

UPDATES FROM THE REGIONAL HUMAN RIGHTS SYSTEMS

EUROPEAN COURT OF HUMAN RIGHTS

In 1959, the European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) established the European Court of Human Rights (Court). The Court enforces the obligations entered into by the Council of Europe's Contracting States. Any Contracting State or individual may allege violations of the Convention by filing a complaint with the Court.

LANDMARK RULING STRIKES DOWN COMPULSORY RELIGIOUS CLASSES IN TURKEY

The tension between Turkey's secularism and hopes of joining the European Union came to a head in the Court in early October 2007. In a case involving compulsory religious lessons at school, a Turkish parent argued that his right to freedom of religion allowed him to prevent his daughter from attending those lessons.

Eylem Zengin, the student in the case, and her father are Alevi, an Islamic sect related to the Shi'ia branch of Islam. At least ten percent of Turks are Alevi, but Turks in general are predominantly Sunni. The Zengins, along with other Alevis, protest against the compulsory religious classes because the classes focus on Sunni beliefs and fail to recognize Alevism. The Turkish Ministry of Education, on the other hand, states that "the mentality of the new school books is quite different," and that the religious education syllabus mentions Alevism. A teacher familiar with the new syllabus says that changes in the syllabus do not have a significant effect on the content of the religious lessons, however, because "most of the teachers are conservative Sunni Muslims who see themselves more as missionaries than teachers." The Ministry of Education could monitor teachers, but the Ministry members are also Sunni and, thus, may be unlikely to prevent teachers from focusing solely on Sunni teachings.

The Court ruled on October 9, 2007 that Turkey's insistence that Ms. Zengin attend compulsory religious classes violated Article 2 of Protocol 1 to the Convention, which requires the government to "respect the right of parents to ensure... education in conformity with their own religious ... convictions." Parents, therefore, have the right to religious freedom, and the Turkish government must respect that right by not forcing students to attend religious education classes.

Alevi groups herald the decision as monumental in their 20-year struggle for religious freedom. Ms. Zengin's lawyer, Kazim Genc, also applauds the decision, saying that the decision solves the recent debate about the justice of compulsory religious education, and the continuance of such education in a new liberal constitution. Genc believes the Court's ruling affirmatively requires that the new constitution not include compulsory religious lessons. The government's current support of compulsory religious education stands in stark contrast to Turkey's increasing secularism, as highlighted by Turkey's controversial ban on the wearing of the hijab in schools and the workplace. Therefore, the elimination of compulsory religious lessons seems logical to bring education into conformity with the other more secular aspects of Turkish society.

PILOT JUDGMENT PROCEDURE SUCCESSFUL IN POLISH BUG RIVER CASES

The Grand Chamber of the Court delivered a judgment in *Broniowski v. Poland* on June 22, 2004. This decision marked the first time the Court used the pilot judgment procedure — a method for the Court to deal once with a systemic problem raised in numerous cases, thus allowing the Court to manage its increasing caseload more effectively. Human rights activists and non-governmental organizations also applaud the pilot judgment procedure as a method for introducing class action cases to the Court. On December 4, 2007, the Court decided that Poland met the

requirements set forth in the pilot judgment. It thus dismissed remaining cases with claims based upon the same violation raised in *Broniowski v. Poland*.

Broniowski v. Poland was one of several of the so-called Bug River Cases, involving Poland's failure to satisfy the claims of persons who had been living in the Eastern provinces of pre-World War II Poland and had to repatriate to Poland after the redrawing of Poland's eastern border along the Bug River at the end of the war. A 1946 Polish law entitled repatriated persons to compensation in kind for their lost property. They had the right to buy land from the state and have the value of the abandoned property offset either against the fee for the "perpetual use" of this land, or against the price of the compensatory property or land. The Local Government Act of May 10, 1990 reduced the pool of government property available to the Bug River claimants, however, which meant the Polish treasury could not fulfill its obligation to meet compensation claims. The Law of 12 December 2003, which entered into force on January 30, 2004, discharged Poland's obligations towards all Bug River claimants who had obtained any compensatory property under the previous legislation at any point, even if this compensatory property did not fully compensate them for their lost property.

