



REPUBLIKA SLOVENIJA
USTAVNO SODIŠČE

U-I-266/04

9. November 2006

D E C I S I O N

At a session held on 9 November 2006 in proceedings to review constitutionality commenced upon the petition of Elizabeta Dolenc of Radovljica and others, and the petition of Marija Petan of Ljubljana, the Constitutional Court

d e c i d e d a s f o l l o w s:

1. The Victims of War Violence Act (Official Gazette RS, Nos. 63/95, 8/96, 44/96, 70/97, 43/99, 28/2000, 64/01, 110/02, 3/03 and 18/03 – official consolidated text) (ZZVN) is inconsistent with the Constitution.
2. The National Assembly is obliged to remedy the established inconsistency within the time limit of one year from the publication of the decision in the Official Gazette of the Republic of Slovenia.
3. The petitions for the commencement of proceedings for the review of the constitutionality of the Redress of Injustices Act (Official Gazette RS, Nos. 59/96, 11/01, 87/01, 34/03, 47/03 – official consolidated text, 53/05 and 70/05 – official consolidated text) are rejected.

R e a s o n i n g

A.

1. The petitioners filed a petition for the review of the constitutionality of the Victims of War Violence Act (hereinafter ZZVN) and the Redress of Injustices Act (hereinafter ZPKri). The petitioners are close relatives of persons who during the World War II (i.e. from May 1942 until inclusive of May 1945) died violently. The petitioners asserted that those persons were civilian victims who had died during the war due to the violence of members of the partisan movement.

2. The petitioners were of the opinion that Art. 50.3 of the Constitution guarantee to them as the closest relatives of the persons who had been victims of war violence special protection in conformity with the law. They emphasized that due to the violent death of their relatives they had suffered severe consequences both during and after the war. As children they were forcibly deprived of the possibility and right to live in a community with their parents. They emphasized that due to the loss of their parents they had experienced severe suffering and mental pain, which continued also in the post-war period, and are still present particularly in those cases in which the children have not yet succeeded in finding the graves of their parents and in such a manner establishing a piety relation towards them. Considering the fact that the remnants of their relatives are situated in unknown and unmarked places, which are not graves, in the opinion of the petitioners, their right to personal dignity is still being violated.

3. The petitioners alleged that due to the confiscation of property they had also been materially damaged. Their social position was allegedly worsened. Furthermore, they did not have equal opportunities as others for education, employment, and a professional career. They were already as children allegedly mocked, injured in their personal development, and socially marginalized. Their mental integrity was allegedly curtailed as well as their personal development and the forming of their personal identity was interrupted. Furthermore, the honor and good reputation of their families were damaged. The petitioners were convinced that they were labeled for the entire postwar period as their honor and good reputation were disdained. By the establishment of the inconsistency of ZPKri and ZZVN with the Constitution they would allegedly achieve concrete material and non-material legal benefits and rights.

4. In the opinion of the petitioners the state of facts that is typical of the execution of their relatives is in essential parts equal as the state of facts in the case of the persons determined in Art. 4.3. of ZPKri, i.e. "persons who were executed without court sentences". Also the relatives of the petitioners were allegedly executed without a conviction by the court or without any legal

proceeding. The difference between the two categories of persons is according to the petitioners only in the period of time in which they were killed. While the relatives of the persons that were killed after the war enjoy the right to compensation determined in Art. 5.1 of ZPKri and the right to be issued death certificates and to mark the graves, the petitioners as the relatives of persons killed during the war are not entitled to the mentioned rights.

5. As the petitioners alleged their position is also not regulated in ZZVN, which in the sense of time relates to the period from 6 April 1941 to 15 May 1945, i.e. to the period in which their relatives were killed. The petitioners warned that concerning the provision of Art. 1 of ZZVN, which includes only violent acts or forcible measures taken by the occupier they cannot acquire the rights which are otherwise guaranteed to the victims of war violence by Arts. 7 and 8 of ZZVN. They emphasized that their relatives do not belong to a circle of persons who had voluntarily or professionally collaborated with the aggressor (Art. 6 of ZZVN), but that their relatives were civilians or even members of the partisan movement. According to their opinion, the legislature did not have a sound reason to exclude from the law the category of persons to which the petitioners or their relatives belong. They opined that by failing to regulate the legal status of the mentioned persons the legislature violated the principle of a law-governed and social state determined in Art. 2 of the Constitution, the principle of equality before the law determined in Art. 14.2 of the Constitution, the right to personal dignity and safety determined in Art. 34 of the Constitution, the right to privacy and personality rights from Art. 35 of the Constitution, and the right to social security determined in Art. 50 of the Constitution.

