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THE PROTECTION OF INDIVIDUAL RIGHTS AND FREEDOMS BY THE ADMINISTRATIVE COURTS

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THE PROTECTION OF INDIVIDUAL RIGHTS AND FREEDOMS BY THE ADMINISTRATIVE COURTS

GENERAL REPORT

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Introduction

The purpose of this Summary Report is to give participants of the 7[th] AIHJA Congress the opportunity to reflect on the role of the administrative court in the protection of individual rights and freedoms. This role has proven to be vital considering that in a law-abiding country, it is the court that lays down the law in the final analysis. It does so within the limits of its powers, but also to their full extent.

This Congress is an opportunity to exchange practical experiences and to expose the problems existing in the various judicial systems.

For the presentation of this report, 23 national reports [including that of the European Communities Court of Justice (ECCJ)] received up until January 15, 2001 were used as a basis for its preparation. The contributing countries were: Germany, Austria, Belgium, Burundi, Canada, China, Spain, Finland, France, Gabon, the Grand Duchy of Luxemburg, Greece, Israel, Italy, Morocco, the Netherlands, Portugal, Senegal, Slovenia, Sweden, Switzerland and Turkey.

Some of the reports covered every aspect of the theme chosen, while others concentrated on just one aspect.

The national reports are characterized by their diversity linked to the very diversity of the countries in question (Northern and Southern countries, European, American, African and Asian countries), to their judicial systems (Romano-Germanic System compared to the Anglo-Saxon system), to the different jurisdictional systems (dualism or monism) and to the different approaches used and their content.

This diversity is both a source of difficulty and a treasure trove of information.

It is a source of difficulty because it was necessary to consider often drastically different situations in order to compile a summary report. And yet, it is essentially a treasure trove because it enabled us to make rarely possible comparisons about the importance the various countries attribute to the protection of rights and freedom by the administrative courts.

The main issue has been to analyse the administrative court's role in the protection of individual rights and freedoms. Consequently, particular attention had to be given to the techniques used. Such a procedure allows one to measure the intensity and effectiveness of control over a government's actions.

Our necessarily comparative approach consisted of determining the constitutional and legislative (textual) safeguards on the one hand, and the jurisdictional safeguards on the other hand.

We therefore prepared the report focusing on three themes: the exercise of individual rights and freedoms: safeguards and limits; the administrative court and civil, political and economic rights; Aliens before the administrative court.

I
THE EXERCISE OF INDIVIDUAL RIGHTS AND FREEEDOMS: SAFEGUARDS AND LIMITATIONS

The recognition of individual rights and freedoms only makes sense if it is accompanied by provisions enabling them to be exercised. A relatively effective safeguard of individual rights and freedoms is indispensable in any State claiming to be law-abiding. But while it is up to the State to define the terms for exercising those individual rights and freedoms, it is also the State's responsibility to set the limits for the exercise of those rights.

A- THE FUNDAMENTAL SAFEGUARDS

The term "safeguard" goes back to the idea of protection. The effectiveness of individual rights and freedoms depends on the safeguards supporting them. All the legal provisions intended to ensure the protection of acknowledged rights are in fact considered to be safeguards.

The protection of individual rights and freedoms is safeguarded simultaneously by domestic safeguards and by international safeguards, as shown in the reports by the States participating in this Congress.

1-DOMESTIC SAFEGUARDS

Individual rights and freedoms are first proclaimed and guaranteed in a country's constitution. Nonetheless, it is the legislator's duty to regulate the exercise of public freedoms since the constitutional text cannot provide all the details.

a - Constitutional safeguards and Legislative Safeguards

Nearly all the modern States have consolidated individual rights and freedoms in their constitutions. This holds for the States possessing a formal constitution as well as those without one.

Not all the countries have enshrined individual rights and freedoms in their constitutional texts in the same manner; some have preferred to proclaim their attachment to individual rights and freedoms in a short preamble whose constitutional value is no longer challenged, and have left it up to the lawmakers to set the rules on civil rights and the basic safeguards granted to citizens for the enjoyment of public freedoms (French Constitution, 4 October 1958).

