Constitutional judgment 3-4-1-5-02

JUDGMENT
OF THE SUPREME COURT *EN BANC*

No. of the case	3-4-1-5-02
Date of decision	28 October 2002
Composition of court	Chairman Uno Lõhmus, members Tõnu Anton, Jüri Ilvest, Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Hannes Kiris, Lea Kivi, Ants Kull, Villu Kõve, Lea Laarmaa, Jaak Luik, Jaano Odar, Jüri Põld, Hele-Kai Remmel, Harri Salmann and Peeter Vaher.
Court case	Petition of the Tallinn Administrative Court to review the constitutionality of § 7(3) of the Principles of Ownership Reform Act.
Date of court session	11 September 2002
Persons participating at session	Representative of the Riigikogu, head of the legal department of the Chancellery of the Riigikogu Marek Sepp; representative of the Chancellor of Justice, Deputy Chancellor of Justice-Adviser Aare Reenumägi; representative of the Ministry of Justice, adviser Kai Kullerkupp.

Decision	**To declare § 7(3) of the Principles of Ownership Reform Act to be in conflict with §§ 13(2) and 14 of the Constitution in their conjunction.**

FACTS AND COURSE OF PROCEEDINGS

1. In January 1992 D. Kalle filed with Tallinn City Assets Agency an application for the return of unlawfully expropriated property. Before expropriation the unlawfully expropriated property a house and a plot of land in Voolu Street, Tallinn had belonged to her grand-grandfather Artur Paul.

2. The Tallinn Committee for the return of and compensation for unlawfully expropriated property (hereinafter the "the Tallinn committee") decided on 25 June 1996 to regard the structures and the plot to be objects of ownership reform, because the land had been nationalised by the declaration of *the Riigivolikogu* [lower house of then Estonian parliament] of 1940 and the structures in 1941. D. Kalle was declared an entitled subject of ownership reform with regard to the unlawfully expropriated property to the extent of 1/8 of the property.

3. On 17 March 1997 the committee made a new decision, recognising D. Kalle's right to 1/4 of the property.

4. On 8 October 2001 the Tallinn committee made a third decision concerning the same property. The committee decided to regard the structures and plots situated in Voolu Street, Tallinn, as objects of ownership reform, because the land had been nationalised by declaration of *the Riigivolikogu* of 23 July 1940 and the structures on 17 February 19941. At the time of expropriation the owners of the property were Artur Paul and Beatrice Haberman, in regard of 1/4 of the property each, and Aleksander Silberhand in regard to 1/2 of the property. The application of D. Kalle to declare her an entitled subject of ownership reform was dismissed, because pursuant to § 7(3) of the Principles of Ownership Reform Act, 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.

The committee considered it proved that Artur Paul left Estonia in January-February 1941 on the basis of the agreement entered into between the Soviet Union and Germany on 10 January 1941. He passed away in December 1944 in Dresden.

5. In the list of houses to be nationalised in Nõmme, Tallinn, published in the *Eesti NSV Teataja* [State Gazette] no. 14 of 1941, the referred house at 5 Voolu Street appears under number 2819, and Artur Paul, Aleksander Silberhand and Beatrice Haberman are referred to as the owners of the house. The nationalisation act of the house was drawn on 17 February 1941.

6. On 18 December 2001 D. Kalle submitted a complaint to the Tallinn Administrative Court, disputing the decision of the Tallinn committee to the extent that it dismissed her petition to be declared an entitled subject of the ownership reform. She also requested that § 7(3) of the Principles of Ownership Reform Act (hereinafter "the PORA") be not applied because of the conflict thereof with the Constitution. The complainant pointed out the necessity to consider the principles of legal certainty, restriction of rights and freedoms, legitimate expectations, equal treatment and protection of confidence, proceeding from §§ 10, 11, 12 and 13 of the Constitution.

7. By its judgment of 18 February 2002 the Tallinn Administrative Court satisfied D. Kalle's complaint:

invalidated the decision of the Tallinn committee of 8 October 2001 to the extent that the complainant was not recognised as an entitled subject of ownership reform, declared § 7(3) of the PORA unconstitutional, and did not apply it. In its petition to the Supreme Court of 19 February 2002 the court points out that § 7(3) of the PORA infringes upon the general right to equality established in indent 1 of § 12 of the Constitution and is in conflict with §§ 10 and 14 of the Constitution.

8. The Constitutional Review Chamber heard the petition of the Tallinn Administrative Court at open session of 24 April 2002. On 5 June 2002 the Chamber decided to refer the petition to the Supreme Court *en banc* for review.