6. The petitioners were convinced that the matter concerned an unconstitutional gap in the law for which the legislature did not have sound and justified reasons. Therefore, they suggested that the Constitutional Court establish that the "Victims of War Violence Act and the Redress of Injustices Act are not in conformity with the Constitution in so far as they do not regulate the legal position of persons killed during the war and the rights of relatives of the persons killed during the war."

7. The petition of Elizabeta Dolenc and others was sent to the National Assembly, which did not respond to that. The petition was also sent to the Government, which also did not submit its opinion.

B. – I.

8. The petitioners substantiated their legal interest by asserting that they are close relatives of persons who had as civilian persons allegedly died violently during the World War II (i.e. between May 1942 and inclusive of May 1945). The Constitutional Court evaluated that the petitioners demonstrated the legal interest to file a petition in the part relating to ZZVN. The Constitutional Court has received a greater number of applications which supported to the filed application, which was the reason why it did not consider such applicants as participants in the proceedings.

9. The Constitutional Court joined the petitions due to joint consideration and decision-making. As the allegations in the petition of Marija Petan and others do not deviate substantively from the allegations in the petition of Elizabeta Dolenc and others, the Constitutional Court did not send the other petition to the National Assembly.

B. – II.

10. The Constitutional Court accepted the petitions to commence proceedings for the review of the constitutionality of ZZVN. As the conditions determined in Art. 26.4 of the Constitutional Court Act (Official Gazette RS, No. 15/94 – hereinafter ZUstS) were fulfilled, it immediately continued with decision-making on the merits of the case.

11. The petitioners suggested the calling of a public hearing. They substantiated their proposal by asserting that thereby the Constitutional Court would benefit from a direct insight into their tragic life stories. The Constitutional Court established, however, that the state of facts being the basis for the review of the constitutionality of the statutory regulation was sufficiently explained already on the basis of the submitted documents. Therefore, it decided not to hold a public hearing.

B. – III.

The Review of ZZVN

12. Hitherto the Constitutional Court has decided several times on cases in which the individuals challenged ZZVN and alleged that they had been unjustly excluded from the circle of persons that are entitled to the recognition of the status of victim of war violence [1]. The petitions considered, however, are opening a new aspect, i.e. the question of the exclusion of an entire group of persons who in accordance with the criteria determined in ZZVN could belong to the circle of civilian victims of war, but for whom ZZVN does not enable the recognition of the status of victim of war violence merely due to the fact that the circumstances which ZZVN determines as criteria for the recognition of the status of victim of war violence were not caused by the occupying forces or their collaborators.

13. The starting-point for the review of the constitutionality of the challenged statutory regulation is Art. 50.3 of the Constitution, according to which war veterans and victims of war are guaranteed special protection in accordance with the law. The Constitutional Court has already in several decisions (see e.g. Decision No. U-I-86/94 dated 14 November 1996, Official Gazette RS, No. 68/96 and OdlUS V, 153, Order No. U-I-327/96 dated 6 May 1999, Official Gazette RS, No. 51/99 and OdlUS IX, 19) emphasized the character of this constitutional right. The mentioned constitutional provision obliges the state to regulate special protection of victims of war in a manner such that exceeds the rights from mandatory social security. The contents of the right to social security are, however, not determined by the Constitution. Furthermore, the Constitution does not ensure specifically determined social rights. What follows from this constitutional provision is only the obligation of the state to create conditions and possibilities for the realization of social security. Special protection entails the ensuring of special rights and a greater extent of rights. The Constitution does not determine the measures that the state will select for such purpose. Special human rights in the area of social security (the social rights) are exercised "under conditions provided by law" – i.e. on the basis of a law which determines the circle of entitled persons, the type and scope of entitlements, the conditions for their acquisition, and the manner of the exercise of the rights.

