

DECISION 21 OF 1990: 4 OCTOBER 1990

ON COMPENSATION FOR EXPROPRIATED PROPERTY:

"COMPENSATION CASE I"

The Prime Minister petitioned for an advisory opinion on the constitutionality of certain legal provisions of the privatization programme.

He requested (a) whether compensation procedures to provide for certain people's former property to be reprivatized while other people's property would not be returned to them amounted to discrimination contrary to Constitution, Art. 70/A. According to the Government, the general principle of privatisation was that state property was sold to new owners in exchange for payment while former owners received partial compensation. The settlement of land ownership would be an exception to these principles because in such questions either the original land would be returned in kind or other land offered in exchange; and (b) whether, in the context of the Constitution, Arts. 12 and 13, it was constitutional to take land from co-operatives without expropriation proceedings and compensation. Within the government's framework of reprivatization, arable land in the possession of the co-operatives, which had not been acquired in the manner prescribed by the Civil Code, would serve as the basis for reprivatization without any compensation.

Held, giving the following opinion:

(1) According to Art. 70/A(1) and in the absence of constitutional reasons, if the property of certain people were to be reprivatized while that of others was not - depending on the type of

property - this would amount to discrimination in relation to the acquisition of property. In examining the Government's privatization programme, it was necessary to clarify the conceptual uncertainty concerning the relationship between privatisation, reprivatisation and compensation. Privatisation involved the assignment of state property into private ownership while reprivatisation was the return of assets formerly owned by private persons but currently in the possession of the State. The term "compensation" was, however, used in a special sense by the Government: the sole legal basis for the partial compensation was fairness, the State was not obliged to pay such compensation and no former owner had the subjective right to receive it since it depended solely on a sovereign state decision (page 00, line 00 - page 00, line 00).

(2) It was then necessary to consider two types of discrimination, first between the former owners and non-owners and then between the former owners according to the type of property. The constitutionality of the discrimination between former and non-owners depended on whether it had been weighed with the same degree of prudence and impartiality. If it were the case that, with the preferential treatment of former owners, the distribution of state property would produce a more favourable overall social result than equal treatment would, then this would be permissible. In the latter situation, it was necessary to ascertain whether the right of other former owners had had their interests considered as thoroughly and impartially as those of former landowners in order to reveal the objective basis of the discrimination between former owners. Further it had to be proved that former non-landowners had to be put into a disadvantageous position in order to achieve equality of persons as completely as possible in the future market economy. On its interpretation of Art. 70/A, the discrimination in the Act under consideration would accordingly be unconstitutional (page 00, line 00 - page 00, line 00).

(3) The taking of property from co-operatives, even by virtue of law, without immediate, unconditional and full compensation violated Constitution, Arts. 12(1) and 13. The recognition by the State under Art. 12(1) that co-operatives were independent included the recognition that they had the right to property although the Constitution did not expressly provide for co-operative property. Article 9(1) provided a ban on discrimination against any forms of ownership and further, under Art. 13, constitutional protection was also extended, *inter alia*, to the unnamed property of business associations. As co-operatives and agricultural co-operatives were a form of business association, irrespective of the fact that they were not regulated by the Act on Business Associations, the property of agricultural co-operatives (including arable land) enjoyed constitutional protection similar to that of the property of business associations. Consequently Arts. 12(1) and 13(1) read together guaranteed the right to property including the right of agricultural co-operatives to the arable land they owned. Since property could be taken by a single official decree or by virtue of law only with immediate, unconditional and full compensation, the Government's proposal was therefore unconstitutional (page 00, line 00 - page 00, line 00).

IN THE NAME OF THE REPUBLIC OF HUNGARY!

Concerning the petition of the Prime Minister made on behalf of the Government on the interpretation of the Constitution, the Constitutional Court has made the following

DECISION.

The Constitutional Court interprets Art. 70/A of the Constitution - with a view to Arts. 9 and 13(1) - to mean that according to Art. 70/A(1) there is discrimination against persons if, in the absence of constitutional reasons, the property of certain persons is reprivatized while the property of others is not, depending on the type of property. Such discrimination is unconstitutional.

