Swiss Federal Supreme Court

1P.541/2006/viz

Session of 28 March 2007
First Public Law Chamber

Composition of the Court	Justices: Féraud (President), Aemisegger, Aeschlimann, Wurzburger, Reeb, Fonjallaz, Eusebio. Clerk of the Court: Kurz.
Parties	Ivan Slatkine, avenue Industrielle 9, 1227 Carouge (Geneva) Pascal Pétroz, route d'Ambilly 24, 1226 Thônex (Geneva) Petitioners Represented by Charles Poncet, Attorney-at-law, P.O. Box 401, 1211 Geneva 12 v. *Grand Conseil* of the Canton of Geneva, Rue de l'Hôtel-de-Ville 2, P.O. Box 3970, 1211 Geneva 3
Issue	Validity of popular initiative "Second-hand smoke and health" (IN 129). Constitutional complaint against the decision of the *Grand Conseil* of the Canton of Geneva of 22 June 2006.

Translator's note: This is an unofficial translation. In the event of any discrepancy between the original French text and the English translation, the original French text will prevail.

Facts:

A.

On 12 October 2005, the *Conseil d'Etat* [Executive] of the Canton of Geneva certified that the popular initiative titled "Second-hand smoke and health" (IN 129) had collected the required number of signatures. The initiative concerns the introduction into the Canton's constitution of a new Article 178B, worded as follows:

> Title XIV Miscellaneous provisions
>
> Art. 178B Protection of public hygiene and of health
> Second-hand smoke
>
> [1] In view of the public interest inherent in respect for public hygiene and in health protection, the *Conseil d'Etat* is tasked with taking measures against the adverse effects on public hygiene and the population's health of exposure to tobacco smoke which, as has been scientifically established, leads to disease, disability and death.
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> [2] With the aim of protecting the whole population, smoking shall be prohibited in indoor or enclosed public places, especially in those whose operation is subject to authorisation.
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> [3] Public places whose indoor or enclosed premises are covered by this provision shall be understood to mean:
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> a) all public buildings or premises under the control of the State and the communes, and all other institutions of a public character;
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> b) all buildings or premises open to the public, in particular those dedicated to medical, hospital and other healthcare-related activities, to cultural, recreational and sports activities, as well as to training and leisure activities, meetings and exhibitions;
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> c) all public establishments within the meaning of legislation relating to the food, drink and hospitality sectors;
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> d) public transport and other professional transport of persons;
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> e) such other places open to the public as may be defined by law.

The report in support of this initiative recalls the hazards linked to second-hand smoke and the need to protect the staff of public establishments as well as the persons frequenting them. Considering ventilation measures to be ineffective, the authors of IN 129 point out that several countries (Italy, Ireland, Malta, Norway, Sweden) have adopted measures identical to those proposed by the initiative.

B.

The *Conseil d'Etat* filed its report on the initiative on 11 January 2006. Regarding the initiative's conformity with federal law, it noted that the Confederation had not yet made use of competences conferred on it by Art. 118, para. 2 lit. b of the Federal Constitution (hereinafter "Cst.")* relating to measures against widespread and particularly dangerous diseases, so that the cantons retained competence in the area of health protection. The Federal Labour Act (hereinafter "LTr"), Art. 6, and Ordinance 3 relative to the LTr (hereinafter "OLT 3"), Art. 19, did not regulate worker protection exhaustively, and the initiative was consistent with federal legislation. It could be interpreted as applying only to public buildings within cantonal competence (with the exception of railway stations, military buildings and civil protection buildings). Concerning fundamental rights, the *Conseil d'Etat* considered that although personal freedom was not affected by the smoking ban, except in the case of prison inmates, the question of proportionality had to be addressed in particular with regard to the right to privacy and economic freedom. The initiative was likely to attain the desired goals of security, respect for others and public health, whereas other possible measures (variable times, designated smoking areas, ventilation) did not seem equally effective. There was a proportionality problem because the initiative sought an outright ban: no exemptions were provided for hospitalised persons, persons with reduced mobility or at the end of life, prison inmates, sole workers, and establishments exclusively dedicated to the sale of tobacco. A conforming interpretation could be envisaged in anticipation of implementing legislation, but the *Conseil d'Etat* considered nonetheless that it would be opportune to submit a direct counter-draft delimiting the extent of the smoking ban with greater precision, either in a new paragraph 3 or in the implementing law.

The legislative commission of the *Grand Conseil* filed its report on 6 June 2006. It had received one legal opinion, drafted by Professor Andreas Auer, concluding that the initiative was totally invalid, mainly on account of its disproportionate character, and a contrary opinion submitted by the authors of the initiative. The commission then charged Professor Vincent Martenet to provide an independent opinion. According to Professor Martenet, a smoking ban could be considered disproportionate when it targeted residential premises intended for predominantly private use, namely prison cells, rooms in psychiatric hospitals, rooms in state-run healthcare and residential facilities, and hotel rooms. This constitutional breach could be remedied by modifying the wording of Art. 178B, para. 3: replacing the introductory phrase with the expression

* *Translator's note: A comprehensive list of abbreviations is provided at the end of the text.*

"*Are covered*" would make it possible to respect the intent of the initiative's authors while retaining the major portion of the text.

