

INTRODUCTION TO LEGAL CASE-SOLVING AND MOOTING

concerning § 5 Exercises in legal case-solving and mooting

Case 1 (facts of the case)

Long time ago, a new religion, the "New Believers", spread into many countries, including Vietnam. They are very spiritual, politically neutral, tolerant and adapt to the habits in the country. However, they are not always welcome in the neighbourhoods where they establish their religious centres because they love religious mass services where they sing and dance vividly, play the gong and ring the bells, making a lot of noise. Nowadays in their services music bands with strong amplifiers play religious songs in the style of Vietnamese pop music. The neighbours usually like the songs and the music but not the time when they are performed: for strictly religious reasons, the services never start before midnight.

A. Some decades ago, when Vietnam nationalised the real estates of religious communities, the "New Believers" lost their land property in central neighbourhoods of Vietnamese cities. Now, after the 2013 Constitutional Revision, they want it back and use the land for their religious mass services. The authorities reject their request. They offer to grant them land use rights, but for other pieces of land in less populated areas of the cities. The "New Believers" think that the freedom of belief and religion (art. 24 of the revised Constitution of 1992¹), the right of ownership (art. 32) and the right to land use (cf. art. 54(2)) of their religious community are violated. Are they right?

B. On the basis of new legislation, the Government adopts a new policy concerning the role of religion in the society, according to which religious services must be celebrated in a restraint and moderate manner and with dignity, concentrating on individual prayer and meditation. Based on this new policy, the competent authorities in Hanoi prohibit any religious service with wild dancing, loud music or more than 100 participants. Is the freedom of belief and religion of the "New Believers" violated?

C. After many complaints of neighbours, the competent authorities in Hanoi prohibit any religious mass service of the "New Believers" between 23:00 and 6:00. The measure is based on legislation for the protection of public order and public health. The "New Believers" think that there would have been other ways to harmonise the interests of the "Believers" and the neighbours. Is their freedom of belief and religion violated?

Art. 24 of the revised Constitution of 1992:

1. Mọi người có quyền tự do tín ngưỡng, tôn giáo, theo hoặc không theo một tôn giáo nào. Các tôn giáo bình đẳng trước pháp luật. / The citizen shall enjoy freedom of belief and of religion; he can follow any religion or follow none. All religions are equal before the law.
2. Nhà nước tôn trọng và bảo hộ quyền tự do tín ngưỡng, tôn giáo. / The State respects and protects the freedom of belief and of religion.
3. Không ai được xâm phạm tự do tín ngưỡng, tôn giáo hoặc lợi dụng tín ngưỡng, tôn giáo để vi phạm pháp luật. / No one can violate freedom of belief and of religion; nor can anyone misuse beliefs and religions to contravene the law and State policies.

¹ This case study is based on the Acquired and revised draft on the basis of people and NA deputies' opinions (Dự thảo tiếp thu, chỉnh lý trên cơ sở ý kiến của nhân dân và ĐBQH) of 17/10/2013, http://duthaoonline.quochoi.vn/DuThao/Lists/DT_DUTHAO_NGHIQUYET/Attachments/56/Du_thao_Hien_phap.Hp92.doc.

INTRODUCTION TO LEGAL CASE-SOLVING AND MOOTING

concerning § 5 Exercises in legal case-solving and mooting

Case 1 (discussion of the case)

SUBJECTS: How to structure a case solution; introductory and concluding sentences in a case solution; freedom of belief and religion (art. 24 Const. 1992); right of ownership (art. 32 Const. 1992); right to land use (art. 54(2) Const. 1992); fundamental rights limits and "limits of limits"; principle of proportionality.

OUTLINE OF THE CASE SOLUTION:

A. Violation of fundamental rights by the refusal to give back the nationalised land

The refusal of the authorities to restitute the ownership of the nationalised real estates or to grant the right of land use for these estates may violate the following fundamental rights of the religious community of the "New Believers": the freedom of belief and religion (art. 24 of the Constitution of the Socialist Republic of Vietnam of 1992 as revised in 2013), the right of ownership (art. 32) and the right to land use (cf. art. 54(2)). These rights are violated if their sphere/scope of protection is concerned, the decision of the authorities encroaches on (interferes with) these rights and the encroachment/interference is not justified by the rights' limits.

