JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT

No. of the case	3-4-1-14-06
Date of judgment	31 January 2007
Composition of court	Chairman Märt Rask, members Eerik Kergandberg, Ants Kull, Villu Kõve and Jüri Põld
Court Case	Petition of the President of the Republic for the declaration of unconstitutionality of the Act on Repeal of § 7(3) of the Republic of Estonia Principles of the Ownership Reform Act
Hearing	Written proceeding
Decision	
	To satisfy the petition of the President of the Republic and to declare the Act on Repeal of § 7(3) of the Republic of Estonia Principles of the Ownership Reform Act unconstitutional.

FACTS AND COURSE OF PROCEEDING

1. Pursuant to § 7(3) of the Republic of Estonia Principles of Ownership Reform Act (hereinafter "PORA") applications for return of or compensation for unlawfully expropriated property which was in the ownership of persons who left Estonia on the basis of agreements entered into with the German state and which was located in the Republic of Estonia are resolved by an international agreement.

2. On 28 October 2002, by its judgment in case 3-4-1-5-02 (RT III 2002, 28, 308) the Supreme Court declared § 7(3) of PORA to be in conflict with §§ 13(2) and 14 of the Constitution in their conjunction, as the provision did not meet the principle of legal clarity and violated persons' right to organisation and procedure. The Supreme Court found that until the Principles of Ownership Reform Act is brought into conformity with the principle of legal clarity, it is impossible to decide on the return of or compensation for or privatisation of the property which was in the ownership of persons who left Estonia on the basis of agreements entered into with the German state (resettlers).

3. On 12 April 2006, by its judgment in case 3-3-1-63-05 (RT III 2006, 13, 123) the general assembly of the Supreme Court declared § 7(3) of PORA invalid and postponed the entering into force of the relevant part of the judgment until 12 October 2006 on the condition that by that time an Act amending or repealing § 7(3) of PORA has not entered into force.

4. On 14 September 2006 the Riigikogu passed the Act on Repeal of § 7(3) of the Republic of Estonia Principles of Ownership Reform Act. By resolution No 1065 of 20 September 2006 the President of the Republic refused to proclaim the referred Act and made a proposal to the Riigikogu to revise the Act and to bring it into conformity with the Constitution. On 27 September 2006 the Riigikogu passed the Act again, unamended.

5. The President of the Republic again refused to promulgate the Act on Repeal of § 7(3) of the Republic of Estonia Principles of Ownership Reform Act and on 4 October 2006 filed a petition with the Supreme Court requesting that the Act be declared unconstitutional.

The Supreme Court received the petition on 6 October 2006.

6. On 12 October 2006, as a consequence of entering into force of the Supreme Court judgment, § 7(3) of PORA became invalid.

JUSTIFICATIONS OF THE PARTICIPANTS IN THE PROCEEDNING

7. The President of the Republic is of the opinion that the Act is unconstitutional because it does not contain regulation sufficient to meet the requirement of legal clarity arising from § 10 of the Constitution and because it is in conflict with everyone's right to the protection of the state and of the law, established in § 13 of the Constitution.

The President of the Republic substantiates his petition with the judgments of the general assembly of the Supreme Court in cases 3-4-1-5-02 and 3-3-1-63-05. According to the petition the regulation of procedure contained in the contested Act does not meet the requirement of the referred judgments and is not sufficient and clear enough for local governments to hear the applications for return of or compensation for property of resettlers. Furthermore, the Act – due to the lack of sufficient regulation – deprives of the protection of the state and of the law those persons who have legitimate expectation to the return of or compensation for the property and also persons who are entitled to privatise the property the return of or compensation for which has been refused. In addition, it is pointed out in the petition that the contested Act essentially enlarged the circle of entitled subjects, so that it differs from the original will of the legislator and the subsequent amendments to the Act.

8. The Constitutional Committee of the Riigikogu, speaking for the latter, is of the opinion that the contested Act is constitutional and requests that the petition be dismissed.

According to the opinion the contested Act forms a sufficient and clear legal basis for the return of and compensation for the property of persons covered by § 7(3) of PORA. To such persons the property shall be returned on the basis of general principles of the Principles of Ownership Reform Act and there is no need for supplementary regulation. The Act obligates local committees to hear, within nine months, the applications that have not yet been heard. Even the declaration of unconstitutionality of the contested Act would not eliminate the alleged conflict with the principle of society based on the rule of law, because the legal ambiguity would continue even when § 7(3) of PORA has already become invalid.

