως ατομικό δικαίωμα[91]. Η ελευθερία στην ιδιωτική ζωή σημαίνει κυρίως ότι ο καθένας έχει δικαίωμα να ορίζει ελεύθερα τον τρόπο και τον περιεχόμενο της ζωής του. Η ιδιωτική ζωή είναι απαραβίαστη.

Στη σημερινή κοινωνία, πέρα από τον κίνδυνο παραβίασης της ιδιωτικής ζωής από τους συνανθρώπους και γείτονες, υπάρχει και ο κίνδυνος από τη διαρκώς αυξανόμενη τεχνολογική δυνατότητα διεισδύσεως στην ιδιωτική σφαίρα τρίτων χωρίς τη θέληση ή καν τη γνώση τους ˙ αλλά και ο κίνδυνος από την καταχρηστική χρησιμοποίηση των πληροφοριών που συσσωρεύονται στα διάφορα συστήματα ηλεκτρονικών υπολογιστών[92]. Για αυτό το λόγο, στην αναθεώρηση του Συντάγματος του 2001 προστέθηκε και το άρθρο 9Α για την προστασία των προσωπικών δεδομένων.

Απαραβίαστη είναι επίσης και η οικογενειακή ζωή, η οποία κατοχυρώνεται και προστατεύεται από το Κράτος στο άρθρο 21 παρ.1 του Συντάγματος: *'' Η οικογένεια, ως θεμέλιο συντήρησης και προαγωγής του Έθνους, καθώς και ο γάμος, η μητρότητα και η παιδική ηλικία τελούν υπό την προστασία του Κράτους''*.

Φορείς του δικαιώματος στο απαραβίαστο της ιδιωτικής και οικογενειακής ζωής είναι όλα τα φυσικά πρόσωπα, ημεδαποί, αλλοδαποί και ανιθαγενείς.

Το δικαίωμα στην ιδιωτική ζωή αναστέλλεται όταν εφαρμόζεται το άρθρο 48 του Συντάγματος.

Το δικαίωμα αυτό κατοχυρώνεται και στο άρθρο 8 της ΕΣΔΑ[93].

Β) Εφαρμογή στους κρατούμενους:

Το δικαίωμα των κρατουμένων στην ιδιωτική ζωή υφίσταται περιορισμούς ,που δικαιολογούνται από την σχέση αιτιώδους συνάφειας μεταξύ δικαιώματος και θεσμού .Οι περιορισμοί αυτοί ανάγονται στην υποχρεωτική συστέγαση και συμβίωση των κρατουμένων ,στην αναγκαστική διαμόρφωση της ιδιωτικής τους ζωής (π.χ ωράριο) ,στη

[90] Δαγτόγλου Π.Δ., ΄΄Συνταγματικό Δίκαιο, Ατομικά Δικαιώματα Α΄΄΄(2005), σελ.383

[91] Δημητρόπουλου Γ. Ανδρέα, ''Συνταγματικά Δικαιώματα-Ειδικό Μέρος'', Τόμος Γ', Τεύχη 4 επ. , σελ. 168

[92] Δαγτόγλου Π.Δ., ΄΄Συνταγματικό Δίκαιο, Ατομικά Δικαιώματα Α΄΄΄(2005), σελ.384

[93] Σύμφωνα με το άρθρο αυτό: *'' Παν πρόσωπον δικαιούται εις τον σεβασμόν της ιδιωτικής και οικογενειακής ζωής του, της κατοικίας του..''*.

χρήση νόμιμων ανακριτικών μεθόδων .
Και η οικογενειακή ζωή υφίσταται περιορισμούς λόγω της ιδιαίτερης φύσης της φυλάκισης .Εξ ορισμού περιορίζεται το δικαίωμα συμβίωσης των συζύγων, ωστόσο το δικαίωμα στην οικογενειακή ζωή ασκείται θεσμικά προσαρμοσμένο : ο κρατούμενος μπορεί να δέχεται επισκέψεις από τον/την σύζυγο και τα τέκνα σε ιδιαίτερο κατάλληλο χώρο (α.53 παρ.3 ΣωφρΚ) ,ενώ χορηγούνται άδειες εξόδου για την αντιμετώπιση έκτακτων οικογενειακών αναγκών .
Τέλος,ο κρατούμενος που επιθυμεί να τελέσει γάμο μπορεί να το πράξει,υπό προϋποθέσεις και σε συγκεκριμένες συνθήκες ,χωρίς να εμποδίζεται από το γεγονός της κράτησης .

Γ) *Νομολογία ΕΔΔΑ*

Το ΕΔΔΑ, στην υπόθεση Perry v. The United Kingdom[94], διευρύνοντας την έννοια της ιδιωτικής ζωής, έκρινε ότι η καταγραφή σε ένα αστυνομικό τμήμα των πράξεων ενός κρατούμενου που ήταν ύποπτος για ληστείες, από κάμερα ασφαλείας, εν αγνοία του, και η χρήση αυτής της καταγραφής για την αναγνώριση του υπόπτου από μάρτυρες συνιστά παραβίαση της ιδιωτικής ζωής. Αν και η παρακολούθηση των πράξεων ενός ατόμου σε δημόσιο χώρο με οπτικοακουστικά μέσα δεν αποτελούν παρέμβαση στην ιδιωτική ζωή, η μόνιμη και συστηματική καταγραφή τους με κάποιο απώτερο σκοπό μπορεί να αποτελέσουν παραβίαση της ιδιωτικής ζωής.

Επίσης, στην υπόθεση Doerga c. The Netherlands[95], η μαγνητοφώνηση μίας τηλεφωνικής συνομιλίας του κρατούμενου με την αδερφή του χρησιμοποιήθηκε αργότερα από τις Αρχές της Ολλανδίας για την καταδίκη του, για την έκρηξη ενός εκρηκτικού μηχανισμού κάτω από ένα αυτοκίνητο. Το ΕΔΔΑ έκρινε ότι, παρά το γεγονός ότι η μαγνητοφώνηση τηλεφωνικών συνομιλιών του κρατούμενου με άτομα εκτός της φυλακής μπορεί να είναι αναγκαία, το νομοθετικό κείμενο που προβλέπει αυτή την παρέμβαση στην ιδιωτική ζωή, πρέπει να είναι σαφές και να προστατεύει τον κρατούμενο από αυθαίρετες παραβιάσεις του δικαιώματός του για σεβασμό της ιδιωτικής του ζωής και της επικοινωνίας.

10)Το δικαίωμα αναφοράς (άρθρο 10 Σ):

Α) Γενικό περιεχόμενο:

[94] European Court of Human Rights, Third Section, Perry v. the United Kingdom, Application no 63737/00 (judgement 17 July 2003, Strasburg), βλ. Παράρτημα
[95] European Court of Human Rights, Second Section, Doerga v. The Netherlands, Application no 50210/99 (Judgement 27 April 2004, Strasburg), βλ. Παράρτημα .

Αναφορά είναι η έγγραφη προσφυγή προς την αρμόδια αρχή προκειμένου να επιληφθεί συγκεκριμένου θέματος .Σύμφωνα με το άρθρο 10 παρ.1 του Συντάγματος: *'' καθένας ή πολλοί μαζί έχουν το δικαίωμα τηρώντας τους νόμους του Κράτους να αναφέρονται εγγράφως στις αρχές ,οι οποίες είναι υποχρεωμένες να ενεργούν σύντομα κατά τις κείμενες διατάξεις και να απαντούν αιτιολογημένα σε εκείνον που υπέβαλε την αναφορά ,σύμφωνα με το νόμο''* .Καθιερώνεται έτσι και αντικειμενική συνταγματική αρχή και ατομικό δικαίωμα .Οι αναφορές ,που είναι πάντοτε γραπτές ,μπορούν να απευθύνονται προς τη διοίκηση ή ακόμα και τη δικαιοσύνη ,ποτέ όμως προς τη νομοθετική εξουσία .

Φορείς του δικαιώματος είναι όλα τα φυσικά πρόσωπα ,καθώς και τα νομικά .

Β) Εφαρμογή στους κρατούμενους:

Το δικαίωμα αναφοράς αναγνωρίζεται και για τους κρατουμένους. Το άρθρο 6 του ΣωφρΚ προβλέπει δικαίωμα γραπτής αναφοράς για κάθε παράνομη ενέργεια σε βάρος κρατουμένου ,εφόσον δεν του παρέχεται άλλο ένδικο βοήθημα .Σε δεκαπέντε ημέρες από την κοινοποίηση της απόφασης που απορρίπτει το αίτημα ή σε ένα μήνα από

την υποβολή της αναφοράς αν δεν εκδόθηκε απόφαση ,ο κρατούμενος μπορεί να προσφύγει στο Δικαστήριο Εκτέλεσης των Ποινών .Επίσης ,η διεύθυνση του καταστήματος υποχρεούται να διαβιβάζει ,σε τρεις το αργότερο ημέρες, κάθε αναφορά ή επιστολή κρατουμένου προς δημόσια αρχή ή διεθνή οργανισμό ,χωρίς να λαμβάνει γνώση του περιεχομένου της.

11)Το δικαίωμα του συνέρχεσθαι (άρθρο 11 Σ):

Α) Γενικό περιεχόμενο:

Σύμφωνα με το άρθρο 11 παρ. 1 του Συντάγματος : *'' οι Έλληνες έχουν το δικαίωμα να*

συνέρχονται ήσυχα και χωρίς όπλα '' .Συνάθροιση ,με την συνταγματική έννοια ,είναι η σκόπιμη καταρχήν και όχι τυχαία ,προσωρινή επί το αυτό συνάντηση αξιόλογου αριθμού προσώπων ,προς έκφραση ή ακρόαση ανακοίνωση γνώμης για ορισμένο θέμα ,ή προς διαδήλωση φρονημάτων ή αιτημάτων οποιουδήποτε χαρακτήρα ,ή προς λήψη από κοινού

αποφάσεων ή προς άσκηση από κοινού του δικαιώματος του αναφέρεσθαι .Το Σύνταγμα κατοχυρώνει την ελευθερία συναθροίσεως και ως αντικειμενική συνταγματική αρχή και ως ατομικό δικαίωμα [96].Οι συναθροίσεις διακρίνονται σε ιδιωτικές ,οι οποίες πραγματοποιούνται σε χώρο μη προσιτό στο κοινό ,σε δημόσιες κλειστές ,που πραγματοποιούνται σε χώρους κλειστούς μεν προσιτούς

[96] Δημητρόπουλου Γ. Ανδρέα, ''Συνταγματικά Δικαιώματα-Ειδικό Μέρος'', Τόμος Γ', Τεύχη 4 επ. , σελ. 204

στο κοινό δε ,και σε δημόσιες υπαίθριες ,οι οποίες διεξάγονται σε ελεύθερο ανοικτό χώρο προσιτό στο κοινό . Η ελευθερία συναθροίσεως περιλαμβάνει την ελευθερία οργανώσεως ,διεξαγωγής ,διεύθυνσης και συμμετοχής σε μια οποιαδήποτε συνάθροιση . Ως ήσυχη συνάθροιση νοείται η ειρηνική ,ως άοπλη αυτή στην οποία δεν παρίστανται πρόσωπα που φέρουν όπλα οποιουδήποτε είδους . Μόνο στις δημόσιες υπαίθριες συναθροίσεις επιτρέπεται η παρουσία της αστυνομίας (άρθρο 11 παρ.2 εδ.α' Σ) .Πρόκειται για επιτρεπόμενο ,απλό περιορισμό ,εφόσον προβλέπεται απευθείας από το Σύνταγμα .Η αστυνομική αρχή με αιτιολογημένη απόφασή της μπορεί να απαγορεύσει τις υπαίθριες συναθροίσεις, αν εξαιτίας τους επίκειται σοβαρός κίνδυνος για τη δημόσια ασφάλεια ,σε ορισμένη δε περιοχή ,αν απειλείται σοβαρή διατάραξη της κοινωνικοοικονομικής ζωής ,όπως νόμος ορίζει (άρθρο 11 παρ.2 εδ.β' Σ) .
Φορείς του δικαιώματος είναι οι Έλληνες πολίτες ,αλλά και νομικά πρόσωπα .

Β) Εφαρμογή στους κρατούμενους:

Οι κρατούμενοι ,λόγω της ειδικής κυριαρχικής σχέσης στην οποία βρίσκονται ,υφίστανται περιορισμό του δικαιώματος του συνέρχεσθαι .
Είναι αυτονόητο πως λόγω του πραγματικού γεγονότος της αναγκαστικής κράτησης δεν έχουν τη δυνατότητα να επικαλεστούν το (ανεπιφύλακτα κατοχυρωμένο από το Σύνταγμα) δικαίωμα συναθροίσεως σε κλειστό χώρο και παρίστανται σε συναθροίσεις εκτός του καταστήματος κράτησης, γιατί αυτό θα αντιστρατευόταν στο νόημα της στερήσεως της ελευθερίας ως ποινής. Η απαγόρευση συναθροίσεως των κρατουμένων είναι αναγκαία για την εκπλήρωση του δημόσιου συμφέροντος εκτίσεως ποινών, που αναγνωρίζει το Σύνταγμα[97]. Μπορούν ωστόσο να παρίστανται σε εκδηλώσεις και συναθροίσεις που οργανώνονται και πραγματοποιούνται εντός του καταστήματος ˙ αυτές βέβαια μπορούν να απαγορευτούν από τη διεύθυνση των φυλακών για ειδικούς λόγους που αναφέρονται στην τάξη και την ασφάλεια του καταστήματος (σύμφωνα με το άρθρο 38 παρ.3 ΣωφρΚ) .Στις συναθροίσεις των κρατουμένων θα πρέπει να γίνει δεκτό πως επιτρέπεται η παρουσία αστυνομικών ,αν και δεν πρόκειται για δημόσιες ανοιχτές συναθροίσεις , περιορισμός που δικαιολογείται βάσει της σχέσεως αιτιώδους συνάφειας δικαιώματος και θεσμού .

12)Θρησκευτική Ελευθερία (άρθρο 13 Σ):

Α) Γενικό περιεχόμενο:

Θρησκεία είναι η γνωστή πίστη και λατρεία του θείου. Η θρησκεία είναι σύνολο γνωστών λατρευτικών πράξεων (corpus) και δοξασιών (animus) αναφερόμενων στην υπόσταση του θείου. Σύμφωνα με το άρθρο 13 του Συντάγματος : *''1. Η ελευθερία της θρησκευτικής συνείδησης είναι απαραβίαστη. Η απόλαυση των ατομικών και πολιτικών δικαιωμάτων δεν εξαρτάται από τις θρησκευτικές*

[97] Δαγτόγλου Π.Δ., ΄΄Συνταγματικό Δίκαιο, Ατομικά Δικαιώματα Α'΄΄(2005), σελ.202

πεποιθήσεις καθενός. 2. Κάθε γνωστή θρησκεία είναι ελεύθερη και τα σχετικά με τη λατρεία της τελούνται ανεμπόδιστα υπό την προστασία των νόμων…''
Το Σύνταγμα προστατεύει μόνο τις γνωστές θρησκείες. Με τη διάταξη αυτή του Συντάγματος η θρησκευτική ελευθερία κατοχυρώνεται και ως αντικειμενική συνταγματική αρχή και ως συνταγματικό δικαίωμα[98].
Η θρησκευτική ελευθερία διακρίνεται σε θετική και αρνητική ˙ στην πρώτη εντάσσονται η ελευθερία συνείδησης και η ελευθερία θρησκευτικής δράσης, ενώ στη δεύτερη η ελευθερία αθρησκείας. Η ελευθερία της θρησκευτικής συνείδησης είναι απαραβίαστη, ενώ από τις μερικότερες μορφές θρησκευτικής δράσης προστατεύεται μόνο η θρησκεία. Επιπλέον, κατοχυρώνεται και η θρησκευτική ισότητα, με την έννοια της απαγόρευσης διακρίσεων λόγω θρησκευτικών πεποιθήσεων (άρθρο 13 και άρθρο 5 παρ. 2β' Σ).
Η θρησκευτική ελευθερία κατοχυρώνεται και στο άρθρο 9 της ΕΣΔΑ αλλά και στα άρθρα ΙΙ-70 και ΙΙ-82 του Χάρτη Θεμελιωδών Δικαιωμάτων Ευρωπαϊκής Ένωσης.
Φορείς του δικαιώματος είναι όλα τα φυσικά πρόσωπα, ημεδαποί , αλλοδαποί και ανιθαγενείς, ενώ στα νομικά πρόσωπα αναγνωρίζεται το ειδικότερο δικαίωμα εκδήλωσης θρησκευτικών πεπεοιθήσεων.

Β) Εφαρμογή στους κρατούμενους:
Η ελευθερία της θρησκευτικής συνείδησης δεν υπόκειται σε περιορισμούς στο πλαίσιο της ποινικής σχέσης. Αντίθετα, η ελευθερία της λατρείας υπόκειται σε περιορισμούς , προσαρμοζόμενη θεσμικά[99]. Τα σχετικά ορίζονται στο άρθρο 39 ΣωφρΚ . Με την είσοδό του στο κατάστημα ο κρατούμενος ερωτάται και δηλώνει ,αν το επιθυμεί ,το θρήσκευμα ή το δόγμα στο οποίο ανήκει ˙ έχει δικαίωμα να ασκεί τα θρησκευτικά του καθήκοντα ,να επικοινωνεί με αναγνωρισμένο εκπρόσωπο του θρησκεύματος ή του δόγματός του και να παρακολουθεί τη θεία λειτουργία ή άλλες εκδηλώσεις θρησκευτικής λατρείας στο ναό ή σε κατάλληλο χώρο που πρέπει να υπάρχει σε κάθε κατάστημα. Το ιδανικό θα ήταν, αν υπάρχει σεβαστός αριθμός κρατουμένων των ιδίων δογμάτων , να λειτουργούν συγχρόνως περισσοτέρων θρησκευμάτων χώροι λατρείας. Προς το παρόν, όμως, ισχύει ο θεσμός της επικρατούσας θρησκείας. Τέλος ο κρατούμενος δεν πρέπει να εξαναγκάζεται σε πράξεις που έρχονται σε αντίθεση με τα θρησκευτικά του πιστεύω .

13)Ελευθερία γνώμης και ιδεών (άρθρο 14 Σ):

Α) Γενικό περιεχόμενο:
Σύμφωνα με το άρθρο 14 του Συντάγματος: *''καθένας μπορεί να εκφράζει και να διαδίδει προφορικά ,γραπτά και δια του τύπου τους στοχασμούς του τηρώντας τους νόμους του Κράτους''* .Κατοχυρώνεται έτσι η ελευθερία των ιδεών ή

[98] Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ', (2008), σελ.646
[99] Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ', (2008), σελ. 658

αλλιώς η ελευθερία γνώμης και ως αντικειμενική συνταγματική αρχή και ως συνταγματικό δικαίωμα .το δικαίωμα αυτό ανάγεται στην πνευματική υπόσταση του ανθρώπου. Γνώμη γενικά είναι ηγια οποιοδήποτε θέμα άποψη συγκεκριμένου ανθρώπου ,είναι η υποκειμενική διάσταση της ιδέας . Η γενική ελευθερία γνώμης αναλύεται σε τρεις μερικότερες ελευθερίες, την ελευθερία της σκέψης ,την ελευθερία της συνείδησης και την ελευθερία της έκφρασης (γραπτής και προφορικής) .Προστατεύεται και η αρνητική ελευθερία έκφρασης ,με την έννοια πως ο φορέας του δικαιώματος δικαιούται να απέχει εφόσον το επιθυμεί από οποιαδήποτε έκφραση της γνώμης του ,δηλαδή να την αποσιωπήσει [100].

Φορείς του δικαιώματος είναι όλα τα φυσικά και νομικά πρόσωπα . Στην ελευθερία της γνώμης ανήκει και η ελευθερία πληροφόρησης , που απορρέει από τα άρθρα 14 παρ.1 Σ και 5 παρ.1 Σ και κυρίως στο άρθρο 5Α Σ, που κατοχυρώνει πλέον ρητά το δικαίωμα στην πληροφόρηση .Σύμφωνα με αυτό :*'' καθένας έχει δικαίωμα στην πληροφόρηση ,όπως νόμος ορίζει''*. Το δικαίωμα αυτό έχει μια ενεργητική και παθητική διάσταση .Η πρώτη εκδηλώνεται ως δικαίωμα του ατόμου να πληροφορεί τους άλλους, ενώ η δεύτερη ως δικαίωμα του ατόμου να πληροφορείταιτο ίδιο .

Η ελευθερία ιδεών και γνώμης ή πληροφόρησης κατοχυρώνεται και στα άρθρα 9 και 10 της ΕΣΔΑ [101], αλλά και στα άρθρα ΙΙ-70 και 71 του Χάρτη Θεμελιωδών Δικαιωμάτων της Ευρωπαϊκής Ένωσης.

<u>Β) Εφαρμογή στους κρατούμενους:</u>

Οι κρατούμενοι μπορούν ελεύθερα να εκφράζουν και να διατυπώνουν τις σκέψεις τους προφορικά ,εγγράφως ή δια του τύπου , όπως και να ενημερώνονται από εφημερίδες, περιοδικά ,ραδιοφωνικές και τηλεοπτικές εκπομπές ,καθώς το δικαίωμα στη γνώμη και την πληροφόρηση τους αναγνωρίζεται πλήρως .Μόνη επιφύλαξη που προβλέπεται είναι ο προσδιορισμός των λεπτομερειών άσκησης (τόπος ,χρόνος ,διαδικασία) του δικαιώματος πληροφόρησης από το Συμβούλιο Φυλακής (άρθρο 37 παρ.1 εδ.β' ΣωφρΚ) .

<u>14)Το δικαίωμα στην Παιδεία , την Τέχνη και τον Αθλητισμό:</u>

<u>Α) Γενικό Περιεχόμενο:</u>

Παιδεία, με την ευρύτερη έννοια του όρου, είναι η καλλιέργεια του ανθρώπινου πνεύματος .Με την στενότερη έννοια ο όρος ''παιδεία'' σημαίνει την

[100] Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ', (2008), σελ. 535 επ.

[101] Σύμφωνα με το άρθρο 9 της ΕΣΔΑ: *''Παν πρόσωπον δικαιούται εις την ελευθερίαν σκέψεως..''* ενώ το άρθρο 10 *: ''Παν πρόσωπον έχει δικαίωμα εις την ελευθερίαν εκφράσεως. Το δικαίωμα τούτο περιλαμβάνει την ελευθερίαν γνώμης ως και την ελευθερία λήψεως ή μεταδόσεως πληροφοριών ή ιδεών, άνευ επεμβάσεως δημοσίων αρχών και ασχέτως συνόρων''.*

εκπαίδευση ή και το εκπαιδευτικό σύστημα .Με την στενότερη αυτή έννοια χρησιμοποιείται κυρίως ο όρος παιδεία από τον συνταγματικό νομοθέτη .Το Σύνταγμα ορίζει πως " η παιδεία αποτελεί βασική αποστολή του Κράτους " (άρθρο 16 παρ.2 Σ) και πως " όλοι οι Έλληνες έχουν δικαίωμα δωρεάν παιδείας ,σε όλες τις βαθμίδες στα κρατικά εκπαιδευτήρια " (άρθρο 16 παρ.4 εδ.α' Σ) .Η ελευθερία της παιδείας κατοχυρώνεται και ως αντικειμενική συνταγματική αρχή και ως
συνταγματικό δικαίωμα ,ενώ περιλαμβάνει εκτός από τη θετική διάσταση και την αρνητική ,δηλαδή την ελευθερία του φορέα του δικαιώματος να αποφασίσει να μην εκπαιδευθεί (δεσμευόμενος βέβαια από την υποχρεωτική 9ετή εκπαίδευση) .[102] Το δικαίωμα στην παιδεία αναγνωρίζεται και στην ΕΣΔΑ,στο πρώτο πρωτόκολλο, στο άρθρο 2 παρ. 1[103].
Φορείς του δικαιώματος είναι οι Έλληνες πολίτες ,αλλά και νομικά πρόσωπα .
Στο άρθρο 16 παρ.1 Σ κατοχυρώνεται επίσης το δικαίωμα στην τέχνη ,με την έννοια της ελευθερίας της καλλιτεχνικής συνείδησης ,της ελευθερίας έκφρασης της καλλιτεχνικής συνείδησης και της ελευθερίας διάδοσης καλλιτεχνικών ιδεών [104].
Επίσης, στο άρθρο 16 παρ. Σ κατοχυρώνεται το δικαίωμα στον αθλητισμό ,ο οποίος κατά το Σύνταγμα τελεί υπό την προστασία και την ανώτατη εποπτεία του κράτους [105].

<u>Β) Εφαρμογή στους κρατούμενους:</u>
Το δικαίωμα στην παιδεία, την τέχνη και τον αθλητισμό προσαρμόζονται θεσμικά και στα πλαίσια της ειδικής κυριαρχικής σχέσης που βρίσκονται οι κρατούμενοι.
Στο άρθρο 35 του ΣωφρΚ προβλέπονται τα σχετικά με την εκπαίδευση των κρατουμένων . Στα καταστήματα κράτησης λειτουργούν σχολεία για την απόκτηση ή συμπλήρωση της εκπαίδευσης των κρατουμένων ,ενώ όσοι κρατούμενοι έχουν συμπληρώσει την πρωτοβάθμια εκπαίδευση μπορούν να συνεχίσουν τις σπουδές στη δευτεροβάθμια ή στην τριτοβάθμια εκπαίδευση με εκπαιδευτικές άδειες . Οι τίτλοι που παρέχονται είναι ισότιμοι με τους αντίστοιχους των σχολών της ίδιας βαθμίδας εκπαίδευσης ,χωρίς να προκύπτει από το κείμενό τους ότι αποκτήθηκαν σε κατάστημα κράτησης .Όπου είναι δυνατό ειδικά μέτρα λαμβάνονται για την εκπαίδευση των αλλοδαπών κρατουμένων . Παρέχονται επίσης προγράμματα επαγγελματικής εκπαίδευσης , κατάρτισης ή εξειδίκευσης .
Τέλος, οι κρατούμενοι έχουν δικαίωμα στην τέχνη και τον αθλητισμό, μπορούν να συμμετέχουν σε καλλιτεχνικές εκδηλώσεις (άρθρο 38 παρ.2 ΣωφρΚ) και

[102] Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ', (2008), σελ. 571
[103] Σύμφωνα με το άρθρο αυτό: *''Ουδείς δύναται να στερηθεί του δικαιώματος όπως εκπαιδευθή''.*
[104]Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ', (2008), σελ.607 επ.
[105] Δημητρόπουλου Γ. Ανδρέα, ΄΄Συνταγματικά Δικαιώματα΄΄ Τόμος Γ', (2008), σελ. 509

να αθλούνται ,σε κατάλληλες προς τούτο εγκαταστάσεις (άρθρο 36 ΣωφρΚ).

15)Το δικαίωμα ιδιοκτησίας (άρθρο 17 Σ):

Α) Γενικό περιεχόμενο:

Σύμφωνα με το άρθρο 17 του Συντάγματος :*'' η ιδιοκτησία τελεί υπό την προστασία του*
Κράτους και κανένας δεν στερείται την ιδιοκτησία του ,παρά μόνο για δημόσια ωφέλεια και κατόπιν αποζημιώσεως (αναγκαστική απαλλοτρίωση) ''. Η ιδιοκτησία κατοχυρώνεται έτσι και ως οικονομικός θεσμός και ως συνταγματικό – οικονομικό δικαίωμα .Με την ευρεία έννοια η ιδιοκτησία ταυτίζεται με την περιουσία και περιλαμβάνει ,κατά την κρατούσα στη θεωρία και την νομολογία άποψη ,μόνο τα εμπράγματα δικαιώματα . Η γενική ελευθερία της ιδιοκτησίας περιλαμβάνει τις ειδικότερες μορφές της ελευθερίας απόκτησης ,της ελευθερίας εκμετάλλευσης και της ελευθερίας διάθεσης[106] .
Φορείς του δικαιώματος είναι όλα τα φυσικά πρόσωπα ,αλλά και τα νομικά.

Β) Εφαρμογή στους κρατούμενους:
Οι κρατούμενοι δεν στερούνται βεβαίως του δικαιώματος της ιδιοκτησίας. Τυπικά, έχουν το δικαίωμα να διαχειρίζονται την περιουσία τους. Ωστόσο, δεν μπορούμε να παρά να παρατηρήσουμε πως στην πράξη η άσκηση αυτού του δικαιώματος μόνο ατελώς μπορεί να γίνει, αφού η διαχείριση της περιουσίας, και όταν δεν έχει περιοριστεί από το νόμο, είναι πρακτικά πολύ μειωμένη.

16)Το δικαίωμα στην επικοινωνία (άρθρο 19 Σ):

Α) Γενικό περιεχόμενο:
Επικοινωνία είναι η ανθρώπινη δραστηριότητα , με την οποία ο άνθρωπος έρχεται σε επαφή ,σε συνεννόηση με άλλους ανθρώπους .Η επικοινωνία αποτελεί μια σημαντική ανθρώπινη δραστηριότητα ,στενά συνδεδεμένη με τη φύση του ανθρώπου ως "κοινωνικού όντος" ,που προστατεύεται ειδικά από το Σύνταγμα Σύμφωνα με το άρθρο 19 του Σντάγματος : *'' Το απόρρητο της των επιστολών και της ελεύθερης ανταπόκρισης ή επικοινωνίας είναι απαραβίαστο''.* .Η επικοινωνία διακρίνεται σε κρυφή ή φανερή και άμεση ή έμμεση .Το κατά παράδοση προστατευτικό περιεχόμενο του άρθρου 19 αναφέρεται στην έμμεση επικοινωνία (επικοινωνία μεταξύ μη παρόντων) ,

[106] Δημητρόπουλου Γ. Ανδρέα, ''Συνταγματικά Δικαιώματα-Ειδικό Μέρος'', Τόμος Γ', Τεύχη 4 επ. , σελ. 343

ωστόσο από το αντικειμενικό νόημα και τη λεκτική διατύπωση προκύπτει ότι θεμελιώνεται ένα ευρύτερο δικαίωμα επικοινωνίας και όχι μόνο το δικαίωμα του απορρήτου της επικοινωνίας. Το Σύνταγμα προστατεύει όλες τις μορφές επικοινωνίας , όπως και την αρνητική ελευθερία επικοινωνίας , το δικαίωμα δηλαδή να επιλέγει κανείς να μην επικοινωνεί[107].
Το Σύνταγμα προβλέπει τη νόμιμη άρση του απορρήτου στο άρθρου 19 παρ.1 εδ.β' Σ *(''λόγοι εθνικής ασφάλειας και διακρίβωση σοβαρών εγκλημάτων'').*
Φορείς του δικαιώματος είναι κάθε φυσικό πρόσωπο, ημεδαποί, αλλοδαποί και ανιθαγενείς αλλά και νομικό πρόσωπο.
Ο κοινός ποινικός νομοθέτης, εξειδικεύοντας την συνταγματική διάταξη, τιμωρεί την παράβαση των απορρήτων. Κατά το άρθρο 370 του ΠΚ τιμωρείται η παραβίαση του απορρήτου των επιστολών. Τιμωρείται επίσης (κατά το άρθρο 370^{A} ΠΚ), η παραβίαση του απορρήτου των τηλεφωνημάτων και της προφορικής συνομιλίας. Απαγορεύεται η μαγνητοφώνηση και γενικότερα παγίδευση τηλεφωνικών ή ιδιωτικών συνδιαλέξεων των άλλων. Επίσης, δεν είναι καταρχήν δυνατή η χρησιμοποίηση μαγνητοταινίας που είναι προϊόν υποκλοπής, ως νομίμου αποδεικτικού μέσου. Η χρήση τους, όμως, δεν είναι άδικη, αν έγινε ενώπιον οποιουδήποτε δικαστηρίου, ανακριτικής ή δημόσιας αρχής για τη διαφύλαξη δικαιολογημένου συμφέροντος που δεν μπορούσε να διαφυλαχθεί διαφορετικά.

<u>Β) Εφαρμογή στους κρατούμενους:</u>
Οι κρατούμενοι απολαμβάνουν το δικαίωμα επικοινωνίας θεσμικά προσαρμοσμένο , αφού η φυλάκιση δεν συνεπάγεται στέρηση της επικοινωνίας με τον έξω κόσμο,μόνο που επιφέρει πρακτικά εμπόδια στην άσκησή του[108] .
Στα άρθρα 51-53 ΣωφρΚ ρυθμίζονται τα σχετικά με τον τρόπο ,τα μέσα και την συχνότητα επικοινωνίας των κρατουμένων .Η εν λόγω επικοινωνία πραγματοποιείται με επισκέψεις , επιστολές (στο χώρο των φυλακών τοποθετείται ταχυδρομικό κιβώτιο των ελληνικών ταχυδρομείων) , τηλεφωνήματα (σημειωτέον ότι δεν επιτρέπεται η χρήση και κατοχή κινητών τηλεφώνων), άδειες εξόδου και με τους θεσμούς ημιελεύθερης διαβίωσης των κρατουμένων .Καταρχήν διασφαλίζεται το απόρρητο της επικοινωνίας των κρατουμένων ,το οποίο υποχωρεί για λόγους εθνικής ασφάλειας ή διακρίβωσης σοβαρών εγκλημάτων (άρθρο 53 παρ.4 ΣωφρΚ), ειδικά εφόσον πρόκειται για ποινικούς κρατούμενους.

[107] Δημητρόπουλου Γ. Ανδρέα, ''Συνταγματικά Δικαιώματα-Ειδικό Μέρος'', Τόμος Γ', Τεύχη 4 επόμενα, (2005), σελ. 180 επ.
[108] Δημητρόπουλου Γ. Ανδρέα, ''Συνταγματικά Δικαιώματα-Ειδικό Μέρος'', Τόμος Γ', Τεύχη 4 επόμενα, (2005), σελ. 199

17) Το δικαίωμα έννομης προστασίας και προηγούμενης ακρόασης (άρθρο 20 Σ):

Α) Γενικό περιεχόμενο:

Το Σύνταγμα στο άρθρο 20 παρ.1 κατοχυρώνει το δικαίωμα δικαστικής προστασίας. Σύμφωνα με το άρθρο αυτό: *'' Καθένας έχει δικαίωμα στην παροχή έννομης προστασίας από τα δικαστήρια και μπορεί να αναπτύξει σ'αυτά τις απόψεις του για τα δικαιώματα ή συμφέροντά του''*. Αρμόδια για την παροχή έννομης προστασίας είναι τα δικαστήρια ˙ για κάθε υπόθεση πρέπει να υπάρχει αρμόδιο δικαστήριο, έτσι ώστε να μην δημιουργείται "κενό αρμοδιότητας"[109]. Με τη διάταξη του άρθρου 20 παρ.1 κατοχυρώνεται η παροχή έννομης προστασίας και ως αντικειμενική αρχή του δικονομικού δικαίου και ως ατομικό δικαίωμα. Το Σύνταγμα εγγυάται τη δικαστική προστασία δικαιωμάτων και συμφερόντων των ατόμων , τα οποία το ίδιο το σύστημα δικαίου αναγνωρίζει . Το δικαίωμα δικαστικής προστασίας αναλύεται σε δικαίωμα πρόσβασης στη δικαιοσύνη και σε δικαίωμα ακρόασης .

Το άρθρο 20 παρ.2 Σ καθιερώνει το δικαίωμα προηγούμενης ακρόασης και για κάθε διοικητική ενέργεια ή μέτρο που λαμβάνεται σε βάρος των δικαιωμάτων ή συμφερόντων του ενδιαφερομένου . Πρόκειται για διαδικαστικό δικαίωμα ενώπιον της διοίκησης . Το δικαίωμα αυτό κατοχυρώνεται και στα άρθρα 6 και 13 της ΕΣΔΑ.
Φορείς των δικαιωμάτων είναι και φυσικά και νομικά πρόσωπα .

Β) Εφαρμογή στους κρατούμενους:

Το δικαίωμα της έννομης προστασίας και της προηγούμενης ακρόασης αναγνωρίζεται και στους φυλακισμένους , και μάλιστα δεν χωρούν περιορισμοί, αφού τα δικαιώματα αυτά αφορούν κατά μεγάλο βαθμό στην ειδική κυριαρχική σχέση των κρατουμένων. Το άρθρο 6 του ΣωφρΚ προβλέπει μάλιστα και πρόσθετη έννομη προστασία για τους κρατούμενους, σε περιπτώσεις παρανόμων εις βάρος τους ενεργειών.

18) Το δικαίωμα στην εργασία (άρθρο 22 Σ):

Α) Γενικό περιεχόμενο:

Εργασία είναι το σύνολο των ενεργειών του ανθρώπου που αποσκοπεί κατά κύριο λόγο στην παραγωγή αποτιμητού αποτελέσματος . Γενικότερα, εργασία είναι κάθε απασχόληση του ανθρώπου, κάθε μορφή δραστηριότητας με κάποιο σκοπό[110]. Διακρίνεται σε πνευματική και σωματική .Το Σύνταγμα καθιερώνει την ελευθερία εργασίας , μετην έννοια της απαγόρευσης της αναγκαστικής

[109] Δημητρόπουλου Γ. Ανδρέα, ''Συνταγματικά Δικαιώματα-Ειδικό Μέρος'', Τόμος Γ', Τεύχη 4 επόμενα, (2005), σελ. 270
[110] Καρακατσάνη Α – Γαρδίκα Σ., ''Ατομικό Εργατικό Δίκαιο'', (1995) σελ.42.

εργασίας . Σύμφωνα με το άρθρο 22 του Συντάγματος :*''1. Η εργασία αποτελεί δικαίωμα και προστατεύεται από το Κράτος, που μεριμνά για τη δημιουργία συνθηκών απασχόλησης όλων των πολιτών..''.* Κανείς δεν μπορεί να εξαναγκασθεί σε εργασία, γενικά ή
συγκεκριμένα (πλην των περιπτώσεων της παρ.4 του άρθρου 22 Σ). Κατοχυρώνεται
επίσης και δικαίωμα ίσης αμοιβής για ίσης αξίας παρεχόμενη εργασία .

<u>Β) Εφαρμογή στους κρατούμενους:</u>

Το δικαίωμα στην εργασία προσαρμόζεται θεσμικά και στην περίπτωση των κρατουμένων.
Εφόσον οι κρατούμενοι δεν περιλαμβάνονται στις περιοριστικώς αναφερόμενες περιπτώσεις του άρθρου 22 παρ.4 Σ , απαγορεύεται και για αυτούς η υποχρεωτική εργασία .Στο άρθρο 40 παρ.1 ΣωφρΚ ορίζεται εξάλλου πως η εργασία των κρατουμένων δεν έχει τιμωρητικό ή καταπιεστικό χαρακτήρα. Μέσα στο κατάστημα κράτησης υπάρχει η δυνατότητα απασχολήσεως ή εργασίας για όσους κρατούμενους το επιθυμούν , ενώ προβλέπεται και η απασχόλησή τους σε βοηθητικές εργασίες που εξυπηρετούν λειτουργικές ανάγκες του καταστήματος . Οι κρατούμενοι μπορούν να εργάζονται για δικό τους λογαριασμό ή έπειτα από παραγγελία του Δημοσίου ή ιδιώτη , έπειτα από συνεννόηση με το Συμβούλιο Φυλακής και με την προϋπόθεση πως δεν παραβλάπτονται οι όροι ασφάλειας και εύρυθμης λειτουργίας του καταστήματος .Στο άρθρο 42 του ΣωφρΚ προβλέπεται και η δυνατότητα εργασίας των κρατουμένων έξω από το κατάστημα κράτησης, αλλά η ιδιότητα του κρατούμενου δρα συχνά κατασταλτικά στην πρόσληψή του από πολλούς εργοδότες. Στο άρθρο 43 του ΣωφρΚ προβλέπεται η αμοιβή των κρατουμένων που καθορίζεται σε ποσοστό επί του βασικού μισθού, ενώ 1/3 της αμοιβής τους παρακρατάται
για το Δημόσιο ως συμμετοχή τους στις δαπάνες διαβίωσης .

19) <u>Το δικαίωμα του εκλέγειν και εκλέγεσθαι (άρθρα 51 και 55 Σ):</u>

<u>Α) Γενικό περιεχόμενο:</u>

Στο άρθρο 51 παρ.2 του Συντάγματος ορίζονται τα προσόντα για τον προσδιορισμό των προσώπων τα οποία διαθέτουν το δικαίωμα του εκλέγειν ή δικαίωμα ψήφου (ιθαγένεια και κατώτατο όριο ηλικίας), όπως επίσης και οι περιπτώσεις περιορισμού του: μη συμπλήρωση του κατωτάτου ορίου ηλικίας , ανικανότητα για δικαιοπραξία , στέρηση των πολιτικών δικαιωμάτων βάσει αμετάκλητης ποινικής καταδίκης για ορισμένα εγκλήματα . Η τελευταία αυτή η περίπτωση ρυθμίζεται στα άρθρα 59-66 ΠΚ .
Το δικαίωμα του εκλέγεσθαι (η δυνατότητα δηλαδή να εκλεγεί κανείς βουλευτής) ρυθμίζεται στο άρθρο 55 παρ.1 Σ΄ τα προσόντα για να εκλεγεί κανείς βουλευτής είναι η ελληνική ιθαγένεια , το δικαίωμα του εκλέγειν και η

συμπλήρωση των 25 ετών . Επομένως όποιος έχει στερηθεί το δικαίωμα του εκλέγειν δεν μπορεί να αναδειχθεί βουλευτής .

Β) Εφαρμογή στους κρατούμενους:

Εφόσον οι κρατούμενοι δεν έχουν στερηθεί το δικαίωμα του εκλέγειν ως παρεπόμενη ποινή βάσει αμετάκλητης ποινικής καταδίκης , έχουν το δικαίωμα να το ασκούν στις βουλευτικές εκλογές ,όπως και στις ευρωεκλογές . Το άρθρο 5 του ΣωφρΚ ρυθμίζει την άσκηση του δικαιώματος του εκλέγειν των κρατουμένων . Δεν υπάρχει ,αντιθέτως ,καμία πρόβλεψη για την άσκηση του δικαιώματος του εκλέγεσθαι για τους κρατουμένους που δεν έχουν στερηθεί τα πολιτικά τους δικαιώματα και συνεπώς έχουν όλα τα προσόντα εκλογιμότητας ,εφόσον η φυλάκιση δεν αποτελεί κώλυμα .

Β' ΜΕΡΟΣ: Η ΕΛΛΗΝΙΚΗ ΠΡΑΓΜΑΤΙΚΟΤΗΤΑ

Δυστυχώς, η ελληνική πραγματικότητα απέχει πολύ από τη ''θεωρητική'' κατοχύρωση των θεμελιωδών συνταγματικών δικαιωμάτων. Η κατάσταση των χώρων έκτισης περιοριστικής της ελευθερίας ποινής αλλά και των χώρων προσωρινής κράτησης υποδίκων (ή αλλοδαπών που έχουν εισέλθει παράνομα στη χώρα και εκκρεμεί η απέλασή τους), αλλά και η συμπεριφορά των σωφρονιστικών και αστυνομικών υπαλλήλων, δεν είναι πάντα σύμφωνη με τις διατάξεις του Συντάγματος, των νομοθετικών κειμένων και των διεθνών συνθηκών από τις οποίες δεσμεύεται η χώρα μας. Διαπιστώσεις παραβιάσεων των ατομικών δικαιωμάτων των κρατουμένων έχουν γίνει από διάφορους μη κυβερνητικούς οργανισμούς, όπως είναι η Διεθνής Αμνηστία, και η Ελλάδα έχει επανειλημμένα καταδικαστεί από το Ευρωπαϊκό Δικαστήριο Ανθρωπίνων Δικαιωμάτων για τις παραβιάσεις αυτές. Σε αυτή την ενότητα θα παραθέσουμε συνοπτικά ορισμένες από τις περιπτώσεις παραβίασης ατομικών δικαιωμάτων κρατουμένων που έχουν δημοσιοποιηθεί και απεικονίζουν την ελληνική πραγματικότητα και τα μελανά της σημεία.

1) Η ΔΙΕΘΝΗΣ ΑΜΝΗΣΤΙΑ:

Η *έκθεση της Διεθνούς Αμνηστίας 2007 για το 2006*[111] (Ετήσια Έκθεση 2007) χρωματίζει με μελανά χρώματα την ελληνική πραγματικότητα, βρίσκοντας επανειλημμένες παραβιάσεις βασικών ανθρωπίνων δικαιωμάτων που , ενώ κατοχυρώνονται στο Σύνταγμα και στις δεσμευτικές διεθνείς Συμβάσεις, εντούτοις δεν εφαρμόζονται, αλλά παραβιάζονται.

Σε δύο πράκτορες της ΕΥΠ απαγγέλθηκαν κατηγορίες σε σχέση με την καταγγελθείσα απαγωγή επτά ανθρώπων στο πλαίσιο του «πολέμου κατά της τρομοκρατίας». Μετανάστες υποβλήθηκαν σε κακομεταχείριση, ενώ υπήρξαν ανησυχίες για βίαιη επαναπροώθηση. Παιδιά-μετανάστες τέθηκαν υπό κράτηση σε τουλάχιστον δύο περιπτώσεις. Επίσης, έγιναν απαγωγές και κράτηση χωρίς επαφή με τον έξω κόσμο στο πλαίσιο του «πολέμου κατά της τρομοκρατίας».

Εδώ είναι εμφανής η παραβίαση των άρθρων για την προσωπική ασφάλεια που κατοχυρώνεται στο άρθρο 6 Σ, η παραβίαση του δικαιώματος στο νόμιμο δικαστή που κατοχυρώνεται στο άρθρο 8 Σ αλλά και η προσβολή της ανθρώπινης αξιοπρέπειας, η οποία αποτελεί και την καταστατική αρχή του Συντάγματος (άρθρο 2 παρ.1) και ισχύει ανεξαρτήτως φυλετικών διακρίσεων.

[111] Ετήσια Έκθεση 2007 της Διεθνούς Αμνηστίας, www.amnesty.org.gr

Επίσης, βάσει του τρόπου μεταχείρισης μεταναστών και προσφύγων και τη φυλάκιση αυτών, σκιαγραφείται και η κατάσταση στις φυλακές και οι συνθήκες κράτησης[112]:

Η κυβέρνηση παρέλειψε να επιτρέψει σε αιτούντες άσυλο την πρόσβαση στη χώρα και συνέχισε να τους επιστρέφει στη χώρα προέλευσής τους, χωρίς νομική βοήθεια ή πρόσβαση στις διαδικασίες ασύλου.

- Τον Σεπτέμβριο απελάθηκαν στην Αίγυπτο 118 άνθρωποι που είχαν ναυαγήσει στην Κρήτη δύο εβδομάδες νωρίτερα, χωρίς να τους δοθεί πρόσβαση σε δικηγόρους και εκπροσώπους της Διεθνούς Αμνηστίας που είχαν ζητήσει να τους συναντήσουν.
- Τον Σεπτέμβριο, 40 άνθρωποι που προσπαθούσαν να φτάσουν στη Χίο με βάρκα αναχαιτίστηκαν από Έλληνες λιμενοφύλακες, οι οποίοι φέρονται να τους επιβίβασαν στο δικό τους σκάφος αφού η βάρκα τους βυθίστηκε, να τους έδεσαν με χειροπέδες, να τους μετέφεραν προς την κατεύθυνση της Τουρκίας και να τους ανάγκασαν να πέσουν στη θάλασσα. Τα πτώματα έξι ανθρώπων βρέθηκαν στις τουρκικές ακτές, 31 άνθρωποι διασώθηκαν από τις τουρκικές αρχές, ενώ τρεις αναφέρθηκαν ως αγνοούμενοι. Οι ελληνικές αρχές αρνήθηκαν τους ισχυρισμούς.