The Grand Chamber of the Court ruled against Poland on June 22, 2004, holding that Poland had to take steps to ensure proper compensation of Bug River claimants. The Court also found that Poland violated Article 1 of Protocol 1 to the Convention, which guarantees the protection of property. In response to the Court's judgment, Poland passed a new law in 2005 that set the ceiling for compensation for Bug River property at 20 percent of the property's original value. This law was based on the friendly settlement reached between Broniowski — one of the repatriated persons — and Poland, which provided Broniowski with a lump sum of 20 percent of his claim. In furtherance of the law, the Ministry for the State Treasury

transmitted documents to the National Economy Bank enabling payment of compensation to 1,730 people. On December 4, 2007, the Court decided that Poland's new law and compensation scheme is effective in practice, and that the law provides adequate domestic compensation. Accordingly, under the pilot judgment procedure, the Court struck out 40 pending Polish cases, and is likely to strike out the remaining 230 cases in early 2008.

FRENCH DENIAL OF BABY'S RETURN TO BIRTH MOTHER NOT A VIOLATION

Irish national Karen Kearns gave birth in France to a daughter from an extramarital relationship, registered her daughter's birth anonymously, and gave her daughter up for adoption. French law allows for anonymous registration of a birth, and stipulates that a birth mother has two months to change her mind and request the return of her child. Kearns, however, did not request the return of her daughter until five months after her daughter's birth. French social services refused Kearns's request for return of her child, and, after the French Court of Cassation also ruled against Kearns, she brought the case to the Court.

Kearns's primary complaints were based on the brevity of the two-month period in which she could request the return of her child and the failure of French social services to provide her with sufficient linguistic assistance to understand all the implications of anonymously registering the birth of her child. She argued that these circumstances violated Article 8 of the Convention, the right to respect for private and family life. The Court found for France in both issues. Council of Europe Member States have not reached a consensus regarding adoption and the time limit for withdrawing consent. Therefore, the Court said greater latitude had to be given to a state in striking a balance between competing public and private interests. Most important among those interests — including those of the biological mother, the adoptive family, and the public — were the child's best interests. France argued that child welfare professionals determined that it was in the child's interests to enjoy stable emotional relations with a new family as soon as possible. In response, the

Court decided that the two-month limit was reasonable.

On the issue of the lack of information and linguistic assistance provided to Kearns, the Court declared that Kearns had received adequate information. Kearns had chosen to come to France to take advantage of the possibility of anonymous registration of the birth, which was not available in Ireland. Kearns had also visited the maternity ward before the birth with her lawyer, and had had two lengthy interviews with social services in the presence of interpreters. The Court determined Kearns understood the implications of her decision because French social services had taken all the steps necessary to ensure that Kearns understood the implications of her actions.

Based on this reasoning, the Court decided unanimously on January 10, 2008 that there was no violation of Article 8 of the Convention. The Court decided that a child's best interests, particularly the interests in a stable family life, are more important than a biological mother's right to her child. The Court's decision, however, does seem to imply that the case could have been decided differently, or decided by employing different reasoning, if there had been consensus among the Council of Europe Member States concerning adoption and appropriate time limits for withdrawing consent.

INTER-AMERICAN SYSTEM

The Inter-American Human Rights System was created with the Adoption of the American Declaration of the Rights and Duties of Man in 1948. In 1959, the Inter-American Commission on Human Rights was established as an independent organ of the Organization of American States. In the 1969, the American Convention on Human Rights (the Convention) was adopted. This Convention further defined the role of the Commission and created the Inter-American Court of Human Rights (the Court). The Commission may recommend cases to the Court, which determines liability under relevant regional treaties and agreements, including the Convention.

