

■ ARTICLES

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Changing the rules mid-game. Legislative interference in specific pending cases: separation of powers and fair trial.

A comparison between the European Court of Human Rights
and the U.S. Supreme Court's views

ABSTRACT

Legislatures sometimes interfere in judicial proceedings when they expect the outcome to be politically undesirable. The resulting ad hoc laws are applicable in cases known in advance, although they may appear to be neutral, general and prospective. Such laws force the courts to decide the case in favor of the State, making continued litigation pointless for the other party. Legislation of this kind may seriously threaten the rule of law, fundamental rights, including the right to a fair trial and the separation of powers. In this article, recent examples will be presented, explaining and comparing the position of the European Court of Human Rights and the U.S. Supreme Court.

I. INTRODUCTION

Traditionally, legislatures are entitled to create general policy through legislation. The impulses to adopt legislative acts differ in nature and origin. For example, legislative proposals may be introduced by reason of the political party programmes involved, because of an emergency situation, through successful campaigning by lobby groups, or in response to extensive media coverage of extraordinary events. A special category is formed by court judgments and court proceedings. Legislatures regularly respond to politically undesirable judicial decisions by overruling them. Constitutionally, this is rarely problematic, because the overruling legislation is general and prospective, and legislative check of this kind on judicial decisions can be seen as natural interaction between the legislature and the judiciary.¹ However, what is often considered problematic is reactive legislation which is not general and prospective but narrowly tailored for a single case that has already been addressed in court proceedings.² Such laws

On constitutional aspects of ad hoc legislation in general see, A. Jasiak, *Constitutional Constraints on Ad Hoc Legislation. A Comparative Study of the United States, Germany and the Netherlands*, diss. Tilburg 2010.

- 1 Richard A. Pashal, 'The Continuing Colloquy: Congress and the finality of the Supreme Court' (1991-1992) 8 J. L & Pol. 143.
- 2 For the requirement of the generality of laws as an element of the rule of law see, for example, Friedrich Hayek, *The Political Ideal of the Rule of Law* (Cairo 1955) 34 and Franz Neumann,

interfere with pending court proceedings and are designed to influence the outcome of pending cases ensuring that court decisions will be favourable to the State as one of the litigating parties. This legislative method is especially attractive when the State's financial stakes in winning the case are high.

This article addresses such ad hoc legislative reactions to pending court proceedings as well as the legislature's discretion to respond in such a way from a comparative and rule-of-law perspective. The European and American approaches to legislative action of this kind will be examined (section 2) and compared (section 3) by analysing the views of the European Court of Human Rights (ECtHR) and the U.S. Supreme Court respectively. The purpose of the comparison is to answer the following questions:

- Which elements of the rule of law do the ECtHR and the U.S. Supreme Court use to assess legislative interference in pending cases?
- Do they use different elements and, if so, what are the consequences?
- Does or should the specific or general character of challenged legislation play any role in the assessment of interfering legislation and, if so, to what extent?

II. THE LEGISLATURE'S INTERFERENCE IN PENDING CASES

1. Interfering in pending cases: The European Court of Human Rights

Three ECtHR decisions are particularly relevant: *Stran Greek Refineries and Stratis Andreadis v. Greece (Stran Greek Refineries)*,³ *National & Provincial Building Society, the Leeds Permanent Building Society and the Yorkshire Building Society v. the United Kingdom (Building Societies)*,⁴ and *Zielinski and Pradal and Gonzalez and Others v. France (Zielinski)*.⁵ Together they form the foundation of the ECtHR's opinion about legislative interference in judicial proceedings. The chronological discussion below will show how the ECtHR developed a nuanced view of the permissibility of legislative interferences in pending cases.

The Stran Greek Refineries case

In 1972, Mr. Andreadis signed a contract with the Greek State, which was then under military junta. The contract allowed Mr. Andreadis and his company, Stran Greek Refineries, to build an oil refinery near Athens. However, a few years later, the junta was succeeded by a democratic government that endeavoured to cancel the agreement and prevented Stran from continuing the building project.

The Rule of Law. Political Theory and the Legal System in Modern Society (Berg Publishing, Leamington Spa and Heidelberg 1986) 132.

3 *Stran Greek Refineries and Stratis Andreadis v. Greece* (App no 13427/87) (1994) Series A no 301.

4 *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom* (Appl nos 117/1996/736/933-935) ECHR 1997-VII.

5 *Zielinski and Pradal and Gonzalez and Others v. France* (Appl nos 24846/94 and 34165/96 to 34173/96) ECHR 1999-VII. See also Anna Jasiak, 'Gelegenheidswetgeving en beïnvloeding van rechterlijke procedures in het licht van het EVRM,' in Rob van Gestel and Hanneke van Schooten eds., *Europa en de toekomst van de nationale wetgever* (Wolf Legal Publishers, Nijmegen 2008).

Stran sued the State for failing to comply with the contract and claimed considerable financial compensation. Time after time, Stran litigated successfully. At some point, the State asked to postpone the planned court hearing. Meanwhile, it prepared a new piece of legislation that was enacted a week before the hearing⁶ and dealt with "the compulsory participation of the State in private undertakings (...) and the redemption of shares."⁷ One of the provisions of the new law, Art. 12, stated:

Any principal or ancillary claims against the Greek State, expressed either in foreign or local currency, which arise out of contracts entered into between 21 April 1967 and 24 July 1974, ratified by statute and terminated by virtue of Law no. 141/19775, are now proclaimed time-barred.⁸

The law in fact determined the outcome of *Stran Greek Refineries* and effectively ensured that the State won the case.