Οι συνθήκες κράτησης αναφέρεται ότι ισοδυναμούσαν με κακομεταχείριση. Αναφέρθηκε επίσης η κράτηση ανηλίκων.

- Αναφέρθηκε ότι έξι ανήλικοι συγκαταλέγονταν στους πρόσφυγες και μετανάστες που κρατούνταν στο κέντρο κράτησης της Χίου. Υπήρξαν επίσης αναφορές για υπερβολικό συνωστισμό και έλλειψη αποχωρητηρίων στο κέντρο.
- Πέντε ανήλικοι τέθηκαν υπό κράτηση στον Βόλο επί 45 ημέρες προτού μεταφερθούν στην Αθήνα, όπου τέθηκαν εκ νέου υπό κράτηση.

Υπήρξαν επίσης αναφορές για κακομεταχείριση μεταναστών και αιτούντων άσυλο.

- Σαράντα μετανάστες, μεταξύ των οποίων και ανήλικοι, οι οποίοι προσπαθούσαν να επιβιβαστούν σε πλοία με προορισμό την Ιταλία από το λιμάνι της Πάτρας, αναφέρθηκε ότι τέθηκαν υπό κράτηση στο Γραφείο Ασφαλείας Πατρών και ορισμένοι ξυλοκοπήθηκαν.

Από αυτά τα περιστατικά, συνάγεται κατάφωρη παραβίαση σειράς δικαιωμάτων που προστατεύονται από το Σύνταγμα: καταρχήν, της ανθρώπινης αξιοπρέπειας ˙ σε καμία περίπτωση δεν επιτρέπεται οι συνθήκες κράτησης να φτάνουν στον εξευτελισμό, την κακομεταχείριση και τον βασανισμό των ανθρώπων, αλλοδαπών ή όχι. Δεν υπάρχει ούτε η ελάχιστη προστασία της παιδικής ηλικίας και της οικογένειας που η διαφύλαξή τους ανάγεται σε υποχρέωση του κράτους , σύμφωνα με το άρθρο 21 του Σ. Η υγεία, δε, που και αυτή προστατεύεται στο Σύνταγμα (άρθρα5 παρ.5 και 20 παρ.3 Σ) περισσότερο κινδυνεύει παρά διαφυλάσσεται στις παραπάνω συνθήκες κράτησης. Γενικά, θα μπορούσαμε να πούμε ότι υπάρχει προφανής παραβίαση των συνταγματικών δικαιωμάτων εκείνων που ανάγονται στο βασικότερο ˙ τη φυσική υπόσταση του ανθρώπου..

[112] Διεθνής Αμνηστία, ‘’Μακριά από τα φώτα της δημοσιότητας: τα δικαιώματα των αλλοδαπών κρατουμένων μεταναστών παραμένουν στο ημίφως’’ (Οκτώβριος 2005)

Επιπλέον, στην *Ετήσια Έκθεση 2006 της Διεθνούς Αμνηστίας για το 2005*[113], (Ετήσια Έκθεση 2006) αναφέρεται μία σημαντικότατη περίπτωση αστυνομικής κακομεταχείρισης από όργανα της ΕΛΑΣ.
Συγκεκριμένα, στις 13 Δεκεμβρίου 2005, στην υπόθεση Μπέκου και Κουτρόπουλου κατά Ελλάδας[114], το Ευρωπαϊκό Δικαστήριο Ανθρωπίνων Δικαιωμάτων αποφάνθηκε ότι η Ελλάδα είχε παραβιάσει διατάξεις της Ευρωπαϊκής Σύμβασης για τα Δικαιώματα του Ανθρώπου (ΕΣΔΑ), η οποία απαγορεύει τα βασανιστήρια και άλλες μορφές κακομεταχείρισης, καθώς και διακρίσεις στην απόλαυση των δικαιωμάτων της ΕΣΔΑ (κυρίως παραβίαση του άρθρου 3 ΕΣΔΑ και των διατάξεων περί ισότητας. Οι δύο αιτούντες, Έλληνες Ρομά που συνελήφθησαν το 1998, μεταφέρθηκαν στο αστυνομικό τμήμα Μεσολογγίου όπου αστυνομικοί τους ξυλοκόπησαν με κλομπ και σιδερολοστό, τους χαστούκισαν και τους κλότσησαν, τους απείλησαν με σεξουαλική επίθεση και τους εξύβρισαν λεκτικά. Οι εν λόγω αστυνομικοί απαλλάχθηκαν από την κατηγορία της κακομεταχείρισης, τόσο από την εσωτερική Ένορκη Διοικητική Εξέταση (ΕΔΕ) της αστυνομίας, όσο και από τη δίκη που ακολούθησε. Στην απόφασή του, το Ευρωπαϊκό Δικαστήριο Ανθρωπίνων Δικαιωμάτων διαπίστωνε ότι οι δύο Ρομά είχαν υποστεί απάνθρωπη και ταπεινωτική μεταχείριση στα χέρια της αστυνομίας, ότι οι αρχές παρέλειψαν να διενεργήσουν αποτελεσματική έρευνα για το περιστατικό, και ότι οι αρχές παρέλειψαν να ερευνήσουν τα πιθανά ρατσιστικά κίνητρα πίσω από το περιστατικό.

2) ΝΟΜΟΛΟΓΙΑ:

Α) Αντισυνταγματική η προσωποκράτηση για χρέη προς το Δημόσιο;

Τόσο ο ΚΔΔ στα άρθρα 231-243, τόσο και ο ν. 1867/1989 ‘’προσωπική κράτηση κατ’ εφαρμογή των διατάξεων του Κώδικα Εισπράξεων Δημοσίων Εσόδων και άλλες διατάξεις’’, προβλέπουν την προσωποκράτηση του οφειλέτη για χρέη προς το Δημόσιο.
Όμως, τα τελευταία χρόνια παρατηρείται στροφή στη νομολογία, η οποία δεν επιβάλλεται πλέον ούτε ως ποινή, ούτε ως μέτρο διοικητικού καταναγκασμού, παρά μόνο σε οφειλέτες που, ενώ δύνανται, εντούτοις δεν τακτοποιούν τις οφειλές τους προς το Δημόσιο.

[113] Ετήσια Έκθεση 2006 της Διεθνούς Αμνηστίας, www.amnesty.org.gr
[114] European Court of Human Rights, Fourth Section, case of Bekos and Koutropoulos v. Greece, Application no. 15250/02, judgement 13th December 2005 (Strasburg), βλ. Και Παράρτημα

Συγκεκριμένα, στην απόφαση ΣτΕ 2611/2004 [115], το Δικαστήριο έκρινε ότι η επιβολή του αναγκαστικού μέτρου της προσωποκράτησης προς είσπραξη δημοσίων εσόδων κατά των οφειλετών του Δημοσίου διαφέρει των γνήσιων μέσων εκτέλεσεως (π.χ. κατάσχεση) διότι αποτελεί μέτρο καταναγκασμού όχι επί της περιουσίας αλλά επί του προσώπου του οφειλέτου, προκειμένου να εξαναγκαστεί αυτός στην καταβολή του οφειλόμενου χρέους. Αυτό όμως είναι συνταγματικά ανεπίτρεπτο ως αντικείμενο στα άρθρα 2 παρ. 1 και 5 παρ. 3 του Συντάγματος σύμφωνα με τα οποία πρωταρχική υποχρέωση της πολιτείας είναι ο σεβασμός και η προστασία της αξίας του ανθρώπου, πυρήνας της οποίας είναι η προσωπική ελευθερία. Το Σύνταγμα ανέχεται τη στέρηση της προσωπικής ελευθερίας υπό την προϋπόθεση ότι αυτή είναι αναγκαία για την προάσπιση του δημοσίου συμφέροντος χάριν του οποίου επιβάλλεται. Τέτοιοι λόγοι δημοσίου συμφέροντος που δικαιολογούν την επιβολή στερητικών της ελευθερίας ποινών προβλέπονται από το ποινικό δίκαιο. Στην προκειμένη όμως περίπτωση η προσωπική κράτηση δεν επιβάλλεται ως ποινή για αποδοκιμαστέα κοινωνική συμπεριφορά αλλά ως μέτρο διοικητικού καταναγκασμού προκειμένου να εξαναγκαστεί ο ιδιώτης να προβεί σε εξόφληση χρέους.

Η προσωπική κράτηση για χρέη προς το Δημόσιο διαφέρει από τα λοιπά μέτρα διοικητικού καταναγκασμού γιατί συνιστά άμεση επέμβαση του Δημοσίου στην προσωπικότητα του οφειλέτη θίγοντας τον πυρήνα της ανθρώπινης αξιοπρέπειας που είναι η ατομική ελευθερία. Η αξία του ανθρώπου και η ανθρώπινη αξιοπρέπεια αποτελούν υπέρτατες αξίες σε μια φιλελεύθερη δημοκρατία. Το γεγονός ότι ο συντακτικός νομοθέτης περιέλαβε την υποχρέωση της Πολιτείας να σέβεται και να προστατεύει την αξία του ανθρώπου στο Α' τμήμα του Συντάγματος, στις βασικές διατάξεις που ρυθμίζουν την μορφή του πολιτεύματος, αποδεικνύει την βούλησή του να αναγάγει αυτή τη διάταξη σε θεμελιώδη αρχή για τη συνταγματική τάξη της χώρας. Η γενική και απόλυτη διατύπωσή της καθώς και η εξαίρεσή της από τις υποκείμενες σε αναθεώρηση διατάξεις καταδεικνύουν ότι η αρχή αυτή δεν είναι απλά κατευθυντήρια αλλά νομικά πλήρως δεσμευτική και αποτελεί μια από τις λίγες περιπτώσεις που το Σύνταγμα επιβάλλει ρητά υποχρεώσεις στο κράτος.

Το δημόσιο συμφέρον δεν μπορεί πάντοτε και άκριτα να περιορίζει υπέρτατα ατομικά αγαθά, έστω και αν πρόκειται για δικαιολογημένο δημόσιο συμφέρον. Ο νομοθέτης όταν θεσπίζει διατάξεις που περιορίζουν ατομικά δικαιώματα, πρέπει να λαμβάνει υπόψη του τους περιορισμούς των περιορισμών των ατομικών δικαιωμάτων έτσι ώστε να μη θίγει τον απαραβίαστο πυρήνα τους και να μην τα καθιστά ανενεργά. Ο πυρήνας του ατομικού δικαιώματος αποτελεί την απροσπέλαστη για τη δημόσια εξουσία περιοχή του που δεν επιτρέπεται να θιγεί για καμία σκοπιμότητα και στην περίπτωση της ανθρώπινης αξιοπρέπειας είναι η ανθρώπινη ελευθερία και η αυστηρά προσωπική σφαίρα του ατόμου. Το δημόσιο συμφέρον που εξυπηρετείται με την είσπραξη των δημοσίων εσόδων δεν δικαιολογεί αυτό τον υπέρμετρο περιορισμό της ανθρώπινης αξιοπρέπειας που

[115] ΣτΕ 2611/2004, σχολιασμός : Ρήγα Νικολία, www.greeklaws.com/pubs/results.php?id=1595

συνεπάγεται η προσωπική κράτηση. Ακόμη και ηπιότερα μέτρα διοικητικού καταναγκασμού που πλήττουν την περιουσία του ατόμου ενδέχεται να θίγουν την αξιοπρέπειά του και να οδηγούν σε οιονεί ισοπέδωση της προσωπικότητάς του όταν τον αποστερούν από τα απαραίτητα προς το ζην και του αφαιρούν την ελάχιστη υλική βάση της ύπαρξής του. Ακόμη και αυτή η αποστέρηση θεωρείται ασυμβίβαστη με το Σύνταγμα ως μη σεβόμενη την υποχρέωση σεβασμού της ανθρώπινης αξίας. Η στέρηση της προσωπικής ελευθερίας είναι ανεκτή από το Σύνταγμα εφόσον είναι λογικά αναγκαία για την προάσπιση δημοσίου συμφέροντος και αποτελεί πρόσφορο, κατάλληλο και το μοναδικό μέσο κατ' αποκλεισμό κάθε άλλου προβλεπόμενου από τις οικείες διατάξεις για την ικανοποίησή του.
Το ποινικό δίκαιο προβλέπει λόγους δημοσίου συμφέροντος που δικαιολογούν την στέρηση της προσωπικής ελευθερίας όπως στην περίπτωση του ποινικού αδικήματος της παραβιάσεως της προθεσμίας καταβολής των βεβαιωμένων και ληξιπρόθεσμων χρεών προς το Δημόσιο και τα ν.π.δ.δ. Σ' αυτές τις περιπτώσεις η στερητική της ελευθερίας ποινή επιβάλλεται ως κακό για αντικοινωνική συμπεριφορά, ως ένδειξη ιδιαίτερης αποδοκιμασίας του δράστη. Αντιθέτως, στην εν λόγω απόφαση επιβάλλεται ως διοικητικό μέτρο αποβλέπον στην άσκηση πιέσεως προς εξόφληση χρέους δια χρημάτων τα οποία ενδέχεται να μην έχει ο οφειλέτης. Υπό το πρίσμα αυτό δεν υφίσταται καν θέμα εφαρμογής της αρχής της αναλογικότητας, διότι αυτή προϋποθέτει ότι τόσο ο σκοπός όσο και τα χρησιμοποιούμενα προς επίτευξη αυτού μέσα είναι κατ' αρχήν θεμιτά, οπότε και ερευνάται περαιτέρω η μεταξύ τους σχέση σε κάθε συγκεκριμένη περίπτωση. Το μέτρο όμως της προσωπικής κράτησης απαγορεύεται καθ' εαυτό εις πάσα περίπτωση ως αντικείμενο στο Σύνταγμα (αρθρ. 2 παρ. 1 και 5 παρ.3), καθώς και στην ΕΣΔΑ (άρθρο 5), που κατοχυρώνει την προσωπική ελευθερία.

Στο ίδιο πνεύμα κινήθηκε και η πρόσφατη απόφαση ΣτΕ 250/2008[116] για την προσωποκράτηση εγγυητή οφειλέτη για χρέη προς το Δημόσιο. Στην υπόθεση αυτή, απορρίφθηκε η αίτηση αναιρέσεως του Δημοσίου κατά αποφάσεως του ΔιοικΕφΑθ., η οποία απέρριπτε αίτηση του Δημοσίου για προσωποκράτηση του εγγυητή του οφειλέτη. Μεταξύ άλλων, ο ν. 1867/1989 στο άρθρο 4 παρ.1 ορίζει: *''...ι) κατά των προσώπων που έχουν συμβληθεί ως εγγυητές ανεξάρτητα από το αν έχουν διατηρήσει το ευεργέτημα δίζησης ή όχι''*. Το Δικαστήριο στήριξε την απόφασή του στο ίδιο σκεπτικό με αυτό της προεκτεθείσας απόφασης (ΣτΕ 2611/2004). Επιπλέον, υποστηρίχθηκε ότι η προσωποκράτηση αντίκειται επιπλέον και στο άρθρο 7 παρ. 2 του Συντάγματος, κατά την έννοια του οποίου το ανθρώπινο σώμα ουδέποτε δύναται να χρησιμοποιείται ως μέσο για την επίτευξη σκοπού, έστω και δημοσίου συμφέροντος. Ακόμη, παραβιάζει και τη συνταγματική αρχή της απαγορεύσεως επιβολής δύο ποινών για την ίδια παράβαση ˙ δεν μπορεί να επιβληθεί και προσωποκράτηση και διοικητικός καταναγκασμός για πληρωμή του ίδιου χρέους.

[116] ΣτΕ 250/2008 , lawdb.intrasoftnet.com/nomos/tee_frame.html

Ανησυχίες, ωστόσο, δημιουργεί η στάση της μειοψηφίας, η οποία θεωρεί τις διατάξεις περί προσωποκράτησης για χρέη προς το δημόσιο ως μη αντικείμενες στο Σύνταγμα. Υποστηρίζεται ότι δεν υπάρχει προσβολή του δικαιώματος της φυσικής ελευθερίας ούτε παραβίαση της αρχής της αναλογικότητας, αφού οι διατάξεις 231-243 του ΚΔΔ ορίζουν όλες τις προϋποθέσεις ούτως ώστε να μην υπάρχει καμία υπέρμετρη προσβολή του δικαιώματος του άρθρου 5 παρ. 3 Σ. Εξάλλου, το Κράτος είναι υποχρεωμένο να προβαίνει σε πράξεις καταναγκασμού, ακόμα και προσωπικής κράτησης των οφειλετών του, γιατί, χωρίς την αποτελεσματική είσπραξη των δημοσίων εσόδων, το Κράτος δεν θα είναι σε θέση να ανταποκριθεί και στον σύγχρονο κοινωνικό του ρόλο με την πραγματοποίηση των αναγκαίων παροχών σε τομείς, όπως η παιδεία, η υγεία, η κοινωνική ασφάλιση, η απασχόληση, που αποτελεί άλλωστε και υποχρέωσή του. Ούτως η άλλως –υποστηρίζει η μειοψηφία- ότι οι διατάξεις του ΚΔΔ και του ΚΕΔΕ σέβονται την αρχή της αναλογικότητας, αφού προσωπική κράτηση δεν επιβάλλεται , όταν ο οφειλέτης τελεί αποδεδειγμένα σε οικονομική αδυναμία καταβολής του χρέους του. Άλλωστε, η προσωποκράτηση γίνεται δεκτή και από το ΕΔΔΑ, σύμφωνα με πάγια νομολογία του (υπόθεση Perks v. The United Kingdom, 12.10.1999, κτλ.) ˙ σύμφωνα με το ΕΔΔΑ, η προσωπική κράτηση, ως μέτρο για την είσπραξη δημοσίων εσόδων, όχι μόνο δεν αντίκειται στις διατάξεις της ΕΣΔΑ, αλλά και προβλέπεται από το άρθρο 5 παρ. 1β'.

Παρόλα αυτά, η νομολογία εμμένει στην προοδευτική (και ορθότερη) άποψη της αντισυνταγματικότητας της προσωπικής κράτησης για χρέη οφειλετών του Δημοσίου. Άλλωστε, ο παρόμοιος θεσμός έχει περιοριστεί σημαντικά και στο Ιδιωτικό Δίκαιο, με το ν. 2462/1997, που κύρωσε το διεθνές σύμφωνο του ΟΗΕ, για τα ατομικά και πολιτικά δικαιώματα. Σύμφωνα με το άρθρο 11 αυτού : *'' Κανείς δεν φυλακίζεται αποκλειστικά λόγω της αδυναμίας του να εκπληρώσει συμβατική υποχρέωση''*. Η κατάργηση της προσωποκράτησης αφορά καταρχήν και τα συμβατικά χρέη προς το Δημόσιο[117] (άρθρο 63. ν.δ. 356/1974).

Β) ΕΔΔΑ και ΕΛΛΑΔΑ:

Δυστυχώς η χώρα μας έχει υποστεί πολλές κυρώσεις από το Ευρωπαϊκό Δικαστήριο Δικαιωμάτων του Ανθρώπου για παραβίαση των θεμελιωδών δικαιωμάτων των κρατουμένων, όπως αυτά κατοχυρώνονται στην ΕΣΔΑ (αν όχι και στο Σύνταγμα) , η οποία κυρώθηκε από τη χώρα μας με το ν.δ. 53/1974 και έχει, σύμφωνα με το άρθρο 28 παρ. 1 του Συντάγματος, υπερνομοθετική ισχύ.

[117] Περάκη Εμμ. Ευάγγελου, ''Γενικό Μέρος του Εμπορικού Δικαίου'' , (2004), σελ. 313

- **<u>Υπόθεση Makaratzis v. Greece[118]- υποχρέωση της αστυνομίας για προστασία της ζωής (άρθρο 3 ΕΣΔΑ):</u>**

Στις 13 Σεπτεμβρίου 2005, ο αιτών κ. Μακαράντζης, οδηγώντας το αυτοκίνητό του, δεν σταμάτησε σε έλεγχο της Αστυνομίας, πλησίον της Αμερικάνικης Πρεσβείας στην Αθήνα. Η εν οι υπηρεσία αστυνομικοί, θεωρώντας τον ύποπτο, ξεκίνησαν να τον καταδιώκουν. Στην πορεία της καταδίωξης εντάχθηκαν και άλλα περιπολικά οχήματα της Αστυνομίας, ακούστηκαν πυροβολισμοί, ενώ ο καταδιωκόμενος χτύπησε αυτοκίνητα και τραυμάτισε επιβάτες στην προσπάθειά του να ξεφύγει. Συνολικά, βρέθηκαν χτυπήματα από 16 σφαίρες στο αυτοκίνητο του αιτούντος, και ο ίδιος μεταφέρθηκε από την Αστυνομία σε νοσοκομείο, αφού είχε πολλαπλούς τραυματισμούς (στα πόδια, χέρια κτλ).
Το ΕΔΔΑ έκρινε (μετά από σειρά αποδείξεων όπως αυτόπτες μάρτυρες, μαρτυρίες των διαδίκων και άλλων αστυνομικών, ιατρική γνωμάτευση κτλ.) ότι, παρόλο που οι αστυνομικοί, κατά τη διάρκεια της καταδίωξης δεν είχαν ούτε τον κατάλληλο χρόνο, ούτε τα κατάλληλα μέσα για να σχεδιάσουν την επιχείρηση, εντούτοις ανάγεται σε υποχρέωσή τους να διαφυλάσσουν την ζωή των πολιτών, ιδιαίτερα όταν αυτή απειλείται με όπλα. Συνεπώς, ο αιτών κ. Μακαράτζης υπέπεσε θύμα παραβίασης του άρθρου 2 της ΕΣΔΑ. Το Δικαστήριο έκρινε επίσης αρνητικά το γεγονός ότι από τη μια μεν οι αστυνομικοί δεν τήρησαν την αρχή της αναλογικότητας, αφού δεν χρησιμοποίησαν τα κατάλληλα και πρόσφορα μέσα για το σκοπό της καταδίωξης (εξάλλου, ο σκοπός της καταδίωξης ήταν άγνωστος ˙ ο καταδιωκόμενος ήταν απλά ‘’ύποπτος’’ για αδιευκρίνιστη αιτία’’) και από την άλλη δε, επτά αστυνομικοί που έλαβαν μέρος στην καταδίωξη δεν παρουσιάστηκαν για αναγνώριση και κατάθεση αναφοράς, ούτε καν παρέδωσαν τα όπλα τους μετά το πέρας της υπηρεσίας τους.
Οι αστυνομικοί αυτοί καταδικάστηκαν για πρόκληση σοβαρής σωματικής βλάβης.
Το Δικαστήριο κατέληξε στο συμπέρασμα ότι οι Αστυνομικές Αρχές φάνηκαν ανίκανες στο να φέρουν εις πέρας την καταδίωξη και υπάρχει προφανής παραβίαση του άρθρου 2 της ΕΣΔΑ, και μάλιστα της παρ. 1, αφού το θύμα ως εκ θαύματος δεν έχασε τη ζωή του και αφού δεν στοιχειοθετούνται καν οι προϋποθέσεις περιορισμού του δικαιώματος στη ζωή, που ρητώς αναφέρονται στην παρ. 2 του άρθρου 2 της ΕΣΔΑ (*‘’συνεπεία χρήσεως βίας καταστάσης απολύτως αναγκαίας…δια την πραγματοποίησιν νμίμου συλλήψεως..’’*).

[118] European Court of Human Rights, Second Section, case of Maranatzis v. Greece, Application no. 50385/99, Judgement 20th December 2004 (Strasburg). , βλ. Παράρτημα

- **<u>Υπόθεση Dugoz c. Greece[119], - συνθήκες κράτησης που θίγουν την ανθρώπινη αξιοπρέπεια:</u>**

Ο Σύριος Dugoz είχε καταδικαστεί για θάνατο στη Συρία για προδοσία προς την πατρίδα κατά την έκτιση της στρατιωτικής του θητείας. Το 1983 διέφυγε στην Ελλάδα, ενώ το 1987 οι Ελληνικές Αρχές τον συλλαμβάνουν για παράνομη διαμονή στη χώρα και κατοχή ναρκωτικών. Με τη βοήθεια της Αστυνομίας και της Επιτροπής των Η. Ε. για τους Πρόσφυγες, θεωρείται πρόσφυγας και λαμβάνει άδεια παραμονής στη χώρα. Μετά από αλλεπάλληλες συλλήψεις για κλοπές κτλ., και αφού είχε λήξει η άδεια παραμονής του στη χώρα, ξανασυλλαμβάνεται το 1997 και παραμένει στη φυλακή μέχρι να απελαθεί από τη χώρα.
Ο αιτών ισχυρίστηκε ότι οι συνθήκες κράτησης στις φυλακές της Δραπετσώνας θεωρούνται εξευτελιστικές. Ενώ έχουν μόνο 20 κρατητήρια, κατά καιρούς φιλοξενούσαν πάνω από εκατό άτομα, και αυξανόταν ανάλογα με τα ‘’αυτόφωρα’’ κάθε νυχτός. Δεν υπήρχαν κρεβάτια ούτε στρώματα, σεντόνια και κουβέρτες. Κάποιοι μάλιστα κοιμούνταν στους διαδρόμους. Τα κρατητήρια ήταν βρώμικα και δεν υπήρχαν επαρκείς συνθήκες υγιεινής, ούτε ζεστό νερό ή και καθόλου νερό. Δεν υπήρχε καθαρός αέρας , ούτε μπορούσε να μπει το φως της ημέρας ˙ ούτε καν λόγος για χώρο άθλησης. Ο μόνος χώρος που μπορούσαν οι κρατούμενοι να κινηθούν ήταν στο διάδρομο που οδηγούσε στις τουαλέτες. Από το συνωστισμό, ο αιτών ισχυρίζεται ότι δεν μπορούσε ούτε να διαβάσει ένα βιβλίο. Το φαγητό ήταν κακής ποιότητας, δεν υπήρχε γάλα, φρούτα ή άλλα βασικά τρόφιμα. Επίσης, δεν υπήρχε ιατρική περίθαλψη, ούτε δυνατότητα επικοινωνίας με τον έξω κόσμο. Τέλος, περιστατικά κακομεταχείρισης από τους φύλακες δεν ήταν σπάνια. Όταν ο αιτών μεταφέρθηκε στις φυλακές στην Αλεξάνδρας, θεώρησε τις συνθήκες κράτησης ελαφρώς καλύτερες.
Μετά τις κατηγορίες αυτές, τις οποίες αρνήθηκε η Ελληνική Διοίκηση, το 1994 η Ευρωπαϊκή Επιτροπή για την Πρόληψη Βασανιστηρίων (CPT) διεξήγαγε έρευνα στις φυλακές Αλεξάνδρας και βρήκε τις συνθήκες ικανοποιητικές, αλλά για προσωρινή κράτηση 4-6 ημερών μόνο.
Με βάση αυτά τα περιστατικά, το Δικαστήριο αποφάσισε ότι υπάρχει παραβίαση του άρθρου 3 της ΕΣΔΑ , το οποίο κατοχυρώνει την απαγόρευση εξευτελιστικής μεταχείρισης που προσβάλλει, μεταξύ άλλων, την ανθρώπινη αξία.

Επίσης, εξαιτίας της ανεπαρκούς βοήθειας τόσο της Αστυνομίας όσο και της Δικαιοσύνης για την προστασία ενός πολιτικού πρόσφυγα και την συνέχιση της κράτησής του σε φυλακή, το Δικαστήριο έκρινε ότι υπάρχει και παραβίαση των άρθρων 5 παρ. 1 και 4 της ΕΣΔΑ, που κατοχυρώνει το δικαίωμα στην φυσική ελευθερία και προσωπική ασφάλεια.

[119] European Court of Human Rights, Third Section, case of Dugoz c. Greece, Application no. 40907/98, Judgement 6th March 2001(Strasburg), βλ. Παράρτημα

- **<u>Υπόθεση Peers c. Greece[120]- εξευτελιστικές συνθήκες κράτησης (άρθρο 3 ΕΣΔΑ) και παραβίαση του δικαιώματος στην ιδιωτική ζωή (άρθρο 8 ΕΣΔΑ):</u>**

Τον Αύγουστο του 1994 ο Βρετανός Peers, ο οποίος είχε τεθεί σε αποτοξίνωση από ηρωίνη, συνελλήφθη στο αεροδρόμιο της Αθήνας για κατοχή και διακίνηση ναρκωτικών και μεταφέρθηκε στο κρατητήριο του Αστυνομικού Τμήματος της Αλεξάνδρας, όπου κρατήθηκε για 5 μέρες. Από εκεί, μεταφέρθηκε στην ψυχιατρική πτέρυγα των φυλακών Κορυδαλλού. Ακολούθως, μεταφέρθηκε στις φυλακές Κορυδαλλού. Στις 28 Ιουλίου ο αιτών κρίθηκε ένοχος από το Τριμελές Εφετείο Αθηνών στις κατηγορίες που του είχαν προσαχθεί. Κατά τη διάρκεια της διαμονής του στις φυλακές Κορυδαλλού, ο αιτών ισχυρίζεται ότι οι συνθήκες διαβίωσης ήταν απάνθρωπες.. Συγκεκριμένα, καταγγέλει ότι δεν του δόθησαν ούτε ρούχα, σεντόνια, μαξιλάρι, σαπούνι ή χαρτί τουαλέτας, παρά μόνο κουβέρτες. Αναγκαζόταν να δανείζεται λεφτά για να εξασφαλίσει τα απαραίτητα. Οι τουαλέτες ήταν τύπου ‘’τούρκικου’’ και συχνό καταφύγιο γατών. Ενώ οι φυλακές είχαν 250 – 360 φυλακισμένους, υπήρχαν μόνο 10 ντους-σωλήνες που το χειμώνα ‘’φιλοξενούσαν’’ τα απόβλητα των γατών. Δεν υπήρχε ζεστό νερό ούτε για μπάνιο ούτε για πλύσιμο των ρούχων. Συχνά διέμενε στο κελί με άλλους, αλλά ζούσε στην απομόνωση, αφού κανείς δεν μιλούσε αγγλικά. Επίσης, δεν υπήρχε φως στο κελί, ούτε χρόνος για άσκηση.
Τις καταγγελίες του Άγγλου επιβεβαιώνει και η Επιτροπή Έρευνας που στάληκε εκεί. Χαρακτηριστικά, παρομοιάζει τις συνθήκες κράτησης με ‘’μεσαιωνικές’’. Μεταξύ άλλων, η τουαλέτα ήταν τόσο κοντά στο κρεβάτι που αποτελούσε προέκτασή του˙ η ζέστη στα δωμάτια ήταν αφόρητη και πολλές φορές κυκλοφορούσαν αρουραίοι. Στο κελί του αιτούντος δεν υπήρχε καν νεροχύτης.
Συνεπώς, το Δικαστήριο έκρινε ότι υπάρχει προφανής παραβίαση του άρθρου 3 της ΕΣΔΑ, λόγω των αδικαιολόγητων συνθηκών κράτησης, που προσβάλλουν την ανθρώπινη αξιοπρέπεια (και επιπλέον των αντίστοιχων διατάξεων του ΣωφρΚ. της Ελλάδας).
Ακόμη, το Δικαστήριο έκρινε ότι ο αιτών στερήθηκε του δικαιώματος στην ιδιωτική ζωή και επικοινωνία (άρθρο 8 ΕΣΔΑ και 9 και 19 του Συντάγματος) γιατί η αλληλογραφία του ανοιγόταν από τους φύλακες.
Τέλος, ο ισχυρισμός του αιτούντος ότι στερήθηκε το τεκμήριο αθωότητας του (άρθρο 6 παρ. 2 ΕΣΔΑ) μέχρι να δικαστεί, γιατί ήταν φυλακισμένος με καταδίκους για σοβαρά εγκλήματα δεν έγινε δεκτός από το ΕΔΔΑ, γιατί κάτι τέτοιο δεν οδηγεί στην ενοχή του και επίσης δεν προβλέπεται η χωριστή φυλάκιση υποδίκων –καταδίκων.

[120] European Court of Human Rights, Second Section, Peers c. Greece, Application no. 28524/95, judgement 19th April 2001, (Strasburg), βλ. και Παράρτημα σελ.

- **<u>Υπόθεση Portington c. Greece[121]-πρόσβαση κατηγορούμενου σε δικαστήριο σε εύλογο χρονικό διάστημα από την απαγγελία της ποινικής κατηγορίας:</u>**

Ο Άγγλος Porington συνελήφθη το 1988 καθώς περνούσε τα σύνορα της Ελλάδας με την κατηγορία φόνου (το 1995, κατά την προηγούμενή του επίσκεψη στην Ελλάδα) και οπλοφορίας. Ο αιτών κρατήθηκε στις φυλακές Καστοριάς και , μετά από βούλευμα του Συμβουλίου Πλημμελειοδικών και Εφετών, δικάστηκε από το Μικτό Ορκωτό Δικαστήριο Θεσσαλονίκης. Καταδικάστηκε σε θανατική ποινή για ανθρωποκτονία και, ισόβια κάθειρξη για ληστεία και σε πέντε χρόνια φυλάκιση για οπλοφορία. Τον ίδιο χρόνο, ο αιτών άσκησε έφεση στο Μικτό Ορκωτό Εφετείο για έλλειψη μαρτύρων και αποδείξεων. Μετά από αλλεπάλληλες καθυστερήσεις, η έφεσή του εκδικάστηκε στις 12 Φεβρουαρίου 1996 και η ποινή του από θανατική μετατράπηκε ισόβια κάθειρξη.
Ο αιτών προσέφυγε στο ΕΔΔΑ για παραβίαση του άρθρου 6 παρ. 1 της ΕΣΔΑ , σύμφωνα με το οποίο : *''παν πρόσωπον έχει δικαίωμα όπως η υπόθεσίς του δικασθή δικαίως δημοσία και εντός λογικής προθεσμίας..''*. Το Δικαστήριο έκρινε ότι η πολυπλοκότητα της υπόθεσης δεν δικαιολογεί την καθυστέρηση της εκδίκασης της έφεσης. Αν και για κάποιες καθυστερήσεις στη διαδικασία ευθυνόταν ο κρατούμενος, οι μεγαλύτερες καθυστερήσεις προκλήθηκαν από την αδράνεια των ελληνικών Αρχών και Δικαστηρίων. Όμως, δεν επιδικάστηκε αποζημίωση υπέρ του, παρά μόνο η ικανοποίηση της δικαίωσής του.

[121] European Court of Human Rights, case of Portington c. Greece, (109/1997/893/1105) , Judgement 23 September 1998, (Strasburg). , βλ. Παράρτημα σελ. ν

ΣΥΜΠΕΡΑΣΜΑ

Μέσα από την εργασία αυτή διαφάνηκε η τεράστια σημασία που έχει η αναγνώριση και προστασία των συνταγματικών δικαιωμάτων των κρατουμένων. Οι κρατούμενοι, ευρισκόμενοι σε μία ειδική κυριαρχική σχέση δύνανται να υποστούν περιορισμούς των δικαιωμάτων τους ˙ περιορισμοί οι οποίοι γίνονται ανεκτοί και είναι νόμιμοι μόνο εφόσον εφαρμοστούν θεσμικά στο πλαίσιο της ειδικής κυριαρχικής σχέσης.

Έτσι, τα μητρικά δικαιώματα, όπως η ανθρώπινη αξιοπρέπεια, η ζωή και η υγεία δεν μπορούν να περιοριστούν ˙ η περιοριστική της ελευθερίας ποινή δεν μπορεί σε καμία περίπτωση να φτάσουν σε προσβολή των δικαιωμάτων αυτών.

Ακόμα και το κατεξοχήν περιοριζόμενο δικαίωμα της ελευθερίας δεν μπορεί να περιορίζεται αδιακρίτως, αλλά με τη σωστή επιβολή της ποινής και τηρουμένης της αρχής της αναλογικότητας. Η στέρηση της φυσικής ελευθερίας δεν σημαίνει και περιορισμό της πνευματικής ελευθερίας, της ελεύθερης ανάπτυξης της προσωπικότητας, ούτε στέρηση της ελευθερίας γνώμης και ιδεών και του δικαιώματος στην τέχνη, την παιδεία και τον αθλητισμό. Απόλυτη στέρηση επίσης του δικαιώματος στην ιδιωτική και οικογενειακή ζωή και επικοινωνία δεν είναι επιτρεπτή , αλλά και εδώ γίνεται θεσμική προσαρμογή των δικαιωμάτων αυτών στην ειδική κυριαρχική σχέση των κρατουμένων. Ακόμη, η θρησκευτική ελευθερία δεν μπορεί να περιοριστεί στον πυρήνα της, ενδεχομένως όμως να τεθούν περιορισμοί στην άσκησή της. Λόγω της φύσης της στέρησης της φυσικής ελευθερίας, είναι λογικό να περιορίζεται το δικαίωμα του συνέρχεσθαι, το δικαίωμα ιδιοκτησίας, το δικαίωμα του εκλέγειν και εκλέγεσθαι και το δικαίωμα στην εργασία ˙ βέβαια, υπάρχουν ειδικές διατάξεις στο εσωτερικό δίκαιο που καθορίζουν τον τρόπο άσκησης των δικαιωμάτων αυτών.

Τα δικαιώματα όμως που δεν πρέπει για κανένα λόγο να περιορίζονται είναι αυτά που αφορούν κυρίως το δικαίωμα στο νόμιμο δικαστή, το δικαίωμα της αναφοράς, την τήρηση της αρχής nullum crimen nulla poena sine lege και το δικαίωμα έννομης προστασίας και προηγούμενης ακρόασης, σε συνδυασμό με το τεκμήριο της αθωότητας.

Το Σύνταγμα, η ΕΣΔΑ (που έχει για τη χώρα μας υπερνομοθετική ισχύ) , οι διεθνείς συμβάσεις καθώς και ο ΣωφρΚ θεσπίζουν διατάξεις για την κατοχύρωση και εξασφάλιση των συνταγματικών δικαιωμάτων των κρατουμένων.

Παρόλα αυτά, η ελληνική πραγματικότητα είναι απογοητευτική. Τόσο η Διεθνής Αμνηστία όσο και το Ευρωπαϊκό Δικαστήριο Δικαιωμάτων του Ανθρώπου είναι καθημερινά αντιμέτωπα με καταστάσεις που πόρρω απέχουν αυτά που ορίζουν τα νομοθετήματα. Οι κρατούμενοι, πολλές φορές, αναγκάζονται να ζήσουν σε απάνθρωπες συνθήκες, εξευτελιστικές για την αξιοπρέπειά τους. Δεν είναι σπάνιο φαινόμενο ούτε η κακοποίηση και ο βασανισμός τους, ούτε η αδυναμία ασκήσεως του δικαιώματός τους σε δίκαιη δίκη. Κοιτάζοντας κανείς την κατάσταση στις σημερινές φυλακές, θα έλεγε ότι όλα τα νομοθετήματα που διασφαλίζουν τα δικαιώματα των κρατουμένων δεν είναι παρά ευχολόγιο.

ΠΕΡΙΛΗΨΗ

Τα δικαιώματα των κρατουμένων κατοχυρώνονται στο Σύνταγμα, τον Σωφρονιστικό Κώδικα, τις διεθνείς συμβάσεις που έχει κυρώσει η Ελλάδα και την ΕΣΔΑ (που έχει υπερνομοθετική ισχύ για τη χώρα μας).

Οι κρατούμενοι βρίσκονται σε μια ειδική, αναγκαστική κυριαρχική σχέση με το Κράτος. Εφόσον οι κυριαρχικές σχέσεις είναι ο κατεξοχήν χώρος των περιορισμών των δικαιωμάτων, είναι αναπόφευκτος ο περιορισμός κάποιων δικαιωμάτων των κρατούμενων.

Τα δικαιώματα αυτά δεν αναστέλλονται εντελώς, αλλά προσαρμόζονται θεσμικά. Τέτοια δικαιώματα είναι το δικαίωμα στην πνευματική ελευθερία και τη ελεύθερη ανάπτυξη της προσωπικότητας, η ελευθερία γνώμης και ιδεών, το δικαίωμα στην παιδεία, την τέχνη και τον αθλητισμό, το δικαίωμα στην ιδιωτική και οικογενειακή ζωή, το δικαίωμα του συνέρχεσθαι, το δικαίωμα ιδιοκτησίας και το δικαίωμα του εκλέγειν και εκλέγεσθαι και το δικαίωμα στην εργασία. Επίσης, η θρησκευτική ελευθερία δεν επιτρέπεται να περιοριστεί, αλλά προσαρμόζεται θεσμικά ως προς την άσκησή της. Αντίθετα, τα μητρικά δικαιώματα όπως η ανθρώπινη αξιοπρέπεια, η ζωή και η υγεία είναι ανεπίτρεπτο να περιοριστούν. Η στέρηση της φυσικής ελευθερίας περιορίζεται όσο αυτό επιβάλλεται από την στερητική της ελευθερίας ποινή. Ακόμα, τα δικαστικά συνταγματικά δικαιώματα των κρατουμένων δεν δύναται να περιορισθούν.

Δυστυχώς, ελληνική πραγματικότητα δεν ανταποκρίνεται πάντα στις συνταγματικές και νομοθετικές ρυθμίσεις των δικαιωμάτων των κρατουμένων. Αυτό φαίνεται τόσο από τις εκθέσεις της Διεθνούς Αμνηστίας όσο και από τις αποφάσεις του ΕΔΔΑ κατά της Ελλάδας.

SUMMARY

The rights of the prisoners enshrined in the Greek Constitution, Penitentiary Code, international conventions ratified by Greece and the European Convention of Human Rights-ECHR (which lays above common law in our country).

The detainees are in a special force of dominant relationship with the State. As executive relations is the main area of restrictions of rights, it is inevitable to limit some rights of detainees.

These rights are not totally suspended, but fit by the certain circumstances of the estate. Such rights are the right to intellectual freedom and the free development of personality, freedom of opinion and ideas, the right to education, art and sport, the right to private and family life, the right of assembly, property rights and right to vote and the right to work. Also, religious freedom may not be restricted, but fit in the certain circumstances as exercised. Instead, the mother rights as human dignity, life and health are unacceptable to any restriction. The deprivation of physical liberty is restricted as required by the deprivation of liberty. Even the judicial constitutional rights of prisoners may not be restricted.

Unfortunately, greek reality does not always correspond to the constitutional and legislative arrangements for the rights of prisoners. This seems both from reports by Amnesty International and by the decisions of the ECHR against Greece.

ΒΙΒΛΙΟΓΡΑΦΙΑ:

- Αλεξιάδη Στέργιου, ‘’Σωφρονιστική’’, Δ’ Έκδοση, Εκδόσεις Αντ. Ν. Σάκκουλα, 2001, Αθήνα – Θεσσαλονίκη

- Αλεξιάδη Στέργιου, ‘’Ανθρώπινα Δικαιώματα – Ποινική Καταστολή’’,
  εκδόσεις Σάκκουλα ,1990 ,Θεσσαλονίκη

1) Ανδρουλάκη Κ.. Νικόλαου, ‘’Θεμελιώδεις έννοιες της ποινικής δίκης’’, Β’
Έκδοση, Εκδόσεις Αντ. Ν. Σάκκουλα, 1994

2) Ανδρουλάκη Κ.. Νικόλαου, ‘’ Ποινικό Δίκαιο – Γενικό Μέρος. Θεωρία για το Έγκλημα’’, Εκδόσεις Δίκαιο και Οικονομία, Π.Ν. Σάκκουλας, Αθήνα, 2000

3) Δαγτόγλου Π.Δ, ‘’Συνταγματικό Δίκαιο – Ατομικά Δικαιώματα Α΄ ‘’, Δεύτερη αναθεωρημένη Έκδοση, Εκδόσεις Αντ. Ν. Σάκκουλα, 2005

4) Δαγτόγλου Π.Δ, ‘’Συνταγματικό Δίκαιο – Ατομικά Δικαιώματα Β΄ ‘’, Δεύτερη αναθεωρημένη Έκδοση, Εκδόσεις Αντ. Ν. Σάκκουλα, 2005

5) Δημητρόπουλου Γ. Ανδρέα, ‘’Συνταγματικά Δικαιώματα, Γενικό Μέρος, Ειδικό Μέρος: Μητρικά Δικαιώματα, Φυσική Υπόσταση, Πνευματική Υπόσταση’’, Σύστημα Συνταγματικού Δικαίου, Τόμος Γ’, τεύχη Ι-ΙΙΙ, Β’ Έκδοση, Εκδόσεις Σάκκουλα, Αθήνα – Θεσσαλονίκη, 2008

6) Δημητρόπουλου Γ. Ανδρέα, ‘’Συνταγματικά Δικαιώματα- Ειδικό Μέρος’’, Παραδόσεις Συνταγματικού Δικαίου, Τόμος ΙΙΙ, τεύχη 4 επόμενα, Αθήνα, 2005

7) Καρακατσάνη Αλέξανδρου, Γαρδίκα Σταύρου, ‘’Ατομικό Εργατικό Δίκαιο’’, Εκδόσεις Αντ. Ν. Σάκκουλα, Αθήνα-Κομοτηνή, 1995

8) Περάκη Εμμ. Ευάγγελου, ‘’Γενικό Μέρος του Εμπορικού Δικαίου’’, Νομική Βιβλιοθήκη, Έκδοση 2004

9) Παπαϊωάννου Ζωή, ‘’Ελληνική Αστυνομία και Λοιποί Φορείς Άσκησης Αστυνόμευσης, Βασικά Νομοθετήματα’’, Δεύτερη Έκδοση, Εκδόσεις Αντ. Ν. Σάκκουλα, Αθήνα-Κομοτηνή, 2006

10) Χρυσογόνου Κωνσταντίνου, ‘’Ατομικά και Κοινωνικά Δικαώματα’’, Β’ Έκδοση, Εκδόσεις Σάκκουλα, Αθήνα 2002

ΑΡΘΡΑ:

1) Γιωτοπούλου - Μαραγκοπούλου Αλίκης, ‘’Στερητική της ελευθερίας ποινή και Ανθρώπινα Δικαιώματα’’ στο ΙΜΔΑ: ‘’Αντεγκληματική πολιτική και Δικαιώματα του Ανθρώπου’’

2) Κίτσιου Ο., «Ειδικές Κυριαρχικές Σχέσεις» (www.greeklaws.com/pubs)

3) Μανιτάκη Αντώνη, ‘’Τα Συνταγματικά Δικαιώματα των κρατουμένων και η Δικαστική Προστασία τους ‘’, Ποινικά Χρονικά ΛΘ’, 1989

4) Τσήτσουρα Α., ‘’Σύντομη ανασκόπηση του έργου της Ευρωπαϊκής Επιτροπής για την πρόληψη των βασανιστηρίων και της απάνθρωπης ή ταπεινωτικής μεταχείρισης ή τιμωρίας. Η συμβολή των μη κυβερνητικών οργανώσεων’’ στο ΙΜΔΑ, ‘’Κρατούμενοι και Δικαιώματα του Ανθρώπου’’, 1996

ΙΣΤΟΣΕΛΙΔΕΣ:

1) www.amnesty.org.gr

2) www.hchr.coe.int/

3) www.bailii.org/eu/cases/ECHR

4) www.hri.org/docs/ECHR50.html (EUROPEAN CONVENTION OF HUMAN RIGHTS AND ITS FIVE PROTOCOLS)

5) http://lawdb.intrasoftnet.com/nomos/

6) www.law.uoa.gr/~adimitrop

7) www.greeklaws.com

ΝΟΜΟΘΕΤΙΚΑ ΚΕΙΜΕΝΑ:

1) Σύνταγμα της Ελλάδας (1975/86/01)

2) Ποινικός Κώδικας

3) Κώδικας Ποινικής Δικονομίας

4) Σωφρονιστικός Κώδικας

5) Κώδικας Εισπράξεων Δημοσίων Εσόδων (ΚΕΔΕ)

6) Κώδικας Διοικητικής Δικονομίας (ν. 2717/1999)

7) Ευρωπαϊκή Σύμβαση Δικαιωμάτων του Ανθρώπου (ΕΣΔΑ)

8) Σχέδιο Ευρωπαϊκού Συντάγματος (ΣχΕυρΣ)

ΠΙΝΑΚΑΣ ΝΟΜΟΛΟΓΙΑΣ

- ΣτΕ 2611/2004 – υπόθεση προσωπικής κράτησης για χρέη προς το Δημόσιο
- ΣτΕ 250/2008 – υπόθεση προσωπικής κράτησης εγγυητή για χρέη προς το Δημόσιο
- European Court of Human Rights, Second Section, Kmetty v. Hungary, Application no 57967/OO (Judgement 16 December 2003, Strasburg), - υπόθεση κακομεταχείρισης από αστυνομικούς
- European Court of Human Rights, Third Section, Sadic Onder v. Turkey, Application no 28520/95 (Judgement 8 January 2004, Strasburg) – υπόθεση βασανισμού υπόπτου για τρομοκρατία
- European Court of Human Rights, Premiere Section, Henaf c. France, Requete no 65346/01 (Judgement 27 november 2003) – υπόθεση ‘’αλυσοδεσίματος’’ ασθενούς κρατουμένου στο κρεβάτι του νοσοκομείου

- European Court of Human Rights, Third Section, Perry v. the United Kingdom, Application no 63737/00 (judgement 17 July 2003, Strasburg), - υπόθεση παραβίασης ιδιωτικής ζωής κρατούμενου με κάμερες ασφαλείας

- European Court of Human Rights, Second Section, Doerga v. The Netherlands, Application no 50210/99 (Judgement 27 April 2004, Strasburg), - υπόθεση παραβίασης ιδιωτικής ζωής κρατούμενου με μαγνητοφώνηση τηλεφωνικής συνδιαλέξεως

- European Court of Human Rights, Fourth Section, case of Bekos and Koutropoulos v. Greece, Application no. 15250/02, judgement 13th December 2005 (Strasburg)- υπόθεση κακομεταχείρισης και βασανιστηρίων κρατουμένων από όργανα της ΕΛ.ΑΣ με ρατσιστικά κίνητρα

- European Court of Human Rights, Second Section, case of Maranatzis v. Greece, Application no. 50385/99, Judgement 20th December 2004 (Strasburg) – υπόθεση κινδύνου ζωής καταδιωκόμενου από την ΕΛ.ΑΣ

- European Court of Human Rights, Third Section, case of Dugoz c. Greece, Application no. 40907/98, Judgement 6th March 2001(Strasburg) – υπόθεση εξευτελιστικών συνθηκών κράτησης

- European Court of Human Rights, Second Section, Peers c. Greece, Application no. 28524/95, judgement 19th April 2001, (Strasburg) – υπόθεση εξευτελιστικών συνθηκών κράτησης

- European Court of Human Rights, case of Portington c. Greece, (109/1997/893/1105) , Judgement 23 September 1998, (Strasburg), - υπόθεση μη απονομής χρηστής και έγκαιρης απονομής δικαιοσύνης

ΠΕΡΙΛΗΨΗ ΝΟΜΟΛΟΓΙΑΣ:

- ΣτΕ 2611/2004 – υπόθεση προσωπικής κράτησης για χρέη προς το Δημόσιο :

  Στην υπόθεση αυτή το ΣτΕ απεφάνθη ότι τόσο οι διατάξεις του ΚΕΔΕ όσο και ο διατάξεις 231-243 του ΚΔΔικ περί προσωποκράτησης είναι αντισυνταγματικές, γιατί περιορίζουν υπέρτερα την φυσική ελευθερία (άρθρο 5 παρ. 3 Σ) και θίγουν την ανθρώπινη αξιοπρέπεια (άρθρο 2 παρ. 1 Σ). Το δημόσιο συμφέρον που εξυπηρετείται με την είσπραξη των δημοσίων εσόδων δεν δικαιολογεί αυτό τον υπέρμετρο περιορισμό της ανθρώπινης αξιοπρέπειας που συνεπάγεται η προσωπική κράτηση.