MANDATORY DEATH PENALTY VIOLATION OF RIGHTS TO LIFE AND FAIR TRIAL

In *Boyce et al. v. Barbados* the Court addressed whether a mandatory death penalty for persons convicted of murder contravenes rights protected in the Convention. On November 20, 2007, the Court held that Barbados violated Article 4 of the Convention, which protects the right to life, when it sentenced Lennox Ricardo Boyce, Jeffrey Joseph, Frederick Benjamin Atkins, and Michael McDonald Huggins (the accused) to death in accordance with Section 2 of Barbados's Offences Against the Person Act of 1868. The Court also found that the Barbadian Constitution, which does not allow for judicial reform of laws that existed before independence, violates Article 2, requiring States Parties to adopt measures to give effect to the rights protected by the Convention, in relation to Articles 4 and 8.1, which relate to fair trial rights.

The state argued that the mandatory death penalty does not violate Article 4 of the Convention for several reasons. First, the punishment is mandated by Barbadian law; second, each accused is judged individually, in accordance with due process requirements; and third, individual circumstances are taken into consideration by the Barbados Privy Council, a branch of the executive, when deciding whether or not to commute a death sentence.

The Court held that the mandatory death penalty violates the protection against arbitrary execution enshrined in Article 4.1 by not allowing consideration of the individual circumstances of each case, such as the degree of culpability of the accused. Furthermore, the Court found that due process requirements are not upheld in determining the appropriate punishment if the accused is convicted, but only in determining the guilt or innocence of the accused.

The Court held that the judiciary should have the power to decide whether to apply the death penalty. The Court distinguished between the right to have a "competent court" determine whether the death penalty is the appropriate sentence under Article 4.2 and the right to "apply for amnesty,

pardon, or commutation of sentence” under Article 4.6.

The state argued that it did not violate the Convention since the death penalty had not been carried out, would not be carried out against three of the accused, and was unlikely to be carried out against a fourth accused. The Court found, however, that Articles 4.1 and 4.2 were violated from the moment the accused were sentenced to death.

The “savings clause” of Section 26 of the Barbadian Constitution takes away courts’ power to review the constitutionality of laws existing before the country became independent. The state argued that Section 26 is not inherently a violation of Article 2 of the Convention — the duty to bring domestic legislation into compliance with the Convention — as it does not prevent Parliament from amending, repealing, or substituting existing laws.

The Court held that by preventing judicial scrutiny over Section 2 of the Offences Against the Person Act, the “savings clause” violates the right not to be arbitrarily deprived of life, as protected in Article 4. The Judicial Committee of the Barbadian Privy Council, in its deliberation, stated that, “[W]ere it not for the savings clause, [we] would have declared the mandatory death penalty contrary to the constitutional right not to be subjected to cruel, inhuman and degrading punishment.” The Court concluded that Section 26 violates Article 2 of the Convention as it does not allow for the modification of domestic laws to protect the rights enshrined in the Convention.

DETENTION PROCEDURES AND CONTROL OF PROPERTY PENDING TRIAL DEEMED VIOLATIONS OF CONVENTION

On November 21, 2007 the Court held that the Republic of Ecuador violated the Convention’s Articles 7 and 21, protecting personal liberty and property, respectively, in relation to the detention of Chaparro Álvarez and Lapo Íñiguez. The Court also found that the controversy surrounding Articles 2 (requiring States Parties to give effect to the Convention’s protections); 5 (providing for a right to humane treatment); 8 (protecting fair trial rights); and

25 (providing a right to judicial protection) ceased when the state recognized their violation.

On November 14, 1997 the Ecuadorian anti-narcotic police impounded a shipment of fish in Guayaquil destined for Miami. The police detected cocaine and heroin chlorohydrate in the ship’s iceboxes. Expert testimony suggested that the drugs were put into the iceboxes during the manufacturing process. Chaparro was the owner of Aislantes Plumavit Compañía Ltd., a company that manufactured iceboxes similar to those impounded. Police arrested Chaparro along with Lapo, the factory manager.