REASONING OF THE COURT AND PARTICIPANTS

Justifications of the Tallinn Administrative Court

9. The Tallinn Administrative Court writes in its judgment that § 7(3) of the PORA infringes upon the first indent of § 12 of the Constitution, pursuant to which everyone is equal before the law. The court holds that the entitled subjects of ownership reform referred to in § 7(3) of the PORA are treated unequally as compared to other persons, who are entitled to request the return of or compensation for the unlawfully expropriated property. The hearing of the applications for the return of or compensation for their property has been postponed into indeterminate future, this gives rise to legal uncertainty and ambiguity in regard to these persons. Unequal treatment is unconstitutional because it violates the principle of a state based on democracy and rule of law, proceeding from § 10, as well as the duty of the legislator to guarantee rights and freedoms of persons, proceeding from § 14 of the Constitution.

The court points out that § 7(3) of the PORA in itself is not unconstitutional. The provision has become unconstitutional because of the activities of the legislator. § 7(3) of the PORA has become unconstitutional because of the fact that within more than ten years no international agreement has been entered into. The provision has lost its regulative character and does not guarantee the complainant the right that her application will be examined within reasonable time or that it will be examined at all. The Ministry of Foreign Affairs informed the court that to their knowledge the Federal Republic of Germany has expressed no will to enter into such an agreement.

It is unacceptable in a democratic society that for a long time there has been a gap in legal regulation and a group of subjects has been deprived of the right to administrative procedure within reasonable time. When the legislator saw that the probability of entering into an international agreement was small or non-existent, it should have acted pursuant to § 14 of the Constitution and established a new regulation.

Although the court admits that invalidation of the provision will create even bigger gap in the legal regulation as compared to the present situation, the court finds it surmountable, if the Supreme Court allows the legislator enough time for establishing new regulatory framework.

The administrative court also admits that by declaring § 7(3) of the PORA unconstitutional the court has not assessed whether the property of persons who resettled should be returned or compensated for. The fact that the deficiency of regulation prevents those who live as lessees in the houses, which formerly belonged to persons who resettled, to privatise the flats, has to be taken into consideration, too.

Justifications of participants

10. On behalf of the Riigikogu the Riigikogu Economic Affairs Committee informed the Supreme Court that presently there are no legislative proceedings in the Riigikogu concerning amendments to the PORA .The ownership reform is about to enter its final stage but is far from being completed. Under § 14 of the Constitution the guarantee of rights and freedoms is also a duty of the executive power. The representative of the Riigikogu explained at the court session that as the Riigikogu has not passed an Act to amend § 7(3) of the PORA or to invalidate it, the conclusion may be drawn that the opinion of the Riigikogu is expressed in the existence of the disputed provision and this means that the provision is not in conflict with the

Constitution. He admitted that the disputed provision does not contain a clear solution or the possible frames of the solution.

11. Pursuant to the opinion of the Chancellor of Justice § 7(3) of the PORA is in conflict with §§ 32(4), 13(2) and 14 of the Constitution, but the legislator should be given sufficient time for establishing the lacking regulation.

The Chancellor of Justice points out that the complainant requests the return of unlawfully expropriated property, which had belonged to her grand-grandfather. Without the disputed provision the complainant would have the right, as an entitled subject of ownership reform, to inherit from her grand-grandfather the unlawfully expropriated property. Thus, we deal with infringement of the protected area of right of succession, established by § 32(4) of the Constitution.

The non-existence of an international agreement infringes upon the complainant's right to administrative procedure within reasonable time. The unconstitutionality of § 7(3) of the PORA proceeds from prolonged omission of the legislative and executive powers. That is why the disputed provision is in conflict with § 14 of the Constitution.

The Chancellor of Justice adds that from § 13(2) of the Constitution springs the principle of definitiveness or determinateness. This principle is a part of the principle of legal certainty, the latter in its turn is a sub-principle of the principle of a state based on the rule of law. The principle of definitiveness is violated when during a long period the legislation does not define the legal grounds of and procedure for handling applications.

12. The Minister of Justice is of the opinion that the disputed provision is in conformity with the Constitution. §§ 7(1) and 7(3) of the PORA relate to each other as a norm of general application and a norm of specific application. § 7(3) is a norm of specific application and thus an international agreement can serve as a prerequisite for return of or compensation for the unlawfully expropriated property, which had belonged to persons who had left Estonia on the basis of agreements entered into with the German state and which was located in Estonia. Such persons can not be regarded as entitled subjects of ownership reform, because they can become subjects only on the bases of an agreement entered into between states.

