COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

(Or. English)

EUROPEAN COMMISSION
OF HUMAN RIGHTS

Application No. 9273/81

Anton ETTL and others
against
AUSTRIA

Report of the Commission

(Adopted on 3 July 1985)

STRASBOURG

Table of contents

9273/81

I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

The substance of the application

2. The applicants complain that in the agricultural land consolidation proceedings in which they have been involved, their civil rights and obligations were not determined by independent and impartial tribunals as required by Art. 6 (1) of the Convention. They claim that the Provincial and Supreme Land Reform Boards before which these proceedings took place did not fulfil the requirements of such tribunals in particular because their membership comprised a majority of civil servants and because the specialised members of the Boards (including two civil servants experienced in agronomy and forestry respectively, and an agricultural expert) acted as experts and subsequently participated in the votes.

Proceedings before the Commission

3. The application was introduced on behalf of the applicants on 27 October 1980. It was registered on 18 February 1981.

4. On 5 October 1982, the Commission began its examination of the admissibility and decided to give notice of the application to the respondent Government who were invited to submit written observations on the admissibility and merits. The Commission put certain specific questions to the Government in this connection.

5. The Government submitted their observations after having been granted an extension of the time limit, on 7 February 1983, and the applicants replied, equally after an extension of the time limit, on 25 May 1983.

6. On 9 July 1983, the Commission continued the examination of the case in the light of the parties' written observations. It decided to hold an oral hearing on the admissibility and merits of the application.

7. The hearing took place on 8 March 1984. The parties were represented as follows :

- the applicants by their lawyer, Mr. R. WANDL of St. Pölten, assisted by Mr. M. WANDL of the same law firm and Mr. E. PAWEL, civil engineer for forestry and wood industry, Gaaden;

- the Government by their Agent, Mr. H. TÜRK, Head of the International Law Department of the Federal Ministry of Foreign Affairs who was assisted by Mr. W. OKRESEK, of the Federal Chancellery's Department of Constitutional Law, and MM. J. JÖSTL and D. HUNGER, members of the Supreme Land Reform Board, Advisers.

8. Following the hearing, the Commission declared the application admissible on 9 March 1984. It decided to adjourn the procedure on the merits pending the judgment of the European Court of Human Rights in the **Sramek** case. After the Court had given its judgment in this case, the Commission resumed the procedure on 8 December 1984 and the parties were then invited to submit supplementary observations on the merits if they so wished.

Both parties submitted such observations on 31 January 1985.

9. On 16 March 1984, the Commission decided to grant the applicants legal aid.

10. After declaring the case admissible, the Commission, acting in accordance with Art. 28 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

The present Report

11. The present Report has been drawn up by the Commission in pursuance of Art. 31 of the Convention and after deliberations and votes in plenary session, the following members being present:

MM C.A. NØRGAARD, President
G. SPERDUTI
J.A. FROWEIN
G. JÖRUNDSSON
G. TENEKIDES
S. TRECHSEL
J.A. CARRILLO
A. WEITZEL
J.C. SOYER
H.G. SCHERMERS
H. DANELIUS
G. BATLINER

12. The text of the Report was adopted by the Commission on 3 July 1985 and is now transmitted to the Committee of Ministers in accordance with Art. 31, para. 2 of the Convention.

13. A friendly settlement of the case not having been reached, the purpose of the present Report, pursuant to Art. 31 of the Convention, is accordingly :

1. to establish the facts, and

2. to state an opinion as to whether the facts found disclose a breach by the respondent Government of their obligations under the Convention.

14. A schedule setting out the history of the proceedings before the Commission is attached hereto as Appendix I and the Commission's decision on the admissibility of the application forms Appendix II.

15. The full text of the pleadings of the parties, together with the documents lodged as exhibits, are held in the archives of the Commission and are available to the Committee of Ministers, if required.

II. ESTABLISHMENT OF THE FACTS

16. The applicants Anton and Leopoldine ETTL, Anton and Rosa SCHALHAS, Franz and Maria GUNACKER, and Anton and Theresia HAAS are farmers living at Obritzberg, Lower Austria. They all are Austrian citizens. They are represented by Mr. Richard WANDL, a lawyer practising at St. Pölten.

17. The applicants complain of consolidation proceedings (Zusammenlegungsverfahren) to which their agricultural lands have been subjected.

The applicable law in general

18. According to Art. 12, para. 1 (3) of the Federal Constitution, the competences in matters of land reform, in particular land consolidation measures, are split between the Federation and the Provinces in the way that the legislation as regards principles is the business of the Federation, and the issue of implementing laws and execution is the business of the Provinces. According to para. 2 of the same constitutional Article, the decision at the highest level and at the level of the Provinces shall lie with boards composed of a chairman and judges, administrative officials and experts. The board entrusted with jurisdiction at the highest level shall be established within the framework of the competent Federal Ministry. The organisation, the duties and the procedure of the boards as well as the principles for the organisation of other authorities concerned with matters of land reform shall be regulated by Federal law. This shall provide that the boards' decisions cannot be repealed or changed by way of administrative ruling. The ordinary appeal from the authority of first instance to the jurisdiction established at provincial level may not be excluded.

19. Within this constitutional framework, the Federation has enacted three different laws governing the following matters:

(i) the principles of substantive law to be applied in matters of land reform: the Federal Agricultural Land Ownership (General Principles) Act (**Flurverfassungs-Grundsatzgesetz**, Federal Law Gazette No. 103/1951) as amended in particular by the Amendment Act of 1977 (Flurverfassungsnovelle, Fed. Law Gazette No. 390/1977)

(ii) the organisation of the land reform boards and the principles for the organisation of the authorities of first instance: the Federal Agricultural Authorities Act (**Agrarbehördengesetz 1950**, Fed. Law Gazette No. 1/1951) as amended by the Agricultural Authorities (Amendment) Act (Agrarbehördennovelle, Fed. Law Gazette No. 476/1974)

(iii) the procedure before the agricultural authorities: the Federal Agricultural Proceedings Act (**Agrarverfahrensgesetz**, Fed. Law Gazette No. 173/1950) which in turn refers to the Code of General Administrative Procedure (**Allgemeines Verwaltungsverfahrensgesetz**, Fed. Law Gazette No. 172/1950 as amended) whose provisions are generally applicable subject to certain limited modifications.

20. The matters left to provincial legislation are regulated in the Agricultural Land Ownership Acts of each Province. In the case of Lower Austria, this is the Lower Austrian Agricultural Land Ownership Act (**Flurverfassungs-Landesgesetz**, Provincial Law Gazette No. 6650/1975) which replaced an earlier Act of 1934 (Provincial Law Gazette No. 208/ 1934 as amended by the Amendment Act, Provincial Law Gazette No. 221/ 1971) which was applicable at the initial stages of the present proceedings.

The organisation of the agricultural authorities

21. The authority of first instance, established by the provincial legislation in accordance with principles laid down in Sections 2 and 3 of the Federal Agricultural Authorities Act, is the Lower Austrian Agricultural District Authority (**Agrarbezirksbehörde**). It is a purely administrative authority which is subject to the instructions of the higher authorities.

22. These higher authorities are the Provincial Land Reform Board (**Landesagrarsenat**) established at the Office of the Lower Austrian Provincial Government according to Section 5 of the above Federal Act, and the Supreme Land Reform Board (**Oberster Agrarsenat**), established at the Federal Ministry of Agriculture and Forestry according to Section 6 of the Act.

23. Since the enactment of the Agricultural Authorities (Amendment) Act of 1974, the Provincial Land Reform Board consists of the following members (Section 5/2 of the Act):

1. a legally qualified provincial official as President,

2. three judges,

3. a legally qualified provincial official with experience in land reform, as Rapporteur,

4. a provincial official of the administrative grade, with experience in agronomic matters,

5. a provincial official of the administrative grade with experience in forestry matters,

6. an agricultural expert within the meaning of Section 52 of the 1950 Code of General Administrative Procedure.

24. The Supreme Land Reform Board is composed of the following members (Section 6/2 of the Act):

1. a legally qualified official of the administrative grade in the Federal Ministry of Agriculture and Forestry, as President,

2. three members of the Supreme Court,

3. a legally qualified official of the administrative grade with experience in land reform from the Federal Ministry of Agriculture and Forestry, as Rapporteur,

4. an official of the administrative grade in the Federal Ministry for Agriculture and Forestry with experience in agronomic matters,

5. an official of the administrative grade in the Federal Ministry of Agriculture and Forestry with experience in forestry matters,

6. an agricultural expert within the meaning of Section 52 of the 1950 Code of General Administrative Procedure.

25. There is a substitute member with the same qualifications for each member of the two boards (Sections 5/3 and 6/3). The members and substitute members of the Provincial Board are appointed by the Provincial Government (Section 5/4), those of the Supreme Board by the Federal Minister for Agriculture and Forestry, except its judicial members who are appointed by the Federal Minister of Justice (Section 6/4). Their term of office is five years and they may be reappointed (Section 9/1). Before expiry of this term, their office terminates if the requirements for appointment are no longer fulfilled (in particular by loss of the qualifying judicial or civil servant functions), or in the case of members who are neither judges nor civil servants, on criminal conviction which in case of a civil servant would involve loss of office (Section 9/2). The suspension from judicial or civil servant functions by the decision of a disciplinary authority also entails the suspension of the exercise of the functions as a member of the boards (Section 9/4). Apart from this, any member may be discharged from office on his own application if serious professional or health grounds prevent him from properly exercising his office (Section 9/3).