Pursuant to § 22 (6^1) and (6^2) of the Privatisation of Dwellings Act (hereinafter "PDA") the lessees of unlawfully expropriated dwellings may submit applications for the privatisation of dwellings subject to an application for the return or compensation until the question of return has been resolved or until the entitled subject of ownership reform submits a notarised waiver of the claim for return of the dwelling. Although privatisation vouchers could be used for payment for assets until 31 December 2006, all other means of payment, especially money, approved by § 8(1) of the PDA, can also be used for privatisation. § 10(1) of the same Act stipulates the book value of a working year in money. Thus, there are no obstacles to the performance of privatisation acts.

The contested Act gives local governments at least the minimum guidelines for the organisation of the ownership reform procedure. The bulk of the procedure has been regulated on the level of the Government of the Republic and the existing authority-delegating norms of the Principles of Ownership Reform Act are broad enough for the Government of the Republic to introduce necessary procedural amendments.

The circle of entitled subjects of the ownership reform was not enlarged by the declaration of invalidity of § 7(3) of PORA. Clause 5 of the resolution of the Supreme Council of 20 June 1991, § 7(3) of PORA in the wording in force until 12 October 2006, as well as relevant judicial practice indicate that the persons enumerated in § 7(3) of PORA are entitled subjects of ownership reform, in regard to the return of and compensation for whose property there existed legal ambiguity until 12 October 2006, attributable to the failure to conclude an international agreement.

9. The Chancellor of Justice is of the opinion that the petition does not set out sufficient considerations and justifications allowing for the conclusion – as a result of abstract assessment – that the Act is unconstitutional, and requests that the petition be dismissed.

The Chancellor of Justice argues that the hearing of the petition is permissible, although it is essentially the omission of the Riigikogu that the President of the Republic is seeking to be declared unconstitutional. However, the petition does not set out in regard to the exercise of which rights the regulation addressed to the entitled subjects of ownership reform is lacking and for the resolution of which specific situations there are no guidelines to the obligated subjects of the ownership reform. § 2(2) of the contested Act is sufficiently clear. Furthermore, it has been recognised in the judicial practice that for the purposes of § 7(3) of PORA both, persons who resettled in 1939 and in 1941, are deemed to be resettlers and that the general norms of the Principles of Ownership Reform Act are applicable in regard to these persons in the proceedings for the return of and compensation for the unlawfully expropriated property.

The Chancellor of Justice admits that the possibility of necessity of additional regulation of practical issues of the return of and compensation for unlawfully expropriated property can not be excluded, yet on the basis of existing norms the procedure could be amended by the Government of the Republic. The constitutionality of the activities of the Government of the Republic can be ascertained within concrete norm control procedure.

10. The Minister of Justice is of the opinion that the proceeding should be terminated, because the President of the Republic has not submitted a reasoned petition, which is the prerequisite of commencing a proceeding. Alternatively, the Minister is of the opinion that the petition should be dismissed.

The Minister of Justice argues that the petition does not set out a single concrete problem that could not be solved if § 7(3) of the PORA were declared invalid or any concrete regulation that is lacking. The Minister of Justice sees, upon entering into force of the contested Act, no implementation problems excluding the return of property or creating insurmountable problems within the proceedings of return of property. Also, the Act is sufficiently clear. The return of, compensation for and privatisation of property to resettlers shall be carried out pursuant to general rules. There is no need for enacting a special regulation. Several implementation problems related to the return of and compensation for property can be overcome on the level of Government of the Republic regulations and relevant norms delegating authority need not be amended. The possible need to supplement implementation acts does not render the contested Act unconstitutional. The circle of entitled subjects of ownership reform was not enlarged by the repeal of § 7(3) of the PORA.

11. The Association of Estonian Cities is of the opinion that it is first and foremost the executive and the legislator who must resolve the issues of return of, compensation for and privatisation of unlawfully expropriated property of resettlers. The expenses that local governments will incur in relation to reviewing the applications concerning the unlawfully expropriated property, as well as for granting housing to the lessees of the houses to be returned should be covered from the state budget. The Association of Estonian Cities has no data as to how big the cost of new hearing of applications would be. As a rule, local governments do not possess the data about resettlers, the property they owned and about the persons who, in the process of ownership reforms, where answered in the negative on the basis of § 7(3) of the PORA. Such information is possessed by county governments, where the Committees for Return of and Compensation for Unlawfully Expropriated Property acted and received the applications.

12. The Association of Municipalities of Estonia is of the opinion that the repeal of § 7(3) of the PORA would probably require the elaboration of supplementary legal regulation. Due to the lack of information it is impossible to foresee neither the amount of acts to be performed and expenses to be incurred in relation to finalisation of the ownership reform nor the time this will take. It is likely that the costs will be significant and shall include the expenses on the proceeding of applications and on granting housing to the lessees of the houses to be returned.