The Minister of Justice points out that § 7(3) of the PORA is not capable of infringing the principle derived from § 12(1) of the Constitution. The PORA does not give the persons, who left Estonia on the basis of agreements entered into with the German state, the right to request the return of or compensation for unlawfully expropriated property. The different treatment of these persons as compared to entitled subjects is justified. The persons who resettled to Germany were in different situation upon exercising the right of ownership than the entitled subjects of ownership reform. The majority of the persons have received sufficient compensation.

The Minister of Justice agrees with the assertion of the administrative court that § 7(3) of the PORA in itself is not in conflict with the Constitution and that the disputed provision becomes unconstitutional because of the fact that the international agreement has not been entered into so far. The entering or non-entering into an agreement can not, in itself, affect the constitutionality of the provision.

The Minister of Justice further adds that it can not be decided within the constitutional review procedure whether the fact that an international agreement has not been entered into is unconstitutional or not, because § 15 of the Constitutional Review Court Procedure Act does not enable the Supreme Court to decide on the issues of constitutionality or unconstitutionality of a procedure.

Disputed Act

13. The disputed provision of the Principles of Ownership Reform Act, which entered into force on 2 March 1997 (RT I 1997, 13, 210), reads as follows:

"§ 7 Former owners of unlawfully expropriated property as entitled subjects of ownership reform.

[---]

(3) 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."

14. Until 2 March 1997 the issue was regulated by clause 5 of the resolution of the Supreme Council of the Republic of Estonia of 20 June 1991 on the implementation of "Ownership Reform Act":

"The issues related to the return of and compensation for unlawfully expropriated property of entitled subjects of ownership reform who left Estonia on the basis of agreements entered into with the German state shall be resolved pursuant to procedure established by international agreements."

The opinion of the Supreme Court *en banc*

I.

15. Upon adjudicating the complaint of D. Kalle requesting the invalidation of the decision of the Tallinn committee of 8 October 2001, the Tallinn Administrative Court did not apply § 7(3) of the PORA. Pursuant to § 15 of the Constitution and § 5(1) of the Constitutional Review Court Procedure Act of 1993 a court, when it comes to the conclusion upon adjudicating a case, that an applicable Act or other legislation is in conflict with the Constitution, shall declare the Act unconstitutional and shall not apply it. Thus, the constitutional review court shall review, within concrete norm control, the constitutionality of the applicable, i.e. relevant Act only. The disputed provision must be of decisive importance for the resolution of a concrete case (see judgment of the Supreme Court *en banc* of 22 December 2000 - RT III 2001, 1, 1, paragraph 10). An Act is of a decisive importance when in the case of unconstitutionality of the Act a court should render a judgment different from that in the case of constitutionality of the Act.

Such an admission does not answer the question of whether the constitutional review court, upon deciding on the applicable or pertinent Act, should proceed from the view of the court that submitted the petition or is it entitled to review on its own motion whether the disputed act is relevant for the resolution of the case. The Supreme Court *en banc* shares the opinion that a constitutional review court is justified to control whether the disputed provision is relevant, that is applicable. Recognition of this competence gives rise to the right and the necessity to check whether the court has - for resolution of a dispute - applied the provision which is of decisive importance for the adjudication of the matter. It cannot be assessed within the constitutional review procedure, whether the court which initiated constitutional review proceedings has correctly adjudicated the dispute.

Thus, the first question to be answered by the Supreme Court *en banc* is whether § 7(3) of the PORA is relevant to the resolution of this dispute.

16. The Tallinn committee considered it proved that Artur Paul, grand-grandfather of Doris Kalle, left Estonia in January-February 1941 on the basis of an agreement entered into by the Soviet Union and Germany on 10 January 1941. The property of Artur Paul - a part of the house and the plot located in Voolu Street, Tallinn - was nationalised even before he relocated to Germany. The plot was nationalised by the declaration of *the Riigivolikogu* of 23 July 1940 and the house located at 5 Voolu Street was entered into the list of houses to be nationalised by the Council of People's Commissars of the Estonian Soviet Socialist Republic on 7 January 1941. On the basis of these facts the Tallinn committee decided not to declare D. Kalle an entitled subject of ownership reform, because pursuant to § 7(3) of the 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.