The Constitutional Court understands Art. 12(1) in conjunction with Art. 13(1) to mean that the Republic of Hungary guarantees for agricultural co-operatives, the right to the arable land they own. Article 13(2) of the Constitution on expropriation is a guarantee provision that is applicable to the taking of property not only by a single official decree but also by virtue of law. Property may be taken either by a single official decree or by virtue of law only with immediate, unconditional and full compensation. Takings without immediate, unconditional and full compensation are, therefore, unconstitutional.

REASONING

I

Under s. 1(g) of Act XXXII of 1989 on the Constitutional Court, the Prime Minister of the Republic of Hungary on behalf of the Government petitioned the Constitutional Court to interpret the following:

1. Article 70/A of the Constitution - with a view to Art. 9 and Art. 13(1) : whether it constitutes discrimination according to Art. 70/A of the Constitution if certain persons' former property will be reprivatized, depending on what they owned, while other people's property will not be returned to them because of the different privatization and compensation principles.

According to the petition, the Government from the viewpoint of the transformation of the ownership system considers privatization to be its basic goal, the achievement of which requires the enactment or revision of several Acts. In this sphere, the Government considers new owners receiving property from state property in exchange for payment, while former owners receive partial compensation, as a general principle of privatization. The settlement of land ownership would be an exception to these principles, because in questions of land ownership either the original land would be returned in kind - *i.e.*, the original ownership would be restored - or other land would be offered in exchange.

2. Article 13 of the Constitution in conjunction with Art. 12 of the Constitution: whether it is possible on the basis of law to take land from co-operatives without expropriation proceedings and compensation.

According to the petition, within the framework of the reprivatization of arable land, arable land in the possession of the co-operatives which was not acquired in the manner determined by the Civil Code would serve as the basis for reprivatization without any compensation.

A

II

According to Art. 70/A(1) of the Constitution, the Republic of Hungary shall insure for all persons in its territory human and civil rights without discrimination on account of race, colour, sex, language, religion, political or other views, national or social origins, ownership of assets, birth or any other ground.

Paragraph (2) says: "Any discrimination of people falling within para. (1) shall be strictly punishable by law."

Paragraph (3) provides: "The Republic of Hungary shall promote the attainment of equality before the law with measures aimed at eliminating inequalities of opportunity."

Article 9(1) says: "The economy of Hungary is a market economy in which public and private property shall receive equal consideration and protection under the law," while according to para. (2): "The Republic of Hungary shall recognize and support the right to enterprise and the freedom of economic competition."

According to Art. 13(1) : "The Republic of Hungary shall guarantee the right to property."

III

In its *Dec. 9 of 1990 (IV.25) AB* (MK 1990/36), the Constitutional Court has interpreted the ban on discrimination contained in Art. 70/A(1) of the Constitution. It established among other principles, that "the ban on discrimination does not mean that any discrimination, including even discrimination intended to achieve a greater social equality, is forbidden. The ban on discrimination means all people must be treated as equal (as persons with equal dignity) by law - *i.e.*, the fundamental right to human dignity may not be impaired, and the criteria for the

distribution of the entitlements and benefits shall be determined with the same respect and prudence, and with the same degree of consideration of individual interests."

In the quoted decision, the Constitutional Court also expressed its view that "the right to equal personal dignity may occasionally result in another right - *i.e.*, assets and choices must be distributed (even qualitatively) equally to everyone. If, however, a social purpose not in conflict with the Constitution, or a constitutional right may only be achieved if equality in the narrower sense is not met, then such a positive discrimination shall not be declared unconstitutional. The limitation upon positive discrimination is either the ban on discrimination against equal dignity in the broader sense of the word, or the protection of the fundamental rights which are positively expressed in the Constitution. Social equality as a purpose or as a social interest may take precedence over individual interests but not, however, over the constitutional rights of the individual."

The Constitutional Court also adhered to this interpretation when making this Decision.

IV

Point 1 of the Government petition asks whether it constitutes discrimination between the former owners when, depending on the kind of property, some of them are given back their former properties, while others are not, during the process of reprivatizing state property.

The permissibility of any limitations upon constitutional rights may be judged only on the basis of arguments which address the unavoidability of the limitations in a particular case.

Arguments in support of the discrimination between the former owners are not included in the petition.

