The Constitutional Court of the Republic of Croatia, composed of Smiljko Sokol, President of the Court, and Judges Marijan Hranjski, Petar Klarić, Jurica Malčić, Ivan Matija, Ivan Mrkonjić, Jasna Omejec, Emilija Rajić, Vice Vukojević and Milan Vuković, deciding on the proposal of several applicants to initiate proceedings to review the constitutionality of a law, at a session held on 8 November 2000, reached the following

D E C I S I O N

I. Proceedings have been instituted to review the constitutionality of a law and the following articles are hereby repealed: Article 22, Article 25 point 7, and Article 36 paragraph 3 of the Expropriation Act (The Official Gazette of the Republic of Croatia *Narodne novine*, Nos. 9/94 and 35/94).

II. The repealed provisions shall cease to be valid on 31 December 2001.

S t a t e m e n t o f R e a s o n s

1. The Croatian Legal Centre from Zagreb submitted a proposal to institute proceedings to review the constitutionality of Article 22, Article 27 point 7, and Article 36 paragraph 3, of the Expropriation Act (hereinafter: ZI).

The disputed provisions read:

"Article 22

The competent body in charge of the area where the real property to be expropriated is located shall decide on the expropriation proposal.

Prior to issuing the expropriation decision, the competent body shall hear the owner of the real property.

The competent body shall instruct the owner of the real property that she/he may file a request for the expropriation of the remainder of the real property in accordance with Article 7 of this Law, and the body shall enter this instruction in the record.

If the proceedings show that the expropriation is undisputed and that the owner does not object to the expropriation, the competent body shall simultaneously hold a hearing to reach an agreement on compensation for the real property subject to expropriation.

Article 25 point 7

The decision on accepting the expropriation proposal shall contain, among other things, the following:

7. the obligation of the expropriation beneficiary with respect to the compensation for the expropriated real property: the detailed designation of the real property (Article 32), the monetary sum of the market value, and the deadline for entering into possession and payment, which may not exceed 15 days after the expropriation decision enters into force, or indication about a settlement in accordance with Article 23 of this Law, if such a settlement has been made.

Article 36 paragraph 3

The competent body shall decide on the compensation in paragraph 2 of this Article, unless it has already decided about this in the decision on the expropriation of the real property."

2. The Correction of ZI (*Narodne novine*, No. 35/94), which, among other things, refers to the disputed provision of Article 36 paragraph 3 ZI, contains a linguistic correction only; namely, the Croatian word “decided” in masculine gender was replaced by “decided” in neutral gender.

3. The applicant deems that the disputed provisions of ZI, which authorise the administrative body to decide on the proposal for expropriation and on the compensation for the expropriated real property (unless a settlement has been reached), without providing for judicial control, i.e. for the protection of a civil right before a court that fulfils procedural requirements, are contrary to the provisions of Article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms and Protocols Nos. 1, 4, 6, 7 and 11 to the Convention on the Protection of Human Rights and Fundamental Freedoms (*Narodne novine*, No. 18/97, hereinafter: the Convention).

However, the applicant further states, the “fact that the domestic law of a member state places a decision about a particular civil right and obligation within the competence of administrative bodies, i.e. of a body that does not meet the requirements of Article 6 of the Convention, does not exclude the application of this Article. The practice of the convention bodies shows that this is not considered to be in breach of the European Convention (…) if subsequent control by a body, a tribunal that meets these requirements, is provided for."

The applicant points out that this contradiction is also in breach of the provisions of Article 1 and Article 2 letters e) and lj) of the Constitutional Act on the Human Rights and Freedoms and the Rights of Ethnic and National Communities or Minorities in the Republic of Croatia (*Narodne novine*, Nos. 65/91, 34/92 and 68/95), and of the provisions of Articles 3, 5 and 134 of the Constitution of the Republic of Croatia (hereinafter: the Constitution).

4. After analysing the provisions of the Administrative Disputes Act (*Narodne novine*, Nos. 53/91, 9/92 and 77/92, hereinafter: ZUS), which are relevant for proceedings before the Administrative Court of the Republic of Croatia, the applicant concludes that this court, when deciding pursuant to the rules on administrative disputes, may not be considered a tribunal (court) in the context of the provision of Article 6 of the Convention.