In other countries, those drafting the constitution did not settle for merely declaring rights and freedoms in the preamble; they devoted a title or a whole chapter to public freedoms. This is the case of most of the countries participating in this Congress. In Switzerland, for example, all the rights are listed in its Constitution, leaving no more room for unwritten constitutional rights.

The idea of specifying individual rights and freedoms in a nation's constitution has developed so much that it has even won over States that do not yet have a constitution (Canada has adopted a Charter of Freedoms that recognizes the constitutional value of certain rights.) or that do not yet have a formal constitution (The State of Israel has elaborated two fundamental laws "supposed to be the different sectors of the emergent Constitution.") which have endowed certain individual rights having constitutional impact.

We can see from these examples that individual rights and freedoms principally originate from constitutional texts or those having constitutional value. However, legislators set up most of the rights proclaimed. It is their duty to draft the constitution and ensure they are executed properly and to ensure they are honoured. A legislative safeguard thus reinforces the constitutional safeguard.

Constitutional drafters refer to laws in order to draft citizens' rights and freedoms recognized by the constitution, thereby allowing them to set concrete conditions for determining the ways and means of exercising each freedom. In accomplishing their mission, they are allowed some leeway for effectively safeguarding the same. However, they are not empowered to enact texts contradicting the will of the constitutional drafters, i.e., texts that would negate any proclaimed individual rights and freedoms.

The constitutional drafters have made provisions for a review system designed to check the conformity of legislative texts in their constitution in

order to prevent or sanction the arbitrary nature of law. This system, which consists of reviewing the constitutional nature of the law, is organized differently depending on the country.

That review is often assigned to a Constitutional Court. Many countries have adopted the system in which review is handled by a special body called the Constitutional Court or the Constitutional Council (France, Turkey, Senegal, etc.). This review board can deliver rulings without there being any litigation, properly speaking, based on direct submission by the political or jurisdictional powers, or even just ordinary persons." In this case, it is a preventive review because intervenes before a law is passed. It is not organized for all laws, but only when those who have the right to submit cases should they feel the need to do so. This means that a law lacking obvious merit cannot be included among the safeguards in force. But at any rate, constitutional jurisdiction has contributed enormously to the development of unwritten constitutional rights in the area of human rights (See examples of case-laws by the French Constitutional Council and the Swiss Federal Court before the latter's constitutional revision in 1999).

The Constitutionality Review System differs in countries where this review is handled in the lower (ordinary) courts, in the absence of a Constitutional Court (Netherlands, Switzerland, etc.). The courts cannot apply laws contrary to the constitution. They are obliged to respect the superiority of the constitution.

It is possible for the review of the constitutionality of laws by courts, which is an *a posteriori* review, to exist at the same time as an *a priori* review assigned to commissions established within a given parliament or other bodies. In Finland, for example, bills are submitted to the Parliamentary Constitutive Council, which advises on the constitutionality of the text. Likewise, Sweden is an example where Legislative Council seated by members belonging to the Supreme Court and to the Supreme Administrative Court can rule on the bills submitted by the government.

Besides constitutional and legislative safeguards, domestic law offers citizens a jurisdictional safeguard. Indeed, citizens may be confronted with administrative decisions that jeopardize their individual rights and freedoms. Therefore, they require protection against Administration. The jurisdictional bodies are supposed to ensure it.

b - Jurisdictional Safeguards

The freedoms proclaimed and guaranteed by texts may be misconstrued or violated by administrative authorities. This explains the competence of a court and the existence of an administrative protection of freedoms. Hence, it is the administrative jurisdiction which delivers decisions on the scope and limits of freedoms.

In countries that have opted for unity of jurisdiction (Anglo-Saxon model), the lower court is qualified to recognise all violations of individual rights and freedoms, whatever their origin. In contrast, in countries that have opted for duality of jurisdiction, any dispute about the infringement of public freedoms by government authorities is referred to the administrative jurisdictions. But even in States where the administrative court is specialized, frequently the "ordinary court" may also become an administrative court for certain litigations. A constitutional court may also rule in cases in which a law contradicts the constitution.