Mr. Andreadis, the owner of Stran Greek Refineries, complained in Strasbourg that the new law deprived him of the possibility of a fair trial as formulated in Art. 6 paragraph 1 of the European Convention on Human Rights (ECHR). According to this provision, "In the determination of his civil rights and obligations (...) everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

Stran argued that the new law created inequality of arms in the judicial proceedings to which the State itself was a party, and made it impossible for the courts to decide the case in favour of the applicants. The Court looked pragmatically at the challenged law and explicitly concluded that the new piece of legislation, and in particular Article 12, "was in reality aimed at the applicant company – although the latter was not mentioned by name."⁹ The Court based this conclusion on the *timing* and the *manner* of the adoption of the new provision.¹⁰ The ECtHR categorically forbade such legislative action, stating that

[t]he principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude *any interference* by the legislature with the administration of justice designed to influence the judicial determination of the dispute. The wording of paragraphs 1 and 2 of Article 12 taken together excluded any meaningful examination of the case.¹¹

This exceptionally strict application of the fair trial principle was elaborated in *Building Societies*.

The Building Societies case

In this case, three years after *Stran Greek Refineries*, the ECtHR modified its position.

The *Building Societies* case centres on the payment of tax to Inland Revenue by three British building societies in order to discharge their investors' liability to

6 Law No. 1701/1987.

7 *Stran Greek Refineries* (n 3) [20].

8 Article 12 of Law No. 1701/1987 as quoted in *Stran Greek Refineries* (n 3) [20].

9 *Stran Greek Refineries* (n 3) [47].

10 See also *Papageorgiou v. Greece* (Appl no 97/1996/716/913) ECHR 1997-VI.

11 *Stran Greek Refineries* (n 3) [49], emphasis added.

pay income tax on the interest they earned.¹² These tax payments were based on voluntary agreements between the building societies and Inland Revenue and concerned a period equal to one fiscal year (the actual calendar periods being different for each of the three building societies).

To harmonize the taxation regarding building societies and banks, the British government had proposed new legislation establishing a new and non-tax-increasing taxation schedule. However, in practice, the new law created a taxation gap period for the building societies.¹³ The State attempted to correct this technical error and to prevent the building societies from obtaining an unintended financial windfall. Several pieces of legislation were enacted, even when the judicial proceedings of the Provincial Building Societies and other building societies were pending. The last piece of legislation corrected the previous legislative errors in such a way that it was pointless for the building societies to continue to seek restitution of taxes they had paid in the gap period.

The applicant societies complained before the European Commission of Human Rights and the ECtHR. Unlike the Commission, which followed the Court's judgment in *Stran Greek Refineries*,¹⁴ the Court ruled that, while it was true that the new pieces of legislation affected the outcome of the judicial proceedings of the three building societies, it remained essential to answer the question of whether such legislative action had a legitimate aim and was not disproportional.¹⁵

The Court looked at the circumstances in which the legislative measures had been taken, and it found that 1) the legislative measures were taken in order to remedy the technical errors in the previous legislation; 2) the building societies could have known that the legislature would try to remedy such errors to comply with the legislative intent of the original legislation; and 3) two new pieces of legislation were introduced without regard to the specific pending legal proceedings: they applied to all building societies in the same situation.¹⁶

The Court reiterated that the justification of retroactive legislation influencing the outcome of a dispute to which the State is a party should be treated with "the greatest possible degree of circumspection".¹⁷ However, the Court ordered that *not every* interference is forbidden. In reaching this decision, the Court distinguished the present case from *Stran Greek Refineries*, where the applicant had already obtained an enforceable judgment, while the case of the building societies was in a very early stage. Moreover, in the *Building Societies* case the legislature had acted on the basis of a *compelling general interest* and had had a legitimate reason to enact the contested pieces of legislation, since it would otherwise have created uncertainty about how much tax had eventually been collected over the period in question. Finally, the building societies should have been aware of the fact that the legislature would repair the technical faults to

12 *Building Societies* (n 4) [8].

13 *Ibid.* [16-17].

14 *Building Societies* (n 4) [106]. The Commission also invoked *Pressos Compania Naviera S.A. and Others v. Belgium* (Appl no 38/1994/485/567) (1995) Series A no 332.

15 With reference to *Stubbings and Others v. United Kingdom* (Appl nos 36-37/1995/542-543/628-629) ECHR 1996-IV [72].

16 *Building Societies* (n 4) [109-111].

17 *Ibid.* [112] quoting *Stran Greek Refineries* (n 3).

comply with the original legislative intent and to prevent the societies from receiving an undeserved windfall.¹⁸ The Court concluded that legislation that repairs technical errors in previous regulations and thereby removes unintentional effects does not violate the right to a fair trial set out in Art. 6 ECHR.¹⁹

The Zielinski case

In the *Building Societies* case the ECtHR prudently introduced the criterion of *a compelling general interest* as a possible justification for legislative interference in pending proceedings. In *Zielinski*, the Court further refined the formula. This last refinement eventually became a standard point of reference for future cases.