- ΣτΕ 250/2008 –υπόθεση προσωπικής κράτησης εγγυητή για χρέη προς το Δημόσιο:

  Στην υπόθεση αυτή το ΣτΕ απεφάνθη ότι τόσο οι διατάξεις τοθ ΚΕΔΕ όσο και οι διατάξεις 231-243 του ΚΔΔικ περί προσωποκράτησης είναι αντισυνταγματικές. Άλλωστε, ο ΚΕΔΕ ορίζει ρητώς ότι ο προσωποκράτηση δεν νοείται εις βάρος του εγγυητή του οφειλέτη. Πέρα από την παραβίαση των άρθρων 2 παρ. 1 και 5 παρ. 3 του Συντάγματος, υπάρχει και παραβίαση της αρχής απαγόρευσης δύο ποινών για το ίδιο πράγμα (έκτιση ποινής και διοικητικός καταναγκασμός) και της αρχής της αναλογικότητας. Η προσωποκράτηση δεν επιβάλλεται ιδίως στις περιπτώσεις όπου ο οφειλέτης βρίσκεται σε αντικειμενική αδυναμία να πληρώσει. Η μειοψηφία στηρίζει την άποψή της στις εγγυήσεις του ΚΔΔικ και σε νομολογία του ΕΣΔΑ.

- European Court of Human Rights, Second Section, Kmetty v. Hungary, Application no 57967/OO (Judgement 16 December 2003, Strasburg), - υπόθεση κακομεταχείρισης από αστυνομικούς :

  Στην υπόθεση αυτή, ο ενάγων κατηγόρησε την Αστυνομίας της Ουγγαρίας για κακομεταχείριση, ξυλοδαρμό από αστυνομικούς, παράνομη κατακράτηση και τραυματισμούς . Το δικαστήριο έκρινε ότι υπάρχει παραβίαση του άρθρου 3 της ΕΣΔΑ γιατί η απαγόρευση αυτής της συμπεριφοράς είναι απόλυτη και δεν επιδέχεται εξαιρέσεις ακόμα και σε περιπτώσεις καταπολέμησης του οργανωμένου εγκλήματος. Σύμφωνα με την αιτιολογία του δικαστηρίου, το άρθρο 3 αποτελεί θεμελιώδη αρχή της Δημοκρατίας και δεν είναι δεκτικό εξαιρέσεων και περιορισμών.

❖ European Court of Human Rights, Third Section, Sadic Onder v. Turkey, Application no 28520/95 (Judgement 8 January 2004, Strasburg) – υπόθεση βασανισμού υπόπτου για τρομοκρατία :

Το Δικαστήριο δέχτηκε τους ισχυρισμούς του αιτούντος, ο οποίος συνελήφθηκε και βασανίστηκε, με την αιτιολογία ότι είναι ύποπτος για τρομοκρατία, παρά την έλλειψη αποδεικτικών στοιχείων , στηριζόμενο στο απαραβίαστο της ανθρώπινης αξιοπρέπειας κατά το άρθρο 3 ΕΣΔΑ. Αρκεί και η πιθανολόγηση των βασανιστηρίων για να υπάρξει παραβίαση, ακόμα και αν πρόκειται για την καταστολή της τρομοκρατίας

❖ European Court of Human Rights, Premiere Section, Henaf c. France, Requete no 65346/01 (Judgement 27 november 2003) – υπόθεση ‘’αλυσοδεσίματος’’ ασθενούς κρατουμένου στο κρεβάτι του νοσοκομείου:

Στην υπόθεση αυτή, όπου ο ενάγων (κρατούμενος) αλυσοδέθηκε κατά τη διάρκεια της νύχτας στο κρεβάτι του νοσοκομείου στο οποίον είχε μεταφερθεί για μία ιατρική επέμβαση, το ΕΔΔΑ έκρινε ότι υπήρξε παραβίαση του άρθρου 3 της ΕΣΔΑ γιατί η επικινδυνότητα του κρατουμένου δεν δικαιολογούσε το μέτρο αυτό. Παραβιάστηκε, δηλαδή, το άρθρο 3 της ΕΣΔΑ από απόψεως παραβίασης της αρχής της αναλογικότητας.

❖ European Court of Human Rights, Third Section, Perry v. the United Kingdom, Application no 63737/00 (judgement 17 July 2003, Strasburg), - υπόθεση παραβίασης ιδιωτικής ζωής κρατούμενου με κάμερες ασφαλείας:

Το ΕΔΔΑ, στην υπόθεση αυτή, διευρύνοντας την έννοια της ιδιωτικής ζωής, έκρινε ότι η καταγραφή σε ένα αστυνομικό τμήμα των πράξεων ενός κρατούμενου που ήταν ύποπτος για ληστείες, από κάμερα ασφαλείας, εν αγνοία του, και η χρήση αυτής της καταγραφής για την αναγνώριση του υπόπτου από μάρτυρες συνιστά παραβίαση της ιδιωτικής ζωής. Αν και η παρακολούθηση των πράξεων ενός ατόμου σε δημόσιο χώρο με οπτικοακουστικά μέσα δεν αποτελούν παρέμβαση στην ιδιωτική ζωή, η μόνιμη και συστηματική καταγραφή τους με κάποιο απώτερο σκοπό μπορεί να αποτελέσουν παραβίαση της ιδιωτικής ζωής.

❖ European Court of Human Rights, Second Section, Doerga v. The Netherlands, Application no 50210/99 (Judgement 27 April 2004, Strasburg), - υπόθεση παραβίασης ιδιωτικής ζωής κρατούμενου με μαγνητοφώνηση τηλεφωνικής συνδιαλέξεως :

Στην υπόθεση αυτή, η μαγνητοφώνηση μίας τηλεφωνικής συνομιλίας του κρατούμενου με την αδερφή του χρησιμοποιήθηκε αργότερα από τις Αρχές

της Ολλανδίας για την καταδίκη του, για την έκρηξη ενός εκρηκτικού μηχανισμού κάτω από ένα αυτοκίνητο. Το ΕΔΔΑ έκρινε ότι, παρά το γεγονός ότι η μαγνητοφώνηση τηλεφωνικών συνομιλιών του κρατούμενου με άτομα εκτός της φυλακής μπορεί να είναι αναγκαία, το νομοθετικό κείμενο που προβλέπει αυτή την παρέμβαση στην ιδιωτική ζωή, πρέπει να είναι σαφές και να προστατεύει τον κρατούμενο από αυθαίρετες παραβιάσεις του δικαιώματός του για σεβασμό της ιδιωτικής του ζωής και της επικοινωνίας.

- European Court of Human Rights, Fourth Section, case of Bekos and Koutropoulos v. Greece, Application no. 15250/02, judgement 13th December 2005 (Strasburg)- υπόθεση κακομεταχείρισης και βασανιστηρίων κρατουμένων από όργανα της ΕΛ.ΑΣ με ρατσιστικά κίνητρα

Στην υπόθεση αυτή, οι δύο αιτούντες, Έλληνες Ρομά που συνελήφθησαν το 1998, μεταφέρθηκαν στο αστυνομικό τμήμα Μεσολογγίου όπου αστυνομικοί τους ξυλοκόπησαν με κλομπ και σιδερολοστό, τους χαστούκισαν και τους κλότσησαν, τους απείλησαν με σεξουαλική επίθεση και τους εξύβρισαν λεκτικά. Στην απόφασή του, το Ευρωπαϊκό Δικαστήριο Ανθρωπίνων Δικαιωμάτων διαπίστωνε ότι οι δύο Ρομά είχαν υποστεί απάνθρωπη και ταπεινωτική μεταχείριση στα χέρια της αστυνομίας, ότι οι αρχές παρέλειψαν να διενεργήσουν αποτελεσματική έρευνα για το περιστατικό, και ότι οι αρχές παρέλειψαν να ερευνήσουν τα πιθανά ρατσιστικά κίνητρα πίσω από το περιστατικό ˙ υπάρχει, συνεπώς, παραβίαση του άρθρου 3 της ΕΣΔΑ, που απαγορεύει τα βασανιστήρια.

- European Court of Human Rights, Second Section, case of Makaratzis v. Greece, Application no. 50385/99, Judgement 20th December 2004 (Strasburg) – υπόθεση κινδύνου ζωής καταδιωκόμενου από την ΕΛ.ΑΣ :

Στην υπόθεση αυτή, ο αιτών τραυματίστηκε και κινδύνεψε να χάσει τη ζωή του ενώ καταδιωκόταν από περιπολικά οχήματα της Ελληνικής Αστυνομίας, χωρίς να είναι ύποπτος για συγκεκριμένη πράξη. Το Δικαστήριο κατέληξε στο συμπέρασμα ότι οι Αστυνομικές Αρχές φάνηκαν ανίκανες στο να φέρουν εις πέρας την καταδίωξη και υπάρχει προφανής παραβίαση του άρθρου 2 της ΕΣΔΑ, και μάλιστα της παρ. 1, αφού το θύμα ως εκ θαύματος δεν έχασε τη ζωή του και αφού δεν στοιχειοθετούνται καν οι προϋποθέσεις περιορισμού του δικαιώματος στη ζωή, που ρητώς αναφέρονται στην παρ. 2 του άρθρου 2 της ΕΣΔΑ.

- European Court of Human Rights, Third Section, case of Dugoz c. Greece, Application no. 40907/98, Judgement 6th March 2001(Strasburg) – υπόθεση εξευτελιστικών συνθηκών κράτησης:

Στην υπόθεση αυτή, ο αιτών ισχυρίζεται ότι οι συνθήκες κράτησης στις φυλακές Δραπετσώνας ήταν απάνθρωπες και εξευτελιστικές ως προς όλες τις πτυχές (υγιεινή, φαγητό, ιατρική περίθαλψη κτλ.). Το Δικαστήριο

αποφάσισε ότι υπάρχει παραβίαση του άρθρου 3 της ΕΣΔΑ , το οποίο κατοχυρώνει την απαγόρευση εξευτελιστικής μεταχείρισης που προσβάλλει, μεταξύ άλλων, την ανθρώπινη αξία.

- <u>European Court of Human Rights, Second Section, Peers c. Greece, Application no. 28524/95, judgement 19th April 2001, (Strasburg) – υπόθεση εξευτελιστικών συνθηκών κράτησης :</u>

Στην υπόθεση αυτή, το Δικαστήριο έκρινε ότι υπάρχει προφανής παραβίαση του άρθρου 3 της ΕΣΔΑ, λόγω των αδικαιολόγητων συνθηκών κράτησης στις φυλακές Κορυδαλλού, που προσβάλλουν την ανθρώπινη αξιοπρέπεια (και επιπλέον των αντίστοιχων διατάξεων του ΣωφρΚ. της Ελλάδας).
Ακόμη, το Δικαστήριο έκρινε ότι ο αιτών στερήθηκε του δικαιώματος στην ιδιωτική ζωή και επικοινωνία (άρθρο 8 ΕΣΔΑ και 9 και 19 του Συντάγματος) γιατί η αλληλογραφία του ανοιγόταν από τους φύλακες.

- <u>European Court of Human Rights, case of Portington c. Greece, (109/1997/893/1105) , Judgement 23 September 1998, (Strasburg), - υπόθεση μη απονομής χρηστής και έγκαιρης απονομής δικαιοσύνης:</u>

Στην υπόθεση αυτή, ο αιτών καταγγέλλει την καθυστέρηση της εκδίκασης της εφέσεώς του, ενώ εν τω μεταξύ αντιμετώπιζε την θανατική ποινή. Το Δικαστήριο έκρινε ότι η πολυπλοκότητα της απόφασης δεν δικαιολογεί την καθυστέρηση της εκδίκασης της έφεσης. Αν και για κάποιες καθυστερήσεις στη διαδικασία ευθυνόταν ο κρατούμενος, οι μεγαλύτερες καθυστερήσεις προκλήθηκαν από την αδράνεια των ελληνικών Αρχών και Δικαστηρίων. Όμως, δεν επιδικάστηκε αποζημίωση υπέρ του, παρά μόνο η ικανοποίηση της δικαίωσής του.

ΣΥΝΤΟΜΟΓΡΑΦΙΕΣ

- ΕΔΔΑ: Ευρωπαϊκό Δικαστήριο Δικαιωμάτων του Ανθρώπου
- ΕΣΔΑ: Ευρωπαϊκή Σύμβαση Δικαιωμάτων του Ανθρώπου
- ΚΔΔικ: Κώδικας Διοικητικής Δικονομίας
- ΚΠοινΔ: Κώδικας Ποινικής Δικονομίας
- ΚΕΔΕ: Κώδικας Εισπράξεων Δημοσίων Εσόδων
- ΔιοικΕφΑθ: Διοικητικό Εφετείο Αθηνών
- ΠΚ: Ποινικός Κώδικας
- ΣτΕ: Συμβούλιο της Επικρατείας
- ΣχΕυρΣ: Σχέδιο Ευρωπαϊκού Συντάγματος
- Σ: Σύνταγμα της Ελλάδας
- ΣωφρΚ: Σωφρονιστικός Κώδικας
- ΟΗΕ: Οργανισμός Ηνωμένων Εθνών

ΛΗΜΜΑΤΑ

Συνταγματικά δικαιώματα - φορείς δικαιωμάτων - γενική σχέση – ειδική σχέση – ποινική σχέση – ειδική κυριαρχική σχέση – ποινή – κρατούμενοι- ανθρώπινη αξία – ισότητα – φυσική ελευθερία – ζωή – υγεία – προσωπική ασφάλεια – nullum crimen nulla poena sine lege – νόμιμος δικαστής – ιδιωτική ζωή – οικογενειακή ζωή – αναφορά – συνέρχεσθαι – θρησκευτική ελευθερία – ελευθερία γνώμης – ελευθερία ιδεών – παιδεία – ιδιοκτησία – επικοινωνία – έννομη προστασία – προηγούμενη ακρόαση – εργασία – εκλέγειν – εκλέγεσθαι – Διεθνής Αμνηστία , Σύνταγμα, ΕΣΔΑ

ENTRIES

Constitutional rights - rights bodies - a general relationship - a special relationship - criminal relationship - a dominant special relationship - a penalty –detainees (prisoners)- human value - equality - physical freedom - life - health - personal security - nullum crimen nulla poena sine lege - lawful judge - private life - family life - a reference - assembly - religious freedom - freedom of opinion - freedom of ideas - education - property - contact - legal protection - prior hearing - work - vote - election - Amnesty International, Constitution, the ECHR

ΠΑΡΑΡΤΗΜΑ :

- European Court of Human Rights, Second Section, Kmetty v. Hungary, Application no 57967/OO (Judgement 16 December 2003, Strasburg), - υπόθεση κακομεταχείρισης από αστυνομικούς :

In the case of Kmetty v. Hungary,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Mr J.-P. Costa, *President*,
Mr A.B. Baka,
Mr L. Loucaides,
Mr K. Jungwiert,
Mr V. Butkevych,
Mrs W. Thomassen,
Mr M. Ugrekhelidze, *judges*,

and Mr T.L. Early, *Deputy Section Registrar*,

Having deliberated in private on 25 March and 25 November 2003,

Delivers the following judgment, which was adopted on the last- mentioned date:

PROCEDURE

1. The case originated in an application (no. 57967/00) against the Republic of Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Hungarian national, Mr Ágoston Kmetty ("the applicant"), on 21 December 1999.

2. The applicant was represented by Mr J. Somogyi, a lawyer practising in Budapest and acting on behalf of the Hungarian Helsinki Committee. The Hungarian Government ("the Government") were represented by their Agent, Mr L. Höltzl, Deputy State-Secretary, Ministry of Justice.

3. The applicant alleged, in particular, that he had been ill-treated by the police and that the investigation of his complaints was inadequate, in breach of Article 3 of the Convention.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1).

6. By a decision of 25 March 2003, the Court declared the application partly admissible.

7. The Government and the applicant each filed observations on the merits (Rule 59 § 1). After consulting the parties, the Chamber decided that no hearing on the merits was required (Rule 59 § 3 *in fine*).

THE FACTS

8. The applicant was born in 1946 and lives in Budapest.

A. Circumstances of the incident

9. The applicant is a merchant with business premises at the Budapest Market Hall. On 22 December 1998 the police arrived at the Market Hall in response to a bomb alert and required everyone to evacuate the building so that it could be searched. The applicant and several other persons refused to comply with this instruction. Following an argument lasting from 4 p.m. until 5.45 p.m. between certain merchants, including the applicant, and the police, the officer in charge decided to detain the applicant, believing him to be responsible for the general disobedience to the order to evacuate.

10. The Government stated that when two police officers grabbed him by his arms and started to hustle him out, the applicant threw himself on the ground.

11. The applicant stated that he had not resisted the police officers and that he had been grabbed without warning and his legs kicked from under him.

12. Having immobilised the applicant, two police officers dragged him through the Market Hall to the exit. Outside the building he was handcuffed and forced into a police car and then driven to the Budapest IX District Police Department.

13. The applicant stated that, while in the car, he was hit repeatedly by a police officer.

14. On their arrival at the Police Department, police officers lifted the applicant out of the car, hauling him up by the handcuffs attached to his wrists.

15. As the applicant had suffered some bruises to his wrists and face, a doctor was called. The applicant did not indicate to the doctor that he had been ill-treated by the police.

16. The applicant maintained that at the police station he was taken to the basement where at least four police officers repeatedly beat and kicked him. One of them stepped on his belly with such violence that it caused bowel movements. Subsequently, he was placed in a cell for about three

hours. During that time a police lieutenant entered the cell, shouted at him, abused him verbally and spat in his face.

17. Eventually two police officers fetched the applicant and escorted him to the exit at about 9 p.m.

18. On 22 and 23 December 1998 the applicant was examined at the National Institute of Traumatology and the Central Institute of Stomatology.

B. Proceedings on the applicant's complaint

19. On 23 December 1998 the applicant laid charges of ill-treatment and unlawful detention against the police. In the ensuing criminal proceedings, the Budapest Investigation Office heard the applicant, his wife and son and five other witnesses who had been present in the Market Hall at the time of the incident.

These witnesses, all from the applicant's side, confirmed that he had been dragged through the Market Hall but they remained inconclusive as to whether the applicant had been kicked off his feet or had thrown himself on the ground in resistance.

The Investigation Office also heard Mr F., who was the commander of the bomb disposal squad in charge of the operation at the Market Hall, as well as the managers of the Market Hall.

20. The applicant alleged that in the course of his interrogation he identified two of the police officers who had assaulted him and that he selected their photographs from several shown to him. However, the photograph of a third officer involved was not among those shown to him.

21. The prosecutor in charge obtained and watched a video recording shot by a television cameraman outside the Market Hall at the time of the incident, but found nothing of relevance.

22. The opinion of Dr M., a forensic medical expert, dated 24 March 1999, which was prepared at the request of the Investigation Office, contained the following conclusions:

> "[...] According to the documents on the medical examination of [the applicant] carried out on 22 December 1998 at 9.58 p.m. at the National Institute of Traumatology, his right-side upper incisor no. 1 was loosened, he had concentrical bruises on the soft parts of both wrists and hyperaemia could be observed on a palm-sized surface on the left side of the belly wall. He complained of pain in the right side of his chest and the right ankle joint but no exterior signs of any injury could be observed. The X-ray examination did not display any traumatic deviation either. The diagnoses contained in the outpatient medical file, the medical report and the medical opinion read as follows: 'Dislocation of the right-side upper tooth. Bruises on both wrists. Bruises on the right side of the chest and on the left side of the belly wall. Bruises on the right hand.'
>
> [The applicant's] stomatological examination carried out at the Central Institute of Stomatology on 23 December 1998 at 10 p.m. established the traumatic loosening of the upper incisor no. 1 on the right side and that of both incisors on the left side. It also

established that the bridgework between the upper teeth nos. 3 and 7 on the left side became loose in a non-traumatic way. As treatment, his pain was alleviated and 'rehabilitative dental treatment' was proposed for him on account of the loosening of the bridgework and of the incisors indicated above. The stomatological report contains the diagnosis of 'loosening of the upper incisors'.

On the basis of the available medical files, it can be established from a forensic medical point of view that [the applicant] actually suffered loosening of the upper incisor no. 1 on the right side and of both incisors on the left side and, in addition, bruises on the soft parts of both wrists and circumscript hyperaemia on the left side of the belly wall.

The bruises on the right side of the chest and on the right hand diagnosed in the traumatological medical files cannot be substantiated from a forensic medical point of view, given that those diagnoses were based exclusively on pain alleged by [the applicant] but no exterior signs of any injury could be observed.

[...]

1. [The applicant's] injuries as described in the medical files jointly and severally healed within 8 days. No disability or serious deterioration of health may be expected as a consequence of the injuries suffered.

2. On the basis of the available medical findings, it can be substantiated that the body sustained three non-incisive knocks of maximally medium impact (*közepesnél nem nagyobb erejű tompa erőhatás*).

One knock may have affected the area of the upper incisors, necessarily at a moment when the lips did not cover the teeth. The mouth was probably open since three incisors became loose whereas the upper lip was not injured.

One knock may have affected the area of both wrists, almost certainly as a result of handcuffing.

One knock may have affected the belly wall, most probably in the form of a blow effected with an open hand.

It cannot be excluded that the injuries diagnosed in the medical files were occasioned at the time specified by [the applicant] in the course of the police action.

It can be stated most definitely that the truth of [the applicant's] allegation as to the degree and severity of the ill-treatment he allegedly suffered can be excluded from a forensic medical point of view. This conclusion is supported by the consideration that if [the applicant] had really been seriously ill-treated by several persons for a longer period of time in the form of numerous blows and kicks to his body, he would also have suffered, all over his body, injuries such as bruises of the covered soft parts. In addition, as a result of the alleged fact that he had been dragged on the ground, he would also have had bruises on the epithelium of the lower limbs.

On the basis of the medical files, however, only the fact of handcuffing can be established. In addition to the latter, the mouth and the belly wall areas may each have sustained a non-incisive knock of medium impact. A blow (*ütés*) or a bang (*ütődés*) could equally have caused these latter injuries, which means that they could easily be caused without ill-treatment, and simply result from an impact sustained in the course of the police action during which physical force was applied in order to effect the handcuffing.

3. The medical reports do not verify the alleged nose bleeding [of the applicant].”

23. On 27 July 1999 the Investigation Office discontinued the proceedings concerning the applicant's complaints against the police. Relying on the above medical report, the Investigation Office concluded that the applicant's allegations of ill-treatment were impossible to prove, whereas his police custody had been justified on account of his resistance to lawful police measures.

24. On 8 August 1999 the applicant complained to the Budapest Public Prosecutor's Office against the order to discontinue the investigations.

25. On 24 September 1999 the Public Prosecutor's Office dismissed the applicant's complaint. It noted that according to the medical documents in the case – and contrary to his statement of complaint – the applicant's injuries had healed within eight days. Furthermore, since his allegations were impossible to reconcile with some of the witness testimony, the Public Prosecutor's Office saw no reason to depart from the conclusions of the Investigation Office.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

26. The applicant complained that he was ill-treated by the police, and that the investigations into his related complaints had been inadequate, in breach of Article 3 of the Convention, which provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. The applicant's arguments

27. The applicant submitted that several persons had witnessed the incident at the Market Hall and that the injuries which he subsequently suffered in police custody were recorded in a medical report. He emphasised that the expert opinion did not exclude the truth of his allegations.

28. Concerning the adequacy of the investigations, the applicant pointed out that the criminal proceedings against the suspected perpetrators were discontinued despite the fact that he had identified two of the police officers who had assaulted him and that he had selected their photographs from several photographs shown to him; the photograph of a third suspected officer had not been among these.

B. The Government's arguments

29. As to the substance of the complaints, the Government submitted that there was no conclusive evidence to support the applicant's allegations of ill-treatment by the police. They stressed that, according to the medical expert opinion of 24 March 1999, the applicant's injuries could simply have been caused by the force administered in order to overcome his resistance to a lawful police measure, rather than by ill-treatment. The expert clearly ruled out any truth in the applicant's allegations about the extent and severity of his ill-treatment. When describing the possible causes of the injuries, the expert observed that they might have resulted from knocks.

30. As to the adequacy of the investigations, the Government emphasised that a proper examination was carried out. This involved hearing the evidence of several witnesses and obtaining the opinion of a medical expert. The investigation had to be discontinued for want of any conclusive evidence. The expert opinion was of central importance in the case, as it constituted the ground for the Investigation Office's finding that the applicant's allegations of ill-treatment could not be proved and that the proceedings should on that account be discontinued.

Furthermore, contrary to the applicant's allegations, the police officers who had allegedly ill-treated him were identified in the course of the investigation. The proceedings were discontinued for want of sufficient evidence to support the applicant's allegations of ill-treatment, rather than because the perpetrators remained unknown.

31. In sum, the Government maintained that neither the substantive nor the procedural requirements of Article 3 of the Convention were breached in this case.

C. The Court's assessment

32. Article 3, as the Court has observed on many occasions, enshrines one of the fundamental values of democratic society. Even in the most difficult of circumstances, such as the fight against terrorism or crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation.

The Court recalls that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some

cases, the sex, age and state of health of the victim. In respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 (see *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, p. 3288, § §§ 93-94).

33. The Court notes that only part of the applicant's alleged injuries, namely, the loosening of an upper incisor on the right side and of both incisors on the left side, bruises on both wrists and a hyperaemia on the left side of the belly wall, were corroborated by the forensic expert (see paragraph 22 above). However, for the Court these injuries alone were sufficiently serious to amount to ill-treatment within the scope of Article 3. It remains to be considered whether the State should be held responsible under Article 3 for the injuries.

1. Alleged ill-treatment by the police

34. The Court observes that the medical expert commissioned by the Investigation Office established that the applicant had been handcuffed and found that non-incisive knocks, either blows or bangs, of medium impact might have affected each of the mouth and the belly wall areas. The applicant alleges that these injuries were caused by police officers when they were beating and kicking him.

35. The Court considers that, since it has not been not disputed – either by the medical expert or by the Government in their observations – that the applicant was the victim of violence from some source on 22 December 1998, it is fair to assume that he sustained the above bruising on that date in connection with his committal to the Police Department.

36. The Court notes that according to the witness statements obtained by the Budapest Investigation Office the applicant was dragged through the Market Hall. However, the medical expert expressed the opinion that any such action would have resulted in the applicant having bruises on the epithelium of the lower limbs, which was not the case.

Furthermore, the witness statements remained inconclusive as to whether the applicant had been kicked off his feet or thrown himself on the ground in resistance.

None of the witnesses said that they had seen police officers hitting the applicant.

Lastly, the medical opinion obtained by the authorities does not seem to support the applicant's allegations that he was repeatedly hit while in the police car, or that he was beaten and kicked by several persons while in custody.

In these circumstances, the Court finds it impossible to establish on the basis of the evidence before it whether or not the applicant's injuries were caused by the police exceeding the force necessary to overcome his

resistance to a lawful police measure, either while immobilising and taking him to the police station or during his custody.

2. Adequacy of the investigation

37. The Court does, however, consider that, taken together, the medical evidence, the applicant's testimony and the fact that he was detained for more than three hours at the Police Department give rise to a reasonable suspicion that he may have been subjected to ill-treatment by the police.

38. The Court recalls that where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. This investigation should be capable of leading to the identification and punishment of those responsible. If this were not the case, the general legal prohibition on torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity (see *Assenov and Others v. Bulgaria*, *op. cit.*, p. 3290, § 102).

39. The Court observes that following the applicant's complaint, the authorities carried out an investigation into the applicant's allegations. It is not, however, persuaded that this investigation was sufficiently thorough and effective to meet the above requirements of Article 3.

40. The Court finds it regrettable that the doctor who had examined the applicant after his committal to the Police Department was apparently not heard during the investigation. The doctor's evidence would have been of utmost importance in determining whether the applicant had suffered his injuries before or after his committal to the Police Department. In the former case, the origin of those injuries could reasonably be considered to have resulted from the force used to overcome the applicant's resistance, whereas in the latter hypothesis, it would then have been incumbent on the Government to provide a plausible explanation as to how the applicant, then entirely in the hands of the police, sustained his injuries (see *Ribitsch v. Austria*, judgment of 4 December 1995, Series A no. 336, p. 26; § 34).

However, the investigating authorities limited their scrutiny to obtaining an *ex post facto* medical opinion, which for obvious reasons did not address the issue whether or not the applicant had his injuries on arrival at the Police Department.

41. The Court also notes the applicant's allegation that, when being heard during the investigation, he identified two of the police officers who had assaulted him and selected their photographs from among those shown

to him; however, the photograph of a third officer allegedly involved was not among the photographs.

The Court is not convinced by the Government's arguments to the effect that the investigations were terminated for want of sufficient evidence, rather than non-identification of the perpetrators. It considers that a confrontation between all the suspects and the applicant could have contributed to the clarification of the events.

42. Moreover, it does not appear to the Court that the suspected police officers, although they may have been identified by the applicant, were actually questioned during the investigation. For the Court, this unexplained shortcoming in the proceedings deprived the applicant of any opportunity to challenge the alleged perpetrators' version of the events.

43. Against this background, in view of the lack of a thorough and effective investigation into the applicant's arguable claim that he was ill-treated by police officers, the Court finds that there has been a violation of Article 3 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

45. The applicant claimed 1,200,000 Hungarian forints (HUF) for the physical and mental suffering from the incident.

46. The Government found the applicant's claim reasonable.

47. The Court finds that the applicant can reasonably be considered to have suffered non-pecuniary damage on account of the distress and frustration resulting from the inadequacy of the investigations into his complaints. Making its assessment on an equitable basis, the Court accepts the entirety of the applicant's claim and awards him 4,700 euros (EUR) under this head.

B. Costs and expenses

48. The applicant claimed HUF 220,000 in respect of the hourly fees of his lawyer, charged in respect of 22 hours' work, and HUF 105,000 for expenses incurred in connection to translation of documents, a total of HUF 325,000.

49. The Government did not comment on the applicant's claims.

50. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the entirety of the claims, i.e. the sum of EUR 1,300 for costs and expenses for the Convention proceedings.

C. Default interest

51. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 3 of the Convention on account of the authorities' failure to carry out an effective investigation into the applicant's allegations of ill-treatment;

2. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 4,700 (four thousand seven hundred euros) in respect of non-pecuniary damage;

(ii) EUR 1,300 (one thousand three hundred euros) in respect of costs and expenses;

(iii) any tax that may be chargeable on the above amounts;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

- European Court of Human Rights, Third Section, Sadic Onder v. Turkey, Application no 28520/95 (Judgement 8 January 2004, Strasburg) – υπόθεση βασανισμού υπόπτου για τρομοκρατία :

In the case of Sadık Önder **v**. **Turkey**,
The European Court of Human Rights (Third Section), sitting as a Chamber composed of:
Mr G. Ress, *President*,
Mr I. Cabral Barreto,
Mr L. Caflisch,
Mr P. Kūris,
Mr B. Zupančič,
Mrs M. Tsatsa-Nikolovska, *judges*,
Mr F. Gölcüklü, ad hoc *judge*,
and Mr **V**. Berger, *Section Registrar*,
Having deliberated in private on 4 December 2003,
Delivers the following judgment, which was adopted on that date:
PROCEDURE
1. The case originated in an application (no. **28520**/**95**) against the Republic of **Turkey** lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Sadık Önder ("the applicant"), on 28 August 1995.
2. The applicant was represented by Mr M.S. Okçuoğlu, a lawyer practising in Istanbul. The Turkish Government ("the Government") did not designate

an Agent for the purposes of the proceedings before the Convention institutions.
3. The applicant alleged that he was subjected to ill-treatment in police custody in breach of Article 3 of the Convention.
4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).
5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1. Mr R. Türmen, the judge elected in respect of Turkey, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mr M. F.Gölcüklü to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).
6. By a decision of 29 June 1999, the Court declared the application admissible.
7. The applicant and the Government each filed observations on the merits (Rule 59 § 1).
8. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section (Rule 52 § 1).
THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant is born in 1969 and lives in Istanbul.

A. Treatment in police custody

10. On 9 July 1994 the applicant with fourteen other people was taken into police custody by the Anti-Terror branch of the Istanbul Security Directorate on suspicion of being a member of the PKK.
11. The applicant alleges that he was ill-treated and tortured in the police car on the way to the Istanbul Security Directorate and during his detention there. He claims that during his interrogation, he was blindfolded and stripped naked. He was strung up by his arms in the form of torture known as “Palestinian hanging”. His head was hit against the wall and he was held parallel to the ground on his hands and feet. He was also electrocuted, threatened and insulted.
12. The applicant further claims that he was coerced into signing a statement in which it was stated that he had worked for and had been involved in the terrorist activities of the PKK. After having signed the statement prepared by the police, he was allegedly kept in custody for one more week so that the signs of the ill-treatment to which he had been subjected would disappear. During that week, he claims that a police officer came to his cell at regular intervals and applied a medicine on his wounds in

order to cover up the signs of ill-treatment. He claims that due to this medicine his scars healed very quickly.
13. The Government submit that the applicant was questioned by the police on 15 July 1994. They have produced a copy of a statement signed by the applicant on this occasion.
14. On 22 July 1994 the applicant together with 14 other detainees was examined by Dr T. Taner Apaydın at the Istanbul Forensic Medical Department. According to the medical report prepared by Dr Apaydın, the applicant showed no signs of ill-treatment.
15. On 23 July 1994 the applicant was brought before the Public Prosecutor at the Istanbul State Security Court. According to the records of this hearing, the applicant admitted that he had been involved with PKK related activities in the past and had been convicted on that account by the Erzincan State Security Court in 1989. He denied having any current relation with the PKK. He stated that the police invented the statement taken in custody.
16. The applicant alleges that he was brought to the Public Prosecutor at the Istanbul State Security Court together with the other detainees on 22 July 1994 but that the Public Prosecutor did not take his statement because he had complained to the prosecutor that he had been tortured in police custody. He further stated that because he told to the prosecutor that he was subjected to torture, he was once again tortured by the police. The Government contested this argument and stated that the applicant was brought for the first time before the Public Prosecutor on 23 July 1994.
17. The applicant alleges that he told the prosecutor on 23 July 1994 of his subjection to torture but that his statement was not taken into consideration by the Public Prosecutor and was not written down on the hearing records.
18. The applicant further stated that he was not seen by a doctor before being questioned by the Prosecutor on 23 July 1994 and consequently he does not have any medical evidence concerning the torture he was subjected to on 22 July 1994.
19. On 23 July 1994 the applicant was also brought before the Judge at the State Security Court. He denied the allegations against him and stated that he was not a member of the PKK. He further declared that the statement he gave to the Public Prosecutor was true. The Judge ordered his detention on remand.
20. The applicant claims that he told the State Security Court Judge that he had been tortured in police custody and that he had explained this to the Public Prosecutor at the State Security Court. However the case files show that the applicant did not claim to have being subjected to ill-treatment neither before the Public Prosecutor nor the State Security Court.
21. While the applicant was held in detention in prison, he requested to see a doctor. The prison doctor prepared a provisional report for the applicant and he was sent to the Eyüp Forensic Medical Department for a medical examination.

22. On 22 August 1994 the medical report prepared by the institution and signed by the medical expert stated that the applicant complained of widespread pain on his back, right arm and on both of his legs but that he could not find any signs of traumatic lesions. The medical report further stated that the complaints were not life threatening but accorded him one day's sick leave.
23. On 15 June 1995 the Chamber of Medicine of Istanbul (*Istanbul Tabib Odası*), in the context of disciplinary proceedings following complaints, found that Dr T. Taner Apaydın had concealed signs of torture in the medical examinations conducted on several persons between 3 February and 7 October 1994 and he was, therefore, prohibited from practising as a doctor for six months.

B. Criminal proceedings against the applicant

24. On 12 December 1994 the Public Prosecutor at the Istanbul State Security Court filed an indictment with the court, requesting that the court to apply Articles 168 §§ 1 and 2 and 169 of the Criminal Code and Section 5 of the Prevention of Terrorism Act.

C. Criminal proceedings against the policemen

25. On 13 September 1994 the applicant filed a complaint with the Istanbul Public Prosecutor's Office. He alleged that he had been ill-treated while in police custody and requested that proceedings be instituted against the police officers. He submitted the medical report of 22 August 1994 as proof of his ill-treatment.
26. On 11 January 1995 the Istanbul Public Prosecutor, referring to the medical report of the Eyüp Forensic Medical Department, gave a decision of non-prosecution on account of lack of evidence.
27. On 8 February 1995 the applicant filed an objection with the Beyoglu Assize Court against the Public Prosecutor's decision.
28. On 7 March 1995 the Beyoğlu Assize Court dismissed the applicant's objections.

II. RELEVANT DOMESTIC LAW

29. The Court refers to the overview of the domestic law derived from previous submissions in other cases, in particular *Veznedaroğlu **v**. Turkey*, no. 32357/96, 11 April 2000, *Tepe **v**. **Turkey*** (dec.), no. 31247/96, 22 January 2002, and *Aksoy **v**. **Turkey***, judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI).
THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

30. The applicant alleges that he was ill-treated in police custody in breach of Article 3 of the Convention which reads as follows:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. Alleged ill-treatment of the applicant in police custody

31. The applicant alleges that he was subjected to torture while in police custody. He claims that during his interrogation, he was blindfolded and stripped naked. He was strung up by his arms in the form of torture known as "Palestinian hanging". His head was hit against the wall and he was held parallel to the ground on his hands and feet. He was also electrocuted, threatened and insulted.

32. He further alleges that he was also subjected to torture on 22 July 1994 after returning from the Public Prosecutor's Office.

33. The Government claims that the allegations of torture and ill-treatment are unfounded.

34. The Court reiterates at the outset that Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (see *Labita* ***v.*** *Italy* [GC], no. 26772/95, § 119, ECHR 2000-IV).

35. The Court asserts that the allegations of ill-treatment must be supported by appropriate evidence (see, *mutatis mutandis*, *Klaas v. Germany*, judgment of 22 September 1993, Series A no. 269, pp. 17-18, § 30). To assess this evidence, the Court adopts the standard of proof "beyond reasonable doubt" but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, pp. 64-65, § 161 *in fine*).

36. In the instant case a number of facts raise doubts as to whether the applicant, as he maintained, suffered treatment prohibited by Article 3.

37. The Court notes that the applicant did not invoke the ill-treatment he was subjected before the State Security Court and the Public Prosecutor. Although the applicant claims that he had complained of ill-treatment he had allegedly suffered before these instances, the case file does not disclose any evidence supporting his allegations.

38. The Court further notes that the medical report dated 22 August 1994 does not contain evidence of ill-treatment apart from the subjective complaints of the applicant. The Court further notes that the applicant was brought before the doctor for a medical examination after he had requested it and that the applicant filed a petition with the Public Prosecutor complaining of ill-treatment for the first time on 13 September 1994.

39. As for the findings of the first medical report, the Court considers in light of the developments concerning the doctor who prepared the report, it cannot be taken into consideration as credible evidence concerning the

applicant's health at that time. However the Court notes that the applicant did not question the reliability of the report before the authorities nor demanded to see another doctor to examine him.

40. In conclusion, since the evidence before it does not enable the Court to find beyond all reasonable doubt that the applicant was subjected to treatment that attained a sufficient level of severity to come within the scope of Article 3, the Court considers that there is insufficient evidence for it to conclude that there has been a violation of Article 3 on account of the alleged torture.

B. Alleged inadequacy of the investigation

41. The Court considers that where an individual makes a credible assertion that he has suffered treatment infringing Article 3 at the hands of the police or other similar agents of the State, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation.

42. As in the case of Article 2, such an investigation should be capable of leading to the identification and punishment of those responsible (see *Labita*, cited above, § 119). Otherwise, the general legal prohibition of torture and inhuman and degrading treatment or punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity (see *Labita*, cited above, § 131).

43. Whether it is appropriate or necessary to find a procedural breach of Article 3 will therefore depend on the circumstances of the particular case.

44. The Court notes that the Public Prosecutor started an investigation as soon as the applicant alleged that he was subjected to ill-treatment in police custody. However it appears from the case file that the Public Prosecutor relied only on the medical report of 22 August 1994 to conclude that the applicant was not subjected to ill-treatment in police custody. Taking into consideration that the applicant was in custody for fifteen days and that the medical report was dated nearly one month after the applicant was taken into custody, the Public Prosecutor could not be considered to have conducted an effective investigation into the allegations of the applicant making sure that the latter had the opportunity to participate in the process. The case file does not reveal whether the Public Prosecutor took the testimony of the applicant, the policemen nor any other possible witnesses.

45. In the light of the above, the Court concludes that the applicant's claim that he was ill-treated in police custody was not subject to an effective investigation by the domestic authorities as required by Article 3 of the Convention.

46. The Court therefore considers that there has been a violation of Article 3 on this regard.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

47. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

48. The applicant claimed a total of 10,523,520,000 Turkish Liras (TRL) of pecuniary damage and 500,000 French Francs of non-pecuniary damage, equivalent to 6,219 and 76,224,31 euros (EUR) respectively.

49. The Government did not submit any observations on these claims.

50. The Court considers that the applicant's claims in respect of pecuniary damage are unsubstantiated.

The Court accepts that the applicant suffered non-pecuniary damage, such as distress and frustration resulting from the inadequacy of the investigations concerning his alleged ill-treatment. Making its assessment on an equitable basis, the Court awards the applicant EUR 5,000 under this head.

B. Costs and expenses

51. The applicant claimed a total of 10,000 German Marks equivalent to EUR 5,112,92 for fees and costs in the preparation and presentation of his case before the Convention institutions.

52. The Government did not submit any observations on this claim either.

53. The Court will make an award in respect of costs and expenses in so far as these were actually and necessarily incurred and were reasonable as to quantum (see, as a recent authority, *Sawicka v. Poland*, no. 37645/97, § 54, 1 October 2002

54. Making its own estimate based on the information available, the Court awards the applicant in respect of costs and expenses EUR 2,500.

C. Default interest

55. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 3 of the Convention in that no effective official investigation into the allegations of ill-treatment was held;

2. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention,

(i) EUR 5,000 (five thousand euros) in respect of non-pecuniary damage;

(ii) EUR 2,500 (two thousand five hundred euros) in respect of costs and expenses;

(iii) any tax that may be chargeable on the above amounts;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

3. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 8 January 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent Berger Georg Ress
Registrar President

SADIK ÖNDER v. TURKEY JUDGMENT

- European Court of Human Rights, Third Section, Perry v. the United Kingdom, Application no 63737/00 (judgement 17 July 2003, Strasburg), - υπόθεση παραβίασης ιδιωτικής ζωής κρατούμενου με κάμερες ασφαλείας:
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In the case of Perry v. the United Kingdom,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of

Mr G. Ress, *President*,
Sir Nicolas Bratza,
Mr L. Caflisch,
Mr P. Kūris,
Mr R. Türmen,
Mrs H.S. Greve,
Mr K. Traja, *judges*,

and Mr M. Villiger, *Deputy Section Registrar*,

Having deliberated in private on 26 June 2003,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

52. The case originated in an application (no. 63737/00) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a United Kingdom national, Mr Stephen Arthur Perry ("the applicant"), on 6 October 2000.

53. The applicant, who had been granted legal aid, was represented by Mr P. Cameron, a solicitor practising in London. The United Kingdom Government ("the Government") were represented by their Agent, Mr C. Whomersley of the Foreign and Commonwealth Office, London.

54. The applicant complained, under Article 8 of the Convention, that the police covertly videotaped him for identification purposes and used the material in the prosecution against him.

55. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that

would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

56. By a decision of 26 September 2002, the Court declared the application partly admissible.

57. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

58. The applicant was born in 1964 and is currently detained in HM Prison Brixton.

59. In 1997, there were a series of armed robberies of mini-cab drivers in and around Wolverhampton. Each robbery was carried out in the same way by a person posing as a passenger at night. Each involved violence. The first robbery was committed on 15 April 1997 (for which the applicant was later acquitted). On 17 April 1997, the applicant was arrested and agreed to an identification parade on 15 May 1997. He was released pending the parade.