26. As regards the position of the members of the land reform boards, Section 8, first sentence, of the Act provides that they shall be independent in the exercise of their functions and shall not be subject to any instructions (Weisungen). At least insofar as the boards give decisions of last instance, the freedom from instructions

of all members is also provided for in the Federal Constitution: Art. 20, para. 2 stipulates that where administrative boards (Kollegialbehörden) in which at least one member is a judge are called upon to give decisions of last instance which cannot be repealed or changed by way of administrative ruling, also the non-judicial members of these boards shall not be bound by any instructions in the exercise of their functions.

27. As mentioned above (para. 18), the Constitution itself provides in its Article 12, para. 2 that the boards' decisions cannot be repealed or changed by way of administrative rulings. This stipulation has been repeated in Section 8, second sentence, of the Agricultural Authorities Act as amended in 1974. The boards accordingly come within the description of Art. 133 (4) of the Federal Constitution which generally exempts the decisions of such administrative boards from judicial review by the Administrative Court, unless it is declared admissible by an express stipulation. Such a provision (Section 8, last sentence) was introduced by the Amendment Act of 1974.

Legislative history

28. The legislative provisions on the establishment of the agricultural authorities as described above were introduced in their present form by the Agricultural Authorities (Amendment) Act 1974, after the Constitutional Court had quashed the earlier version of the Agricultural Authorities Act as being unconstitutional (official collection of Constitutional Court decisions, dec. No. 7284 of 19 March 1974).

29. The Constitutional Court found that the organisation of the Land Reform Boards did not satisfy the requirements of Art. 6, para. 1 of the Convention for the following reasons:

- Art. 6, para. 1 of the Convention is applicable to land consolidation proceedings before the agricultural authorities because they determine civil rights and obligations within the meaning of this provision. In fact the consolidation plan alters ownership rights in the parcels constituting the consolidation area, and thus affects private law relationships between the affected landowners (cf. the Eur. Court of Human Rights judgment in the **Ringeisen** case).

- The earlier case-law of the Constitutional Court (decisions Nos. 5741/1968, 5943/1969 and 6044/1969) according to which Art. 12, para. 2 of the Federal Constitution is a lex specialis in relation to Art. 6, para. 1 of the Convention cannot be maintained. Neither this nor any other constitutional provision permits to establish the Land Reform Bords differently from other authorities which have to determine civil rights and in a manner which does not comply with Art. 6, para. 1.

- This provision requires a tribunal fulfilling the necessary conditions of independence and impartiality only at last instance and this requirement is met if an appeal lies to both courts of public law, i.e. to the Administrative Court and the Constitutional Court (cf. Const. Court decs. Nos. 5100/1965 and 7068/1973).

- As long as an appeal to the Administrative Court is excluded by virtue of Art. 133 (4) of the Federal Constitution, the Land Reform Boards themselves must under constitutional law be established as tribunals within the meaning of Art. 6, para. 1 of the Convention. This applies to the boards at the provincial and the federal level because both can be seized with matters which may include the determination of civil rights and obligations at last instance.

- The organisation of these boards does not meet the requirements of Art. 6, para. 1 if they include members of the Federal or a Provincial Government, and if the mandate of the other members can be revoked at any time by the Executive (cf. the Const. Court's dec. No. 7099/1973 relating to the Tyrol Real Property Transactions Authority, where the same principle was developed for the first time).

30. The Amendment Act of 1974 modified the composition of the Boards by excluding any members belonging to the Federal or a Provincial Government, and introduced new provisions regulating the period of functions and the recall of members (Section 9). It also provided for an appeal to the Administrative Court in derogation from the general principle established by Art. 133 (4) of the Constitution.

Special provisions on experts

31. The applicants in the present case consider that the new organisation of the Boards as brought about by the Amendment Act of 1974 is still lacking sufficient guarantees of impartiality and independence in particular due to the participation of experts who allegedly are called upon to prepare expert opinions as a basis of the boards' decisions in which they themselves participate as voting members. The experts in question are the persons mentioned in sub-paras. 4-6 of Sections 5(2) and 6(2) of the Agricultural Authorities Act (see paras. 23 and 24 above). They include two civil servants specialised in agronomic and forestry matters, respectively, and a further agricultural expert within the meaning of Section 52 of the Code of General Administrative Procedure.

32. This latter provision reads as follows:

"(1) If the taking of expert evidence becomes necessary, the authority shall rely on the services of the official experts (Amtssachverständige) attached to it or put at its disposal.

(2) However, by way of exception, the authority may also consult other suitable persons sworn as experts, if no official experts are available or if it becomes necessary having regard to the particular circumstances of the case. Persons who have been publicly appointed to prepare expert opinions of the type required, or who publicly exercise, or who are publicly employed or authorised to exercise the science, the art, or business whose knowledge is a condition for the required expertise, shall be obliged to accept the appointment as expert. The provisions of Sections 49 and 50 are mutatis mutandis applicable to the latter experts. "
<The last mentioned Sections concern the duty of witnesses to appear before the authority and to tell the truth, and their right to refuse giving evidence on certain matters.>

33. Section 53 of the same Code provides grounds for the exclusion of certain persons from the function of expert. They are different according to whether the person in question is an offical expert, or a non-official expert.

34. The taking of expert evidence is further governed by the general regulations concerning the administration of evidence including in particular the principle laid down in Section 45 (3) of the Code of General Administrative Procedure according to which the parties shall have the opportunity to take note of and comment on the result of evidence-taking. The applicability of this provision in respect of the expert members of the Land Reform Boards seems to be in dispute between the parties.

Appeal proceedings before the Constitutional and Administrative Courts

35. Under domestic law, the decisions of the Land Reform Boards are considered as administrative decisions. As such, they can and could always be challenged before the Constitutional Court in proceedings under Art. 144 of the Federal Constitution. The Constitutional Court's power of review under this provision is limited to allegations of unconstitutionality based either on the infringement of a constitutionally guaranteed right, or on the application of an illegal ordinance or treaty, or an unconstitutional law.

36. Except in the cases enumerated in Art. 133 of the Federal Constitution, administrative decisions can also be challenged before the Administrative Court, and this separately from and parallel to an appeal to the Constitutional Court. By virtue of Art. 144, para. 3 of the Constitution it is also possible to seize the Administrative Court after the Constitutional Court's decision if no violation of constitutional rights is established. In such cases the Constitutional Court will refer the proceedings to the Administrative Court with a view to establishing whether any other rights of the interested party have been violated. This latter procedure was chosen by the applicants in the present case.

37. The appeal to the Administrative Court had not been possible prior to the 1974 Amendment Act because at that time the general rule of Art. 133, para. 4 of the Constitution was applicable according to which the Administrative Court lacks jurisdiction to review decisions of administrative boards (**Kollegialbehörden**) unless this is expressly provided for by law. An express provision on Administrative Court appeals was inserted in Section 8 of the Agricultural Authorities Act only by the above Amendment Act.

38. According to Art. 134 of the Constitution, all members of the Administrative Court are appointed by the Federal President on the proposal of the Federal Government. The proposals for the appointment of the President and Vice-President are based on recommendations by the Administrative Court itself. All members must have completed studies of law and must for at least ten years have held a professional appointment which requires the completion of these studies. At least one third of the members must be qualified to hold judicial office, and at least one quarter should be drawn from professional appointment in provincial administrations. Members of the Federal or of a Provincial Government, or of a legislative body are not eligible.

After their appointment, the members are professionally employed judges to whom the constitutional provisions on independence and irremovability of judges (Arts. 87 and 88) are applicable. They are obliged to retire when they have reached the age of 65 years. They have to refrain from exercising their functions and may be challenged in cases of conflict of interest or where there are other important grounds likely to throw a doubt on their full impartiality (Section 31 of the Administrative Court Act).

39. By virtue of Art. 130 of the Constitution, the Administrative Court's power of review is limited to allegations of unlawfulness of an administrative decision (or assimilated act of direct administrative compulsion). The review of the exercise of discretionary powers within the scope of the law is excluded (Art. 130, para. 2). Apart from this, the Administrative Court is also competent to deal with complaints that the administrative authority has violated its duty to take a decision (Art. 132).

40. Detailed provisions about the procedure of the Administrative Court are laid down in the Administrative Court Act (Fed. Law Gazette No. 2/1965, as amended). From this it follows that only in the cases under Art. 132 of the Constitution is the Administrative Court empowered to take a decision on the merits of the case at issue (in replacement of the decision which the administrative authority failed to take), whereas in all other cases it has only the choice between either confirming the administrative decision or quashing it (Section 42 of the above Act). Its function is therefore in principle that of a court of cassation.

41. It further follows from Section 41 of the Act that in reviewing an administrative decision as to its lawfulness, the Administrative Court's jurisdiction is limited in scope because the court is as a matter of principle bound by the grounds of appeal invoked by the applicant. Only if in connection with the examination of the grounds of appeal reasons emerge which have not so far been brought to the notice of one party, the parties must be given an opportunity to be heard and the proceedings adjourned if necessary.