THE CONTESTED ACT

13. The Act on Repeal of § 7(3) of the Republic of Estonia Principles of Ownership Reform Act establishes the following:

"§ 1. § 7(3) of the Republic of Estonia Principles of Ownership Reform Act (RT 1991, 21, 257; RT I 2006, 25, 184) is repealed.

§ 2. (1) Section 1 of this Act does not give rise to the right to submit new applications for the return of or compensation for unlawfully expropriated property.

(2) Local Committees for Return of and Compensation for Unlawfully Expropriated Property shall re-examine, within nine months as of entry into force of this Act, on their own initiative, all applications submitted concerning unlawfully expropriated property that had been dismissed on the ground of § 7(3) of the Republic of Estonia Principles of Ownership Reform Act."

OPINION OF THE CHAMBER

14. First, the Chamber shall analyse the admissibility of the petition (I) and thereafter shall resolve the petition(II).

I.

15. The Supreme Court received the petition of the President of the Republic on 6 October 2006. On 12 October the judgment of the general assembly of the Supreme Court of 12 April 2006 in case 3-3-1-63-05 entered into force to the extent that it declared § 7(3) of the PORA invalid. Thus, § 7(3) of the PORA is invalid, irrespective of the result of the proceeding of the petition of the President of the Republic.

This is why the Constitutional Review Chamber considers it necessary to analyse whether it would still be possible to examine the petition in this situation, that is whether the contested Act still has an object of regulation and whether it could be enforced, in principle. Thereafter the Chamber shall assess the admissibility of the petition in the narrower sense.

16. As § 1 of the contested Act reiterates what was said in item 2 of the decision part of the Supreme Court judgment of 12 April 2006 and contains no conditions, the entering into force of an Act containing such a provision would not bring about new legal consequences in comparison to those that the Supreme Court judgment, which has already entered into force, has created. An invalid provision of law can not be declared invalid for the second time.

Nevertheless, this in itself does not prevent the review of constitutionality of an Act repealing the provision. Moreover, the invalidity of § 7(3) of the PORA as of 12 October 2006 does not mean that the contested Act in its entirety has lost its meaning. Namely, § 2 of the Act contains implementation provisions related to the repeal of § 7(3) of the PORA, that could – in principle – be applicable after 12 October 2006.

Thus, the fact that § 7(3) of the PORA has become invalid does not prevent the resolution of the petition.

17. The President of the Republic is contesting the constitutionality of the Act on Repeal of § 7(3) of the Republic of Estonia Principles of Ownership Reform Act due to legal ambiguity and lack of sufficient procedural rules, with the help of which local governments could resolve the applications for the return of and compensation for the

unlawfully expropriated property of resettlers and applications for privatisation of returned dwellings. Thus, it is first and foremost the constitutionality of the legislator's omission that the President of the Republic is contesting.

18. The legislator's omission or insufficient activity may be unconstitutional and the Supreme Court can ascertain the unconstitutionality of the legislator' omission within the constitutional review court procedure. In its earlier judgments the Supreme Court has deemed it possible for the President of the Republic to contest the omission of the legislator within abstract norm control, that is under § 5 of the Constitutional Review Court Procedure Act. The President of the Republic is entitled to contest the omission of the legislator if the norm not enacted should be a part of a contested legislation or when it is in substance related to a contested legal act. The norms that the President of the Republic has already promulgated in another Act can not be contested (see judgment of the Supreme Court of 2 December 2004 in constitutional review case 3-4-1-20-04 (RT III 2004, 35, 362), §§ 44-46).

Thus, in order to ascertain the admissibility of the petition it has to be assessed whether the lacking norms, referred to in the petition, should be a part of the contested Act or are in substance related thereto.

19. The Chamber does not agree with the opinion of the Minister of Justice that the petition does not set out a single concrete problem that could not be solved if § 7(3) of the PORA were repealed or any concrete regulation that is lacking. In his petition the President of the Republic refers to the procedural rules on return of and compensation for unlawfully expropriated property that are lacking and that could be applicable upon resolving the resettlers' applications after the repeal of § 7(3) of the PORA. On the other hand, the President of the Republic argues that due to the lack of regulation the persons who have legitimate expectation to the return of and compensation for property, as well as the persons entitled to privatise the property pursuant to general principles after the refusal to return the property, are deprived of the protection of the state and of the law.