This is so because the Administrative Court of the Republic of Croatia, as a rule, decides on a matter (administrative dispute) on the grounds of facts determined in the administrative proceedings. The applicant points out that in Croatian legislation the concept of an administrative dispute is (as a rule) a dispute about the legality of an administrative enactment. Also, the Administrative Court of the Republic of Croatia is not obliged to hold an oral hearing in every case, but only exceptionally when it finds this necessary due to the nature of the dispute or at the request of the parties (by which the Court is not bound).

5. Based on the foregoing, the applicant proposes that proceedings should be instituted to review the constitutionality of the disputed provisions of the Law, and that they should be repealed.

6. The proposal was delivered for a response to the Croatian National Parliament (*Sabor*), the Ministry of Physical Planning, Construction and Housing and the Ministry of Justice.

The Croatian State Parliament delivered a notice to the Constitutional Court informing them that the matter had been forwarded to the Committee for the Constitution, Standing Orders and Political System.

The Ministry of Physical Planning, Construction and Housing informed the Constitutional Court that the application of the disputed Act falls within the competence of the Ministry of Justice, pursuant to Article 15 of the Act on the Organization and Scope of Work of the Ministries and the State Administrative Organizations (*Narodne novine*, No. 48/99), in force at that time.

The Ministry of Justice (Civil Rights Administration) delivered an expert opinion on 28 October 1999, whereby they dispute the applicant's arguments in their entirety, deeming that the disputed provisions of the Act are not contrary to the Constitution and the cited international documents.

The proposal is well-founded.

7. Deciding on the applicant's proposal implied that the Constitutional Court had to answer the following key issues:

- is the Constitutional Court competent to decide on the compliance of a law with an international treaty;

- which requirements, guarantees and rights does paragraph 1, Article 6 of the Convention contain, with respect to proceedings deciding on civil rights and obligations;

- do expropriation proceedings involve deciding on civil rights and obligations, which is a prerequisite for the application of paragraph 1, Article 6 of the Convention;

- does the legal regulation of the institute of expropriation in Croatia comply with the procedural requirements in paragraph 1, Article 6 of the Convention?

1. The provisions of the Constitution and the Constitutional Act on the Constitutional Court of the Republic of Croatia (*Narodne novine*, No. 99/99 - hereinafter: the Constitutional Act) do not explicitly authorise the Constitutional Court to review and evaluate compliance of a law with an international treaty.

Pursuant to Article 125 of the Constitution, the Constitutional Court decides on the constitutionality of a law and the constitutionality and legality of other regulations. From this provision, as well as from the provision of Article 5 of the Constitution, it follows that the Constitutional Court has the right and duty to ensure the mutual harmony of regulations of different legal force, which constitute the legal order of the state, and that the ranked list of regulations from higher to lower consists of the Constitution, laws and other regulations.

However, the Constitution includes yet another category of regulations in the legal order of the Republic of Croatia. In accordance with Article 134 of the Constitution, international treaties that have been signed and confirmed (ratified) in compliance with the Constitution, and published, form part of the domestic legal order, and in legal force they are ranked higher than laws. Therefore, the constitutionally determined ranking list of regulations in the legal order of the Republic of Croatia consists of Constitution, international treaty, law and other (subordinate) regulations.

If the decision of the Constitutional Court on the compliance of a law with the Constitution, and on the compliance of other regulations with the Constitution and the law, is in fact a decision on the compliance of a lower-ranking regulation with a higher-ranking regulation and with the Constitution, as the highest-ranking regulation, then the authority of the Constitutional Court to review the compliance of a law with an international treaty is a logical consequence of the constitutional provision whereby the international treaty, which has been ratified and published, forms a part of the domestic legal order and is by legal force ranked higher than a law.

The Republic of Croatia ratified the Convention on 17 October 1997, and, as stated at the beginning, published it in *Narodne novine*, No. 18/97 - supplement: *International Treaties*, of 28 October 1997. However, it must be pointed out that the Convention had been incorporated in the legal order of the Republic of Croatia much earlier, in 1991, with the passing of the aforementioned Constitutional Act on the Human Rights and Fundamental Freedoms and the Rights of Ethnic and National Communities or Minorities in the Republic of Croatia (Articles 1 and 2).

In its practice to date the Constitutional Court indirectly accepted its competence to review compliance of a law with an international treaty, when it found that non-compliance of a law with the provisions of international law is a breach of the principle of rule of law in Article 3 of the Constitution (for example, decisions Nos: U-I-920/1995, U-I-950/1996, U-I-262/1998, U-I-322/1998 - *Narodne novine*, No. 98/98).

