

DECISION 10 OF 1992: 25 FEBRUARY 1992

ON POWERS *EX NUNC*

The petitioners sought constitutional review and annulment of s.43 of Act XXXII of 1989 on the Constitutional Court.

Section 43(1) provides that a legal rule declared null and void by the Constitutional Court may not be applied commencing from the date the Court's decision is published in the *Hungarian Official Gazette* (*i.e.*, it is effective prospectively, *ex nunc*).

The petitioners submitted that, on the basis of legal certainty, a violation of the Constitution could only be remedied by a retroactive (*i.e.*, *ex tunc*) nullification. Legal certainty was infringed by an *ex nunc* invalidation since this left intact legal relationships which had come into existence on an unconstitutional basis.

Held, rejecting the petition:

(1) Legal certainty, as part of the rule of law under Art. 2(1), was not violated by *ex nunc* invalidation of an unconstitutional legal rule which thereby left intact those legal relationships which had come into existence on a (now) unconstitutional basis. Considerations of legal certainty were separate from those of the nullity of a legal rule especially concerning legal relationships created on the basis of unconstitutional legal rule. Specific legal relationships and legal facts became independent of the underlying basic norms: thus they did not share

automatically the fate of those norms, otherwise every change in a legal rule would involve the review of all relevant legal relationships (page 00, lines 00-00; page 00, lines 00-00).

(2) Legal certainty had been borne in mind when drafting the Constitutional Court Act. In harmonising the principle with the constitutional reviewability of all laws in force, the Act provided that legal rules would lose their validity upon the date of publication of the decision determining their unconstitutionality and that legal relationships created prior thereto were to remain intact. Intervention into the latter relationships was legally permitted only if such intervention was demanded by another rule of law principle competing with that of legal certainty. For example, in harmony with fundamental principles of constitutional criminal procedure, s. 43(3) of the Act mandated the review of a final judgment in criminal proceedings for the benefit of a convicted person. In principle this would be detrimental to legal certainty were the provision not to state that it was applicable only if the detrimental consequences of the punishment were still in force (page 00, lines 00-00; page 00, lines 00-00).

IN THE NAME OF THE REPUBLIC OF HUNGARY!

In the matter of the petition seeking an *ex post facto* examination of the unconstitutionality of a legal rule, the Constitutional Court has made the following

DECISION.

The Constitutional Court rejects the petition seeking a determination and declaration of nullity of s. 43 of Act XXXII of 1989 on the Constitutional Court.

The Constitutional Court rejects the petition seeking a modification of its *Dec. 27 of 1991 (V.20) AB* (MK 1991/53) and, furthermore, the retroactive nullification of previously invalidated legal rules.

The Constitutional Court orders the publication of this Decision in the *Hungarian Official Gazette*.

REASONING

I

The petitioners consider unconstitutional that regulation of s. 43(1) of Act XXXII of 1989 on the Constitutional Court (hereinafter referred to as "the Constitutional Court Act") which prescribes as the chief rule that a legal rule declared null and void by the Constitutional Court may not be applied commencing from the date of the Decision's publication in the *Official Gazette* (i.e., it is effective *ex nunc*). It is the petitioners' contention that a violation of the Constitution may only be effectively remedied by a retroactive (i.e., *ex tunc*) nullification of the legal rule violating the Constitution. In their brief the petitioners do not cite particular constitutional provisions which, in their view, contradict the legal rule they challenge but, instead, they invoke the principle of legal certainty. It is their contention that legal certainty is violated by the fact that an *ex nunc* invalidation of an unconstitutional legal rule leaves intact legal relationships which came into being from an unconstitutional foundation.

II

The Constitutional Court holds that the consequences of the unconstitutionality of a legal rule, as defined by s. 43 of the Constitutional Court Act are, indeed, connected with the requirement of legal certainty which is to be regarded as part of the rule of law declared by Art. 2(1) of the Constitution. The question is, therefore, whether s. 43 of the Constitutional Court Act is contrary to Art. 2(1) of the Constitution.