The *Zielinski* case dealt with the retroactive interference of the French legislature in a number of pending cases on the interpretation of a collective social security agreement. This agreement with the regional representatives of the trade unions was signed in 1953 by the representatives of the social security offices of the Strasbourg region and included a "special difficulties allowance" (*indemnité de difficultés particulières*, IDP). The IDP was a special social security benefit for employees of social security bodies in certain regions in France. According to the agreement, the special allowance was equal to twelve times the value of "one salary point" as laid down in the national agreement covering social security staff. However, as a consequence of changes in the job classifications and in the calculation of salaries, the boards of some social security bodies lowered the value of the allowance twice. This prompted more than one hundred employees of the social security bodies to file a petition in the French courts asking for the application of the 1953 agreement instead, with the original allowance equal to twelve times the salary point. The many courts involved had awarded the employees' claims for payment of the IDP, but had used different calculation base: either the lowered 1974 value of 3.95 points or the 1953 twelve-times value.

In the light of this ongoing litigation, which had led to conflicting outcomes, and during the considerations on a public health bill, the French parliament adopted an amendment that was meant to set a uniform standard for the calculation of the IDP.²⁰ The amendment set the basis for the calculation of the social security allowance at 3.95 times the value of the salary point. This basis was clearly less advantageous than the "twelve-times" rule in the 1953 agreement.

The amendment established the calculation basis with retroactive effect as from 1 December 1983, which was exactly the date from which the employees of the social security bodies claimed payment of their salary in accordance with the 1953 agreement. Clearly, the legislature's intent was to order the courts to apply the new 3.95 standard to pending cases. The amendment did not order the reopening of final judicial decisions.

Before the ECtHR, Zielinski and his co-claimants argued that they had been deprived of a fair trial, because the State had intended to direct the outcome of

18 Ibid.

19 For conflicting human rights in the light of the right to a fair trial from Art. 6 of the European Convention on Human Rights see Eva Brems, 'Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and the Fundamental Freedoms' (2005) 27 H.R.Q. 294-326.

20 Sec. 85 of Law No. 94-43.

pending cases in its own favour.²¹ The government, however, argued that the law had been enacted in the general interest and had a legitimate aim.²² The compelling general interest was that strict application of the 1953 agreement to all officials who had claimed payment of the "twelve-times" IDP until the enactment of the amendment would impose a heavy financial burden on the State and reduce the social security budget. The government also maintained that the legislature could change a law in the course of judicial proceedings, as long as an appeal could be brought and a final judgment had not yet been delivered.

The ECtHR made it clear that, in principle, it is not forbidden for the legislature to enact retrospective civil legislation in order to "regulate rights arising under existing laws".²³ Nevertheless,

the principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature – *other than on compelling grounds of the general interest* – with the administration of justice designed to influence the judicial determination of a dispute.²⁴

The Court was clear: sometimes *the compelling general interest* will allow or even force the legislature to interfere in pending cases. Applying this general formula to the *Zielinski* case, the Court found that the primary intention of the French legislature had been to influence the outcome of several pending cases and that the amendment had not been enacted after careful preparation.

The Court was quite pragmatic in its observations and looked at the circumstances of the law's enactment. It examined the effect, timing and manner of the law's adoption. It observed that the new law had been enacted shortly after the Besançon Court of Appeals had rendered a decision favourable to the claimants.²⁵ Moreover, the manner of the law's enactment was peculiar: the amendment had been drafted on impulse during the considerations on a public health bill. It was therefore clear to the Court that the law was more an ad hoc piece of legislation that had been passed by Parliament in response to the decision of the Besançon Court of Appeals to influence the final judgment in that and in similar cases, rather than as a general policy law that was required by the general interest. The financial risk advanced by the government to justify legislative intervention in pending cases was not a compelling general interest. Furthermore, the Court endorsed the argument of the claimants that a judiciary system where different courts may reach divergent opinions in similar cases does not in itself justify legislative interference in pending cases.

The ECtHR's guidelines

All three decisions have been crucial in developing the current case law on legislative interference in pending judicial proceedings aimed at influencing their outcome. The case law centres on the right to a fair trial, including the rights of

21 *Zielinski* (n 5) [51].

22 *Ibid.* [53].

23 *Ibid.* [57].

24 *Ibid.* emphasis added.

25 *Zielinski* (n 5) [58].

equality of arms and of access to courts. These decisions as well as subsequent decisions seem to point to two tests used by the ECtHR, which will here be called the procedural test and the substantive test. The procedural test deals with the legislatures' intention which can be constructed on the basis of circumstances in which the impugned law had been enacted. The second test deals with the justification question. Below, it will be shown that the ECtHR is not easily satisfied with any after-the-fact explanation for the interference in pending cases given by the legislature.

a. Procedural test: Legislative intention

In the first test, the ECtHR considers whether the legislature *intended* to interfere in pending cases ("manifest object"). The Court answers this query pragmatically: it is not the legislature's explanation that matters, but the *circumstances* in which the contested legislation was introduced and passed. The Court establishes legislative intent on the basis of *the timing* and *the manner* of the new law's enactment. As a third element, the *effect* of the impugned legislation is also often put forward.²⁶ Using these elements, the Court deliberates whether the new piece of legislation was adopted ad hoc while judicial proceedings against the State were pending.

