

**JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT**

No. of the case	3-4-1-4-07
Date of judgment	8 June 2007
Composition of court	Chairman Märt Rask, members Hannes Kiris, Indrek Koolmeister, Julia Laffranque and Priit Pikamäe
Court Case	Petition of Tallinn City Council to declare § 8(2) and § 9(4) of the Protection of War Graves Act invalid due to their unconstitutionality.
Hearing	Written proceeding
Decision	To dismiss the petition of Tallinn City Council.

FACTS AND COURSE OF THE PROCEEDINGS

1. On 10 January 2007 the Riigikogu passed the Protection of War Graves Act (Hereinafter “PWGA”), which entered into force on 20 January 2007.
2. By its resolution No 48 of 27 February 2007 the Tallinn City Council requests that the Supreme Court declare §§ 8(2) and 9(4) of the PWGA invalid due to their conflict with the constitutional guarantees of local government.

The Supreme Court received the petition of the Tallinn City Council on 1 March 2007.

JUSTIFICATIONS OF THE PARTICIPANTS IN THE PROCEEDING

3. The Tallinn City Council is of the opinion that §§ 8(2) and 9(4) of the PWGA are in conflict with the constitutional guarantees of local government.

The right of the state to arrange issues pertaining to grave monuments and marks does not proceed from Article 34 of the First Protocol Additional to the Geneva Conventions of 12 August 1949 (hereinafter “additional protocol”), as the provision regulates a situation where hostilities have recently ceased. Thus, the Riigikogu had no authorization arising from international agreements to regulate the issues pertaining to grave monuments and marks in a manner established by §§ 8(2) and 9(4) of the PWGA. The state is entitled to arrange the issues related to the remains of the deceased only in

regard to remains created after accession to the Geneva Conventions and the additional protocol.

As the Constitution does not define the issue under discussion as a national issue the Riigikogu has no right to infringe upon the competence of local government through the contested provisions. The Heritage Conservation Act (hereinafter “HCA”) also treats the issues related to grave monuments and marks as a local issue.

Proceeding from the additional protocol the relocation of a grave monument or mark arising from §§ 8(2) and 9(4) of the PWGA is neither necessary nor justified in each concrete case. Pursuant to the additional protocol it is necessary to guarantee that the remains and gravesites be respected, marked and preserved in a due manner. A grave monument or mark is not a grave or the remains, and the public significance of a grave monument or mark may be greater in its present location than upon its relocation without thorough consideration. The reburial of remains without the relocation of a grave monument or mark and with suitable marking of the new gravesite can not be in conflict with the respect for the gravesite.

§§ 8(2) and 9(4) of the Protection of War Graves Act establish in an imperative manner that the grave monument or mark shall be relocated with the reburial of the remains. Thus, if a grave monument or mark is not situated on state land, this amounts to disproportionate restriction of the right of ownership. In situations where the relocation of a grave monument or mark is not necessary (§ 9(1) and (4) of the PWGA, that is if there is no war grave or grave) the Protection of War Graves Act unjustifiably and disproportionately restricts the right of ownership and the right of local government to resolve local issues independently and at its own liability.

In certain situations the Protection of War Graves Act disproportionately infringes into the competence of local governments to organize construction activities. As a grave monument or mark is a construction works (structure) for the purposes of the Building Act (hereinafter “BA”) (§ 2(1) and (3) of the BA), for the demolition of the construction works the permission of the local government in the form of a building permit is required (§ 22(1)4) of the BA). Bearing in mind the public function of grave monuments or marks these can not be regarded as small construction works (see § 15(1)1) of the BA).

Furthermore, § 7(2) of the PWGA, which excludes the possibility of a local government to request expropriation of an immovable by the state in the cases when the guaranteeing of preservation of a war grave severely hinders the use of the plot of land for the intended purpose by the owner, is unconstitutional, too.

4. The Legal Affairs Committee and the Constitutional Committee of the Riigikogu do not think that §§ 8(2) and 9(4) violate the constitutional guarantees of local government.