According to Art. 32/A(2) of the Constitution, in the event of a determination of unconstitutionality, the Constitutional Court nullifies the statutes and legal rules. The Constitutional Court Act defines the consequences of the determination of unconstitutionality by using three different terms: the Constitutional Court nullifies the legal rule (s. 40), in which case the legal rule loses its validity on the day of the publication of the Decision (s. 42(1)) and from that day onward it may not be applied (s. 43(1)). The chief rule, therefore, is invalidation *ex nunc*; s. 43(2) supports this conclusion by also stating separately that the nullification of a legal rule does not affect the legal relationships arising prior to the publication of the Decision, or the rights and duties arising therefrom.

As an exception from this rule, s. 43(4) of the Constitutional Court Act renders possible for the Constitutional Court to invalidate a legal rule *ex tunc*, that is retroactively, or even to determine invalidation as being effective from a future date.

The same paragraph also provides that where the unconstitutional legal rule is being applied to a concrete dispute the Constitutional Court may even decide its applicability contrary to the chief rule, that is it may determine the consequences of the unconstitutionality for certain legal relationship on a case-by-case basis, retroactively as well as prospectively. However,

concerning the consequences of an unconstitutional legal rule serving as the basis for a final judgment in a criminal proceeding, the Constitutional Court is compelled to arrive at a single conclusion: the court must order a review of the judgment if the convicted person has not yet received relief from the detrimental repercussions and if the nullification of the legal rule applied in the case would lead to a reduction of the punishment or an exculpation from criminal liability (s. 43(3)).

The Constitutional Court Act regulates the consequences of the unconstitutionality of a legal rule, with respect to the unconstitutional legal rule itself as well as concerning the legal relationships previously created thereon. This topic is not identical to the problem of nullity. (Such a question of nullity is, for instance, whether a legal rule contrary to the Constitution is, in principle, null and void or merely voidable; whether a legal rule contrary to the Constitution, already upon its enactment, comes into being as a legal rule at all; whether a Constitutional Court decision merely determines the existence of nullity; what is the relationship between the normative nullity of a legal rule and its actual coming into force). Since nullity differs from annulment, petitioners' reasoning that annulment must conceptually be exclusively retroactive is not sound. Annulment, which in legal parlance always means a legal constitutive decision, may be either *ex nunc* or *ex tunc* and, indeed, it may even designate a date subsequent to the publication of the Decision. In contrast, nullity is a quality which exists from the beginning, *ab initio*, with respect to which it is meaningless to pose questions concerning the timing of a legal impact.

The Constitutional Court Act takes no position on theoretical and legal dogmatic problems concerning nullity. Nor is there a need to do so in the Constitutional Court's view since

a dogmatic classification of nullity has no decisive influence on the issue whether deriving legal consequences from unconstitutionality is itself constitutional.

Different considerations govern the norm-doctrinaire classification of nullity than the practical arrangement of the consequences of nullity in a manner which leave intact where possible the existing rights and concluded legal relationships. The consequences of the unconstitutionality of a legal rule must be ordered in such a way that it really leads to legal certainty and this constitutional requirement is more important than the consistent application of the principle of nullity. Following a given doctrine of nullity serves legal certainty at most in principle only by being suitable for some non-contradictory descriptive theory of the legal system. Considerations of legal certainty diverge from that of the nullity of a legal rule especially concerning legal relationships created on the basis of the unconstitutional legal rule. Specific legal relationships and legal facts become independent of the underlying basic norms and they do not automatically share the fate of the latter. Were this otherwise, every change in a legal rule would involve the review of the multitude of legal relationships.

This is the reason why foreign laws regulating constitutional courts either address only the legal consequences of unconstitutionality, or -- if a theoretical position concerning nullity may be discerned in their regulation -- they do not address every conceivable consequence and, in the interest of legal certainty, they have separate provisions addressing those legal relationships which came into being from the null and void legal rules. In the area of the Constitutional Court's norm control the requirement of legal certainty may be satisfied in a variety of ways. One may imagine a system where only the constitutionality of "new" legal rules may be examined, that is only a short period of time is provided for challenging a legal rule upon its coming into force. It is possible that a law permits only a prospective invalidation of a legal rule. Another known

solution is whereby the constitutional court act mandates that the constitutional court determines the "nullity" of a legal rule but the Act does not permit the consequences of this decision to be given effect to already-concluded legal relationships.