I. Violation of the freedom of belief and religion (art. 24 Const. 1992): (-)

In the given case, the freedom of belief and religion (art. 24 Const. 1992) cannot be violated because the *sphere (scope) of protection* of this freedom is not concerned and hence this fundamental right is not relevant: The refusal of the authorities to restitute the property or to grant land use rights for the real estates that once belonged to the community of the "New Believers" *does not hinder them from exercising their religion*. In particular, the community is free to hold its religious mass services on other pieces of land that it may use for this purpose.

II. Violation of the right of ownership (art. 32 Const. 1992): (-)

The refusal of the authorities to restitute the ownership of the nationalised real estates does not violate the constitutional right of ownership (art. 32 Const. 1992). Once again, the sphere of protection of the fundamental right is not concerned: Firstly, under the Vietnamese Constitution, the *right of ownership does not comprise the right to ownership of land*, since the land is under entire people ownership (art. 32(1), 53). Secondly, the right of ownership protects the citizen against an unlawful withdrawal of a given ownership but *does not grant him any right to gain ownership*. It does not entitle the citizen to regain ownership of land that he has lost by nationalisation in the past - in particular not if this happened before the Constitution came into force.

III. Violation of the right to land use (cf. art. 54(2) Const. 1992): (-)

The refusal of the authorities to grant land use rights for the real estates that once belonged to the "New Believers" does not violate the right to land use under art. 54(2) Const. 1992. This provision does not only guarantee the protection of granted land use rights (cf. phrase 2) but also obliges the State to establish a practice of handing over land to organisations and individuals and recognizing their right to land use (cf. phrase 1). However, this does not entitle anybody to claim land use rights for a *specific* piece of land such as the real estates once belonging to the "New Believers". Therefore, once again the sphere of protection of the fundamental rights is not concerned.

B. Violation of the freedom of belief and religion (art. 24 Const. 1992) by the prohibition of religious services with wild dancing, loud music or more than 100 participants

The general prohibition of any religious services in Hanoi with wild dancing, loud music or more than 100 participants may violate the freedom of belief and religion of the "New Believers" under art. 24 Const. 1992. This is the case if the sphere of protection of this fundamental right is concerned, the prohibition encroaches on (interferes with) it and the encroachment/interference is not justified by the rights' limits.

I. Sphere of protection: (+)

The sphere of protection of the freedom of belief and religion is concerned: This freedom does not only encompass the *right to* have a religion but also the right to *exercise the religion in practice*. As the prohibition hinders the "New Believers" to celebrate their religious mass services with huge amounts of people singing and dancing vividly and loud music performed by music bands using strong amplifiers, this right is restricted. However, according to art. 24(1) the freedom is limited to the "citizen" (people with national citizenship). Therefore, there is no violation of the freedom of belief and religion in question as far as foreigners living in Vietnam are concerned.

II. Encroachment/interference: (+)

The restrictive measure has been taken by public authorities in the exercise of public power and has a direct impact on the exercise of religion in Hanoi in practice. So it represents an encroachment on (interference with) the freedom of belief and religion.

III. Illegality of the encroachment/interference (no justification by the right's limits): (+)

The encroachment/interference represents a violation of the freedom of belief and religion if it is not justified by the freedom's limits. Every fundamental right has its limits. In the revised Constitution of 1992 they are formulated in *art. 14(2)*, which stipulates that all rights can be restricted by law in case of necessity for the purpose of national defense, national security, social order, ethics and community's health. In the given case, none of the enumerated important public goods is concerned. In particular, the measure of the authorities in Hanoi is not limited to the purpose to protect neighbours against excessive nuisances caused by religious services. It is rather based on and has the purpose to implement a new policy of the Government according to which religious services must be celebrated in a restraint and moderate manner and with dignity, concentrating on individual prayer and meditation.

