

Criminal Actions

Constitutional Court,

Case No. 2002/92 – Decision No. 2004/25

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The parties involved being not published are not known.

The First Instance Criminal Court of Bergama has applied to the Constitutional Court for the cancellation of the paragraph (d) of Article 61 of Decree-Law no.556 on Trademark Protection and paragraph (c) of Article 61/A, which has been added to the said Decree-Law through the Law no.4128, on grounds that subject clauses of the Decree-Law are contrary to the Articles 7, 13, 33, 38, 64 and 91 of the Constitution.

A criminal action (*) has been instituted for infringement of the complainant's registered trademark by the accused person(s) due to use of the trademark without a deed authorizing/licensing license use according to the paragraph (d) of Article 61 of Decree-Law and paragraph (c) of Article 61/A reading "enlarging the scope of the rights granted by the trademark owner on the basis of a contractual license or transferring such rights to third persons without authorization" and "Those who have committed any one of the felonies specified in Article 61 shall be sentenced to an imprisonment term of between two and four years and to pay a fine of between six hundred million and one billion liras, furthermore, judgment shall be ruled to close down the premises of their undertaking for a period not to be less than one year and they shall be prevented from practicing any commercial activity during the same period". Upon such action the Court decided to apply to the Constitutional Court for the cancellation of said articles on grounds that they are contrary to the Constitution, in that the constitution does not authorize any sanction involving privation of liberty for failing to fulfill obligations arising from a contractual relation.

The act subject to the crime is deemed to constitute a penally punishable offence as of articles 61 and 61/A-C of the Decree-Law no.556 whereas a provision of law duly enacted by the parliament would have been need to this effect. Therefore, the principle "all offences and their penalties should be provided by provisions of law" has been disregarded. Accepting such course of action for ruling the offences and penalties is rather critical and dangerous, since such reference leads to so called "white provisions", i.e. devolution the authority to the Council of Ministers for establishing any act as an

offence. Nevertheless, such situation is in violation of Article 7 of the Constitution ruling the devolution of the authority for legislation to another organ of the state, Article 13 ruling that the basic rights and freedom can only be restricted by law, Article 33 ruling that crimes can only be determined by law, Article 64 ruling that only The Grand National Assembly of Turkey has the power to legislate and Article 91 ruling that it is not possible to establish a crime through decree-law.

Besides the above grounds, according to the last paragraph of the Article 38 of Constitution, enacted with the Law no.4709 published on October 17, 2001, “no one's freedom can be restricted due to failure of fulfilling the obligations arising from an agreement”. The subject Articles of Decree-Law are contrary to said provision as well. The subject crime/offence arises from the nonfulfilment of the contractual obligations. The obligations occurred from the contracts include pecuniary obligations and undertakings for doing, giving or not doing something. Accordingly, in order to avoid that such situations lead to the privation of liberty, the provision of Article 38 reading “one's freedom cannot be restricted in case the obligations of an agreement is not fulfilled” has been enacted.

Examination of the paragraph (d) of Article 61 of Decree-Law no. 556

The subject article reads enlarging the scope of the rights granted by the trademark holder on the basis of a contractual license or transferring such rights to third persons without authorization shall be considered as a trademark infringement.

In Article 61/A-c of same Decree-law it has been cited that “Those who have committed any one of the felonies specified in Article 61 shall be sentenced to an imprisonment term of between two and four years and to pay a fine of between six hundred million and one billion liras, furthermore, judgment shall be ruled to close down the premises of their undertaking for a period not to be less than one year and they shall be prevented from practicing any commercial activity during the same period”.

According to the Article 38 of the Constitution, the penalties and safety measures replacing penalties can only be established by law and in the first paragraph of the Article 91, The Grand Assembly of Turkey may grant to the Council of Ministers the authority to enact decree-laws, however, to the exception of situations of state of emergency and martial law, the basic rights, personal rights, personal rights and obligations, political rights and obligations included in the first, second and fourth parts of the Constitution cannot be ruled by decree-laws.

The Articles 61 and 61/a of the Decree-Law rule regarding penalty refer to the Article 38 of the Constitution, which is included in the second part of the Constitution. Accordingly, such provision

cannot be enacted by a decree-law and therefore the paragraph d of the Article 61 of the Decree-Law on Trademark Protection is contrary to the Article 91 of the Constitution.

The Constitutional Court decided that said provision is not to be evaluated in scope of the Articles 13 and 38 of the Constitution.

Examination of the paragraph (c) of Article 61/A of Decree-Law no. 556

Since the paragraph (c) of Article 61/A of Decree-Law no.556 has been enacted by the Law No.4128, it is not contrary to the Article 38 on Constitution regarding the establishment of the penalties by a law enacted by the parliament.

On the other hand with reference to the paragraph (d) of Article 61 of the Decree-Law No.556 bearing the heading “Acts Constituting Infringement of Trademark Right”, the act recognized therein as an offense for “trademark rights infringement” according to the paragraph (c) of Article 61/A, which has been enacted by law, cannot be evaluated in scope of the Article 38 reading “no ones freedom can be restricted due to failure of fulfilling the obligations arising from an agreement”; since the act cited in the paragraph (d) of Article 61 is an offence for extending without authorization the right of use granted by the registrant on the basis of a contractual license, and fulfillment is not an offense arising from the non-fulfillment of a contract.

On such grounds the Constitutional Court ruled that such an act constitutes an offence originating from the law and that with reference to Article 61 (d) of Decree-Law No. 556 the provision of Article 61/A paragraph (c) of the Decree-Law No. 556 on Trade/Service Marks is not in violation of Article 38 of the Constitution.