The regulation by the Constitutional Court Act is in harmony with the requirement of legal certainty. The Constitutional Court Act does not impose restrictions on the challenging of legal regulations by their date of coming into force, the constitutionality of any legal rule may be subject to enquiry irrespective of the duration of its being in force or the multitude of legal relationships which were built upon them. In the interest of legal certainty such a free hand in intervening in past legal situations must be counterbalanced by some restrictions. Such a treatment of the past is made especially justified by the fact that almost simultaneously with the passing of the Constitutional Court Act the Constitution was comprehensively amended; thus the legislature had to be aware that the Constitutional Court would also review legal rules enacted prior to the constitutional amendment, based upon the new Constitution. Yet it would work to the detriment of legal certainty if as the chief rule the Constitutional Court would nullify such legal rules with retroactive force which came into being prior to the Constitution now in force, and if as a result of this retroactivity such legal relationships would have to be regarded as invalid which came into being at a time when the divergent value system and rules of the Constitution now in force were not foreseeable. Thus, it was precisely legal certainty which the Constitutional Court Act considered, and regulated in harmony with the constitutional reviewability of all the laws in force, when it made the chief rule that unconstitutional legal rules lose their validity upon the day of publication of the decision determining their unconstitutionality and that legal relationships created previously would remain intact.

Concurrently, the Constitutional Court Act renders it possible for the Constitutional Court to diverge from the rule of *ex nunc* invalidation if in a given case a different date would better serve legal certainty. For instance, in order to avoid a legal vacuum the Constitutional Court frequently provides time for the enactment of new regulations with its prospective nullifications. The Constitutional Court has an opportunity to exercise *ex nunc* invalidation as well, just as it may apply the consequences of unconstitutionality to specific legal relationships. Thus, by law the Constitutional Court may exercise these prerogatives in the interest of legal certainty and it may consider the especially important interests of a petitioner -- the latter evidently employed in the event of a constitutional complaint. Intervention into already concluded legal relationships is prescribed by law only in the event such intervention is demanded by another rule of law principle competing with that of legal certainty. It is in such a manner, in harmony with the fundamental principles of constitutional criminal procedure, s. 43(3) of the Constitutional Court Act mandates the review of a final judgment in criminal proceedings for the benefit of a convicted person. In principle this is detrimental to legal certainty. The contradiction is solved by the Constitutional Court Act in stating that s. 43 is applicable only if the detrimental consequences of the punishment are still in force.

III

With respect to the petitioners' request that the Constitutional Court modify a previously delivered Decision, the Constitutional Court determines that it lacks the jurisdiction. According to s. 27 of the Constitutional Court Act a Decision of the Constitutional Court may not be appealed and the Decision of the Constitutional Court is binding on everyone. In the event the

Constitutional Court's position changes regarding some legal question this will be expressed in a new Decision delivered on another occasion. It is an entirely different matter that with respect to certain mistakes (misspellings, for instance) the Constitutional Court has an opportunity for correcting its decision (*Dec. 20 of 1990 (XI.27) AB (MK 1990/98)*). But the petitioner here requests the Constitutional Court to review its position on a legal question in the form of modifying a previous Decision. For this reason the Constitutional Court rejects this part of the petition.

The petitioners sought the *ex tunc* nullification of the previously invalidated legal rule affecting detrimentally the property and personality of Hungarian citizens who have left the country illegally. The jurisdiction of the Constitutional Court in the event of an abstract norm control extends only to a constitutional review of those legal rules which are in effect at the time of the judicial enquiry. A constitutional review of a legal rule already invalidated is possible only if in a concrete case such an enquiry is initiated by a judge, pursuant to s. 38 of the Constitutional Court Act, concerning the constitutionality of a case pending before him or her (*Dec. 34 of 1991 (VI.15) AB (MK 1991/65)*), or if the question of the applicability of the already invalidated legal rule is raised pursuant to a constitutional complaint. In the present case neither condition is met and for this reason the Constitutional Court rejects the petition seeking a review of the constitutionality of previously invalidated legal rule and its retroactive nullification.