Decision 92/2007 (XI. 22.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

In the matter of a constitutional complaint with concurring reasoning by dr. András Bragyova, Judge of the Constitutional Court, the Constitutional Court has adopted the following

d e c i s i o n :

1. The Constitutional Court establishes that Section 10 of Government Decree 12.200/1947 Korm. on amending, supplementing and summarising Prime Minister's Decree 12.330/1945 M.E. on the expulsion of ethnic Germans to Germany and other related decrees has become unconstitutional by virtue of Act XXXI of 1989 on the amendment of the Constitution, therefore it cannot be applied in the lawsuit concluded with a final and non-appealable judgement of the Metropolitan Court (No. 44.Pf.27.789/2003/5).

The Constitutional Court publishes this Decision in the Official Gazette.

R e a s o n i n g

I

1. The petitioners submitting the constitutional complaint have asked the Constitutional Court to establish the unconstitutionality of and to annul Prime Minister's Decree 12.330/1945 M.E. on the expulsion of ethnic Germans to Germany (hereinafter: the D) as well as Government Decree 12.200/1947 Korm. on amending, supplementing and consolidating Prime Minister's Decree 12.330/1945 M.E. on the expulsion to Germany of the German minority population in Hungary and other related decrees (hereinafter: "GovD"), and to prohibit the application of the decrees specified above in the lawsuit concluded with the final and non-appealable judgement of the Metropolitan Court as the appellate court (judgement No. 44.Pf.27.789/2003/5). The petitioners have stated that in the lawsuit initiated by the Hungarian State for the purpose of establishing the ownership of the State the court applied the challenged in the constitutional complaint and it established the ownership of the State of Hungary in respect of the real estate the petitioners had believed to be their own property (under the titles of adverse possession,

inheritance or transfer), but under the prohibition in Section 121 para. (3) of Act IV of 1959 on the Civil Code in force at that time (and repealed by Section 15 para. (3) item *a)* of Act XIV of 1991) the real estate could not be the subject of transfer by adverse possession.

According to the facts of the case established by the courts in charge, the legal predecessors of the petitioners rented from the year 1943 the real estate the challenged statutes apply to and the whereabouts of the owner were unknown at the time of the procedure. In 1976, the ownership of the petitioners' predecessor was recorded in the real estate registry under the legal title of adverse possession based on the uninterrupted possession of the predecessor as verified by an official certificate. When the predecessor deceased, further legal relationships and situations arose in the respect of the real estate.

In the year 1996, the brother of the original owner filed a claim for the establishment of his ownership title over the real estate. The courts in charge established that the original owner was a person forced to move to Germany as the D was applicable to him, thus all his movable and immovable assets were reverted free of encumbrances to the State in accordance with Section 10 of GovD. As established in the judgements, the State obtained the property by virtue of an official resolution in the case of which it had not been necessary to hand over the subject the property or to have the change of ownership recorded in the real estate registry.

Subsequently, the Treasury Property Directorate (in line with its statutory obligation) filed a claim against the petitioners for the establishment of the ownership title of the Hungarian State and the judgement made on the basis of the claim is the ground for the constitutional complaint. It has been established in the final judgement that the D and the GovD were applicable to the original owner, therefore the ownership of his real estate was transferred to the State. To the provisions of the Civil Code effective in 1976, no ownership of a real estate acquired by the State can be acquired by way of adverse possession, therefore all further legal transactions based upon the ownership of the petitioners' legal predecessor are null and void.

In the opinion of the petitioners, the statutory provisions providing for acquiring the ownership of the concerned real estate by the State violate Article 9 para. (1) and Article 13 of the Constitution, therefore they have asked the Constitutional Court to prohibit their application in the case.

The challenged statutes regulated the expulsion of the ethnic German population of Hungary to Germany, as well as the seizure and the confiscation of the property of the persons forced to move. The petitioners have cited Decision 27/1991 (V. 20.) AB of the Constitutional Court (ABH, 1991, 73.; hereinafter: "the CCDec") establishing the unconstitutionality and annulling the statutes on taking certain property items into State ownership (most of the statutes had been adopted in the early 1950's and were still in force at the time the decision was passed). The statutes annulled by the CCDec did not include the ones challenged by the petitioners. According to the petitioners, the same reasoning in support of annulling the nationalization statutes in the CCDec should be applied in the present case, too, and the unconstitutionality of the challenged statutes can be established on the same grounds.

2. The Constitutional Court has established that the petitioners received the Metropolitan Court's final judgement 28 April 2004 and that the constitutional complaints were filed on 14 June 2004, thus the complaint was made within the sixty-day deadline specified in Section 48 para. (2) of Act XXXII of 1989 on the Constitutional Court (hereinafter: the ACC).