According to *art. 24(3)*, nobody is allowed to "misuse beliefs and religions to contravene the law and State policies". This may be considered as a limit to the freedom of belief and religion too. So the measure of the authorities in Hanoi may be justified by this limit. However, the *limitation clauses* in constitutional fundamental rights provisions *must be interpreted narrowly*, since it is not the purpose of fundamental provisions to restrict but to guarantee and protect the freedom of the citizen. Therefore, the "law and State policies", which lead to a limitation of the freedom of belief and religion, must for their part show consideration and respect for this freedom as a constitutional value. This *interdependence of the freedoms and the limiting laws and policies* is an essential element of fundamental rights doctrine in modern constitutional states (see, for example, the *Wechselwirkungslehre* of the German Federal Constitutional Court). Art. 24(3) cannot be interpreted to the effect that it allows the legislator or the Government to reduce the freedom of belief and religion to a minimum by defining restrictive "State policies". Otherwise it would only pretend to guarantee but not really guarantee a freedom of belief and religion. Furthermore, it would contrast with the obligations of Vietnam under *art. 18* of the *International Covenant on Civil and Political Rights* (ICCPR), which Vietnam has signed and ratified. In the given case, it is not in the power of the Government to decide how religious services should be celebrated. Any policy on that can only have the character of giving recommendations but not lead to a limitation of the freedom to exercise one's religion in practice. Consequently, in the given case the encroachment on the freedom under art. 24 is not justified by the limit under art. 24(3).

The prohibition of any religious services in Hanoi with wild dancing, loud music or more than 100 participants concerns the fundamental right under art. 24 Const. 1992 and represents an encroachment/interference that is not justified by the freedom's limits. The freedom of belief and religion of the "New Believers" (those who are Vietnamese citizen) is violated.

C. Violation of the freedom of belief and religion (art. 24 Const. 1992) by the prohibition of religious mass services of the "New Believers" between 23:00 and 6:00

The prohibition of any religious mass services of the "New Believers" between 23:00 and 6:00 may violate their freedom of belief and religion, in particular with regard to the fact that for strictly religious reasons, their services never start before midnight. A violation of this fundamental right requires that its sphere of protection is concerned, the prohibition encroaches on (interferes with) it and the encroachment/interference is not justified by the rights' limits.

I. Sphere of protection: (+)

The sphere of protection of the freedom of belief and religion - here: the freedom to exercise the religion in practice - is concerned. The prohibition hinders the "New Believers" to celebrate their religious services in the suitable way (as mass services) at a suitable time (after midnight).

II. Encroachment/interference: (+)

The prohibition of religious mass services during the night by the public authorities in Hanoi represents an encroachment on this right.

III. Illegality of the encroachment/interference (no justification by the right's limits): (+)

However, the encroachment may be justified by the freedom's limit under art. 14(2). According to this provision, the fundamental rights can be restricted by law in case for necessity for the purpose of social order or community's health.

1) Legal basis: (+)

The measure has been taken on the basis of legislation for the protection of public order and public health. As required in the relevant legal provisions, the measure serves to ensure public order and health: It prevents excessive nuisances caused by the strong noise accompanying the nocturnal religious mass services of the "New Believers", which could raise dangerous tensions in the neighbourhoods that result in violence, and affect the health of neighbours who cannot sleep during the night.

2) Pursuit of a legitimate public interest enumerated in art. 14(2): (+)

The measure pursues the purposes of social order (= public order) and community's health (= public health) that are enumerated in art. 14(2) as important public interests that can justify restrictions on fundamental rights.

3) Compliance with the "*limits of limits*": (-)

The measure must finally comply with the so-called "limits of limits", that means the constitutional *limitations for encroachments* on the fundamental rights. It is a basic concept of fundamental rights doctrine that not only the fundamental rights have their limits but in turn the limits of the rights are limited too. According to art. 14(2) Const. 1992 encroachments are only allowed "in case of *necessity*" for the pursuit of the legitimate public interest. This refers to the *principle of proportionality*, which is the most prominent element of the rule of law and of fundamental rights doctrine. It requires that all encroachments on fundamental rights pursue a legitimate aim, are suitable and necessary for this purpose and are proportional in the strict sense.

a) Suitability: (+)

The measure must be suitable to achieve its purpose. Any measure, which is not suitable, cannot be necessary and therefore not meet the requirements under art. 14(2) Const. 1992.

The prohibition of the religious is conducive to the pursued legitimate purpose to protect social order and community's health by preventing insupportable nocturnal noise, which would prevent the neighbours from sleeping and cause dangerous tensions in the neighbourhood. Since there will not be such noise if the nocturnal services are prohibited, the measure is suitable.

b) Necessity: (-)

The measure must also be necessary for the pursuit of its purpose. That means that it must be the *least intrusive act* of intervention *that is equally conducive*. If there is any alternative that serves the purpose sufficiently and that imposes a smaller burden on the citizen, the measure is illegal. The rule of law requires the authorities to consult the concerned citizens before taking the measure in order to make sure that there are no such alternatives. *Usually, general*

prohibitions are unnecessary and the authorities have to search for an appropriate limitation of the prohibition and to allow exceptions.