Acting in accordance with the additional protocol and the Constitution the legislator, who is always entitled to decide which issues shall be national and which local, has determined by the Protection of War Graves Act the competence of the state in relation to issues of war graves' monuments and marks. Neither does the Heritage Conservation Act provide for the distribution of competence different from that in the Protection of War Graves Act.

The contested provisions leave the executive sufficient margin of discretion, which is manifested in the alternatives of application of the referred norms.

The Protection of War Graves Act restricts the competence of local governments concerning building issues upon relocation of grave monuments or marks, as it does not prescribe for the condition that a building permission or consent of a local government be acquired for the removal of a grave monument or mark. The requirement of a building permission or at least a written consent of local government would have been a solution more correct from the legal point of view, yet the special provision of the Protection of War Graves Act is not in conflict with the Constitution. The omission of the requirement of a building permit is justified as the grave monuments and marks do not have a public function for the purposes of the Building Act. These structures are not being used, instead they rather have a so called visual function.

5. The Chancellor of Justice is of the opinion that the third sentence of § 8(2) and § 9(4) of the PWGA are not in conflict with the constitutional guarantees of local government.

Pursuant to the valid legislation, including the Heritage Conservation Act and the Planning Act, the issues relating to war graves' monuments and marks are not local issues. The respect for war graves is inseparably related to the monuments and marks erected for marking the graves. As an armed conflict is a national issue, so are the grave monuments and grave marks marking the war graves and having bearing on the nation's historical memory.

The construction, relocation, adapting, etc. pertain, to a certain extent, to the competence of local governments, as the topic relates to the developing of public space and suitability to a local environment.

The exclusion of the local governments' right to decide on the adapting of war graves' monuments and marks to public spaces does not amount to an intensive infringement of the constitutional guarantees of local government (e.g. it has been provided that a building permit or consent of a local government must be obtained for relocating a grave monument or mark to a place other than the new burial place; the contested provisions also leave the Government of the Republic a wide discretion to choose).

6. The Minister of Justice is of the opinion that the contested provisions are in conformity with the principle of local government autonomy, arising from § 154(1) of the Constitution.

The state is under a standing obligation, arising from the additional protocol, to guarantee the respect for, preservation and marking of the war graves and the remains of the persons who have died for the reasons of hostilities and occupation. A grave and its mark are substantially related. The state has the right to exhume the remains in public interests.

As a mass grave clearly has a public function, it can not be regarded as a small construction works and the consent of a local government is required for the erection or demolition thereof (§ 22(1) 1) and 4) of the BA). Thus, § 8(2) of the PWGA amounts to the restriction of local government's right of self-resolution in regard to deciding on the erection and demolition of grave monuments that are not small construction works. § 9(4) of the Protection of War Graves Act amounts to a restriction of local government's right to self-regulation.

§§ 8(2) and 9(4) of the Protection of War Graves Act do not leave the Government of the Republic discretion to decide, they leave the government the discretion to choose. The restrictions established by the contested provisions are necessary for the guarantee of protection of the remains and the memory of persons died in the course of hostilities and, thus, the preservation of the Estonian culture and the fulfilment of the international obligations of the state. As the restriction of local government's autonomy with the aim of protecting essential constitutional values is not an intense one, the restriction is proportional.

The Minister of Justice failed to analyse the issue of whether § 7(2) of the PWGA restricted the local government's right of ownership. The review of constitutionality of this provision was not applied for.

7. The Minister of Defence representing the Government of the Republic disagrees with the reasons set out in the petition of the Tallinn City Council and is of the opinion that the petition should be dismissed.

The issues related to war graves are national issues, so are the issues related to monuments and marks on war graves. War graves pertain to the state's fulfilment of obligations arising under international law, the graves relate to local life only in regard to the aspects of building and cultural environment, which can not prevail over the state's obligations in regard to international community. The Geneva Conventions of 1949 have the status of international common law. The validity of Article 34 of the additional protocol is not restricted in time to the cease of hostilities in recent past.