However, the Constitutional Court has taken into consideration that the question itself implies that it should be examined in relation to the Government's privatization programme; furthermore, that the privatization of state property through sale, to anyone theoretically, is a principal rule in this programme. The former owners of assets that are now in the property of the State will receive partial compensation. Land ownership is an exception to these principles because the original ownership would be restored in kind.

From the wording of the petition it may be inferred that in the case of former owners of assets other than land, the return of assets in kind would be substituted by partial compensation: "their property" will not be returned to them due to the different privatization and compensation principles"

These explanations do not contain an assessable cause for the discrimination, moreover, they reflect conceptual uncertainty concerning the relationship between reprivatization, privatization and partial compensation.

Because of the foregoing, the Constitutional Court will first clarify the concepts utilized for the interpretation of the Constitution.

(a) Privatization involves the assignment of state property into private ownership. Reprivatization is the return to their former owners of assets previously owned by private persons but presently in the possession of the State. Both privatization and reprivatization may be either gratuitous or in exchange for payment; the difference is among those who are entitled.

The State may privatize or reprivatize those assets that are in its possession. Both privatization and reprivatization are decisions of ownership. It follows from Art. 10(2) of the Constitution that the right of the State to privatization and reprivatization is theoretically unlimited, and this right derives solely from the freedom of ownership. Therefore, no one has the subjective right to privatization or reprivatization without a relevant State decision or under conditions other than those contained in such a decision.

The interpretation of the Constitutional Court concerns legally-sound state property.

The Constitutional Court notes that it is now examining the constitutionality of the different legal rules concerning nationalization. The Constitutional Court refers to ss. 40-43 of Act XXXII of 1989, especially to the provision that the annulment of a legal rule - as a principal rule - does not affect legal relations and the rights and obligations deriving therefrom that came into effect prior to the publication of the decision. Any deviation from this rule may be declared only by the Constitutional Court on the basis of its discretionary powers, if it is justified by legal certainty or if a particularly important interest of the petitioner is attached to it.

(b) Compensation, according to general legal usage is the remedy for legitimately caused disadvantages and damages, including the remedy for the taking of property, as opposed to the payment of damages for illegitimately caused damages. One that causes damage is legally obliged to pay damages, while the person suffering from damage has the subjective right to receive damages. The word "compensation" is not used in this usual sense in the Government's petition for the interpretation of the Constitution.

The sole legal basis for the partial compensation planned by the Government is fairness: the State is not obliged to pay such compensation, and no one has the subjective right to receive such compensation. Just as reprivatization is not a claim resulting from nationalization or the

organization of co-operatives, compensation is not that either; it solely depends on a sovereign state decision.

It is not only the seized property that is the basis for the planned Government compensation, but also the injuries sustained in general. Gratuitous reprivatization and compensation may be different versions of political compensation, however, they are legally independent and their legal settlement occur in completely different contexts (the establishment of the market economy, the mitigation of damage sustained). Discrimination within one may not be counterbalanced by reverse discrimination in the other. Therefore, during the assignment of state property into private ownership, the preference of the former landowners may not be equated with the fact that they do not receive compensation. The restoration of original ownership of land, and the partial financial compensation of the owners of other assets may not be regarded as different methods of the same compensation.

(c) The question to be answered is whether the reprivatization of land ownership, with a view to the reprivatization of other state-owned assets, involves discrimination that conflicts with Art. 70/A of the Constitution.

The position of the Constitutional Court is that, in this particular case, differentiating on the basis of the type of the property becomes discrimination against persons since it relates to the acquisition of property.

The question includes two partially overlapping kinds of discrimination: discrimination between the former owners and non-owners, on the one hand; and discrimination between the former owners according to the type of the property.

In *Dec. 9 of 1990 (IV.25) AB (1)*, the Constitutional Court declared that the ban on negative discrimination included in Art. 70/A of the Constitution was not absolute: departure from it is allowed according to the stipulations of that decision.

(a) Article 70/A of the Constitution prohibits discrimination in connection with human rights or the rights of citizens. In the Constitutional Court's opinion the State's guarantee of the right to property [Art. 13(1) of the Constitution] also embraces the right to acquire property. In the given context, the right to enterprise must also be taken into consideration because privatization, including the privatization of land, primarily serves the formation of an entrepreneurial economy.