If this question is answered in the affirmative, the ECtHR will often examine the *timing* of the legislation's enactment in relation to the stage of the proceedings: an enforceable judgment can more readily justify the conclusion that the interfering legislation violates Art. 6 than proceedings that have only just been instituted.²⁷ If the legislation is enacted ad hoc shortly before scheduled hearings in the proceedings to which the State is a party, this can also indicate that the legislature's object is to influence the outcome of proceedings. Additionally, if a new piece of legislation is hurriedly enacted before the highest national court can deliver a judgment which, on the basis of the settled case law of that court, would be unfavourable for the State as a litigating party, the ECtHR will interpret this as a deliberate attempt to influence the outcome of proceedings.

Addressing *the manner* in which the interfering piece of legislation was adopted, the ECtHR examines whether it was prepared in a scrupulous legislative process or whether it was impulsively attached to a bill it in fact not belong to. In *Zielinski*, for example, the Court explicitly discussed the questionable adoption procedure of the controversial provision: "(...) section 85 was part of an Act on 'public health and social welfare.' (...) It was only in the course of the parliamentary debates and shortly after the delivery of (...) the Besançon Court of Appeal's judgment that an amendment on the *IDP* was tabled".²⁸

26 See e.g. *Stran Greek Refineries* (n 3), *Zielinski* (n 5), *Scordino v. Italy* (Appl no 36813/97) ECHR 29 March 2006, *Smokovitis and Others v. Greece* (Appl no. 46356/99) 11 April 2002, and *Gorraiz Lizarraga and Others v. Spain* (Appl no 62543/00) 2004-III. For the observations on the legislative motive requirement in the light of the *Zielinski* case see Marc de Werd, 'Beïnvloeding van Rechtspraak door de Wetgever' (2001) 3 NJCM-Bulletin 348.

27 *Building Societies* (n 4) [111].

28 *Zielinski* (n 5) [57].

In terms of its *effect*, the interfering legislation must be able to have a *decisive* influence on the proceedings. In other words, it must be clear that continuation of judicial proceedings would have been pointless as the applicants would have had no chance of winning the case against the State,²⁹ even if the dismissal of the case "was based even subsidiarily on the impugned statute."³⁰

b. Substantive test: Compelling general interest

Using the second test, the Court examines whether the legislature had good reasons to interfere in pending proceedings. The ECtHR will justify such interference on one condition only: the interfering legislation must have been inspired by compelling grounds of the general interest. It is worthwhile to note that applying Art. 6 ECHR in other cases the ECtHR seeks normally answers to the following two questions: 1) does the limitation (by the State) have a legitimate aim?, and 2) is there "a reasonable relationship of proportionality between the means employed and the aim sought to be achieved"?³¹ The ECtHR referred to this test in *Building Societies*, but it appears to be the only case concerning legislative interference in pending cases where the Court explicitly invoked this proportionality test. Implicitly, however, proportionality still plays an important role as regards legislative interferences in pending cases. The only difference is that in that case the Court does not perform a balancing of interests test. The decisive question is of whether the State had a compelling general interest to frustrate the administration of justice. If this is not the case, the Court finds the violation of Art. 6 ECHR. It thus implicitly concludes that the impugned law is disproportional.

What then does the ECtHR consider to be compelling grounds of the general interest? The Court's approach differs from the procedural test method. Here, no subquestions or criteria are formulated in order to answer the question of possible justification. It seems as if the ECtHR is using two casuistic and extendable lists, one stating what the compelling general interest is and the other specifying what in any event it is not. Regarding the first, positive list, what interests can justify legislative interference in pending cases?

Firstly, the Court accepted legislative intervention when the new legislation was intended to remedy technical errors in the original legislation or to fill a legal gap, thereby effectuating the real intention of the legislature. In such cases, the legislature interfered to prevent some individuals or companies from unintentionally benefiting from technical faults.³² Secondly, the contested law was not seen as contrary to Art. 6 even though it interfered with pending

29 See e.g. *Building Societies* (n 4) [107]; *Anagnostopoulos and Others v. Greece* (Appl no 39374/98) ECHR 2000-XII [20]; *Smokovitis and Others v. Greece* (n 26) [26]; and *Papageorgiou v. Greece* (n 10) [38].

30 *Anagnostopoulos and Others v. Greece* (n 29) [21].

31 Pieter van Dijk et al., *Theory and Practice of the European Convention on Human Rights* (Intersentia, Antwerpen 2006) 573.

32 See the description of the *Building Societies* case and *Ogis Institut Stanislas, Ogec St. Pie X et Blanche de Castille et Autres c. France* (Appl nos 42219/98 and 54563/00) ECHR 27 May 2004 [71].

proceedings, for the law settled patrimonial conflicts that had arisen after the reunification of West and East Germany in a general way. The law was not adopted ad hoc to influence pending proceedings; it was enacted to ensure enduring peace and legal certainty in Germany, according to the Court in the *Forrer-Niedenthal* case.³³

As for the second list, no compelling general interest justifying legislative interference in pending cases could be found in the legislature's intention to implement a political programme centred on budgetary considerations, as the Court argued in the *Scordino* case.³⁴ Furthermore, neither a financial risk for the government nor conflicting decisions of different national courts could justify legislative interference with judicial proceedings.³⁵

c. Connecting the two tests

The connection between the procedural test and the substantive test is somewhat unclear as appears from the three above described cases and subsequent judgments in which the ECtHR addressed the question of permissibility of legislative intervention in pending cases. Sometimes the ECtHR discusses legislative interference in the light of both tests to conclude that there are no compelling grounds of the general interest.³⁶ The conclusion that the fair trial requirement has been violated follows from the first procedural test. In other cases, the ECtHR does not even ask whether the legislation was inspired by a compelling general interest (substantive test). In those cases, the procedural test appears to predominate.³⁷ Finally, when the ECtHR decides that the legislature had compelling grounds of the general interest to enact interfering legislation, it skips the procedural test.³⁸

d. The nature of the right breached

In *Gorraiz Lizarraga and Others*,³⁹ the ECtHR emphasized the importance of the nature of the violated right for the assessment of legislative interference. The inhabitants of a small village in Spain had protested against a governmental dam-building project. After the national courts had upheld their claims and had ordered the work to be stopped, the legislature enacted a law sanctioning continued construction, although it was formulated in general terms. Consequently, the final judicial decision could not be enforced.

