

27.12.2002, E.2002/146, K.2002/201

Date : 27.12.2002
Number : E.2002/146, K.2002/201
Official Gazette : 11.12.2003, 25313
Subject : Sovereignty, Unitary State, Relations between the State and bodies of a religious or ideological nature, Indivisibility of the territory, Regional language(s), Minority language(s), Procedure, Independence, Ne bis in idem, Freedom of expression, Right to property, Protection of minorities and persons belonging to minorities, Terrorism, death penalty, abolition / Death penalty, abolition, terrorist act / Language, minority, education / Language, regional, minority, use in broadcasting / European Court of Human Rights, decision, national law, effects / Minority, community, property, right to manage.

Headnotes:

The Constitutional amendments of 3 October 2001, made by Law no. 4709, established the competence of the legislative power as to whether the death penalty may be imposed in the appropriate cases in times of war, imminent threat of war and terrorist crimes. Abolishment of the death penalty for terrorist crimes is therefore not contrary to the Constitution.

Law no. 4771 established the right of foundations belonging to religious minority communities to possess and freely manage real property in order to fulfil their religious, charitable, social, educational, health and cultural objectives.

Procedural laws were also amended, and judgments of the European Court of Human Rights finding violation of fundamental rights and freedoms are listed among the reasons for the retrial of a case. Since the laws provide that the judges examining cases upon retrial must rule according to their conscience, the impugned provision does not provide for the delegation of sovereignty to other bodies or interference with judicial proceedings, and the principle of the independence of the courts is not violated.

Another amendment by Law no. 4771 concerns broadcasting in traditional languages and dialects other than Turkish. According to the Constitutional Court, that provision is not contrary to the constitutional principles on the indivisibility of the State, national language and education.

Summary:

More than one-fifth of the members of the Parliament brought Law no. 4771 before the Constitutional Court alleging its unconstitutionality. The Law amended a number of laws on different subjects. In order to harmonise the provisions of the

Constitution with those of other Laws, the death penalty was abolished except in times of war and imminent threat of war.

A. Article 1/A-1 and provisional Article 1 of Law no. 4771

Article 1/A-1 of Law no. 4771 provides that excluding times of war and imminent threat of war, the death penalty laid down by the Criminal Code (Law no. 765), by Law no. 1918, and by the Forestry Law (Law no. 6831) has been commuted to life imprisonment. The provisional Article 1 of Law no. 4771 provided rules for cases pending in the ordinary courts and in the Court of Cassation for which the death penalty was provided.

Article 1 states that the amendment broadens the scope of fundamental rights and freedoms and thereby aims at harmonising the Constitutional amendments made in 2001 with the Universal Declaration of Human Rights and the European Convention on Human Rights and its Protocols.

It is doubtless that criminal codes are governed by the fundamental principles of the Constitution and criminal law in order to fulfil the political, social and economic needs of the country. In that respect, the Criminal Code must conform to the rule of law as set out in Articles 2 and 5 of the Constitution. The State has discretionary power as to which actions are to be deemed as crimes on the basis of the State's observation of the nature of crimes, the way they are committed and their danger to society. The State may amend the Criminal Code to include new situations.

According to the Constitutional amendment of 2001, the death penalty may be imposed in three cases (that is to say, in cases in times of war, imminent threat of war and terrorist crimes) on the basis of social requirements. The impugned provision transformed the death penalty into life imprisonment in a number of Laws. As a result, the lawmaker preserved the death penalty for the appropriate cases in time of war and imminent threat of war, and excluded it for cases related to terrorist activities.

The Court concluded that the commutation of the death penalty into life imprisonment for sentenced persons could not be deemed to be amnesty. Therefore, the application on that point was rejected.

B. Article 4/A of Law no. 4771

Article 4/A of Law no. 4771 introduced provisions relating to the capacity of foundations of minority communities to possess and manage real property. According to those provisions, the foundations of religious minority communities are able to possess and manage real property in order to fulfil their religious, charitable, social, educational, health and cultural objectives. In Turkey, the foundations of minority communities belong to religious communities whose

members have Turkish citizenship. Those foundations have legal personality and have been preserved since 1923 by the Lausanne Treaty.