The Court found several Article 7 violations relating to the suspects’ initial detention. First, the Court held that Lapo’s detention violated Article 7.2 because the judge did not issue a warrant for his arrest until after he was detained. Second, the Court found a violation of Articles 7.2 and 7.4 when the state failed to prove that Chaparro was notified of the reasons for his detention. Third, the Court held that the state violated Articles 7.2 and 7.5 by not bringing Chaparro before a judge within 48 hours, where he could argue against the necessity of his detention, as mandated by Ecuador’s penal code.

The Court stated that a suspect can only be detained pending a trial verdict in three situations. First, a suspect can be detained once an initial investigation has led to a reasonable suspicion that the suspect indeed committed the crime. Second, detention is permitted to ensure that the suspect does not impede the investigation. Finally, detention is allowed to prevent the suspect from fleeing. The Court found that Chaparro and Lapo’s detention was arbitrary and, therefore, in violation of Article 7.3 because the police had no cause to reasonably suspect they had committed the crime, and the judge authorized their detention before the results of the investigation became available. Additionally, neither the second nor third justifications of detention applied.

In relation to Article 21, the Court held that Ecuadorian law did not violate the Convention *per se*, because the law only permitted a deprivation of property in limited circumstances. Under Ecuadorian

law, deprivation of property is only permitted to avoid goods being used in illicit acts; to procure the success of the criminal investigation; to guarantee funds to cover any eventual verdict; or to avoid loss or deterioration of evidence.

The Court found that the method of carrying out the law became arbitrary when the judge refused to evaluate evidence about whether Aislantes Plumavit Compañía Ltd. was involved and whether its goods should remain impounded. Furthermore, the Court held that the state violated Article 21 because there was no clear link between the goods impounded and the crime. The Court also held that the state violated Article 21 because it was disproportionate to require the suspects, once acquitted, to pay for the costs of impounding their goods.

BALANCE STRUCK BETWEEN INDIGENOUS RIGHT TO LAND TITLE AND STATE DEVELOPMENT NEEDS

The Court decided the case of the *Saramaka People v. Suriname* on November 28, 2007. It held that the Republic of Suriname violated Articles 2 (requiring States Parties to ensure effective protection of the Convention’s provisions); 3 (providing a right to juridical personality); 21 (protecting property rights); and 25 (providing a right to judicial protection) of the Convention by not recognizing and protecting the communal property rights of the Saramaka people. The Court found that the Saramaka people constitute a tribal community because they have social, cultural, and economic traditions different from the national community, because they identify themselves with their ancestral territories, and because they regulate themselves according to their own norms, customs, and traditions.

Suriname has an obligation to enact measures aimed at guaranteeing the Saramaka people’s physical and cultural survival under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights. The Court found that Suriname has a duty to protect the Saramaka people’s property title because land is not only a source of subsistence for them but also of spiritual and cultural identity. By failing to recognize the Saramaka as a juridical personality, the state prevents them from

being eligible to receive communal title to their land. The Court held that in addition to the state-granted privilege of using their land, the Saramaka people have a right to the land's title.

Suriname currently allows timber and gold-mining activity on the Saramaka people's land. While acknowledging that the Saramaka have a right to prevent the state or third parties from appropriating their resources, the Court found that the state may restrict the enjoyment of this right if the restrictions are previously established by law, necessary, proportional, and aimed at "achieving a legitimate objective in a democratic society." The Court instructed the state that it must consult in good faith with the Saramaka people when granting permits for exploration and development.

In addition, the state must share the benefits of its activities with the Saramaka people. Furthermore, the state must ensure that independent and competent environmental and social impact assessments are conducted. In granting timber and gold-mining concessions, the state did not undertake any of these three actions and, thus, violated Article 21. **HRB**

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