The Court distinguished the legislative interference in this case from those in *Zielinski* and *Stran Greek Refineries*. In *Gorraiz Lizarraga and Others* the

33 *Forrer-Niedenthal c. Allemagne* (Appl no 47316/99) ECHR 20 February 2003 [64]. See also the comment of Patricia Popelier, 'Behoorlijke Wetgeving in de Rechtspraak van het Europees Hof voor de Rechten van de Mens' (2004) 6 T.v.W. 131.

34 *Scordino v. Italy* (n 26) [132].

35 *Zielinski* (n 5) [59].

36 *Zielinski* (n 5) and *Scordino v. Italy* (n 26).

37 See e.g. *Anagnostopoulos and Others v. Greece* (n 29) and *Smokovitis v. Greece* (n 26).

38 See e.g. *Forrer-Niedenthal c. Allemagne* (n 33).

39 *Gorraiz Lizarraga and Others v. Spain* (Appl no 62543/00) ECHR 2004-III.

challenged legislation concerned regional development plans, "a sphere in which an amendment or change to legislation following a judicial decision is generally accepted and practised". The Court found that the nature of the rights impaired in the sphere of environmental planning are different (i.e., less weighty) than those infringed in, for instance, *Zielinski* or *Stran Greek Refineries*. The Court saw the urban and regional policies as

spheres (*par excellence*) in which the State intervenes, particularly through control of property in the general and public interest. In such circumstances, where the community's general interest is pre-eminent, the Court takes the view that the State's margin of appreciation is greater than when exclusively civil rights are at stake.⁴⁰

The Court's message is clear: environmental rights are of a different nature than traditional civil rights and the legislature therefore has more freedom to change environmental policy even if it does so by interfering in the administration of justice. The Court also emphasized the legislative intent of the legislature: it was not directed at influencing the outcome of a litigation to which the State was a party and the legislature therefore did not aim to circumvent the rule of law.⁴¹

e. Interference through general or specific legislation

Does the ECtHR's doctrine on legislative interference in pending cases apply equally to specific legislation designed to influence one particular case and to general legislation affecting a large group of similar cases? In this respect, the cases of *Anagnostopoulos*⁴² and *Scordino*⁴³ are illustrative examples.

In these two cases, the ECtHR showed that, for a violation of Article 6 to be established, it is not required that the legislative intention was directed at influencing *one particular case*; the objective to influence the judicial process in a manner favourable for the State in a number of cases of *the same type* can be sufficient to declare the law incompatible with the rule of law and the fair trial principle in particular.⁴⁴

Nonetheless, the ECtHR sometimes stresses the general or specific nature of the legislation concerned. In *Stran Greek Refineries*, the contested piece of legislation was ruled to have been intended to influence specifically the outcome of that case. This ruling contributed significantly to the conclusion that, given the first procedural test, the right to a fair trial had been violated.

By contrast, the ECtHR occasionally concludes that interfering legislation served the general interest precisely because of its *general* character. The ECtHR

40 Ibid. with reference to *James and Others v. the United Kingdom* (Appl no 8793/79) (1986) Series A no 98 [46], *Mellacher and Others v. Austria* (Appl nos 10522/83; 11011/84; 11070/84) (1989) Series A 169 [55], and *Chapman v. the United Kingdom* (Appl no 27238/95) ECHR 2001-I [104].

41 *Gorraiz Lizarraga and Others v. Spain* (n 26) [96].

42 *Anagnostopoulos and Others v. Greece* (n 29).

43 *Scordino v. Italy* (n 26).

44 *Ibid.* [130]. See also *Adamogiannis v. Greece* (Appl no 47734/9) ECHR 14 March 2002.

thus connects generality in terms of the law's addressees with generality in terms of the general interest when it applies the second substantive test.⁴⁵

2. Interfering in pending cases: The U.S. Supreme Court

The American legislature has on several occasions enacted laws affecting cases that had already been subject to court proceedings.⁴⁶ As for direct Congressional intervention in pending proceedings, the *Robertson v. Seattle Audubon Society* case is illuminating: the environmental groups bringing the action explicitly argued that the legislature attempted to influence the outcome of the court proceedings they were involved in. As will be shown, the Supreme Court assessed such alleged legislative interference in pending cases in the light of the separation of powers principle.

The Robertson v. Seattle Audubon Society case

The *Robertson v. Seattle Audubon Society* case is a famous environmental case concerning the northern spotted owl. This bird is listed as an endangered species⁴⁷ and has its habitat in the old-growth forests of Washington and Oregon, which are managed by the United States Forest Service (Forest Service) and the Bureau of Land Management (BLM). The case originated from an environmental groups' challenge of management of these forests by the two federal agencies.