It can be concluded from the petition that the President of the Republic is of the opinion that the general procedure based on the Principles of Ownership Reform Act, the legal acts enacted on the basis thereof, the contested Act and acts related to the referred Acts, do not enable correct resolution of the applications for the return of, compensation for and privatisation of property after the repeal of § 7(3) of the PORA.

The petition makes a reference to what was stated in § 30 of the judgment of the general assembly of the Supreme Court in case 3-3-1-63-05, namely that "The general assembly points out that the decision taken concerning the property which had been in the

ownership of resettlers shall be a basis for drafting further legal acts necessary for the resolution of practical issues. [---] There are several other issues that inevitably concur with the invalidation of § 7(3) of PORA that need a legal solution. The valid regulation is not meant for application in a situation where, in 2006, § 7(3) of PORA, the principles of which originate in clause 5) of the resolution of the Supreme Council of 20 June 1991, shall be declared invalid. The local governments resolving the practical issues of ownership reform need a clear legal regulation to be able to act in the new situation."

20. Most of the regulation of the procedure of the return of, compensation for and privatisation of unlawfully expropriated property is contained in the Principles of Ownership Reform Act and in the regulations issued by the Government of the Republic on the basis of the Act. Yet, some important aspects of the procedure of return of and compensation for property and privatisation procedure are regulated by other Acts. Thus, important rules of privatisation of dwellings are included in the Privatisation of Dwellings Act. Some aspects of the use of privatisation vouchers are regulated by the Privatisation Act.

21. If the problems referred to in the petition and the lack of procedural rules substantially impede the return of, compensation for and privatisation of property, the main objective of the contested Act – repeal of § 7(3) of the PORA, which was declared invalid by the Supreme Court, and issue of transitory provisions necessary for the ordering of legal situation created as a consequence thereof – is not achieved. That is why the Chamber is of the opinion that the lacking regulation, referred to in the petition, should be a part of the contested Act or that it is, at least, in substance related to the Act.

Thus, the petition of the President of the Republic is admissible and if the lack of regulation, referred to in the petition, proves unconstitutional, the contested Act itself can be declared unconstitutional.

II.

22. According to the petition the repeal of § 7(3) of the PORA without passing sufficient procedural norms will create a legally ambiguous situation, and that is in conflict with the requirement of legal clarity, arising from § 10 of the Constitution, and does not meet the requirements of general right to procedure and organisation, arising from §§ 13 and 14 of the Constitution. Neither does the President of the Republic find that the general right to protection is sufficiently guaranteed to persons having legitimate expectation to the return of and compensation for property and the persons entitled to privatise.

Proceeding from the fact that the general right to protection, established in § 13 of the Constitution, is every person's right that must be guaranteed equally to everybody, the allegations of the President of the Republic that the referred groups of persons are left without the protection of the state and of the law raise the issue of compatibility of the regulation with the principle of equal treatment.

23. § 10 of the Constitution gives rise to the principle of legal certainty. In the most general sense this principle must create certainty as to the existing legal situation. Legal certainty means both clarity as to the content of valid norms (principle of legal clarity) as well as certainty that enacted norms will remain in force (principle of legitimate expectation). Pursuant to the principle of legal clarity a person must be able to foresee with sufficient clarity the legal consequences of his or her acts. Whether a norm is determinate enough can be gauged against an imaginable person of average abilities (see also judgment of the Supreme Court of 15 December 2005 in constitutional review case 3-4-1-16-05 (RT III 2006, 1, 2), §§ 22-24).

24. The rules of procedure on the return of an compensation for property to resettlers consist, on the one hand, of the earlier enacted general procedural rules on return and compensation and, on the other hand, of the procedural norms established in § 2 of the contested Act. The President of the Republic is of the opinion that the legally ambiguous situation is created by these norms in their conjunction.

25. The Chamber is of the opinion that § 2(1) of the contested Act, pursuant to which the repeal of § 7(3) of the PORA does not give rise to the right to submit new applications for the return of or compensation for unlawfully expropriated property, clearly reveals the obvious will of the legislator that the persons who could request the return of or compensation for unlawfully expropriated property but who have not submitted a relevant application earlier on, can not submit a new application.

It is obvious from § 2(2) of the Contested Act that the applications for return of or compensation for property that were filed on time but not heard due to § 7(3) of the PORA have to be examined again, that is the proceeding of these applications must be renewed on the initiative of local Committees for Return of and Compensation for Unlawfully Expropriated Property. Furthermore, the contested Act does not prevent the proceeding of the applications the proceeding of which was suspended or not completed for some other reason or in regard to legality of which a court case is pending (see e.g. judgment of the general assembly of the Supreme Court of 6 December 2006 in case 3-3-1-63-05 (RT III 2006, 46, 385)).