The administrative court's role may extend as far as being allowed to "review conflicting issues between two constitutional provisions." (Luxemburg)

Considered both as the government censurer and its collaborator, the administrative court plays a dual role. It must assure protection of citizens' individual rights and freedoms before the Administration, all while permitting the latter to fulfil its mission of meeting needs of a general interest.

The administrative court reviews the legality of acts by administrative authorities and annuls them when they are illegal. In some countries, the enforceable regulating acts that can be directly attacked are distinguished from those "that require a concrete enforcing act" (Portugal). Administrative courts are "obliged to give precedence to the Constitution if an appeal is lodged to implement a law that does not comply with the Constitution" (Finland).

The administrative court can refer to the general principles of law, which are applicable even without a text. These principles are instruments actually ruled by Courts.

In order to improve control of administrative activity and to make it more effective, the court disposes of emergency procedures. For example, a delay of

execution permits to suspend the execution of an administrative (or jurisdictional) decision against which an appeal for annulment has been lodged. In case of emergency, the judge can take interim measures.

The administrative courts pronounce the annulment of act which contradict the principle of legality, whereas they are qualified to repair injuries caused by encroachments upon individual rights and freedoms in the scope of liability disputes.

Besides these domestic safeguards, all of the reports deal with the international safeguards.

2 - INTERNATIONAL SAFEGUARDS

The international agreements ratified by different States (treaties, conventions, Covenants, protocols, etc.) recognise and protect a wide number of rights and freedoms. Thus, International law appears as an essential source in the field of Human Rights, establishing a global system in this context. International safeguards are protected by international bodies and often by national jurisdictions upheld by the international commitments of concerned States. Actually, by ratifying international agreements, States accept to limit their sovereignty.

Regarding the relationship between international law and domestic law States adopt either the dualistic approach or the monistic one. According to the first one, which emphasise the separate nature of the two systems, a treaty has no effect in domestic law unless it has been brought into the legal system by legislation (Finland, Sweden). According to the second one, international law can be treated as automatically part of domestic law (Netherlands). In order to observe the pre-eminence of international law the constitution of several States insist on the primacy of "treaties or agreements regularly ratified or approved' over domestic law (France, Senegal). However, the supremacy of treaties is subordinate to a the condition of reciprocity.

International safeguards are generally the same. Their sources are drawn up from treaties concluded under the United Nations or regional organisations. In addition, there are a lot of bilateral agreements dealing with Human Rights in

connection with a specific matter (Immigration, Asylum, Extradition...)

a) The Protection of Individual Rights and Liberties in the Framework of the United Nations

In order to "achieve international cooperation by developing and encouraging the respect of human rights and fundamental rights," pursuant to the objectives set by its Charter, the United Nations Organisation has promoted the conclusion of several conventions on human rights. These conventions cover different areas. Some are general, while others address particular aspects of human rights.

The International Covenants adopted on 16 December 1966 by the UN repeated the rights proclaimed by the Universal Declaration of Human Rights of 10th December 1948. Actually, the International Covenant on Economic, Social and Cultural Rights that entered into force on 3rd January 1976 enumerates those rights considered to be inalienable: the right to work which includes the right of everyone to the opportunity to gain his living by work; the right to social security; the right to form trade unions, etc. As for the International Covenant on Civil and Political Rights (entry into force on 23 March 1976), it concentrates on public freedoms and political rights, the freedom of movement, the inviolability of the home and confidentiality of correspondence, freedom of association and to assemble, etc.

Unlike the Covenant on Economic, Social and Cultural Rights, which merely obliges Contracting States to send in periodical reports to the UN Economic and Social Council, the Covenant on Civil and Political Rights established a non-jurisdictional body called the Human Rights Committee. Complaints lodged with the Committee may emanate from a contracting State or from a national individual from a State having ratified the optional protocol, after exhausting all appeals under domestic law.

In addition with the International Covenants of 1966, many States ratified conventions dealing with special issues such as the Convention on the Elimination of All forms of Discrimination against Women, the Convention on the Rights of the Child, the Convention relating to the Status of Refugees.