First, in 1987, after the BLM had executed its management policy for the old-growth forests in western Oregon and was selling tracts of old-growth forests for harvesting, the Portland Audubon Society filed a suit in the District Court of Oregon seeking declaratory and injunctive relief. The Audubon Society stated that the proposed harvesting would have disastrous consequences for the subsistence of the northern spotted owl and therefore violated several federal statutes.

The protection of the northern spotted owl also received attention from the Seattle Audubon Society, which, together with other environmental groups, challenged the Forest Service's administrative decision in 1988. That decision amended the guidelines used by the Forest Service dealing with the prohibition of timber harvesting in certain areas. The environmental groups argued that the plan provided inadequate protection for the northern spotted owl. One month later, a separate lawsuit was filed by the Washington Contract Loggers Association, which was joined by other industry organisations. They also challenged the plan, but from an opposite angle. They argued that restrictions on the amount of harvesting allowed under the plan would have disastrous consequences for the local economy. In the District Court for the Western District of Washington, the

45 *Forrer-Niedenthal c. Allemagne* (n 33) [64].

46 See e.g. an Act for the relief of the parents of Theresa Marie Schiavo, Publ. L. 101-97. See also Michael P. Allen, 'Congress and Terri Schiavo: A Primer on the American Constitutional Order?' (2005) 108 *W.Va.L.Rev.* 309.

47 Endangered Species Act of 1973, 16 U.S.C. § 1531 et seq. (2000).

Audubon Society was successful and 163 of the planned timber sales were preliminarily enjoined.⁴⁸

In view of this ongoing litigation and the preliminary injunctions blocking the proposed timber sales, Congress decided to interfere. As a matter of fact, it was the Congressmen from Oregon and Washington who introduced a bill after the timber industries asked them for help in reversing the Court's blockade of the sales. Congress passed Section 318 (a legislative rider) of the Department of the Interior and Related Agencies Appropriations Act of 1990,⁴⁹ popularly known as the Northwest Timber Compromise. The provisions of Section 318 had limited effect both in time and in geographical scope, since they expired at the end of the 1990 fiscal year and governed timber sales in thirteen listed national forests in Oregon and Washington known to contain the northern spotted owl. The new provisions directed, among other things, the release of 1.1 billion out of 1.8 billion board-feet of timber sales that courts had blocked through preliminary injunctions.⁵⁰

The Portland and Seattle Audubon Societies challenged Section 318 as being unconstitutional. Both environmental groups maintained that the statute, particularly Section 318 (b)(6)(A), clashed with the separation of powers principle.⁵¹ This section provided:

the Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-99 (order granting preliminary injunction) and the case of Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR.

District Courts rejected the claims of both groups and found no violation of the constitutional separation of powers principle.⁵² Quashing these decisions, the Court of Appeals for the Ninth Circuit, where the cases were consolidated, decided that Sec. 318 (b)(6)(A) did violate the separation of powers principle by "directing the outcome in pending litigation involving the protection of the northern spotted owl, without any change in the underlying law."⁵³

48 U.S. District Court of the Western District of Washington, *Seattle Audubon Soc. v. Robertson*, No. 89-160 (1989). For the procedural history, see *Seattle Audubon Soc. v. Robertson*, 914 F.2d 1311 (1990).

49 Pub. L. No. 101-121, 103 Stat. 745, § 318.

50 135 CONG. REC. S2961 (1989).

51 See also Amy D. Ronner, 'Judicial Self-Demise: The Test of when Congress Impermissibly Intrudes on Judicial Power after *Robertson v. Seattle Audubon Society* and the Federal Appellate Courts' Rejection of the Separation of Powers Challenges to the New Section of the Securities Exchange Act of 1934' (1993) 35 *Ariz. L. Rev.* 1037 discussing challenges to the Northwest Timber Compromise.

52 U.S. District Court of the Western District of Washington, *Seattle Audubon Soc. v. Robertson*, No. 89-160 (1989) and U.S. District Court of Oregon, *Portland Audubon Soc. Lujan*, No. 87-1160 (1989).

53 *Seattle Audubon Soc. v. Robertson*, 914 F.2d 1311 (1990).

What were the exact claims, how did the Court of Appeals arrive at its decision and how did the Supreme Court respond? The environmental groups complained that the Northwest Timber Compromise directed the Court to make some factual findings, thereby prescribing the Court to reach a certain result. Such legislative action had already been condemned by the U.S. Supreme Court, and the doctrine preventing Congress from controlling litigation through legislation dated from the Supreme Court's 1871 *Klein* judgment.⁵⁴ To support this argument, the organisations emphasized the imperative language of the statute ("the Congress hereby determines and directs")⁵⁵ and the fact that the statute explicitly and specifically referred to the pending cases of the Seattle and Portland Audubon Societies.

In its analysis, the Court of Appeals concentrated on the distinction between prescribing the rule of decision and changing the law in pending cases. It endorsed the Supreme Court's interpretation of Congressional interference in litigations through legislative changes in *Pennsylvania v. Wheeling and Belmont Bridge Co.*⁵⁶ The Court of Appeals concluded that the Supreme Court had "decided the case on the theory that Congress had changed the law, not that Congress had told the court that it should decide the case differently under the same law". In other words, as long as Congress does not arbitrarily direct the Court as to how it should decide in a particular case, it may amend or repeal the underlying law even for the purpose of ending the proceedings.⁵⁷

The Court of Appeals applied the ruling in *Klein* and *Wheeling and Belmont Bridge Co.* to the Seattle Audubon Society case. It decided that the controversial provisions of the Northwest Timber Compromise did not change the law and had been enacted to predispose the Court towards a decision that would benefit the government and indirectly the timber industry. The provisions thus violated the separation of powers principle.