2. Paragraph 1, Article 6 of the Convention provides: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.

The above provision gives rise to the following procedural guarantees, i.e. rights of a person whose civil right or obligation is being decided on:

2.1. The right for an independent and impartial tribunal established by law to decide on his civil rights and obligations**.**

In practice the European Commission of Human Rights and the European Court of Human Rights have accepted the interpretation that the court deciding on a civil right and obligation must be authorised for independent fact-finding, i.e. for the independent presentation and weighing of evidence, in short, it has to be a court of full jurisdiction (See for example judgments of the European Court of Human Rights in cases *Le Compte, Van Leuven and De Meyere* vs. *Belgium* from 1981 and *Ettl* vs. *Austria* from 1987, published in the PUBLICATIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS, Series A., Vol. 43 (1981) and Vol. 117 (1987)).

Administrative bodies in general do not meet the requirement, emerging from the established practice of the European Commission and the European Court, of being an independent body deciding on a civil right and obligation. This is explained as followings: lower administrative bodies are bound by the instructions of higher bodies, responsibility in performing administrative activities is hierarchically organised, and administrative bodies, i.e. the executive power, is responsible to the legislative power. Still, it should be mentioned that the practice of the European Commission and the European Court accepts the interpretation whereby the Convention has not been infringed if civil rights and obligations are decided by a body that does not meet the requirements in paragraph 1 Article 6 of the Convention, provided that "subsequent control by" a body that does meet these requirements has been ensured, namely "a judicial body that has full jurisdiction" (judgement *Albert and Le Compte* vs. *Belgium*, PUBLICATIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS, Series A, Vol. 58 (1983), point 29, p.16).

2.2. The right to fair proceedings in deciding on the civil right and obligation**.**

Pursuant to the practice of the European Commission and the European Court, fairness of proceedings requires that they be, among other things, oral and contradictory (for example, the judgment in *Fredin vs. Sweden*, PUBLICATIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS, Series A, Vol. 283 (1994), points 21-22, pp. 10-11).

2.3. The right to a public hearing and mandatory publication of the decision.

2.4. The right for a decision to be issued within reasonable time.

3. The prerequisite for the application of paragraph 1, Article 6 of the Convention is that the matter concerns a decision on civil rights and obligations. The practice of the European Court shows that this term is rather widely construed, so the application of the aforementioned provision relates not only to classical civil-law procedures, but also to all procedures whose outcome directly relates to a civil right or obligation in the context of established Continental-European interpretation. It is irrelevant whether regulations of a private or public legal nature are applied in such a case, whether natural or legal persons of private or public law are participating in the proceedings (such as the state), and whose competence it is to

decide on a particular right in domestic law. In accordance with this practice, the decision on expropriation, including the decision on compensation for the expropriated property, is considered to be a decision on a civil right and obligation in the context of Article 6 of the Convention.

It is undoubted that, according to Croatian regulations as well, the decision on expropriation, both full and partial (forming a servitude or a lease), is a decision about a civil right and obligation. The point of the matter is seizure or limitation of the right of ownership, which is the fundamental subjective civil right in the civil law system. Its inviolability is included among the highest values of the constitutional order of the Republic of Croatia (Article 3 of the Constitution). Since the Constitution guarantees ownership (Article 48), expropriation would not be possible without a special constitutional provision that, under certain preconditions, exceptionally allows its seizure and limitation. Pursuant to paragraph 1, Article 50 of the Constitution, which is the constitutional basis for expropriation, this is possible provided that it is prescribed by law, that it is in the interest of the Republic of Croatia, and that the owner is paid compensation in the amount of the market value.

4. After comparing the aforementioned procedural guarantees and requirements in paragraph 1, Article 6 of the Convention with the solutions in the Croatian regulations on expropriation, the Court has found that the latter, in the part relating to the bodies deciding on expropriation and their authorities in the proceedings, do not meet the Convention requirements.

Two governmental bodies are involved in expropriation proceedings during their possible total duration.

Pursuant to Article 22 ZI, the competent administrative body issues the decision on expropriation (pursuant to Article 13 ZI, this is the county office or the office of the City of Zagreb, in charge of property rights). If no settlement has been reached between the expropriation beneficiary and the property owner regarding the kind and the amount of the compensation for the expropriated property, the same body also decides on the compensation, pursuant to the provisions of Article 25 point 7 and Article 36 point 3.