60. On 30 April 1997, a second robbery, later alleged in count 2 of the indictment against the applicant, was committed. On 1 May 1997, the applicant was arrested in relation to that offence. The applicant again agreed to participate in an identification parade to be held on 15 May and was then released. However, on that date, the applicant did not appear for the identification parade but instead sent a doctor's note stating that he was too ill to go to work. A subsequent identification parade was set for 5 June 1997. Notice to that effect was sent to the applicant's residence. He did not appear for identification on the specified date, stating later that he did not receive such notification as he had changed address.

61. On 27 June 1997, the applicant was arrested on an unrelated matter at which time he gave the address to which the previous notification was sent.

62. On 21 July 1997, a robbery, for which the applicant was charged in count 3 of his indictment, occurred. The applicant was arrested on 1 August 1997 and later acquitted on this count. The applicant agreed to stand on an identification parade scheduled to take place on 11 September. On 3 September, the applicant was interviewed with respect to another

unconnected matter and said that he would attend the parade on 11 September. On that date, he did not in fact attend.

63. On the 17 September 1997, the robbery alleged in count 4 occurred, while a further robbery alleged in count 5 took place on 24 October 1997.

64. An important part of the prosecution's case rested almost entirely on the ability of the witnesses to visually identify the perpetrator. For this reason, submitting the applicant to an identification parade was of great importance for the prosecution. Given the failure of the applicant to attend the arranged identification parades, the police decided to arrange a video identification parade. Permission to covertly video the applicant for identification purposes was sought from the Deputy Chief Constable for the West Midlands Police Force under the Home Office Guidelines on the Use of Equipment in Police Surveillance Operations 1984.

65. On 19 November 1997, the applicant was taken from Strangeways Prison (where he was being detained on another matter) to the Bilston Street police station. The prison, and the applicant, had been informed that this was for identification purposes and further interviews concerning the armed robberies. On arrival at the police station, he was asked to participate in an identification parade. He refused.

66. Meanwhile, on his arrival at the police station, he was filmed by the custody suite camera which was kept running at all times and was in an area through which police personnel and other suspects came and went. An engineer had adjusted the camera to ensure that it took clear pictures during his visit. A compilation tape was prepared in which eleven volunteers imitated the actions of the applicant as captured on the covert video. This video was shown to various witnesses of the armed robberies, of whom two positively identified the applicant as involved in the second and fourth robberies. Neither the applicant nor his solicitor were informed that a tape had been made or used for identification parade purposes or given an opportunity to view it prior to its use.

67. The applicant's trial commenced in January 1999.

68. At the outset, the applicant's counsel made an application pursuant to section 78 of the Police and Criminal Evidence Act 1984 that evidence of the video identification should not be admitted. The judge heard submissions from the prosecution and defence during a preliminary hearing ("*voir dire*") on 11 and 12 January 1999. On 14 January 1999, the trial judge ruled that the evidence should be admitted. When shortly afterwards this judge became unable to sit, the new trial judge heard the matter afresh. In his ruling of 26 February 1999, he found that the police had failed to comply with paragraphs D.2.11, D.2.15 and D.2.16 of the Code of Practice, *inter alia* with regard to their failure to ask the applicant for his consent to the video, to inform him of its creation, to inform him of its use in an identification parade, and of his own rights in that respect (namely, to give him an opportunity to view the video, object to its contents and to inform

him of the right for his solicitor to be present when witnesses saw the videotape). However, the judge concluded that there had been no unfairness arising from the use of the video. Eleven persons had been filmed for comparison purposes rather than the required eight and were all within comparative height, age and appearance. Even though the applicant's solicitor was not present to verify the procedures adopted when the witnesses were shown the videos, the entire process had been recorded on video and this had been shown to the court which had the opportunity of seeing exactly how the entire video identification process had been operated. The judge ruled that the evidence was therefore admissible.

69. The trial lasted 17 days, the applicant and 31 witnesses giving live evidence. During the course of it, the applicant discharged all his legal representatives (leading and junior counsel and solicitors) and conducted his own defence as he was dissatisfied with the way his defence was being conducted. In his summing-up to the jury, the trial judge warned the jury at considerable length about the "special need for caution" before convicting any defendant in a case turning partly on identification evidence and told the jury to ask themselves whether the video was a fair test of the ability of the witnesses to pick out their attacker, telling them that if it was not a fair test they should not give much, if any weight, to the identifications and also that if there was any possibility that the police planned a video identification rather than a live identification to put the applicant at a disadvantage, they could not rely safely on the video identification evidence. The jury were also made aware of the applicant's complaints about the honesty and fairness of his treatment by the police and the alleged breaches of the code.

70. On 17 March 1999, the jury convicted the applicant of three counts of robbery and acquitted him of two others. The judge sentenced him to five years' imprisonment.

71. The applicant applied for leave to appeal against conviction, *inter alia*, alleging that the trial judge had erred in not excluding the evidence obtained as a result of the covert identification video and that the conviction was unsafe due to significant and substantial breaches of the code of practice relating to identification parades. Leave was granted by a single judge of the Court of Appeal.

72. On 3 April 2000, after a hearing at which the applicant was represented by counsel, the Court of Appeal rejected his appeal, finding that the trial judge had dealt with the matter in a full and careful ruling, that he had been entitled to reach the conclusion that the evidence was admissible and that he had directed the jury to give the evidence little or no weight if it was in any way unfair. It refused leave to appeal to the House of Lords.

73. On 14 April 2000, the applicant applied to the House of Lords. It rejected the application. The solicitors claimed that they were informed on 7 July 2000.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Home Office Guidelines

74. Guidelines on the use of equipment in police surveillance operations (the Home Office Guidelines of 1984) provide that only chief constables or assistant chief constables are entitled to give authority for the use of such devices. The Guidelines are available in the library of the House of Commons and are disclosed by the Home Office on application.

75. In each case, the authorising officer should satisfy himself that the following criteria are met: (a) the investigation concerns serious crime; (b) normal methods of investigation must have been tried and failed, or must from the nature of things, be unlikely to succeed if tried; (c) there must be good reason to think that the use of the equipment would be likely to lead to an arrest and a conviction, or where appropriate, to the prevention of acts of terrorism and (d) the use of equipment must be operationally feasible. The authorising officer should also satisfy himself that the degree of intrusion into the privacy of those affected by the surveillance is commensurate with the seriousness of the offence.

B. The Police and Criminal Evidence Act 1984 ("PACE")

76. Section 78(1) of PACE provides as follows:

> "In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

77. In *R. v. Khan* [1996] 3 All ER 289, the House of Lords held that the fact that evidence had been obtained in circumstances which amounted to a breach of the provisions of Article 8 of the Convention was relevant to, but not determinative of, the judge's discretion to admit or exclude such evidence under section 78 of PACE. The evidence obtained by attaching a listening device to a private house without the knowledge of the occupants in breach of Article 8 of the Convention was admitted in that case.

C. Code of Practice annexed to PACE

78. The Code of Practice was issued under sections 66-67 of PACE, laid before Parliament and then made a statutory instrument. It provided as relevant:

> "D:2.6

The police may hold a parade other than an identification parade if the suspect refuses, or having agreed to attend, fails to attend an identification parade.

D:2.10

The identification officer may show a witness a video film of a suspect if the investigating officer considers, whether because of the refusal of the suspect to take part in an identification parade or group identification or other reasons, that this would in the circumstances be the most satisfactory course of action.

D:2.11

The suspect should be asked for his consent to a video identification and advised in accordance with paragraphs 2.15 and 2.16. However, where such consent is refused the identification officer has the discretion to proceed with a video identification if it is practicable to do so.

D:2.12

A video identification must be carried out in accordance with Annex B. ...

D:2.15

Before a parade takes place or a group identification or video identification is arranged, the identification officer shall explain to the suspect:

(i) the purposes of the parade or group identification or video identification;

(ii) that he is entitled to free legal advice (see paragraph 6.5 of Code C);

(iii) the procedures for holding it (including the right to have a solicitor or friend present); ...

(vi) that he does not have to take part in a parade, or co-operate in a group identification, or with the making of a video film and, if it is proposed to hold a group identification or video identification, his entitlement to a parade if this can practicably be arranged;

(vii) if he does not consent to take part in a parade or co-operate in a group identification or with the making of a video film, his refusal may be given in evidence in any subsequent trial and police may proceed covertly without his consent or make other arrangements to test whether a witness identifies him; ...

D:2.16

This information must also be contained in a written notice which must be handed to the suspect. The identification officer shall give the suspect a reasonable opportunity to read the notice, after which he shall be asked to sign a second copy of the notice to indicate whether or not he is willing to take part in the parade or group identification or co-operate with the making of a video film. The signed copy shall be retained by the identification officer."

79. Annex B set out the details for arranging a video identification, including how, the number and appearance of participants etc.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

80. The applicant complained that he was covertly videotaped by the police, invoking Article 8 of the Convention which provides as relevant:

> 1. Everyone has the right to respect for his private ... life...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. The parties' submissions

1. The applicant

81. The applicant submitted that filming of him in the police station violated his right to respect for private life. He disputed that the custody area could be regarded as a public area or that the camera was running as a matter of routine. It had been run at a different speed to produce a sharper, clearer image of the applicant. He was only in the police station because he had been brought there by the police, and if anything persons in custody required greater protection than the public. He denied that he knew of the camera or that he was aware that he was being filmed. Even if he saw the camera, he could not have known that it was to be used unlawfully for identification purposes. Furthermore, the purpose of the recording was to obtain evidence to prosecute the applicant.

82. The applicant argued that the videotape was made in circumstances which breached the law deliberately from start to finish and could not be regarded as in accordance with law. The courts could not be regarded as a safeguard where they admitted such evidence in breach of the law and the Convention. The breaches were not procedural but had a substantive effect, for if the Code had been followed it was highly likely that the applicant would have received proper legal advice, agreed to a formal identification parade, would have objected to and asked for the replacement of unsuitable volunteers and may not have been identified. It could never, in his view, be legitimate for agents of the Government to deliberately and extensively breach the law.

83. The applicant submitted that the prosecution argued at trial and on appeal that the actions of the police were lawful because they had the authority of the Guidelines, not PACE. The Guidelines however, whatever the view of the domestic courts, were administrative and not primary legislation and could not supplant the specific procedures set down in PACE. The applicant accepted that PACE and the code satisfied the requirements of "law" under the second paragraph. Since however the trial court found three specific breaches of the applicable code (though the facts

supported breaches of further provisions), the procedure adopted by the police could not be regarded as regular and authorised by PACE. In particular, PACE could not be regarded as authorising the collection of footage without the suspect's knowledge where the rules had not been followed.

2. The Government

84. The Government submitted that the filming did not take place in a private place, or even in the police cells, with any intrusion into the "inner circle" of the applicant's private life. It was carried out in the custody suite of the police station which was a communal administrative area through which all suspects had to pass and where the closed circuit video camera, which was easily visible, was running as a matter of security routine. The images related to public, not private, matters. The applicant did not have a reasonable expectation of privacy in such an environment and had been informed that he was there for identification. Further, the applicant was not filmed for surveillance purposes but for identification purposes and only for use in the criminal proceedings in question akin to the cases of *Friedl v. Austria* (Commission report of 19 May 1994) and *Lupker and others v. the Netherlands* (Commission report of 7 December 1992). Nor could it be said that the footage was "processed": the section concerning the applicant was simply extracted and put with footage of the eleven volunteers and there was no public disclosure or broadcast of the images.

85. Even assuming an interference occurred, the Government submitted that it was in accordance with the law as the legal basis for the filming could be found in the statutory authority of the PACE Code of Practice, which was both legally binding and publicly accessible. The 1984 Guidelines were not the legal basis for the filming. The Code provided for a video identification procedure and the collection of footage without the suspect's knowledge if the suspect does not consent to take part in an identification parade. The fact that the Code was breached in three respects in the applicant's case however did not change its status as the basis for the compilation of the tape in domestic law and the domestic courts regarded the Code as sufficient legal basis for the compilation of the tape. The police obtained permission under the 1984 Guidelines as this dealt with the procedure for securing permission to obtain footage and the permitted mechanisms for obtaining it as distinct from the Code which provided the statutory authority for obtaining the footage.

86. The fact that there were breaches of the Code in this case was not determinative of whether there was a breach of Article 8 as it was the quality of the law that was important. The quality of the law was such as to provide sufficient safeguard against arbitrariness and abuse, the Code setting out procedures in very precise detail and the criminal courts having the power to exclude the resultant evidence under section 78 where necessary. Further, the breaches were not deliberate, and were breaches of

procedure not substance, and the courts found no unfairness resulted. Further, any interference pursued the legitimate aim of protecting public safety, preventing crime and protecting the rights of others and since the applicant had failed or refused to attend four identification parades could reasonably be considered as "necessary in a democratic society".

B. The Court's assessment

1. The existence of an interference with private life

87. Private life is a broad term not susceptible to exhaustive definition. Aspects such as gender identification, name, sexual orientation and sexual life are important elements of the personal sphere protected by Article 8. The Article also protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world and it may include activities of a professional or business nature. There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life" (*P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 56, ECHR 2001-IX, with further references).

88. It cannot therefore be excluded that a person's private life may be concerned in measures effected outside a person's home or private premises. A person's reasonable expectations as to privacy is a significant though not necessarily conclusive factor (*P.G. and J.H v. United Kingdom*, § 57).

89. The monitoring of the actions of an individual in a public place by the use of photographic equipment which does not record the visual data does not, as such, give rise to an interference with the individual's private life (see, for example, *Herbecq and Another v. Belgium*, applications nos. 32200/96 and 32201/96, Commission decision of 14 January 1998, DR 92-A, p. 92). On the other hand, the recording of the data and the systematic or permanent nature of the record may give rise to such considerations (see, for example, *Rotaru v. Romania* [GC], no. 28341/95, §§ 43-44, ECHR 2000-V, and *Amann v. Switzerland* [GC], no. 27798/95, §§ 65-67, ECHR 2000-II, where the compilation of data by security services on particular individuals even without the use of covert surveillance methods constituted an interference with the applicants' private lives). While the permanent recording of the voices of *P.G.* and *J.H.* was made while they answered questions in a public area of a police station as police officers listened to them, the recording of their voices for further analysis was regarded as the processing of personal data about them amounting to an interference with their right to respect for their private lives (the above-cited *P.G. and J.H.* judgment, at §§ 59-60). Publication of the material in a manner or degree beyond that normally foreseeable may also bring security recordings within the scope of Article 8 § 1. In *Peck v. the United Kingdom* (no. 44647/98, judgment of 28 January 2003, ECHR 2003-...), the

disclosure to the media for broadcast use of video footage of the applicant whose suicide attempt was caught on close circuit television cameras was found to be a serious interference with the applicant's private life, notwithstanding that he was in a public place at the time.

90. In the present case, the applicant was filmed on video in the custody suite of a police station. The Government argued that this could not be regarded as a private place, and that as the cameras which were running for security purposes were visible to the applicant he must have realised that he was being filmed, with no reasonable expectation of privacy in the circumstances.

91. As stated above, the normal use of security cameras *per se* whether in the public street or on premises, such as shopping centres or police stations where they serve a legitimate and foreseeable purpose, do not raise issues under Article 8 § 1 of the Convention. Here, however, the police regulated the security camera so that it could take clear footage of the applicant in the custody suite and inserted it in a montage of film of other persons to show to witnesses for the purposes of seeing whether they identified the applicant as the perpetrator of the robberies under investigation. The video was also shown during the applicant's trial in a public court room. The question is whether this use of the camera and footage constituted a processing or use of personal data of a nature to constitute an interference with respect for private life.

92. The Court recalls that the applicant had been brought to the police station to attend an identity parade and that he had refused to participate. Whether or not he was aware of the security cameras running in the custody suite, there is no indication that the applicant had any expectation that footage was being taken of him within the police station for use in a video identification procedure and, potentially, as evidence prejudicial to his defence at trial. This ploy adopted by the police went beyond the normal or expected use of this type of camera, as indeed is demonstrated by the fact that the police were required to obtain permission and an engineer had to adjust the camera. The permanent recording of the footage and its inclusion in a montage for further use may therefore be regarded as the processing or collecting of personal data about the applicant.

93. The Government argued that the use of the footage was analogous to the use of photos in identification albums, in which circumstance the Commission had stated that no issue arose where they were used solely for the purpose of identifying offenders in criminal proceedings (*Lupker v. the Netherlands*, no. 18395/91, Commission decision of 7 December 1992, unreported). However, the Commission emphasised in that case that the photographs had not come into the possession of the police through any invasion of privacy, the photographs having been submitted voluntarily to the authorities in passport applications or having been taken by the police on the occasion of a previous arrest. The footage in question in the present

case had not been obtained voluntarily or in circumstances where it could be reasonably anticipated that it would be recorded and used for identification purposes.

94. The Court considers therefore that the recording and use of the video footage of the applicant in this case discloses an interference with his right to respect for private life.

2. The justification for the interference with private life

95. The Court will accordingly examine whether the interference in the present case is justified under Article 8 § 2, notably whether it was "in accordance with the law".

96. The expression "in accordance with the law" requires, firstly, that the impugned measure should have some basis in domestic law; secondly, it refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and that it is compatible with the rule of law (see, amongst other authorities, *Kopp v. Switzerland*, judgment of 25 March 1998, *Reports* 1998-II, p. 540, § 55). It also requires that the measure under examination comply with the requirements laid down by the domestic law providing for the interference.

97. The Government's observations focus on the existence and quality of the domestic law authorising the taking of video film of suspects for identification purposes, submitting that an adequate basis for the measure existed in the provisions of PACE and its Code which set out detailed procedures and safeguards. While the police were required to obtain authorisation under the Home Office Guidelines (a form of instruction found in previous cases not to satisfy requirements of foreseeability and accessibility), they sought to distinguish the procedure for the police to obtain consent to use the camera as such from the statutory authority for the taking and use of the film.

98. Noting that the applicant agreed that PACE and its Code furnished a legal basis for the measure in his case, the Court considers that the taking and use of video footage for identification had sufficient basis in domestic law and was of the requisite quality to satisfy the two-prong test set out above. That is not however the end of the matter. As pointed out by the applicant, the trial court, with which the appeal court agreed, found that the police had failed to comply with the procedures set out in the applicable code in at least three respects. The judge found shortcomings as regarded police compliance with paragraphs D.2.11, D.2.15 and D.2.16 of the Code of Practice (see paragraph 17 above), which concerned, significantly, their failure to ask the applicant for his consent to the video, to inform him of its creation and use in an identification parade, and of his own rights in that respect (namely, to give him an opportunity to view the video, object to its contents and to inform him of the right for his solicitor to be present when witnesses saw the videotape). In light of these findings by domestic courts,

the Court cannot but conclude that the measure as carried out in the applicant's case did not comply with the requirements of domestic law.

99. Though the Government have argued that it was the quality of the law that was important and that the trial judge ruled that it was not unfair for the videotape to be used in the trial, the Court would note that the safeguards relied on by the Government as demonstrating the requisite statutory protection were, in the circumstances, flouted by the police. Issues relating to the fairness of the use of the evidence in the trial must also be distinguished from the question of lawfulness of the interference with private life and are relevant rather to Article 6 than to Article 8. It recalls in this context its decision on admissibility of 26 September 2002 in which it rejected the applicant's complaints under Article 6, observing that the obtaining of the film in this case was a matter which called into play the Contracting State's responsibility under Article 8 to secure the right to respect for private life in due form.

100. The interference was not therefore "in accordance with the law" as required by the second paragraph of Article 8 and there has been a violation of this provision. In these circumstances, an examination of the necessity of the interference is not required.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

101. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

102. The applicant argued that an award of non-pecuniary damage should be made to reflect the deliberate flouting of national and Convention law by the way in which the applicant was misled and covertly filmed to obtain evidence for use at trial. Such an award was necessary, in his view, to enforce respect of citizens' rights. It should also be greater than that made in *P.G. and J.H. v. the United Kingdom*, where no real argument was made regarding the amount of damages. He emphasised that in his case his treatment has contributed greatly to his sense of insecurity and problems of accepting the good faith of public authorities. He also was deprived of his liberty throughout the criminal trial, suffered two trials and an appeal hearing, and as a result lost earnings, job opportunities and humiliation of a trial which should never have taken place due to blatant breaches in the obtaining of evidence. He proposed, by analogy with malicious prosecution

and misfeasance in a public office awards in domestic cases, an award of 10,000 pounds sterling (GBP).

103. The Government pointed out that the applicant's complaints under Article 6 had been rejected as inadmissible and claims relating to his trial and detention could not be made. There was no convincing distinction between his case and *P.G. and J.H.* and the comparisons made with domestic awards were irrelevant, *inter alia*, since the torts were very different from the elements in issue under Article 8.

104. The Court agrees with the Government that domestic scales of damages in relation to torts, not relevant, to the facts of this case are of little assistance. Considering nonetheless that the applicant must be regarded as having suffered some feelings of frustration and invasion of privacy by the police action in this case, it awards, for non-pecuniary damage, the sum of 1,500 euros (EUR).

B. Costs and expenses

105. The applicant claimed legal costs and expenses of a total of GBP 8,299.41, inclusive of value-added tax (VAT), consisting of GBP 3,841.29 for his solicitor and GBP 4,458.12 for counsel

106. The Government considered that the applicant's claims for legal costs and expenses were on the high side for an application that did not go beyond the written stage. They considered a figure of GBP 4,000 would be reasonable.

107. Taking into account the fact that the applicant's complaints were only declared partly admissible and the amount of legal aid paid by the Council of Europe, the Court makes an award of EUR 9,500, inclusive of VAT.

C. Default interest

108. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention;

2. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, to be converted into pounds sterling at the rate applicable at the date of settlement;

(i) EUR 1,500 (one thousand five hundred euros) in respect of non-pecuniary damage;

(ii) EUR 9,500 (nine thousand five hundred euros) in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

3. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 17 July 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Mark Villiger	Georg	Ress
Deputy Registrar	President	

❖ European Court of Human Rights, Fourth Section, case of Bekos and Koutropoulos v. Greece, Application no. 15250/02, judgement 13th December 2005 (Strasburg)- υπόθεση κακομεταχείρισης και βασανιστηρίων κρατουμένων από όργανα της ΕΛ.ΑΣ με ρατσιστικά κίνητρα

In the case of Bekos and Koutropoulos v. Greece,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Sir Nicolas Bratza, *President*,
Mr J. Casadevall,
Mr C.L. Rozakis,
Mr G. Bonello,
Mr R. Maruste,
Mr S. Pavlovschi,
Mr J. Borrego Borrego, *judges*,
and Mr M. O'Boyle, *Section Registrar*,

Having deliberated in private on 29 November 2005,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

109. The case originated in an application (no. 15250/02) against the Hellenic Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Greek nationals belonging to the Roma ethnic group, Mr Lazaros Bekos and Mr Eleftherios Koutropoulos ("the applicants"), on 4 April 2002.

110. The applicants were represented by the European Roma Rights Center, an international law organisation which monitors the human rights situation of Roma across Europe, and the Greek Helsinki Monitor, a member of the International Helsinki Federation. The Greek Government ("the Government") were represented by the Delegates of their Agent, Mr V. Kyriazopoulos, Adviser at the State Legal Council and Mrs V. Pelekou, Legal Assistant at the State Legal Council.

111. The applicants alleged that they had been subjected to acts of police brutality and that the authorities had failed to carry out an adequate investigation into the incident, in breach of Articles 3 and 13 of the Convention. They further alleged that the impugned events had been motivated by racial prejudice, in breach of Article 14 of the Convention.

112. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

113. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Fourth Section (Rule 52 § 1).

114. By a decision of 23 November 2004 the Court declared the application admissible.

115. The applicants and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

116. The applicants, who are Greek nationals of Roma origin, were born in 1980 and live in Mesolonghi (Western Greece).

I. THE CIRCUMSTANCES OF THE CASE

A. Outline of the events

117. On 8 May 1998, at approximately 00.45 a.m., a patrol car from the Mesolonghi police station responded to a telephone complaint reporting the attempted burglary of a kiosk. The call had been made by the grandson of the owner of the kiosk, Mr Pavlakis. Upon arriving at the scene, the latter found the first applicant attempting to break into the kiosk with an iron bar while the second applicant was apparently acting as a lookout. He struggled with the second applicant, who subsequently stated that Mr Pavlakis had punched him in the face.

118. At that point three police officers, Mr Sompolos, Mr Alexopoulos and Mr Ganavias, arrived. The first applicant claimed that he was initially handcuffed without being beaten. Then, an officer removed his handcuffs

and repeatedly beat him on the back and the head with a truncheon. He stopped when the first applicant complained that he had a medical condition and was feeling dizzy.

119. Following their arrest, the applicants were taken to the Mesolonghi police station, where officers Tsikrikas, Avgeris, Zalokostas, Skoutas and Kaminatos were present. The first applicant alleged that as he was being led to his cell one officer beat him twice with a truncheon and another slapped him in the face.

120. At 10.00 a.m. the first applicant was taken to the interview room, where allegedly three police officers punched him in the stomach and the back, trying to extract confessions to other crimes and information about who was dealing in drugs in the area. According to the first applicant, the police officers took turns beating him, slapping him and hitting him all over his body. The first applicant further alleged that another police officer beat him with the iron bar that had been used in the attempted burglary. He alleged that this officer also pushed him against the wall, choking him with the iron bar and threatening to sexually assault him, saying "I will f... you", while trying to lower his trousers.

121. The second applicant said that he was also abused throughout his interrogation. During the early hours of the day, he was allegedly beaten with a truncheon on his back and kicked in the stomach by an officer who later returned to beat him again. Subsequently, the second applicant identified the officer as Mr Tsikrikas. The second applicant also testified that the police officers "inserted a truncheon in [his] bottom and then raised it to [his] face, asking [him] whether it smelled".

122. The applicants stated that they were both able to hear each other's screams and cries throughout their interrogation. The first applicant testified before the domestic court: "I could hear Koutropoulos crying in the other room". The second applicant stated: "I screamed and cried when they were beating me. I could also hear Bekos's screams and cries". They also claimed that they suffered repeated verbal abuse about their Roma origins. In his sworn deposition dated 3 July 1998 the first applicant testified before the public prosecutor that the officer who had choked him with the iron bar said to him "you guys f... your sisters" and "your mothers are getting f... by others" (see also paragraph 25 below).

The Government disputed that the applicants had been assaulted or subjected to racial abuse while in police detention.

123. The applicants remained in detention until the morning of 9 May 1998. At 11.00 a.m. they were brought before the Mesolonghi Public Prosecutor. The first applicant was charged with attempted theft and the second applicant with being an accomplice. The Public Prosecutor set a trial date and released the applicants. In November 1999 the applicants were sentenced to thirty days' and twenty days' imprisonment respectively, in each case suspended for three years.

124. On 9 May 1998, the applicants went to the regional hospital in order to obtain medical evidence of their injuries. However, the intern they saw at the hospital was only able to verify that they both had bruises. In order to acquire stronger evidence of their injuries, the applicants consulted a forensic doctor in Patras. The latter issued a medical certificate dated 9 May 1998, in which he stated that the applicants bore "moderate bodily injuries caused in the past twenty-four hours by a heavy blunt instrument..." In particular, the first applicant had "two deep red (almost black) parallel contusions with areas of healthy skin, covering approximately 10 cm stretching from the left shoulder joint to the area of the deltoid muscle and the right shoulder joint. He complains of pain in his knee joint. He complains of pain in the left parietal area". The second applicant had "multiple deep red (almost black) parallel 'double' contusions with areas of healthy skin covering approximately 12 cm stretching from the left shoulder joint along the rear armpit fold at the lower edge of the shoulder blade, a contusion of the aforementioned colour measuring approximately 5 cm on the rear left surface of the upper arm and a contusion of the aforementioned colour measuring approximately 2 cm on the right carpal joint. He complains of pain on the right side of the parietal area and of pain in the midsection. He complains that he is suffering from a torn meniscus in the right knee, shows pain on movement and has difficulty walking". The applicants produced to the Court pictures taken on the day of their release, showing their injuries. The Government questioned the authenticity of these pictures and affirmed that they should have first been produced to the domestic authorities. They also questioned the credibility of the forensic doctor who examined the applicants and submitted that he had convictions for perjury.

125. On 11 May 1998 the Greek Helsinki Monitor and the Greek Minority Rights Group sent a joint open letter to the Ministry of Public Order protesting against the incident. The letter bore the heading "subject matter: incident of ill-treatment of young Roma (Gypsies) by police officers"; it stated that members of the above organisations had had direct contact with the two victims during a lengthy visit to Roma camps in Greece and that they had collected approximately thirty statements concerning similar incidents of ill-treatment against Roma. The Greek Helsinki Monitor and the Greek Minority Rights Group Reports urged the Minister of Public Order in person to ensure that a prompt investigation of the incident was carried out and that the police officers involved be punished. They expressed the view that precise and detailed instructions should be issued to all police stations in the country regarding the treatment of Roma by the police. Reports of the incident were subsequently published in several Greek newspapers.

B. Administrative investigation into the incident

126. On 12 May 1998, responding to the publicity that had been generated, the Ministry of Public Order launched an informal inquiry into the matter.

127. After the incident received greater public attention, the Greek police headquarters requested that the internal investigation be upgraded to a Sworn Administrative Inquiry (Ενορκη Διοικητική Εξέταση), which started on 26 May 1998.

128. The report on the findings of the Sworn Administrative Inquiry was issued on 18 May 1999. It identified the officers who had arrested the applicants and found that their conduct during the arrest was "lawful and appropriate". It concluded that two other police officers, Mr Tsikrikas and Mr Avgeris had treated the applicants "with particular cruelty during their detention". The report noted that the first applicant had consistently identified the above officers in his sworn depositions of 30 June and 23 October 1998 and that the second applicant had also consistently and repeatedly identified throughout the investigation Mr Tsikrikas as the officer who had abused him.

129. More specifically, it was established that Mr Tsikrikas had physically abused the applicants by beating them with a truncheon and/or kicking them in the stomach. It further found that although the two officers had denied ill-treating the applicants, neither officer was able to "provide a convincing and logical explanation as to where and how the above plaintiffs were injured, given that according to the forensic doctor the ill-treatment occurred during the time they were in police custody".

130. As a result, it was recommended that disciplinary measures in the form of "temporary suspension from service" be taken against both Mr Tsikrikas and Mr Avgeris. The inquiry exculpated the other police officers who had been identified by the applicants. Despite the above recommendation, neither Mr Tsikrikas nor Mr Avgeris were ever suspended.

131. On 14 July 1999 the Chief of the Greek Police fined Mr Tsikrikas 20,000 drachmas (less than 59 euros) for failing to "take the necessary measures to avert the occurrence of cruel treatment of the detainees by his subordinates". The Chief of the Greek Police acknowledged that the applicants had been ill-treated. He stated that "the detainees were beaten by police officers during their detention ... and were subjected to bodily injuries".

C. Criminal proceedings against police officers

132. On 1 July 1998 the applicants and the first applicant's father filed a criminal complaint against the Deputy Commander in Chief of the

Mesolonghi police station and "all other" officers of the police station "responsible".

133. On 3 July 1998 the first applicant gave a sworn deposition relating to his allegations of ill-treatment. He claimed that during his arrest, he had been beaten on the head with a truncheon by a "tall, blond" policeman, who also gave him a beating in the police station and that he had been subjected to racial insults (see paragraph 14 above).

134. On 18 December 1998 the Mesolonghi Public Prosecutor asked the Mesolonghi investigating judge to conduct a preliminary inquiry into the incident (προανάκριση). The findings of the inquiry were then forwarded to the Prosecutor of the Patras Court of Appeal. In January 2000 the Patras Court of Appeal ordered an official judicial inquiry into the incident (κύρια ανάκριση).

135. On 27 January 1999 and 1 February 2000 the first applicant stated that the behaviour of the police officers "was not so bad", that he wanted "this story to be over" and that he did not want "the police officers to be punished". On the same dates the second applicant repeated that he had received a beating at the hands of Mr Tsikrikas, but said that the police officers' behaviour was "rightfully bad" and that he did not want them to be prosecuted. He apologised to the owner of the kiosk and said that he wanted "this story to be over" because he has joining the army and wanted "to be on the safe side".

136. On 31 August 2000 the Mesolonghi Public Prosecutor recommended that three police officers, Mr Tsikrikas, Mr Kaminatos and Mr Skoutas, be tried for physical abuse during interrogation.

137. On 24 October 2000 the Indictment Division of the Mesolonghi Criminal Court of First Instance (Συμβούλιο Πλημμελειοδικών) committed Mr Tsikrikas for trial. It found that "[the] evidence shows that Mr Tsikrikas ill-treated [the applicants] during the preliminary interrogation, in order to extract a confession from them for the attempted theft ... and any similar unsolved offences they had committed in the past". The Indictment Division further stated that Mr Tsikrikas had failed to provide a plausible explanation as to how the applicants were injured during their interrogation and noted that they had both identified Mr Tsikrikas, without hesitation, as the officer who had ill-treated them. On the other hand, it decided to drop the criminal charges against Mr Kaminatos and Mr Skoutas on the ground that it had not been established that they were present when the events took place (bill of indictment no. 56/2000).

138. Mr Tsikrikas's trial took place on 8 and 9 October 2001 before the three-member Patras Court of Appeal. The court heard several witnesses and the applicants, who repeated their allegations of ill-treatment (see paragraphs 10-14 above). Among others, the court heard Mr Dimitras, a representative of the Greek Helsinki Monitor, who stated that the said organisation was monitoring the situation of Roma in Greece and that the

incident was reported to him during a visit to the Roma/Gypsy camps. He claimed that he was horrified when he saw the injuries on the applicants' bodies and that the latter were initially afraid to file a complaint against the police officers. Mr Dimitras also referred to the actions subsequently taken by the Greek Helsinki Monitor in order to assist the applicants. The court also read out, among other documents, the Greek Helsinki Monitor's and the Greek Minority Rights Group's open letter to the Ministry of Public Order (see paragraph 17 above).

139. On 9 October 2001 the court found that there was no evidence implicating Mr Tsikrikas in any abuse and found him not guilty (decision no. 1898/2001). In particular, the court first referred to the circumstances surrounding the applicants' arrest and to the subsequent involvement of members of the Greek Helsinki Monitor in the applicants' case, noting their role in monitoring alleged violations of human rights against minorities. Taking also into account the forensic doctor's findings, the court reached the following conclusion:

"... Admittedly, the second applicant had clashed with Mr Pavlakis. Further, given the applicants' light clothing, it was logical that they were injured during the fight that took place when they were arrested. Even if some of the applicants' injuries were inflicted by police officers during their detention, it has not been proved that the accused participated in this in one way or the other, because he was absent when they arrived at the police station and did not have contact with them until approximately two hours later, on his arrival at the police station. In his sworn deposition dated 3 July 1998, the first applicant stated that in the process of his arrest he had been beaten with a truncheon by a tall, blond police officer (a description that does not match the features of the accused) and that the same police officer had also beaten him during his detention. However, the accused was not present when the applicants were arrested. If the applicants had indeed been beaten by police officers during their detention, they would have informed their relatives who arrived at the police station that same night. Thus, the accused must be found not guilty."

140. Under Greek law, the applicants, who had joined the proceedings as civil parties, could not appeal against this decision.

II. REPORTS OF INTERNATIONAL ORGANISATIONS ON ALLEGED DISCRIMINATION AGAINST ROMA

141. In its country reports of the last few years, the European Commission against Racism and Intolerance at the Council of Europe (ECRI) has expressed concern about racially motivated police violence, particularly against Roma, in a number of European countries including Bulgaria, the Czech Republic, France, Greece, Hungary, Poland, Romania and Slovakia.

142. The Report on the Situation of Fundamental Rights in the European Union and Its Member States in 2002, prepared by the European Union (EU) network of independent experts in fundamental rights at the request of the European Commission, stated, *inter alia*, that police abuse against Roma and similar groups, including physical abuse and excessive use of force, had

been reported in a number of EU member States, such as Austria, France, Greece, Ireland, Italy and Portugal.

143. In its second report on Greece, adopted on 10 December 1999 and published on 27 June 2000, ECRI stated, *inter alia*:

> "26. There have been consistent reports that Roma/Gypsies, Albanians and other immigrants are frequently victims of misbehaviour on the part of the police in Greece. In particular, Roma/Gypsies are often reported to be victims of excessive use of force -- in some cases resulting in death -- ill-treatment and verbal abuse on the part of the police. Discriminatory checks involving members of these groups are widespread. In most cases there is reported to be little investigation of these cases, and little transparency on the results of these investigations. Although most of these incidents do not generally result in a complaint being filed by the victim, when charges have been pressed the victims have reportedly in some cases been subjected to pressure to drop such charges. ECRI stresses the urgent need for the improvement of the response of the internal and external control mechanisms to the complaints of misbehaviour *vis à vis* members of minority groups on the part of the police. In this respect, ECRI notes with interest the recent establishment of a body to examine complaints of the most serious cases of misbehaviour on the part of the police and emphasises the importance of its independence and of its accessibility by members of minority groups.
>
> 27. ECRI also encourages the Greek authorities to strengthen their efforts as concerns provision of initial and ongoing training of the police in human rights and anti-discrimination standards. Additional efforts should also be made to ensure recruitment of members of minority groups in the police and their permanence therein ...
>
> ...
>
> 31. As noted by ECRI in its first report, the Roma/Gypsy population of Greece is particularly vulnerable to disadvantage, exclusion and discrimination in many fields...
>
> ...
>
> 34. Roma/Gypsies are also reported to experience discrimination in various areas of public life...They also frequently experience discriminatory treatment and sometimes violence and abuse on the part of the police ..."

144. In its third report on Greece, adopted on 5 December 2003 and published on 8 June 2004, ECRI stated, *inter alia*:

> "67. ECRI notes with concern that since the adoption of its second report on Greece, the situation of the Roma in Greece has remained fundamentally unchanged and that overall they face the same difficulties – including discrimination - in respect of housing, employment, education and access to public services...
>
> ...
>
> 69. ECRI welcomes the fact that the government has taken significant steps to improve the living conditions of Roma in Greece. It has set up an inter-ministerial committee for improving the living conditions of Roma...
>
> 70. ...ECRI deplores the many cases of local authorities refusing to act in the interests of Roma when they are harassed by members of the local population. It is also common for the local authorities to refuse to grant them the rights that the law guarantees to members of the Roma community to the same extent as to any other Greek citizen...

...

105. ECRI expresses concern over serious allegations of ill-treatment of members of minority groups, such as Roma and both authorised and unauthorised immigrants. The ill-treatment in question ranges from racist insults to physical violence and is inflicted either at the time of arrest or during custody. ECRI is particularly concerned over the existence of widespread allegations of improper use of firearms, sometimes resulting in death. It is equally concerned over reports of ill-treatment of minors and expulsion of non-citizens outside of legal procedures.

106. The Greek authorities have indicated that they are closely monitoring the situation and that mechanisms are in place to effectively sanction such abuses. For example, the Internal Affairs Directorate of the Greek Police was established in 1999 and is responsible for conducting investigations, particularly into acts of torture and violation of human dignity. The police –specifically police officers working in another sector than that of the person under suspicion - and the prosecution equally have competence over such matters and must inform the above-mentioned body when dealing with a case in which a police officer is implicated. The Greek Ombudsman is also competent for investigating, either on request or ex officio, allegations of misbehaviour by a police officer, but he is only entitled to recommend that appropriate measures be taken. ECRI welcomes the fact that the chief state prosecutor recently reminded his subordinates of the need for cases of police ill-treatment, particularly involving non-citizens, to be prevented and prosecuted with the appropriate degree of severity. The authorities have pointed out that instances of ill-treatment were primarily due to difficult conditions of detention. ECRI notes with satisfaction cases of law enforcement officials having been prosecuted, and in some cases penalised, for acts of ill-treatment. However, human rights NGOs draw attention to other cases where impunity is allegedly enjoyed by officials responsible for acts of violence, whose prosecution has not lead to results or even been initiated. ECRI deplores such a situation and hopes that it will no longer be tolerated."

145. In their joint report published in April 2003 *("Cleaning Operations – Excluding Roma in Greece"*), the European Roma Rights Center and the Greek Helsinki Monitor, which represent the applicants in the instant case, stated, *inter alia*:

"ERRC/GHM monitoring of policing in Greece over the last five years suggests that ill-treatment, including physical and racist verbal abuse, of Roma in police custody is common. Although Greek authorities deny racial motivation behind the ill-treatment of Roma, Romani victims with whom ERRC/GHM spoke testified that police officers verbally abused them using racist epithets.

Anti-Romani sentiment among police officers often leads to instances of harassment, inhuman and degrading treatment, verbal and physical abuse, and arbitrary arrest and detention of Roma at the hands of police. The ERRC and GHM regularly document ill-treatment of Roma at the hands of the police, either at the moment of arrest or in police custody. Police officers' use of racial epithets in some cases of police abuse of Roma is indicative that racial prejudice plays a role in the hostile treatment to which officers subject Roma..."

III. RELEVANT DOMESTIC LAW

146. According to Article 2 § 1 of the Greek Constitution, the "value of the human being" is one of the fundamental principles and a "primary obligation" of the Greek State.

147. Article 5 § 2 of the Constitution reads as follows:

> "All persons living within the Greek territory shall enjoy full protection of their life, honour and liberty irrespective of nationality, race or language and of religious or political beliefs. Exceptions shall be permitted only in cases provided for by international law..."

148. Law no. 927/1979 (as amended by Law no. 1419/1984 and Law no. 2910/2001) is the principal implementing legislation on the prevention of acts or activities related to racial or religious discrimination.

IV. RELEVANT INTERNATIONAL LAW

149. European Union Council Directive 2000/43/CE of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Council Directive 2000/78/CE of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, provide, in Article 8 and Article 10 respectively:

> "1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.
>
> 2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.
>
> 3. Paragraph 1 shall not apply to criminal procedures.
>
> ...
>
> 5. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case."

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 3 OF THE CONVENTION

150. The applicants complained that during their arrest and subsequent detention they were subjected to acts of police brutality which inflicted on them great physical and mental suffering amounting to torture, inhuman and/or degrading treatment or punishment. They also complained that the Greek investigative and prosecuting authorities failed to carry out a prompt

and effective official investigation into the incident. They argued that there had been a breach of Article 3 of the Convention, which provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. The submissions of the parties

151. The applicants submitted that they had suffered serious bodily harm at the hands of the police and that the investigation into the incident and the ensuing judicial proceedings were ineffective, deficient and inconclusive. They stressed that at the material time they were young and vulnerable. They had also received threats during the course of the investigation. This was the reason why, at some point, they claimed that they did not wish to pursue their complaints against the police officers.

152. The Government referred to the findings of the domestic court and submitted that the applicants' complaints were wholly unfounded. Their moderate injuries were the result of the struggle that took place during their arrest. The applicants themselves had stated that the conduct of the police officers was justified and that they did not want to see them prosecuted. The investigation into the incident was prompt, independent and thorough, and led to a fine being imposed on Mr Tsikrikas. Criminal charges were also brought against him. Several witnesses and the applicants were heard in court. The fact that the accused was acquitted had no bearing on the effectiveness of the investigation.

B. The Court's assessment

1. Concerning the alleged ill-treatment

153. As the Court has stated on many occasions, Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation (see *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999-V, and the *Assenov and Others v. Bulgaria* judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, p. 3288, § 93). The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct (see the *Chahal v. the United Kingdom* judgment of 15 November 1996, *Reports* 1996-V, p. 1855, § 79).

154. In assessing evidence, the Court has generally applied the standard of proof "beyond reasonable doubt" (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, pp. 64-65, § 161). However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during such detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII).

155. In the instant case the applicants complained that during their arrest and subsequent detention they were subjected to acts of police brutality. Admittedly, on the day of their release from police custody, the applicants bore injuries. According to the Court's case-law, "where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation as to the causing of the injury, failing which a clear issue arises under Article 3 of the Convention" (*Aksoy v. Turkey*, judgment of 18 December 1996, *Reports* 1996–VI, p. 2278, § 61).

156. The Court considers that in the present case the domestic authorities have failed to provide such an explanation. It notes in this respect that the three-member Patras Court of Appeal which tried the only police officer who had been committed to trial attributed the applicants' injuries to the struggle that took place during their arrest and considered that "if the applicants had indeed been beaten by police officers during their detention, they would have reported this fact to their relatives"; in the Court's view this reasoning is less than convincing, in particular taking into account that the administrative investigation that was conducted into the incident established that the applicants had been treated "with particular cruelty during their detention" and the acknowledgement by the Chief of the Greek Police that the applicants had been beaten by police officers during their detention.

157. The question which therefore arises next is whether the minimum level of severity required for a violation of Article 3 of the Convention can be regarded as having been attained in the instant case (see, among other authorities, *İlhan v. Turkey* [GC], no. 22277/93, § 84, ECHR 2000-VII). The Court recalls that the assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim (see, among other authorities, *Tekin v. Turkey*, judgment of 9 June 1998, *Reports* 1998-IV, p. 1517, § 52).

158. In considering whether a punishment or treatment is "degrading" within the meaning of Article 3, the Court will also have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3 (see, for example, *Raninen v. Finland*, judgment of 16 December 1997, *Reports* 1997-VIII, pp. 2821-22, § 55).

159. In the light of the above circumstances, the Court considers that the serious physical harm suffered by the applicants at the hands of the police, as well as the feelings of fear, anguish and inferiority which the impugned treatment had produced in them, must have caused the applicants suffering of sufficient severity for the acts of the police to be categorised as inhuman and degrading treatment within the meaning of Article 3 of the Convention.

160. The Court concludes that there has been a breach of Article 3 of the Convention in this regard.

2. Concerning the alleged inadequacy of the investigation

161. The Court recalls that where an individual makes a credible assertion that he has suffered treatment infringing Article 3 at the hands of the police or other similar agents of the State, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. As with an investigation under Article 2, such investigation should be capable of leading to the identification and punishment of those responsible. Otherwise, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity (see, among other authorities, *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV).

162. As regards the present case, the Court notes that on several occasions, during both the administrative inquiry that was conducted into the incident and the ensuing judicial proceedings, it has been acknowledged that the applicants were ill-treated while in custody. However, no police officer was ever punished, either within the criminal proceedings or the internal police disciplinary procedure for ill-treating the applicants. In this regard the Court notes that the fine of less than 59 euros imposed on Mr Tsikrikas was imposed not on the grounds of his own ill-treatment of the applicants but for his failure to prevent the occurrence of ill-treatment by his subordinates (see paragraph 23 above). It is further noted that neither Mr Tsikrikas nor Mr Avgeris were at any time suspended from service, despite the recommendation of the report on the findings of the administrative inquiry (see paragraphs 20-22 above). In the end, the domestic court was satisfied that the applicants' light clothing was the

reason why the latter got injured during their arrest. Thus, the investigation does not appear to have produced any tangible results and the applicants received no redress for their complaints.

163. In these circumstances, having regard to the lack of an effective investigation into the credible allegation made by the applicants that they had been ill-treated while in custody, the Court holds that there has been a violation of Article 3 of the Convention in this respect.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

164. The applicants complained that they had not had an effective remedy within the meaning of Article 13 of the Convention, which stipulates:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

165. In view of the grounds on which it has found a violation of Article 3 in relation to its procedural aspect (see paragraphs 53 to 55 above), the Court considers that there is no need to examine separately the complaint under Article 13 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

166. The applicants complained that the ill-treatment they had suffered, along with the subsequent lack of an effective investigation into the incident, were in part due to their Roma ethnic origin. They alleged a violation of Article 14 of the Convention, which provides:

> "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 or other status."

A. The submissions of the parties

167. The applicants acknowledged that in assessing evidence the standard of proof applied by the Court was that of "proof beyond reasonable doubt", but noted that the Court had made it clear that that standard had not be interpreted as requiring such a high degree of probability as in criminal trials. They affirmed that the burden of proof had to shift to the respondent Government when the claimant established a *prima facie* case of discrimination.