In the given case, there are obviously several alternatives that are equally conducive but less intrusive. For example, the authorities in Hanoi could have limited the prohibition of nocturnal religious mass services to densely populated areas or other places where neighbours easily are affected. There is no reason why the noisy services should be prohibited if they take place in isolated locations with no neighbours around. The authorities could also have prohibited nocturnal services in the open air and prescribed effective noise insulation in the worship buildings - like in concert halls or nightclubs. They finally could have limited the loudness of the services in order to make sure that the neighbours are not inappropriately disturbed. They could even have determined an absolute decibel limit that must not be exceeded and that can be easily monitored (with any modern smartphone).

So the general prohibition of any religious mass services of the "New Believers" between 23:00 and 6:00 is not necessary to protect the social order and community's health in the given case.

c) Proportionality in the strict sense

Even if the prohibition was necessary, it still had to be proportional in the strict sense. In any case, the burden imposed by a measure encroaching on fundamental rights must not be out of proportion to the aim in view. This requires a thorough *weighing* (balancing) of the conflicting interests (here: the threat of tensions in the neighbourhood and health problems of the neighbours on one side and the freedom to exercise one's religion in practice on the other side). The requirement of the proportionality in the strict sense is not stipulated explicitly in art. 14(2) Const. 1992 but implied in the requirement of "necessity", which is modelled on the corresponding requirements (generally understood in this way) in the fundamental rights limitation clauses in international human rights treaties (eg. art. 18(3) ICCPR).

Given that the "New Believers" perform their loud services during the night for *strictly religious reasons only*, the general prohibition without any exceptions imposes an unproportional (excessive) burden on them. Even if the neighbours are disturbed considerably, the religious services must be tolerated from time to time (for example at important religious holidays or once a month etc.) because otherwise the "New Believers" could de facto not practice their religion at all. The authorities of Hanoi have to search for a solution that reconciles the conflicting interests in an appropriate way, for example limiting the number of services or restricting the services to suitable locations (where very few neighbours are affected) and certain days (for example the Saturday evening where it is loud in the neighbourhood anyway).

So the general prohibition of any religious mass services of the "New Believers" between 23:00 and 6:00 is not proportional in the strict sense.

The prohibition does not comply with the "limits of limits" for encroachments on the freedom of belief and religion.

In the given case, the encroachment is not justified by the fundamental rights limits under art. 14(2).

The freedom of belief and religion of the "New Believers" (insofar as they are Vietnamese citizens and not foreigners) is violated.

NOTE:

The *principle of proportionality* is the most expedient principle of the rule of law and of fundamental rights doctrine: Firstly it makes sure that *in law no objective is taken as absolute*: Any pursued purpose, even the most important one, has to be openly and thoroughly balanced with the conflicting rights of the human being. To be moderate is one of the very ideas of law. Secondly, the authorities must *consider all* conducive *alternatives* before they take a certain decision. This requires a higher degree of professionalism and usually the consultation of the concerned citizens. Often at this point you will find the central problem of the practical case.

A. Violation of fundamental rights by the refusal to give back the nationalised land

- I. Violation of the freedom of belief and religion (art. 24)**
- II. Violation of the right of ownership (art. 32)**
- III. Violation of the right to land use (cf. art. 54(2))**

B. Violation of the freedom of belief and religion (art. 24) by the prohibition of religious services with wild dancing, loud music or more than 100 participants

- I. Sphere of protection**
- II. Encroachment**
- III. No justification of the encroachment by the fundamental right's limits**

C. Violation of the freedom of belief and religion (art. 24) by the prohibition of religious mass services between 23:00 and 6:00

- I. Sphere of protection**
- II. Encroachment**
- III. No justification of the encroachment by the fundamental right's limits
(→ art. 14(2))**
 - 1) Legal basis**
 - 2) Pursuit of a legitimate public interest enumerated in art. 14(2)**
 - 3) Compliance with the "limits of limits" → *principle of proportionality***
 - a) Suitability**
 - b) Necessity**
 - c) Proportionality (in the strict sense)**