Other international safeguards are enshrined in instruments whose geographic scope is more limited than treaties which have been signed by UN Member States.

b) The Protection of Individual Rights and Freedoms in the Framework of the Council of Europe and the OAU

The Members of the Council of Europe have recognized the "principle of the pre-eminence of law and the principle according to which any person placed (under the Council's jurisdiction) must enjoy Human Rights and the Fundamental Freedoms" (Article 3 of the European Council By-laws). In compliance with those principles, the Members of the Council of Europe signed the "European Convention for the Protection of Human Rights and Fundamental Freedoms" of 1950 and the European Social Charter of 1961.

The first convention pursues the maintenance and further realisation of human rights and fundamental freedoms, on the same way as the International Covenant on Civil and Political Rights. In order to protect the rights and freedoms recognized by the Convention, the European Commission of Human Rights and the European Court of Human Rights were created.

Any Contracting Party which considers that the Convention has been violated can lodge a complaint with the ECHR, which is seated by independent Justices. Individuals can also appeal to the Commission, provided that their respective Contracting States have accepted the optional clause providing for appeals lodged by individuals. The admissibility of cases presented by States and of individual appeals is superseded by the requirement that all "venues of domestic recourse" have been exhausted (and within a certain timeframe). If the commission fails to reach a friendly settlement, it then transfers its report to the Committee of Ministers or to the European Court of Human Rights. This Court comprised of judges, provides relatively effective protection of the Convention's provisions while interpreting them "in light of the prevailing concepts of our times in the democratic States" (ECHR, 25 April 1978 *Tyrer*).

The second convention, i.e. the European Social Charter, provides for a certain number of economic and social rights (inalienable rights), but does not grant them the same importance. The charter recognizes seven economic rights

as being fundamental: the right to work, the right of trade union, the right to collective negotiation, the right to social security, the right to social and medical assistance, the right to family with social and economic protection and the right of migrant workers and their families to protection and assistance. The enforcement of these economic and social rights is guaranteed by a committee of independent experts, based on reports addressed by the Contracting States.

On the African Continent, the OAU Member States, which have approved a large number of international instruments protecting Human Rights, adopted an African Charter of Human and People's Rights on 28 June 1981. The African Charter, which enteredi into force on 21 October 1981, reasserts most of the rights declared by the international texts bearing on Human Rights, while taking the African context into account. Consecrating individual rights to which it added people's rights, the Charter set up an African Commission on Human and People's Rights appointed to ensure "the protection and promotion" of Human Rights in the Contracting States. In order to reinforce the protection of those acknowledged rights, in 1998 the OAU adopted another protocol creating an African Court of Human Rights.

B. LIMITATIONS, RESTRICTIONS, INTERFERENCES

The exercise of individual rights and freedoms can be limited depending on how they are organized. In order to prevent the negation of them a jurisdictional review is required.

The restrictions or limitations on the exercice of these rights can result from the implementation of police regulations, or consequently of derogations in time of emergency.

1 – CIVIL RIGHTS AND FREEDOMS *v.* JUSTIFICATIONS OF POLICE

The public authorities may interfere in the exercice of rights and freedoms if it is necessary for the protection of public order, or for the protection of rights and freedoms of others. In this aim, they can intervene by implementing special regulations or ordering decisions that may infringe on freedoms (freedom of movement, freedom of assembly, freedom of trade and industry, etc.).

The protection of freedom is the principle whereas the restriction of police is the exception. Accordingly, the public authorities must take into account, in their regulations, both the principle of necessity and the principle of proportionality. It means measures taken by public bodies, under the control of courts, must be strictly necessary, especially to preserve welfare.

Considering special circumstances or justifications, the Constitution itself may provide restrictions or limitations to fundamental rights. Such limitations or restrictions, placed by administrative authorities, have to be grounded on the necessity to protect the public order.

Besides, there are freedoms which could be considered as absolute, so that no restrictions or limitations could be placed upon them (Germany, Sweden). The Constitution itself may fix the extent of the breach of citizen's rights by the administrative bodies (Spain, Greece...).

2- DEROGATION IN TIME OF EMERGENCY

In time of public emergency or special circumstances threatening the life of Nation, the public authorities may take extraordinary measures in order to ensure the principle of continuity of State.

All the measures taken by the public authorities in this aim could be reviewed by judges, in accordance with the principle of legality. The judicial review considered whether or not the extent of the measures was strictly requiered by the exigencies of the situation.