168. Turning to the facts of the instant case, the applicants claimed that the nature of the incident itself, the racist language used by the police and the continuous failure of the domestic authorities to sanction anti-Roma police brutality clearly demonstrated a compelling case of racially motivated abuse and dereliction of responsibility. In this respect the applicants reiterated that the police officers had explicitly used racist language and had referred to their ethnic origin in a pejorative way. They

further argued that the discriminatory comments which the police officers shouted at them during their detention had to be seen against the broader context of systematic racism and hostility which law-enforcement bodies in Greece repeatedly displayed against Roma. This attitude had been widely documented by intergovernmental and human rights organisations.

169. The Government emphasised that the Court had always required "proof beyond reasonable doubt" and that in the instant case there was no evidence of any racially motivated act on the part of the authorities. They firmly denied that the applicants had been ill-treated; however, even assuming that the police officers who were involved in the incident had acted in a violent way, the Government believed that their behaviour was not racially motivated but was tied to the fact that the applicants had previously committed an offence.

170. The Government further contended that in its latest report on Greece (see paragraph 36 above), ECRI drew the attention of the Greek authorities to the situation of the Roma, highlighting in particular problems of discrimination in respect of housing, employment, education and access to public services. ECRI also stressed the importance of overcoming local resistance to initiatives that benefit Roma but welcomed the fact that the government had taken significant steps to improve the living conditions of Roma in Greece. The Government stressed that there was no mention in the report of any other discrimination suffered by the Roma in respect of their rights guaranteed under the Convention. Lastly, they affirmed that the Greek Constitution expressly proscribed racial discrimination and pointed out that the State had recently undertaken action for the transposition into the Greek legal order of the anti-racism Directives 2000/43 and 2000/78 of the European Communities.

B. The Court's assessment

1. Whether the respondent State is liable for degrading treatment on the basis of the victims' race or ethnic origin

171. Discrimination is treating differently, without an objective and reasonable justification, persons in relevantly similar situations (see *Willis v. the United Kingdom*, no. 36042/97, § 48, ECHR 2002-IV). Racial violence is a particular affront to human dignity and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism and racist violence, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of its enrichment (*Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 145, 6 July 2005).

172. Faced with the applicants' complaint of a violation of Article 14, as formulated, the Court's task is to establish whether or not racism was a

causal factor in the impugned conduct of the police officers so as to give rise to a breach of Article 14 of the Convention taken in conjunction with Article 3.

173. The Court reiterates that in assessing evidence it has adopted the standard of proof "beyond reasonable doubt" (see paragraph 47 above); nonetheless, it has not excluded the possibility that in certain cases of alleged discrimination it may require the respondent Government to disprove an arguable allegation of discrimination and – if they fail to do so – find a violation of Article 14 of the Convention on that basis. However, where it is alleged – as here – that a violent act was motivated by racial prejudice, such an approach would amount to requiring the respondent Government to prove the absence of a particular subjective attitude on the part of the person concerned. While in the legal systems of many countries proof of the discriminatory effect of a policy or decision will dispense with the need to prove intent in respect of alleged discrimination in employment or the provision of services, that approach is difficult to transpose to a case where it is alleged that an act of violence was racially motivated (see *Nachova and Others v. Bulgaria*, cited above, § 157).

174. Therefore, turning to the facts of the present case, the Court considers that whilst the police officers' conduct during the applicants' detention calls for serious criticism, that behaviour is of itself an insufficient basis for concluding that the treatment inflicted on the applicants by the police was racially motivated. Further, in so far the applicants have relied on general information about police abuse of Roma in Greece, the Court cannot lose sight of the fact that its sole concern is to ascertain whether in the case at hand the treatment inflicted on the applicants was motivated by racism (see *Nachova and Others v. Bulgaria*, cited above, § 155). Lastly, the Court does not consider that the failure of the authorities to carry out an effective investigation into the alleged racist motive for the incident should shift the burden of proof to the respondent Government with regard to the alleged violation of Article 14 in conjunction with the substantive aspect of Article 3 of the Convention. The question of the authorities' compliance with their procedural obligation is a separate issue, to which the Court will revert below (see *Nachova and Others v. Bulgaria*, cited above, § 157).

175. In sum, having assessed all relevant elements, the Court does not consider that it has been established beyond reasonable doubt that racist attitudes played a role in the applicants' treatment by the police.

176. It thus finds that there has been no violation of Article 14 of the Convention taken together with Article 3 in its substantive aspect.

2. Whether the respondent State complied with its obligation to investigate possible racist motives

177. The Court considers that when investigating violent incidents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice

may have played a role in the events. Admittedly, proving racial motivation will often be extremely difficult in practice. The respondent State's obligation to investigate possible racist overtones to a violent act is an obligation to use best endeavours and not absolute. The authorities must do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of a racially induced violence (see, *mutatis mutandis*, *Nachova and Others v. Bulgaria*, nos. 43577/98 and 43579/98, §§ 158-59, 26 February 2004).

178. The Court further considers that the authorities' duty to investigate the existence of a possible link between racist attitudes and an act of violence is an aspect of their procedural obligations arising under Article 3 of the Convention, but may also be seen as implicit in their responsibilities under Article 14 of the Convention to secure the fundamental value enshrined in Article 3 without discrimination. Owing to the interplay of the two provisions, issues such as those in the present case may fall to be examined under one of the two provisions only, with no separate issue arising under the other, or may require examination under both Articles. This is a question to be decided in each case on its facts and depending on the nature of the allegations made (see, *mutatis mutandis*, *Nachova and Others v. Bulgaria* [GC], cited above, § 161).

179. In the instant case the Court has already found that the Greek authorities violated Article 3 of the Convention in that they failed to conduct an effective investigation into the incident. It considers that it must examine separately the complaint that there was also a failure to investigate a possible causal link between alleged racist attitudes and the abuse suffered by the applicants at the hands of the police.

180. The authorities investigating the alleged ill-treatment of the applicants had before them the sworn testimonies of the first applicant that, in addition to being the victims of serious assaults, they had been subjected to racial abuse by the police who were responsible for the ill-treatment. In addition, they had before them the joint open letter of the Greek Helsinki Monitor and the Greek Minority Rights Group protesting about the ill-treatment of the applicants, which they qualified as police brutality against Roma by the Greek police, and referring to some thirty oral testimonies concerning similar incidents of ill-treatment of members of the Roma community. The letter concluded by urging that precise and detailed instructions should be given to all police stations of the country regarding the treatment of Roma by the police (see paragraph 17 above).

181. The Court considers that these statements, when combined with the reports of international organisations on alleged discrimination by the police in Greece against Roma and similar groups, including physical abuse and the excessive use of force, called for verification. In the view of the Court,

where evidence comes to light of racist verbal abuse being uttered by law enforcement agents in connection with the alleged ill-treatment of detained persons from an ethnic or other minority, a thorough examination of all the facts should be undertaken in order to discover any possible racial motives (see, *mutatis mutandis*, *Nachova and Others v. Bulgaria* [GC], cited above, § 164).

182. In the present case, despite the plausible information available to the authorities that the alleged assaults had been racially motivated, there is no evidence that they carried out any examination into this question. In particular, nothing was done to verify the statements of the first applicant that they had been racially verbally abused or the other statements referred to in the open letter alleging similar ill-treatment of Roma; nor do any inquiries appear to have been made as to whether Mr Tsikrakas had previously been involved in similar incidents or whether he had ever been accused in the past of displaying anti-Roma sentiment; nor, further, does any investigation appear to have been conducted into how the other officers of the Mesolonghi police station were carrying out their duties when dealing with ethnic minority groups. Moreover, the Court notes that, even though the Greek Helsinki Monitor gave evidence before the trial court in the applicants' case and that the possible racial motives for the incident cannot therefore have escaped the attention of the court, no specific regard appears to have been paid to this aspect, the court treating the case in the same way as one which had no racial overtones.

183. The Court thus finds that the authorities failed in their duty under Article 14 of the Convention taken together with Article 3 to take all possible steps to investigate whether or not discrimination may have played a role in the events. It follows that there has been a violation of Article 14 of the Convention taken together with Article 3 in its procedural aspect.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

184. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

1. Pecuniary damage

185. The first applicant claimed 4,540.80 euros (EUR) for loss of income over a period of twelve months after the incident. The second applicant claimed EUR 2,250 for loss of income over a period of six months after the incident. They further submitted that due to their injuries they were unable to resume their previous occupations.

186. The Government submitted that the applicants had not duly proved the existence of pecuniary damage and that their claims on this point should be dismissed.

187. The Court notes that the claims for pecuniary damage relate to loss of income, which was allegedly incurred over a period of twelve and six months respectively after the incident, and to alleged subsequent reduction of income. It observes, however, that no supporting details have been provided for these losses, which must therefore be regarded as largely speculative. For this reason, the Court makes no award under this head.

2. Non-pecuniary damage

188. The applicants claimed EUR 20,000 each in respect of the fear, pain and injury they suffered.

189. The Government argued that any award for non-pecuniary damage should not exceed EUR 10,000 for each applicant.

190. The Court considers that the applicants have undoubtedly suffered non-pecuniary damage which cannot be compensated solely by the findings of violations. Having regard to the specific circumstances of the case and ruling on an equitable basis, the Court awards each applicant EUR 10,000, plus any tax that may be chargeable on that amount.

B. Costs and expenses

191. The applicants made no claim for costs and expenses.

C. Default interest

192. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 3 of the Convention in respect of the treatment suffered by the applicants at the hands of the police;

2. *Holds* that there has been a violation of Article 3 of the Convention in that the authorities failed to conduct an effective investigation into the incident;

3. *Holds* that there is no need to examine separately the complaint under Article 13 of the Convention;

4. *Holds* that there has been no violation of Article 14 of the Convention taken in conjunction with Article 3 of the Convention in respect of the allegation that the treatment inflicted on the applicants by the police was racially motivated;

5. *Holds* that there has been a violation of Article 14 of the Convention taken in conjunction with Article 3 of the Convention in that the authorities failed to investigate possible racist motives behind the incident;

6. *Holds*

(a) that the respondent State is to pay to each applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 10,000 (ten thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 13 December 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'Boyle Nicolas Bratza
Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Sir Nicolas Bratza;
(b) separate opinion of Mr Casadevall.

N.B.
M.O.B.

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

CONCURRING OPINION OF JUDGE
SIR NICOLAS BRATZA

I agree with the conclusions and with the reasoning of the Chamber, save that I have the same hesitations about the passage in paragraph 65 of the judgment, which draws on paragraph 157 of the Court's *Nachova* judgment (*Nachova and Others v. Bulgaria* [GC], nos.43577/98 and 43579/98), as I expressed in the *Nachova* case itself.

Although it does not affect the outcome of the present case, any more than it did in the case of *Nachova*, I remain of the view that the paragraph is too broadly expressed when it suggests that, because of the evidential difficulties which would confront a Government, it would rarely if ever be appropriate to shift the burden to the Government to prove that a particular act in violation of the Convention (in this case, Article 3; in *Nachova*, Article 2) was not racially motivated. As in the *Nachova* case itself, I consider that circumstances could relatively easily be imagined in which it would be justified to require a Government to prove that the ethnic origins of a detainee had not been a material factor in the ill-treatment to which he had been subjected by agents of the State.

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

- European Court of Human Rights, Second Section, case of Maranatzis v. Greece, Application no. 50385/99, Judgement 20th December 2004 (Strasburg) – υπόθεση κινδύνου ζωής καταδιωκόμενου από την ΕΛ.ΑΣ

CASE OF MAKARATZIS v. GREECE

(Application no. 50385/99)

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

JUDGMENT

STRASBOURG

20 December 2004

In the case of Makaratzis v. Greece,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Mr G. RESS,
Sir Nicolas BRATZA,
Mr G. BONELLO,
Mr R. TÜRMEN,
Mrs F. TULKENS,
Mrs V. STRÁŽNICKÁ,
Mr P. LORENZEN,
Mrs N. VAJIĆ,
Mrs M. TSATSA-NIKOLOVSKA,
Mrs H.S. GREVE,
Mr A. KOVLER,
Mr V. ZAGREBELSKY,
Mrs A. MULARONI,
Mr K. HAJIYEV, *judges*,

and Mr P.J. MAHONEY, *Registrar*,

Having deliberated in private on 30 June and 17 November 2004,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

193. The case originated in an application (no. 50385/99) against the Hellenic Republic lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Greek national, Mr Christos Makaratzis ("the applicant"), on 2 June 1998.

194. The applicant, who had been granted legal aid, complained, under Articles 2, 3 and 13 of the Convention, that the police officers who had tried to arrest him had used excessive firepower against him, putting his life at risk. He further complained of the absence of an adequate investigation into the incident.

195. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11). It was registered on 18 August 1999.

196. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1. On 18 October 2001 the application was declared partly admissible by a Chamber of that Section, composed of Mr A.B. Baka, President, Mr C.L. Rozakis, Mrs V. Strážnická, Mr P. Lorenzen, Mr E. Levits, Mr A. Kovler, and Mr V. Zagrebelsky, judges, and Mr S. Nielsen, then Deputy Section Registrar.

197. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section (Rule 52 § 1).

198. On 5 February 2004, following a hearing on the merits (Rule 59 § 3), a Chamber of that Section, composed of Mrs F. Tulkens, President, Mr C.L. Rozakis, Mr G. Bonello, Mr P. Lorenzen, Mrs N. Vajić, Mr E. Levits, and Mr A. Kovler, judges, and Mr S. Nielsen, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

199. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

200. On 9 June 2004 third-party comments were received from the *Institut de formation en droits de l'homme du barreau de Paris*, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).

201. A hearing took place in public in the Human Rights Building, Strasbourg, on 30 June 2004 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mr M. APESSOS, Senior Adviser,
State Legal Council, *Delegate of the Agent*,
Mr V. KYRIAZOPOULOS, Adviser,
State Legal Council, *Counsel*,
Mr I. BAKOPOULOS, Legal Assistant,
State Legal Council, *Adviser*;

(b) *for the applicant*
Mr Y. KTISTAKIS,
Mrs I. KOURTOVIK, *Counsel*,
Mr E. KTISTAKIS, *Adviser*.

The Court heard addresses by Mr Ktistakis, Mrs Kourtovik and Mr Kyriazopoulos.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

202. The applicant was born in 1967 and lives in Athens.

A. Outline of events

203. In the evening of 13 September 1995 the police tried to stop the applicant, who had driven through a red traffic light in the centre of Athens, near the American embassy. Instead of stopping, the applicant accelerated. He was chased by several police officers in cars and on motorcycles. During the pursuit, the applicant's car collided with several other vehicles. Two drivers were injured. After the applicant had broken through five police roadblocks, the police officers started firing at his car. The applicant alleged that the police were firing at the car's cab, whereas the Government maintained that they were aiming at the tyres.

204. Eventually, the applicant stopped at a petrol station, but did not get out. The police officers continued firing. The applicant alleged that the policemen knelt down and fired at him, whereas the Government maintained that they were firing in the air, in particular because there were petrol pumps in danger of exploding. One of the police officers threw a pot at the windscreen. Finally, the applicant was arrested by a police officer who managed to break into the car. The applicant claimed that he was shot on the sole of his foot while being dragged out of his car. The Government contested that claim, referring to the findings of the domestic court (see paragraph 19 below). The applicant was immediately driven to hospital, where he remained for nine days. He was injured on the right arm, the right foot, the left buttock and the right side of the chest. One bullet was removed from his foot and another one is still inside his buttock. The applicant's mental health, which had broken down in the past, has deteriorated considerably since the incident.

B. The administrative investigation

205. Following the incident, an administrative investigation was carried out by the police. Twenty-nine of the police officers who had taken part in the chase were identified. There were also other policemen who had participated in the incident of their own accord and who had left the scene without identifying themselves and without handing in their weapons. In total, thirty-five sworn witness statements were taken. Laboratory tests were conducted in order to examine thirty-three police firearms, three bullets and four metal fragments. The applicant's car was also examined.

The laboratory's findings

206. On 12 January 1996 the police laboratory issued a report which contained the following findings:

(a) As regards the applicant's car

"... The car that has been examined is severely damaged due to collisions/crashes, but also to bullets ... At the front, there is damage to the car's windscreen, where there are three holes and a mark ... Bullets, directed from the inside of the car outwards, caused the three holes as well as the mark. From the general damage to the car (the rear window is broken and has collapsed), the location of the examined damage and the course (direction) of the bullets that caused it, it may be assumed that the bullets in question broke through the rear window and ended up hitting the windscreen, producing the holes and the mark.

... The rear window is broken and has collapsed. Because of its total destruction, it is not possible to determine exactly why it broke. From the rest of the findings (the damage to the windscreen, etc.) it may be assumed that bullets were responsible ... The trajectory of the bullets that caused the holes is from the rear of the car towards the front ... The shape and size of the holes suggest that the bullets were fired by a 9 mm calibre firearm.

... On the driver's side of the car, there is a mark on the rear wing, near the wheel; its dimensions are approximately 55 x 25 mm. From the shape of the mark it may be assumed that the bullet that caused it came from the rear of the car towards the front, with an upward trajectory. On the right-hand side of the car, the window of the front passenger's door is broken.

There is a bump on the roof of the car, and a corresponding hole in the upholstery inside. This has been caused by a bullet that travelled upwards from the rear of the car towards the front. It may be assumed that the bullet entered the car through the rear window ..."

(b) As regards the firearms

"In total, twenty-three revolvers, six pistols, four submachine guns and three bullets were sent to us ... Twenty-three of the weapons are revolvers of .357 Magnum calibre; six are pistols, five of which are of 9 mm Parabellum calibre and one of .45 ACP calibre; and four are HK MP 5 submachine guns of 9 mm Parabellum calibre. The serial numbers of the weapons, their make and the names of the police officers to whom they belong are indicated in the above-mentioned document as well as in the delivery and confiscation reports of 14 and 16 September 1995 of the Paleo Faliro police station, copies of which are attached to this report. We performed the same number of trial shots with the twenty-three weapons, using three cartridges in each case. All the weapons functioned properly. The spent cartridges and bullets for each weapon were put into plastic envelopes for identification purposes, and each envelope was marked with the distinctive characteristics of the weapon.

... Two of the three bullets were found in the car and the third was surgically removed from the first metatarsal of the injured driver's right foot. For identification purposes, the bullets were marked 'PB1/4722' (for the bullet from the injured person's body) and 'PB2 and PB3/4722' (for the bullets found in the car). They will be regarded as evidence ... The heads and cylindrical surfaces of all three bullets are more or less deformed as a result of hitting hard surfaces, and have broken sabots and parts

missing. The average diameter of the bullet bases is 9 mm. From the measurements and their characteristics it is surmised that the bullets come from 9 mm Parabellum cartridges (9 x 19). These kinds of cartridges are fired mainly by pistols and submachine guns of the same calibre ..."

(c) Conclusions

"... Sixteen holes were found on the car, caused by the direct impact of the same number of bullets. It is assumed that the bullets that caused the holes were fired by 9 mm calibre weapons. Inside the car, there are holes due to secondary impact and ricochets from some of the above bullets.

... The exhibit bullet 'PB2' and the bullets the metal sabots 'PP1' and 'PP2' come from were fired by the HK MP 5 submachine gun no. C273917.

... The exhibit the metal sabot 'PP3' comes from was fired by the Sphinx pistol no. A038275.

... The exhibit bullet 'PB1' that was removed from the injured driver's body and the bullet 'PB3' that was found in the car have a 9 mm Parabellum (9 x 19) calibre and were fired by the same weapon of the same calibre. Despite being deformed, the two bullets exhibit sufficient and reliable traces from the inner part of the weapon barrel from which they were fired; comparison of these traces has led to the conclusion that they are identical. Comparative tests of the traces on these two bullets and those on the sample bullets fired with the examined 9 mm calibre weapons (see above) have not disclosed any similarities, which leads to the conclusion that the bullets in question were not fired by any of these weapons ..."

C. Proceedings before the Athens First-Instance Criminal Court

207. Following the administrative investigation, the public prosecutor instituted criminal proceedings against seven police officers (Mr Manoliadis, Mr Netis, Mr Markou, Mr Souliotis, Mr Mahairas, Mr Ntinas and Mr Kiriazis) for causing serious bodily harm (Articles 308 § 1 (a) and 309 of the Criminal Code) and unauthorised use of weapons (section 14 of Law no. 2168/1993). At a later stage, the applicant joined the proceedings as a civil party claiming a specific amount by way of damages.

208. The trial of the seven police officers took place on 5 December 1997 before the Athens First-Instance Criminal Court. The applicant's statement was taken down as follows:

"I was on Dinokratous Street. I turned right at the traffic lights, and saw two police officers in front of me on Vassilissis Sofias Street. I was driving at a high speed and I couldn't stop immediately. I moved a little to the left, and they immediately started firing at me. I was afraid, I thought they wanted to kill me, so I accelerated and drove off. They chased me and fired constantly. I moved into the oncoming lane and hit some cars. I was very scared. I had recently been in hospital for depression. I stopped at a petrol station and, while I was taking off my seat belt, I opened the door a little and they injured my arm and chest. They pulled me out of the car; a police officer injured me again, on the leg, and put handcuffs on me. I heard banging noises on the car, but I don't know what they were. There were gunshots coming from everywhere, also from above. I don't know exactly who injured me. I didn't have a weapon. I never

carry a weapon. They took me to the General State Hospital. A chief officer of police came and brought me a document to sign, but I didn't sign it because I didn't know what they had written in it. This happened at the same place where they took 3.5 litres of blood from me. They removed the bullet from my leg without anaesthetic. It was very painful; I don't know why they did this. I had internal bleeding and the doctors said it was from my teeth. My father obtained a paper from the public prosecutor so that he could take me from the General State Hospital to the KAT (centre for rehabilitation following injury). A bullet has remained in my lung and the other bullet has caused an internal wound below my waist. The first gunshot was on Vassilissis Sofias Street. Perhaps they were looking for something; perhaps they thought I was someone else. I drove towards Sintagma. They fired at me during the entire chase. When they pulled me out of the car, they made me lie on the ground, shot at me and then put handcuffs on me. It was then that they shot me in the foot. After the incident I suffered from psychological shock and was admitted to the State Hospital. I am still receiving medical attention from [another hospital] and I take medication. Before the incident I worked as a plasterer. Since then I haven't been able to work. I have never in my life held a gun, apart from when I was in the army, where I served normally. There was no roadblock on Vassilissis Sofias Street. I saw two police officers. One of them waved at me to stop and the other pointed his weapon at me. I was frightened because of the weapon and I didn't stop immediately. After some time they started firing at me. I don't remember whether I noticed a police car or not near the War Museum. When I reached Parliament, they had their sirens on and they were following me and firing at me. I moved into the oncoming lane. I wanted to get home quickly. In Siggrou Avenue there was a police roadblock. I didn't take any notice of it. On Flisvos Street there was another roadblock. I didn't take any notice of that one either. Further down, at some traffic lights, I wove my way through the traffic in order to get away. I remember colliding sideways with someone, not head on. I don't remember causing a car to turn over. I don't remember a seeing a roadblock on Kalamakiou Street. I don't remember if they were shooting at me there. I stopped at the petrol station because I had already been hit by a bullet and I was in pain. Besides, there were a lot people there and I wasn't so scared. I stopped and tried to unbuckle my seat belt. Right then, I felt bullets in my back. The windows were broken. A police officer came, pulled me out and, while I was lying on my side, face down, they shot me in the foot. I don't know which one of them shot me. I didn't see who shot me because I was lying face down. Before the incident I had been in hospital once only, for minor depression. After the incident I developed persecution mania. Before the incident I had only had minor depression. When I was at the petrol station I did not make any movements that could make the police officers think I was carrying a weapon."

209. The defendants' statements were taken down as follows:

1. Mr Manoliadis

"I was in police car no. A62. We were in the Paleo Faliro area. We heard about the chase on the radio. We arranged with the control centre to create traffic congestion at the beginning of the road close to Trokadero. We positioned the police car sideways across the road, facing the sea. I also stopped some civilian cars in order to block the road. Suddenly I saw flashing lights, sirens and a car at a distance of 30 metres coming towards me. The driver moved to the right of the street that leads to the marina and drove past me at a distance of 1 metre; I even jumped out of the way so that he wouldn't run me over. Motorcycles and police cars drove past, following at a distance of 30 to 40 metres. There were no gunshots fired by anyone there. We got in the car and followed the other police cars at a distance of about 300 metres. I remember seeing a red car that had skidded on to the barrier. We lost control briefly, then continued driving. I heard gunshots after seeing the car that was turned upside down on Kalamakiou Street. I used my weapon later. We followed the fugitive's course. When we reached Kalamakiou Street, we heard gunshots again. We went towards the petrol station. I got out of the car, there was chaos everywhere, and I heard gunshots. Some colleagues had ducked, others were on the ground, others were taking cover. I didn't know where the gunshots were coming from. They could also have been coming from the Skoda [the applicant's car]. I saw some of my colleagues firing in the air. Then I fired two shots in the air and threw myself to the ground. I was 50 metres away from the car. I didn't get close to fire the shots, because there was a block of flats nearby. I heard the shouts of the colleagues who were telling the driver to get out of the car. Finally, I saw the police officers who were at the front walking freely and I realised the incident was over. I believe that the weapons of the colleagues who were summoned, or who had notified the control centre, were checked. From where I was standing, I couldn't see the victim in the car."

2. Mr Netis

"Since 9 p.m., we had been on duty at the B department of the Flying Squad. We heard on the radio that a chase was in progress, starting from the American embassy, of a car which had almost run over two pedestrians and a traffic warden. We followed the car. Near Trokadero we saw that the police had formed a roadblock. Manoliadis was using his whistle to stop the cars. The Skoda drove over to the right, to the side street, and then suddenly turned left. Manoliadis jumped out of the way instinctively, and the Skoda passed very near him. At Rodeo there was a roadblock similar to the one where Mr Manoliadis was. The victim hit a red car and caused it to turn upside down. The radio of the first police car informed us of the course the Skoda was taking. As we approached the junction of Posidonos and Kalamakiou Streets and we were 50 to 60 metres behind, I heard the first gunshots. We continued driving and entered Kalamakiou Street. There were some police cars ahead of us. Among them, there may have been some that had not been called but had come on their own initiative. When we arrived, I got out of the police car and went towards the vehicle that was being chased. Other colleagues kept calling to the driver to get out of the car. He didn't get out. I heard someone say, 'Let's fire some shots to intimidate him', and I took my weapon out and shot twice in the air. One of my colleagues took advantage of a break in the shooting to pull the driver out of the car. I was 10 to 15 metres away from the Skoda, or 8; I don't remember exactly. The control centre issued a warning that the man was carrying a weapon. I have been in many chases, and this particular individual gave me the impression that he was familiar with this kind of thing."

3. Mr Markou

"I ride a motorcycle. On Posidonos Street we heard on the radio that a chase was in progress from the American embassy. Very soon afterwards we heard that the driver had reached Onassio Hospital. I tried to get on to the central reservation to take up my position and wait for him. I saw the car coming. Risking my life, I got down from the high pavement and followed it. A police car and two motorcycles were in pursuit. I heard on the radio that the individual was dangerous and possibly carrying a weapon; he was driving very dangerously. At the traffic lights on Posidonos Street, close to Edem, as we reached the marina of Amfithea and Posidonos, I was struck by his ability to weave in and out of the other cars. I had never seen a chase like this one, although I had spent fifteen years in the service. At the junction of Amfitheas and Posidonos Streets, he collided with a taxi. At the traffic lights at that junction there was a police roadblock. Makaratzis turned right and entered the side street. He was driving into the oncoming traffic and, having gone past the traffic lights, he turned left and created confusion, because the lights changed and the cars were moving off. I didn't know whether anyone had been killed, or what was happening. I was still in the right side street. The Skoda had been blocked by the other cars, and I shot three times in the air to intimidate him. It was impossible to aim at the Skoda because it was between other cars. Makaratzis drove off, continued down Kalamakiou Street, drove uphill and, as I was approaching at a distance of 30 metres, I saw the car at the petrol station. I got off my motorcycle and entered the petrol station from the right. I went into the workshop and shouted 'Everyone move out of the way!'. I climbed up a staircase and on to the veranda. While I was climbing up the stairs, I heard gunshots. I didn't know where they were coming from. When I got up there I heard the others calling to the driver to get out of the car. I saw him leaning over to the side and opening the glove compartment, and I assumed that he was going to take out a weapon and shoot. I shouted at the others to be careful because he might have a weapon. I picked up a big pot and threw it at the car. I was watching the driver's hands, so as to be able to shout and warn my colleagues if I saw him taking something out to throw."

4. Mr Souliotis

"Mahairas and I set off together. At 9.15 p.m. I was standing in front of the police car. I saw the Skoda coming from the Naval Hospital, going through a red light and almost hitting a couple. I waved to the driver to stop. He drove straight towards me and almost hit me. I jumped aside. No one took out their weapons. I got in the car and we chased him, not only for contravening traffic regulations, but also because he had almost hit me. At Vassilissis Sofias Street we crossed into the oncoming lane and turned right at a red light. We had the flashing lights on and we were driving very fast, but we couldn't locate him. Suddenly, we saw the Skoda in front of the War Museum. We turned on the flashing lights and the siren, and we flashed our lights at him. He saw us from his car, braked and turned on his hazard lights, and suddenly he drove off again at high speed, sounding his horn. He reached Sintagma, crossed into the oncoming lane near the flower shops and drove into Amalias Street against the traffic. We turned the flashing lights on again and followed him. We continued driving and notified the control centre. On Kallirois Street he almost collided with another police car. At the traffic lights at Diogenis Palace he went through a red light, crossed into the oncoming lane, hit a car and continued driving. Two motorcycles came close to him. At Trokadero, a police car, two motorcycles and fifteen civilian cars had formed a roadblock. He drove towards the right, mounted the pavement and went past them. At Flisvos he caused a Daihatsu to turn upside down. We thought that whoever was in it must be dead. The control centre told the officers on motorcycles to follow him from

a distance because of the danger. At Amfithea he collided with a taxi driver, causing him a neck injury; he later had to wear a collar. He continued down Posidonos Street and Kalamakiou Street. He entered the side street and drove against the traffic. He drove past the other cars and crossed over to Kalamakiou. That was where the first gunshots were fired. I leaned out of the left window at the back and shot at the back left tyre of the Skoda. The tyre burst. I was certain about the direction of the bullet. I knew that no one was in danger. When a bullet hits a tyre, it does not ricochet. I fired from a distance of 5 metres. After firing, I saw that the tyre had been punctured. Mahairas fired at the right tyre at the back. With his tyres burst, Makaratzis stopped at the petrol station. We were almost level with him. I acted as a traffic controller. I stopped the oncoming cars, and once the arrest had been made I saw how many police cars there were. There were more than nine. When all the police cars were at the petrol station, shots were fired in the air, not at the car. The car had been hit at the junction. There were a lot of policemen. They occupied both lanes of the street. The Skoda had to slow down, and they fired at him. I was stopping the cars. If they had aimed at the car when we were at the petrol station, they would have shot me too. I believe all the gunshots, even the ones that hit the windows, were aimed at the tyres."

5. Mr Mahairas

"I was at the American embassy with Markou. We saw a Skoda going through a red light. The traffic warden waved to him to stop. The Skoda continued driving towards our colleague, at the risk of hitting him. We got in our car and followed him. He crossed into the oncoming lane and went through a red light at Vassilissis Sofias Street. We lost him and then we suddenly saw him at the War Museum. We followed him, turned on the flashing lights and waved to him to stop. At the flower shops he turned on his hazard lights as if he were going to stop. Suddenly, he increased his speed and crossed into the oncoming lane on Amalias Street and continued towards Sintagma and Siggrou. We followed him. Other police cars arrived. At Trokadero he bypassed a roadblock by driving around the side. At Flisvos he caused a Daihatsu to turn upside down and continued on his way. Further down the road there was a roadblock. He collided with a taxi driver and continued on. At the junction of Kalamakiou and Posidonos Streets there was another roadblock. He turned right into a side street and then turned left, crossing Posidonos Street. I heard some gunshots there. We drove to the top of the side street, followed him and, when we reached Posidonos Street, we were 5 metres away from him. I took my weapon out and aimed at his right rear tyre. When you fire shot after shot it is difficult to aim. I put my weapon on to automatic, which makes it fire three or four times. The Skoda stopped 70 metres away, at the petrol station, and we followed. The entire course and his behaviour had seemed extremely dangerous to us, like that of a terrorist. Other police cars and motorcycles arrived. They called to him to get out of the car. He didn't, and some gunshots were fired. We were 10 metres behind him. If they did fire from the other police cars directly at him, we weren't in their line of fire. I heard some colleagues say, 'Let's fire some gunshots to intimidate him'. Someone got up on the veranda and threw a pot down. One of my colleagues, who was wearing a bullet-proof vest, and whom I did not know, along with someone else, got close, broke the window and called to him to get out. He didn't, so they pulled him out. One of them attempted to put handcuffs on him. Someone shouted 'Careful, he is injured' and they didn't put them on. The ambulance came. I didn't know whether he had been injured by a bullet or in a car accident. Neither my weapon nor Souliotis's fires Magnum bullets. The A-45 is very powerful and has a great force of penetration. I don't know who said that he was armed and that we should fire in the air."

6. Mr Ntinas

"Kiriazis and I were on duty as instructed at Neos Kosmos. We received a message to go to Siggrou, where a car which had hit other cars and hadn't stopped when signalled to by a traffic warden, etc., was being chased. We went to Siggrou and followed the driver. At Interamerican he drove through a red light and continued towards the coastal avenue. At Trokadero we saw a lot of police cars and flashing lights. We remained behind him and, at Flisvos, we saw the car that had been turned upside down. We were left a bit behind. At the junction of Posidonos and Kalamakiou Streets we lost him completely. We asked a civilian, who told us that he had turned right and was heading towards Kalamakiou Street, and we headed that way. I heard some gunshots that I thought were coming from the junction of Kalamakiou and Posidonos Streets. Artificial traffic congestion had been created. The control centre issued a warning that the man was armed and dangerous. We stopped 100 metres to the right of the petrol station and heard gunshots. We didn't know whether they were coming from the victim or the police officers because we couldn't see the car. We took cover and heard him being called out of the car. We fired some intimidation shots in order to confuse him, because we knew that a police officer would try to arrest him."

7. Mr Kiriazis

"Ntinas was my chief of crew. We received a message and chased the car, getting close to it at the traffic lights at Amfitheas Street. At Trokadero we were falling behind. The driver went through the roadblock that had been set up. At Flisvos we saw the car that had been turned upside down. There was a problem with the traffic and we were left behind. At the junction of Amfitheas and Posidonos Streets a taxi had been damaged. Further down we heard gunshots. Some civilians told us that the driver had turned left. We followed him. When we got to the petrol station we heard gunshots. Some colleagues were heard shouting, 'Get out', 'Be careful', and someone else said, 'Shoot to intimidate him'. So I fired two shots to intimidate him. I have served for fifteen years. I have never seen anything like this. During the chase we heard from the control centre that the individual was extremely dangerous and possibly armed."

210. The witnesses' statements were taken down as follows:

1. Mr Ventouris

"I am the driver who chased the victim. Mahairas, Souliotis and I serve in the Flying Squad. The victim's car was considered suspicious. We consider suspicious anything that moves around the American embassy. One of my colleagues, who was not carrying a gun, signalled the driver to stop. My other colleague and I waited at a distance, outside the car. Instead of stopping, the driver continued towards my colleague and almost hit him. Then he drove off. We considered him dangerous, and had to chase after him. At first we lost him for a while, but then we spotted him again near the War Museum. We waved to him to stop. He hesitated for a while, looked as if he was about to stop, but then drove on. At this point we started chasing him with the sirens on. He reached Parliament, crossed into the oncoming lane and continued towards Siggrou at full speed. We had notified other police cars that were going to Siggrou. At some stage he almost collided with a police car. When he reached the coastal avenue, we had already formed a roadblock. He collided with some civilian cars, got away, and drove on. Further down, at Flisvos, he collided with a red car and caused it to turn over, and then drove off at full speed. There was traffic in the area. There was a lot of traffic in Kalamakiou and he moved on to the hard shoulder. It was

in that area, in Kalamakiou, that we heard gunshots for the first time. Until then we hadn't fired because there was a lot of traffic and we could have injured civilians. We didn't lose him at any point; we only almost lost him at the beginning of Kalamakiou, where there was an obstacle on the pavement. Mr Mahairas and Mr Souliotis were in the car with me and it was around that area that our colleagues fired at the tyres of the car. I maintain that, with our training, we can hit the target in 99% of cases, if not 100%. The driver stopped at the petrol station. We moved the civilians out of the way and some other colleagues who were wearing bullet-proof vests approached his car, broke the windows and pulled him out of the car, because they had called to him to get out several times but he hadn't. Gunshots were heard from a distance. I don't know where they were coming from. A colleague had gone up on to the veranda, but I don't think he fired. He threw a pot at the driver. When the gunshots were fired, the victim's car was parked sideways on the right of the petrol station. We were at the left of the petrol station and the others were behind me. I don't know if others fired at the car. We heard gunshots at the beginning of Kalamakiou, and at the end, when everything was over. The final shots were probably fired to intimidate the victim. [Officer] Boulketis was the one that pulled him out. I don't think he fired at him. There was no reason to do so. The victim made some movements in the car: he moved right and then left, as if looking for something, and it was conceivable that he had a weapon. That is why colleagues wearing bullet-proof vests went to pull him out of the car. I don't know about the ballistic investigation. The bullets found inside the car were from the weapons of Souliotis and Mahairas. However, my colleagues were aiming at the tyres. The speed of the chase was approximately 60 km/h in Vassilissis Sofias and Amalias Streets, because there was traffic. We were about 10 metres behind him. Near the columns [of the Temple of Olympian Zeus] motorcycles appeared both ahead of us and behind. At the beginning of Siggrou another police car came up in front of the victim and he almost collided with it. He was moving from left to right in Siggrou, racing at 160 km/h and changing lanes constantly. I can't say which police cars were behind us at the corner of Kalamakiou, because when we chase someone we don't see what is going on behind. We stopped at the petrol station; two motorcycles stopped behind us, and another car stopped behind them. The first gunshots were fired at the junction of Posidonos and Kalamakiou Streets. In Kalamakiou Street, before Posidonos Street, when we were 5 metres behind him, Mr Mahairas used his firearm and shot at the tyres of the car. Mr Souliotis must have used his weapon too at the same spot. When the driver reached the petrol station and stopped, I called from the car to the civilians to move out of the way and to the driver to get out, and a colleague who was wearing a bullet-proof vest went to pull him out. I don't know how many bullets were fired; the front windscreen broke because a pot was thrown at it. I do not know how the front passenger's window broke, or how the back window broke. I don't know how the victim's foot was injured. It couldn't have been when shots were fired around the car. Finally, we went to the police station to make a statement. Our lives weren't directly at risk during the incident. The driver had caused accidents, driven into the oncoming traffic and endangered many people. In total, he had been chased by thirty-three policemen, whose weapons were confiscated, but others had also got involved. We had never seen anything like it. They told us on the radio to be careful, that the individual was carrying a weapon and might be extremely dangerous. Souliotis is a traffic warden. Of course he was not carrying a weapon when he waved to him to stop. The police roadblocks were set up because they had been ordered by the control centre. We also created artificial traffic congestion with civilian cars at the traffic lights. During the incident we noticed that civilians were injured, that cars were turned upside down; we didn't have any other way of stopping him, after the roadblocks and the artificial traffic congestion. The last roadblock was on Kalamakiou Street. There were police officers on foot in the side

street. He drove straight at them. That was the moment when the first gunshots were fired. That was also the moment when my colleagues first fired from the car at his tyres. It is possible that other weapons were used besides the thirty-three that were confiscated. For that matter, the bullet that was taken from his leg did not belong to any of the thirty-three weapons that were confiscated. If someone had fired in the victim's direction at the petrol station, the petrol would have caught fire. At the petrol station they fired shots in the air. Probably in order to cover the colleague that went to pull him out. One of my colleagues climbed up on to the veranda and threw a pot at him to create confusion. Boulketis pulled him out and handcuffed him. We saw that he was bleeding and they took him to hospital. The investigation was carried out by our officers and some other department, not by those of us who had gone to the police station."

2. Mr Nomikos

"I was on the old coastal avenue in Agia Skepi. I saw a vehicle driving erratically. We got an order from the control centre and went after it. On the way we saw all the accidents, the cars that had been hit and someone who was injured. We reached Kalamakiou from Amfitheas. We were far behind. We didn't hear any gunshots. Even if there had been gunshots, we would not have heard them. Mr Boulketis, who was with me, had a bullet-proof vest. He put it on, while another colleague broke the window. Mr Boulketis pulled the driver out and put handcuffs on him, but when he saw that he had been injured he removed them. The victim was looking right and left; his hands were on the floor, we could not see them, and we assumed he had a gun. When we reached the petrol station, I heard one or two gunshots; I don't know where they came from. Boulketis and Xilogiannis were with me in the police car. Xilogiannis and I didn't have bullet-proof vests and we didn't move closer, as Boulketis did. There were a lot of police cars and motorcycles. There is no way any weapons could have been concealed or changed hands. Our weapons are given to each of us personally. We do not give them to other colleagues. At the petrol station, when we moved closer so that Boulketis could pull the driver out of the car, nobody fired. No colleague could have become involved in the incident without receiving an order, unless someone heard about it and came on his own initiative. If such a person had used his weapon, there is no way he would have left without handing it over."

3. Mr Xilogiannis

"I was the driver of the last police car, where Mr Boulketis was. We received an order from the centre and we followed the chase. We were the last to get to the petrol station where the Skoda was parked. There were a lot of police cars and motorcycles. Everybody was out of their cars; the Skoda was right next to the pump that is on the right-hand side when facing the petrol station. Everyone was out of their cars ... Mr Boulketis put on his bullet-proof vest and I covered him from the back, while behind me there were more officers covering him. When we got there, we heard some gunshots. When we got out of the car and were standing very close to the Skoda two or three gunshots were fired; they were not fired in my direction, because we were very close to the Skoda ... Perhaps the car was hit in the process, I don't know. I am not in a position to know at which stage the victim was hit; probably during the chase ..."

4. Mr Davarias

"... The shots fired at the petrol station were for intimidation. I didn't see any shots fired at the car, the shots were fired towards the car but in the air, that is, the bullets

went up in the air. I don't know the [police officers] who fired. I had never seen them before. I know Markou and Kasoris. The police officer who climbed up on to the veranda didn't shoot; he threw a pot. We are bound by our duty and have to follow orders when it comes to the areas we are patrolling, but we don't always follow them and often go on our own initiative to the scene of incidents like this one where colleagues are in danger and all manner of things have happened in the past. The entire operation at the petrol station lasted ten to fifteen minutes; the Skoda had stopped along the kerb at the petrol station. I parked on the right, I arrived almost at the same time as the men in the first police car, and the rest got there immediately afterwards, one after the other. All the men were holding weapons in their hands. Usually all police cars have a light machine gun. After I got there I took cover behind a column. We called to the driver to get out of the car, and then the shooting began. I don't remember even approximately how long afterwards the shooting began. The victim made some movements in the car. The movements he made while he was unlocking the car and all his other movements could have been seen by us as movements to get his weapon out from a holster under his arm, or to take out a hand grenade. At the junction of Kalamakiou and Posidonos Streets I didn't notice any shots being fired at the right-hand side of the Skoda, only the ones fired at the tyres on the left-hand side. The first photograph shows that the tyres on the left-hand side are burst, the second one shows that the ones on the right are burst. As to the injury to [the applicant's] right foot, it is possible that a bullet that was fired at the tyres ricocheted and penetrated through the metal plate of the car, which is only a few millimetres thick. There are bullets that can pierce metal plates of double thickness. In those cars there is no chassis. There are only plain metal plates, which can be pierced by a ricocheting bullet: the victim may have been hit in the buttock in this way. He may have been hit in the armpit area in the same way. At some point I saw him leaning towards the seat; I thought he might have been hit and I shouted."

5. Mr Mastrokostas

"I am the petrol station attendant. I was in front of the pump, filling up. Suddenly, I saw the Skoda slowly coming up and stopping next to me, with the front facing the street as you can see in the photograph. The driver was not moving. Then the police cars arrived; the policemen were shouting, 'Move out of the way, move out of the way!'. I left the pump and went inside, 4 to 5 metres away, and the owner and I moved to an area further at the back. There is a second door, and we went through to the workshop. When I went inside the store I heard gunshots. There was chaos. More gunshots were fired. They were firing, but I don't know in which direction. I couldn't see anything. The pumps were next to the store; if they had fired towards the car the bullets would also have hit the pumps. I think someone went up on to the veranda and threw a pot down. I saw it because I had gone out the back but I didn't go close. I couldn't see anything and I didn't witness the arrest or see whether they shot him. When the car arrived I saw the tyres were burst, but I do not remember whether the windows were also broken. In the first photograph, I think the tyres are burst. It was the first statement I had ever made, I was still in a state of panic and I don't know whether I reported everything accurately. It's the same today, two years having passed since the incident. When I went to the back, I saw the police officer. He didn't shoot, he threw a pot, but I couldn't see the victim's car. Neither the Vespa, which was half a metre away, next to the car, nor the pumps, of course, had any bullet holes. The end of the veranda where the police officer went overlooked the car. The front of the car must have been protruding a bit under the veranda."

6. Mr Georgopoulos

"I am the owner of the petrol station. I was standing a bit further inside than Mastrokostas. I saw the Skoda coming up slowly. It stopped, and seconds later I heard gunshots. The boy heard the shouting, I didn't. When I heard the gunshots I left, I went up to the house, and then a police officer came and threw a large pot at the roof of the car. He didn't shoot. I came down when the shooting had stopped and I saw the victim as they were pulling him out of the car. I think the man who pulled him out was wearing civilian clothes. I am not sure. I saw him holding a big machine gun. I don't know if he fired. I don't remember. If he had fired, I would remember it. He may have fired; but I didn't see him do it. I don't remember whether the windows of the car were broken. I remember that he had crashed ... I didn't find any cartridge cases anywhere. I didn't find any bullet holes anywhere. When I saw the police officer who came from the back on to the veranda, I left and didn't see if he fired. I went downstairs and saw them pulling the driver out of the car. The police officer didn't shoot him. It may also have been the person that got off the motorcycle. The veranda is wide and it covered more than half of the car."

7. Mr Kiriazidis

"I was at the junction of Posidonos and Kalamakiou Streets ... Suddenly, I saw in my rear-view mirror a car coming from the side street at great speed; it drove over the curb, came from the right and crashed into me. It threw me a distance of 10 to 15 metres. There was a police car next to me. The police officers must have been out of the car, and were holding weapons. I heard gunshots and I was frightened. More police cars came and followed the Skoda to the left, towards Kalamakiou Street. He caused great damage to me. If someone had been sitting in the back seat, they would not have survived."

211. Having deliberated, the court acquitted the seven police officers on both the criminal charges brought against them (see paragraph 15 above). On the first count (causing serious bodily harm), the court found that it had not been established that the accused were the ones who had injured the applicant. A number of police officers who had taken part in the incident had left the scene after the applicant's arrest without revealing their identity or giving the necessary information concerning their weapons. The bullet that was removed from the body of the victim and a bullet that was found inside the car were fired from the same weapon but were unrelated to the traces from the thirty-three weapons that were examined. The other bullet and some of the metal fragments found in the applicant's car had been fired from the weapons of two of the accused. However, it had not been shown beyond a reasonable doubt that these officers had injured the applicant, given that many other shots had been fired from unidentified weapons.

As regards the second charge (unauthorised use of weapons), the court held that the police officers had used their weapons for no other purpose than trying to stop a car whose driver they reasonably considered to be a dangerous criminal.