42. By virtue of the same Section 41, the Administrative Court is in principle bound by the facts as established by the administrative authority, unless it finds that the latter was incompetent or violated basic principles of procedural law (i.e. establishment of essential facts in contradiction to the file, incompleteness of the established facts on an essential point, or non-observance of procedural regulations whose application might have given rise to a different decision, cf. Section 42, para. 1 (c) of the above Act). In the latter cases the Administrative Court considers itself competent to take supplementary evidence in order to determine whether or not the alleged violation of procedural principles might have affected the result of the proceedings. Apart from this the Administrative Court refuses to review the facts or their assessment by the competent administrative authority.

43. In essence the proceedings before the Administrative Court consist of an exchange of written observations between the parties (Section 36), and an oral hearing of their legal arguments (Sections 39 and 40). The parties have a right to request a hearing which may be dispensed with only in cases of formal inadmissibility or if the decision is favourable to the applicant.

The development of the proceedings in the concrete case

Proceedings before the agricultural authorities

44. The Lower Austrian Agricultural District Authority issued the consolidation plan for Obritzberg on 30 July 1973. Each of the applicants appealed against this decision, claiming that he had not obtained a lawful land compensation according to the provisions of the Provincial Agricultural Land Ownership Act. The reasons of appeal differed in the case of each applicant, according to the particular manner in which his possessions were affected by the consolidation plan.

45. The Provincial Land Reform Board dealt with these appeals in separate decisions of 12 June 1975 (applicants Gunacker and Haas) and of 7 July 1975 (applicants Ettl, Schalhas and Gunacker). The appeals were in part allowed, in part rejected, and the land compensation assigned to each of the applicants was modified in certain respects.

46. All applicants appealed further to the Supreme Land Reform Board which dealt with these appeals in separate decisions of 6 October 1976. The appeals of the applicants Ettl and Schalhas were in part allowed insofar as they had complained of a danger of water erosion for certain of their lands. Certain draining measures were ordered so as to remove this danger. The remainder of the appeals of these applicants was rejected, as were also the appeals of the applicants Gunacker and Haas.

Proceedings before the Constitutional Court

47. All applicants then lodged complaints with the Constitutional Court about various matters, including in each case an allegation that they had been deprived of their right to a decision by the lawful judge (Art. 83, para. 2 of the Federal Constitution) on the ground that according to the legislation on the organisation of the agricultural authorities a certain number of experts had to take part in their decisions. It was submitted to be illogical that these members had to cast a vote even if the matter concerned was outside their field of specialisation or, on the other hand, if they had themselves prepared an expert opinion. The constitutional complaints also generally referred to "the corresponding provisions of the Convention on Human Rights".

48. The Constitutional Court rejected the above constitutional complaints as unfounded, stating that the participation of experts was provided for in Art. 12, para. 2 of the Federal Constitution. The relevant parts of the Constitutional Court's decisions of 1 February (applicants Haas), 28 February (applicants Gunacker) and 19 March 1980 (applicants Ettl and Schalhas) were worded in identical terms.

49. The Constitutional Court also rejected the applicants' further complaints (based essentially on the constitutional guarantee of equality before the law), but referred the cases to the Administrative Court for the purpose of determining whether apart from constitutional rights any other rights of the applicants had been violated.

Proceedings before the Administrative Court

50. In the proceedings before this court, the applicants claimed inter alia a violation of the substantive provisions of the Provincial Agricultural Land Ownership Act concerning the lawfulness of the land compensation assigned to them, and in addition a violation of the procedural provisions concerning bias of the authority (Section 7 of the Code of General Administrative Procedure) and concerning their right to be heard (Section 45, para. 3 of the Code).

51. In its decisions of 11 November (applicants Ettl and Gunacker) and 25 November 1980 (applicants Schalhas and Haas), the Administrative Court found in each case that there had been a violation of the applicants' procedural rights. The applicants' remaining complaints were rejected.

52. The decisions were worded in similar terms and can be summarised as follows:

- Insofar as the applicants had complained of bias of the expert members of the land reform boards on the ground that they had participated in the decisions although the matter at issue was outside their particular field of specialisation, their complaint was without foundation because the boards had been composed as provided for by law. The Agricultural Authorities Act expressly stipulated that the Supreme Land Reform Board had to include, apart from judges and civil servants with legal training, an official with experience in agronomic matters,

an official with experience in forestry matters, and an agricultural expert within the meaning of Section 52 of the Code of General Administrative Procedure. The lawful participation of these members in the decision therefore could not create any bias on the part of the authority.

- Insofar as the applicants had complained of the absence of a written expert opinion, the Administrative Court observed that a procedural defect was excluded because the applicants had failed to substantiate which relevant facts had not come to the authority's knowledge as a result of the alleged failure to take expert evidence.

- Insofar as the applicants had further complained of the fact that the result of the investigation proceedings had not been brought to their knowledge, the Administrative Court conceded that not only the establishment of the facts (Befund) by the expert member of the board in preparation of his expert opinion, but also the expert opinion itself (Gutachten) was subject to the provision of Section 45, para. 3 of the Code of General Administrative Procedure, i.e. it had to be brought to the knowledge of the parties. However, it was not sufficient for the parties concerned to show that this had not been done. The parties were further required to state what submissions they could have made if they had been informed of the expert opinions and what relevant considerations had therefore been omitted by the authority. Since the applicants had not specified the further submissions which they would have made if they had known the expert opinions, they had failed to substantiate the essential procedural defect claimed by them, namely the violation of their right to be heard.

- As regards the alleged violations of their substantive rights under the Agricultural Land Ownership Act, the Administrative Court found them unsubstantiated in the case of each applicant, for various reasons relating to the special situation in each case. However, the Administrative Court noted in this connection that certain measures (water operations in the cases of Ettl, Schalhas and Haas, the construction of a way of access in the case of Gunacker) had been ordered by the authority without giving sufficient reasons on the factual basis of those decisions, in particular the expert opinions on which they were founded. In the Ettl case it was in addition stated that the authority had obtained an opinion (Stellungnahme) on the question of water erosion from its member experienced in agronomic matters, and that this opinion had not been brought to the knowledge of the applicants in conformity with Section 45, para. 3 of the Code of General Administrative Procedure. Consequently, they therefore had had no opportunity to comment on this opinion. In the Administrative Court's view these omissions constituted essential procedural defects, and the relevant parts of the Supreme Land Reform Board's decisions were therefore quashed. This authority was accordingly called upon to give a new decision.

53. The Commission has not been informed of the further development of the proceedings.

III. THE PARTIES' SUBMISSIONS

54. The parties' principal submissions have been made at the admissibility stage in their written observations and oral pleadings which each time included arguments as to the merits. These submissions have been summarised in the decision on admissibility which is annexed to this Report. The Commission refers to the relevant parts of this decision (see Appendix II).

55. At present, the Commission can limit itself to recalling the parties' main arguments as further developed in their supplementary written observations on the merits which were made in the light of the European Court of Human Rights judgment of 22 October 1984 in the **Sramek** case.

The applicants' submissions

56. The applicants consider Art. 6, para. 1 of the Convention to be violated because the Land Reform Boards are not sufficiently independent of the Executive, and at least some members cannot be considered as impartial.

57. There are altogether five civil servants sitting as members of each of the boards, and their number thus outweighs that of the judges. They are moreover entrusted with the key functions of President, Rapporteur, and experts. Insofar as they may be regarded as representatives of special interests, the bias created by this fact is not counterbalanced by the presidency of a judge, which in the **Ringeisen** judgment was considered as essential in this respect.

58. As regards the freedom from instructions as provided for in the Agricultural Authorities Act, the applicants believe that it lacks a constitutional basis because Art. 20, para. 2 of the Federal Constitution requires a constitutional and not a normal legislative provision for this. In particular where the Provincial Land Reform Board does not act as an authority of last instance, there is no constitutional basis for its members' freedom from instructions.

59. In any event, the members may receive instructions regarding their other activities outside the boards, and this may create doubts about their actual independence, as career considerations may prompt them to exercise even their functions within the boards in a particular manner.

60. In the case of the Lower Austrian Provincial Land Reform Board, all five civil servant members moreover belong to the same division of the Office of the Provincial Government whose head is at the same time the President of the Board. The other members may

therefore receive instructions from the President when exercising functions outside the Board. The applicants consider such an organisation as incompatible with Art. 6, para. 1 of the Convention, and in this respect they rely in particular on the **Sramek** judgment of the Court.

61. In the applicants' view, the independence of all members (including the judges) is further compromised by the fact that their term of office is only five years. The executive organs competent to appoint them may decide not to renew their mandate having regard to the manner in which they exercised it during their previous term. In the applicants' view, the members of the boards should therefore be appointed for lifetime.

62. The applicants accept that consolidation proceedings are particularly complex and that expert advice is therefore required. They object, however, to the fact that the experts are themselves members of the boards with the right to participate in the votes. Both the civil servants specialised in agronomic and forestry matters, and the agricultural expert within the meaning of Section 52 of the Code of General Administrative Procedure deliver expert opinions to the boards which are used as evidence in the proceedings. It is for this reason that the Administrative Court found in the present case that the parties must in principle be heard on these expert opinions in accordance with Section 45, para. 3 of the Code of General Administrative Procedure.