II
THE ADMINISTRATIVE COURTS AND CIVIL, POLITICAL AND ECONOMIC RIGHTS

Considering the values of liberalism, Democracy, and rule of law, civil, political and economic rights are, very often, stated in the Constitution. Besides, those rights or freedoms may be defined in International Convention, in Courts' decisions, in statutes, as well.

The different constitutions ensure a safeguard of rights through the organization by the constitution itself of the entire exercice of several civil liberties. These different rights and freedoms may be stated by international conventions, case law and statutes.

After being recognized or proclaimed, rights and freedoms may be restricted by statutes. The legislator is able to intervene indeed, either by developping constitutional provisions, or enforcing provisions which are contained in Preamble or Declaration of rights.

The national reports which has been studied insist on the content, the scope and the guarantees of the following freedoms: freedom of conscience and opinion, freedom of association, freedom of enterprise and trade.

Those freedoms may clash each others. Therefore, in case of such conflicts, the courts and tribunals intend to ensure the conciliation of the civil liberties; very often, the freedom which seems to be more important in the collective thinking will prevail.

The administrative court, in the exercice of its control over administrative bodies, creates its own methods or instruments in order to ensure an effective protection of civil rights; in that sense, we can notice the theory of the general principles of law, grounded on the natural justice.

In particular, courts apply the principle of proportionality as a standard by which to assess the lawfulness of certain administrative decisions. In addition, they refer to the balancing test in order to resolve a conflict between civil liberties or to combine them.

The present topic will be divided into three elements: the freedom of conscience and opinion, the freedom of association, and the freedom of trade and enterprise. For each of them, we will deal with its content, its jurisdictional safeguards, and their limitations or restrictions.

A - FREEDOM OF CONSCIENCE AND OPINION

Undoubtedly, these freedoms are very bounded. Meanwhile, in accordance with the national reports, we will successively deal with the freedom of conscience and the freedom of opinion.

1 - FREEDOM OF CONSCIENCE

a-Contents

According to the natioal reports, there are differents approach of the freedom of conscience. On the one hand, it can be considered as the equivalent of the freedom of religion, so that it would imply the freedom to express its religion and to practice a rite (China, Luxemburg, Portugal, Sweden and Turkey). On the other hand, it can be an aspect of the freedom of religion (right to choose and practice faith) which also consists of freedom of worship (France). In some countries, it also includes philosophical opinions (Germany, Spain).

In the countries which have been studied, the freedom of conscience is stated and guaranted by the constitution. Generally speaking, it is an absolute liberty (Morocco, Sweden, France) which cannot be infringed (Germany, Greece, Portugal).

b-Protection

First of all, the case-law is quantitatively more important for the religious aspects of the freedom of conscience. The courts ensure a protection of freedom of conscience of citizens, especially in the field of civil service, army and education.

Generally speaking, the scope of jurisdiction of the administrative courts concerns all kind of situations in which the beliefs and the religious practices of citizens are involved. Therefore, citizens are preserved for revealing their political opinions, religious beliefs in their relations with public bodies. They could not be obliged to take part in a meeting which consists of an action against their opinions, or to be a member of political party or organisation. The refusal to recognize a religious association grounded of the religious ideology can be pronounced by public bodies. In such circumstances, the courts consider that this refusal is a discrimination on religion which is contrary to the principle of secularity and the principle of equality (Canada, France, Italy, Netherlands, Portugal, Turkey). Thus a statute which forbids the commercial activity an Sunday, due to the fact it consists of the Lord's day for Christians infringes the

freedom of religion of people who are not Christians (Canada). Besides, courts are entitled to annul decisions of administrative bodies which deny to register religious association (Spain). Then, the public authorities are only entitled to decide whether or not the association is respectful of statutes which concern the safeguard of security, health and ethics. Accordingly, a group would be forbidden to promote the use of drugs in public places, whereas courts would be very watchful in their control of sects (France).