The majority of commission members agreed with that opinion. In their view, the initiative met the requirements of unity of subject matter, form and substance, and was feasible. However, it did not comply with superior law. The suppression of paragraph 3 was rejected and the provision was declared partially invalid, as recommended by Professor Martenet.

C.
On 22 June 2006, the *Grand Conseil* of the Canton of Geneva followed the legislative commission's proposal and declared IN 129 partially valid. It amended the first sentence of Art. 178B, para. 3 Cst./GE by replacing its original wording with the expression "*Are covered*".

D.
On 29 August 2006, two Geneva citizens and parliamentarians, Ivan Slatkine and Pascal Pétroz, filed a constitutional complaint before the Federal Supreme Court, invoking breach of citizens' right to vote (Art. 85 lit. a OJ) and asking the Court to annul the decision of the *Grand Conseil* and declare IN 129 invalid. In substance, they contend that the *Grand Conseil* has, on the one hand, amended the text of the initiative in a way contrary to the intent of its authors and, on the other, adopted a text which violated superior law (namely, federal law relating to worker protection and personal freedom) and was lacking in clarity.

The *Grand Conseil* moved for the complaint to be rejected, pointing out in particular that the initiative needed to be given concrete expression through implementing legislation. Following a further exchange of briefs, the parties reiterated their submissions.

In law, the Federal Supreme Court finds as follows:

1.
Since the contested decision was taken and the constitutional complaint filed before the Federal Supreme Court Act (hereinafter "LTF") came into force, the Federal Act on the

Organisation of the Judiciary (hereinafter "OJ") is applicable (Art. 132 para. 1 LTF). In conformity with Art. 15 para. 3 OJ, the case was heard by a seven-judge panel.

2.
By virtue of Art. 85 lit. a OJ, the Federal Supreme Court is competent to hear constitutional complaints pertaining to citizens' right to vote and to voting and elections at cantonal level, whatever the provisions of the cantonal constitution and of federal law governing the matter.

2.1 The recourse offered by Art. 85 lit. a OJ enables citizens to file a complaint alleging that an initiative was improperly withheld from popular vote, in particular as a result of being declared fully or partially invalid by the cantonal authority in charge of examining it, whatever the stated reasons for invalidation.

The avenue of constitutional complaint offered by Art. 85 lit. a OJ may also be used to challenge a cantonal authority's decision to submit an initiative to popular vote, provided that under cantonal law the competent authority is responsible for routinely verifying whether initiatives conform to superior rules. In such cases, the citizens are entitled to expect that this compulsory control be carried out correctly and the electoral body exempted from voting, if applicable, on provisions which from the outset appear to be contrary to superior substantive law (ATF [decision of the Federal Supreme Court] 128 I 190 point 1.3, p. 194).

2.2 According to Art. 66, para. 3 of the Constitution of the Canton of Geneva of 24 May 1847 (hereinafter "Cst./GE"; RS 131.234), an initiative shall be declared partially invalid by the *Grand Conseil* if a part thereof is clearly contrary to law but the remaining part or parts are intrinsically valid; if this is not the case, the *Grand Conseil* shall declare the initiative invalid. Even though it sanctions only manifest breaches of the law (which should be understood to mean not only procedural law relating to admissibility of initiatives but superior law as well), the *Grand Conseil* is bound to carry out verifications as a matter of course. This process opens up the possibility to file a complaint for violation of political rights.

2.3 Any person to whom cantonal legislation grants the exercise of political rights to take part in the vote at issue has standing to lodge a complaint related thereto, even if he or she has no personal legal interest in having the contested act struck down (ATF 128 I

190 point 1, p. 192; ATF 121 I 138 point 1, p. 139; 357 point 2a, p. 360). Since the petitioners are voters in the Canton of Geneva, their standing is indisputable.

2.4 When seised of a complaint for violation of political rights, the Federal Supreme Court freely examines the interpretation and application of federal law and of cantonal constitutional law, as well as that of lower-rank provisions closely linked to the right to vote or specifying its content and scope (ATF 129 I 185 point 2, p. 190). However, as regards the initiative's conformity with superior law, Art. 66 para. 3 Cst./GE provides that invalidation should be pronounced only in the event of a flagrant violation. Seised of a complaint aiming to ascertain, as mentioned above, whether the verification conducted by the *Grand Conseil* was conform to the latter's constitutional attributions, the Federal Supreme Court cannot assume a more extensive power of review than that of the cantonal authority: it too can sanction only manifest breaches of superior law (ATF 132 I 282 point 1.3, p. 284). On the other hand, contrary to what the *Grand Conseil* affirms, the fact that the constitutional norm must subsequently obtain federal approval cannot justify an additional limitation on the Supreme Court's power of review.

2.5 According to settled case law, the authority in charge of ruling on the material validity of an initiative must interpret its terms in the way most favourable to the authors. Where, with the aid of acknowledged methods, the text of an initiative can be interpreted in a way that shows it as being conform to superior law, the initiative must be declared valid and submitted to popular vote. Conforming interpretation should thus help to avoid declarations of invalidity as much as possible, in accordance with the saying "*in dubio pro populo*" (ATF 125 I 227 point 4a, p. 231ff and cases cited). As regards a constitutional rule which is to be given concrete expression in a law or statute, the Federal Supreme Court should take into account the way in which the text will most likely be applied (SJ 2001 241; ATF 121 I 334 point 2c, p. 338). With this in view, preparatory documents in support of the decision to validate the initiative may be used as factors of interpretation (ATF 121 I 334 point 2c, p. 338; 111 Ia 292 point 2, p. 295, 303 point 4, p. 305; 105 Ia 151 point 3a, p. 154).