It is true that private expert opinions may also be submitted by the parties, but it is obvious that the experts sitting in the boards will generally not be impressed by such private expert opinions and will prefer to adhere to their own opinions, influencing also the other members of the boards in favour of the latter opinions. These expert members are nevertheless not considered as biased and do participate in the decision. In a way they are therefore judges in their own cause. In the applicants' view they lack impartiality for this reason.

63. The proceedings before the Land Reform Boards finally lack the guarantee of publicity as provided for in Art. 6, para. 1 of the Convention.

64. As regards the control by the Administrative Court, the applicants consider it as insufficient for various reasons. First, this judicial review is only available after lengthy administrative proceedings and is not effective for this reason alone, secondly it does not lead to a decision on the merits because of its purely cassatorial nature, and finally it is not sufficiently wide in scope because it is in principle limited to a review of questions of law. It is true that procedural defects can also be raised as questions of law, and that in this respect the Administrative Court has power to take certain evidence, but this power is limited in scope and does not amount to a full review of the facts at issue.

The Government's submissions

65. The Government do not contest the applicability of Art. 6, para. 1 of the Convention, but contend that the requirements of this provision are fully met. In their view both the Provincial and the Supreme Land Reform Boards are established as independent and impartial tribunals, and the judicial review by the Administrative Court provides an additional guarantee which in itself makes the whole procedure consistent with Art. 6, para. 1. The scope of review by this court is sufficiently wide to constitute the final determination of the civil rights in question. It can review all questions of legality and also the establishment of the facts insofar as it might have been affected by procedural defects of decisive importance. The taking of supplementary evidence in the latter respect is possible. The fact that the Administrative Court acts as a court of cassation does not bring the proceedings outside the scope of Art. 6 because it has to state a legal opinion which is binding the authorities below.

66. However, the Land Reform Boards are also independent and impartial tribunals. They are administrative boards with a judicial element, or specialised administrative tribunals. Under Arts. 20, para. 2 and 133, para. 4 of the Constitution, all their members enjoy judicial independence characterised in particular by freedom from instructions. The fact that some members are civil servants and may receive instructions in exercise of their functions outside the Board is irrelevant. It has in fact been recognised in the **Ringeisen** and **Sramek** judgments of the Court that the presence of civil servants in a tribunal is as such compatible with the Convention if they are independent both of the Executive and of the parties to the dispute. In the present case there is no hierarchical relationship in organisational terms between a member of the tribunal and a party to the proceedings, and therefore it cannot in any sense be compared to the **Sramek** case.

67. The Government further emphasise that through the Amendment Act of 1974 the organisation of the Land Reform Boards was brought into line with the requirements of Art. 6, para. 1 of the Convention as interpreted by the Constitutional Court in the light of the **Ringeisen** case. Persons belonging to the Federal or a Provincial Government were excluded, and a fixed term of office during which members cannot be removed except for specific reasons was provided for. A fixed term of office had been regarded as being of particular importance in the **Ringeisen** judgment, in which a term of five years was considered as sufficient. In the cases of **Sramek** and **Campbell and Fell**, the Court considered even a three year term as sufficient.

68. As regards the expert members, the Government consider that they can be assimilated to representatives of special interests whose membership in a tribunal was accepted by the Court in the **Ringeisen** case. The presence of these expert members is required by Art. 12, para. 2 of the Constitution, and this is a reasonable requirement having regard to the need to find particularly qualified members, with a technical knowledge, to deal with a particularly difficult subject.

69. The Government also stress that the reference to Section 52 of the Code of General Administrative Procedure only means the designation of a class of persons eligible to become members of the boards. The agricultural expert within the meaning of this Section, and the two specialised civil servants for agronomic and forestry matters do not have the function of preparing expert opinions as a means of evidence, but - like all the other members - they only participate in the decision-making process of the boards on the basis of their specialised knowledge. The papers presented by them to the board are of an internal nature and must not be disclosed to the parties in order to ensure the effective exercise of their right to be heard. This has been clarified by the Constitutional Court (case No. 8455) and also by the Administrative Court's decisions in the present case.

70. The expert members furthermore cannot be regarded as judges in their own cause. The dispute to be decided is between private land-owners and does not concern the relationship between the authorities and the land-owners. The expert members also do not defend plans prepared by themselves, as the boards as a rule review plans drawn up by the authority of first instance. When carrying out this review, they can also take into account the opinion of any private expert.

71. The proceedings generally provide sufficient guarantees for a fair hearing of the parties. As regards the lack of publicity of the proceedings, the Government refer to the **Ringeisen** judgment where this matter was seen as being covered by the Austrian reservation under Art. 6 of the Convention.

IV. OPINION OF THE COMMISSION

A) Point at issue

72. The only point at issue in the present case is the question whether or not the applicants' right under Art. 6, para. 1 of the Convention to the determination of their civil rights and obligations by "an independent and impartial tribunal" has been respected in the agricultural land consolidation proceedings in which they have been involved.

B) The applicability of Art. 6, para. 1 of the Convention

73. Art. 6, para. 1 of the Convention reads as follows:

> "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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

74. The applicability of this provision to agricultural land consolidation proceedings such as those at issue in the present case is not in dispute between the parties. In fact these proceedings affect the ownership rights of the persons who have real property in the consolidation area. Certain property is taken from them and different property is assigned to them, with a financial equalisation of limited extent in some cases. The private law relationships between the various landowners are directly determined in this way. This has been recognised both by the Austrian Constitutional Court and also by the Commission in its earlier case law (cf. e.g. applications No. 6837/74 v. Belgium, dec. 2.10.75, DR 3, 135; No. 7620/76 v. Austria, dec. 6.7.77, DR 11,156, and No. 8255/78, dec. 13.3.80, unpublished).

75. Since Art. 6, para. 1 is as such applicable, the applicants were entitled to have their case heard by a tribunal satisfying the conditions laid down in this provision. These conditions must be fully complied with. The substantial judicial guarantees of Art. 6, para. 1 must not be diminished by its application to procedures which under domestic law are regarded as being of an administrative nature (cf. application No. 8790/79, **Sramek** v. Austria, Rep. 8.12.82, para. 66).

C) The levels of jurisdiction to which Art. 6, para. 1 applies in the present case

76. The land consolidation proceedings of which the applicants complain were conducted before several administrative authorities, i.e. the Agricultural District Authority, and the Provincial and Supreme Land Reform Boards. They were subsequently reviewed by the Constitutional Court and by the Administrative Court.

77. According to the case law of the Commission and the Court, Art. 6, para. 1 does not require that the procedure which determines civil rights and obligations is conducted at each of its stages before tribunals meeting the requirements of this provision. As the Court has stated "demands of flexibility and efficiency, which are fully compatible with the protection of human rights, may justify the prior intervention of administrative or professional bodies, and, a fortiori, of judicial bodies which do not satisfy the said requirements in every respect; the legal tradition of many Member States of the Council of Europe may be invoked in support of such a system" (Eur. Court H.R., **Le Compte, van Leuven and de Meyere** judgment, 23.6.81, para. 51, sub-para. (a); cf. also para. 69 of the Commission's above-mentioned Report in the **Sramek** case, with further references).

78. While an administrative procedure may thus precede the determination of civil rights by the tribunal envisaged in Art. 6, para. 1, it is on the other hand required that this determination itself involves a comprehensive examination of all relevant questions of law and fact. As the Court has observed in its above-mentioned **Le Compte, van Leuven and de Meyere** judgment, "Art. 6, para. 1 draws no distinction between questions of fact and questions of law. Both categories of question are equally crucial for the outcome of proceedings relating to 'civil rights and obligations'. Hence, the 'right to a court' ... and the right to a judicial determination of the dispute ... cover questions of fact just as much as questions of law" (para. 51, sub-para. (b) of the judgment). The requirement of full jurisdiction was also underlined in the **Albert and Le Compte** judgment where the Court stated: "The Convention calls at least for one of the following systems: either the jurisdictional organs themselves comply with the requirements of Art. 6, para. 1, or they do not so comply, but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Art. 6, para. 1" (judgment of 10.2.83, para. 29).

79. In application of those principles, the Government have argued in the present case that Art. 6, para. 1 of the Convention is satisfied because the decisions of the agricultural authorities can be reviewed by the two courts of public law, i.e. the Constitutional Court and the Administrative Court. This argument corresponds to the case law of the Constitutional Court developed since case No. 5100/1965 which was also recalled in case No. 7284/1974 relating to the organisation of the agricultural authorities prior to the 1974 Amendment Act. It is noteworthy, however, that this case law has not been invoked by the Constitutional Court in the present case.

80. As regards review by the Constitutional Court, the Commission notes that this court is exclusively called upon to review the constitutionality of the agricultural authorities' decisions. Its procedure therefore does not involve a determination of civil rights within the meaning of Art. 6, para. 1 of the Convention, and therefore it falls outside the scope of this provision. On this point, the Commission refers to para. 68 of its Report in the **Sramek** case, which was confirmed in para. 35 of the Court's judgment concerning that case (loc. cit.).

81. As regards the review by the Administrative Court, the Government argue that it is sufficiently wide in scope to constitute the final determination of the civil rights in question. The applicants contest this.

82. The Commission notes that, as the Belgian Court of Cassation (cf. para. 51 of the **Le Compte, van Leuven and de Meyere** judgment, and para. 36 of the **Albert and Le Compte** judgment), the Austrian Administrative Court has no full jurisdiction concerning the civil rights at issue. In this respect, the Commission considers it also of importance that the functions of the Administrative Court are those of a court of cassation, and that it cannot therefore take a decision on the merits of the case before it.