14. When reviewing a challenged statutory regulation the Constitutional Court must also consider generally valid principles of international law (Art. 8 of the Constitution and Art. 160.1.2 of the Constitution). This concept in particular embraces rules of international customary law and general legal principles recognized by civilized nations. The Statute of the International Court of Justice states these two sources of international law in items b

and c of Art. 38.[2] In the framework of the constitutional category of 'generally accepted principles of international law' as a criterion for deciding the Constitutional Court has often used the 'general principles recognized by civilized nations'.[3] In Decision No. U-I-23/93[4] it stemmed from the fact that after the World War II the international legal order had been established on the basis of the condemnation of the Nazi and Fascist regimes and the persecution of perpetrators responsible for crimes committed, which was confirmed by the entire international community of that time.[5] In the mentioned decision the Constitutional Court took a position that certain activities of an individual during the war can be a reason for such not to be entitled to Yugoslav citizenship. It is also necessary to emphasize the significance of the Preamble to the Constitution, which in this respect states the following: "Proceeding from ... the historical fact that in a centuries-long struggle for national liberation we Slovenes have established our national identity and asserted our statehood..." Both from the documents of the Commission for Constitutional Matters and from constitutional theory it follows that by the struggle for national liberation particularly the periods of the national liberation struggle and the struggle for independence are meant.[6] In connection with such, Dr. Peter Jambrek wrote: "The Slovene constitutional doctrine of the right of the nation to self-determination was explicitly formed, practically tested, and constitutionally implemented in two key periods of the previous century relating to Slovene statehood – the years between 1941 and 1945 and between 1987 and 1991.[7]

15. In Art. 1 of ZZVN the legislature determined that a citizen of the Republic of Slovenia who was during a war or military aggression to the Republic of Slovenia subject to violent acts or forcible measures by the occupier, aggressor or their collaborators, is entitled to the status of victim of war violence. By such definition the legislature determined as the basic criterion for the recognition of the status of victim of war violence that who caused that the person was subject to violent acts or forcible measures. On the basis of such criterion the legislature introduced different regulation of the position of victims of war violence who had experienced the period of the World War II in otherwise comparable circumstances.

16. The basic text of ZZVN was adopted in 1995, as one of the so-called war statutes (together with the War Disabled Act, Official Gazette RS, No. 63/95 et seq. – hereinafter ZVojI, and the War Veterans Act, Official Gazette RS, No. 63/95 et seq. – ZVV). As it follows from the

legislative materials (Reporter of the National Assembly, No. 72/02) ZZVN was adopted in order to ensure special protection of those citizens of the Republic of Slovenia who had been during the war (from 1941 until 1945) subject to certain typical and general forms of war violence, which left consequences to the war generation such that the society is able to remedy or reduce only by special material and organizational efforts. Initially ZZVN referred to only certain categories of such persons; subsequently the circle of entitled persons was expanded by several amendments to ZZVN.

17. In the original text of ZZVN the legislature embraced individual typical categories of civilian persons who had been subject to war violence, however, it did not define the concept of civilian person itself (neither did it such in subsequent amendments).[8] In Art. 2 of ZZVN the following categories of victims of war violence were defined: exiles, prisoners, prisoners of camps, labor deportees, internees, refugees, and stolen children. By Art. 4 of ZZVN the legislature made possible the recognition of the status of victim of war violence also to persons who had been forcibly mobilized into the regular military units of the occupier. These can also be listed among the especially exposed victims of war as they concern civilian persons who had been contrary to the then valid rules of international law[9] forced to join the military units of the occupier. Only by the 2002 amendment to ZZVN (i.e. ZZVN-G) recognized the legislature the status of victim of war violence to the only category which cannot be considered as civilian victims of war, i.e. members of the former Yugoslav army at the capitulation of the Kingdom of Yugoslavia, however, this category is not relevant for the consideration of this case.[10]

18. In view of a recognized status ZZVN links appropriate categories with a different extent of statutory rights (health care, spa and climate treatment, the reimbursement of travel expenses, the recognition of years of service for retirement benefits, the right to pension under more favorable conditions, the right to military compensation according to a special law; life-time monthly allowance, and priority in the allocation of a social apartment). Under certain conditions such protection also belongs to the family members of a person who lost their life or was missed in the circumstances relevant for the recognition of the status of victim of war violence according to this law (Art. 7 of ZZVN).[11]

19. In the framework of the authority granted to it by Art. 50.3 of the Constitution the legislature adopted the regulation by which it limited the recognition of the status of victim of war violence

to different categories of civilian persons. However, it made possible the recognition of the status of victim of war violence only for those civilian persons who had been subject to violent acts or forcible measures by the occupier or its collaborators. From the circle of entitled persons it entirely excluded civilian persons who had been subject to violent acts or forcible measures by the armed forces of the other warring side. In order to define the concept of civilian victim it is decisive that the matter concerns persons who had been subject to violence due to war events without actively cooperating with any of the warring sides.[12]