3.

The petitioners first claim a violation of cantonal law relating to popular initiatives. In their view, the authors of an initiative drafted in precise terms, as is the case of IN 129, are alone responsible for its wording and thus assume the risk of it being declared invalid: the *Grand Conseil* is not entitled to make any amendments other than purely formal editing changes. Partial invalidation makes it possible to remove an inadmissible

portion of the text, provided that this does not distort the remaining part. In the present case, the deleted part of the text was not in itself contrary to federal law. Moreover, the authors clearly intended to ban smoking in public places without exception; the new wording adopted by the *Grand Conseil* modifies the initiative on an essential point, claim the petitioners, such that it no longer corresponds to the intent of its authors.

3.1 The constitution of the Canton of Geneva does not prohibit the *Grand Conseil* from amending the text of a popular initiative. On the contrary, Art. 66, para. 3 Cst./GE expressly provides for partial invalidation of an initiative when a portion of the text is manifestly contrary to law, if the remaining parts are inherently valid. This authorises the *Grand Conseil* to remove a part of the text of the initiative, particularly in order to make the remainder conform to superior law. Even a considerable portion of the text can be invalidated, if necessary, provided that the remaining portion meets the conditions for validity, has a meaning and corresponds to the intent of the initiative's authors and signatories (cf. ATF 130 I 185 point 5, p. 202, concerning invalidation of five out of eight constitutional articles proposed by the initiative; decision 1P.238/2000 of 26 January 2001, published in SJ 2003 137, and ATF 125 I 227, both of which deal with invalidation of several subparagraphs of a paragraph). Contrary to what the petitioners claim, on this point Art. 66, paras. 2 and 3 Cst./GE makes no distinction between an initiative formulated as a general proposal and one drafted in precise terms (besides, all the decisions cited above concern initiatives of the latter type). Finally, it does not matter whether the deleted portion can – *per se* and detached from its context – be considered conform to federal law: what is decisive is that the end result of the amendment, together with the consequent improvement that it brings to the text of the initiative as a whole, retains a meaning that can be reasonably ascribed to its authors.

3.2 The modification made by the *Grand Conseil* consisted in removing a dozen or so words (*Public places whose indoor or enclosed premises […] by this provision shall be understood to mean*), retaining the expression "*are covered*", and amending punctuation. Strictly speaking, this does not constitute a partial invalidation – in and of itself, the removed portion is not contrary to superior law – but is rather an editing change intended to take into account *Grand Conseil*'s stated reservations in regard to interpretation. In fact, the *Grand Conseil* could have refrained from making the change, simply indicating instead the way in which it intended to interpret the constitutional norm and give it concrete expression. The amendment makes it possible, however, to formalise the text's conforming interpretation, thereby giving voters the benefit of some transparency. The intervention of the *Grand Conseil* thus cannot be seen as an

inadmissible alteration of the text of the initiative: the meaning has not been modified, it is rather the initiative's scope that has been clarified.

3.3 As regards the alleged distortion of authors' intent, one may ask whether the petitioners have standing to raise such a grievance – their aim being to have the initiative totally invalidated – since that the initiative's authors themselves did not contest the decision of the *Grand Conseil*. The question can remain open, however, as the grievance is manifestly ill-founded.

3.4 Indeed, although the initiative could have originally been interpreted as aiming for an absolute ban on smoking in all public places, it is evident that its authors and signatories would rather have a text accompanied by some exceptions than see the *status quo* maintained as a result of the initiative's total invalidation (ATF 105 I 362 point 9, p. 368). Moreover, it should be pointed out that the essence of the initiative's meaning and purpose has been maintained, namely the prohibition of smoking in nearly all public places. The exceptions envisaged relate only to places intended for private use, in which the problem of second-hand smoke is not so acute. It therefore cannot be claimed, as the petitioners have done, that the *Grand Conseil*'s intervention has distorted the initiative.

In addition, it appears that in a press release of 6 July 2006 the authors of the initiative expressed agreement with Professor Martenet's conclusions by accepting "without reservation the modification as to form … which allows a more precise interpretation of the proposed legislation without altering its substance in any way". On 12 September 2006, the committee behind the initiative gave its full approval to the decision of the *Grand Conseil*, thereby removing any doubts that may have subsisted regarding respect for the authors' intent. The petitioners' first grievance must therefore be dismissed.

4.

The petitioners further contend that despite the modification made by the *Grand Conseil*, IN 129 is still contrary to superior law. While agreeing that cantons have broad competences in the field of health protection, they claim that when it comes to worker protection – which is also covered by the reference to "indoor or enclosed public places" – the initiative encroaches upon the scope of application of the Federal Labour Act and its implementing ordinance, in particular Art. 19 OLT 3 relative to the protection of non-smoker workers.