83. The Administrative Court's functions are limited not only as to the legal effect of its decisions, but also as regards the scope of its jurisdiction. In principle, it can only review the legality of the administrative decisions which directly determine the civil rights at issue, but it cannot review the establishment and assessment of the relevant facts. It is explicitly provided in Section 41 of the Administrative Court Act that in this respect the Administrative Court is bound by the findings of the administrative authorities.

84. It is true that the review of legality referred to above also includes a control of the observance of basic procedural principles, and that in this connection the Administrative Court considers itself competent to take certain supplementary evidence in order to determine the relevance of alleged procedural defects for the result of the proceedings. However, this is apparently done only in exceptional cases.

85. The Commission finds that the subsidiary and abstract possibility of a certain limited review of the facts is not sufficient to establish the Administrative Court's full jurisdiction concerning the determination of the civil rights at issue. Important elements of this determination such as in particular the establishment and assessment of the facts are lacking. It follows that the agricultural authorities themselves, which in fact determine civil rights, are required to be independent and impartial tribunals within the meaning of Art. 6, para. 1 of the Convention.

86. These authorities are again established on several levels, and it follows from the above that they need not comply with Art. 6, para. 1 on all levels. In particular it is not required that already the authority of first instance, in the present case the Lower Austrian District Authority, should be an independent and impartial tribunal. In the light of this authority's particular functions, namely to draw up the initial consolidation plan, it may even be doubtful whether a "dispute" ("contestation") relating to civil rights and obligations exists already when this authority takes its decision.

87. However, even if the adoption of the initial plan should be considered as a "determination" of civil rights, it must not necessarily be entrusted to a tribunal having all the guarantees of Art. 6, para. 1, provided that there is subsequent control by such a tribunal having full jurisdiction (cf. para. 29 of the **Albert and Le Compte** judgment, loc. cit., and para. 69 of the Commission's Report in the **Sramek** case).

88. It is therefore on the level of the Land Reform Boards, which actually have full jurisdiction to determine the civil rights in question, that the requirements of Art. 6, para. 1 must be met. The Boards established on the Provincial and the Federal levels must both meet these requirements.

The reason for this is not only the fact that each of those Boards may in certain cases be called upon to give a final decision. The Convention does not start from the general assumption that in the determination of civil rights only the decisions of last instance must be taken by a tribunal within the meaning of Art. 6, para. 1. (cf. Eur. Court HR, **De Cubber** judgment, 26.10.84, para. 32, see also application No. 7360/78, **Zand** v. Austria, Report 12.10.78, DR 15, 70 at para. 59).

89. In the present case, the task of determining disputes concerning the civil rights of landowners involved in consolidation proceedings is primarily entrusted to the Provincial Land Reform Board. An appeal to the Supreme Land Reform Board is only available in the cases exhaustively enumerated in Section 7 of the Agricultural Authorities Act. While the Supreme Board may also review certain questions of fact when examining an appeal, its powers are in essence limited to controlling the legality of the Provincial Board's decision in certain, but not all respects. It therefore has no full jurisdiction.

In these circumstances, the procedure before the Supreme Board must be assimilated to appeals on points of law which are often provided for in the legal systems of the Convention States against the decisions of the ordinary civil courts in the same way as the subsequent appeal to the Administrative Court. As the Commission has

consistently held in its case law, the Convention does not guarantee a right to appeal as such, but where an appeal is provided for by the domestic law, the relevant procedure must also comply with the requirements of Art. 6. This case law has been confirmed by the European Court of Human Rights in several judgments (**Pakelli** case, 25.5.83; **Pretto** and **Axen** cases, 8.12.83; **Sutter** case, 22.2.84; and **De Cubber** case, 26.10.84). The Commission has in fact recognised in relation to land consolidation proceedings in Austria that the same principle also applies to the appeals to the Supreme Land Reform Board and to the Administrative Court (cf. application No. 7620/76, dec. 6.7.77, DR 11, 156).

90. It follows that in the present case the determination of the applicants' civil rights took place in substance before the Lower Austrian Provincial Land Reform Board, an authority which for this reason was required to provide the guarantees of an independent and impartial tribunal within the meaning of Art. 6, para. 1 of the Convention. It further follows that the authorities called upon to decide the appeals brought against the decisions of the Provincial Board, i.e. the Supreme Land Reform Board and the Administrative Court, were also required to provide the same guarantees.

D) As to compliance with the requirements of Art. 6, para. 1 of the Convention

91. It is not in dispute that the organisation and procedure of the Administrative Court are as such in conformity with Art. 6, para. 1 of the Convention. The Commission can therefore limit its examination to the Land Reform Boards. As these bodies are organised according to the same principles both on the level of the Provincial and of the Supreme Board, they can be considered jointly.

92. The applicants claim, first, that the members of the Boards are not sufficiently independent of the Executive because they are appointed for a limited term of office by executive organs. However, in this respect the Commission may simply refer to para. 38 of the **Sramek** judgment (loc.cit.) where the appointment of members of a tribunal by an executive organ for a fixed term of three years was not considered as objectionable, having regard to the fact that they were appointed to sit in an individual capacity and that the law prohibited their being given instructions by the Executive. In the present case the legal situation is exactly the same, with the only difference that the term of office is five years. Accordingly, there is no appearance of a breach of the Convention in this respect.

93. The applicants claim, secondly, that the Boards are not sufficiently independent of the Executive because five of the eight members, including the members which hold the key functions of President, Rapporteur and experts, are civil servants who may receive instructions from the Executive outside their functions in the Boards. In practice they belong all to the same administrative service and are, at least in part, in relationships of hierarchical subordination between one another.

94. The Government rely on the **Ringeisen** and **Sramek** judgments of the Court which accepted the participation of civil servants in the decision of a tribunal within the meaning of Art. 6, para. 1 of the Convention, if they were in this respect free from instructions. The Government further stress that unlike in the **Sramek** case there is no question of hierarchical subordination of one of the members to the representative of a party in this case.

95. The Commission recognises that in exercise of their functions in the Boards, also the civil servant members are free from instructions. It further accepts that in the present case there is no question of hierarchical subordination of even one member of the Boards to the representative of a party. However, the Commission still considers that this is not in itself sufficient to ensure full independence and impartiality. The full independence also requires a sufficient organisational separation from the executive branch. A tribunal in the sense of Art. 6 must be recognisable as an independent judicial organ by the individual who has no specific legal training. Justice must not only be done, but also seen to be done. This requires an organisational structure clearly distinguishing the tribunal from a normal administrative authority (cf. **Sramek** Report, loc.cit., at para. 74).

96. The present case clearly shows a predominance of civil servants in the decision-making process of the Boards. On both the Provincial and the Federal levels they constitute in practice the majority of the members: Four members holding key functions, i.e. the President, the Rapporteur, and two expert members, must be civil servants by virtue of the law itself, and a further member must be an expert within the meaning of Section 52 of the Code of General Administrative Procedure, i.e. preferably an official expert employed by or attached to the competent administrative service. In practice this latter member is also appointed from among the civil servants of the same administration as the other four.

97. The applicants claim that on the level of the Provincial Board all five of the above members were not only civil servants of the Office of the Provincial Government, they even belonged to the same division of this Office, the President of the Board being at the same time the hierarchical superior of the other four as regards matters outside the competence of the Board. This allegation has not been contested by the Government. In fact, it appears from the organisation chart for the relevant time (Amtskalender 1976/77, p. 60) that four of the ordinary members and four substitute members of the Board were all civil servants of division VI/3 of the Office of the Provincial Government. The President of the Board was at the same time head of this division and therefore the hierarchical superior of all the other members including the Rapporteur. The President, the Rapporteur and two further members in addition belonged to division VI/4, and also in this division there was the same hierarchical structure between them.

98. On the level of the Supreme Land Reform Board, the legislation itself requires four of the members to be civil servants of the Ministry of Agriculture and Forestry, and the official expert according to Section 52 of the Code of General Administrative Procedure was again a civil servant of this Ministry. Although these persons came from different divisions within the Ministry, at least two of them, namely the President and the Rapporteur, belonged to the same division (I/7) which is competent, inter alia, for providing the secretariat of the Supreme Land Reform Board.

99. The Commission considers it as incompatible with the requirements of an independent tribunal that the majority of its members, including the President, the Rapporteur and the expert members, are civil servants who, while free from instructions in exercise of their functions within this tribunal, may nevertheless receive (or give) administrative instructions in closely related matters falling outside the exercise of these functions.

The independence of the tribunal can be even more doubted if all these civil servants belong to the same administration, or even the same administrative unit, making it likely that they will adopt the same views already for this reason. It is unacceptable that a relationship of hierarchical subordination should exist between the individual members of a tribunal. Even if it is limited to matters outside the competence of this tribunal, it cannot be excluded that the hierarchical structure will influence also the behaviour within the tribunal.

100. The Commission therefore finds that both the Provincial and the Supreme Land Reform Boards were not sufficiently independent of the Executive by reason of the membership of a majority of civil servants belonging all to the same administration with structures of hierarchical subordination between these members as regards their activities outside the Boards.