II

1. The provisions of the Constitution relevant in respect of the petition are as follows:

"Article 9 para. (1) The economy of Hungary is a market economy, in which public and private property shall receive equal consideration and protection under the law."

"Article 13 para. (1) The Republic of Hungary guarantees the right to property.

(2) Expropriation shall only be permitted in exceptional cases, when such action is in the public interest, and only in such cases and in the manner stipulated in Act of Parliament, with provision of full, unconditional and immediate compensation."

2. The provisions of the D relevant in respect of the petition are as follows:

"Section 3 All immovable and movable property assets of the persons affected by the expulsion (irrespectively to residing in or outside the territory of the country) shall be seized as of the effective day of the present decree and the owner (possessor) may not alienate or encumber any of such assets. (…)"

The provisions of the GovD taken into account with regard to the petition are the following:

"Section 10 The ownership of the movable and immovable assets are to be seized under Section 3 of Prime Minister's Decree 12.330/1945. M.E. of the persons affected by the expulsion to Germany in accordance with the present decree (...) shall be transferred free of encumbrances to the State upon the establishment of the obligation to move (...) and it shall form part of the assets in the Land Redistribution Fund. (…)"

"Section 21 para (1) This decree shall enter into force as of the day of its promulgation; on the day this decree takes effect, Prime Minister's Decree 12.330/1945. M.E. (...) shall be repealed.

(2) The present decree shall have no effect whatsoever on the measures taken on the basis of the decrees mentioned in paragraph (1). (…)"

The rule in the Council of Ministers Decree 84/1950 (III. 25.) MT on the termination of the application of the restrictive provisions related to the expulsion of ethnic Germans from Hungary as referred to in the decision:

"Section 1 para. (1) As from the effective date of the present decree, the restrictive provisions related to the expulsion of ethnic Germans from Hungary shall not be applicable.

(2) In accordance with the provisions mentioned in paragraph (1) the official measures implemented prior to the present decree taking effect shall remain in force, and no claims for damages or other claims whatsoever shall be enforced on the basis of such measures."

III

The constitutional complaint is well-founded for the following reasons.

1. On the basis of the petition, the Constitutional Court has had to review the constitutionality of a specific provision of a repealed statute.

   As a general rule, the Constitutional Court has competence for only the posterior constitutional review of statutes that are in force. The Constitutional Court may only review the constitutionality of a repealed or amended statutory provision if it is to decide on the applicability of the relevant provision. (Order 335/B/1990 AB, ABH 1990, 261) In the two cases of a review [that is, the judicial initiative as defined in Section 38 para. (1)

of the ACC and the constitutional complaint filed in accordance with Section 48 of the ACC], the Constitutional Court shall examine the unconstitutionality of a repealed statute as in the above cases the application of the provision can be prohibited. Since in the present case the petition was filed as a constitutional complaint, the Constitutional Court has examined the repealed statutory provision applied in the case which serves as the basis for the constitutional complaint.

2. The provisions of the GovD applied in the final judgement and challenged by the constitutional complaint were repealed in 1950. It was established by the Constitutional Court in Decision 11/1992 (III. 5.) AB (in connection with the relationship between the law of past regimes and the state under the rule of law as defined by the Constitution) that the Constitutional Court had never treated the laws enacted before or after the new Constitution any differently in the course of reviewing them from the aspect of their constitutionality. However, there is no difference regarding the validity of the statutes adopted before and the statutes adopted after the Constitution. The legitimacy of the different (political) systems during the past half-century is irrelevant from this perspective; that is, their legitimacy is irrelevant from the aspect of the constitutionality of statutes. Each (...) statute must conform with the new Constitution, irrespective of the enactment date. Likewise, constitutional review does not admit two different standards for the review of laws. The date of enactment can be important insofar as previous laws may have become unconstitutional when the new Constitution entered into force." (ABH 1992, 77, 81)

   The principle developed in the abovementioned decision was applied in Decision 66/1992 (XII. 17.) AB establishing the unconstitutionality of certain provisions in force at the time of the review of the Prime Minister's Decree 600/1945 ME on eliminating the system of large estates and the redistribution of land for the farmers (re-enacted as Act VI of 1945 by Parliament). The Constitutional Court has examined the constitutionality of the statutes concerned in the context of the Constitution in force. (ABH 1992, 293, 299)