The administrative court found that the legislator wanted to establish special regulation for both, the persons who resettled in 1993 as well as in 1941. The persons who resettled are not recognised as entitled subjects of ownership reform. The return of and compensation for their property, which was located in Estonia but was unlawfully expropriated, shall be determined by an international agreement. The administrative court found that the disputed legislation was lawful and § 7(3) of the PORA constitutional in this regard.

It proceeds from the decision of the Tallinn committee and the judgment of the administrative court that both hold that persons, whose property was expropriated before the Soviet Union and Germany entered into the agreement of 10 January 1941, but who left Estonia on the basis of the agreement, belong to the circle of persons determined by § 7(3) of the PORA.

17. Deciding on the relevance of the disputed provision it has to be clarified first of all, which agreements the legislator bore in mind. After that it is to be found out whether the legislator wanted not to return or compensate for the unlawfully expropriated property of those persons, who left on the basis of agreements entered into with the German state, or was it intended to regulate the conditions of return of and compensation for property by an international agreement. Also, it has to be clarified, whether the provision provides a clear enough rule of conduct for the owners of unlawfully expropriated property and their successors and to persons, who use the unlawfully expropriated property.

18. The wording of § 7(3) of the PORA leaves room for one conclusion only: one of the parties must have been the German state. As it is known, before World War II the German state entered into agreements concerning resettlement from Estonia to Germany in 1939 and in 1941. That is why the court finds it necessary to study the process of drafting the norm.

19. On 15 October 1939 the German state and the Republic of Estonia entered into a "Protocol on resettlement of German national group located in Estonia to German State" (*RT Eesti Vabariigi lepingud välisriikidega* (Republic of Estonia International Agreements) 1939, 17, 29) and an "Additional protocol to the protocol of 15 October 1939 on resettlement of German national group located in Estonia to German State" (*RT Eesti Vabariigi lepingud välisriikidega* 1940, 2, 4). As for the property left behind in Estonia, Article III(1) of the first protocol stated that "German Government shall set up at German Consulate in Tallinn a "German Trustee-government", which constitutes a specific managing office of the German state and which has a duty, under a lawful delegation, to take under its governance the property declared under this article and left behind and the whole property of persons who resettled which is to be transferred, as far as possible to liquidate without delay and to finally arrange, and at the same time, pursuant to special rule of clause 2, to see to the payment of the debts of persons who resettled and fulfilment of their obligations." The additional protocol on the transfer of property values to Germany was signed by the parties on 6 April 1940. The legal status of the German trustee-government was determined by law (RT 1940, 18, 129).

20. The agreements of 10 January 1941 were entered into by the Soviet Union and the German state. These agreements were the following: "Agreement on resettlement of persons of German nationality from the territories of Latvian and Estonian Soviet Socialist Republics to Germany" with an additional protocol and final protocol, and "Agreement between the German state and the Union of Soviet Socialist Republics on regulation of reciprocal proprietary claims in regard to Lithuania, Latvia and Estonia". By the latter agreement it was agreed that the USSR shall pay to the German state 200 reichsmark for full and final compensation for German property located in the territories of Lithuania, Latvia and Estonia, and the German state shall pay the USSR 50 million reichsmark for full and final compensation for Lithuanian, Latvian and Estonian property located on the territory of Germany. Among other property the following was considered to be German property: property and proprietary claims of Germans belonging to the *Reich* and of Germans by nationality, who have resettled or are resettling to Germany, except movable property and other property that these persons take along in accordance with the conditions of resettlement.

21. On 13 June 1991 the Supreme Council of the Republic of Estonia passed the Principles of Ownership Reform Act. The Act states that the purpose of ownership reform is to restructure ownership relations in

order to ensure the inviolability of property and free enterprise, to undo the injustices caused by violation of the right of ownership and to create the preconditions for the transfer to a market economy (§ 2(1)). As a rule, all natural persons whose property was nationalised in between 16 June 1940 and 1 June 1981 and who, on the date of entry into force of this Act, reside permanently in the territory of the Republic of Estonia, or if they were citizens of the Republic of Estonia on 16 June 1940, are entitled to claim return of or compensation for unlawfully expropriated property. If the owner of the property is dead, his or her successors are entitled to apply for the return of or compensation for the property. On 20 June of the same year the Supreme Council adopted a resolution on the implementation of the Act, and clause 5 thereof stipulated the following: "The issues related to the return of and compensation for unlawfully expropriated property of entitled subjects of ownership reform who left Estonia on the basis of agreements entered into with the German state shall be resolved pursuant to procedure established by international agreements."