4.1 Generally speaking, a cantonal popular initiative should not contain any elements that infringe upon superior law, be it cantonal, intercantonal, federal or international (cf. ATF 124 I 107 point 5b, p. 118f). Article 49, para. 1 Cst. prevents the adoption or implementation of cantonal rules that sidestep federal norms or contradict their meaning or spirit, in particular through their purpose or mechanisms for implementation, and of those that encroach on matters already exhaustively regulated by the lawmaker (ATF 130 I 82 point 2.2, p. 86-87, 128 I 295 point 3b, p. 299; 127 I 60 point 4a, p. 68 and cases cited). The presence or absence of exhaustive federal legislation therefore constitutes the first criterion for determining whether there is a conflict with a cantonal rule. However, even if federal legislation in a given area is considered to be exhaustive, a cantonal law can subsist in that same area if its purpose is different from that of federal law (Auer, Malinverni and Hottelier, *Droit constitutionnel suisse*, Vol. 1, Berne 2000, § 1031, p. 364). Nor is the principle of override power violated where a cantonal law strengthens the effectiveness of federal regulations (ATF 91 I 17 point 5, p. 21ff). It is only when federal legislation precludes any regulations in a particular field that the cantons lose their competence to adopt completive provisions, even if these do not run counter to federal law or are consistent with it (cf. ATF 130 I 82 point 2.2, p. 86-87, 128 I 295 point 3b, p. 299).

4.2 Article 118 Cst. governs the Confederation's competences in health protection. In this regard, legal scholars speak of its "*fragmentarische Rechtssetzungskompetenz*", or partial law-making competence, in the field of public health: in other words, the Confederation has the competence to enact health protection provisions only in areas listed exhaustively in paragraph 2 of this article (Häfelin and Haller, *Schweizerisches Bundesstaatsrecht - Die neue Bundesverfassung*, 6th ed., 2005, N° 1185-1187). Within these areas it enjoys "overall competence invested with subsequent override power" (FF 1997 I 338). It can legislate on the use of foodstuffs, therapeutic agents, drugs, organisms, chemicals and objects that can present a danger to health (Art. 118 para. 2 lit. a Cst.), as well as on combating widespread and particularly dangerous diseases (Art. 118 para. 2 lit. b Cst.). These provisions could be used as a basis for federal legislation aimed at providing protection against the effects of second-hand smoke (Jaag and Rüssli, "Schutz vor Passivrauchen: verfassungsrechtliche Aspekte", AJP 1/2006, p. 21ff). The federal lawmaker has made partial use of this competence to regulate – albeit not exhaustively – alcohol and tobacco advertising (ATF 128 I 295). The cantons retain the possibility to enact general rules to protect the population from the effects of second-hand smoke, in any event until the Confederation enacts legislation in this field.

4.3 Under Art. 110 para. 1 lit. a Cst., the Confederation can legislate in the area of worker protection. It made use of that competence by adopting the Federal Labour Act (LTr; RS 822.11), whose provisions on health protection (in particular Art. 6) enjoy extended application (Art. 3a). The petitioners point out that federal regulations are exhaustive as regards shop opening hours, for example (ATF 130 I 279 point 2.3.1, p. 284 and cases cited). This does not mean, however, that the Federal Labour Act alone governs all aspects of worker protection.

Pursuant to Art. 6 para. 4 LTr, Ordinance 3 (OLT 3; RS 822.113) sets forth hygiene measures that all establishments governed by the Federal Labour Act must take. It provides that the employer must ensure, within the limits of the enterprise's possibilities, that non-smoker workers are not inconvenienced by other people's smoke (Art. 19 OLT 3). This provision aims to protect not only workers' health but also their well-being (ATF 132 III 257 point 5.4.1, SJ 2007 173). The protective measures have to be economically bearable for the enterprise and proportional to the need for protection (*idem*, point 5.4.4); however, it is not specified what those measures are.

4.4 Private labour law also contains some protective measures: Art. 342 para. 2 CO [Code of Obligations] requires that provisions of the Federal Labour Act be respected, and Art. 328 para. 2 CO imposes on employers the duty to take appropriate measures to protect workers' life, health and physical integrity.

4.5 Contrary to public and private labour law, initiative IN 129 aims to protect the public as a whole. It pursues a public health and hygiene goal in respect of which – and the petitioners do not dispute this – the canton enjoys its own competence (ATF 128 I 295 point 3d, p. 301 and references cited), at any rate until the Confederation enacts some general legislation on the basis of Art. 118 para. 2 lit. b Cst. (cf. Report of the Federal Council on protection against second-hand smoke, FF 2006 3547, 3565). Prohibiting smoking in public places does have an impact on worker protection but those effects are indirect since the two types of legislation pursue clearly different objectives. Furthermore, while a smoking ban can incidentally – depending on the places where it is applied – overlap with worker protection as envisaged by federal law, instead of hindering the accomplishment of objectives pursued by the Federal Labour Act it will actually facilitate it (ATF 128 I 295 point 3f, p. 303). The grievance must therefore be dismissed.

5.