The relevant passages of the court's judgment read as follows:

"On 13 September 1995 the victim, Christos Makaratzis, was driving a private vehicle with the number plate YIM 8837 in Athens in the area around the American embassy. At the junction of Telonos and Kokkali Streets, a unit of the special police

control division of the Flying Squad of Attica was carrying out checks on passing cars. The accused Mahairas, Souliotis and Ventouris were part of this unit. The victim's vehicle was coming from the direction of the hospital; he drove through a red light and the accused Souliotis signalled to him to stop. Instead of stopping at the signal made by the traffic warden, however, he continued driving towards him and almost hit him. The police crew got into their car immediately and began chasing him. At Vassilissis Sofias Street he entered the oncoming lane and drove through a red light. Because of the traffic, the police officers lost the car, which they were chasing with their flashing lights on, and met with it again near the War Museum. They flashed their lights at the driver in order for him to stop; the siren and the flashing lights of the police car were on. Initially the victim turned his hazard lights on, as if he were going to stop the car. However, he suddenly accelerated and drove off. He reached Sintagma near the flower shops; he entered the oncoming lane at Amalias Street and continued towards Siggrou Avenue. The police car informed the Flying Squad control centre, and the control centre notified other units that were on duty in the area in which the victim was moving, in order for them to come and assist. At Siggrou Avenue the car was moving at a very high speed from one lane to the other. Near Kallirois Street the driver almost collided with a police car; at the traffic lights at Diogenis Palace he drove through a red light, entered the oncoming lane and collided with a car. At Trokadero there was a roadblock formed by a police car, two motorcycles and fifteen civilian cars, which he got past by driving on the pavement, and the crew of the police car were almost run over. At Flisvos he collided with a Daihatsu that was stationary, caused it to turn upside down, injuring the driver, and on Amfitheas Street he collided with a car and a taxi, whose driver was injured. At the junction of Posidonos and Kalamakiou Streets there was a police car in the side street, and the cars moving towards Glifada had been blocked. The victim drove over the central reservation towards the right, in order to head towards the side street, but then he noticed the police car and drove over the central reservation towards the left and collided with two cars that were crossing Posidonos Street and almost ran over Police Constable Stroumpoulis. The first gunshots directed at the pursued car, which were fired in order to stop the victim, were heard at the junction of Posidonos and Kalamakiou Streets. It was in that area that the accused Mahairas, who was riding in the police car and had been chasing the vehicle from the beginning, fired a burst of shots when the car was at a distance of approximately 5 metres, with his firearm no. MP 5 C273917, because the car was moving. He aimed at the rear right tyre. The accused Souliotis, who was riding in the same police car, fired from the left window, with his pistol no. AO 38275, aiming at the rear left tyre, which he punctured. Near that junction the victim had to slow down. Many police officers had reached that spot and occupied both lanes; other police officers, besides those already mentioned, also fired at the car, as many gunshots were fired at that spot. It is also to be noted that, during the entire course, policemen, police cars and motorcycles joined the chase, without being able to stop the vehicle. It continued its course along Kalamakiou Avenue, despite the gunshots, and stopped at the junction of Kalamakiou and Artemidos Streets, at the entrance of a petrol station and near the petrol pumps, with the front facing the street. There, he was surrounded by the police units that were chasing him, and which the control centre knew had taken part in the operation, and also by other units that had come on their own initiative to help their colleagues when they heard about the incident from the control centre. In other words, there were units in the area that had gone to the scene of the incident, without being called. The police officers got out of their cars and off their motorcycles, holding their weapons. The victim made some movements in his car, which gave the police officers the impression that he had a weapon. The police officers asked him to get out of the car, but he did not, and the police officer who was wearing a bullet-proof vest, Nikolaos Boulketis, approached the car. Then, a lot of the

police officers who were present began firing in order to intimidate the victim and cover their colleague; Nikolaos Boulketis took the opportunity to break the car window and arrest the victim. Earlier, the accused police officer Christos Markou had climbed on to the veranda which was above the petrol station and had thrown a pot down, which broke the windscreen without making it fall in. When the victim got out of the car, he was immobilised by the police officer who had arrested him, and by his colleagues, and then it became clear that he was injured. He had an exit wound on his right arm, another exit wound on the right of the thorax, with the entry from the back of the armpit. He had an exit wound at the end of his left foot, a wound high up on his left buttock and wounds on the outer surface of the kidney area. The windscreen of the car driven by the victim was broken, but had not fallen in; it had three bullet holes and a mark made by another. There were three bullet holes in the metal part of the left door at the back, and a bullet mark on the metal surface of the chassis. The back window was smashed and on its metal part there were two bullet holes and another one at the left rear lights. There was a bullet mark on the right rear wing above the wheel. The front passenger window was broken and there was a bullet mark on the outside of the roof. There were bullet holes inside the car under the glove compartment on the dashboard, on the radio, the top part of the dashboard, in the driver's seat, in the front passenger seat and in the back seat. Two bullets and four fragments were found inside the car. Of the police officers who took part in the operation, thirty-three handed over their weapons, that is, all those who had been ordered to take part in the chase or who had notified the control centre and whose departments knew that they had taken part in the operation. However, others had taken part of their own accord in order to help their colleagues, and it is not known who they are or why they left after the arrest of the victim without informing the control centre of their presence at the scene of the incident. Among the thirty-three weapons, there were twenty-three revolvers of .357 Magnum calibre; six pistols, five of which were of 9 mm Parabellum and one of .45 ACP calibre; and four HK MP 5 submachine guns of 9 mm Parabellum calibre. Of the thirty-three weapons, only the weapons of the accused had been fired. The three bullets that were found in the car and the one that was removed from the first metatarsal of the right foot of the driver came from cartridges of 9 mm Parabellum (9 x 19) calibre. Such cartridges are fired mainly from pistols and submachine guns with the same calibre. The four fragments found inside the car are sabot fragments of coated bullets of different calibre and it was not possible to identify the calibre of the bullets, although one of the fragments was assessed as a fragment of 9 mm Parabellum (9 x 19) calibre. The report by the laboratory expert confirmed that the three bullets, two of which were found in the car and one of which was found in the foot of the victim, came from cartridges of 9 mm Parabellum (9 x 19) calibre. The bullet [PB2] and the two metal sabots [PP1 and PP2] found inside the car were fired by the HK MP 5 submachine gun number no. C273917 that belonged to the accused Mahairas. The bullet from which the other metal sabot [PP3] came, which was found inside the car, was fired by the Sphinx pistol no. A038275 that belonged to the accused Souliotis. The bullet that was removed from the body of the victim and a bullet that was found inside the car were fired by the same weapon, of Parabellum (9 x 19) calibre, but bear no relation to the traces left by the thirty-three weapons that were examined. The victim, Christos Makaratzis, was indeed injured by the submachine guns used by the police officers who took part in the chase and which were fired during the pursuit at the junction of Posidonos and Kalamakiou Streets where, apart from Souliotis, Mahairas and Markou [illegible] (third accused) other police officers fired who have not been identified, since there were many police officers who fired at that spot. This emerges indirectly from the fact that the bullet that was removed from the body of the victim and another one were fired by a weapon the owner of which was not identified and were not fired by the weapons of the accused.

The fact that bullets and sabots that were found inside the car were fired by the weapons of the accused Souliotis and Mahairas leads to the conclusion that the physical injuries of the victim were caused by the weapons that belonged to the accused, apart from the one to his foot. In addition, since there were many bullet holes in his car that were caused by other, unidentified, weapons, the victim might have been injured by those bullets. As already stated, submachine guns and pistols are also of the same calibre. The first, second, third, sixth and seventh defendants fired shots for the purpose of intimidation in the area of the final operation (the petrol station). It is also to be noted that many others also fired shots there for intimidation purposes in order to assist their colleagues who were closer to the car to arrest the victim. They cannot have fired towards the car, because there was a danger of hitting the pumps of the petrol station, and there were no traces of gunshots in that area. The victim's foot injury was caused from above, since only the top of the shoe was hit and not the sole, but it cannot be said that the shot was fired by the accused Markou, who had climbed on to the veranda of the petrol station, because the car was parked in such a way that almost half of it was under the veranda and thus the direction of the shot would have to have been almost vertical in order to hit the top part of the foot. If that had been the case, the bullet would also have had to go through a part of the dashboard. There is no trace of this, the closest mark being on the radio. Besides, if this injury had been caused by the weapon of the accused, it would have been confirmed by the expert investigation ... The injury was indeed on the top part of the foot; but it could have been caused by a shot that was fired from behind the car while the victim was driving and his foot was almost vertical to the accelerator, by one of the weapons fired at him at the junction of Kalamakiou and Posidonos Streets. The victim's allegation that he was shot immediately after he was pulled out of the car must be considered groundless, since, as he stated, he was shot when he was 'lying on his side, face down'. If that had been the case, the injury would have been different. Having regard to the above, and taking into account the fact that other police officers who have not been identified took part in the operation, some of whom possibly used their weapons, the Court has doubts as to whether the accused caused the victim's injury. As a result, they should be declared innocent of the first act attributed to them. They should also be declared innocent of the second act because, although they used their weapons, they had attempted to stop the car by creating artificial traffic congestion and roadblocks and had failed, as the victim had continued driving while he was being chased by a large number of police officers, in a manner that was dangerous to the civilians that were in his way. Furthermore, the police officers did not know whether the civilians in the cars that had collided with the victim were killed, and they understandably considered him to be a dangerous criminal because of his behaviour and because they had received that information from the control centre. The Court also doubts whether the accused could have avoided using their weapons, which they did in order to stop him and intimidate him, so that he would stop driving in a manner that was dangerous to other civilians, and to protect the latter, as was their duty. Therefore, the accused must be declared innocent of the acts attributed to them in the indictment."

212. The applicant, who was present when the judgment was pronounced, did not have the right to appeal under domestic law. The text of the judgment was finalised on 20 May 1999.

D. Criminal proceedings against the applicant

213. On 20 April 1997 the public prosecutor instituted criminal proceedings against the applicant. The indictment read as follows:

"[The applicant] is accused ... of committing a number of offences and more specifically:

A. While driving [his] car in Athens on 13 September 1995, he caused with his vehicle bodily injury and harm to others by his negligence, that is, by failing to take the care he should and could have taken in the circumstances and to anticipate the culpable consequences of his acts. More specifically: (a) while he was driving the vehicle referred to above in Posidonos Avenue, near Paleo Faliro, towards the airport, he did not keep enough distance between himself and the vehicles in front to be able to avoid a crash in case they reduced their speed or stopped, so that he crashed the front of his car into the back of the car with the private registration number IR-8628 that Iliostalakti Soumpasi was driving in the same direction, resulting in injuries to her neck; (b) after the above crash, the accused continued driving the vehicle referred to above and, while he was going along Posidonos Avenue near Kalamaki, he again failed to keep enough distance from the vehicles in front, thus crashing the front of his car into the back of the car with the taxi registration number E-3507 that Ioannis Goumas was driving and that had stopped at a red light in the left lane of Posidonos Avenue, the consequence of which was to cause injury to the aforementioned driver who suffered a cervical hernia and an injury to the head.

B. While he was driving [his] car at the time and place referred to above, he did not keep enough distance from the vehicles in front to avoid a crash in case they reduced their speed or stopped.

C. While he was driving [his] car at the time and place referred to above, he did not abide by the police officers' signal to stop and, specifically, while he was driving the vehicle referred to above in Athens, crossing Vassilissis Sofias Street, Amalias Avenue, Siggrou Avenue and Posidonos Avenue, he did not comply with a signal to stop made by police officer Sotirios Souliotis, who was using a car of the Hellenic Police, registration number EA-11000, in Vassilissis Sofias Street, but continued driving, crossing all the streets mentioned above, while the above-mentioned police car and other police cars of the Hellenic Police were chasing him ..."

214. By judgment no. 16111/2000, the Athens First-Instance Criminal Court sentenced the applicant to forty days' imprisonment.

II. RELEVANT DOMESTIC LAW AND PRACTICE

215. The relevant provisions of the Criminal Code read as follows:

Article 308 § 1 (a)

"Intentional infliction of bodily harm on another person ... shall be punishable by up to three years' imprisonment ..."

Article 309

"Where the act punishable under Article 308 has been committed in a way which could have endangered the victim's life or caused him grievous bodily harm, imprisonment of at least three months shall be imposed."

216. Section 14 of Law no. 2168/1993 provides:

"Anyone who uses a gun ... while committing a serious crime or lesser offence of which he is subsequently convicted shall be punished by a term of imprisonment of at least three months to be added to the sentence imposed for that offence."

217. At the material time, the use of firearms by law-enforcement officials was regulated by Law no. 29/1943, which was enacted on 30 April 1943 when Greece was under German occupation. Section 1 of that statute listed a wide range of situations in which a police officer could use firearms (for example in order "to enforce the laws, decrees and decisions of the relevant authorities or to disperse public gatherings or suppress mutinies"), without being liable for the consequences. These provisions were modified by Article 133 of Presidential Decree no. 141/1991, which authorises the use of firearms in the situations set forth in Law no. 29/1943 "only when absolutely necessary and when all less extreme methods have been exhausted". Law no. 29/1943 was criticised as "defective" and "vague" by the Public Prosecutor of the Supreme Court (see Opinion no. 12/1992). Senior Greek police officers and trade unions have called for this legislation to be updated. In a letter to the Minister of Public Order dated April 2001, the National Commission for Human Rights (NCHR), an advisory body to the government, expressed the view that new legislation which would incorporate relevant international human rights law and guidelines was imperative (NCHR, 2001 Report, pp. 107-15). In February 2002 the Minister of Public Order announced that a new law would shortly be enacted, which would "safeguard citizens against the reckless use of police weapons, but also safeguard police officers who will be better informed as to when they can use them".

218. In the summer of 2002, a group called the "Revolutionary Organisation 17 November" was dismantled. That group, established in 1975, had committed numerous terrorist acts, including the assassination of United States officials in 1975, 1983, 1988 and 1991.

219. On 24 July 2003 Law no. 3169/2003, which is entitled "Carrying and use of firearms by police officers, training of police officers in the use of firearms and other provisions", came into force. Law no. 29/1943 was repealed (section 8). Further, in April 2004, the "Pocket Book on Human Rights for the Police", which was prepared by the United Nations Centre for Human Rights, was translated into Greek with a view to being distributed to Greek policemen.

III. RELEVANT INTERNATIONAL LAW AND PRACTICE

220. Article 6 § 1 of the International Covenant on Civil and Political Rights provides:

> "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

221. In this connection, the Human Rights Committee of the United Nations noted the following (see General Comment no. 6, Article 6, 16th Session (1982), § 3):

> "The protection against arbitrary deprivation of life which is explicitly required by the third sentence of Article 6 § 1 is of paramount importance. The Committee considers that States Parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities."

222. The United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials ("United Nations Force and Firearms Principles") were adopted on 7 September 1990 by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. Paragraph 9 of the Principles provides:

> "Law-enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life."

223. Paragraph 5 of the Principles provides, *inter alia*, that law-enforcement officials shall "act in proportion to the seriousness of the offence and the legitimate objective to be achieved". Under the terms of paragraph 7, "governments shall ensure that arbitrary or abusive use of force and firearms by law-enforcement officials is punished as a criminal offence under their law". Paragraph 11 (b) states that national rules and regulations on the use of firearms should "ensure that firearms are used only in

appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm".

224. Other relevant provisions read as follows:

Paragraph 10

"... law-enforcement officials shall identify themselves as such and shall give a clear warning of their intent to use firearms, with sufficient time for the warnings to be observed, unless to do so would unduly place the law-enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident."

Paragraph 22

"... Governments and law-enforcement agencies shall ensure that an effective review process is available and that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances. In cases of death and serious injury or other grave consequences, a detailed report shall be sent promptly to the competent authorities responsible for administrative review and judicial control."

Paragraph 23

"Persons affected by the use of force and firearms or their legal representatives shall have access to an independent process, including a judicial process. In the event of the death of such persons, this provision shall apply to their dependants accordingly."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

225. The applicant complained that the police officers who chased him had used excessive firepower against him, putting his life at risk, and that the authorities had failed to carry out an adequate and effective investigation into the incident. He argued that there had been a breach of Article 2 of the Convention, which provides:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

A. Arguments of those appearing before the Court

1. The applicant

226. The applicant submitted that Article 2 § 1 of the Convention imposed a positive duty on States to protect human life. In particular, national law must strictly control and limit the circumstances in which a person may be deprived of his life by agents of the State. The State must also give appropriate training and instructions to its agents who may carry weapons and use force. However, at the time of the event, the necessary regulatory framework was lacking. The law regulating the use of weapons by Greek police officers was enacted in 1943. It was commonly agreed that it was anachronistic and incomplete and did not afford general protection to society against unlawful and excessive use of force by the police. Therefore, the Greek State had not taken all the preventive measures that Article 2 demanded for the protection of human life.

227. Turning to the facts of the instant case, the applicant submitted that his serious injuries were the result of unnecessary and disproportionate use of force by the police. He emphasised that he had been unarmed and that he was neither a criminal nor a terrorist. He had simply been scared and had tried to escape. The police had opened fire on him without warning; all they had done was to use two private cars in an attempt to stop him. As a result, innocent civilians had been injured. The police had used neither their own cars to create roadblocks, nor tyre-traps in order to burst his car's tyres, nor smoke bombs or tear gas in order to intimidate him. They had fired at him in an uncontrolled and excessive way, putting his life at serious risk.

228. Further, the applicant claimed that the authorities had failed to fulfil their procedural obligation under Article 2 to carry out an effective investigation into the potentially lethal use of force. He identified a series of shortcomings in the investigation, including, *inter alia*, the failure of the authorities to identify all the police officers who had participated in the chase, and in particular those who were responsible for his injuries, and their failure to collect all the weapons used during the chase and all the bullets fired at him.

229. Relying on a joint report published in September 2002 by Amnesty International and by the International Helsinki Federation for Human Rights ("Greece in the shadow of impunity – Ill-treatment and the misuse of firearms"), the applicant submitted lastly that the inadequate investigation into the incident was also evidence of official tolerance on the part of the State of the use of unlawful lethal force.

2. The Government

230. The Government contended that Article 2 did not come into play in the present case since the victim was still alive. Admittedly, the police

officers who were involved in the chase had made use of their weapons; however, they had not intended to kill him, but only to force him to stop his car and arrest him. Referring to earlier judgments of the Court, the Government argued that the applicant's complaints fell to be examined under Article 3 of the Convention instead.

231. In any event, the Government emphasised that police facing dangerous situations should enjoy considerable discretion in making honest judgments on the use of force. In the instant case, the applicant had driven through a red traffic light in the centre of Athens, near the American embassy, where security measures were always strengthened since the embassy was considered a possible target of terrorist actions. Instead of stopping his car at the police's signal, the applicant had accelerated and continued driving in a frenzied, extremely dangerous way, putting his life and the lives of innocent people at risk. Thus, in the circumstances, the police had reason to suspect that the applicant was a dangerous criminal or even a terrorist. Even so, before opening fire, the police officers had tried to arrest him by using alternative methods, such as artificial traffic congestion, roadblocks, etc. It was only when they realised that these means were ineffective that they unavoidably resorted to the use of force. While doing so, they tried to minimise damage and injury and preserve the applicant's life. That was clearly demonstrated by the fact that the police officers had aimed only at the tyres of the applicant's car or fired warning shots in the air. There had been no element of negligence or oversight in the way in which the operation was conducted. After his arrest, the applicant suffered no harm at the hands of the police but was immediately driven to hospital.

232. The Government further contended that there had been no inadequacies in the domestic investigation, which had been prompt and thorough. They stressed that the day after the incident an administrative investigation had commenced. In total, thirty-five sworn witness statements had been taken. Moreover, complete laboratory tests had been conducted in order to examine thirty-three police firearms, three bullets and four metal fragments. The applicant's car had also been examined. In addition, a criminal investigation had been carried out and seven police officers had been charged with serious bodily harm and unauthorised use of weapons. Several witnesses and the applicant himself had been heard in court.

233. The Government concluded that the authorities had shown their adherence to the rule of law and had taken the reasonable steps available to them to establish a full and circumstantial account of the events and to identify all the policemen who had taken part in the incident. It was impossible for them to do anything else. Therefore no violation could be found in the present case.

3. The third-party intervener

234. The *Institut de Formation en Droits de l'Homme du Barreau de Paris*, a human rights institute founded in 1979 (hereinafter "the Institute"), submitted written comments regarding the applicability of Article 2 of the Convention and the States' obligations under that provision, following the leave granted to it by the President of the Court to intervene as a third party (see paragraph 8 above). Its submissions may be summarised as follows.

235. As regards the applicability of Article 2, the Institute considered that it should be possible for that provision to apply in a case where the police had made use of potentially lethal force, even if that force did not cause the death of the person who was the target of the police actions. There should be no waiting for an irreversible violation of the right to life before reviewing the circumstances in which lethal force was used. The Court itself recognised that, in certain circumstances, a merely "potential" or "virtual" victim of a violation was entitled to take action under the Convention (see *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161). In that case, the Court had laid emphasis on "the serious and irreparable nature of the alleged suffering risked". It should thus be possible to transpose this reasoning to a virtual violation of Article 2, since use of lethal force by police officers could indeed, depending on the circumstances, pose a serious risk of violation of the right to life.

236. The Institute acknowledged that the Court had already extended the applicability of Article 2 to cases where the applicant was not killed, but regretted the fact that it had limited the scope of its scrutiny to "only exceptional circumstances" (see *Berktay v. Turkey*, no. 22493/93, 1 March 2001). Against this background, certain abuses of power by State agents would not fall foul of the Convention on the ground that they did not cause death and, at the same time, did not necessarily meet the applicability conditions of Article 3. Only an extension of the applicability of Article 2 to all cases where lethal force was used, irrespective of the outcome, could fill this loophole.

237. As regards the States' obligations under Article 2, the Institute stressed that, in addition to the "negative obligation" not to commit an intentional breach of the right to life, there were also a number of "positive obligations" incumbent on them. In particular, the public authorities had a duty to adopt very precise rules governing the use of firearms by law-enforcement officials; the latter should also have proper and regular training. The Institute also referred to the importance of the proportionality rule when making use of potentially lethal force. Lastly, the Institute stressed that the domestic authorities were under an obligation to conduct an official, effective, speedy and independent investigation when individuals were killed as a result of the use of force. That approach should also be adopted in cases where no death occurred. That was a necessary requirement in view of the need to end any system allowing the impunity of

those responsible for actual or virtual violations of rights as fundamental as the right to life.

B. The Court's assessment

1. Establishment of the facts

238. The Court is called on to determine whether the facts of the instant case disclose a failure by the respondent State to protect the applicant's right to life and to comply with the procedural obligation imposed by Article 2 of the Convention to carry out an adequate and effective investigation into the incident.

239. The Court notes at the outset that it is confronted with divergent accounts of the events, in particular as regards the conduct of the police during the applicant's chase and arrest. Further, it notes that the author or the authors of the gunshots which injured the applicant were not identified. Nonetheless, the Court does not consider it necessary to verify the facts itself in order to draw a complete picture of the factual circumstances surrounding the incident. It observes that there was a judicial determination of the facts of the instant case at domestic level (see paragraph 19 above) and that no material has been adduced in the course of the Strasbourg proceedings which could call into question the findings of fact of the Athens First-Instance Criminal Court and lead the Court to depart from them (see *Klaas v. Germany*, judgment of 22 September 1993, Series A no. 269, pp. 17-18, § 30).

240. Therefore, even if certain facts remain unclear, the Court considers, in the light of all the material produced before it, that there is a sufficient factual and evidentiary basis on which to assess the case, taking as a starting-point, as mentioned above, the findings of the national court.

2. Applicability of Article 2 of the Convention

241. In the present case, the force used against the applicant was not in the event lethal. This, however, does not exclude in principle an examination of the applicant's complaints under Article 2, the text of which, read as a whole, demonstrates that it covers not only intentional killing but also situations where it is permitted to use force which may result, as an unintended outcome, in the deprivation of life (see *İlhan v. Turkey* [GC], no. 22277/93, § 75, ECHR 2000-VII). In fact, the Court has already examined complaints under this provision where the alleged victim had not died as a result of the impugned conduct.

242. In this connection, it may be observed, on the one hand, that the Court has already recognised that there may be a positive obligation on the State under the first sentence of Article 2 § 1 to protect the life of the individual from third parties or from the risk of life-endangering illness (see

Osman v. the United Kingdom, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, pp. 3159-63, §§ 115-22; *Yaşa v. Turkey*, judgment of 2 September 1998, *Reports* 1998-VI, pp. 2436-41, §§ 92-108; and *L.C.B. v. the United Kingdom*, judgment of 9 June 1998, *Reports* 1998-III, pp. 1403-04, §§ 36-41).

243. On the other hand, the case-law establishes that it is only in exceptional circumstances that physical ill-treatment by State agents which does not result in death may disclose a violation of Article 2 of the Convention. It is correct that in the proceedings brought under the Convention the criminal responsibility of those concerned in the use of the impugned force is not in issue. Nonetheless, the degree and type of force used and the intention or aim behind the use of force may, among other factors, be relevant in assessing whether in a particular case the State agents' actions in inflicting injury short of death are such as to bring the facts within the scope of the safeguard afforded by Article 2 of the Convention, having regard to the object and purpose pursued by that Article. In almost all cases where a person is assaulted or ill-treated by the police or soldiers, their complaints will rather fall to be examined under Article 3 of the Convention (see *İlhan*, cited above, § 76).

244. What the Court must therefore determine in the present case, where State agents were implicated in the applicant's wounding, is whether the force used against him was potentially lethal and what kind of impact the conduct of the officials concerned had not only on his physical integrity but also on the interest the right to life is intended to protect.

245. It is common ground that the applicant was chased by a large number of police officers who made repeated use of revolvers, pistols and submachine guns.

It is clear from the evidence adduced before the Court that the police used their weapons in order to stop the applicant's car and effect his arrest, this being one of the instances contemplated by the second paragraph of Article 2 when the resort to lethal, or potentially lethal, force may be legitimate. As far as the ill-treatment proscribed by Article 3 is concerned, at no time could there be inferred from the police officers' conduct an intention to inflict pain, suffering, humiliation or debasement on him (see, as a recent authority, *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, §§ 425-28, ECHR 2004-VII). In particular, on the material before it the Court cannot find that the applicant's allegation as to the shooting of his foot after his removal from his car (see paragraph 12 above) has been substantiated.

246. The Court likewise accepts the Government's submission that the police did not intend to kill the applicant. It observes, however, that the fact that the latter was not killed was fortuitous. According to the findings of the ballistic report, there were sixteen holes in the car caused by bullets following a horizontal or an upward trajectory to the car driver's level.

There were three holes and a mark on the car's front windscreen caused by bullets which came through the rear window; the latter was broken and had fallen in. In the end, the applicant was injured on the right arm, the right foot, the left buttock and the right side of the chest and was hospitalised for nine days (see paragraphs 12 and 14 above). The seriousness of his injuries is not in dispute between the parties.

247. In the light of the above circumstances, and in particular the degree and type of force used, the Court concludes that, irrespective of whether or not the police actually intended to kill him, the applicant was the victim of conduct which, by its very nature, put his life at risk, even though, in the event, he survived. Article 2 is thus applicable in the instant case. Furthermore, given the context in which his life was put at risk and the nature of the impugned conduct of the State agents concerned, the Court is satisfied that the facts call for examination under Article 2 of the Convention.

3. Alleged failure of the authorities to fulfil their positive obligation to protect the applicant's right to life by law

248. Article 2, which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, from which no derogation is permitted (see *Velikova v. Bulgaria*, no. 41488/98, § 68, ECHR 2000-VI). Together with Article 3, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which deprivation of life may be justified must therefore be strictly construed (see *Salman v. Turkey* [GC], no. 21986/93, § 97, ECHR 2000-VII). The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective (see *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, pp. 45-46, §§ 146-47).

249. The first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps within its internal legal order to safeguard the lives of those within its jurisdiction (see *Kılıç v. Turkey*, no. 22492/93, § 62, ECHR 2000-III). This involves a primary duty on the State to secure the right to life by putting in place an appropriate legal and administrative framework to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.

250. As the text of Article 2 itself shows, the use of lethal force by police officers may be justified in certain circumstances. Nonetheless, Article 2 does not grant a *carte blanche*. Unregulated and arbitrary action by State agents is incompatible with effective respect for human rights. This

means that, as well as being authorised under national law, policing operations must be sufficiently regulated by it, within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force (see, *mutatis mutandis*, *Hilda Hafsteinsdóttir v. Iceland*, no. 40905/98, § 56, 8 June 2004; see also Human Rights Committee, General Comment no. 6, Article 6, 16th Session (1982), § 3), and even against avoidable accident.

251. In view of the foregoing, in keeping with the importance of Article 2 in a democratic society, the Court must subject allegations of a breach of this provision to the most careful scrutiny, taking into consideration not only the actions of the agents of the State who actually administered the force but also all the surrounding circumstances, including such matters as the planning and control of the actions under examination (see *McCann and Others*, cited above, p. 46, § 150). In the latter connection, police officers should not be left in a vacuum when performing their duties, whether in the context of a prepared operation or a spontaneous chase of a person perceived to be dangerous: a legal and administrative framework should define the limited circumstances in which law-enforcement officials may use force and firearms, in the light of the international standards which have been developed in this respect (see, for example, the "United Nations Force and Firearms Principles" – paragraphs 30-32 above).

252. Against this background, the Court must examine in the present case not only whether the use of potentially lethal force against the applicant was legitimate but also whether the operation was regulated and organised in such a way as to minimise to the greatest extent possible any risk to his life.

253. In view of the recent enactment of Law no. 3169/2003, the Court notes that, since the facts giving rise to the present application, the Greek State has put in place a reviewed legal framework regulating the use of firearms by police officers and providing for police training, with the stated objective of complying with the international standards for human rights and policing (see paragraphs 25 and 27 above).

254. At the time of the events in issue, however, the applicable legislation was Law no. 29/1943, dating from the Second World War when Greece was occupied by the German armed forces (see paragraph 25 above). That statute listed a wide range of situations in which a police officer could use firearms without being liable for the consequences. In 1991 a presidential decree authorised the use of firearms in the circumstances set forth in the 1943 statute "only when absolutely necessary and when all less extreme methods have been exhausted" (see paragraph 25 above). No other provisions regulating the use of weapons during police actions and laying down guidelines on the planning and control of police operations were contained in Greek law. On the face of it, the above – somewhat slender – legal framework would not appear sufficient to provide

the level of protection "by law" of the right to life that is required in present-day democratic societies in Europe.

255. This conclusion as to the state of Greek law is confirmed by the evidence before the Court of the bearing which the legal and administrative framework at the material time had on the way in which the potentially lethal police operation culminating in the applicant's arrest was conducted.

256. Turning to the facts of the present case, and having regard to the findings of the domestic court (see paragraphs 19 and 48 above), the Court accepts that the applicant was driving his car in the centre of Athens at excessive speed in an uncontrolled and dangerous manner, thereby putting the lives of bystanders and police officers at risk; the police were thus entitled to react on the basis that he was in charge of a life-endangering object in a public place. Alternative means to stop him were tried but failed; this was accompanied by an escalation of the havoc that the applicant was causing and by the lethal threat that he posed by his criminal conduct to innocent people. Further, the police officers pursuing the applicant had been informed by the control centre that he might well be armed and dangerous; they also believed that the movements which they saw the applicant make when he stopped his car were consistent with his being armed (see the accused police officers' statements, paragraph 17 above, and Mr Ventouris's and Mr Davarias's statements, paragraph 18 above).

257. Another important factor must also be taken into consideration, namely the prevailing climate at that time in Greece, which was marked by terrorist activities against foreign interests. For example, a group called the "Revolutionary Organisation 17 November", established in 1975, had committed, until it was dismantled in 2002, numerous crimes, including the assassination of United States officials (see paragraph 26 above). This, coupled with the fact that the event took place at night, near the American embassy, contributed to the applicant being perceived as a greater threat in the eyes of the police.

258. Consequently, like the national court, the Court finds in the circumstances that the police could reasonably have considered that there was a need to resort to the use of their weapons in order to stop the car and neutralise the threat posed by its driver, and not merely a need to arrest a motorist who had driven through a red traffic light. Therefore, even though it was subsequently discovered that the applicant was unarmed and that he was not a terrorist, the Court accepts that the use of force against him was based on an honest belief which was perceived, for good reasons, to be valid at the time. To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the performance of their duty, perhaps to the detriment of their lives and those of others (see *McCann and Others*, cited above, pp. 58-59, § 200).

259. However, although the recourse as such to some potentially lethal force in the present case can be said to have been compatible with Article 2

of the Convention, the Court is struck by the chaotic way in which the firearms were actually used by the police in the circumstances. It may be recalled that an unspecified number of police officers fired a hail of shots at the applicant's car with revolvers, pistols and submachine guns. No less than sixteen gunshot impacts were found on the car, some of them attesting to a horizontal or even upward trajectory, and not a downward one as one would expect if the tyres, and only the tyres, of the vehicle were being shot at by the pursuing police. Three holes and a mark had damaged the car's windscreen and the rear window glass was broken and had fallen in (see paragraph 14 above). In sum, it appears from the evidence produced before the Court that large numbers of police officers took part in a largely uncontrolled chase.

260. Serious questions therefore arise as to the conduct and the organisation of the operation. Admittedly, some directions were given by the control centre to some police officers who had been expressly contacted, but others went of their own accord to their colleagues' assistance, without receiving any instructions. The absence of a clear chain of command is a factor which by its very nature must have increased the risk of some police officers shooting erratically.

261. The Court does not of course overlook the fact that the applicant was injured during an unplanned operation which gave rise to developments to which the police were called upon to react without prior preparation (see, *a contrario*, *Rehbock v. Slovenia*, no. 29462/95, §§ 71-72, ECHR 2000-XII). Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the positive obligation must be interpreted in a way which does not impose an impossible burden on the authorities (see, *mutatis mutandis*, *Mahmut Kaya v. Turkey*, no. 22535/93, § 86, ECHR 2000-III).

262. Nonetheless, while accepting that the police officers who were involved in the incident did not have sufficient time to evaluate all the parameters of the situation and carefully organise their operation, the Court considers that the degeneration of the situation, which some of the police witnesses themselves described as chaotic (see, for example, Mr Manoliadis's statement – paragraph 17 above), was largely due to the fact that at that time neither the individual police officers nor the chase, seen as a collective police operation, had the benefit of the appropriate structure which should have been provided by the domestic law and practice. In fact, the Court points out that in 1995, when the event took place, a law commonly acknowledged as obsolete and incomplete in a modern democratic society was still regulating the use of weapons by State agents. The system in place did not afford to law-enforcement officials clear guidelines and criteria governing the use of force in peacetime. It was thus unavoidable that the police officers who chased and eventually arrested the

applicant should have enjoyed a greater autonomy of action and have been left with more opportunities to take unconsidered initiatives than would probably have been the case had they had the benefit of proper training and instructions. The absence of clear guidelines could further explain why a number of police officers took part in the operation spontaneously, without reporting to a central command.

263. In the light of the above, the Court considers that, as far as their positive obligation under the first sentence of Article 2 § 1 to put in place an adequate legislative and administrative framework was concerned, the Greek authorities had not, at the relevant time, done all that could be reasonably expected of them to afford to citizens, and in particular to those, such as the applicant, against whom potentially lethal force was used, the level of safeguards required and to avoid real and immediate risk to life which they knew was liable to arise, albeit only exceptionally, in hot-pursuit police operations (see, *mutatis mutandis*, *Osman*, cited above, p. 3160, § 116 *in fine*).

264. Accordingly, the applicant has been the victim of a violation of Article 2 of the Convention on this ground. In view of this conclusion, it is not necessary to examine the life-threatening conduct of the police under the second paragraph of Article 2.

4. Alleged inadequacy of the investigation

265. The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see *Çakıcı v. Turkey* [GC], no. 23657/94, § 86, ECHR 1999-IV). The essential purpose of such an investigation is to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility (see *Anguelova v. Bulgaria*, no. 38361/97, § 137, ECHR 2002-IV). Since often, in practice, the true circumstances of the death in such cases are largely confined within the knowledge of State officials or authorities, the bringing of appropriate domestic proceedings, such as a criminal prosecution, disciplinary proceedings and proceedings for the exercise of remedies available to victims and their families, will be conditioned by an adequate official investigation, which must be independent and impartial. The same reasoning applies in the case under consideration, where the Court has found that the force used by the police against the applicant endangered his life (see paragraphs 53 to 55 above).

266. The investigation must be capable, firstly, of ascertaining the circumstances in which the incident took place and, secondly, of leading to

the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony and forensic evidence. A requirement of promptness and reasonable expedition is implicit in this context. Any deficiency in the investigation which undermines its capability of establishing the circumstances of the case or the person responsible is liable to fall foul of the required standard of effectiveness (see *Kelly and Others v. the United Kingdom*, no. 30054/96, §§ 96-97, 4 May 2001, and *Anguelova*, cited above, § 139).

267. In the instant case, following the incident, an administrative investigation was opened. A number of police officers and other witnesses were interviewed and laboratory tests were conducted. After the investigation a criminal prosecution was brought against seven police officers, who were eventually acquitted (see paragraphs 13 and 15 above).

268. However, the Court observes that there were striking omissions in the conduct of the investigation. In particular, the Court attaches significant weight to the fact that the domestic authorities failed to identify all the policemen who took part in the chase. In this connection, it may be recalled that some policemen left the scene without identifying themselves and without handing over their weapons; thus, some of the firearms which were used were never reported. This was also acknowledged by the domestic court. It also seems that the domestic authorities did not ask for the list of the policemen who were on duty in the area when the incident took place and that no other attempt was made to find out who these policemen were. Moreover, it is remarkable that only three bullets were collected and that, other than the bullet which was removed from the applicant's foot and the one which is still in his buttock, the police never found or identified the other bullets which injured the applicant.

269. The above omissions prevented the national court from making as full a finding of fact as it might otherwise have done. It will be recalled that the seven police officers were acquitted on the first charge (causing serious bodily harm), on the ground that it had not been shown beyond reasonable doubt that it was they who had injured the applicant, since many other shots had been fired from unidentified weapons (see paragraph 19 above). The Court is not convinced by the Government's assertion that the domestic authorities could not have done more to obtain evidence concerning the incident.

270. Having regard to the above considerations, the Court concludes that the authorities failed to carry out an effective investigation into the incident. The incomplete and inadequate character of the investigation is highlighted by the fact that, even before the Court, the Government were unable to identify all the officers who were involved in the shooting and wounding of the applicant.

271. There has accordingly been a violation of Article 2 of the Convention in that respect.

5. Alleged practice of the authorities of failing to comply with their procedural obligations under Article 2 of the Convention

272. Having regard to its findings above (see paragraphs 72 and 79), the Court does not find it necessary to determine whether the failings identified in this case are part of a practice adopted by the authorities, as asserted by the applicant (see paragraph 37 above).

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

273. The applicant complained that he had been the victim of serious bodily harm, in breach of Article 3 of the Convention, which stipulates:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

274. The Government maintained that the applicant's injuries were accidental and regrettable consequences of a lawful arrest.

275. In view of the grounds on which it has found a dual violation of Article 2 of the Convention (see paragraphs 46 to 79 above), the Court considers that no separate issue arises under Article 3 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

276. The applicant complained that he had not had an effective remedy within the meaning of Article 13 of the Convention, which stipulates:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

277. The Government did not address this allegation other than to assert the availability of remedies at the domestic level to redress the applicant's grievances.

278. In view of the submissions of the applicant in the present case and of the grounds on which it has found a violation of Article 2 in relation to its procedural aspect (see paragraphs 73 to 79 above), the Court considers that no separate issue arises under Article 13 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

279. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only

partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

1. Pecuniary damage

280. The applicant claimed 60,000 euros (EUR) for loss of income over a period of twenty months after the incident and a reduction of his income for the next fifteen years.

281. The Government claimed that this amount was excessive and unjustified. They contended that even before the incident the applicant had been facing psychological problems which had prevented him from working.

282. The Court notes that the claim relates to loss of income which was allegedly incurred over a period of twenty months after the incident, and to alleged future loss of income. It observes, however, that no supporting details have been provided for these losses, which must therefore be regarded as largely speculative. For this reason, the Court makes no award under this head.

2. Non-pecuniary damage

283. The applicant claimed EUR 75,000 for non-pecuniary damage in respect of the anxiety, fear, pain and injury he suffered. He claimed that his life was ruined.

284. The Government reiterated that, by his dangerous behaviour, the applicant had put the lives of innocent people at risk. They contended that the finding of a violation of the Convention would constitute sufficient just satisfaction.

285. Having regard to all the circumstances of the present case, the Court accepts that the applicant has suffered non-pecuniary damage which cannot be compensated solely by the findings of violations. Making its assessment on an equitable basis, the Court awards the applicant EUR 15,000 under this head.

B. Costs and expenses

286. The applicant, who was granted legal aid before the Court, made no claim for costs and expenses.

C. Default interest

287. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* by twelve votes to five that there has been a violation of Article 2 of the Convention in respect of the respondent State's obligation to protect the applicant's right to life by law;

2. *Holds* unanimously that there has been a violation of Article 2 of the Convention in respect of the respondent State's obligation to conduct an effective investigation into the circumstances of the incident which put the applicant's life at risk;

3. *Holds* by fifteen votes to two that no separate issue arises under Article 3 of the Convention;

4. *Holds* by sixteen votes to one that no separate issue arises under Article 13 of the Convention;

5. *Holds* by fifteen votes to two
   (a) that the respondent State is to pay the applicant, within three months, EUR 15,000 (fifteen thousand euros) in respect of non-pecuniary damage, together with any tax that may be chargeable on the above amount;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 20 December 2004.

Luzius WILDHABER
President

Paul MAHONEY
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint concurring opinion of Mr Costa, Sir Nicolas Bratza, Mr Lorenzen and Mrs Vajić;

(b) partly dissenting opinion of Mr Wildhaber joined by Mr Kovler and Mrs Mularoni;

(c) partly dissenting opinion of Mrs Tsatsa-Nikolovska joined by Mrs Strážnická.

L.W.
P.J.M.

JOINT CONCURRING OPINION OF JUDGES COSTA, Sir Nicolas BRATZA, LORENZEN AND VAJIĆ

While we share the view of the majority of the Court that there has been a violation of both the substantive and procedural aspects of Article 2 in the present case, we cannot fully subscribe to the Court's reasoning as to the former.

That reasoning is founded principally on two factors – the inadequacy of the general legal framework in Greece at the time of the incident regulating the use of firearms by police officers and the chaotic way in which firearms were in the event used by the police during the course of the chase and eventual wounding of the applicant. In the view of the Court, the two factors are closely linked, "the autonomy of action and unconsidered initiatives" of the police officers concerned being, in the view of the majority, an unavoidable consequence of the lack of clear guidelines and criteria governing the use of force in peacetime.

We can readily agree that the way in which the operation was in fact carried out by the Athens police gave rise to a breach of the obligation to protect life within the meaning of the first sentence of Article 2. As is established by the case-law of the Court, the first sentence enjoins the State not only to refrain from the intentional and unlawful taking of life but also to take appropriate steps to safeguard the life of those within its jurisdiction. This involves a primary duty on the part of the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. However, it also requires in our view that recourse to potentially lethal force by agents of the State should be regulated and controlled in such a way as to minimise to the greatest extent possible the risk to human life.

We accept that in the present case the authorities were faced with what appeared to be an emergency situation and one which developed with great rapidity and without any opportunity for pre-planning. We accept, too, that the obligation imposed by Article 2 should not be interpreted in such a way as to impose an impossible burden on the authorities and that the actions of those authorities should not be evaluated with the wisdom of hindsight. Nevertheless, we consider that the controls exercised by the authorities over the operation to stop and detain the applicant were manifestly inadequate. Like the majority of the Court, we are particularly struck by the number of police officers, armed with a variety of weapons, who took part in the chase without any effective centralised control over their actions or any clear chain of command. These included not only twenty-nine identified officers but an unquantified number of additional officers who participated in the chase on their own initiative and without instructions and who left the scene

without identifying themselves and without handing in their weapons. Moreover, it is apparent that at least one of these unidentified officers opened fire on the car, the Athens First-Instance Criminal Court finding that a bullet recovered from the body of the applicant and a bullet found inside the car were unrelated to any of the thirty-three weapons which had been surrendered for examination following the incident.

In our view, the undisciplined and uncontrolled manner in which the operation was conducted, which carried with it a serious risk of fatal injury to the applicant, is in itself sufficient to give rise to the finding of a breach of the obligation to protect life under Article 2.

Where we part company with the majority is as to their further reliance on the claimed inadequacy of the legislative framework in Greece at the relevant time, governing the use of firearms. The majority emphasise that the applicable legislation, which dated from the occupation of Greece in the Second World War, listed a wide range of situations in which a police officer could use firearms without being liable for the consequences. While noting that these provisions had been qualified by the presidential decree of 1991, which authorised the use of firearms "only when absolutely necessary and when all less extreme methods have been exhausted", the majority have found this "somewhat slender legal framework" to be insufficient to provide the level of protection "by law" of the right to life that is required in present-day democratic societies in Europe.

Unlike the majority, we have found no clear evidence to suggest that the lack of control over the operation in the present case was attributable to any gap or deficiency in the level of protection provided by the relevant Greek law. In these circumstances, while we welcome the improvements in the law governing the carrying and use of firearms by police officers which were introduced in Greece in July 2003 (see paragraph 27 of the judgment), we have not found it to be either necessary or appropriate to examine in the abstract the compatibility with Article 2 of the legislative provisions in force at the relevant time (see *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, p. 47, § 153) or to base our conclusion on any deficiency in those provisions.

PARTLY DISSENTING OPINION OF JUDGE WILDHABER JOINED BY JUDGES KOVLER[1] AND MULARONI

To my regret I am unable to subscribe to the finding of a substantive violation of Article 2 in the instant case.

This case is about a dangerous police chase in the centre of Athens. Dangerous, because the police shot at the applicant, but dangerous also because, before the police opened fire, the applicant had broken through several police roadblocks with his car, collided with several other vehicles, injured two drivers and caused a cervical hernia in one of them in the process (see paragraphs 11, 19, 21 and 64 of the judgment). It does not therefore necessarily help simply to state that the right to life is fundamental (see paragraph 56). The problem is: whose life? And how should the different lives at stake be protected?

Our Court's case-law asserts that a State may have a positive obligation to protect the life of individuals from third parties (see paragraph 50). Concretely, this may mean that the police had to protect the lives of pedestrians, car drivers and their colleagues from the applicant. The Court's case-law states at the same time that, in exceptional circumstances, physical ill-treatment by State agents that does not result in death may disclose a violation of Article 2 (see paragraphs 43-44 and 51-52 of the judgment; see also *Berktay v. Turkey*, no. 22493/93, 1 March 2001, and *İlhan v. Turkey* [GC], no. 22277/93, § 76, ECHR 2000-VII). Concretely, this may mean that the use of force by the police against the applicant could amount to a violation of Article 2, notwithstanding the fact that it was not in the end lethal.

If these two strands of case-law are over-extended, they may ultimately overlap and come into conflict. The State might then paradoxically violate both its positive duty to protect the life of individuals from third parties and its obligation to curb the use of force by the police. Obviously, such an overlap would be unfortunate. In extreme cases it can place the competent authorities in an impossible situation. In between there must be room for the unpredictability of life and the subsidiarity of the Convention system. Such difficult decisions, taken in the heat of the action, should properly be reviewed by the national courts and our Court should only depart from such findings with reluctance.

In the present case the Court's majority relies on some of the findings of the Greek court, which indeed appear in no way arbitrary (see paragraphs 19 and 66 of the judgment). It finds that the police could reasonably have considered that there was a need to resort to the use of their weapons. I see no grounds for finding otherwise.