This interpretation was rejected by the Supreme Court by explaining how Sec. 318 (b)(6)(A) worked.⁵⁸ According to the Court, if the agencies followed the new requirements of subsections (b)(3) and (b)(5) and logged in the areas described in these section, they would be deemed to violate neither the MBTA (the Migratory Bird Treaty Act) nor any other statute underlying the litigation. Consequently, the Supreme Court classified the disputed provisions as modifying the old law, or a permissible change of standards. According to the Court, Congress opted for the "operation of the canon that specific provisions qualify general ones", but could also modify the MBTA directly, without enacting an entirely new statute.⁵⁹

The Court rejected the argument that Congress intended to direct a rule of decision in a particular case by means of the specific nature of the statute (it explicitly referred to the two pending cases) concluding that reference to these

54 *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).

55 Brief of Respondents Seattle Audubon Society *et al.*, 1991 WL 521289, 34.

56 *Pennsylvania v. The Wheeling and Belmont Bridge Co.*, 59 U.S. 421 (1855).

57 *Seattle Audubon Soc. v. Robertson* (n 54) 1315.

58 *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 437-438 (1992).

59 *Ibid.* 439-440.

two specific cases was purely meant to identify the relevant statutes. It was not more than that.

The final but by no means trivial argument (as suggested by the Public Citizen) was that, even if Section 318 (b)(6)(A) did indeed change the underlying environmental statutes instead of directing the court a rule of decision, it would still be unconstitutional by reason of the very narrow scope of the new provisions; only the pending cases of the Seattle and Portland Audubon Societies would be affected by the change. "Such a case-specific repeal presents all of the dangers of an explicit legislative direction of the same outcome".⁶⁰ Unfortunately, the Supreme Court declined to discuss the specificity theory of the Public Citizen owing to procedural obstacles.⁶¹

The Supreme Court's guidelines

When it comes to legislative interference in pending cases, the Supreme Court applies the following rules.

a. Changing the law during pending cases: General change or directing a rule of decision?

The Supreme Court determined as early as 1801 how courts should react to legislative changes during pending cases. In *U.S. v. Schooner Peggy*, the Supreme Court explained that "if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs," the appellate court is obliged to comply with the new rules.⁶² The underlying assumption is that the legislature is fully entitled to change the law, even if changes in law affect pending judicial proceedings. Three situations can be discerned.

Firstly, the Supreme Court agrees that the legislature has the constitutional power to deny appeal in a certain class of pending cases. Such a legislative change constitutes a permissible change in law, because the legislature has the authority to regulate the jurisdiction of the federal courts:

Undoubtedly the legislature has complete control over the organization and existence of that court and may confer or withhold the right of appeal from its decisions. And if this act did nothing more, it would be our duty to give it effect. *If it simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make 'such exceptions from the appellate jurisdiction' as should seem to it expedient.*⁶³

Secondly, in, for instance, *Miller v. French*, the U.S. Supreme Court recognizes that the legislature can enact new legislation instructing the courts in general terms to dismiss a certain class of pending cases, as long as the courts remain free to decide to which cases the new interfering legislation applies and therefore

60 On Writ of Certiorari to the U.S. Court of Appeals, Motion of Public Citizen, No. 90-1596, 2.

61 *Robertson v. Seattle Audubon Society* (n 59) 441.

62 *U.S. v. Schooner Peggy*, 5 U.S. 103, 110 (1801).

63 *United States v. Klein*, (n 55) 145, emphasis added.

which cases will be dismissed. As long as they have this freedom, the separation of powers principle is not violated.⁶⁴

Thirdly, the legislature can enact a new piece of legislation that neither denies an appeal nor directs a dismissal of certain pending cases, but sets new standards to be followed by the courts. As the Supreme Court decided in *Robertson v. Seattle Audubon Society*, setting new legislative standards for cases at bar can be seen as a permissibly changing in law as referred to in *Wheeling and Belmont Bridge* and *Klein*, because the courts are still at liberty to apply these new standards and make factual findings (a reasoning similar to that in *Miller v. French*). If the legislature, instead of changing the rules, attempted to instruct the courts to decide a case differently under the same law (prescribing a rule of decision), it would encroach on the domain of the judiciary and therefore violate the separation of powers principle.

b. General or specific change?

The Supreme Court's view of legislation intervening in cases awaiting judicial determination does not address the question whether changes in general legislation during pending proceedings are so specific that they essentially prescribe a rule of decision and effectively preclude a court from making its own findings. The specificity argument suggested by the Public Citizen was put forward in *Robertson v. Seattle Audubon Society*, but the Supreme Court declined to discuss it.