The petitioners also contend that the initiative constitutes an infringement of personal freedom (Art. 10, para. 2 Cst.). According to them, choosing whether or not to smoke falls within the ambit of personal freedom in the same way as, for example, meeting others at a train station in order to consume alcohol (ATF 132 I 49). Articles 13 Cst. and 8 ECHR are also applicable, they maintain, as is the principle of economic freedom, in so far as the prohibition of smoking could lead to a fall in turnover in the establishments concerned.

5.1 The *Grand Conseil* considers that smoking is not a basic manifestation of personality development and is hence not protected by Art. 10 para. 2 Cst. For the same reason Art. 13 Cst. is not applicable, except in the specific cases of either imprisonment or a long stay in a healthcare establishment or a hotel. Similarly, economic freedom could be invoked only in very specific cases (establishments devoted to smoking) that implementing legislation could take into account. Absent a fundamental right, requirements concerning legal basis and proportionality are inapplicable. As a subsidiary matter, the *Grand Conseil* considers that the amended version of the initiative is sufficiently clear as regards the principle and scope of the smoking ban, and that the necessary exceptions could be detailed in implementing legislation. In its view, the initiative is undeniably in the public interest since it sets forth measures designed to safeguard public health, and no other measure is equally effective in that respect. Furthermore, the ban is consistent with the postulate of the WHO Framework Convention on Tobacco Control of 21 March 2003.

5.2 Personal freedom, a constitutional right enshrined in Art. 10 para. 2 and Art. 7 Cst., is not meant only to ensure freedom of movement or even to protect physical and mental integrity; generally speaking, it guarantees all basic freedoms whose exercise is indispensable for human beings' personal fulfilment and which every human being should enjoy so that human dignity is not adversely affected by state measures (ATF 130 I 369 point 2, p. 373; 124 I 170 point 2a, p. 171-172 and cases cited). It is conceived as a general and subsidiary guarantee that citizens can invoke for the protection of their person or their dignity, in the absence of a more specific fundamental right (ATF 123 I 113 point 4, p. 118).

According to the definition given in case law, personal freedom – which at that time was an unwritten constitutional right – gave citizens very broad protection in their freedom to decide on their way of life, in particular the freedom to organise their leisure

activities, enter into relations with other people and obtain information on what is happening around them or far away from them (ATF 97 I 839 point 3, p. 842). Case law later specified that personal freedom did not guarantee a general freedom of choice and action (ATF 101 Ia 306 point 7, p. 345; 132 I 49 point 5.2, p. 56; 124 I 85 point 2a, p. 86-87) and that it could not be construed as a protection against any type of infringement of physical or psychological integrity (ATF 127 I 6 point 5a, p. 11 and cases cited).

5.2.1 Aside from cases relating to deprivation of freedom and other restrictions on freedom of movement (cf., for example, ATF 130 I 369), case law has recognised – in the name of personal freedom – the right to freely choose a physician in the event of pregnancy termination (ATF 101 Ia 575), the right to certain forms of assisted procreation (ATF 119 Ia 460), the right to know one's parentage (ATF 128 I 63), the right to personal relations (ATF 118 Ia 473 point 6c, p. 483), the right to direct the manner of disposal of one's body after death (ATF 123 I 112). In a recent case it was also held that assembling habitually for the purpose of consuming alcohol was a matter of personal freedom, even though freedom of movement as such was not affected (ATF 132 I 49 point 5.2, p. 56). Case law has also dealt with specific cases pertaining to smoking in prison facilities (ATF 118 Ia 64 point 3i, p. 81), without however deriving a more general right from it.

On the other hand, the following prerogatives have not been recognised by the Federal Supreme Court as basic manifestations of human personality: the right to play with automatic appliances (ATF 101 Ia 336; cf. however decision 1P.780/2006 of 22 January 2007, concerning the use of a games console in prison), the right of a prison inmate to choose his or her physician (ATF 102 Ia 302), the right to keep animals (left undecided in ATF 132 I 7 point 3.2, p. 9-10; decision 5C.198/2000 of 18 January 2001, published in RDAT 2001 II N° 73, p. 289; decision of 5 October 1977 published in ZBl 1978, p. 34, point 4), and the right to navigate on a specific stretch of water (ATF 108 Ia 59). The Court has also held that the right to work and to training did not derive from personal freedom (ATF 100 Ia 189) and that, likewise, quotas under the so-called *clause de besoin* – which could hinder physicians from exercising their profession independently – did not constitute an infringement of personal freedom (ATF 130 I 26 point 9, p. 62). More recently, the Federal Supreme Court affirmed that the consumption of drugs – specifically cannabis – could hardly be seen as a basic condition for personal fulfilment (decision 6P.25/2006 of 27 April 2006, published in EuGRZ 2006, p. 682).

5.2.2 The disparate nature of the cases mentioned above highlights the fact that the scope of personal freedom cannot be defined in general terms but must rather be determined on a case-by-case basis, taking into consideration not only the objectives of freedom and the degree of infringement but also the specific personal situation of the individuals concerned (ATF 108 Ia 59 point 4a, p. 61). The question of whether smoking is a matter of personal freedom – i.e., whether it constitutes a basic manifestation of a human being which is necessary for the latter's fulfilment – therefore cannot be answered *in abstracto*: while for some people smoking is an occasional practice which, like some other habits, is not in any way necessary for personal fulfilment and can be abandoned easily, for other people things are certainly different, especially for heavy smokers for whom smoking can be a genuine need.