Article 35 of the Constitution provides: "Everyone has the right to own and inherit property. These rights may be limited by law only in view of public interest. The exercise of the right to own property shall not be in contravention of the public interest." The impugned provision provides that the minority community foundations must register with the registry office the real property possessions used by them to fulfil the above-mentioned objectives, if those possessions have not yet been registered because of obstacles originating from statutory provisions or judicial decisions. Consequently, the Court found that the impugned provision was not contrary to the right to own property as regulated in Article 35 of the Constitution.

C. Article 6/A and 7/A of Law no. 4771

This provision stipulates that the retrial of a case may be requested by the Ministry of Justice, by the Chief Public Prosecutor attached to Court of Cassation, by the person who has applied to the European Court of Human Rights or his/her legal representative where the human right violation found by the European Court does not lend itself to reparation by just satisfaction under Article 41 ECHR.

In the application to the Constitutional Court, it was alleged that that regulation delegated the right of the Turkish Nation to exercise its sovereignty partly to the European Court of Human Rights.

Article 6 of the Constitution provides: "Sovereignty is vested fully and unconditionally in the nation. The Turkish Nation shall exercise its sovereignty through the authorised organs as prescribed by the principles laid down in the Constitution. The right to exercise sovereignty shall not be delegated to any individual, group or class. No person or agency shall exercise any state authority which does not emanate from the Constitution." In a country governed by the rule of law, the independence of the courts, as regulated by Article 138 of the Constitution, means that the courts are independent from the legislative and executive power. Independence of the judges means that they should perform their duties according to their conscience in conformity with the Constitution, other legal provisions and the law.

The reasons for the retrial of a case are listed in the relevant articles of the laws, and the impugned provision has been added as a new reason for the retrial of a case. The Constitutional Court found that that provision was not a delegation of the judicial power to the European Court of Human Rights and that it did not infringe the independence of the courts. The application on that point was rejected.

D. Article 8 of Law no. 4771

Article 8 of Law no. 4771 permits broadcasting in languages and dialects other than Turkish. However, such broadcasting may not be carried out in such a way so as to be contrary to the principles of the Republic listed in Constitution or the indivisibility of the State with its territories and its nation.

The applicants alleged that that provision was contrary to Articles 3, 4, 5, 14 and 42 of the Constitution.

According to Article 3 of the Constitution, the language of the Turkish State is Turkish. In 2001, Article 26 of the Constitution was amended, and the expression of ideas was expanded. After that amendment, it was possible to use different languages and dialects in daily life. Allowing broadcasting in languages and dialects other than Turkish is in conformity with the Constitutional amendments made in 2001 to Articles 26 and 28 of the Constitution. However, it is clear that in the application of the impugned provision, activities against indivisibility of the State with its territory and its nation shall not be permitted.

Article 42.9 of the Constitution provides: "No language other than Turkish shall be taught as a mother tongue to Turkish citizens at any institutions of training or education". It is certain that this rule is valid for educational programs broadcast on radio and television or found in other kinds of media.

Consequently, the Court found that Article 8 of Law no. 4771 was not contrary to the Constitution. The application on that point was rejected.

Justices Hüner and Ersoy dissented.

E. Article 11/A and B of Law no. 4771

Article 11/A of Law no. 4771 changed the name of Law no. 2923 from the Law on Foreign Language Education and Training to the Law on Foreign Language Education and Training and the Teaching of Different Languages and Dialects to Turkish Citizens.

Article 11/B 4771 added a paragraph to Article 1 of Law no. 2923 permitting courses on different traditional languages and dialects to be offered.

It was asserted that Article 11/A-B was contrary to Articles 3, 4, 5, 14 and 42 of the Constitution.

This new regulation permits the offering of courses teaching different languages and dialects traditionally used by the citizens in daily life. However, these courses are under the supervision and observation of the Ministry of National Education. Since that Ministry may not permit any activities against the fundamental principles of the Republic listed in Articles 3, 4, 5 and 14 or the indivisibility of the State with

its territories and nation, the impugned provision is not contrary to the Constitution. The application on that point was rejected.

Justices Hünér, Ersoy and Tuđcu delivered dissenting opinions.