22. The Supreme Court failed to find explanations from the shorthand notes of the Supreme Council concerning clause 5 of the Supreme Council of the Republic of Estonia resolution of 1991 concerning the implementation of "Principles of Ownership Reform Act". In 1997, during the legislative proceedings of amendment proposals to the PORA the Riigikogu decided to include the norm of clause 5 of the resolution into the PORA in a slightly amended wording. There was no discussion of the content of the norm in the Riigikogu. The Minister of Justice asserted in the Riigikogu that this was not a new norm and that persons who left Estonia on the basis of agreements were not covered by general rules of ownership reform.

23. On 20 May 1998 the Government of the Republic set up a committee of experts "For evaluating the problems arisen upon return of and compensation for unlawfully expropriated property which had belonged to persons who had left Estonia on the basis of agreements entered into with the German state and which was located on the territory of the Republic of Estonia, and for making proposals on amendments into legislation, if necessary". The committee submitted its report on 27 October 1998. The report does not state clearly that the agreements entered into with the German state are the agreements of both 1939 and 1941, although the agreements of both years are discussed in the report. It is pointed out that pursuant to clause 5 of the resolution of the Supreme Council of 1991 it was impossible to return unlawfully expropriated property, if a person had left for Germany as a person resettling. The expert opinion added to the committee report assures that upon implementing § 7(3) of the PORA also the agreements entered into in 1941 have to be taken into account. Pursuant to the committee report § 7(3) should not remain in force in its present form. The committee argues that the amendment or repeal of the provision requires a political decision.

24. In January 1999 the Government of the Republic submitted to the Riigikogu a draft amendment of § 7(3) of the PORA. The government suggested the following wording of the subsection: "Persons who left Estonia on the basis of agreements entered into with the German state are not entitled subjects of ownership reform in regard to the property which had belonged to them and had been unlawfully expropriated before they left Estonia". The explanatory letter explains that "some of the persons who resettled got compensation from the German state for the property abandoned, some did not. Federal Republic of Germany has assumed no obligation to compensate for the property, neither has the Russian Federation. The Republic of Estonia Ownership Reform Act does not provide for the return of or compensation for the unlawfully expropriated property which had belonged to persons who resettled, and leaves the matter to be resolved by an international agreement. Entering into such an agreement with the Federal Republic of Germany or with the Russian Federation is not likely. Considering the aforementioned the draft provides for abandoning the reference to an international agreement in § 7(3) of the Principles of Ownership Reform Act and to stick to the present view that under the Principles of Ownership Reform Act it is not possible to return or compensate for the referred property to former owners or to their legal successors."

During the first reading of the draft in the Riigikogu on 27 January 1999 the Minister of Justice pointed out the following in his explanatory report to the draft: "The rule has been valid since the Principles of Ownership Reform Act was passed. It is true, though, that initially it was included in the implementation resolution, but the rule has essentially been the same all the time. What did it mean in 1991? It was decided that to persons who left on the basis of agreements entered into with the German state that property shall not be compensated for or returned under the Principles of Ownership Reform Act. In 1991 the issue was that

perhaps we would succeed to enter into some agreement with Germany, and Germany who caused war damage would agree to compensate for the property, and then, under the agreement, it would be possible to resolve the matter. That is, at present we have to admit that all those who left on the basis of agreements entered into in 1939 and 1941, have no right for the return of or compensation for the property. [ ] At the moment, primarily the lessees have the problem. Resettling persons, who left on the basis of these agreements, are not entitled subjects and houses shall not be returned to them, but neither can the flats be privatised, because the legislator has left open a possibility that maybe an agreement will be entered into and on the basis of the agreement the houses shall be returned." To the question about the impediments to deciding that the property of persons who left under the agreement entered into with the German state in 1941 is to be returned, the Minister of Justice replied, that the Riigikogu and the government have proceeded from the principle that the circle of entitled subjects of ownership reform shall not be extended (Riigikogu shorthand notes 1999, I, p 287). The draft fell out of the Riigikogu proceedings because the powers of that composition of the Riigikogu expired in March 1999.