5.2.3 Smoking – especially in a public place – brings into play a number of contradictory aspects of personal freedom. For smokers it is a matter of exercising a personal choice, possibly even a way of life, but this immediately clashes with, on the one hand, the harm to their own health and life as a result of smoking and, on the other, the self-imposed restriction on freedom brought on by their dependence on tobacco. From the point of view of persons confronted with second-hand smoke, meanwhile, the issue is naturally one of respect for the right to health and life (Art. 10, para. 1 Cst.). The greater the conflict between these different aspects of personal freedom, the greater the need for ordinary legislation to give them concrete expression by duly weighing and coordinating them: the question cannot be settled by merely defining the field of application of fundamental freedoms (cf. Auer, Malinverni and Hottelier, *op. cit.*, Vol. II, p. 142).

5.2.4 As presented in the initiative, the question is limited to smoking in public places. Now, if it is doubtful that smoking falls within the realm of personal freedom, it is even more doubtful that constitutional law protects the mere possibility of smoking anywhere and at any time, and particularly in public places (cf. Report by the Federal Council cited above, FF 2006 3565-3566).

The issue can remain undecided, however, just like the one concerning protection of the private sphere (Art. 13 para. 1 Cst. and 8 ECHR). Indeed, supposing that one of these fundamental rights could be invoked, under the *Grand Conseil*'s intended interpretation the initiative would in any case meet the conditions on restrictions as set forth in Art. 36 Cst.

6.
The petitioners consider that the text of initiative IN 129 lacks normative precision. According to them, the change made by the *Grand Conseil* does nothing to bring out what is in fact an essential notion, namely "places intended for private use" for which some exemptions should be granted. Without explicit legislative delegation, they say, there is no guarantee that implementing legislation will remedy this lack of precision.

6.1 The requirement for normative precision stems from the principle of legal basis, applicable in the case of restrictions on fundamental rights (Art. 36 para. 1 Cst.). A restrictive rule must in particular be sufficiently precise to allow citizens to appreciate its scope and adapt their conduct accordingly (ATF 124 I 40 point 3b, p. 43 and cases cited).

6.2 The provision being challenged is a norm of constitutional rank. It thus poses no problem of democratic legitimacy since it can be adopted only with the explicit agreement of the people. In addition, one cannot demand from it the same level of precision as from a legislative rule. The constitution is a fundamental norm and, as such, its main function is to define state organisation and structure, apportion competences and lay down principles, and not to regulate each and every matter exhaustively (Aubert, "Notion et fonction de la Constitution", in Thurer, Aubert and Miller (eds.), *Droit constitutionnel suisse*, Zurich 2001, p. 4), even in spheres where fundamental rights might be affected.

All in all, the principle of IN 129 is clear: under Art. 178B, para. 2 Cst./GE, the smoking ban covers all "indoor or enclosed public places". Although the initiative is not very explicit on this point, Art. 178B para. 2 lit. e mentions the adoption of implementing legislation. In fact, enactment of such legislation is inherent in this type of regulation that gives no details on how it is to be put into practice. It seems obvious that a measure as general as the prohibition of smoking in enclosed public places is not directly applicable: it needs to be supplemented by control measures and sanctions, possibly a deadline for introducing the ban, etc.; furthermore, in accordance with the intent expressed by the *Grand Conseil*, the prohibition is to be accompanied by a certain number of derogations and exceptions. Nevertheless, it should be pointed out that, contrary to what Art. 178B para. 1 Cst./GE seems to indicate, these various adjustments cannot be decided directly by the *Conseil d'Etat*. The principle of legal basis authorises delegating such a task to the executive provided, however, that the essential content of the rules is already set forth in a formal law, particularly when individuals' legal status is

seriously affected (ATF 118a 245 point 3, p. 246). In the present case, the constitutional provision does not contain essential points such as exceptions to the smoking ban; these will therefore have to be stated in a law in the formal sense of the term.

This notwithstanding, the simple fact that the constitutional norm must be followed up by implementing legislation does not justify invalidating it completely on account of its alleged lack of precision (ATF 128 I 295 point 5b/aa, p. 309).

7.

According to the petitioners, the main problem posed by the initiative concerns compliance with the principle of proportionality. What renders IN 129 disproportionate, they say, is its failure to set clear exceptions to the smoking ban. Rooted in such a constitutional rule, an implementing law that refrains from providing adequate exceptions could no longer be challenged. The petitioners claim that even when it is interpreted in the way intended by the *Grand Conseil*, the initiative means the end of public establishments like cigar, pipe and water pipe lounges. They also contest the need for a general ban on smoking in public places, affirming that smoking is nowadays proscribed in a sufficient number of places (schools, hospitals, universities, public transport, government offices, enterprises and many restaurants) and that social disapproval of smoking is a sufficient deterrent. According to them, the initiative does not bring about a significant change in the factual situation, while in law it constitutes a serious infringement of freedom.

7.1 The principle of proportionality requires that a restrictive measure be likely to achieve the intended results (rule of likelihood) and that the latter cannot be attained through a less invasive measure (rule of necessity); in addition, it prohibits any limitation that exceeds the objective sought, and requires a reasonable relationship between the objective and the public or private interests infringed upon (principle of proportionality in the strict sense, entailing a weighing-up of interests – ATF 130 II 425 point 5.2, p. 438f; 126 I 219 point 2c, p. 221ff and cases cited).