   As stated in the CCDec referred to by the petitioners as well, the provision under Article 13 para. (2) of the Constitution is a guarantee that governs the expropriation of property regardless whether the property is expropriated by individual administrative measures or through an Act of Parliament. "In addition to the protection of property without any discrimination or any distinction of the owners, the State is entitled to expropriate

property exceptionally in the public interest and only in the manner prescribed in Act of Parliament, with full, unconditional and immediate compensation. The individual administrative measure or the Act of Parliament ordering the expropriation violates the Constitution if any of the above conditions are not met. The Constitutional Court establishes that all the statutes ordering the nationalization of the property fail to comply with the constitutional conditions. It may not be considered public interest and it may not be allowed (not even exceptionally) for the state to acquire the ownership of property or to restrict or to deprive the people's ownership rights based on the stigmatisation or the discrimination of people or groups of society." (ABH 1991, 77)

The Constitutional Court has not found it justified to deter in the course of the present constitutional review from the holdings made in its earlier decision. Accordingly, the Constitutional Court establishes that Section 10 of the GovD on seizing and confiscating the property of the ethnic German citizens forced into expulsion to Germany has become unconstitutional and its unconstitutionality has been established on the basis of the reasoning under the CCDec, that is, due to the violation of Article 13 of the Constitution.

As the Constitutional Court established the unconstitutionality of Section 10 of the R with regard to the violation of Article 13 in the Constitution, it has not performed the examination related to the alleged violation of Article 9, in accordance with its established practice [Decision 64/1991 (XII. 17.) AB, ABH 1991, 297, 307; Decision 30/2000 (X. 11.) AB, ABH 2000, 202, 209].

3. Under Section 43 para. (1) of the ACC, the unconstitutional statute shall not be applicable as from the day of publication of the relevant decision of the Constitutional Court in the Official Gazette. However, according to Section 43 para. (4) that is applicable under Section 48 para. (3) of ACC to constitutional complaints as well, the Constitutional Court may regulate the applicability of the unconstitutional statute in the concrete case differently from the provisions under Section 43 para. (1) if it is justified due to legal certainty or due to the particularly important interest of the person initiating the procedure. Taking into account the particularly important and reasonable interest of the petitioners, the Constitutional Court has accepted the petition in the respect of the prohibition of applicability and ordered on the basis of Section 43 para. (4) of ACC that the challenged statute (as found unconstitutional) shall not be applicable in the lawsuit

concluded by the Metropolitan Court in the final and non-appealable judgement No. 44.Pf.27.789/2003/5.

4. The Constitutional Court stressed that the principle of the rule of law binds the State even in the course of enforcing its claims under private law. However, the State may not present any proprietary (ownership) claim on the basis of statutes that were in force in the past if these statutes clearly violate the fundamental principles of the rule of law. This is a prohibition preventing the "democratic State under the rule of law" as defined in Article 2 para. (1) of the Constitution from enforcing any claim under private law based on statutes based on principles that are condemned by the State itself.

   According to Section 1 para. (1) in Act XXV of 1991 on the partial compensation of the damage unjustly caused by the State in the property of citizens, in the interest of settling property issues, partial compensation is payable to those natural persons whose property suffered damage in consequence of the statutes enacted after 1 May 1939 and listed in Annexes 1 and 2. The D is listed under item 11 and the GovD is listed under item 22 of Annex 1 to the Act among the statutes the application of which caused unjust damage to the property of the citizens. Consequently these statutes may serve as grounds for compensation. Thus, as the list in the Annex of the Act on Compensation has already established that the application of those statutes by the State could cause an unjust damage to the property of the citizens, the entitlement to financial compensation has been established. Based on all of the above, the Constitutional Court emphasises that the Republic of Hungary as a democratic State under the rule of law may not cause another violation of property and may not enforce a proprietary claim against natural persons on the basis of a statute formerly determined by the legislature as a statute that violated property rights

The publication of this Decision in the Official Gazette (*Magyar Közlöny*) is based on Section 41 of the ACC.

Budapest, 19 November 2007

Dr. Mihály Bihari

President of the Constitutional Court

Dr. Elemér Balogh	*Dr. András Bragyova*
Judge of the Constitutional Court	Judge of the Constitutional Court
Dr. András Holló	*Dr. László Kiss*
Judge of the Constitutional Court	Judge of the Constitutional Court
Dr. Péter Kovács	*Dr. István Kukorelli*
Judge of the Constitutional Court	Judge of the Constitutional Court
Dr. Barnabás Lenkovics	*Dr. Miklós Lévay*
Judge of the Constitutional Court, Rapporteur	Judge of the Constitutional Court
Dr. Péter Paczolay	*Dr. László Trócsányi*
Judge of the Constitutional Court	Judge of the Constitutional Court

This document is a certified and true copy:

Concurrent reasoning by *Dr. András Bragyova*, Judge of the Constitutional Court

I agree with the majority decision with respect to the non-applicability of Government Decree 12.200/1947 Korm. on amending, supplementing and consolidating Prime Minister's Decree 12.330/1945 M.E. on the expulsion of ethnic Germans to Germany and other related decrees in the case of the present constitutional complaint. I also agree that the under the constitutional principle of the rule of law, the State of Hungary is not allowed to enforce a (proprietary) claim under private law against private individuals, in particular against the persons deprived of their rights under the above-mentioned decrees or against their descendants.