26. § 2 of the contested Act does not prescribe the review of the applications for the return of or compensation for unlawfully expropriated property that were dismissed due to § 7(3) of the PORA. Neither does the contested Act require the review of those applications for the return of or compensation for property that had initially been satisfied but in regard to which the decision on satisfaction had later on been repealed (see e.g. judgment of the Supreme Court of 15 June 2005 in civil case 3-2-1-62-05 (RT III 2005, 25, 255)).

27. The Chamber is of the opinion that in regard to the referred issues the regulation of the contested Act allows to foresee with sufficient clarity the legal consequences of one or another act and is, therefore, not legally ambiguous in itself.

28. A proceeding must be aimed at the protection of person's rights, otherwise it would prove impossible for a person to exercise his or her rights. The general right to protection, established in § 13 of the Constitution, is the right of every person and must be guaranteed equally to everybody and is, thus, connected to the principle of equal treatment, established in § 12(1) of the Constitution.

29. The contested Act stipulates that the right to proceeding shall be guaranteed to those resettlers whose applications for the return of or compensation for unlawfully expropriated property were denied; those resettlers whose applications for the return of or compensation for property had been dismissed have no possibility to exercise their rights.

In its ruling of 22 March 1999, in administrative case 3-3-1-6-99 (RT III 1999, 10, 102), the Supreme Court has found that the local Committees for Return of and Compensation for Unlawfully Expropriated Property were under the obligation, under § 7(3) of the PORA, to dismiss an application for the return of or compensation for unlawfully expropriated property if they ascertained that the application had been submitted by a person who had left Estonia on the basis of agreements entered into with the German state or by such person's successor. It appears from the ruling that on account of § 7(3) of the PORA an application for the return of or compensation for property was to be dismissed and not denied. Provided that the practice of proceeding with the applications followed the opinion of the Supreme Court of 1999, § 2(2) of the contested Act guarantees protection to only a group of persons from among those affected by § 7(3) of the PORA.

As the contested Act guarantees the general right to protection in conjunction with the general right to procedure and organisation to only a group of persons, there exists an infringement of the general equality right.

30. It is impossible to deduct from the discussions preceding the adoption of the contested Act the reason why the legislator decided to restrict the persons' right to equality in conjunction with the general right to protection and general right to procedure and organisation in such a manner. The Chamber itself can see no good reason that could serve as an aim of the restriction imposed by the contested Act. Thus, the restriction on the general right to equality, the general right to protection and the general right to procedure and organisation is a disproportional and unconstitutional one.

31. The Chamber points out that the contested Act may contain other problems regarding the constitutionality of differential treatment of the entitled subjects of the return of, compensation for or privatisation of property. Thus, for example, pursuant to § 2(1) of the contested Act the applications for the return of or compensation for property may not be submitted by the persons who, because of § 7(3) of the PORA, had not previously submitted the applications and were waiting for an international agreement to be concluded.

32. Also, the Chamber points out that pursuant to § 29(1) of the Privatisation Act the persons entitled to privatise dwellings can no longer use privatisation vouchers for payment for privatised dwellings. Although, pursuant to § 29^1(2) of the same Act the nominal value of the unused privatisation vouchers shall be compensated for in money, the receipt of the compensation my partially be postponed – pursuant to the same provision – for up to five years. This, too, may hinder the privatisation of dwellings, even if the applications for privatisation were submitted in good time. The contested Act does not solve this issue arising from the repeal of § 7(3) of the PORA.

33. The Chamber is of the opinion that the rules stipulated in § 2 of the contested Act do not constitutionally resolve the legal issues related to the repeal of § 7(3) of the PORA and instead, due to unequal treatment of different groups of resettlers, create more problems. Practically, the Riigikogu has not fulfilled the requirements of § 30 of the judgment of the general assembly of the Supreme Court in case 3-3-1-63-05, pursuant to which an effective regulation should have been prepared for the resolution of the issues following the repeal of § 7(3) of the PORA, a regulation that would enable the resettlers and persons entitled to privatise unlawfully expropriated dwellings to exercise their rights.

34. This is why the Chamber is of the opinion that the contested Act does not meet the principle of equal protection of the general right to protection and the general right to procedure and organisation, arising from §§ 13, 14 and 12(1) of the Constitution.

35. On the basis of the aforesaid the Chamber satisfies the petition and declares the Act on Repeal of § 7(3) of the Republic of Estonia Principles of Ownership Reform Act, that the President of the Republic refused to proclaim, unconstitutional.

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