101. In view of this finding it is not necessary to examine in detail the applicants' allegation that the Boards were not sufficiently independent or impartial as a result of the participation of specialised members who presented expert opinions to these Boards and subsequently took part in the votes. In the proceedings before the Commission, the parties have not clarified the real nature of these specialised members' functions. In particular it has remained doubtful whether or not their above-mentioned expert opinions are merely internal documents assisting the Boards in reaching a correct decision, or whether they must be considered as technical evidence in the same way as private expert opinons which may be submitted to the Boards by any of the parties to the procedure. The views of the Constitutional Court and of the Administrative Court are divided on this issue, and the practice of the Boards themselves seems to be far from consistent in this respect.

E) Conclusion

102. The Commission concludes by ten votes against two that there has been a breach of Art. 6, para. 1 of the Convention in that the applicants' right to the determination of their civil rights and obligations by "an independent and impartial tribunal" has not been respected.

Secretary to the Commission

(H.C. KRÜGER)

President of the Commission

(C.A. NØRGAARD)

SEPARATE OPINION OF MR. C. A. NØRGAARD

I have voted with the majority in concluding that there has been a breach of Art. 6, para. 1, in this case.

I fully agree with the finding that the Provincial and the Supreme Land Reform Boards cannot be considered independent tribunals within the meaning of Art. 6, para. 1, of the Convention (para. 100 above).

The most difficult and crucial problem in the case, however, is whether the review by the Administrative Court is sufficiently wide in scope to constitute the final determination of the civil rights in question.

In my opinion the requirements of Art. 6, para. 1 would in general be complied with, in a case like the present one, where the Administrative Court, in ensuring the observance of basic procedural principles, had full jurisdiction to review questions of legality and a limited possibility to review questions of fact.

However, as referred to above (para. 78), the Court in the case of Le Compte, van Leuven and de Meyere stated: "Hence, the right to a court ... and the right to a judicial determination of the dispute ... cover questions of fact just as much as questions of law".

I read this statement by the Court to mean that in order to fulfil the requirements of Art. 6, para. 1, the national court in question must have equal jurisdiction to review the facts as well as the law. I consider myself bound by this statement of the Court and since the Austrian Administrative Court does not have the same jurisdiction with regard to the facts as with questions of law, I have voted with the majority.

DISSENTING OPINION OF MR. G. SPERDUTI (*)

I.

1. Ce n'est pas la première fois que je dois, à regret, me dissocier de la majorité de la Commission dans l'interprétation de l'article 6, par. 1, de la Convention, dans la mesure où il vise la décision judiciaire des "contestations sur des droits et obligations de caractère civil" s'élevant par suite d'actes d'intervention des autorités publiques dans le domaine desdits droits et obligations.

Dans l'affaire Ettl et autres contre Autriche (Requête N° 9273/81), l'objet de la requête a été ainsi résumé dans le paragraphe 2 du rapport que la Commission a adopté le 3 juillet 1985 :

> "Les requérants se plaignent que, dans les opérations de remembrement foncier les concernant, les décisions relatives à leurs droits et obligations de caractère civil n'ont pas été le fait de tribunaux indépendants et impartiaux comme l'exige l'article 6, par. 1, de la Convention. Ils soutiennent que les commissions d'agriculture, supérieure et provinciale, compétentes en l'espèce, ne répondent pas aux conditions exigées pour ces tribunaux, en raison notamment de ce que figurent parmi leurs membres une majorité de fonctionnaires et que les experts membres de ces organes (dont deux fonctionnaires spécialisés respectivement dans les questions agronomiques et forestières, ainsi qu'un expert en agriculture) ont agi comme experts d'abord et ont ultérieurement pris part aux votes."

Il m'apparaît nécessaire aujourd'hui, en abordant à nouveau le problème de l'interprétation de l'article 6, par. 1, par rapport à la catégorie susvisée de "contestations", de faire un effort accru d'analyse et de réflexion en vue d'atteindre un degré satisfaisant de clarté et aider à un débat constructif. Il s'agit, somme toute, d'essayer de saisir correctement dans ses différentes implications la doctrine que la Cour a, en des termes extrêmement concis, énoncée la première fois au paragraphe 94 de son arrêt du 16 juillet 1971 dans l'affaire Ringeisen.

(*) Original French. The quotations from the Commission's Report are based on a provisional French translation of the relevant passages.

2. L'avis de la Commission dans l'affaire Ettl et autres, qui a recueilli l'accord de 10 membres sur 12 ayant participé au vote, s'articule autour de plusieurs éléments et ce en raison même de la complexité de la législation autrichienne applicable en matière de remembrement foncier rural. Il convient de reproduire in extenso certains passages de l'avis qui retiennent particulièrement l'attention.

a) "... même si l'adoption du plan initial devait être considérée comme une 'détermination' de droits de caractère civil, il n'est pas nécessaire qu'elle soit confiée à un tribunal présentant toutes les garanties de l'article 6, par. 1, à condition toutefois qu'il y ait le contrôle ultérieur d'un organe judiciaire de pleine juridiction" (par. 87).
L'adoption du plan initial étant du ressort du "Service du district de Basse-Autriche" (par. 86), "c'est donc au niveau des commissions de la réforme agraire, qui disposent effectivement de la plénitude de juridiction pour décider des droits civils en question, que les conditions prescrites par l'article 6, par. 1, doivent être réunies. Les commission créées aux niveaux provincial et fédéral doivent répondre à ces conditions" (par. 88).

b) Pour ce qui est de la notion de "pleine juridiction", l'avis se réfère à la jurisprudence de la Cour dans les affaires dites des médecins belges : "Comme la Cour l'a fait remarquer dans son arrêt susmentionné Le Compte, Van Leuven et De Meyere, <l'article 6, par. 1, ne distingue pas entre points de fait et questions juridiques. A l'égal des secondes, les premiers revêtent une importance déterminante pour l'issue d'une procédure relative à des 'droits et obligations de caractère civil'. Le 'droit à un tribunal' ... et à une solution juridictionnelle du litige ... vaut donc pour eux autant que pour elles> (par. 51, al. b) de l'arrêt). La condition de la plénitude de juridiction a été soulignée aussi dans l'arrêt Albert et Le Compte où la Cour a déclaré : <La Convention commande, pour le moins, l'un des deux systèmes suivants : ou bien lesdites juridictions remplissent elles-mêmes les exigences de l'article 6, par. 1, ou bien elles n'y répondent pas mais subissent le contrôle ultérieur d'un organe judiciaire de pleine juridiction présentant, lui, les garanties de cet article> (arrêt du 10.2.83, par. 29)" (par. 78).

c) Et la Commission de poursuivre : "... La Cour administrative autrichienne n'a pas la plénitude de juridiction sur les droits de caractère civil en question ici..." (par. 82). "... elle ne peut que contrôler la légalité des actes administratifs qui déterminent directement les droits de caractère civil en question, mais elle ne peut pas contrôler l'établissement et l'appréciation des faits de la cause..." (par. 83). "... Il s'ensuit que ce sont les services de l'agriculture eux-mêmes, puisqu'ils déterminent en réalité des droits de caractère civil, qui doivent être des tribunaux indépendants et impartiaux au sens de l'article 6, par. 1, de la Convention" (par. 85).

d) "La Commission estime ... que tant la commission provinciale que la commission supérieure de la réforme agraire n'étaient pas suffisamment indépendantes de l'exécutif du fait qu'elles se composaient d'une majorité de fonctionnaires appartenant à la même administration et se trouvant en situation de subordination hiérarchique dans leurs activités extérieures aux commissions" (par. 100).

e) Dans ces conditions, "la Commission estime ... qu'il y a eu violation de l'article 6, par. 1, de la Convention en ce qu'il n'y a pas eu respect du droit des requérants à faire décider de leurs droits et obligations de caractère civil par un 'tribunal indépendant et impartial'" (par. 102).

3. Il faut dire que c'est, dans une certaine mesure, l'argumentation développée par les parties qui a contribué à faire adopter dans le rapport le raisonnement ci-dessus indiqué dans les grandes lignes. Il n'y a pas lieu, toutefois, de s'arrêter sur cet aspect de la situation. C'est un principe valable en général pour les instances appelées à dire le droit qui a été énoncé par la Cour internationale de Justice dans les affaires des Essais nucléaires en ces termes : "C'est ... le devoir de la Cour de circonscrire le véritable problème en cause et de préciser l'objet de la demande" (C.I.J., Recueil 1974, p. 262, par. 24).

Or, le problème aujourd'hui soumis à la Commission se rapporte, certes, à une "determination of civil rights and obligations" par les autorités publiques autrichiennes, dont M. Ettl et les autres requérants s'étaient plaints au plan national. Toutefois, c'est une erreur de perspective que d'entendre les termes "determination of civil rights and obligations", tels qu'employés dans l'article 6, par. 1, comme visant en général une "determination" par une instance juridictionnelle et comme donnant par conséquent droit à ce que cette "determination" s'effectue dans le plein respect de cette disposition.

C'est l'erreur que commit M. Kaplan en adressant à la Commission sa requête N° 7598/76, requête qui conduisit la Commission à adopter à l'unanimité le 17 juillet 1980 un rapport qui élargissait, voire même précisait la doctrine que la Cour, dans l'affaire Ringeisen, avait directement dégagée du texte français de l'article 6, par. 1.