25. The Administrative Law Chamber of the Supreme Court, in its ruling of 22 March 1999 in case no. 3-3-1-6-99 pointed out the following: "It proceeds from the wording of clause 5 of the implementation resolution of the Principles of Ownership Reform Act and § 7(3) of the PORA that these provisions speak of agreements entered into with the German state, on the basis of which people left Estonia. It proceeds from the wording of these provisions that the Estonian state does not have to be the other party to the agreement. Thus, persons who have left Estonia on the basis of agreements entered into with the German state are persons, who resettled from Estonia to Germany on the basis of "Protocol on resettlement of German national group located in Estonia to German State", entered into between the German state and the Republic of Estonia on 15 October 1939, on the basis of "Additional protocol to the protocol of 15 October 1939 on resettlement of German national group located in Estonia to German State", as well as on the basis of agreement entered into by the Soviet Union and the German state on 10 January 1941." The Administrative Law Chamber explained that if a committee for the return of and compensation for unlawfully expropriated property ascertains that a petition for the return of or compensation for unlawfully expropriated property was submitted by a person who had left Estonia on the basis of an agreement entered into by the German state or by his or her successor, the local committee must deny the petition on the basis of § 7(3) of the PORA by its decision (RT III 1990, 10, 102, see also the judgment of the Administrative Law Chamber of the Supreme Court of 19 November 2001 in case no. 3-3-1-41-01- RT III 2001, 31, 328).

26. In May 1999, the government set up after the Riigikogu elections, submitted a draft for invalidating § 7(3) of the PORA and for supplementing the end of § 1 of the "Act establishing simplified procedure for proving the unlawfulness of expropriation of property" with the following sentence: "Property abandoned because of real danger of repression is also property given away or abandoned upon resettlement to Germany by persons who left Estonia on 1941 on the basis of agreements entered into by the German state." Pursuant to the explanatory letter the amendment seeks to create a legal ground for return of and compensation for unlawfully expropriated property to persons who resettled to Germany from Estonia in 1941 on the basis of agreements entered into by the German state. The Minister of Justice, who presented the draft, pointed out in his speech during the first reading of the draft in the Riigikogu on 24 November 1999: "It was decided upon passing the Principles of Ownership Reform Act, that persons who resettled to Germany shall not belong to the circle of ownership reform subjects. [ ] It has been disputed whether what was established in a separate resolution, was the intent of the legislator and whether this intent (if we read the present text of § 7(3) of the Act) has changed. A position should be taken that there has been no such change of heart in the intent of the legislator" (Riigikogu shorthand notes 1999, VII, p 1183). This draft was under the Riigikogu legislative proceedings until 13 February 2002, when the Government of the Republic withdrew it.

27. On 28 March 2002, in reply to the Supreme Court's enquiry about the likelihood of entering into an international agreement, the Minister of Justice, on the Prime Minister's orders, informed the court that: 1) the Federal Republic of Germany has shown no initiative to enter into the agreement referred to in § 7(3) of the PORA and has warded off the Republic of Estonia's wish to raise the issue, and 2) the Government of the

Republic is not planning to submit a draft for amending or repealing the referred provision.

28. On the basis of the aforesaid the Supreme Court *en banc* agrees that the interpretation of § 7(3) of the PORA, given by the administrative court, pursuant to which the regulation of the provision also covers agreements on resettlement of persons to Germany entered into 1941 by the Soviet Union and the German state, is based on the draft laws submitted by the Government of the Republic and explanatory letters to these, on debates in the Riigikogu and on judicial practice. Such interpretation of the Act renders the disputed provision pertinent.

II.

29. The Tallinn Administrative Court is convinced that § 7(3) of the PORA infringes upon the general right of equality established in § 12(1) of the Constitution. The court found that persons referred to in § 7(3) of the PORA are treated unequally as compared to other persons, who are entitled to apply for the return of or compensation for unlawfully expropriated property. Pursuant to the judgment of the administrative court the unequal treatment consists in the fact that resolution of their applications for the return of or compensation for property has been postponed to indeterminate future, consequently in regard to these persons there is legal uncertainty and ambiguity. It is incompatible with the principle of a state based on democracy and the rule of law, referred to in § 10 of the Constitution, that "for such a long time there has been a gap in legal regulation and one of the subjects has been deprived of the right to administrative proceedings within reasonable time". The administrative court is of the opinion that if the legislator had acted pursuant to § 14 of the Constitution, it should have established new regulation when seeing that the probability of entering into an international agreement is small or nonexistent. The problem of return of the property of persons who resettled has not been regulated.

It proceeds from the reasoning of the administrative court that the court is of the opinion that the unequal treatment of those who resettled to Germany on the basis of agreements of 1941 is not manifested in the fact that to them the unlawfully expropriated property is not returned on the same conditions as to those persons whose property was also unlawfully expropriated, but who did not leave Estonia, or who did leave but not on the basis of an agreement.

