

21.11.2002, E.2001/408, K.2002/191

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Subject : Deprivation of liberty, Freedom of contract, Contract, obligation, failure to fulfil / Cheque, issued, non-sufficient, funds.

Headnotes:

Imprisonment for the inability to fulfil a contractual obligation is contrary to the Constitution. However, where a drawer of a cheque does not deposit an amount to cover the cheque in the bank, or where that person does not duly return a chequebook to the bank in spite of being asked to do so and warned, or where that person commits similar acts, imprisonment for those acts is not contrary to the Constitution.

Summary:

A number of First Instance Courts applied to the Constitutional Court seeking the annulment of some articles of the Law on Cheques (Law no. 3167). The applicant courts noted that a cheque is a method of payment that is commonly used in contracts. In contracts that are freely entered into by the parties, a debtor is under an obligation to pay the amount appearing on the cheque at the date indicated on the cheque. Articles 13 and 16 of the Law on Cheques provide for the imprisonment of the drawer of the cheque where he/she does not deposit an amount to cover the cheque in his/her bank account. Since Article 38 of the Constitution stipulates that no one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation, the impugned provisions are contrary to the Constitution.

The impugned provisions of the Law on Cheques envisage imprisonment for drawers of cheques who breach the rules laid down in the Articles 13 and 16 of the Law on Cheques.

According to Article 818 of the Code of Obligations, contracts may be concluded upon the mutual and corresponding declarations of the will of the parties. Cheques have the nature of negotiable instruments and are payable upon presentation. They are a special kind of bill of exchange. Under Article 38 of the Constitution, no one may be deprived of his/her liberty merely on the ground of inability to fulfil a contractual obligation. A similar provision is found in Article 1 Protocol 4 ECHR.

Since the holder of the cheque has a right deriving from the cheque rather than one deriving from a contract concluded between the drawer of the cheque and the

holder of the cheque, the impugned articles provide for imprisonment in order to secure public order and the right of cheque holder. Therefore, the relation between the drawer of the cheque and the holder of the cheque does not arise from a contractual relationship, and it is not necessary to have a contractual relationship concerning the cheque. Where there is a contractual relationship between the drawer of the cheque and the bank, the drawing of the cheque is independent of the initial contract. On the other hand, where the cheque drawer draws a cheque in spite of the fact that the amount is not covered by the funds in his/her account, it should not be construed as the inability to fulfil a contractual obligation.

It is impossible to regard the acts of the drawer of a cheque as being unable to fulfil a contractual obligation where that person merely fails to duly return the chequebook to the bank in spite of receiving a request to do so and a warning, or where that person fails to deposit funds in the bank account to cover the cheque, or where that person does not deposit the relevant amount and default interest in the name of the holder of the cheque.

For these reasons, the impugned provisions are not contrary to the Constitution. The application was rejected. Justice Kýlýç dissented.