An administrative dispute against the expropriation decision can be brought before the Administrative Court of the Republic of Croatia, since this matter is decided by an administrative enactment and ZI does not provide for any judicial protection other than the administrative dispute (Article 7 and 9 of the Administrative Disputes Act, hereinafter: ZUS). In accordance with the constitutional guarantee of judicial control over the legality of separate enactments of administrative authorities and bodies vested with public authority (Article 19 paragraph 2), the rationale and the purpose of these proceedings is to contest the administrative enactment before a court on the grounds of its illegality.

The above legislative regulation of expropriation proceedings, whereby the administrative body issues a decision on expropriation, and the court controls its legality, could meet the requirements of Article 6 paragraph 1 of the Convention only if the Administrative Court of the Republic of Croatia is indeed a court of full jurisdiction.

Two requirements need to be met for the Administrative Court to be considered a full jurisdiction court:

First, that the Court has the right and duty to independently present and evaluate evidence, in other words – to independently determine the facts of the

case, whenever a party contests that they have been validly and fully determined in the administrative proceedings, regardless of whether the court is deciding on the legality of an administrative enactment or is directly deciding on the plaintiff's right to which the administrative enactment relates;

Second, that the Court has the right and duty to schedule and hold an oral and contradictory hearing whenever the matter concerns a complaint against an administrative enactment deciding on a civil right or obligation, i.e. that the Court is obliged to hold a hearing whenever the party to the proceedings so requests.

After inspection and analysis of the relevant provisions in ZUS, the Constitutional Court found that the Administrative Court of the Republic of Croatia fulfils none of the aforementioned requirements to a satisfactory extent.

With respect to determining facts, the Administrative Court, as a rule, does not determine them but decides the dispute based on the facts determined in the administrative proceedings, pursuant to paragraph 1 Article 39 ZUS. The circumstance that the Administrative Court is bound by the facts determined in the administrative proceedings is in line with the fundamental characteristic of an administrative dispute as a dispute about the legality of an administrative enactment.

It is necessary to mention that the Administrative Court may, if it so decides, independently determine the facts only in several instances provided by law. Thus, pursuant to paragraph 3 Article 39 ZUS, the Administrative Court may independently determine the facts and make a decision or a ruling on the basis of these findings:

- if the annulment of the disputed administrative enactment and repeated proceedings before the competent body would result in hardly reparable damage to the plaintiff, or
- if, based on public documents or other evidence in the file, it is obvious that the facts of the case are differ from the ones determined in the administrative proceedings, or
- if the administrative enactment has already been nullified in the same dispute, and the competent body has not complied with the decision.

The Administrative Court, if it decides to accept the complaint and to settle the administrative matter by making a judgment (instead of returning the matter to the defendant and instructing them what decision to make), also has the option to independently determine the facts (Article 42 paragraph 5 ZUS) in the case of "silence of administration".

Concerning the second requirement, i.e. holding an oral and contradictory hearing in the decision making process, the Administrative Court does not meet this requirement either. Pursuant to Article 34 paragraph 1 ZUS, the Administrative Court decides administrative disputes at a non-public session. It is true that the Administrative Court may decide, either independently or at the party's request, to hold an oral hearing if it finds that the complexity of the dispute or the better clarification of the matter might require doing so. However, the Court is not obliged to satisfy the party's proposal to hold a hearing.

Starting from the aforementioned provision of Article 34 paragraph 1 ZUS, in Article 4 of the Act on the Ratification of the Convention, the Republic of Croatia made a reservation with respect to holding public hearings guaranteed in Article 6 paragraph 1 of the Convention, in the case when the Administrative Court is deciding on conformity with the law of separate enactments, stating that the reservation relates in particular to this provision in ZUS. However, this reservation

only covers the requirement in Article 6 paragraph 1 of the Convention to hold a public hearing, which is also connected to an oral hearing, but does not cover the requirement for the contradictory nature of the hearing.

8. Based on the foregoing, the Constitutional Court has found that the provisions of Article 22, Article 25 point 7, and Article 36 paragraph 3 are contrary to the provision of Article 6 paragraph 1 of the Convention, and thus also contrary to the provisions of Articles 3, 5 and 134 of the Constitution of the Republic of Croatia.

9. The Constitutional Court has reached its decision pursuant to the provision of Article 53 paragraph 1 of the Constitutional Act.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA

No: U-I-745/1999
Zagreb, 8 November 2000

THE PRESIDENT
Smiljko Sokol, m.p.