In the field of public service, tribunals prohibit discriminations on religion or religious beliefs. It can not exist any obligations for civil servants to reveal their religion, whereas they are not allowed to express their beliefs in the exercice of their duties. Consequently, a Bar may lawfully pronouce the strikking off of a trainee-solicitor in case he would like to plead with his turban (Turkey). We can notice that tribunals protect the principle of secularity which implies the neutrality of civil services. Therefore, the application of a civil servant cannot be refused, or disciplinary penalties pronounced, because of his beliefs or political convictions (France, Morocco).

Considering the question in the field of the army, the Courts and tribunals adopt liberal approaches of the freedom of religion of conscientious objectors, that is people who are opposed to violence, hence to their recruitment in the Army. In such context, there is a conflict between the imperative of the national security and the freedom of conscience. Actually, litigations dealing with that problem are quiet rare consequently of the choice made by governments to provide a non combatant service (France, Germany, Italy, Portugal, Spain). In all situations, in order to decide on applications for being granted the status of conscientious objectors, public bodies have to consider whether or not the reasons alleged by the applicant are serious or credible.

In state schools, the conciliation of the neutrality of education and freedom of conscience is crucial. Accordingly, the principle of secularity may justify, in contradiction with the principle of equality in the accession to civil service, the decision of a minister refusing a clergyman to apply for the competitive examination of philosophy (France).

While the issue of the freedom of worship of students has been settled, the way by which students wear signs revailing their religion at school is a much debated question. Generally speaking, the expression of religious beliefs by students has to be conciliated with other imperatives (France, Turkey).

Basically, students have the right to express their religious beliefs at schools, whereas the principle of neutrality governing the state schools prohibit any discriminations on religion in the access to education. Therefore, public bodies cannot refuse the admittance of students at schools because of their beliefs (France, Luxemburg). In this context, the Council of State of France has considered the question of wearing the islamic veil or *Hijab* by Muslim women. It judged this wearing was not contrary to the principle of secularity, only if it did not constitute a sign of proselytism or propaganda, affect the dignity and liberty of the pupil, compromise her health and safety, disturb the teaching of pupils, or threat the order in the school[1]. In accordance with the principles above-mentionned, the Council of State of France condemn prohibitions which are general or absolute, because the behaviour of pupils has to be considered and judged with regard to the situation precisely involved. examine accordingly of the situation involved. Then, the Courts would allow public bodies to prononce penalties in case of absence from physical classes, actions of proselytism, or wearing dresses which could be contrary to the normal session of schools.

c-Limitations

Basically, limitations or restrictions to the exercice of the freedom of conscience would be obviously exceptional. In addition, there would be necessary for the protection of public order, territorial integrity, or other fundamental rights and freedoms, etc. The Courts are very careful to restrain the interference of public bodies in the exercice of this freedom. Meanwhile, they admit that some other rights, such as right to education may restrict it. It is the reason why judges consider that students can lawfully being refused to stay away from schools every saturday, since it seriously disrupts schools programs (Luxemburg). We have to notice that the freedom of conscience in Sweden is fundamental and undefeasible, so that no restrictions would be imposed on its exercice.

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[1] The French Governement proposed to the Parliament to enact a statute dealing with the application of the principle of secularity in schools, secondary schools, and *lycées*, proposal No 1378, of 28 January, 2004.

2 - FREEDOM OF OPINION

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The freedom of opinion means the freedom to hold thought, an idea, and to express or manifest it. Consequently, the freedom of opinion is deeply linked to the freedom of expression. In the first sense it signifies the opportunity to choose his truth in the secret of his thought, while in the second sense, it consists of revealing his toughts to others. Therefore, the freedom of press and the freedom of audiovisual communication constitutes some special features of the freedom of opinion and expression as well. Besides, freedom of assembly and freedom of expression represent, in the context of collectives liberties, the freedom of opinion and the freedom of expression.

The freedom of opinion is guaranted by the Constitution, by texts of constitutional values, and international conventions, while the Courts ensure an effective protection of it with some limitations.

b- Protection

In administrative law, the prohibition of every kind of penalties regarding the exercice of the freedom of opinion is ensured by the principles of the neutrality of public utilities. Indeed, as it is done in the context of the freedom of conscience, the Court censure discriminations on religion or political ideas. Therefore, the civil servant is not obliged to reveal both its political, religious or other opinions in the process of his recruitment (Sweden, Turkey, France). The freedom for individual to choose their opinions and to express them is guaranted by courts, meanwhile they take into account for some of civil servants the duty of confidentiality. The duty of confidentiality does not signify the suppression of the freedom of opinion of civil servants, but consists however of a restraint of its expression. Moreover, civil servants have to be impartial in the relation with the users.