§§ 8(2) and 9(4) of the Protection of War Graves Act do not establish any powers of the Government of the Republic or the Minister of Defence that violate the constitutional guarantees of local government. The contested provisions contain norms delegating authority and leaving room for discretion to choose, which must be applied on the basis of the Constitution and the law. If the rules for the exercise of discretion are violated, the local government or any other person whose subjective rights have been violated has the right of recourse to administrative courts.

It is the individual administrative acts, issued on the basis of §§ 8(2) and 9(4) of the PWGA, that could violate the constitutional guarantees of local government and not the referred provisions themselves. Therefore, the contested provisions can not be unconstitutional in the manner described by the petitioner.

Bearing in mind the international dimension of the issues related to war graves the establishment of special regime concerning war graves is justified from the building aspect as well. The state can not afford a failure to fulfil its international obligations on the reason that a local government does not issue a necessary building permit or a written consent. Furthermore, normally the grave monuments are small-scale constructions without inner space the technical safety of which is comparatively well guaranteed. The lack of public function for the purposes of § 15(1)1) of the BA does not exclude the national importance of issues related to grave monuments and marks in the case of war graves.

The Tallinn City Council has also referred to the unconstitutionality of § 7(2) of the PWGA, whereas it did not request the declaration of invalidity of the provision. The referred provision is not related to the constitutional guarantees of local government, it may, instead, have a bearing on the subjective rights of local governments. As § 7 of the Constitutional Review Court Procedure Act does not give a local government a general right of appeal or the right to file petitions for the protection of subjective rights of persons, the review of the provision is not the aim of this dispute.

CONTESTED PROVISIONS

8. §§ 8(2) and 9(4) of the Protection of War Graves Act provide as follows:

“§ 8. Remains subject to reburial and deciding of reburial

[...]

(2) The Government of the Republic shall decide the reburial of the remains in a war grave in the case when the grave is not located in an unsuitable place within the meaning of subsection (1) of this section but reburial is in the public interests for another reason. Public interest may be involved, in particular, in the case of construction or expansion of social constructions in the immediate vicinity of the war grave, in the case of a danger to the preservation of the war grave which is caused by natural phenomena, for reasons of health protection and for reasons of security, and if circumstances become evident which render reburial of the remains in the war grave and relocation of the grave monument or grave mark inevitable. While deciding the reburial of the remains, the Government of the Republic shall determine the new burial site of the remains and shall resolve issues relating to the relocation, adjustment, dismantling and preservation of the grave monument or mark and to the establishment of a new grave monument or mark.”

“§ 9. Identification

[...]

(4) If there has been good reason to suspect that a grave is a war grave but it becomes evident that it is not a war grave, the reburial of the remains and the relocation, adjustment and demolition of the grave monument or mark and the withdrawal of the status of a monument shall be decided on the basis of this Act pursuant to the same procedure as in the case of war graves. If it becomes evident that there are no remains in the suspected grave, the Minister of Defence shall decide, on the proposal of the war graves committee, the adjustment of the grave monument or mark or other grave construction as a memorial, the relocation thereof to a museum or another appropriate place, or partial or full dismantling thereof. In such case, § 13 of this Act shall apply in respect of restrictions related to the monument and § 14 of this Act shall apply to the withdrawal of the status of a monument.”

OPINION OF THE CNSTITUTIONAL REVIEW CHAMBER

9. First, the Constitutional Review Chamber shall examine the admissibility of the petition of the Tallinn City Council and the nature of the regulation contained in §§ 8(2) and 9(4) of the Protection of War Graves Act. Thereafter the Chamber shall form an opinion on whether the referred provisions violate the right of local government to independently resolve and manage local issues, provided for in § 154(1) of the Constitution. Finally, the Chamber shall resolve the Tallinn City Council petition requesting the declaration of unconstitutionality and invalidity of §§ 8(2) and 9(4) of the Protection of War Graves Act.

10. Pursuant to § 7 of the Constitutional Review Court Procedure Act a local government council may submit a petition to the Supreme Court for the declaration of invalidity of an Act which has entered into force or a provision thereof, if its is in conflict with the constitutional guarantees of local governments.