7.1.1 The petitioners do not contest the fact that the initiative "Second-hand smoke and health" is motivated by a public-interest objective. As evidenced by its title, the initiative aims to protect the whole population from exposure to tobacco smoke in indoor and enclosed public places. The tenor of Art. 178B para. 1 Cst./GE is in substance the same as that of Art. 8 of the WHO Framework Convention on Tobacco Control, of 21 May 2003, which reads as follows:

> Protection from exposure to tobacco smoke
>
> 1. Parties recognize that scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease and disability.
>
> 2. Each Party shall adopt and implement in areas of existing national jurisdiction as determined by national law and actively promote at other jurisdictional levels the adoption and implementation of effective legislative, executive, administrative and/or other measures, providing for protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, other public places.

Switzerland signed this Convention on 25 June 2004; the Federal Council [Executive] thereby wished to show its willingness to adopt the WHO plan, with a view to formulating a ratification message before the end of the legislative term in 2007. As soon as this multilateral treaty – WHO's first legally binding treaty – is ratified, recognition of the harmful effects of tobacco smoke will constitute an international obligation for Switzerland. After all, this is undeniable since it is widely recognised that second-hand smoke can cause lung disease, cardio-vascular disease, asthma and respiratory infections. According to conservative estimates, several hundred non-smokers die in Switzerland every year because of second-hand smoke. Foetuses and infants are at particularly high risk (OFSP, *Informations de base sur le tabagisme passif*, May 2006, with numerous references; cf. also Report of the Federal Council on protection from second-hand smoke, FF 2006 3547 and references cited). A sufficiently high number of scientific studies have attested to the harmfulness of second-hand smoke to warrant it being considered a reflection of the current state of science and not, as the petitioners seem to claim, a short-lived trend or a simple expression of political correctness. It appears that in Switzerland a quarter of non-smokers are exposed to environmental tobacco smoke for at least one hour a day. Among non-smokers aged between 14 and 65 years, 86% are exposed to second-hand smoke in public places, and most of them find it highly bothersome. According to the same sources, it is for this reason that 26% of the population avoid frequenting these places. The initiative therefore pursues an unquestionable public health objective.

7.2 The petitioners do not dispute the fact that a smoking ban is indeed likely to achieve the desired result. However, they invoke the principle of adequacy, affirming that one should take into account the fact that, on the one hand, prohibitions on smoking

in public buildings are becoming more widespread and, on the other, that growing social pressure is having an undeniable impact on smokers' behaviour.

Nevertheless, this should not lead to the conclusion that introducing binding legislation would be useless: indeed, it appears that in restaurants, cafés and bars in particular, exposure has not changed significantly since 2001-2002, while the proportion of persons inconvenienced by smoke has increased (OFSP, *op. cit.*, p. 4). Social disapproval invoked by the petitioners therefore does not seem to constitute a significant diminution factor; at any rate, it does not have the same – general and immediate – effect as a formal prohibition of smoking in public places. What is more, the petitioners do not claim that other solutions, such as designated smoking areas or corners, variable times or ventilation of premises would lead to an identical outcome. These measures are encumbered by difficulties related to their cost, implementation and monitoring; a smoking ban, on the other hand, is not just free from such constraints but has decisive advantages in respect of the intended objective: only a clear, unambiguous rule can bring about a real change in habits while at the same time averting numerous difficulties of interpretation and application.

7.3 The parties agree that in order to conform to the principle of proportionality in the strict sense, a general ban on smoking in public places must provide some exceptions. Due account should be taken of specific situations where a person wishing to smoke is set to spend a certain length of time in an enclosed space that he or she cannot leave or cannot leave easily, which for the person concerned would be tantamount to a permanent smoking ban. This concerns prison inmates and residents of healthcare establishments most of all. The case of public places put to private use should also be reserved because, on the one hand, in such places (hotel rooms and other lodgings) the problem of second-hand smoke is less acute and, on the other, in such situations the occupants can invoke a right to the protection of privacy.

The petitioners disregard the fact that the changes made to the text of the initiative are intended precisely to take those special cases into account and to allow the rules to be relaxed, as required by the principle of proportionality. It is true that at first sight the editing change adopted by Geneva's *Grand Conseil* does not improve the text significantly: as in the original wording, Art. 178B para. 3 indicates that the places mentioned are "covered" by the smoking ban declared in the preceding paragraph. Nevertheless, according to the idea expressed by the author of the legal opinion accepted by the majority of the legislative Commission and later by the *Grand Conseil*, the

amendment was designed to affirm that the places mentioned in Art. 178B para. 3 are covered but only *to the extent that* they have to be considered as public. This would make it possible to exclude parts of buildings that are exclusively or predominantly in private use. Although such relaxing of rules is not immediately obvious on reading the adopted text, the *Grand Conseil* has thereby already manifested its intention concerning interpretation of the constitutional provision and the drafting of implementing legislation. Indeed, interpretation of the constitutional provision will have to be based on preparatory parliamentary work and on the intentions expressed clearly on that occasion (ATF 121 I 334 point 2c, p. 338). The amendment thus introduces the possibility of the provision's interpretation and application conforming to superior law, where applicable.