The Court ensure a concrete and effective protection of freedom of press, being cautious there would not be any censure in its exercice or preliminary authorization for it (Netherlands). The freedom of press has only to be conciliated with the protection of public order. By contrast, the freedom of

audiovisual communication may be subject to preliminary authorization, and cinema as well, in order to ensure the protection of childhood (Finland). On the opposite, in Israel, the Courts considered that a decision which censured a play involving erotics scenes and features of perversion was unlawful.

c- Limitations

The court take into account all kind of limitations which could have been ruled by statutes to the freedom of opinion. Those restrictions would be prescribed by law in order to ensure, the protection of public order, public safety, and national security, or the protection of health and ethics, the protection of the rights and freedoms of others, or for the prevention of disorder or crime, the reputation of people, the respect of private life, or the protection of childhood (France, Luxemburg, Spain, Sweden).

Hence, the exercice of the freedom of opinion can be restricted in order to permit the exercice of other freedom. Accordingly, the Court ensure a conciliation between, for instance, the freedom of religion and the freedom of association, between the right to manifest his opinion and the freedom of movement regarding people who do not manifest. In addition, the judge consider the proportionality between any possible restrictions to the right to work of individuals, and the imperatives of the safety of States.

B - FREEDOM OF ASSOCIATION

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The freedom of association consists in the right for one to form with others organisation or group, in order to exert an activity or to share knowledge. The association is distinguished from the simple meeting by its permanence.

Generally speaking, this freedom will be viewed as an collective liberty, meanwhile some countries consider it as an individual liberty (Canada, Portugal). On the one hand, in its positive aspect, the freedom of association signifies the right to join a group, whereas in its negative aspect, it implies the

right to refuse to take part in the association (Greece, Finland, Portugal, Spain, Sweden).

If we consider the different reports, we have to notice that the freedom of association is guaranted by the constitution or texts of equivalent ranks.

2 - PROTECTION

The basic principles which govern the exercice of the freedom of association are liberalism and the exclusion of interferences by public bodies. Therefore, in order to understand how the freedom of association is guaranted, we will, firstly, consider its positive aspect, then we deal with its negative aspect.

Firstly, the judge protect the freedom to create an association, by respecting all kind of preliminary authorization (Spain). Actually, the existence of an association is only submitted to the formality of declaration, so that the recognition is automatic. The judge insist on the fact that public authorities are not entitled to appreciate whether or not the goals and the means of action of the association, as well its methods of organisation, before its recognition.

Moreover, the public bodies are not allowed to pronounce the interruption or the dissolution of an association which has lawfully been constituted.

Concerning the negative aspect of the freedom of association, in Greece, the courts annulled administrative decisions stipulating obligatory membership in an association. On the other hand, courts have admitted the legality of formulas requiring obligatory association for reasons grounded on the general interest (Spain, Portugal).

The courts ensure a special protection to associations with economic and religious aims, political parties and unions (Finland, Switzerland, the Netherlands, Turkey).

Generally speaking, the courts protect citizens against administrative interference, on the one hand by seeking the admissibility of appeals lodged by

associations and in particular their standing to sue (France, Luxemburg, Finland, Senegal), and on the other hand, by reviewing the legality and sometimes even the constitutional validity of administrative acts.

The courts also proceed to reconcile freedoms or seek to determine their compatibility.

3 – LIMITATIONS

Associations can be banned by the administration. The appropriate courts deliver rulings on such bans. They attempt to determine whether the facts justify their banning or dissolution. This concerns extremist or violent associations (Germany, Spain), criminal associations, those that violate criminal laws, those with criminal or illicit motives (Germany, Portugal, the Netherlands) and secret associations (Spain, Italy). It also includes armed, military, paramilitary or militarised associations (Spain, Portugal, the Netherlands, Switzerland) and extreme right associations propagating nationalist and racist ideas (the Netherlands) or advocating the persecution of a group of people of a certain race, colour or ethnic origin (Sweden).