Bref, le droit à un tribunal reconnu par l'article 6, par. 1, s'analyse entre autres, selon les circonstances, en un droit au contrôle judiciaire - assorti de toutes les garanties d'un procès équitable - de la conformité à la loi d'une décision de l'autorité publique affectant lesdits droits et obligations.

4. Cela étant, il n'est pas besoin d'en dire davantage pour parvenir à la conclusion correcte, à laquelle l'on aurait dû arriver dans l'affaire Ettl et autres, du fait que les requérants disposaient d'un pourvoi en annulation devant la Cour administrative autrichienne. Il suffira de prendre acte de la première phrase du par. 91 du rapport du 3 juillet 1985 :

"Il n'est pas contesté que l'organisation de la Cour administrative et la procédure qui s'y déroule soient, en tant que telles, conformes à l'article 6, par. 1, de la Convention."

5. Certaines remarques doivent pourtant être ajoutées, notamment en vue de jeter quelque lumière sur une autre source de déviation du raisonnement. Il s'agit de la conviction, assez répandue, que le "droit à un tribunal", que reconnaît, selon les termes de la Cour, l'article 6, par. 1 (arrêt Golder du 21 février 1975, par. 36), s'analyse toujours en un droit à un tribunal exerçant une "full jurisdiction".

Un examen attentif de plusieurs éléments contribuera à cet éclaircissement.

6. a) Dans une opinion séparée annexée au rapport dans l'affaire Benthem, que la Commission a adopté le 8 octobre 1983, j'ai expliqué les raisons qui m'empêchaient de suivre l'approche restrictive des autres membres de la majorité à l'égard de l'article 6, par. 1. Tout en donnant mon assentiment à la conclusion qui a été retenue, à savoir qu'il n'y avait pas eu en l'espèce violation de cette disposition, je me suis séparé de la majorité en ce que, contrairement à l'avis selon lequel l'article 6, par. 1 n'avait pas été violé parce qu'il n'était pas applicable en l'espèce, je considérais l'article 6, par. 1 à la fois comme applicable et correctement appliqué.

J'ai saisi l'occasion pour apprécier de manière positive une institution centenaire du droit néerlandais. En effet, le respect des règles du procès équitable devant la Division du Conseil d'Etat pour les litiges administratifs et le fait que la Couronne s'était bornée, comme dans presque 100% des cas, à entériner formellement le résultat dudit procès m'ont paru suffisants pour satisfaire aux exigences d'une bonne administration de la justice.

b) L'approche restrictive à laquelle je viens de faire allusion était due à une préoccupation qui avait amené à souligner ceci : "il faut faire preuve de circonspection" dans l'application de l'article 6, par. 1, à des contestations portant sur des interventions des autorités administratives dans le domaine des droits et obligations de caractère civil. La préoccupation était que "si l'article 6, par. 1, devait s'appliquer à diverses questions relevant de la compétence de l'administration, cela pourrait avoir de grandes répercussions sur les traits marquants des ordres juridiques internes" (par. 39).

c) On se souviendra que c'est une crainte du même genre qui amena une autre majorité de la Commission, celle qui se forma dans l'affaire Ringeisen, à conclure que les termes de l'article 6, par. 1 "droits et obligations de caractère civil" doivent "être interprétés de façon restrictive de manière qu'ils n'englobent que les relations juridiques qui caractérisent les relations entre particuliers, à l'exclusion des relations juridiques, dans le cadre desquelles le citoyen se trouve confronté à ceux qui exercent l'autorité publique" (voir Cour eur.D.H., Série B, Vol. 11, p. 71).

La minorité (5 membres contre 7) s'en tint à une perspective modérée. En préconisant une interprétation plus libérale, elle affirme ceci : "...même à supposer que les 'droits de caractère civil' auxquels se rapporte l'article 6, par. 1, soient en principe des droits de personnes privées dans leurs relations avec d'autres personnes privées, il ne s'ensuit pas que la légalité des ingérences des autorités publiques dans la sphère de ces droits ne tombe pas sous le coup du contrôle judiciaire envisagé par l'article 6, par. 1" (Cour eur.D.H., Série B, Vol. 11, p. 73).

La Cour, saisie de l'affaire par la Commission, confirma, en substance, ce point de vue.

d) Je me permets de répéter ici qu'il faut distinguer, en ce qui concerne la correcte interprétation des termes "in the determination of civil rights and obligations", entre "ce qui appartient et ce qui n'appartient pas de par sa nature même" au domaine d'application de l'article 6, par. 1, et distinguer donc "entre la réglementation par la loi de ces droits et obligations quant à leur naissance, leur modification et leur extinction, et la garantie judiciaire du respect de cette même réglementation". Ma conclusion était et demeure que "l'article 6, par. 1, porte sur la garantie judiciaire et sur rien d'autre. Il ne crée pas la moindre obligation pour les Etats parties à la Convention quant à la manière de pourvoir à ladite réglementation" (Sur l'arrêt de la Cour européenne des Droits de l'Homme dans l'affaire König, "Rivista di diritto internazionale", 1980, fasc. I, p. 31).

e) Ces réflexions demandent à être poursuivies car cet ordre conceptuel, bien qu'approfondi et ultérieurement développé dans le rapport Kaplan, peut ne pas fournir, à lui seul, une orientation adéquate dans les circonstances particulières aux différentes affaires.

On dira notamment que la liberté dont jouissent les Etats parties à la Convention de pourvoir selon leurs besoins et leurs traditions juridiques à l'organisation des pouvoirs publics peut, en fonction de certaines situations, les amener à confier à des tribunaux judiciaires la tâche de faire eux-mêmes directement application de certaines lois sur les interventions de droit public dans des domaines ayant trait à la vie privée. Le choix entre la solution administrative et la solution judiciaire sera, en principe, commandé par la nature même des mesures d'intervention envisagées : ainsi comprend-t-on aisément le choix de la deuxième solution dans le cadre de lois prévoyant l'infliction de sanctions.

Un ancien membre de la Commission, M. Melchior, qui représentait avec moi la Commission devant la Cour lors des audiences dans l'affaire Le Compte, Van Leuven et De Meyere, n'a pas manqué de souligner le fait que la Belgique avait "choisi la solution de la juridictionnalisation de la procédure disciplinaire" (audience du 25 novembre 1980, matin : voir Cour eur.D.H., Série B, Vol. 38, p. 168).

Or, le choix de la solution judiciaire implique que la notion du procès équitable comporte alors un élément qui, tout en n'étant pas explicité dans l'article 6, par. 1, s'en dégage néanmoins en tant qu'élément caractéristique normal de la fonction judiciaire : c'est l'élément de la pleine juridiction, c'est-à-dire l'examen par le juge du fond de l'affaire avec établissement des faits et détermination des conséquences juridiques qui s'y rattachent.

f) On ne saurait dire toutefois que les pouvoirs du juge administratif, comparés à ceux du juge ordinaire, ne satisfont pas de manière adéquate aux exigences de la bonne administration de la justice. Il s'agit de pouvoirs qui demandent à être appréciés en fonction de l'office même du juge administratif, en tant que juge de la légalité des actes des autorités publiques.

Il est utile de mentionner ici l'évolution de la jurisprudence du Conseil d'Etat français sur le contrôle de la matérialité des faits formant la base des décisions administratives attaquées devant lui (cf. VEDEL, Droit administratif, Presses universitaires de France, 6ème édition, 1976, p. 592). Toujours par rapport aux motifs de fait et en s'appuyant sur la jurisprudence du Conseil d'Etat, M. Vedel écrit : "... en matière de remembrement rural les opérations doivent permettre aux propriétaires intéressés de recevoir des lots équivalents en productivité réelles à ceux qu'ils ont dû abandonner. La notion d'erreur manifeste permet d'annuler les décisions administratives qui altèrent gravement l'équilibre voulu par la loi, sans cependant empêcher le jeu d'approximations inévitables faute desquelles le remembrement serait impossible" (op.cit., p. 600).

7. Revenons-en pour quelques instants au rapport Ettl et autres. On ne saurait se borner à dire que la Commission n'y a guère suivi l'approche restrictive qu'elle avait adoptée - par "précaution" - dans le rapport Benthem. En effet, la Commission est passée d'un extrême à l'autre jusqu'à s'immiscer - et d'une manière poussée - dans l'organisation administrative de l'Etat mis en cause.

On peut à cet égard se borner à citer un bref extrait de l'avis formulé dans le rapport.

Eu égard aux procédures autrichiennes en matière de remembrement rural, notamment au fait que ces procédures "affectent les droits de propriété des personnes qui ont des biens-fonds dans la zone remembrée" (par. 74), la Commission a commencé par observer ceci :

> "L'article 6, par. 1 étant applicable, les requérants avaient droit à l'examen de leur cause par un tribunal répondant aux conditions prescrites par cette disposition. Ces conditions doivent être intégralement respectées : les garanties judiciaires fondamentales prévues à l'article 6, par. 1, ne doivent pas se trouver diminuées par l'application de cet article à des procédures qui sont considérées comme étant de caractère administratif en droit interne (cf. Requête N° 8790/79, Sramek c/Autriche, Rapport 8.12.82, par. 66)" (par. 75).