20. According to the Constitutional Court, the legislature acted inconsistently with the authority determined in Art. 50.3 of the Constitution when it entirely excluded from special protection the mentioned circle of civilian victims of war who had experienced the period of the World War II in comparable circumstances as determined by Art. 1 of ZZVN. The authority that the mentioned constitutional provision grants to the legislature is not unlimited. The legislature may exercise such only within the framework of the constitutional principles and when the constitutionally guaranteed human rights and fundamental freedoms are respected. By determining in Art. 6 of ZZVN that those persons who voluntarily or professionally collaborated with the occupier are excluded from the circle of victims of war violence the National Assembly acted within the framework of such authority. Regulation which would recognize the status of victim of war violence for persons who collaborated with the occupier could be inconsistent with the generally valid principles of international law and thereby with the Constitution.[13] However, it does not follow from the Constitution that the concept of victim of war violence should be restricted to only those civilian persons who had been subject to violent acts or forcible measures by the armed forces of the occupier. Therefore, it is inconsistent with the Constitution that the legislature excluded from the circle of civilian victims of war violence all those persons who had been subject to violent acts or forcible measures by the armed forces of the other warring side. Establishing whether potential victims of war violence collaborated with the occupier can be the subject of concrete procedures and thereby also the subject of a possible constitutional review of acts adopted in such procedures, not the subject of the constitutional review of a regulation.

21. For the mentioned reasons the Constitutional Court establishes that the challenged regulation according to ZZVN is inconsistent with the Constitution. As the matter concerns a situation determined in Art. 48 of ZUstS, the Constitutional Court established the unconstitutionality of the challenged statutory regulation (Item 1 of the operative provisions). The Constitutional Court

determined a time limit of one year in which the legislature is obliged to remedy the established inconsistency (Item 2 of the operative provisions). By regulating the position and rights of civilian victims of war in conformity with the above-mentioned, the legislature will make possible also for the family members of killed relatives to acquire under the conditions determined in Art. 7 of ZZVN certain rights according to this law.

22. As the Constitutional Court established the unconstitutionality of the challenged regulation of ZZVN already due to the inconsistency with Art. 50.3 of the Constitution, it did not enter the review of other alleged inconsistencies.

23. Considering the fact that the petitions substantively refer to the regulation according to ZZVN, the petitioners do not have a legal interest to challenge ZPKri. Thus, the Constitutional Court rejected the petitions in this part (Item 3 of the operative provisions). In connection with the petitioners' allegations concerning their inability to arrange graves and obtain death certificates the Constitutional Court explains that such issues are not the subject of the challenged laws..

C.

24. The Constitutional Court reached this Decision on the basis of Arts. 25 and 48 of ZUstS, composed of: Dr. Janez Čebulj, President, and Judges Dr. Zvonko Fišer, Lojze Janko, Marija Krisper Kramberger, LL.M., Milojka Modrijan, Dr. Ciril Ribičič, Dr. Mirjam Šrk, Jože Tratnik, and Dr. Dragica Wedam Lukić. The Decision was reached unanimously.

Dr. Janez Čebulj

President

Notes:

[1] See e.g. Order No. U-I-403/02 dated 12 December 2002 (OdlUS XI, 259).

[2] A Graseli, *Komentar Ustave Republike Slovenije* [Commentary on the Constitution of the Republic of Slovenia] (L. Šturm ed.), Fakulteta za podiplomske državne in evropske študije, Ljubljana 2002, p. 141.

[3] See the following Constitutional Court decisions: Decision No. U-I-6/93, dated 1 April 1994, Official Gazette RS, No. 23/94 and OdlUS III, 33; Decision No. U-I-67/94, dated 21 March 1996, Official Gazette RS, No. 24/96 and OdlUS V, 31; Decision No. U-I-249/96, dated 12 March 1998, Official Gazette RS, No. 29/98 and OdlUS VII, 47; Decision No. U-I-248/96, dated 30 September 1998, Official Gazette RS, No. 76/98 and OdlUS VII, 176; Decision No. U-I-247/96, dated 22 October 1998, Official Gazette RS, No. 76/98 and OdlUS VII, 195, and Decision No. U-I-23/93, dated 20 March 1997, Official Gazette RS, No. 23/97 and OdlUS VI, 43.

[4] In Case No. U-I-23/93 the Constitutional Court reviewed the statutory regulation by which the post-war Yugoslav authorities had denied persons of German nationality who had been during the occupation loyal to the German Reich the possibility to acquire Yugoslav citizenship. It established that such regulation was not inconsistent with the general legal principles which were already then recognized by civilized nations.