30. The Supreme Court *en banc* is of the opinion that first of all the conformity of the disputed provision to §§ 13 and 14 of the Constitution has to be reviewed. The latter provides for a general fundamental right to organisation and procedure. § 7(3) of the PORA, which sets entering into an international agreement as a condition for the return of property of persons who resettled, presumes the activities of the state, above all the government, aimed at entering into such an agreement. If this proves impossible because of the lack of will of the other party, then it would be presumable to amend the regulative framework to create clarity for the persons who resettled and their successors, as well as for the present users of the unlawfully expropriated property, whose right to privatise the property depends on whether the persons who resettled have the right for the return of their property. The Supreme Court en banc is of the opinion the infringement of the fundamental right referred to in § 14 of the Constitution consists in the fact that up to the present the law has not been adjusted to the new situation, because during more than ten years no international agreement has been entered into and there is no prospect of entering into it in the future.

31. Pursuant to § 13(2) of the Constitution the law shall protect everyone from the arbitrary exercise of state authority. This provision also gives rise to the principle of legal clarity. Legal norms must be sufficiently clear and comprehensible, so that an individual could foresee the conduct of public power with certain probability and could regulate his or her conduct. A citizen "must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable "(see judgment of the ECHR of 27 October 1978, *Sunday Times v. United Kingdom*).

Thus, the Supreme Court *en banc* is of the opinion that it is necessary to answer the question of whether § 7(3) of the PORA is sufficiently clear and comprehensible for all those to whom it concerns.

32. Although in 1999 the Government of the Republic, through the Minister of Justice, assured the Riigikogu that in 1991 it was decided not to return or compensate for the unlawfully expropriated property of those who resettled to Germany on the basis of the 1941 agreement (see paragraph 24 above), the wording of the Act does not allow for such an interpretation. The Supreme Court *en banc* points out that the Administrative Law Chamber of the Supreme Court explained in its judgment of 22 March 1999 (see paragraph 25 above) that § 7(3) of the PORA is extended also to the agreements of 1941 and a committee for the return of and compensation for unlawfully expropriated property must dismiss the application of a person who resettled or of his or her successor, but did not give the interpretation that these persons have no right to the return of or compensation for the property. The wording of § 7(3) of the PORA leaves a possibility to interpret it to the effect that the property shall not be returned to persons who resettled and their successors under the conditions and pursuant to procedure established in the PORA, but still gives them hope for the return of or compensation for the property.

33. The Government of the Republic has submitted to the Riigikogu drafts concerning the problem under discussion (see paragraphs 24 and 26 above), which offered contradicting solutions. During the parliamentary debates of these drafts the question of extending the disputed provision to the agreements of 1941 has been raised now and again, which indicates the lack of consensus among the people's representatives on the scope of application of § 7(3) of the PORA. The legislative proceedings of these drafts were not completed and thus, only aggravated the uncertainty. Today the Government of the Republic declares that it is not planning to submit a new draft for amending or invalidating § 7(3) of the PORA.

34. § 7(3) of the PORA states that applications for the return of as well as compensation for property are resolved by an international agreement. Return of property is possible only if it has not been privatised. Leaving open the possibility to return property on the basis of an international agreement leaves it unclear whether the prohibition to transfer property, established by § 7(3) of the PORA, is extended to the property unlawfully expropriated from persons who resettled and whether it is allowed to transfer the property. While § 18 of the PORA allows to transfer or encumber with a real right the property of persons who resettled in regard of which the application for return or compensation for has been dismissed, it is totally unclear whether it is possible to transfer or encumber with a real right the property which was unlawfully expropriated from the persons who resettled, but for the return of or compensation for the person has not submitted an application, considering the provisions of § 7(3) of the PORA. In 1999 the Minister of Justice justified the submission of the draft for amending § 7(3) of the PORA with creating clarity for lessees. According to the Minister the flats which had belonged to persons who resettled must not be privatised, because "the legislator has left open a possibility that maybe an agreement will be entered into and on the basis of the agreement the houses shall be returned" (Riigikogu shorthand notes 1999, I, p 287). Such a situation prevents the users of the property from finding clarity in plans for creating a home and arranging family life.

