Egypt’s Court of Cassation rejects ICCPR-based claim in a deliberate breach of public contracts case

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Appeal No.30988 Judicial year 84

Court of cassation

Judgment of 28 December 2020

On 28 December 2020, the Court of Cassation dismissed arguments based on the International Covenant on Civil and Political Rights (1966) (ICCPR) in the context of reviewing a case where the appellants were convicted for the deliberate breach of a public works contract concluded with the General Authority for Housing and Building Cooperatives.

At first instance, the Criminal Court convicted the first defendant, with the second and third defendants participating by agreement and assistance, of the deliberate breach of contractual obligations under a construction contract with the General Authority for Housing and Building Cooperatives concerning the construction of thirty residential buildings and a sewage system. They deliberately breached certain contractual requirements, including the use of insufficient water for soil treatment and the use of non-compliant construction materials, resulting in substantial financial losses to the Authority.

The fourth defendant, with the participation of the fifth defendant, was convicted of the deliberate breach of contractual obligations under a construction contract with the General Authority for Housing and Building Cooperatives, relating to the construction of a water supply network for forty-one residential buildings. They deliberately breached essential contractual obligations by failing to construct concrete supports around pipelines and failing to cover exposed parts, which caused significant damage to the Authority’s fund.

Upon conviction, the Criminal Court imposed various penalties on all defendants, including terms of imprisonment and fines. Following appeals and retrials, **the second and fourth defendants filed a second appeal before the Court of Cassation, arguing, *inter alia,* that their conduct should not give rise to criminal liability under international law. In support of their argument, they relied on Article (11) of ICCPR, which provides that: “No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation.”**

The Court of Cassation rejected the argument stating that

> Criminal law is a punitive body of law with an independent system, distinct from other legal systems and guided by its own intrinsic objectives—where punishment is intended to safeguard the security of the State, and its primary mission is the protection of fundamental interests—it is therefore not merely a legal system whose function is limited to serving the objectives pursued by those other systems. **Accordingly, when a court applies criminal law to an offense expressly provided for therein, and where its constituent elements and conditions are satisfied, it must adhere to the will of the legislator as expressed in this domestic law, and observe the provisions addressed by the legislator to the criminal judge, as these are to be given primary consideration, irrespective of the rules or principles imposed by international law and addressed to the States of the international community.**

Accordingly, in determining the meaning of culpable breach under Article 116 bis (c) of the Penal Code, the criminal court shall be guided by the intent of the criminal legislator in order to achieve the purpose sought, namely the protection of the fundamental interests of the community, based on the facts established in the case and supported by evidence.

Whereas the offense attributed to the appellants is expressly criminalized under Article 116 *bis* (c) of the Penal Code .... and whereas it is established that a legislative provision may not be repealed except by a subsequent statute that expressly provides for such repeal, or that contains a provision which is inconsistent with the provision of the earlier legislation, or re-regulates the subject matter previously governed by that legislation and establishes new rules for it.

And whereas it is evident, upon a careful examination of the provisions of the ICCPR, which was adopted by the UN General Assembly and signed on 4 August 1967, and incorporated into domestic law pursuant to Presidential Decree No. 536 of 1981 (published in the Official Gazette on 15 April 1982)—particularly Article 11 thereof, which provides that: "No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation"—that such provision amounts to no more than a call upon States, as subjects of public international law, to undertake coordinated action to ensure the effectiveness of the measures adopted so as to prevent the imposition of imprisonment on individuals solely due to their inability to perform a contractual obligation. Furthermore, the provisions of the ICCPR are devoid of any rule that would undermine the principle of criminal liability, which is predicated upon acts harmful to society and founded on a conscious breach of a legal duty safeguarded by penal

statutes through specific provisions.

Whereas Article 116 bis (c) of the Penal Code—introduced by Law No. 120 of 1962 and amended by Law No. 95 of 2003— criminalizes the intentional breach in the execution of any of the contracts referred to therein, whether by non-performance of all or part of the contractual obligations, or by performing them in a manner inconsistent with the terms of the contract, the legal rules governing it, or the requirements of good faith binding upon the contracting parties. Furthermore, this offence is conditioned by the legislature upon the gravity of the resulting consequence, as it requires the occurrence of serious harm as an essential element thereof, to the exclusion of lesser harm. The legislature further requires, for the establishment of this offence, that the breach occur in the execution of one of the contracts exhaustively enumerated in the Article, and that such contract be concluded with one of the entities indicated therein. It is also required that the offender be a contracting party with one of these entities, or a subcontractor, agent, or intermediary, provided that the breach in the execution of the obligation is attributable to his act. Moreover, the existence of this offence requires the presence of criminal intent, namely that the will of the offender is directed towards breaching the execution of the contract with knowledge thereof.

Thus, in light of the foregoing, the Court decided that the provisions of the Penal law must be applied to the incident in question, given that its scope of application differs from that of the ICCPR. Therefore, the appellants' contention that the law contravenes the said Covenant is unfounded.

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