7.4 The *Grand Conseil* has also taken into consideration possible infringements of economic freedom, which includes in particular the free exercise of a lucrative activity (Art. 27, para. 2 Cst.).

A ban on smoking in public establishments such as restaurants, bars and hotels does not directly affect their operators in the free exercise of their profession. In fact, it has not been shown that prohibiting smoking will lead to a fall in turnover (cf. FF 2006, p. 3553, note 9). It is true that a smoking ban precludes the operation of establishments that are exclusively dedicated to tobacco consumption (cigar or water pipe bars). In these places, frequented exclusively by smokers (with the exception of employees, whose protection falls under the Federal Labour Act, as we have seen), the problem of second-hand smoke does not arise in quite the same terms, which could also justify a derogation from the law; there is also the possibility of turning these establishments into private clubs. These adjustments too can be provided in implementing legislation.

7.5 In view of the above, the lawmaker will have a broad power of appreciation to adapt the smoking ban to different situations where adjustments are required. The petitioners' fear that the disproportionate character of the constitutional rule will find its way into the future law and that the latter will thus not be open to a subsequent challenge, appears to be ill-founded. The grievance must therefore be dismissed.

8.

Lastly, the petitioners claim that the text of the initiative as amended by the *Grand Conseil* is not sufficiently clear to allow voters to grasp the import of the text submitted to them, that IN 129 can only be understood as an absolute ban, and that the possibility

of exemptions is only a supposition regarding the way in which the initiative will be implemented through legislation.

8.1 Pursuant to Art. 34 para. 2 Cst., the guarantee of political rights protects the free formation of opinion by the citizens and the true and faithful expression of their will. Elections and votes must be organised in such a way that voter intent can be exercised freely and without outside pressure or influence (ATF 129 I 185 point 5, p. 192; 121 I 138 point 3, p. 141 and references cited). In particular, questions submitted to a vote must be properly worded: they must not be misleading or drafted in a way that influences the citizens' decision (ATF 106 Ia 20; 131 I 126 point 5.1, p. 132).

8.2 In the present case, there is nothing unusual or misleading about the matter submitted to Geneva voters: the text of the initiative is clear as to the principle; it is less clear with regard to the possibility of granting exemptions through legislative means, but this could be, if appropriate, drawn to the voters' attention in the explanatory message. The petitioners are concerned that the initiative might be approved both by citizens favourable to an outright ban and by those wishing for less restrictive measures. It is obvious that the text of the initiative as amended and interpreted by the *Grand Conseil* is likely to garner greater approval among the population. However, this is not a result of manipulation or infringement of the citizens' right to choose: the *Grand Conseil* intervened in the interests of respect for superior law and with the aim of preventing a total invalidation, which corresponds to the tasks assigned to it under Art. 66 Cst./GE. This last grievance must therefore also be dismissed.

9.
In view of the above, the constitutional complaint must be rejected. The complaint pertaining to violation of political rights, there are no procedural costs and there is no award of attorney fees.

For the above reasons, the Federal Supreme Court declares as follows:

1.
The complaint is rejected.

2.
There are no procedural costs and there is no award of attorney fees.

3.
Copy of the present decision is notified to the petitioners' counsel and to the *Grand Conseil* of the Canton of Geneva.

Lausanne, 28 March 2007

For the First Public Law Chamber
of the Swiss Federal Supreme Court

President:
(signed)

Clerk of the Court:
(signed)

(seal of the Swiss Federal Supreme Court)

ABBREVIATIONS

AJP	*Aktuelle Juristische Praxis* / *Pratique juridique actuelle* (PJA)
ATF	*Arrêt du Tribunal fédéral* (Decision of the Federal Supreme Court)
CO	*Code des Obligations* (Code of Obligations)
Cst.	*Constitution fédérale* (Federal Constitution)
Cst./GE	*Constitution du Canton de Genève* (Constitution of the Canton of Geneva)
ECHR	European Convention on Human Rights
EuGRZ	*Europäische Grundrechte-Zeitschrift*
FF	*Feuille fédérale* (Federal Gazette)
LTF	*Loi sur le Tribunal fédéral* (Federal Supreme Court Act)
LTr	*Loi fédérale sur le travail dans l'industrie, l'artisanat et le commerce (Loi sur le travail)* (Federal Act on Labour in Industry, Trade and Commerce – Federal Labour Act)
OFSP	*Office fédéral de santé publique* (Federal Office of Public Health)
OJ	*Loi fédérale d'organisation judiciaire* (Federal Act on the Organisation of the Judiciary)
OLT 3	*Ordonnance relative à la Loi fédérale sur le travail dans l'industrie, l'artisanat et le commerce* (Ordinance relative to the LTr)
RDAT	*Rivista di diritto amministrativo e tributario ticinese*
RO	*Recueil officiel du droit fédéral* (Official collection of federal law – chronological)
RS	*Recueil systématique* (Systematic collection of federal law – by subject)
SJ	*Semaine judiciaire* (Weekly court bulletin)
ZBl	*Schweizerische Zentralblatt für Staats- und Verwaltungsrecht*