The Tallinn City Council has submitted a petition to the Supreme Court, raising the issue of compatibility of §§ 8(2) and 9(4) of the PWGA, which entered into force on 20 January 2007, with the constitutional guarantees of local government. As the petition does not pertain to a concrete instance, this amounts to abstract norm control.

11. To answer the question of whether the petition of the Tallinn City Council is admissible, it has to be ascertained whether the provisions of the Protection of War Graves Act, referred to by the Tallinn City Council, infringe into the constitutional guarantees of local government. For that purpose it has to be ascertained first whether the issues related to monuments and marks of war graves are national or local issues.

12. The local governments are competent to resolve local issues (§ 154(1) of the Constitution), just as the state is competent to resolve national issues (§ 65(16) of the Constitution).

On the basis of substantial criteria local issues are those that arise from within a local community and relate to it and are not, from the formal aspect or under the Constitution, within the competence of some other state authority.

On the basis of the simple reservation by law, contained in § 154 of the Constitution, the legislator may restrict the independence of local governments by excluding, by a reasoned decision, some issues from local issues. While doing this the legislator has to see to it that the constitutional guarantee of local government is preserved.

13. While assessing the formal criterion of the disputed issue belonging to the competence of local governments it has to be taken into account that within the valid legal order the legislator has not clearly determined the issues relating to war graves' monuments and marks as being in the sole competence either of the state or of local governments.

Neither the Constitution nor the Local Government Organisation Act (§ 6 (1) and (2) of the LGOA) provide that grave monuments and marks are either national or local issues. Contrary to the allegation of the Tallinn City Council the Heritage Conservation Act does not regard the issues relating to grave monuments and marks to be primarily local issues and it provides for state protection (§ 2 of the HCA) and stipulates organisational functions for local governments (§ 9(1) of the HCA). For the resolution of issues related to grave monuments and marks it is important that the issuing of building permits as a local issue has been given into the competence of local governments, as well as the planning activities on the local territory (§ 6(1) of the LGOA, § 22(1) of the BA), as these pertain to the development of public space on the territory of a local government and the suitability of construction works in the local environment.

14. When assessing whether, on the basis of substantial criteria, the issue under discussion should be for the local governments to decide, the Chamber is of the following opinion.

The area or regulation of the Protection of War Graves Act is restricted to the issues relating to war graves only, i.e. the protection of and respect for the remains and gravesites of persons who died in the course of hostilities.

By acceding to Protocol Additional to the Geneva Conventions of 12 August 1949, adopted on 8 June 1977, the Government of the Republic has assumed an international obligation to guarantee the respect for, preservation and marking of remains and gravesites of persons who have died for reasons related to detention, occupation and hostilities. Under Article 34 (4) b) of the additional protocol the state has the right to exhume and rebury the remains in public interests. In regard to marking of gravesites the additional protocol inter alia regulates the marking of graves with grave monuments. The protocol regulates the protection of war graves irrespective of when they were created (see Article 34(2)b) of the additional protocol).

The Chamber does not concur with the opinion of the Tallinn City Council that the remains and the grave marks have to be treated as issues that are not interrelated. A grave monument is substantially related to a grave, as it is the grave mark that marks the grave, i.e. the location where remains are buried or stored.

It is the Estonian state that is internationally liable for the fulfilment of the obligations under the Geneva Conventions of 1949. The fact that on a domestic level a state may organise the fulfilment of the obligation in different ways, including imposition of duties on local governments and cooperating with them, does not render the activities arising from the referred obligation a local issue. That is why the Chamber deems the issues related to war graves' monuments and marks to be national issues.

15. Although the issues pertaining to war graves' monuments and marks are national issues, the possibility of an infringement of the rights of local governments and other persons must be born in mind when resolving national issues. The erection, preservation, adoption, demolition, dismantling and relocation of war graves' monuments and marks concern the constitutional guarantee of local government to a certain extent, as the referred activities are related to the duties of local governments in the developing and protection of the public space and its cultural environment.