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1. Judge Kovler does not share the conclusions in the opinion as regards Article 41 of the Convention since he voted with the majority on that issue.

However, the Court's majority then nevertheless concludes that Article 2 was violated. It declares itself struck by the "chaotic way" in which the police operation was carried out (see paragraph 67) and explains this by the "absence of a clear chain of command" (paragraph 68), the lack of "proper training and instructions" (paragraph 70) and the "obsolete and incomplete law" regulating police conduct (paragraph 70; see also paragraphs 25, 62, and 71).

The file of this case does not, in my view, establish the absence of a clear chain of command. On the contrary, several policemen referred to orders given to them and to instructions from the control centre (see paragraph 17, point 2 (Mr Netis), point 6 (Mr Ntinas), point 7 (Mr Kiriazis), paragraph 18, point 1 (Mr Ventouris), point 2 (Mr Nomikos), point 3 (Mr Xilogiannis), point 4 (Mr Davarias)), and the Athens First-Instance Criminal Court similarly accepts the existence of a chain of command (see paragraph 19). There is also reference in the file to the training that the police force receives (see paragraph 18, point 1 (Mr Ventouris)). If the Court's majority did not accept this testimony or if it relied on extraneous evidence, it should have explained why.

It is accepted that several off-duty policemen must have joined the chase and must have used their weapons. The subsequent administrative investigation did not establish adequately what had happened in that respect. That is why our Court found a procedural violation of Article 2. I joined the Court's majority on this point, which reflects well-established case-law. However, domestic law did not prohibit off-duty members of the police force from joining a police chase in an exceptional situation, and I see no reason why such a participation should *a priori* be considered to constitute a substantive violation of Article 2.

As I see it, the strongest argument advanced by the Court's majority is the over-broad discretion which Law no. 29/1943 left to the police. However, at the time of the police chase in the instant case (13 September 1995), Law no. 29/1943 had already been superseded by Article 133 of Presidential Decree no. 141/1991, which authorised the use of firearms in the situations set forth in Law no. 29/1943 "only when absolutely necessary and when all less extreme methods have been exhausted". This is admittedly not the same as an exhaustive modern police law, but it lays down an essential standard for the use of force by the police in an absolutely clear fashion.

I cannot agree that the Court should find a substantive violation of Article 2 in a case that stems from the irresponsible and dangerous behaviour of the applicant; where a national criminal court has looked carefully at the relevant facts and decided that the use of force by the police was justified in order to protect the life of third persons; where our Court itself accepts the national court's view that the use of weapons by the police was justifiable; where the applicant suffered injuries (as did some of his

victims), but did not lose his life; and where the domestic law restricts the use of police firearms to situations of absolute necessity.

Given my views on this case, I am opposed to the award of a substantial sum to the applicant in respect of non-pecuniary damage. The finding of a violation should have sufficed in terms of just satisfaction.

PARTLY DISSENTING OPINION OF JUDGE TSATSA-NIKOLOVSKA JOINED BY JUDGE STRÁŽNICKÁ[1]

I regret that I am unable to share the opinion of the majority of the Court regarding its finding of a violation of Article 2 in respect of the State's obligation to protect the applicant's right to life by law and that no separate issue arises under Article 3 and Article 13 of the Convention.

I consider that, given the actual circumstances of the incident which put the applicant's life at risk, it is impossible to conclude beyond reasonable doubt that there has been a violation of Article 2 in substance.

The case-law of the Court establishes that it is only in exceptional circumstances that physical ill-treatment by State agents which does not result in death may disclose a violation of Article 2 of the Convention.

I accept that there are exceptional circumstances in the present case which bring Article 2 into play, because the applicant's life was put at risk by the lethal means used by the police officers to stop his car and arrest him, but in the circumstances of the case I have some doubts that there are enough well-established facts to conclude beyond reasonable doubt that there has been a violation of Article 2 in substance.

I consider that in this case it is necessary to have a clear picture of the incident for the purpose of assessing whether there has been a possible violation of Article 2 in substance.

In the present case, I think that the Court should deal with the question of the police officers' conduct during the incident, namely their identification as participants in the chase, their use of firearms from beginning to end, including the actions of the operational units of patrol cars and motorcycles, the actions of the control centre, their instructions and coordination. It should also have regard to the implementation in practice of the national and international principles of legality, proportionality and necessity in the case, the outcome of the incident, all the applicant's injuries and his conduct during the incident in order to assess and evaluate whether there were irregularities and arbitrariness in the action of the police or an abuse of force. The Court should have relevant evidence and proof in this field.

It is true that the national law quoted in the judgment is the old one and that some provisions gave the police wide scope in the use of firearms, such as the use of force to enforce the laws, decrees and decisions of the relevant authorities or to disperse public gatherings or suppress mutinies, but this is not in issue in the instant case. Generally speaking, this fact does not mean that the police can use force without control. This is particularly true in this case, where there is no evidence justifying such use of force. On the other hand, that law was amended by the provisions authorising the use of

1. Judge Strážnická does not share the conclusions in the opinion as regards Article 13 of the Convention since she voted with the majority on that issue.

firearms only when absolutely necessary and when all less extreme methods have been exhausted. Furthermore, all the relevant international principles in the international documents quoted in the judgment have been recognised by the Greek authorities. Criminal proceedings for causing serious bodily harm and for the unauthorised use of weapons were instituted against seven police officers, who were later acquitted, on the basis of the result of an administrative investigation which was carried out in respect of twenty-nine police officers, and it is difficult for me to accept that it would be possible for a police officer to use firearms without being liable for the consequences.

I must say that I do not have a clear picture of the incident because there is insufficient factual evidence owing to the inadequate, incomplete and ineffective investigation and information concerning police practice regarding the use of firearms. It is generally for the national authority to establish the facts. The Court made efforts to do this by itself but, in my opinion, unfortunately did so unsuccessfully in some respects.

In these circumstances, I consider that it is impossible to make a proper evaluation and conclude beyond reasonable doubt that there has been a violation of Article 2 in substance as a result of the incident. I think that in such a situation it is not necessary to consider the applicant's complaint under Article 2 of the Convention regarding the alleged lack of protection by national law of the right to life.

On the other hand, I think that there are elements which enable an assessment to be made under Article 3 of the Convention of the police officers' conduct during the incident.

The Court has reiterated in *Tekin v. Turkey*, ([GC], no. 22277/93, ECHR 2000-VII) and *İlhan v. Turkey* (judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV) that ill-treatment must attain a minimum level of severity and that this assessment depends on all the circumstances of the case, namely the duration of the treatment, its physical or moral effects and the state of health of the victim.

In the instant case, there are some indisputable circumstances. The applicant had driven through a red traffic light and was chased by thirty-three police officers in cars and on motorcycles, shooting from guns, revolvers and submachine guns, who used force to stop and arrest him.

There was no intention or order given to kill him, and no one contests that the applicant felt fear and panic. The police lost him once during the chase. The applicant stopped at the entrance of a petrol station of his own free will, did not offer any resistance and did not get out of the car. The shots were numerous and the applicant was seriously injured. He underwent three operations, his health deteriorated considerably after the incident and he is now severely disabled.

All the points that I have mentioned above provide elements that enable an assessment to be made of the level of severity, that is, the duration of the treatment, the physical and moral effects and the state of health of the victim. This leads me to conclude that there is a separate issue in this case to be considered under Article 3 of the Convention, especially as I consider that there are no elements on which this case can be assessed under Article 2 in substance or a conclusion reached beyond reasonable doubt under that provision.

The Court reiterates that Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see *Kaya v. Turkey*, judgment of 19 February 1998, *Reports* 1998-I, pp. 329-30, § 106; *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 96, ECHR 2002-II; *Gül v. Turkey*, no. 22676/93, § 100, 14 December 2000; *İlhan*, cited above; and *McKerr v. the United Kingdom*, no. 28883/95, § 107, ECHR 2001-III).

Given the fundamental importance of the right to life, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible, and including effective access for the

complainant to the investigation procedure (see *Kaya*, cited above, p. 330, § 107, and *Gül*, cited above, § 100).

On the basis of the circumstances in the present case, in which there has been a finding of a violation of Article 2 in respect of the respondent State's obligation to protect the applicant's right to life by law and to conduct an effective investigation into the circumstances of the incident which put the applicant's life at risk, the authorities should make available to the victim a mechanism for establishing any liability of State agents or bodies for acts or omissions involving a breach of their rights protected by the Convention. Furthermore, in the case of a breach of Articles 2 and 3, which rank as the most fundamental provisions of the Convention, compensation for the non-pecuniary damage flowing from the breach should, in principle, be available as part of the range of redress (see *Paul and Audrey Edwards*, cited above).

The applicant complained that, before a civil case for compensation could be brought, the responsibility of the perpetrators had to be proved in order to establish liability on the part of the State. As a result of the acquittal of the accused, the applicant could not obtain compensation for the non-pecuniary damage resulting from his injuries. He has no right of appeal against the above-mentioned decision acquitting the police officers. The applicant argued that, owing to the lack of an effective investigation, he had also been deprived of an effective remedy regarding the breach of Article 13 of the Convention.

The Government asserted that a remedy was available at domestic level, but did not submit evidence demonstrating the effectiveness of the available remedies for compensation in practice.

In the instant case, the national court acquitted the seven police officers on both criminal charges brought against them, firstly on the count of causing serious bodily harm and secondly on the count of unauthorised use of weapons. The court found that the accused police officers were not the ones who had injured the applicant and that they had used their weapons to stop the car, the driver of which they considered to be dangerous. An administrative investigation was carried out by the police in respect of the twenty-nine police officers who had taken part in the chase, but the applicant had no effective access to it. Following that administrative investigation, the public prosecutor instituted criminal proceedings against

only seven police officers, who were later acquitted. The applicant was accused of committing offences and sentenced to forty days' imprisonment (see paragraphs 21-22 of the judgment).

In these circumstances, it is questionable whether the applicant could prove the responsibility of the perpetrators if he were to bring a civil action for appropriate compensation.

The mere fact that the applicant was able to join the proceedings as a civil party is insufficient for the purposes of Article 13. Moreover, the fact that he was unsuccessful is a further element proving that the effectiveness of this remedy is doubtful.

The question now arises whether it would be enough for the purposes of Article 13 to deal only with the question of the identification of all policemen who took part in the chase and who injured the applicant.

The answer for me would be "no" because another question arises in these circumstances, which is whether the authorities make available to the applicant, as a real victim, an effective mechanism for establishing the civil liability of the State agents or bodies – in this case the police officers – for the acts or omissions involving the breach of his rights under the Convention. I have in mind the majority's finding that the State did not fulfil its obligation to protect the applicant's right to life by law.

Moreover, a right to appropriate compensation as an effective remedy for redress is relevant in a situation where no effective investigation for the purpose of Article 2 was carried out, bearing in mind that misconduct, omissions, delays and all errors made during an investigation carried out by the police, especially when the police officers are involved in the incident, could raise problems in the criminal proceedings when establishing the relevant facts and possible redress later.

That is why I consider that in the instant case a separate issue arises under Article 13 of the Convention.

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

- European Court of Human Rights, Third Section, case of Dugoz c. Greece, Application no. 40907/98, Judgement 6th March 2001(Strasburg) – υπόθεση εξευτελιστικών συνθηκών κράτησης

THIRD SECTION

CASE OF DOUGOZ v. GREECE

(*Application no. 40907/98*)

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

JUDGMENT

STRASBOURG

6 March 2001

FINAL

06/06/2001

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

In the case of Dougoz v. Greece,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Mr C.L. ROZAKIS,
Mr L. LOUCAIDES,
Mr P. KŪRIS,
Mrs F. TULKENS,
Mr K. JUNGWIERT,
Sir Nicolas BRATZA, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 8 February 2000 and 13 February 2001,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

288. The case originated in an application (no. 40907/98) against the Hellenic Republic lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Syrian national, Mr Mohamed Dougoz ("the applicant"), on 24 April 1998.

289. The applicant was represented by Mrs I. Kourtovik, a lawyer practising in Athens. The Greek Government ("the Government") were represented by the Delegate of their Agent, Mr M. Apessos, Senior Adviser at the State Legal Council, and Mrs K. Grigoriou, Adviser at the State Legal Council.

290. The applicant alleged, in particular, that his conditions of detention whilst awaiting expulsion amounted to inhuman and degrading treatment, and complained about the lawfulness and length of his detention and the lack of remedies under domestic law in this connection.

291. On 24 April 1998 the President of the Commission had given an indication under former Rule 36 of the Commission's Rules of Procedure. On 10 July 1998 the Commission decided not to renew this indication.

292. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

293. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

294. By a decision of 8 February 2000, the Chamber declared the application partly admissible [*Note by the Registry*. The Court's decision is obtainable from the Registry [1].

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

295. The applicant claims that, while in Syria, he was accused of national security offences, namely having leaked information during his military service. The applicant left that country. He claims that he was subsequently found guilty of these offences and sentenced to death.

296. The Government claim that the applicant entered Greece surreptitiously, probably in July 1983. The applicant claims that he entered Greece lawfully.

297. In 1987 the applicant was arrested by the Greek authorities for drug-related offences. In 1988 he was found guilty by the three-member Court of Appeal of Athens, sitting as a first-instance court. The court, considering that the applicant was himself a drug user, sentenced him to two years' imprisonment. The applicant's conviction was upheld by the five-member Court of Appeal of Athens in 1989.

298. In 1989 the applicant applied for refugee status to the Athens Office of the United Nations High Commissioner for Refugees (UNHCR)

and was recognised as a refugee under the UNHCR mandate. On that occasion he was issued by the Greek authorities with an alien's residence card.

299. According to the Government, his leave to remain in Greece expired on 8 January 1991. However, he remained illegally.

300. In the course of 1991, the applicant was arrested for theft and bearing arms without authorisation. He was placed in detention on remand. In 1993 he was found guilty of these offences by the Nafplio Court of Appeal, composed of judges and jurors, and was sentenced to five and a half years' imprisonment.

301. On 6 June 1994 the applicant was released on licence. On the same day, the Chief of Police ordered his expulsion from Greece in the public interest.

302. On 23 June 1994 the applicant applied to the Greek authorities for refugee status. On 4 August 1994 the Minister of Public Order rejected his application, which was found to be abusive because "it had been submitted ten years after the arrival of the applicant in Greece, obviously with the aim of avoiding his lawful expulsion after his release from prison where he had served long sentences for very serious crimes".

303. The Government claim that, following this decision, the applicant requested to be expelled to "the Former Yugoslav Republic of Macedonia", and on 19 September 1994 he was sent to that country, but thereafter he returned to Greece illegally. However, the applicant claims that he was never "lawfully expelled" to "the Former Yugoslav Republic of Macedonia". He neither asked to go there, nor was he accepted by that country.

304. On 9 July 1995 the applicant was arrested in Greece for drug-related offences. On 26 November 1996 he was found guilty and sentenced to three years' imprisonment and a fine by the three-member Athens Court of Appeal. In 1998 the five-member Athens Court of Appeal upheld his conviction and sentence.

305. On 25 June 1997 the applicant asked for his release on licence claiming, *inter alia*, that he could return to Syria because he had been granted a reprieve. The Indictments Division of the Piraeus Criminal Court of First Instance examined the applicant's request in camera on 16 July

1997. Although the applicant was not allowed to attend the hearing, the prosecutor was present and was heard. The court decided that the applicant should be released on licence and expelled from Greece. It considered that the applicant's conduct during his detention indicated that he was not going to commit any further offences once released and that it was not necessary to prolong the detention.

306. Following this decision the applicant was released from prison on 10 July 1997 and was placed in police detention pending his expulsion, on the basis of an opinion given by the deputy public prosecutor at the Court of Cassation that decision no. 4803/13/7A of 18-26 June 1992 applied by analogy in cases of expulsion ordered by courts (see paragraph 39 below). Initially the applicant was detained at a detention centre in Drapetsona. He was issued with a temporary passport by the Greek authorities and on 12 September 1997 was given leave to enter Syria by the Syrian embassy in Athens.

307. The applicant claims that the Drapetsona detention centre consisted of twenty cells. At times there were up to one hundred people detained there. The applicant's cell was overcrowded. The number of persons in his cell would increase tenfold depending on the detainee population each night. There were no beds and the detainees were not given any mattresses, sheets or blankets. Some detainees had to sleep in the corridor. The cells were dirty and the sanitary facilities insufficient, since they were supposed to cater for a much smaller number of persons. Hot water was scarce. For long periods of time there would not be any. There was no fresh air or natural daylight and no yard in which to exercise. The only area where the detainees could take a walk was the corridor leading to the toilets.

308. According to the applicant, there was no recreational or other activities at the Drapetsona detention centre. The applicant could not even read a book because his cell was so overcrowded. Detainees were served with a "passable plate of food" twice a day. No milk was ever provided while fruit, vegetables and cheese rarely appeared on the menu. Moreover, the detainees could not obtain any food from outside. The applicant had no access to a doctor or a chemist. Only family visits were allowed and, as a result, foreign detainees did not receive any visits at all. The applicant could not address himself to the social services or the public prosecutor. Although

payphones existed, their number was clearly insufficient. Cases of ill-treatment by the guards were not uncommon.

309. The Government claim that hot water was available on a 24-hour basis at the Drapetsona detention centre. The food served to detainees was sufficient and of a very high quality. The police officers had the same menu. There was adequate natural light where the applicant was detained. The applicant was able to circulate freely in a wide corridor at regular intervals during the day. The detention area was cleaned every day by the staff of the centre and was regularly disinfected. There was medical care.

310. In the autumn of 1997 there was a hunger strike at the Drapetsona detention centre.

311. On 28 November 1997 the applicant asked the Minister of Public Order to allow him to travel to a country other than Syria where he allegedly faced the death penalty.

312. On 2 February 1998 the applicant applied for the order for his expulsion to be lifted, relying on, *inter alia*, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the fact that he had been recognised as a refugee by the UNHCR. He also claimed that his continued detention contravened Article 5 of the Convention and that the expulsion order had been made in breach of national law.

313. In March 1998 there were forty to fifty people detained at the Drapetsona centre.

314. In April 1998 the applicant was transferred to the police headquarters in Alexandras Avenue in Athens. According to the applicant, the conditions were similar to those at Drapetsona, although there was natural light, air in the cells and adequate hot water. The Government described the conditions in Alexandras Avenue as being the same as those at Drapetsona.

315. On 28 April 1998 the UNHCR representative in Athens requested the Ministry of Public Order not to expel the applicant to Syria as long as his case was under review.

316. On 11 May 1998 the Indictments Division of the Piraeus Criminal Court of First Instance, sitting in camera, refused to lift the expulsion order recalling, *inter alia*, that in his application of 25 June 1997 the applicant had

claimed that he was no longer subject to persecution in Syria. The decision of the court did not contain any express ruling on the applicant's claim concerning his detention.

317. On 26 and 28 July 1998 the applicant requested the Ministers of Justice and of Public Order to lift the expulsion order and, in any event, to release him.

318. On 3 December 1998 the applicant was expelled to Syria. The Government claim that they had been informed by Interpol that Syria had not asked for his extradition.

319. The applicant claims that upon his arrival in Syria he was placed in detention.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

320. Article 74 § 1 of the Criminal Code provides as follows:

> "The court may order the expulsion of an alien who has been given a prison sentence under Articles 52 and 53 of the Criminal Code, provided that the country's international obligations are respected. An alien lawfully present in Greece may only be expelled if given a sentence of at least three months' imprisonment. The expulsion takes place immediately after the alien has served his or her sentence or is released from prison. The same applies when the expulsion has been ordered by way of a secondary penalty."

321. Article 105 of the Criminal Code provides for the release of prisoners on licence.

322. Article 106 of the same Code provides that the court may impose on the person released on licence certain obligations concerning, *inter alia*, his place of residence.

323. On 15 January 1981 the public prosecutor at the Court of Cassation opined that, although persons released on licence could not leave the country, a court could order their expulsion under Article 74 of the Criminal Code.

324. Section 27(6) of Law no. 1975/1991 provides that the Minister of Public Order may, in the public interest and if the person to be expelled is

dangerous or might abscond, order his detention until his deportation from Greece becomes feasible.

325. Section 27(7) of Law no. 1975/1991 provides that the details concerning the execution of deportation orders issued in accordance with the provisions of that Law, as well as those ordered by the criminal courts in accordance with Article 74 of the Criminal Code, will be fixed by a common decision of the Ministers for Foreign Affairs, of Justice and of Public Order.

326. Decision no. 4803/13/7A of 18-26 June 1992 of the Ministers for Foreign Affairs, of Justice and of Public Order makes a number of provisions concerning the expulsion of aliens by administrative order. According to section 6 of the decision, "aliens subject to expulsion are detained in police detention centres or other appropriate places determined by the Minister of Public Order". On 1 April 1993 the deputy public prosecutor at the Court of Cassation opined that decision no. 4803/13/7A of 18-26 June 1992 applied by analogy in cases of expulsion ordered by the courts.

327. On 29 November 1994 the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) published a report following its visit to Greece in March 1993, which contains the following findings and recommendations concerning the Athens police headquarters in Alexandras Avenue:

> "54. The principal detention facilities at the Athens Police Headquarters were situated on the 7th floor of the Headquarters building. They consisted of 20 cells divided into two sections. The cells measured just over 12 m^2, and were equipped with fixed benches for rest/sleeping purposes; the lighting was adequate, as would be the ventilation in the absence of overcrowding. In principle, the cellular accommodation could be considered as acceptable for persons obliged to remain in police custody for a relatively short period, on condition that the premises are kept clean and those obliged to spend the night in custody are provided with mattresses and blankets.
>
> 55. However, the delegation found that in addition to criminal suspects (who might stay for a maximum of some four to six days ...), the Headquarters were being used to accommodate for lengthy periods persons held under the Aliens legislation. Many of these persons met by the delegation had been held in the Headquarters' detention facilities for periods in excess of a month, and a few had been there for over three months. Such a situation is not acceptable. The physical surroundings and the regime

are quite unsuitable for such lengthy stays. There is not even the possibility of access to the open air: out of the cell "exercise" is taken in a corridor adjacent to the cells.

56. There were between 50 to 60 detained persons in the Headquarters at the time of the delegation's visit, some 60% of whom were being held under the Aliens legislation. However, it was clear that shortly before the delegation's visit, the number of persons accommodated had been much higher. At least 50 persons had been transferred a few days earlier from the Headquarters to a new holding centre for aliens situated close to the airport ...

For the most part, the detainees were being held two or three to a cell, though a cell reserved for women was accommodating five detainees. The delegation was told by persons detained that in the very recent past, ten or more persons had been held per cell. Given the cells' dimensions, such occupancy levels would be grossly excessive.

57. Police officers told the delegation that one set of cells was reserved for criminal suspects, and the other for persons held under the Aliens legislation; however, it was observed that, in practice, the separation between these two very different types of detained persons was not assured.

Further, some persons detained under the Aliens legislation stated that they had received no information about the procedure applicable to them (at least not in a language they understood). On the other hand, such detainees did have access to a telephone.

58. Persons detained had blankets at their disposal (though the delegation heard allegations that they had only been made available the day before the delegation's first visit), but not mattresses.

Toilet and shower facilities were situated alongside the cells, and no complaints were heard about access to those facilities; however, detainees did complain that they had not been provided with towels or soap. The state of cleanliness and overall state of repair of the toilets/shower facilities was appalling, although an attempt to improve the situation was made between the delegation's different visits.

59. As regards the detention facilities on the 7th floor of Athens Police Headquarters, the CPT wishes to make the following recommendations:

– that no-one be held in these facilities for longer than is absolutely necessary;

– that there be a maximum occupancy level of four persons per cell (with a possible exception as regards persons only staying a few hours in custody);

– that persons detained overnight be provided with both blankets and mattresses;

– that the toilet/shower facilities be renovated in a hygienic condition, and detained persons provided with the wherewithal to keep themselves clean;

– that means be sought of enabling persons detained for more than 24 hours to be offered outdoor exercise on a daily basis;

– that persons detained under the Aliens legislation be strictly separated from criminal suspects;

– than an information leaflet be given to persons detained under the Aliens legislation explaining the procedure applicable to them and their related rights; this leaflet to be available in the languages most commonly spoken by such persons and, if necessary, the services of an interpreter provided."

328. In May 1997 and in October 1999 the CPT carried out two more visits to the Alexandras police headquarters and the Drapetsona detention centre. The reports following these visits have not yet been made public.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

329. The applicant complained about his conditions of detention, whilst awaiting his expulsion, in both Drapetsona and Alexandras. He relied on Article 3 of the Convention, which reads as follows:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

330. The Government argued that the conditions of detention of the applicant did not amount to inhuman or degrading treatment contrary to Article 3 because the required level of severity was not reached. The seventeen-month detention was due to the applicant's various efforts to stop his expulsion.

331. The Court recalls that, according to the Convention organs' case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, p. 65, § 162). The same holds true in so far as degrading treatment is concerned (see *Costello-Roberts v. the United Kingdom*, judgment of 25 March 1993, Series A no. 247-C, p. 59, § 30). The assessment of this minimum level of severity is relative; it

depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see *Ireland v. the United Kingdom* and *Costello-Roberts*, both cited above, loc. cit.).

332. In the present case the Court notes that the applicant was first held for several months at the Drapetsona police station, which is a detention centre for persons held under aliens legislation. He alleges, *inter alia*, that he was confined in an overcrowded and dirty cell with insufficient sanitary and sleeping facilities, scarce hot water, no fresh air or natural daylight and no yard in which to exercise. It was even impossible for him to read a book because his cell was so overcrowded. In April 1998 he was transferred to the police headquarters in Alexandras Avenue, where conditions were similar to those at Drapetsona and where he was detained until 3 December 1998, the date of his expulsion to Syria.

The Court observes that the Government did not deny the applicant's allegations concerning overcrowding and a lack of beds or bedding.

333. The Court considers that conditions of detention may sometimes amount to inhuman or degrading treatment. In the "Greek case" (applications nos. 3321/67, 3322/67, 3323/67 and 3344/67, Commission's report of 5 November 1969, Yearbook 12) the Commission reached this conclusion regarding overcrowding and inadequate facilities for heating, sanitation, sleeping arrangements, food, recreation and contact with the outside world. When assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as of specific allegations made by the applicant. In the present case, although the Court has not conducted an on-site visit, it notes that the applicant's allegations are corroborated by the conclusions of the CPT report of 29 November 1994 regarding the police headquarters in Alexandras Avenue. In its report the CPT stressed that the cellular accommodation and detention regime in that place were quite unsuitable for a period in excess of a few days, the occupancy levels being grossly excessive and the sanitary facilities appalling. Although the CPT had not visited the Drapetsona detention centre at that time, the Court notes that the Government had described the conditions in Alexandras as being the same as at Drapetsona, and the

applicant himself conceded that the former were slightly better with natural light, air in the cells and adequate hot water.

334. Furthermore, the Court does not lose sight of the fact that in 1997 the CPT visited both the Alexandras police headquarters and the Drapetsona detention centre and felt it necessary to renew its visit to both places in 1999. The applicant was detained in the interim, from July 1997 to December 1998.

335. In the light of the above, the Court considers that the conditions of detention of the applicant at the Alexandras police headquarters and the Drapetsona detention centre, in particular the serious overcrowding and absence of sleeping facilities, combined with the inordinate length of the period during which he was detained in such conditions, amounted to degrading treatment contrary to Article 3.

336. Accordingly, there has been a violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

337. The applicant also complained under Article 5 of the Convention about the lawfulness and length of his detention and the lack of remedies under domestic law in this connection. Article 5 of the Convention provides as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
>
> ...
>
> 4. 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.
>
> ..."

338. The Government submitted that the applicant was detained pursuant to a court decision ordering his expulsion. It transpired from this decision that the applicant was considered a danger to public order and safety, otherwise he would not have been expelled. Moreover, the detention had a basis in domestic law: Article 74 of the Criminal Code and section 27(7) of Law no. 1975/1991, in conjunction with section 6 of Ministerial Decision no. 4803/13/7A of 18-26 June 1992. The seventeen-month detention was due to the applicant's various efforts to stop his expulsion.

339. The Government further submitted that the judicial control of the lawfulness of the applicant's detention was incorporated in the decision ordering his expulsion. In any event, on 11 May 1998 the Piraeus court reviewed the question of the applicant's expulsion and, by implicit extension, that of his detention.

340. The applicant submitted that, in the absence of any statutory provisions, an opinion of the public prosecutor at the Court of Cassation could not render his detention lawful. Moreover, he did not have any remedies to challenge the lawfulness of his lengthy detention; his requests to the Ministers of Justice and of Public Order, whereby he requested them to lift the expulsion order and release him, did not constitute judicial remedies and were all rejected or remained unanswered. In fact, as his detention was ordered neither by an administrative decision nor by a court judgment, no remedy under domestic law was available to him to challenge its lawfulness.

341. The Court recalls that it is not in dispute that the applicant was detained "with a view to deportation" within the meaning of Article 5 § 1 (f). However, it falls to the Court to examine whether the applicant's detention was "lawful" for the purposes of Article 5 § 1 (f), with particular reference to the safeguards provided by the national system. Where the "lawfulness" of detention is in issue, including whether "a procedure prescribed by law" has been followed, the Convention refers essentially to the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from

arbitrariness (see *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1864, § 118).

342. In this connection the Court recalls that in laying down that any deprivation of liberty must be effected "in accordance with a procedure prescribed by law", Article 5 § 1 primarily requires that any arrest or detention have a legal basis in domestic law. However, these words do not merely refer back to domestic law; they also relate to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all Articles of the Convention. Quality in this sense implies that where a national law authorises deprivation of liberty, it must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness (see *Amuur v. France*, judgment of 25 June 1996, *Reports* 1996-III, pp. 850-51, § 50).

343. The Court notes that section 27(6) of Law no. 1975/1991, which applies to the expulsion of aliens by administrative order, provides for the detention of an alien on condition that the execution of an administrative order for expulsion made by the Minister of Public Order is pending, and that the alien is considered to be a danger to public order or that he might abscond.

In the present case the expulsion of the applicant was ordered by a court and not by an administrative decision. Moreover, the applicant was not considered a danger to public order. The Indictments Division, which ordered his release from prison in July 1997, held that it transpired from the applicant's conduct during detention that he was not going to commit any further offences when released and that it was not necessary to prolong his detention.

344. The Court further notes that on 1 April 1993 the deputy public prosecutor at the Court of Cassation opined that decision no. 4803/13/7A of 18-26 June 1992 applied by analogy in cases of expulsion ordered by the courts. The Court does not consider that the opinion of a senior public prosecutor – concerning the applicability by analogy of a ministerial decision on the detention of persons facing administrative expulsion – constituted a "law" of sufficient "quality" within the meaning of the Court's case-law.

345. In these circumstances, the Court finds that there has been a breach of Article 5 § 1 of the Convention in the present case.

346. Having found that the detention of the applicant did not in any event comply with the requirements of Article 5 § 1, the Court does not find it necessary to examine separately whether that provision was also violated by reason of the length of the applicant's detention.

347. Examining the applicant's complaint from the viewpoint of Article 5 § 4 of the Convention, the Government argued that the Article 5 § 4 review was incorporated in the court decisions ordering the applicant's expulsion (16 July 1997) and refusing to revoke it (11 May 1998).

348. The Court recalls that the notion of "lawfulness" under paragraph 4 of Article 5 has the same meaning as under paragraph 1, so that the detained person is entitled to a review of his detention in the light not only of the requirements of domestic law but also of those in the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 § 1. Article 5 § 4 does not guarantee a right to a judicial review of such breadth as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the "lawful" detention of a person according to Article 5 § 1 (see *Chahal*, cited above, pp. 1865-66, § 127).

349. The Court notes that the requests of the applicant of 28 November 1997 and 26 July 1998 to the Ministers of Justice and of Public Order to release him cannot be considered effective remedies whereby the applicant could challenge the lawfulness of his detention. By submitting them, the applicant appealed to the discretionary leniency of these ministers, who either rejected them or left them unanswered. Moreover, in its decision of 11 May 1998, the Indictments Division of the Piraeus Criminal Court of First Instance, sitting in camera, failed to rule on the applicant's claim concerning his detention.

350. It follows that the domestic legal system did not afford the applicant an opportunity to have the lawfulness of his detention pending expulsion determined by a national court, as required by Article 5 § 4.

351. The Court concludes that there has also been a violation of Article 5 § 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

352. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage and costs

353. The applicant in effect claims a global sum of 18,000,000 drachmas (GRD) for pecuniary and non-pecuniary damage, as well as for costs and expenses.

354. The Government consider that amount excessive.

355. The Court notes that the applicant has not sought to substantiate his claim of pecuniary damage. Accordingly, no such damage has been established and the claim fails under this head.

356. As regards the claim for non-pecuniary damage, the Court recalls the number and seriousness of the violations it has found in the present case, for which the applicant should be awarded compensation. The applicant has also incurred costs relating to his representation before the Commission and the Court. Ruling on an equitable basis, as provided for in Article 41 of the Convention, the Court decides to award a total of GRD 5,000,000 for non-pecuniary damage and costs, plus any value-added tax that may be chargeable.

B. Default interest

357. According to the information available to the Court, the statutory rate of interest applicable in Greece at the date of adoption of the present judgment is 6% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

1. *Holds* that there has been a violation of Article 3 of the Convention;

2. *Holds* that there has been a violation of Article 5 § 1 of the Convention;

3. *Holds* that there has been a violation of Article 5 § 4 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, GRD 5,000,000 (five million drachmas) in respect of non-pecuniary damage and costs, plus any value-added tax that may be chargeable;
   (b) that simple interest at an annual rate of 6% shall be payable from the expiry of the above-mentioned three months until settlement;

5. *Dismisses* the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on 6 March 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

SECOND SECTION

CASE OF PEERS v. GREECE

(*Application no. 28524/95*)

- **In the case of Peers v. Greece,**

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Mr A.B. BAKA, *President*,
Mr G. BONELLO,
Mrs V. STRÁŽNICKÁ,
Mr P. LORENZEN,
Mr M. FISCHBACH,
Mr E. LEVITS, *judges*,
Mrs C.D. SPINELLIS, ad hoc *judge*,
and Mr E. FRIBERGH, *Section Registrar*,

Having deliberated in private on 5 October 2000 and 5 April 2001,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

358. The case was referred to the Court, in accordance with the provisions applicable prior to the entry into force of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), by the European Commission of Human Rights ("the Commission") on 11 September 1999 (Article 5 § 4 of Protocol No. 11 and former Articles 47 and 48 of the Convention).

359. The case originated in an application (no. 28524/95) against the Hellenic Republic lodged with the Commission under former Article 25 of the Convention by a United Kingdom national, Mr Donald Peers ("the applicant"), on 9 October 1994.

360. The applicant alleged, in particular, that the conditions of his detention at Koridallos Prison amounted to inhuman and degrading treatment. He also claimed that the failure of the prison authorities to provide for a special regime for remand prisoners amounted to a violation of the presumption of innocence. He further alleged that letters sent to him by the Commission's Secretariat were opened by the prison administration.

361. The application was declared partly admissible by the Commission on 21 May 1998. On 22 June 1998 the Commission carried out a fact-finding visit at Koridallos Prison. In its report of 4 June 1999 (former Article 31 of the Convention) [*Note by the Registry.* The report is obtainable from the Registry], it expressed the opinion, by twenty-six votes to one, that there had been a violation of Article 3 as a result of the conditions of the applicant's detention in the segregation unit of the Delta wing at Koridallos

Prison. It also expressed the unanimous opinion that there had been no violation of Article 6 § 2 and that there had been a violation of Article 8.

362. Before the Court the applicant, who had been granted legal aid, was represented by his counsel. The Greek Government ("the Government") were represented by their Agent, Mr E. Volanis, President of the State Legal Council.

363. On 20 September 1999 a panel of the Grand Chamber determined that the case should be decided by a Chamber constituted within one of the Sections of the Court (Rule 100 § 1 of the Rules of Court). Subsequently the application was allocated to the Second Section (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1. Mr C.L. Rozakis, the judge elected in respect of Greece, who had taken part in the Commission's examination of the case, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mrs C.D. Spinellis to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

364. A hearing took place in public in the Human Rights Building, Strasbourg, on 5 October 2000 (Rule 59 § 2).

There appeared before the Court:

(a) *for the Government*
Mr M. APESSOS, Senior Adviser, State Legal Council, *Agent*,
Mr I. BAKOPOULOS, Adviser, State Legal Council, *Counsel*;

(b) *for the applicant*
Mrs R. SPARTALI-ARETAKI, Lawyer, *Counsel*,
Mr A. ARETAKIS, Lawyer, *Adviser*.

The Court heard addresses by Mrs Spartali-Aretaki and Mr Apessos.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Outline of events

365. On 19 August 1994 the applicant, who had been treated for heroin addiction in the United Kingdom, was arrested at Athens Airport for drug offences. He was transferred to the central police headquarters of Athens in Alexandras Avenue, where he was detained until 24 August 1994.

366. On 24 August 1994 the applicant was transferred to Koridallos Prison and was admitted in a comatose state to the prisoners' psychiatric hospital.

367. On 30 August 1994 he was discharged from the psychiatric hospital. The certificate of discharge described him as a drug user. He was immediately taken to Koridallos Prison proper.

368. The applicant was placed in the segregation unit of the "Delta" wing of the prison. Subsequently, he was transferred to the "Alpha" wing.

369. On 28 July 1995 the applicant was found guilty of drug offences by the three-member Court of Appeal (Τριμελές Εφετείο) of Athens, which, due to the nature of the charges, sat as a first-instance court. The court acknowledged that the applicant was a drug addict and sentenced him to thirteen years' imprisonment and a fine of 5,000,000 drachmas. The applicant appealed.

370. In November 1995 there was a riot in Koridallos Prison.

371. On 30 August 1996 Ms Vasiliki Fragathula, a social worker of Koridallos Prison, reported to the prison governor, *inter alia*, the following facts. The applicant, after his conviction, shared a cell with one other convict. Letters sent by the applicant were not opened. Letters sent to the applicant by the European Commission of Human Rights were opened by a prison officer in front of the applicant. Foreigners who did not speak Greek could not participate in the vocational training courses organised in Koridallos Prison. A programme for learning Greek had once been available in the prison library but was destroyed during the riot. However, it was the intention of the welfare office to replace it in due course. According to the Penitentiary Code, remand prisoners did not have the right to work. However, the applicant, after his conviction, started working as a cleaner. Almost immediately after his arrival at Koridallos Prison the applicant started being treated by Dr P., a psychiatrist. He continued to participate in the awareness and self-help therapeutic programmes for the foreign prisoners of two organisations, Drug Addicts Anonymous and Over 18. He was also individually treated by a psychologist who was a member of Drug Addicts Anonymous. After the applicant's arrival at Koridallos Prison, his case was followed by the prison's welfare office. It was true that no distinctions were made between remand prisoners and convicts.

372. In September 1996 the applicant was transferred from Koridallos to Tirintha Prison. According to a letter by the governor of Tirintha Prison dated 20 November 1996, this was done "to ensure better conditions of detention for the applicant". From Tirintha Prison the applicant was transferred at his request to Agias Prison in Canea.

373. In November 1997 a court of appeal upheld the applicant's conviction but reduced his sentence to nine years' imprisonment and ordered his expulsion from Greece.

374. On 2 June 1998 the applicant applied for release on probation. On 10 June 1998 a Chamber of the Canea First-Instance Criminal Court granted his application. The applicant was released from prison and was transferred to the Canea deportation centre. From there he was taken to Piraeus and expelled from Greece immediately after his appearance before the Commission's delegates at Koridallos Prison on 22 June 1998.

B. Oral evidence before the Commission's delegates

375. The evidence of the applicant and the three witnesses who appeared before the delegates at Koridallos Prison on 22 June 1998 may be summarised as follows.

1. The applicant

(a) Conditions of detention in Koridallos prisoners' psychiatric hospital

376. The applicant was admitted to Koridallos prisoners' psychiatric hospital on 24 August 1994. Initially, he was detained in a single cell for three days. He slept all the time due to medication. It was another prisoner who told him how long he had been there. When he woke up, he was moved to a cell with eight to ten "very disturbed" persons. They slept on mattresses on the floor. It was hot, but the windows were open. Occasionally, the door would open and they would be allowed out to go to the toilet or have a shower or walk in the yard. Meals were served in plastic containers on the floor. He stayed for four to five days and nights in the second cell.

(b) Conditions of detention in the segregation unit of the Delta wing

377. Subsequently the applicant was taken to the prison proper. He asked to be kept somewhere quiet and he was immediately placed in the segregation unit of the Delta wing. At first, the applicant did not know that he was in a segregation unit.

378. The cell was very small and high. It had two doors and there were two beds. One could hardly walk between them. During the entire period of his stay in the segregation unit he was detained with another person, Mr Petros Papadimitriou. There was only one window in the roof which did not open and which was so dirty that no light could pass through. There was just one electric bulb which did not provide sufficient light for reading. There were no other windows apart from a peephole in one of the two doors, which could be opened. There was an Asian-type toilet in the cell. There was no screen or curtain separating the toilet from the rest of the cell. Sometimes the toilet would flush and sometimes not. There was only one shower in the unit, which contained nine cells with up to three prisoners in each. There was no sink in the cell.

379. It was August when the applicant was placed in the segregation unit. It was very hot. During the day the door of his cell would be open. The segregation unit was unsupervised and "anything could happen". However, the applicant had not been ill-treated by any particular person. There were two small high-walled yards, "ten steps forward, ten steps back". At night the door of his cell would be locked. As there was no ventilation the cell became so hot that the applicant would wake up drenched. In order to have water in his cell, the applicant would fill a bottle from the tap near the shower and sometimes from the toilet flush.

380. After maybe two weeks in the segregation unit, the applicant was offered the possibility of going to the ordinary cells in the Delta wing. However, he had to turn this offer down because the Delta wing was for drug addicts and "he wanted to stay away from drugs". There were no drug addicts in the segregation unit.

(c) Conditions of detention in the Alpha wing

381. The applicant did not remember exactly when he left the segregation unit – perhaps two or two and a half months later, at the end of October or the beginning of November. He was moved to the Alpha wing where mainly economic offenders were kept. Mr Papadimitriou was moved with him and they continued to share the same cell.

382. Alpha was the best wing in the prison. However, it was still dirty and overcrowded. There were three beds in each cell: two bunk beds, one on top of the other, and a third bed. Usually, there were three prisoners in each cell. There was a sink and an Asian-type toilet. There was a plastic screen on one side of the toilet, part of which was broken. Although one could not see the inmate using the toilet, one could smell and hear him. The cell had a window. Sometimes there was a table and a chair in the cell.

383. The doors of the cells were locked between 1 p.m. and 3 p.m. and between 8.30 p.m. and 8 a.m. This schedule differed by one hour between summer and winter. The cells were very noisy due to fellow inmates' television and radio sets. The prisoners had no control over the light switches. In winter, the cells were very cold as they were heated for only two hours a day. Sometimes the applicant had to stay in bed under his blankets to keep warm. After the riot, several windows were broken and it was freezing in the prison. In the summer, the cells were unbearably hot, as there was no through-draught when the doors were shut. Sometimes the applicant had to wait until three or four o'clock in the morning before he could fall asleep. When the door of the cell was open, the situation improved but there was no ventilation in the wing in general. Occasionally, there were problems with the plumbing and the toilet would not always flush.

384. At one point, when the applicant was sharing his cell with only one other prisoner, three Chinese inmates were brought in for one night. They slept on two mattresses on the floor.

(d) Complaints concerning the entire period of the applicant's detention in Koridallos Prison

385. The only thing the applicant was ever given were blankets. He was not given any clothes, sheets, pillows, toiletries (including soap) or toilet paper. He had to buy toiletries and toilet paper from the canteen. Occasionally he did not have any money and had to ask other prisoners. The social services and certain charitable organisations would also help. However, there were times when he was left with no toilet paper, in particular when he had to use the toilet often, due to problems with his stomach. On these occasions, in order to keep clean, he had to use water from the Asian-type toilet. Despite all that, he managed "to keep himself clean". Eventually, he managed to get hold of sheets and a pillow, which he inherited from other prisoners. However, it took him a long time, perhaps a year.

386. There were ten showers – described by the applicant as pipes – in the basement for the 250 to 360 prisoners held in the wing. There was hot water for two hours a day or perhaps longer. There were no curtains and no windows. After the riot there was no hot water. In winter, the showers were used by the cats as toilets.

387. He had to wash his clothes himself and this was made difficult because of the shortage of hot water. He would dry his clothes by hanging them on the bars of his cell window.

388. Food was served in such a manner that the cats could play around with it. Before entering prison he had been a vegetarian but he had to change his eating habits as there were no vegetarian menus in Koridallos.

389. The applicant "lived in a vacuum". He could not communicate with the prison staff, who did not speak English. The social worker knew English. In order to see her, he had to make a request. He would see the social worker three times a week, usually for between two and five minutes. Ten minutes was the maximum.

390. There were no vocational activities, courses or library.

391. At first, the applicant was allowed only one telephone call a week, in the evening. However, the social worker subsequently arranged for him to be able to use the telephone in the morning.

2. Spiros Athanassopoulos

392. The witness was the governor of Koridallos Prison between 14 December 1994 and 15 September 1997.

393. The witness did not know of any improvements that had been made in the Alpha wing since the applicant's transfer from Koridallos Prison.

There had been some improvements made to the segregation unit. Now, there were screens separating the toilets from the rest of the cell in the segregation unit, but he did not want to contradict the applicant in this regard. It was possible that there had been no screen in his cell. There were sinks in the cells of the segregation unit.

394. It was as hot in the segregation unit as in the rest of the prison. In summer it could be hot. During the winter, there was central heating.

395. The prison administration provided inmates with pillows. However, it was possible that the applicant did not receive any because at times there were shortages. There was a problem with sheets, especially for foreign prisoners. The latter could get sheets from the welfare office, which had a stock built up from donations or acquisitions through grants from the Ministry of Justice. The prison administration did not provide prisoners with toiletries. Such items were provided by charitable organisations via the welfare office. Toilet paper could be obtained from the welfare office or another prisoner or the chief warden. It was more difficult to find sheets than toilet paper.

396. Food was not served in an unhygienic manner. While it was being transported, the pan was 60 to 70 cm from the floor, although the witness was not 100% sure about that.

397. It was possible that the applicant had slept in the cell with four other prisoners. Usually, each prisoner had his own bed. It was very rare that he did not. However, accommodating four prisoners in a cell had been known to happen.

398. There was no problem with the showers. However, those who had to wash their clothes in prison were faced with problems.

399. Prisoners communicated with the social workers whom they could see upon request either on the same day or the day after. Those who did not speak Greek could face problems. However, in the witness's experience, they managed to adapt. There was always somebody, a member of staff or another prisoner, who could speak English.

400. All announcements and notices were in Greek. Foreign prisoners were informed of their rights orally upon arrival. However, this was not done systematically. An information pamphlet in English entitled "Everyday life in the prison establishment" was distributed to newcomers in 1996 but the witness did not remember whether this was before or after the applicant had left Koridallos Prison.

3. Vasiliki Fragathula

401. The witness was the social worker of the Delta wing of Koridallos Prison. She met the applicant there and followed his case throughout his stay in prison.