Commencer de la sorte équivaut à s'engager dans un chemin qui amène tout droit à s'immiscer dans l'organisation administrative de l'Etat en tant que telle. On remarquera, au demeurant, que la référence à l'affaire Sramek c/Autriche n'est pas pertinente, cette affaire ayant trait à une décision de l'Office provincial des transactions immobilières du Tyrol qui n'était pas susceptible d'un recours en annulation devant la Cour administrative.

Bref, il est clair que l'article 6, par. 1, se réfère aussi, aux fins qui lui sont propres, aussi aux procédures internes de nature administrative dont l'issue, selon les termes de la Cour dans l'affaire Ringeisen, "est déterminante pour des droits et obligations de caractère privé". Mais il faut entendre la doctrine de la Cour, d'une part, en tenant dûment compte de la liberté que gardent les Etats, sous l'angle de l'article 6, par. 1, quant à la réglementation par la loi des faits et procédés auxquels se rattachent la naissance, la modification ou l'extinction même des droits et obligations de caractère civil et, d'autre part, en recherchant à la lumière des circonstances propres à chaque espèce si dans l'Etat concerné l'instance judiciaire compétente pour décider d'une contestation se rapportant auxdits droits et obligations est ou n'est pas en mesure, en raison de la juridiction qu'elle peut exercer, de satisfaire aux exigences de l'article 6, par. 1.

Par application de ces critères, on aboutit dans l'affaire Ettl et autres à la conclusion opposée à celle du rapport de la Commission.

II.

8. Peut-être est-il utile de résumer, en guise de conclusion générale, les points saillants de l'exposé qui précède.

Un tournant dans la jurisprudence des organes de la Convention au sujet de l'application de son article 6, par. 1, aux "contestations sur des droits et obligations de caractère civil" s'est produit à l'occasion de l'affaire Ringeisen. La majorité de la Commission avait conclu à l'impossibilité d'une interprétation large de ces termes, qui aurait amené à les appliquer aussi à des contestations "entre le citoyen et l'autorité publique", interprétation qu'elle jugeait "incompatible avec les intentions des Parties contractantes", et ce eu égard notamment au fait suivant : les différents systèmes juridiques des Etats membres du Conseil de l'Europe ont "pour caractéristique commune que certains éléments du pouvoir discrétionnaire administratif ne peuvent être contrôlés par le juge". La minorité de la Commission n'a pas considéré cette remarque comme convaincante. Du fait même que le pouvoir administratif discrétionnaire et ses limites découlent du droit interne, il revient au juge administratif de contrôler dans les cas appropriés, en tant que juge du respect de la loi, la conformité à la loi de l'exercice de ce pouvoir discrétionnaire. Et s'il s'agit de cas où l'on demande l'annulation pour défaut de légitimité d'une décision administrative affectant des droits de caractère privé, le procès devant le juge administratif tombe alors sous le coup de l'article 6, par. 1, de la Convention et doit en conséquence se dérouler dans le respect des garanties y énoncées. Il en découle l'accès à la Commission européenne pour qu'elle contrôle, à son tour, si la décision du juge administratif a, à titre de décision d'une contestation "sur des droits de caractère civil", été prise dans le respect desdites garanties.

9. Mais il faut prendre garde aux erreurs d'interprétation.

En disant dans son arrêt Ringeisen que les termes "contestations" sur des droits et obligations de caractère civil "couvrent" toute procédure dont l'issue est déterminante pour des droits et obligations de caractère privé, la Cour s'est exprimée certes en un langage concis, mais dont le sens se dégage néanmoins avec netteté. Il signifie que le droit à un tribunal qu'accorde l'article 6, par. 1, vise aussi les contestations s'élevant au sujet de procédures internes (administratives et autres) "dont l'issue est déterminante pour des droits et obligations de caractère privé".

En ce qui concerne le domaine administratif, cela amène à distinguer entre deux catégories différentes de procédures : celles (à un ou à plusieurs degrés) que la loi prévoit comme devant permettre aux autorités publiques de prendre de manière correcte des mesures qui affectent des droits et obligations de caractère privé ; celles (aussi à un ou à plusieurs degrés) qui s'analysent en procédures judiciaires de recours, leur fonction étant d'assurer le contrôle de la conformité de telles mesures à la loi par l'examen des griefs formulés par les intéressés.

Seules les procédures de cette deuxième catégorie tombent sous le coup de l'article 6, par. 1, tandis que les Etats pourvoient comme bon leur semble à l'organisation de celles de la première catégorie.

10. Une variante est à signaler. Le Parlement d'un Etat peut estimer que l'adoption dans l'intérêt public de certaines mesures affectant les droits de caractère civil d'une personne doit être réservée à des instances de l'ordre judiciaire. A la différence des juges administratifs, juges de la légalité des actes de l'administration publique, les instances de l'ordre judiciaire désignées à cette fin exercent la plénitude de juridiction (full jurisdiction) car toute décision qu'elles sont appelées à prendre par rapport aux droits de caractère civil d'une personne dépendra de l'établissement, par des enquêtes de leur ressort, des faits pertinents. On se souviendra du phénomène, défini par M. Melchior, de la "juridictionnalisation de la procédure disciplinaire" en Belgique.

11. On voit aussi à quel point il faut faire preuve de "précaution" en recherchant le sens approprié de la doctrine exposée par la Cour dans l'arrêt Ringeisen et dans une série d'autres arrêts, qui ont comme trait commun de concerner, dans le cadre de l'article 6, par. 1, de la Convention, le droit à un procès judiciaire équitable par rapport à des interventions des autorités publiques dans le domaine des "droits et obligations de caractère civil".

Il apparaît également que cette doctrine, correctement comprise, marque un progrès d'une grande portée dans la garantie internationale du droit à la protection judiciaire, sans pour autant indûment restreindre l'autonomie des Etats du Conseil de l'Europe dans l'organisation de leurs pouvoirs publics.

APPENDIX I

HISTORY OF PROCEEDINGS

Item	Date	Participants
Introduction of the application	27 October 1980	
Registration	18 February 1981	
Examination of Admissibility		
Decision to give notice of the application to the respondent Government and to invite them to submit written observations on admissibility and merits (Rule 42(2)(b)) before 14 January 1983	5 October 1982	MM NØRGAARD FROWEIN FAWCETT TRIANTAFYLLIDES OPSAHL JÖRUNDSSON TENEKIDES TRECHSEL KIERNAN MELCHIOR SAMPAIO GÖZÜBÜYÜK WEITZEL SCHERMERS
At Government's request, the President extends the time-limit until 14 February 1983	19 January 1983	
Government's observations submitted	14 February 1983	
Applicants invited to submit observations in reply before 15 April 1983	16 February 1983	
At applicants' request the President extends the time limit until 30 May 1983	21 April 1983	

9273/81

Applicants' observations submitted	25 May 1983	
Commission continues examination of the admissibility in the light of parties' observations, decides to hold an oral hearing with the parties on admissibility and merits	9 July 1983	MM NØRGAARD SPERDUTI FROWEIN ERMACORA TRIANTAFYLLIDES OPSAHL JÖRUNDSSON TRECHSEL KIERNAN MELCHIOR SAMPAIO CARRILLO GÖZÜBÜYÜK WEITZEL SOYER SCHERMERS DANELIUS
Date of hearing proposed to the parties	26 October 1983	
Hearing on admissibility and merits	8 March 1984	MM NØRGAARD SPERDUTI FROWEIN FAWCETT JÖRUNDSSON TENEKIDES TRECHSEL MELCHIOR SAMPAIO CARRILLO WEITZEL SOYER SCHERMERS DANELIUS BATLINER
	Government:	TÜRK OKRESEK JÖSTL HUNGER
	Applicants:	R. WANDL M. WANDL PAWEL

9273/81

Decision on admissibility. Decision to adjourn proceedings on the merits until **Sramek** judgment.	9 March 1984	MM NØRGAARD SPERDUTI FROWEIN FAWCETT JÖRUNDSSON TENEKIDES TRECHSEL MELCHIOR SAMPAIO CARRILLO SOYER SCHERMERS DANELIUS BATLINER

Examination of the merits

Grant of legal aid	16 March 1984	MM NØRGAARD SPERDUTI FROWEIN FAWCETT JÖRUNDSSON TENEKIDES TRECHSEL MELCHIOR WEITZEL SOYER SCHERMERS DANELIUS BATLINER
Decision on admissibility sent to parties	22 June 1984	
Court's judgment in the **Sramek** case	22 October 1984	
Commission considers state of procedure, decides to resume proceedings and invite the parties to submit supplementary observations on the merits in the light of the Sramek judgment before 31 January 1985	8 December 1984	MM NØRGAARD SPERDUTI FROWEIN JÖRUNDSSON TENEKIDES TRECHSEL CARRILLO SOYER SCHERMERS DANELIUS BATLINER MELCHIOR

9273/81

Government's supplementary observations on the merits	31 January 1985		
Applicants' supplementary observations on the merits	31 January 1985		
Consideration of state of procedure	11 May 1985	MM	NØRGAARD FROWEIN JÖRUNDSSON TRECHSEL CARRILLO SOYER SCHERMERS DANELIUS BATLINER
Examination of merits, consideration and adoption of Report under Art. 31 of the Convention	2 & 3 July 1985	MM	NØRGAARD SPERDUTI FROWEIN JÖRUNDSSON TENEKIDES TRECHSEL CARRILLO WEITZEL SOYER SCHERMERS DANELIUS BATLINER