16. The development of public space through the direction of building activities and planning on the administrative territory of a rural municipality or city is, under § 4(2) of the Planning Act, an issue of self-regulation of local government.

For the purposes of the Building Act a grave mark, being an integrated thing which is built as a result of human action and is attached to the site subsoil, constitutes a structure (§ 2(1) (3) of the BA). The grave marks are mainly small construction works, for which building design documentation need not be prepared and the written consent of a local government is not required (§§ 15(1)1) and 15(2) of the BA). The Chamber is of the opinion that certain war graves and their marks may have weighty public functions (see § 15(1)1) of the BA). Therefore the treatment of such grave marks as small construction works that do not require the permission of a local government is excluded. Thus, for the erection as well as relocation of such monuments the local government consent (a building permit) referred to in § 22(1) 1) 4 of the BA is required.

17. At the same time the first sentence of § 10(5) of the PWGA unambiguously excludes the necessity of a building permit and the local government permission. The third sentence of § 8(2) of the Protection of War Graves Act establishes that while deciding the reburial of the remains in the public interests, the Government of the Republic shall determine the new burial site of the remains and shall resolve issues relating to the relocation, adjustment, dismantling and preservation of the grave monument or mark and to the establishment of a new grave monument or mark. As the Government of the Republic does not have to apply for the local government permission for the erection or demolition of a structure, this amounts to the restriction of local

government's right to self-organisation upon deciding on the erection and demolition of grave monuments that are not small construction works.

§ 9(4) of the Protection of War Graves Act establishes, inter alia, that a state authority shall decide on the remains and a grave mark when it is not a war grave or a grave. In the essence the issues relating to so called ordinary graves and such objects/plots of land that prove not to be graves can be regarded as local issues. As the referred provision gives the state the right to decide on the issues relating to the remains and grave marks, this is an infringement into the local government's right to self-regulation.

18. On the basis of the aforesaid the present case amounts to an infringement of the constitutional guarantee of local government arising from § 154(1) of the Constitution. Thus, the petition of the Tallinn City Council is admissible.

19. Next, the Chamber shall analyse the constitutionality of the infringement of the constitutional guarantee of local government.

In its judgment of 16 January 2007 the Constitutional Review Chamber expressed the following position: "The local governments' right of self-management is not unlimited. § 154(1) of the Constitution prescribes that local governments shall operate independently pursuant to law. Thus, the legislator is allowed to put restrictions on the local governments' right to self-management. Nevertheless, not every restriction imposed by law on local governments' right to self-management is constitutional. To guarantee the preservation of the essence of the local governments' right of self-determination the restrictions imposed thereon must be proportional, that is suitable and necessary for the achievement of the aim of the restriction, and proportional in the narrow sense." (3-4-1-9-06 – RT III 1007, 3, 19; § 23)

Thus, the restriction of constitutional guarantees of local government is permissible if it is lawful in the formal and substantial senses. In the present case there is no doubt as to the formal lawfulness of the restriction and that is why the Chamber shall now analyse the substantive lawfulness of the restriction.

20. § 154(1) of the Constitution establishes that the competence of a local government may be restricted by a reservation made in law. Thus, the right of a local government to resolve local issues may be restricted for the protection of a constitutional value. Having previously admitted that the issues relating to war graves are national issues and bearing in mind that the aim of the Protection of War Graves Act is the protection, respect for

and dignified treatment of persons who have died in the course of hostilities, the appropriate fulfilment of the state's international obligation – to protect war graves and the uniform regulation of the protection of war graves throughout the country have to be regarded as the legitimate objectives for the guarantee of which it is allowed to restrict the right of local governments to manage local issues.