402. On his arrival in Koridallos Prison proper (after his detention in the prisoners' psychiatric hospital), the applicant was placed in the segregation

unit. This had been decided by the prison governor and the chief warden as a result of his condition – he had withdrawal symptoms. The applicant did not have advance knowledge of the conditions in the segregation unit. Shortly afterwards, the applicant complained of the conditions there and the witness arranged for him to meet the governor, Mr Costaras. The latter gave instructions for the applicant to be moved to another wing. However, this would have been the Delta wing, which was for drug addicts. The applicant was aware of this. He had found out through his contacts with other inmates. He refused to go there. He considered that staying in the segregation unit would help him stay away from drugs. The witness would not confirm that there were drugs in the Delta wing. However, she accepted that "the Delta wing was problematic for someone who wanted to free himself from drugs". In her view, the segregation unit was not appropriate for prisoners. However, the applicant, who was suffering from withdrawal symptoms, could not be moved to the Alpha wing immediately. This wing was reserved for persons convicted of economic offences and other prisoners whose conduct had been good. So the applicant had a choice between the segregation unit and the Delta wing. The witness did not advise the applicant to choose one or the other because she did not want to influence what she regarded as a purely personal choice. The applicant chose to remain in the segregation unit. He was subsequently moved to the Alpha wing, together with all the inmates of the segregation unit, when it was decided to accommodate in the segregation unit prisoners who were serving disciplinary terms.

403. The witness would communicate with the applicant in English. The applicant did not speak Greek and this exacerbated his adaptation problems at the beginning, since most of the prison staff did not speak English. However, several of the Greek prisoners spoke some elementary English. Gradually, the applicant managed, through his personal efforts, to establish a rudimentary level of communication with the prison staff in Greek. There were no information notices in English. The pamphlet to which Mr Athanassopoulos referred was distributed in Koridallos in 1997.

404. The welfare office had a storage room in the prison with toilet paper, razors, detergent, soap, etc. These were funded by the Ministry of Justice and charitable organisations. Destitute prisoners could get supplies from this storage room once a week. However, during the summer there were often shortages. The welfare office did not provide prisoners with sheets and blankets. These were provided to newcomers by the prison administration, but it was impossible to replace them. The witness did not know whether the applicant had received any sheets. The applicant would receive clothes, toiletries and toilet paper from the welfare office in so far as this was possible, given the restrictions with which it was faced. In the witness's view, given the extended period of the applicant's detention in Koridallos, it was possible that he had been confronted with shortages of

toiletries and toilet paper. The applicant had also been given assistance by charitable organisations with which the witness had put him in touch.

4. Petros Papadimitriou

405. The witness was an inmate of Koridallos Prison. He spent one year in the same cell as the applicant, four months in the segregation unit of the Delta wing and eight months in the Alpha wing. The witness was in the segregation unit of his own free will because he was a new prisoner and wanted some peace and quiet. They were both moved to the Alpha wing, probably when the prison administration decided to accommodate in the segregation unit prisoners who were serving disciplinary terms.

406. The segregation unit of the Delta wing contained nine cells, each occupied by two or three prisoners. While in the segregation unit, the witness shared his cell with the applicant and nobody else. There were two beds with mattresses and blankets. They were not given sheets or pillows. The toilet had no curtain.

407. While he was in the segregation unit the applicant would often complain. As it was very hot and he had respiratory problems, he would wake up at two o'clock in the morning coughing. He would bang on the door because he could not breathe.

408. There were usually three prisoners in the cells in the Alpha wing. The witness could not remember more than three prisoners in his cell. He remembered one Chinese inmate sleeping in their cell but not three. He did not remember anybody sleeping on the floor. The toilet screen was always there and was not broken. The witness kept a cat in the cell.

409. As regards the conditions of detention in Koridallos Prison in general the witness stated the following. The food was bad and risked being contaminated by cats. It was easy to take a shower and one did not have to queue. However, there was not enough water and no curtains. He spoke to the applicant in English and sometimes in Greek. He would also act as a mediator for him. The prison administration would only provide soap. The welfare office would sometimes hand out certain things, but it was difficult. The witness would buy toiletries and toilet paper himself. The applicant would buy them whenever he had money. He would also ask the witness for toothpaste and toilet paper, which the witness would give him. Sometimes it was possible to find a pillow.

C. Inspection of Koridallos Prison

410. The delegates of the Commission visited the segregation unit of the Delta wing where the applicant had been detained in cell no. 9. The description given by the applicant was on the whole accurate. All the cells were approximately the same size. Cell no. 9 measured 2.27 by 3 m. Given that there was practically no window, the cell was claustrophobic. At the

time of the delegates' visit, the prisoners were locked in their cells. Cells where two persons were held were very cramped. Prisoners were virtually confined to their beds. There was no screen separating the toilet from the rest of the cell. The toilet was adjacent to the beds. Some prisoners had put up curtains themselves. The entire unit was very hot. Due to the lack of ventilation, the cells were unbearably hot, "like ovens". The air was stale and a stench came out of the cells. The cells were all in a state of disrepair and they were very dirty. Some prisoners complained about rats in the cells. There was no sink in cell no. 9. There was a tap. According to the applicant, who accompanied the delegates during their inspection, the tap had recently been installed. On the doors of some cells there were signs saying "WC". When asked, the prisoners said that the signs would be put up during the day when the cell doors were not locked to ensure that the cell-mate did not enter the cell while the toilet was being used. The applicant's cell could be compared to a medieval oubliette. The general atmosphere was repulsive.

411. The delegates also visited a cell on the third floor of the Alpha wing where the applicant had been detained. According to the chief warden of Koridallos Prison, who accompanied the delegates during their inspection, Mr Papadimitriou was still detained in this cell. The cell measured approximately 4.5 by 2.5 m. The description by the applicant was again accurate, except that the toilet screen was not in disrepair. The cell had windows of an adequate size.

412. The delegates saw the shower area in the basement. It was reasonably clean, although the applicant claimed that during his time it had been much dirtier. Most shower cubicles had curtains. However, some did not.

413. In the prison storage room, there were small bags containing toilet paper and toiletries that were given to new prisoners. However, the delegates were told that these bags had arrived only very recently. There were no sheets. The inmate in charge claimed that they had all been distributed or that they were at the laundry. There was a cupboard which contained mainly soap.

414. The welfare office storage room was closed at the time. There was a sign indicating that each wing was served once a week. It was opened at the delegates' request. It contained a lot of used clothes. The delegates were shown toilet paper and one sheet. There was a book showing that prisoners came to the room and were provided with various items, such as toiletries, shoes, etc.

415. The kitchen was quite spacious and clean. The trolleys on which food was transported, however, did not correspond to Mr Athanassopoulos's description. They were rather low.

416. In one corner of a corridor outside the kitchen a cat had defecated. The delegates also had the opportunity of seeing the inmates queuing to use the telephones. The queues were rather long.

417. According to the chief warden, no prisoners' location charts dating from the applicant's detention in Koridallos Prison had been kept. Nor were there books showing the movement of prisoners from one cell to another. The only books that had been kept indicated the last cell in which each prisoner had been kept before leaving Koridallos Prison.

D. Findings of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)

418. On 29 November 1994 the CPT published a report following its visit to Greece in March 1993 [Koridallos Prison was also visited by the CPT in May 1997] which contains the following findings and recommendations concerning Koridallos Prison.

> "...
>
> 91 ... Koridallos Prison for men was built to accommodate 480 prisoners in four separate blocks, each having 120 cells on three floors. On the first day of the delegation's visit, the establishment was holding 1410 prisoners, approximately 800 on remand and the remainder sentenced. The total prison staff complement was 170, of which some 110 were prison officers. Perimeter security was the responsibility of armed police.
>
> ...
>
> 95. In the following paragraphs, the CPT shall make a number of specific recommendations concerning the prison establishments visited by its delegation. However, it wishes to emphasise at the outset that the act of depriving someone of his liberty brings with it the responsibility for the State to detain him under conditions which respect the inherent dignity of the human person. The facts found during the course of the CPT's visit demonstrate that as a consequence of the present level of overcrowding in prisons, the Greek authorities are not in a position to fulfil that responsibility *vis-à-vis* many prisoners.
>
> The CPT therefore recommends that a very high priority be given to measures to reduce overcrowding in the Greek prison system.
>
> ...
>
> 105. As already indicated (cf. paragraph 91), at the time of the delegation's visit to the Koridallos Prison for men the number of inmates amounted to almost three times the establishment's official capacity. A standard cell measured 9.5 m^2 and was equipped *inter alia* with a screened Asian-type toilet and a hand-basin. Originally designed for individual occupancy, the cells are just about large enough for two prisoners; with more than two, conditions become very cramped. In practice, only a handful of prisoners had their own cells; the majority of the cells were accommodating two or three prisoners, and a number were accommodating four. The level of overcrowding was somewhat lower in A wing (approximately 300 prisoners) than in B, C and D wings (each of which were accommodating 350 or more inmates).
>
> The prisoner distribution chart indicated that three cells (one in C wing and two in D wing) were holding five prisoners. The delegation visited the relevant cell in C wing,

in which it found five prisoners of Indian origin; they claimed to have been held under such conditions for some six weeks.

106. Inevitably, the high level of overcrowding had extremely negative repercussions upon the conditions of detention: living space was very poor, ventilation inadequate, and cell cleanliness and hygiene wanting. In many cells prisoners were to all intents and purposes confined to their beds, there being no room for other furniture. In some of the most over crowded cells, there were more prisoners than beds. Further, the toilet and washing facilities in certain cells were in need of repair.

Despite the overcrowding, prisoners apparently did have ready access to the shower facilities located in the basement of each wing. However, some of the shower cubicles were in a poor state of repair and decoration.

107. The negative aspects of the overcrowding were mitigated to some extent by reasonable out-of-cell time. Between 8.30 to 11.30 and 14.30 to sunset, inmates were allowed to circulate freely and associate with other prisoners within their detention wing and its courtyard; the wing courtyards were of a good size. It must be stressed, however, that the free circulation of prisoners in their detention wings could have undesirable effects in the absence of proper control by prison staff; with the manning levels at the time of the delegation's visit (3 to 4 prison staff on duty during the day in a wing accommodating some 350 prisoners), it is difficult to see how such control could be guaranteed (cf. also paragraph 96).

108. Activities in any meaningful sense of the term were scarce. There were only 236 work places (i.e. 1 work place for 6 prisoners), practically all in the area of general services (kitchen, laundry, cleaning, maintenance, stores, etc.); no workshops were in operation. However, a printing and bookbinding vocational training centre, with places for 30 prisoners, was due to open in 1993. The shortage of work places was particularly resented by many sentenced prisoners, as it prevented them from taking advantage of the system of earning remission through work.

No educational classes were available and the prison library was both small and ill-equipped. Further, there was no prison gymnasium and, as far as the delegation could ascertain, no organised sporting activities. However, the exercise yards were sufficiently large for certain games (e.g. volleyball), and arrangements were in hand to provide a separate weight-training area in each of the yards (at the time of the visit, a few prisoners did weight training in the wing basements).

To sum up, the vast majority of prisoners at the Koridallos Prison for men (including a majority of the sentenced prisoners) were offered no work or educational activities, and possibilities for sport were very limited. Most prisoners spent their day walking around their detention wing or courtyard, talking with fellow prisoners, or watching television in their cell. Such a monotonous and purposeless existence is quite inconsistent with the objective of social rehabilitation set out in the Greek Code of basic rules for the treatment of prisoners (cf. paragraph 94).

109. As regards material conditions of detention at the Koridallos Prison for men, the CPT recommends:

– that immediate steps be taken to ensure that no more than three prisoners are held per cell;

– that serious efforts be made to reduce as soon as possible the occupancy rate to two prisoners per cell (Naturally, the long-term objective should be to have one prisoner per cell, save for specific situations when it is not appropriate for a prisoner to be left alone);

– that every prisoner be provided with his own bed and mattress;

– that shower cubicles, toilets and washing facilities be restored to a good state of repair and maintained in a hygienic condition.

As regards out-of-cell activities, the CPT recommends:

– that current efforts to augment the number of work and vocational training places be intensified;

– that a thorough examination of the means of improving the prison's activity programmes in general (including education, sport and recreational activities) be undertaken without delay and that fuller programmes be progressively introduced as overcrowding is brought down.

...

133. The segregation unit at Koridallos Men's Prison consisted of two groups of 10 cells, all of which were apparently used for both disciplinary confinement and other segregation purposes. The cells measured approximately 7 m^2; they were equipped with a bed, but no other furniture (e.g. table or chair). There was adequate ventilation and artificial lighting; however, access to natural light was, at best, mediocre. Each cell possessed an asian toilet, and some cells had a wash basin. The adjacent exercise yards measured approximately 40 m^2. The whole unit required to be – and was being – redecorated.

134. No-one was being confined as a punishment at the time of the delegation's visit. A number of transvestite prisoners had been held in the unit for several months at their own request. Other prisoners were being held in the unit involuntarily, presumably under Rule 93 or 94 of the Code (the absence of a segregation unit register made it difficult to ascertain the precise grounds); certain of them appeared to have psychological or psychiatric problems.

The prisoners were allowed to move freely within the unit and exercise areas during much of the day, and they had TV sets and other personal possessions in their cells (though staff indicated that a prisoner undergoing disciplinary confinement would remain in his cell and would not be allowed personal possessions).

135. The conditions of detention in this segregation unit are on the whole acceptable for prisoners undergoing the disciplinary sanction of confinement in a special cell. However, the CPT considers that it would be desirable for the cells accommodating such prisoners to be fitted with a table and chair, if necessary fixed to the floor.

The CPT also recommends that all prisoners, including those confined to a special cell as a punishment, be allowed at least one hour of exercise in the open air everyday.

136. Conditions of detention in the unit are far less suitable for prisoners subject to segregation for non-disciplinary reasons, in particular if that measure is applied for a lengthy period.

As regards more particularly prisoners who are segregated because of personality disorders and/or for their own protection, the CPT invites the Greek authorities to explore the possibility of creating special units organised along community lines.

The unit is a totally unsuitable place in which to accommodate someone in need of psychiatric care. Neither the material environment nor the staff (ordinary prison officers) are appropriate. The CPT recommends that no such prisoner be placed in the unit. If, exceptionally, prisoners who are emotionally or psychologically disturbed

have to be held temporarily in the segregation unit, they should be kept under close observation.

Further, the CPT recommends:

– that the cells in the unit used to accommodate prisoners segregated for a non-disciplinary reason be equipped in the same way as an ordinary prison cell;

– that the respective regimes applicable, on the one hand, to persons undergoing disciplinary confinement and, on the other hand, to persons held in the segregation unit for other reasons, be expressly laid down."

II. RELEVANT DOMESTIC LAW

419. According to Article 51 §§ 2 and 3 of the Penitentiary Code, a prisoner's correspondence may be controlled if this is required by reasons of security or if there is a risk of commission of especially serious crimes or a need to establish whether such crimes have been committed.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

420. The applicant complained that the conditions of his detention in Koridallos Prison amounted to inhuman and degrading treatment. Before the Court his complaints focus on the conditions in the segregation unit of the Delta wing of the prison. The applicant relied on Article 3 of the Convention, which is worded as follows:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

421. The applicant submitted that he never asked to be placed in the segregation unit. The prison administration decided to put him there on his arrival in Koridallos Prison. One week later, he was given the possibility of going to the Delta wing proper but he did not agree because he wanted to keep away from drugs. The applicant alleged that the conditions in the segregation unit had not improved significantly between his detention there and the delegates' visit. He complained in particular that he had to spend a considerable part of each day confined to his bed in a cell with no ventilation and no window. He further complained that the prison administration did not provide inmates with sheets, pillows, toilet paper and toiletries. Although indigent prisoners like the applicant could address themselves to the prison's welfare office, it was admitted that their needs could not always be met. The fact that he could have obtained toiletries and toilet paper from his co-detainees does not absolve the respondent State

from responsibility under the Convention. The applicant submitted that he ended up sleeping on a blanket with no sheets or pillow during the hottest period of the year. He also complained that he had to use the toilet in the presence of another inmate and be present while the toilet was being used by his cell-mate. The applicant claimed that he felt humiliated and distressed and that the conditions of his detention had had adverse physical and mental effects on him.

422. The Government first submitted that the applicant asked to be detained in the segregation unit. The prison authorities wanted to satisfy his request. However, because there were no cells available, he had to share a cell with another inmate. As a result, the problem with the toilet arose. The applicant could have moved to another part of the prison at any time if he so wished. It appears that the applicant never asked for such a transfer because, in the meantime, he had developed a friendly relationship with his cell-mate, Mr Papadimitriou. The special character of their relationship is also shown by the fact that they continued sharing a cell when they were both moved to the Alpha wing two months after the applicant's arrest.

423. Moreover, the Government disputed that the treatment complained of had attained the minimum level of severity required to fall within the scope of Article 3. They stressed that the conditions of detention complained of in no way denoted contempt or lack of respect for the applicant as a person. On the contrary, the prison authorities tried to alleviate the situation by allowing the applicant extra telephone calls. The applicant himself accepted that he was never left dirty while in the segregation unit. He could take a shower and had frequent contact with the prison psychiatrist. According to the Government, there was no evidence that the conditions of his detention had caused the applicant injury or any physical or mental suffering.

424. The Court recalls that, according to its case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, among other authorities, *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, p. 65, § 162).

425. Furthermore, in considering whether a treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3 (see *Raninen v. Finland*, judgment of 16 December 1997, *Reports of Judgments and Decisions*, 1997-VIII, pp. 2821-22, § 55).

426. As regards the present case, the Court notes in the first place that, contrary to what the Government argue, the applicant was not placed in the segregation unit because he had so wanted himself. According to the testimony of Ms Fragathula, this was a measure decided by the prison governor and the chief warden and related to the applicant's medical condition, more specifically to the fact that he had been suffering from withdrawal symptoms. According to the same witness, once the applicant became acquainted with the conditions of detention in the segregation unit, he asked for a transfer. He was then offered the possibility of going to the Delta wing, where drug addicts were being detained. Although Ms Fragathula would not expressly admit that there were drugs in the Delta wing, she stated that the "wing was problematic for someone who wanted to free himself from drugs". The Court considers that this implies that there were drugs illegally circulating in the Delta wing, a cause for serious concern. In these circumstances, the Court considers that the applicant cannot be blamed for refusing to be moved from the segregation unit. The Court, therefore, considers that the applicant did not in any way consent to being detained in the segregation unit of the Delta wing.

427. Concerning the conditions of detention in the segregation unit, the Court has had regard to the Commission's delegates' findings and especially their findings concerning the size, lighting and ventilation of the applicant's cell, that is, elements which would not have changed between the time of the applicant's detention there and the delegates' visit. As regards ventilation, the Court notes that the delegates' findings do not correspond fully with those of the CPT, which visited Koridallos Prison in 1993 and submitted its report in 1994. However, the CPT's inspection took place in March, whereas the delegates went to Koridallos Prison in June, a period of the year when the climatic conditions are closer to those of the period of which the applicant complains. Furthermore, the Court takes into account the fact that the delegates investigated the applicant's complaints in depth, giving special attention, during their inspection, to the conditions in the very place where the applicant had been detained. In these circumstances, the Court considers that the findings of the Commission's delegates are reliable.

428. The Court notes that the applicant accepts that the cell door was open during the day, when he could circulate freely in the segregation unit. Although the unit and its exercise yard were small, the limited possibility of movement enjoyed by the applicant must have given him some form of relief.

429. Nevertheless, the Court recalls that the applicant had to spend at least part of the evening and the entire night in his cell. Although the cell was designed for one person, the applicant had to share it with another inmate. This is one aspect in which the applicant's situation differed from the situation reviewed by the CPT in its 1994 report. Sharing the cell with

another inmate meant that, for the best part of the period when the cell door was locked, the applicant was confined to his bed. Moreover, there was no ventilation in the cell, there being no opening other than a peephole in the door. The Court also notes that, during their visit to Koridallos, the delegates found that the cells in the segregation unit were exceedingly hot, although it was only June, a month when temperatures do not normally reach their peak in Greece. It is true that the delegates' visit took place in the afternoon, when the applicant would not normally be locked up in his cell. However, the Court recalls that the applicant was placed in the segregation unit during a period of the year when temperatures have the tendency to rise considerably in Greece, even in the evening and often at night. This was confirmed by Mr Papadimitriou, an inmate who shared the cell with the applicant and who testified that the latter was significantly physically affected by the heat and the lack of ventilation in the cell.

430. The Court also recalls that in the evening and at night when the cell door was locked the applicant had to use the Asian-type toilet in his cell. The toilet was not separated from the rest of the cell by a screen and the applicant was not the cell's only occupant.

431. In the light of the foregoing, the Court considers that in the present case there is no evidence that there was a positive intention of humiliating or debasing the applicant. However, the Court notes that, although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3 (see *V. v. the United Kingdom* [GC], no. 24888/94, § 71, ECHR 1999-IX).

432. Indeed, in the present case, the fact remains that the competent authorities took no steps to improve the objectively unacceptable conditions of the applicant's detention. In the Court's view, this omission denotes lack of respect for the applicant. The Court takes into account, in particular, that, for at least two months, the applicant had to spend a considerable part of each 24-hour period practically confined to his bed in a cell with no ventilation and no window, which would at times become unbearably hot. He also had to use the toilet in the presence of another inmate and be present while the toilet was being used by his cell-mate. The Court is not convinced by the Government's allegation that these conditions did not affect the applicant in a manner incompatible with Article 3. On the contrary, the Court is of the opinion that the prison conditions complained of diminished the applicant's human dignity and aroused in him feelings of anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical or moral resistance. In sum, the Court considers that the conditions of the applicant's detention in the segregation unit of the Delta wing of Koridallos Prison amounted to degrading treatment within the meaning of Article 3 of the Convention.

There has thus been a breach of this provision.

II. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

433. The applicant complained that, despite the fact that he was a remand prisoner, he was subjected to the same regime as convicts. He argued that the failure of the Koridallos Prison authorities to provide for a special regime for remand prisoners amounts to a violation of the presumption of innocence. He relied on Article 6 § 2 of the Convention, which reads as follows:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

434. The Government submitted that Article 6 § 2 could not be interpreted in this manner.

435. The Court recalls that the Convention contains no Article providing for separate treatment for convicted and accused persons in prisons. It cannot be said that Article 6 § 2 has been violated on the grounds adduced by the applicant.

There has accordingly been no violation of Article 6 § 2 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

436. The applicant complained that letters sent to him by the Commission's Secretariat were opened by the Koridallos Prison administration and not always in his presence. He relied on Article 8 of the Convention, which provides as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

437. The Government submitted that letters addressed to prisoners are always opened in front of them because this is required by law and is necessary to prevent criminal offences, such as the smuggling of drugs into the prison. Letters addressed to prisoners by the Convention organs cannot be exempted because the Commission's or the Court's envelopes can be forged by criminals.

438. The Court considers that it has not been established that letters from the Commission to the applicant were opened in his absence. However, the Government accept that letters from the Convention organs are always opened in front of the prisoner concerned. It follows that the letters that the Commission addressed to the applicant were also opened.

There was, therefore, an interference with the applicant's right to respect for his correspondence under Article 8 of the Convention which can be justified only if the conditions of the second paragraph of the provision are met.

439. In particular, if it is not to contravene Article 8 § 2, such interference must be "in accordance with the law", pursue a legitimate aim and be necessary in a democratic society in order to achieve that aim (see *Silver and Others v. the United Kingdom*, judgment of 25 March 1983, Series A no. 61, p. 32 § 84, and *Petra v. Romania*, judgment of 23 September 1998, *Reports* 1998-VII, p. 2853, § 36).

440. The interference had a legal basis, namely Article 51 §§ 2 and 3 of the Penitentiary Code, and the Court is satisfied that it pursued the legitimate aim of "the prevention of disorder or crime".

441. As regards the necessity of the interference, the Court finds no compelling reasons for the monitoring of the relevant correspondence, whose confidentiality it was important to respect (see *Campbell v. the United Kingdom*, judgment of 25 March 1992, Series A no. 233, p. 22, § 62). Although the Government have alluded in general to the possibility of the Commission's envelopes being forged in order to smuggle prohibited material into the prison, the Court considers, as the Convention organs have done on previous occasions, that this risk is so negligible that it must be discounted (ibid.). Accordingly, the interference complained of was not necessary in a democratic society within the meaning of Article 8 § 2.

There has consequently been a violation of Article 8 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

442. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

443. The applicant claimed 42,000,000 drachmas (GRD) in respect of non-pecuniary damage. He maintained that the violations of the Convention in his case, which had entailed serious intrusion into his physical and mental integrity, had caused him to suffer a substantial degree of anxiety and distress.

444. The Government considered that the finding of a violation of the Convention would constitute adequate satisfaction for any non-pecuniary damage sustained by the applicant. In any event, the Government considered that the amount claimed was too high and that a sum of GRD 2,000,000 would be reasonable.

445. The Court, bearing in mind its findings above with regard to the applicant's complaints, considers that he suffered some non-pecuniary damage as a result of his detention which cannot be compensated solely by the finding of a violation. Deciding on an equitable basis, the Court awards the applicant GRD 5,000,000 under this head.

B. Default interest

446. According to the information available to the Court, the statutory rate of interest applicable in Greece at the date of adoption of the present judgment is 6% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 3 of the Convention;

2. *Holds* unanimously that there has been no violation of Article 6 § 2 of the Convention;

3. *Holds* by six votes to one that there has been a violation of Article 8 of the Convention;

4. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months, GRD 5,000,000 (five million drachmas) in respect of non-pecuniary damage;
   (b) that simple interest at an annual rate of 6% shall be payable from the expiry of the above-mentioned three months until settlement;

5. *Dismisses* unanimously the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on 19 April 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Erik FRIBERGH
Registrar

András BAKA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Mrs Spinellis is annexed to this judgment.

A.B.B.
E.F.

PARTLY DISSENTING OPINION OF JUDGE SPINELLIS

1. I regret that I have found it necessary to part company with the majority of the Court on the question whether there was an interference with the applicant's right to respect for his correspondence under Article 8 of the Convention.

2. The applicant complains that his letters from the Commission's Secretariat were opened by the prison administration and not always in his presence [see paragraph 79 of the judgment].

3. The Government submitted that letters addressed to prisoners are always opened in front of them [see paragraph 80 of the judgment].

4. The Court considers, rightly according to my view, that it has not been established that letters from the Commission to the applicant were opened in his absence [see paragraph 81 of the judgment].

5. Article 51 §§ 2 and 3 of the Penitentiary Code of 1989 refers to inmates' correspondence [see paragraph 62 of the judgment]. Paragraph 3, which provides for punishment (according to Article 252 of the Criminal Code) of prison officers who lawfully interfere with "the right to respect for [the inmates'] correspondence" and who reveal to third parties what they have learned during the exercise of this duty, is irrelevant to the issues discussed in the present case. However, in paragraph 2 it is stated that "[t]he content of telegrams or letters is not controlled. If there are reasons of security or if there is a risk that especially serious crimes will be committed or a need to establish whether such crimes have been committed, the correspondence may be controlled upon the granting of permission by the judge responsible for the execution of sentences".

6. On the one hand, the applicant does not claim that there was an interference with his right to respect for his correspondence without the relevant permission from the judicial authorities. Moreover, the applicant had been a drug addict who, in spite of his treatment in the United Kingdom, had been in a comatose state on 24 August 1994 [see paragraphs 8 and 9 of the judgment], which suggests that he was still an addict. Furthermore, the applicant had been sentenced by both the first-instance court [see paragraph 12 of the judgment] and the court of appeal [see paragraph 16 of the judgment] to penalties appropriate for felonies (drug-related offences) [see paragraph 8 of the judgment]. Hence, the prison authorities could reasonably have believed that the applicant might have the irresistible impulse "to smuggle drugs into the prison" in envelopes of

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

- European Court of Human Rights, case of Portington c. Greece, (109/1997/893/1105) , Judgement 23 September 1998, (Strasburg), - υπόθεση μη απονομής χρηστής και έγκαιρης απονομής δικαιοσύνης

AFFAIRE PORTINGTON c. GRÈCE

CASE OF PORTINGTON v. GREECE

(109/1997/893/1105)

ARRÊT/JUDGMENT

STRASBOURG

23 septembre/September 1998

Cet arrêt peut subir des retouches de forme avant la parution de sa version définitive dans le *Recueil des arrêts et décisions* 1998, édité par Carl Heymanns Verlag KG (Luxemburger Straße 449, D-50939 Cologne) qui se charge aussi de le diffuser, en collaboration, pour certains pays, avec les agents de vente dont la liste figure au verso.

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SUMMARY[1]

Judgment delivered by a Chamber

Greece – length of criminal appeal proceedings

I. ARTICLE 6 § 1 OF THE CONVENTION ("reasonable time")

A. Period to be taken into consideration

Starting-point: when appeal lodged.
End: when appeal finally heard and judgment delivered by Court of Appeal.
Total: almost eight years.

B. Applicable criteria

Complexity of case: complexity of issues involved cannot explain length of proceedings – noteworthy that it took trial court just one day to hear case and deliver judgment and Court of Appeal also one day to dispose of appeal.

Conduct of applicant: disagreement between parties on whether all adjournments of hearings requested by applicant – nevertheless, even if all delays attributable to requests made by him and he may be considered on that account to be responsible for some of delay, this cannot justify length of periods in between individual hearings and certainly not total length of appeal proceedings.

Conduct of national authorities: several periods of inactivity in appeal proceedings – after applicant had filed appeal, case lay dormant for over one year and seven months until it was listed for first hearing – procedural measures which had to be taken in order to have case file transferred to appellate court cannot explain such excessive period of delay – furthermore, case relisted on four occasions – this gave rise to periods of inactivity in between dates set for hearing – Government's submissions that length of one of those periods was caused by lawyers' strikes dismissed since over five months elapsed after end of strikes and before case was listed – this delay also attributed to conduct of national authorities – these and remaining periods of inactivity cannot be excused by Court of Appeal's volume of work – Article 6 § 1 imposes on Contracting States duty to organise their judicial systems in such way that their courts can meet each of its requirements.

Conclusion: violation (unanimously).

II. APPLICATION OF ARTICLE 50 OF THE CONVENTION

A. Non-pecuniary damage

Judgment constitutes in itself sufficient just satisfaction.

B. Costs and expenses

Claim allowed in part.

[1]. This summary by the registry does not bind the Court.

Conclusion: finding of violation constitutes sufficient just satisfaction for alleged non-pecuniary damage; respondent State to pay specified sum to applicant for costs and expenses (unanimously).

COURT'S CASE-LAW REFERRED TO

27.6.1997, Philis v. Greece (no. 2); 25.11.1997, Zana v. Turkey

In the case of Portington v. Greece[125],

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A[126], as a Chamber composed of the following judges:

Mr THÓR VILHJÁLMSSON, *President*,
Mr C. RUSSO,
Mr N. VALTICOS,
Mr J.M. MORENILLA,
Mr D. GOTCHEV,
Mr B. REPIK,
Mr U. LÕHMUS,
Mr P. VAN DIJK,
Mr V. BUTKEVYCH,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 30 June and 25 August 1998,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

447. The case was referred to the Court by the Greek Government ("the Government") on 11 December 1997, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 28523/95) against the Hellenic Republic lodged with the European Commission of Human Rights ("the Commission") under Article 25 by a British national, Mr Philip Portington, on 11 May 1995.

The Government's application referred to Articles 44 and 48 of the Convention and Rule 32 of Rules of Court A. The object of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 of the Convention.

448. In response to the enquiry made in accordance with Rule 33 § 3 (d), the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30). The Government of the United Kingdom, having been informed by the Registrar of their right to intervene (Article 48 (b) of the Convention and Rule 33 § 3 (b)), indicated that they did not intend to do so.

449. The Chamber to be constituted included *ex officio* Mr N. Valticos, the

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Notes by the Registrar

125. The case is numbered 109/1997/893/1105. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

126. Rules of Court A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol. They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

elected judge of Greek nationality (Article 43 of the Convention), and Mr R. Ryssdal, the then President of the Court (Rule 21 § 4 (b)). On 31 January 1998, in the presence of the Registrar, Mr R. Bernhardt, Vice-President of the Court at the time, drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr C. Russo, Mr J.M. Morenilla, Mr D. Gotchev, Mr B. Repik, Mr P. van Dijk and Mr V. Butkevych (Article 43 *in fine* of the Convention and Rule 21 § 5). Subsequently Mr Thór Vilhjálmsson, the new Vice-President of the Court, replaced as President of the Chamber, Mr Ryssdal, who died on 18 February 1998 (Rule 21 § 6, second sub-paragraph), and Mr U. Lõhmus, the first substitute judge, became a full member of the Chamber (Rule 22 § 1).

450. As President of the Chamber at the time (Rule 21 § 6), Mr Ryssdal, acting through the Registrar, had consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's and the applicant's memorials on 1 April and 20 April 1998 respectively, Mr Bernhardt, the Vice-President of the Court at the time, having acceded to the applicant's request for an extension of the time-limit for the submission of his memorial.

451. On 24 August 1998, having consulted the Agent of the Government and the Delegate of the Commission, the President of the Chamber acceded to the applicant's request for legal aid (Rule 4 of the Addendum to Rules of Court A).

452. In accordance with the President's decision the hearing took place in public in the Human Rights Building, Strasbourg, on 24 June 1998. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*
Mr A. APESSOS, Adviser,
State Legal Council,
Delegate of the Agent,
Mrs V. PELEKOU, Legal Assistant,
State Legal Council,
Counsel;

(b) *for the Commission*
Mr C.L. ROZAKIS, *Delegate*;

(c) *for the applicant*
Mr K. STARMER, Barrister-at-Law, *Counsel*,
Mr A. MCCOOEY, Solicitor,
Mr J. MCCOOEY, Solicitor, *Advisers*.

The Court heard addresses by Mr Rozakis, Mr Starmer and Mrs Pelekou.

AS TO THE FACTS

THE CIRCUMSTANCES OF THE CASE

453. The applicant is a British citizen born in 1950. He is currently detained in Wandsworth Prison, London.

454. In 1986, on a date which has not been specified, while crossing the frontier into Greece the applicant was arrested and charged with committing a murder in July 1985 on his previous visit to Greece as well as with using and carrying arms. He denied the charges.

455. The applicant was remanded in custody by the magistrates of Kastoria on a date which has not been specified. On 28 February 1986 he was committed for trial by the Indictments Division of the First Instance Criminal Court (*Symvoulio Plimmeliodikon*) of Kastoria. On 27 November 1987 his appeal against the decision of 28 February 1986 was dismissed by the Indictments Division of the Salonika Court of Appeal (*Symvoulio Efeton*) which further charged him with robbery.

456. On 17 February 1988, after a hearing which lasted one day, the Salonika Criminal Court (*Mikto Orkoto Dikastirio*) composed of jurors and professional judges convicted the applicant of all the charges. He was sentenced to the death penalty for murder, to life imprisonment for robbery and to five years' imprisonment for carrying and using arms. On 18 February 1988 the applicant appealed against the verdict on the ground that the evidence before the trial court did not sustain a finding of guilt.

457. On 6 October 1989 the applicant's appeal came for hearing before the Salonika Criminal Court of Appeal (*Mikto Orkoto Efetio*). The applicant was represented by officially appointed counsel, Mr H. Nine prosecution witnesses were absent. According to the Government, the applicant, through his defence counsel, requested an adjournment on the ground that, while none of the witnesses present had first-hand information about the murder, there was a person in England who knew about the case and who should be called to testify. The Court of Appeal granted the applicant's request and adjourned the hearing *sine die* to enable further evidence to be obtained. The applicant disputes this and maintains that he did not instruct his lawyer to apply for an adjournment and that the Court of Appeal adjourned the case on the ground that it was necessary to hear the testimony of all the witnesses, including the nine who were absent at the appeal hearing.

458. The applicant's appeal came for hearing again on 19 April 1991. According to the Government, the applicant asked for the adjournment of the case on the ground that a certain lawyer, Mr G., who had taken over his case a year before was not present at the hearing. Mr H., who was present, stated that he was prepared to defend the applicant. The prosecutor considered that the case should be heard on that day. The court decided to adjourn *sine die* to enable the applicant to be represented by Mr G. The applicant submits that he did not request that the court adjourn *sine die* but merely sought a brief adjournment to enable him to arrange his legal representation.

459. On 8 February 1993 the applicant appeared again before the Court of Appeal, represented by another counsel, Mr S. The defence asked for an adjournment on the ground that six prosecution witnesses were absent. The prosecution agreed and the court adjourned *sine die*. The applicant claims that he did not request that the court adjourn *sine die* but merely requested that all witnesses be present. Between 27 May 1993 and 31 December 1993, 16 February 1994 and 17 February 1994, 7 March 1994 and 11 March 1994, 16 March 1994 and 18 March 1994, 21 March 1994 and 13 May 1994 and 16 May 1994 and 30 June 1994 lawyers were on strike.

460. A new hearing for the applicant's appeal was fixed for 5 December 1994. According to the Government, the applicant asked for an adjournment on the ground that he wanted to be represented by a lawyer whom the British Embassy had found for him and whom he did not name. The prosecutor agreed and the court adjourned *sine die*. The applicant submits however that this reflects the position as at 19 April 1991 (see paragraph 12 above), and by December 1994 he was represented by Mr E., and did not want to change lawyers.

461. The applicant's appeal was finally heard on 12 February 1996. The Court of Appeal upheld his conviction but commuted his death sentence to life imprisonment. At the time of the Court's consideration of the case the applicant had lodged an appeal on points of law.

PROCEEDINGS BEFORE THE COMMISSION

462. Mr Portington applied to the Commission on 11 May 1995. He complained under Article 6 § 1 of the Convention of the length of the criminal proceedings against him.

463. The Commission (First Chamber) declared the application (no. 28523/95) admissible on 16 October 1996. In its report of 10 September 1997 (Article 31), it expressed the unanimous opinion that there had been a violation of Article 6 § 1 of the Convention. The full text of the Commission's opinion is reproduced as an annex to this judgment[127].

FINAL SUBMISSIONS TO THE COURT

464. The applicant in his memorial requested the Court to find that the facts of the case disclosed a violation of Article 6 § 1 of the Convention and to award him just satisfaction under Article 50.

The Government for their part requested the Court to find that Article 6 § 1 had not been violated in the present case.

as to the law

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

465. The applicant contended that the criminal appeal proceedings in his case were not concluded within a reasonable time, contrary to Article 6 § 1 of the Convention, the relevant parts of which provide:

[127]. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1998), but a copy of the Commission's report is obtainable from the registry.

> "In the determination of … any criminal charge against him, everyone is entitled to a … hearing within a reasonable time by [a] … tribunal…"

The Commission agreed with the applicant's arguments whereas the Government contended that the facts of the case disclosed no breach of that provision.

A. Period to be taken into consideration

466. The Court notes that the applicant's complaint concerns the length of the appeal proceedings before the Salonika Criminal Court of Appeal. Therefore, the period to be taken into account began on 18 February 1988, the date on which he lodged an appeal against the judgment of the trial court, and ended on 12 February 1996, when his appeal was finally heard and judgment delivered by the Court of Appeal (see paragraphs 10 and 15 above). The appeal proceedings accordingly lasted almost eight years.

B. Reasonableness of the length of the proceedings

467. The Court will assess the reasonableness of the length of the proceedings in the light of the circumstances of the case and having regard to the criteria laid down in its case-law, in particular the complexity of the case and the conduct of the applicant and of the relevant authorities. On the latter point, what is at stake for the applicant has also to be taken into account (see, among other authorities, the Philis v. Greece (no. 2) judgment of 27 June 1997, *Reports of Judgments and Decisions* 1997-IV, p. 1083, § 35).

1. Complexity of the case

468. The applicant submitted that the case was not complex. He pointed out that he was the only defendant involved and that all the charges against him arose out of the same event. Moreover, the evidence before the Court of Appeal was not voluminous and the court's task was not complicated by the need to consider any expert evidence. The legal issues raised by the case were not complex and the trial took just one day.

469. The Government maintained that the case was complex. It involved voluminous evidence which had to be obtained in part from abroad. In addition, the nature of the charge contributed to the complexity of the case.

470. The Commission considered that the case was of a certain complexity since it involved an appeal against a conviction on a murder charge.

471. The Court considers that, even though the case was of some complexity, having regard to the serious nature of the conviction and the applicant's grounds of appeal, it cannot be said that this in itself justified the length of the proceedings on appeal. In this regard it is noteworthy that it took the trial court just one day to hear the case and deliver judgment and the Court of Appeal also one day to dispose of the appeal (see paragraphs 10 and 15 above). As the length of the proceedings cannot be explained in terms of the complexity of the issues involved, the Court will examine it in the light of the conduct of the applicant and the national authorities (see paragraph 21 above).

2. Conduct of the applicant

472. The applicant maintained that his conduct did not contribute in any way to the length of the proceedings. On the contrary, throughout the whole of the period of the appeal proceedings he had requested that his case be listed for hearing. He also enlisted numerous groups and individuals to make requests on his behalf to expedite the proceedings. Furthermore, the applicant contended that he had not requested adjournments of hearings on 6 October 1989 and 5 December 1994 (see paragraphs 11 and 14 above). As to his requests for adjournments on 19 April 1991 and 8 February 1993, he did not ask the court to adjourn *sine die* but merely sought brief adjournments to allow his lawyer and prosecution witnesses to be present (see paragraphs 12–13 above).

473. The Government submitted that the applicant had requested all the adjournments of the appeal hearings and was therefore solely responsible for the delays in his case. He never availed himself of the possibility under the Code of Criminal Procedure to ask for brief adjournments. Even if the periods in between individual appeal hearings had been shorter, this would have made no difference to the applicant since he was not ready for the appeal hearing. His only concern was to have it adjourned irrespective of the resulting delays. Furthermore, he had never complained before the appellate court about the length of the proceedings and he had lodged his application with the Commission only shortly before the final appeal hearing.

474. The Commission agreed with the Government that the applicant had requested a number of adjournments. However, the Delegate of the Commission pointed out that the applicant's requests had been based on plausible grounds and did not justify the *sine die* referrals and excessive delays in rehearing the case.

475. The Court notes that there is disagreement about whether all the adjournments of hearings were requested by the applicant. Nevertheless, even if all the delays were attributable to requests made by him and he may be considered on that account to be responsible for some of the delay which resulted, this cannot justify the length of the periods in between individual hearings and certainly not the total length of the appeal proceedings – almost eight years (see, *mutatis mutandis*, the Zana v. Turkey judgment of 25 November 1997, *Reports* 1997-VII, p. 2552, § 79).

3. Conduct of the national authorities

476. The applicant submitted that the respondent State was responsible for most, if not all, delays in the proceedings. He contended that the national authorities bore the responsibility for not ensuring the presence of witnesses on 6 October 1989 and 8 February 1993, which led to the adjournment of hearings. Although he might have contributed to some extent to the overall delay by asking on 19 April 1991 for an adjournment to arrange for his representation, the delays in listing the case after that date and other adjournments were attributable to the national authorities (see paragraph 12 above).

477. The Government maintained that the time which elapsed between individual hearings was entirely reasonable and justified. In particular, the Government pointed out that the delay in listing the first hearing after the applicant had lodged an appeal on 18 February 1988 was caused by the need to take several procedural measures, such as the transfer of the case file to the appellate court and the referral of the case to the public prosecutor at that court. As for the adjournment of the hearing on 6 October 1989, this was caused by the applicant who wanted to have his witness residing in England testify and not by the absence of the nine prosecution witnesses whose evidence could in any event have been readily read out from the transcripts available to the court (see paragraph 11 above). Further, all the subsequent delays in listing the case were the responsibility of the applicant who had asked for adjournments. Witnesses had to be summoned anew before each hearing.

In addition, the Salonika Court of Appeal, which had dealt with the applicant's case, was an assize court responsible for a large number of serious cases and whose jurisdiction extended over a wide area. The Government also recalled that between 27 May 1993 and 30 June 1994 lawyers had been on strike on several occasions and this factor also contributed to the length of the proceedings (see paragraph 13 above).

478. The Commission considered that the State authorities were responsible for several periods of inactivity in the proceedings. In particular, the respondent State was responsible for a delay between 18 February 1988 when the appeal was lodged and 6 October 1989 when the first hearing was held. As that hearing had to be adjourned because nine prosecution witnesses were absent, the national authorities were also responsible for the delay preceding the second listing of the case on 19 April 1991. The Commission further considered that the respondent State was responsible for the remaining delays even though the applicant also bore a certain degree of responsibility because of his two requests for adjournments on 19 April 1991 and 5 December 1994.

For the above reasons the Commission concluded that the length of the proceedings failed to meet the "reasonable time" requirement.

479. The Court notes that there were several periods of inactivity in the appeal proceedings before the Salonika Criminal Court of Appeal. After the applicant had filed an appeal on 18 February 1988 the case lay dormant for over one year and seven months until it was listed for the first hearing on 6 October 1989 (see paragraphs 10–11 above). The Government have sought to explain this by reference to the procedural measures which had to be taken in order to have the case file transferred to the appellate court (see paragraph 31 above). However, the Court considers that this cannot explain such an excessive delay, which must be imputed to the authorities.

Furthermore, after 6 October 1989, the case was relisted on four occasions: 19 April 1991, 8 February 1993, 5 December 1994 and 12 February 1996. This gave rise to periods of inactivity in between the dates set for hearing lasting: one year, six months and twelve days; one year, nine months and nineteen days; one year, nine months and twenty-six days and one year, two months and six days (see paragraphs 11-15 above). As regards the Government's submissions that the length of the third of those periods (one year, nine months and twenty-six days) was caused by the lawyers' strikes, it is to be noted that a period of over five months elapsed after the end of the strikes and before the case was listed on 5 December 1994 (see paragraphs 13–14 above). This delay also has to be attributed to the conduct of the national authorities. As for these and the remaining

periods of inactivity, they cannot be excused by the volume of work with which the Salonika Criminal Court of Appeal had to contend at the relevant period. The Court recalls that Article 6 § 1 imposes on Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time (see the above-mentioned Philis (no. 2) judgment, p. 1084, § 40).

4. Conclusion

480. The Court concludes that the complexity of the case and the applicant's conduct are not in themselves sufficient to justify the length of the appeal proceedings. Although it is true that the applicant may be responsible for some delay in the proceedings resulting from his requests for adjournments, the overall delay was essentially due to the way in which the authorities handled the case. Regard being had to the importance of what was at stake for the applicant, who was sentenced to the death penalty by the trial court, a total lapse of time in hearing his appeal of approximately eight years cannot be regarded as reasonable. There has accordingly been a breach of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 50 OF THE CONVENTION

481. The applicant claimed just satisfaction under Article 50 of the Convention, which provides:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Non-pecuniary damage

482. The applicant sought compensation for non-pecuniary damage. He submitted that he had suffered anxiety about the uncertainty of his fate and frustration as a result of increasing delays in the hearing of his appeal. The applicant left the amount to be awarded to the discretion of the Court.

483. The Government contended that the applicant had not suffered any damage as a result of the delay in hearing his appeal since his conviction was upheld by the appellate court. The fact that his death sentence was commuted to life imprisonment did not make any difference as it was widely known that a death penalty had not been carried out in Greece since 1975.

484. The Delegate of the Commission did not comment on this claim.

485. In the circumstances of the case, the Court considers that the present judgment constitutes in itself sufficient just satisfaction.

B. Costs and expenses

486. The applicant requested the Court to award him the sum of 20,032.60 pounds sterling (GBP) inclusive of value-added tax in respect of legal fees which he incurred in the Strasbourg proceedings.

487. The Government submitted that only expenses that have been justified and were absolutely necessary should be awarded to the applicant. The Delegate of the Commission did not comment on this claim.

488. The Court, deciding on an equitable basis, awards the applicant the sum of GBP 15,000 less the sum of 14,549 French francs received by way of legal aid from the Council of Europe.

C. Default interest

489. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7.5% per annum.

for these reasons, the court unanimously

1. *Holds* that Article 6 § 1 of the Convention has been violated;

2. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any alleged non-pecuniary damage;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, 15,000 (fifteen thousand) pounds sterling in respect of costs and expenses less 14,549 (fourteen thousand five hundred and forty-nine) French francs to be converted into pounds sterling at the rate applicable on the date of delivery of the present judgment;
   (b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement.

Done in English and French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 23 September 1998.

Signed: Thór VILHJÁLMSSON
President

Signed: Herbert PETZOLD
Registrar

128