35. For the above reasons the Supreme Court *en banc* came to the conclusion that the disputed provision is not in conformity with the principle of legal clarity and violates the fundamental right of persons to organisation and procedure and is thus in conflict with the provisions of §§ 13(2) and 14 of the Constitution in their conjunction. Legal ambiguity exists also when some people are given the hope that property will be returned or compensated for and in regard to other people is retained an indeterminate prospect to privatise the property in their use. Such a situation requires effective intervention of the Government of the Republic and of the Riigikogu, in order to guarantee the right to general organisation and procedure.

Because of the conclusion that § 7(3) of the PORA is not in conformity with §§ 13(2) and 14 of the Constitution, the Supreme Court *en banc* can not review the conformity of the provision to § 12(1) of the Constitution.

36. The Supreme Court *en banc* points out that although the agreement of 1941 was entered into by then big powers, one of which had annexed Estonia, this fact is not of decisive importance upon reviewing the constitutionality of § 7(3) of the PORA. When establishing § 7(3) of the PORA, the legislator did not assess

the validity of the agreement, instead - upon providing for different treatment - it proceeded from the historical fact that on the basis of this agreement some persons left Estonia for Germany of their own accord. Pursuant to international law the Republic of Estonia is not responsible for unlawful acts committed on its territory which was not controlled by a legal government. That is why the provisions of § 32 of the Constitution can not be taken into account upon reviewing the constitutionality of an Act stipulating the return of or compensation for property. The decision to undo the injustices caused by violation of the right of ownership and to create the preconditions for the transfer to a market economy, was based on the principle of a society based on democracy and the rule of law, and was possible because a big proportion of the unlawfully expropriated property was in the possession of the state when Estonia's independence was restored.

37. The Supreme Court *en banc* is of the opinion that it can not declare § 7(3) of the PORA invalid. The consequence of the declaration of invalidity is that the unlawfully expropriated property should be returned or compensated for to some persons who resettled pursuant to procedure established by the PORA. This would be a political decision a court has no competence to take. The question of whether and on what conditions the property will be returned or compensated for to these persons, can only be determined by the legislator, observing the procedural rules established by law. The Supreme Court *en banc* is convinced that the disputed provision is in conflict with the Constitution because the legislator failed to fulfil its duty to sufficiently comprehensibly establish the rights of persons who resettled and of the users of the property which had belonged to them. The general right to organisation and procedure, established by § 14 of the Constitution, obligates the executive and legislative powers to achieve a political agreement and to give a clear message to the persons who resettled, whose property was expropriated, and to their successors, as well as to the lessees using the property, concerning the return or non-return of the property. Failure to fulfil and obligation can not be declared invalid.

The Supreme Court *en banc* declares that § 7(3) of the PORA is in conflict with §§ 13(2) and 14 of the Constitution in their conjunction and obligates the legislator to bring the provision into conformity with the principle of legal clarity.

The Supreme Court *en banc* admits that the declaration of unconstitutionality of § 7(3) of the PORA means the continuation of uncertain situation. To overcome this, the legislator must adopt appropriate legal regulation. Until the law is brought into conformity with the principle of legal clarity, the return of or compensation for the property which had belonged to persons who resettled can not be decided and the property can not be privatised.

Uno Lõhmus
Chief Justice of the Supreme Court

Dissenting opinion of justices Jüri Ilvest, Henn Jõks, Lea Kivi and Villu Kõve in constitutional review case no. 3-4-1-5-02

We share the opinion of the Supreme Court *en banc* expressed in clauses 15 to 36.

We find, though, that when declaring § 7(3) of the PORA unconstitutional, the provision should also have been declared invalid on the basis of delegation norm of § 19(1) of the Constitutional Review Court Procedure Act, valid until 1 July 2002.

As a consequence of the declaration of invalidity, the property which had been unlawfully expropriated from the persons who resettled should have been returned to them or compensated for on the grounds and pursuant to the procedure established in the PORA. Thus, the declaration of invalidity of the disputed norm would have entailed financial obligations for the state. This is a sphere requiring above all a political decision. The political decision, whether to return or compensate for the property of the referred persons,

could be made by the legislator, pursuant to procedural rules established by law. The legislator should be given reasonable time for making such a decision. Considering the approaching elections to the Riigikogu and the complications in the work of the legislative body proceeding therefrom, a reasonable time for resolving the matter would be one year. For the above exceptional circumstances the entering into force of the judgment should have been postponed for one year. Such a judgment would have been in conformity with the powers and competence of the Supreme Court as the court of constitutional review.

The postponement of the entering into force of the judgment could have avoided the call for partial stay of the ownership reform and uncertainty as for § 7(3) of the PORA. The referred norm would have remained in force and applicable until the entering into force of the judgment.