21. § 8(2) of the Protection of War Graves Act enables to rebury the remains in a dignified manner if it is necessary in the public interests. At the same time the Government of the Republic is under the obligation to decide also on the grave mark, which constitutes a part of dignified treatment of the remains and the memory of persons. Thus, § 8(2) of the PWGA guarantees a suitable means of reburial of the remains, marking of the new grave and transformation of the old gravesite in a manner that respects the memory of the dead. Also, the regulation in § 9(4) of the PWGA is suitable for the protection of a grave as an integral unit and the memory in the cases where it becomes evident, during exhumation, that there is no war grave or a grave at all.

22. To achieve the aim of protection of, respect for and dignified treatment of the remains of persons who have died in the course of hostilities it is necessary to restrict, on the basis of § 8(2) of the PWGA, the right of local government to resolve building issues. The reburial of remains, if it is unavoidable for the reasons of public interests, and the resolution of the issues of relocation and adjustment of the grave mark is the state's obligation arising from international law, the fulfilment of which can not be dependent on the local government's discretion to issue building permits.

Also, in a situation regulated by § 9(4) of the PWGA, when it becomes evident that it is not a war grave or a grave at all, the infringement of the local government's guarantee amounts to a necessary measure. Namely, even in such a case it can not be excluded that the alleged war grave or the monument marking such a grave, serving the interest of preserving the memory of war victims, has to be treated as a national issue. The fate of such grave monuments is to be decided on by the state, irrespective of the existence of the remains of war victims or other persons.

23. At the same time, the competence of local governments to resolve the aspects of building rights concerning war grave monuments is restricted only in certain cases. The first sentence of § 10(5) of the Protection of War Graves Act excludes the building permission or consent of a local government if a grave monument or another grave mark is removed from the previous location and installed to the new burial site of remains. The second sentence of § 10(5) of the same Act requires the building permit or local government consent if a grave construction is to be installed elsewhere than to the new burial site of remains. Consequently, the restriction included in § 8(2) and § 9(4) of the PWGA can be regarded as proportional in the narrow sense.

24. Thus, the restrictions imposed by §§ 8(2) and 9(4) of the PWGA are suitable and necessary for the fulfilment of the international obligation of the state in the protection of the remains and the memory of persons who died in the hostilities. These are values and principles arising from the international law and protected by the Constitution. Although the Protection of War Graves Act excludes the local government's right to decide, the restriction is – on the basis of the aforesaid – of small intensity and proportional as a whole.

25. The fact that deciding on war graves' monuments and marks is a national issue does not exclude the involvement of local governments in the decision-making process. Such involvement must guarantee in each concrete case the possibility of a local government to submit its opinion, and the making of well-balanced and reasoned decisions.

The involvement of local governments in the process of resolving issues of reburial under the Protection of War Graves Act arises from clauses 2) and 3) of § 13(3) of the PWGA (the duty to notify of the works and the termination of the works related to reburial of the remains buried in the graves or a heritage conservation area designated as a monument and the relocation of a grave monument or mark). As the decisions concerning reburial of the remains and the issues relating to war grave monuments and marks as well as pertinent acts are performed within administrative procedure, the legal regulation of administrative procedure is applicable to the acts issued and acts performed within the referred procedure. Bearing in mind the peculiarities of such procedure a local government is a participant in the proceedings, with the rights and duties arising from the law. Thus, the Chamber is of the opinion that the making of decisions and performing the acts provided for in the Protection of War Graves Act are subject to the Administrative Procedure Act (see also the judgment No 3-3-1-32-03 of the Administrative Law Chamber of the Supreme Court of 4 April 2003 – RT III 2003, 11, 111 § 12) and to the principles of sound administration (see judgment No 3-4-1-1-03 – RT III 2003, 5, 48; § 14 and the following).

26. On the basis of the aforesaid and within the abstract norm control procedure the Chamber does not find the unconstitutionality of §§ 8(2) and 9(4) of the Protection of War Graves Act for the reasons specified in the petition of the Tallinn City Council. The infringement of the constitutional guarantee of local governments is proportional.

On the basis of the aforesaid the Supreme Court dismisses the petition of the Tallinn City Council requesting that

§§ 8(2) and 9(4) of the Protection of War Graves Act be declared unconstitutional and invalid.

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