(b) The question whether discrimination remained within constitutional limits may only be examined in the objective and subjective context of the current rules because the same criterion - *e.g.*, "landowner" - may constitute discrimination, depending on the context. Equality shall exist in reference to the essential element of a given state of facts. If, however, a different rule applies to a group within a given regulatory scheme, this will be in conflict with the ban on discrimination, unless there is sufficient constitutional justification for the difference. By assignment of state property into private ownership, the State fulfills the duty to create a socially-aware market economy, set forth as an aim in the preamble to the Constitution. However, as an owner, the State acts freely in deciding how to support private property, even when it comes to assigning its own property.

If, however, during the assignment of state property into private ownership, the State differentiates between and treats the former owners differently by establishing different

conditions for the acquisition of property and, what is more, it further differentiates within the group of former owners, then it will only violate Art. 70/A of the Constitution if its arguments fail to meet the conditions of permissible positive discrimination.

The constitutionality of the discrimination depends on whether the discrimination between owners and non-owners is realized in a procedure where the interests of former owners and non-owners have been weighed with the same degree of prudence and impartiality. In the review of such a possibility, former owners just like non-owners have the right to equal treatment and to have their interests judged with the same degree of attention and fairness, rather than a right to a share in the state property. Without this, the discrimination violates the Constitution.

Even if the above considerations are flawless, the discrimination is only unconstitutional if the gratuitous property acquisition, granted to former owners, and property acquisition by others in exchange for payment, ultimately fails to establish equality between the private owner participants in the market economy to be developed. If it can be proved that with the preferential treatment of former owners, the distribution of state property will yield a more favourable overall social result than equal treatment would, and if it follows inexorably from the facts that another non-discriminatory procedure against the non-owners would be far from this result, then non-owners could not claim their rights ensured by Art. 70/A of the Constitution were violated. The criterion of discrimination - *i.e.*, the former ownership situation - would not be unconstitutional if it logically followed from the above arguments.

The same examination must be made in order to decide whether discrimination between the former owners by the type of property - *i.e.*, if only real property is reprivatized - is in conflict with Art. 70/A of the Constitution. First, it must be ascertained whether the right of the other former owners have their interests considered with the same degree of thoroughness and

impartiality as that of the former landowners has been satisfied in the enactment of the discriminatory regulation. The objective basis of the discrimination between the former owners must be discovered. In addition, it must be proved that it was necessary to put non-land owners into a disadvantageous position in order to achieve the equality of persons as completely as possible in the future market economy and that the initial conditions of the market economy would be much more unfavourable if the other former owners were not put into a disadvantageous position.

While proving whether discrimination against certain persons or groups is a condition for achieving a more complete social equality, the Constitutional Court may not accept arguments concerning a preferred group which are not valid solely as related to this group (*e.g.* the establishment of entrepreneurial economy, the remedying of injustice). On the other hand, to prove equal treatment, it is necessary to give a complete account of the interests of both the preferred and discriminated groups together with the method of evaluation.

VI

In conclusion: the Constitutional Court holds that the reprivatization of land and "partial compensation" appear in a different economic and political context; they are based on different criteria and there is no legal relationship between them; therefore they may not be interpreted in their correlation with a view to the equality required under Art. 70/A of the Constitution. As to the constitutionality, based on the above criteria, of discrimination between the former owners and non-owners and of discrimination by the type of property, these discriminations are not

supported either by the petition or by the documents at the Constitutional Court's disposal. The Constitutional Court interpreted Art. 70/A of the Constitution to mean that it amounts to discrimination against persons if certain persons' former property is reprivatized, while other persons' property is not returned to their possession; the Constitutional Court therefore proclaimed this discrimination unconstitutional.

B

VII

In Point 2 of the petition for the interpretation of the Constitution, the Government requested the Constitutional Court to interpret Art. 13 of the Constitution in relation to Art. 12: whether it is possible to take land from co-operatives on the basis of law but without expropriation and compensation procedures. The petition suggests that the question concerns the reprivatization of land owned by agricultural co-operatives. The Constitutional Court has interpreted the above provisions of the Constitution with a view to the property belonging to agricultural co-operatives, irrespective of the fact that there are several other kinds of co-operatives.

VIII

According to Art. 13 of the Constitution the Republic of Hungary shall guarantee the right to property, and it adds that property may be expropriated only exceptionally and for the public

interest, and only in the manner prescribed by law, with full, unconditional and immediate compensation.