C – FREEDOM OF ENTERPRISE

1 - CONTENTS

Definition of the freedom of enterprise varies from one country to the other. Some perceive it in a restrictive manner and others in a more expansive manner. Hence, freedom of enterprise is conceived as the freedom to choose one's profession, employment and establishment (Germany), the freedom to create, practice and transfer an industrial and commercial activity (France), the freedom to choose one's profession and to have free access to a professional activity independently and the freedom to practice it. It includes the right of establishment, which arises from community rights (Luxemburg), the right to found and direct an enterprise (Greece), freedom of establishment and the freedom to provide services (Netherlands).

Along with freedom of competition, it is sometimes viewed as one arm of the freedom of trade and industry (France), or on the professional side, as an

expression of the freedom of commerce and of conventional freedom and the freedom of each individual to practice the lucrative activity of his choice. Some reports include the right to property in the freedom of enterprise (Switzerland, Finland, Sweden, Italy and the European Communities Court of Justice). Finally, some of them include contractual freedom (Turkey, Canada, Greece). Generally speaking, freedom of establishment is distinguished from freedom of practice.

The legal status of freedom of enterprise also varies: in some countries it is safeguarded by the constitution (Germany, Spain, Switzerland, Morocco, Portugal, Finland, China, Sweden, Turkey, Italy and Senegal) and considered to be a fundamental right (Portugal, Spain, Israel). In yet others, it is safeguarded by law and by principles instilled with constitutional value (France), in others by law (Greece, Canada, the Netherlands, Israel).

2 – PROTECTION

The court ensures the protection of freedom of enterprise, whether it concerns the right of establishment, e.g., freedom to choose one's profession against the intervention of public authorities or the right to freely practice one's professional activity. This may involve a special protection. In that case legislature cannot ignore its essential contents (Spain). According to the courts, a government cannot breach a citizen's free access to practice a professional activity that has not been limited by any legal provisions. Neither is any prior authorisation required to practice a profession. Basically, the courts protect one's access to and exercise of his profession. The administrative court is qualified to rule on decisions made by independent administrative authorities such as the Italian Market Competition Review Authority. It is also qualified to select the government's co-contractors, especially when this involves a mutual agreement that might infringe upon the freedom of enterprise and of competition. In general, the courts annul acts limiting the opening hours of commercial establishments without any grounds. Moreover, authorities may not intervene in the dynamics of free competition (the Netherlands, France).

The courts also protect the right to property. The various laws stipulate that in case of expropriation, the victim will be compensated (Switzerland, Finland, Sweden, Italy and CJEC).

Generally speaking, the court has extensive control over violations of the freedom of enterprise, which can go as far as reviewing proportionality when a decision encroaches too heavily upon the rights protected by a constitution. The court verifies whether the restriction set by law corresponds to the importance of the objective sought by the legislature and does not exceed the limits of what is required to attain it (Germany, Spain, Greece, Israel, the Netherlands). The principle of proportionality can be established as one criterion for reviewing administrative powers (Spain). The court also applies the doctrine of "indubio pro liberate" (Germany) and the rule of reason (Netherlands). Finally, the court attempts to conciliate freedom of enterprise, consumers' rights and the balance of the freedom of trade with the protection of community or group interests.

CONCLUSION

Judging by the wide diversity of the safeguards for individual rights and freedoms before the administrative courts as expressed through the instruments or judicial texts in force and according to the procedures, techniques and safeguards applicable before and by the administrative court, the concern to reconcile the various national solutions and experiences would gain from being shared more widely, with the aim of anchoring the increased protection of individual rights before the administrative court on every continent.

Those countries which are just beginning to set up a protective system, thanks to the recent creation in their respective lands of a qualified administrative jurisdiction in the area considered or because of a yet timid opening up to the venues of effective recourse (like those in which the administrative courts still have new spheres of freedom to conquer) should find in those advances that positively characterise the systems presenting the best safeguards, an compelling source of inspiration. Such inspiration is most likely to help their own institutional and safeguards systems evolve, favouring the opportunities for comparing the tried and true models offered by this Congress.