[5] See United Nations General Assembly Resolution No. 3 of 13 February 1946 on the extradition and punishment of war criminals, and Resolution No. 95(I), dated 11 December 1946, on the confirmation of the principles of international law recognized in the Founding Charter of the International Military Tribunal in Nuremberg. The Constitutional Court referred to them already in Decision No. U-I-6/93.

[6] Cf. the discussion by Dr. France Bučar, President of the Commission for Constitutional Matters, *Nastajanje slovenske ustavnosti* [The Building of Slovene Constitutionality], selection of the materials of the Commission for Constitutional Matters (1990–1991), Vol. 1 (M. Cerar and G. Perenič, eds.), Ljubljana 2001, p. 236.

[7] P. Jambreč, *Komentar Ustave Republike Slovenije*, p. 35.

[8] The concept of a civilian is defined in the Additional Protocol to the Geneva Conventions of 12 August 1949 Relating to Protection of Victims of International Armed Conflicts, which was adopted on 8 June 1977 (Official Gazette SFRY, MP, No. 16/78 and Official Gazette RS, No. 14/92 – hereinafter Protocol I). According to Art. 50.1 of Protocol I, a civilian is a person who does not belong one of the categories of persons referred to in Art. 4 A (1), (2), (3) and (6) of the Third Geneva Convention and in Art. 43 of this Protocol. In case of doubt whether a person is a civilian, such person shall be considered to be a civilian. The matter concerns an excluding approach in defining the concept of a civilian. Members of armed forces, the wounded and sick, and prisoners of war are excluded from the circle of civilians. If we interpret the mentioned definition of the concept of a civilian from the view of rules of international military law that applied during World War II we establish that also in accordance with the then war regulations

the wounded and sick in the framework of armed forces and prisoners of war are especially protected categories, which cannot be considered to be civilian victims of war (cf. the Convention For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field and the Convention Relative to the Treatment of Prisoners of War adopted in Geneva on 27 July 1929; the Kingdom of Yugoslavia submitted to both of them the instruments of ratification with the Swiss Federal Council on 20 May 1931. The conventions were superseded by the First and Third Geneva Conventions concerning victims of war of 12 August 1949.

[9] The prohibition against enlisting recruits from inhabitants on an occupied territory can be discerned by means of interpreting the Hague Rules of 1907, which in Art. 45 determined that it was not allowed to force the inhabitants of an occupied territory to pledge allegiance to an enemy's force. This prohibition was included in the Fourth Geneva Convention, i.e. the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (Official Gazette of the Presidium of the People's Assembly of FPRY, No. 6/50 and 24/50 and Official Gazette RS, No. 14/92), which in Art. 51.1 determines: "The Occupying Power must not compel protected persons to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing enlistment is permitted."

[10] In the framework of their allegations the petitioners do not mention this category.

[11] According to Art. 7.1 of ZZVN, protection under this law is extended to a citizen of the Republic of Slovenia, a family member of a person who lost their life or was missed in the circumstances relevant for the recognition of the status of victim of war violence in accordance with this law. The protection is ensured to the same circle of family members and under equal conditions as according to the rules on war disabled. Arts. 8 to 10 of ZVojL defines which family members belong to the circle of entitled persons according to this law. In conformity with Art. 9 of ZVojL the following family members are entitled to protection according to this law:

1. the spouse whom a war disabled, fallen combatant or another person has maintained during the last year at least prior to their death, and the spouse whose marriage was dissolved if they have or had the right to maintenance based on a court decision or agreement and enjoyed such until the death of the war disabled, fallen combatant or another person (i.e. the divorced spouse);
2. children and adoptees, stepchildren however only under the condition that a war disabled, fallen combatant, or another person has maintained such during the last year at least prior to their death, or from the birth onwards if they are less than one year old and did not have a parent to maintain them;

3. parents, an adopter, stepfather and stepmother whom the war disabled, fallen combatant or another person has maintained during the last year at least prior to their death and if the stepfather or stepmother have maintained the war disabled, fallen combatant or another person for at least three years and cared for such.

On the basis of Art. 10 of ZVojL a community of partners which lasts at least three years, which is according to the regulations on the marriage and family relations equated with the marriage, has according to this law the same legal consequences as a marriage.

[12] See note No. 8.

[13] Cf. Decision No. U-I-23/93.