Under Art. 12(1) of the Constitution, the State shall support co-operatives based on voluntary association and shall recognize their autonomy. That provision of the Constitution, therefore, concerns those co-operatives which exist on the basis of voluntary association - irrespective of the circumstances of their formation. The only organ competent to decide whether a co-operative exists on the basis of voluntary or involuntary association is the general meeting of the co-operative.

Accordingly, the Constitutional Court has not found any constitutional justification for depriving, with universal validity of law, the agricultural co-operatives of the protection guaranteed under Art. 12(1) of the Constitution.

When formulating its opinion, the Constitutional Court has paid special attention to the current legal rules in force on agricultural co-operatives which allow the winding up of a co-operative upon the decision of the general meeting, and for a member to leave, but which do not allow the distribution of the co-operative's property. Since the petition for the interpretation of the Constitution does not require interpretation of this problem, the Constitutional Court will not examine this issue on its merits. However, it points out that - considering Art. 9 of the Constitution - the property of agricultural co-operatives is not entitled to more protection than that of other participants in the economy, or than other property in general. (The Constitutional Court notes that the problem of distributing co-operative property may be resolved by amending Act I of 1987 on Land as well as Act III of 1967 on Agricultural Co-operatives.) Further, the Constitutional Court took into account the fact that under Act III of 1967 it is also possible for co-operatives to transform themselves into another type of business association.

IX

The recognition by the State that co-operatives are independent includes the recognition that they have the right to property although the Constitution does not provide explicitly for co-operative property. The Constitutional Court, therefore, found it necessary to interpret Art. 12 of the Constitution with a reference to Art. 9(1).

According to Art. 9(1) of the Constitution, in the Republic of Hungary public and private property shall receive equal protection under the law. The clause, however, may not be viewed as containing an exhaustive list of the classes of ownership and to be classified in one of these is a precondition for constitutional protection. It is not the ownership forms that the Constitution distinguishes between but, on the contrary, it provides a ban on discrimination against any forms of ownership. Accordingly, Art. 9(1) of the Constitution is an explanation for the proposition of equality before the law, referred to in Art. 70/A(1), as well as the general proposition of the right to enterprise and freedom of competition contained in Art. 9(2), with regard to the right to property.

Article 9(1) of the Constitution is, therefore, not related to Art. 13 which guarantees the right to property without the distinction (between private and public property) set forth in Art. 9(1). On the basis of Art. 13, constitutional protection is extended, among others, to the unnamed property of business associations as well. Co-operatives, therefore, agricultural co-operatives, are a form of business associations, irrespective of the fact that - because of political reasons existing

at the time of the enactment of the Act - they are not controlled by the Act VI of 1988 on Business Associations.

Based on the above, the Constitutional Court does not attach importance to the question whether or not the name of co-operative property explicitly appears in the text of Constitution. The Constitutional Court, therefore, takes the position that the property of agricultural co-operatives, including arable land, enjoys constitutional protection similar to that of the property of business associations.

Consequently, Art. 13(1) in the context of Art. 12(1) is understood to mean that the Republic of Hungary guarantees the right to property including the right of agricultural co-operatives to the arable land they own.

X

In accordance with the petition for the interpretation of the Constitution, the Constitutional Court examined the possibility of taking land from co-operatives by virtue of law but without an expropriation procedure and compensation. Article 13(1) of the Constitution on expropriation is a guarantee provision that applies to the taking of property not only by a single official decree but also by virtue of law. Property may only be taken either by a single official decree or by virtue of law - with regard to Art. 13(1) of the Constitution - with immediate, unconditional and full compensation.

Accordingly, the Constitutional Court took the position that the taking of property from co-operatives - even by virtue of law - without immediate, unconditional and full compensation, violates Art. 12(1) and Art. 13 of the Constitution, and is, therefore, unconstitutional.

XI

The Constitutional Court finally points out that the taking of property from co-operatives without immediate, unconditional and full compensation violates the principle included in Art. 9(2) of the Constitution, according to which the Republic of Hungary recognizes and supports the right to enterprise and the freedom of economic competition. At the same time, such an action means the violation of the principle of equality before the law included in Art. 70/A of the Constitution, since this principle concerns not only natural persons but legal entities as well.