III. COMPARISON AND CONCLUSIONS

Legislatures do not hesitate to change the rules during the game. They do not do this because the rules are dysfunctional, but because they can work out inconveniently for the State when applied by the courts. Such changes can affect the general class of pending judicial proceedings, but, as *Stran Greek Refineries* and *Robertson v. Seattle Audubon Society* illustrate, they can also be designed to influence the outcome of one particular case. The higher purposes such laws try to achieve may differ. For example, as illustrated by the Northwest Timber Compromise, they can be a result of lobby efforts to favour timber industry and thereby support economic development. Besides, they can express the legislature's will to keep public finances healthy, as follows from a number of European cases. These purposes are as such legitimate. They have been formulated in a political process by a democratically chosen legislature. Nevertheless the negative effects they can have either for individuals or in relation to the judicial branch of the government make them vulnerable to rule of law challenges. Both the ECtHR and the U.S. Supreme Court have developed a view to assess legislative interference in pending cases from such a rule of law perspective. The severity of the approaches in Europe and in the United States, however, differs significantly. The ensuing consequences for the effects of judicial assessment of interfering legislation can have an impact on the litigating parties.

64 See *Miller v. French*, 530 U.S. 327, 349 (2000).

Both Courts assess legislative interference in pending cases in the light of the rule of law, but they use different elements of the rule of law. While the Supreme Court analyses legislative intervention in pending cases from the perspective of the separation of powers, the central question in the ECtHR's analysis is whether the State violated the individual's right to a fair trial, including the rights of access to the courts and of equality of arms. These two different approaches have led to different outcomes.

The first striking difference is the very factual assessment by the ECtHR as opposed to the Supreme Court's fictitious assessment. The ECtHR sees its role as offering *effective* protection of fundamental rights against the State's arbitrary actions against individuals. The Court has repeatedly ordered that "the convention [ECHR] is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective."⁶⁵ To be able to provide effective protection, the ECtHR pays a great deal of attention to the facts of the case and the circumstances in which the interfering legislation was adopted. For this purpose, the ECtHR has developed a procedural test – focusing on the *timing*, *manner* and *effect* of the law's adoption – which it uses to decide whether the actual legislative intent was to influence the outcome of pending proceedings in such a way as to benefit the State.

This factual approach is not at the forefront of U.S. Supreme Court decisions. *Robertson v. Seattle Audubon Society* is a case in point. The Supreme Court based its judgment on a vague distinction between "changing the general rules" and "prescribing a rule of decision".⁶⁶ Using this test, the Court allows the legislature quite a bit of latitude in taking the law into its own hands. In its assessment of interfering legislation, the Supreme Court does not investigate the real reasons for the adoption of a law, nor whether the courts could, not only in theory but also in practice, have decided the case themselves, i.e, within their discretionary powers and without being directed by the legislature. This question was not raised by the Supreme Court in the *Robertson v. Seattle Audubon Society* case. The Court did not consider the fact that the law had been enacted and initiated by the Congressmen from Oregon and Washington, who had been approached by the timber industry from these two states when the proceedings were pending. Moreover, the Court found nothing suspicious in the fact that the law mentioned the cases by name, despite the fact that it was obvious that the law had been drafted to assure that these two cases would be decided in favour of the State and thus indirectly in favour of the timber industry.

The Supreme Court itself earlier marked the principle of the separation of powers as essential for the preservation of liberty.⁶⁷ It seems that the principle of the generality of laws can have a very important role within the Supreme Court's assessment of interfering legislation in order to serve the original meaning of the separation of powers principle. It can be argued that in answering the question whether the interfering legislation constituted a general change rather than a

65 *Multiplex v. Croatia* (Appl no 58112/00) ECHR 10 July 2003 [44].

66 See Peter A. Gerangelos, 'The separation of powers and legislative interference in pending cases' (2008) 30 Sydney L. Rev. 89 who proposes a more precise interpretation of that criterion in the U.S. and Australia.

67 See e.g. *Mistretta v. United States*, 488 U.S. 361, 380 (1989).

specific instruction directing a rule of decision, the Supreme Court should take its specificity or generality into account. The essential question should then be whether the law applies to an open group of cases and therefore constitutes a general change of law, or to a limited and specifically identifiable number of cases and therefore *de facto* prescribes a rule of decision. This approach, however, requires a factual method.

Unlike the Supreme Court, the ECtHR does sometimes stress the general or case-specific character of interfering legislation in its analysis. In doing so, the ECtHR distinguishes two types of generality: generality in the sense of the general interest served by the legislation and generality in the sense of the addressees of the law. Although the Court clearly expressed that laws that are intended to influence the outcome of one specific case as well as general laws can violate the right to a fair trial, it appears that the ECtHR treats laws that affect single cases even more stringently. As *Stran Greek Refineries* shows, once the ECtHR determined that the law was aimed at that specific company, even if it was not mentioned by name, the Court did not apply the second, substantive test to answer the question whether the law had, nevertheless, been inspired by compelling grounds of the general interest and was therefore justified. Conversely, the general nature of the law in *Forrer-Niedenthal* was sufficient reason for the ECtHR to conclude that the law had been enacted in the general interest and therefore did not violate Art. 6. However, it is fair to question whether a law's specificity automatically leads to the conclusion that it therefore has not been enacted in the general interest. The conclusion that when a law is general, it must have been enacted in the general interest is not always true, either, as was shown in *Scordino* and *Anagnostopoulos*. There, despite the general character of the law, the ECtHR ruled that the legislature had intended to influence the outcome of pending judicial proceedings and that the right to a fair trial had therefore been violated. In other words, the ECtHR is not always consistent in its analysis. Nevertheless, the ECtHR's characteristically practical approach to legislation designed to influence the outcome of pending proceedings can only be applauded, because it seems to protect individual rights more effectively. Perhaps the U.S. Supreme Court will one day come to appreciate the merits and the potential of this approach.

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