However, I cannot accept the statement made in the holdings about the two decrees becoming unconstitutional in 1989. The two decrees *could not have become* unconstitutional in October 1989 by the adoption of Act XXXI of 1989 on the amendment of the Constitution resulting in a new constitutional regime. In respect of these two decrees, the question of subsequent unconstitutionality cannot be raised at all as the decrees were repealed by Decree 84/1950 (III. 25.) MT on terminating the application of the restrictive provisions related to the expulsion of ethnic Germans from Hungary.

The establishment of the new constitutional order did not result in breaking the continuity of the legal system [see the Decision 11/1992 (III. 5.) AB on the "Zétényi-Takács" Act in which the Constitutional Court had established that as the change of the regime had been in line with

the requirement of legality, the validity of the statutes formerly being valid may not be challenged. The amendment of the Constitution in 1989 had no retroactive effect, therefore the statutes held unconstitutional based on the new content of the Constitution may be held unconstitutional as of the effective date of the Constitution at the earliest (ABH, 1992, 77, 94)]. The continuity of the legal system means that the legal system contains all of its earlier stages. Therefore some of the 'repealed' norms (not binding any more and unable to create new rights or obligations) would remain the part of the legal system as a valid norm (capable of having a legal effect) even a century after they lose their effect.

Nevertheless, it is clear that the two decrees are unconstitutional *under the present Constitution* also due to the level of the sources of law. Indeed, they are more than simply unconstitutional as expropriation based on ethnicity negates the moral foundations of the state under the rule of law. This, however, does not mean that the two decrees were at the time of their adoption (or were at any time during their effect) unconstitutional *in the legal sense* (that is, invalid). The Hungarian legal system did not acknowledge the legal invalidity of an unconstitutional norm (statute) prior to 23 October 1989 (or 1 January 1990, the effective date of the Act on the Constitutional Court). The two decrees could only be held 'unconstitutional' in the case of attributing a retroactive effect to the Constitution of 1989 with regard to the period between 1945 and 1950 (when the two decrees were in force), if we evaluated the *validity of the statutes in force at that time* on the basis of the Constitution in force today. However, the Constitution has no retroactive force since the new constitutional system under the rule of law (as termed by the Constitutional Court) was established by way of amending the former Constitution and thus maintaining the continuity of the legal system as described above. In Decision 27/1991 (V. 20.) AB (ABH, 1991, 73.) referred to in the majority decision, the Constitutional Court has implied that the Constitution has retroactive effect with regard to the constitutionality of the laws on nationalization.

According to the above, the unconstitutionality (strictly in a legal sense) of the challenged statutes in the present case may not even be established to the extent it may be established in case of nationalizations. The ownership title acquired on the basis of the statutes on the expulsion of ethnic Germans from Hungary (that is, the expropriation by the State and the future ownership of the expropriated assets, primarily real estates) has not been affected by the fact that subsequently the Hungarian State and the Hungarian law renounced and condemned the relocation several times and it has even provided for a partial compensation for the unjust damage caused.

By providing compensation, the Act on Compensation did indeed reinforce the legality of the ownership titles acquired; otherwise there would not have been a reason for providing compensation. As the constitutional complaint is aimed at the violation of fundamental rights caused by the *application* of the unconstitutional statute [Section 48 para. (1) of the ACC], the decisive factor in the assessment of the complaint is which statutes have been applied by the court. It is presumed in the decision that the court has "applied" the two decrees. However, the court judgement challenged in the constitutional complaint did not apply those decrees; instead, it applied the regulations of the Civil Code on property in respect of State property acquired on the basis of the decrees, or, to be exact, in respect of the State's property *claim* not lapsed and not terminated due to adverse possession. From that point of view, the title of the State's acquisition of property does not matter. The challenged court judgement is partially based upon Section 115 para. (1) of the Civil Code, according to which "ownership claims shall not lapse". This is a provision to be applied in the respect of all kinds of property, including State property, and the ownership issue of the real estate could not have been settled by way of adverse possession as it would have happened between natural persons as under Socialist law the State's property was not the subject of adverse possession until 1991. Due to the prohibition of adverse possession in respect of State property that was in force until 1991, the adverse possession period of fifteen years (presently in force in the respect of real estates) did expired by the date of passing the judgement, thus the State could enforce its "non-lapsing" ownership claim. As explained above, although the challenged court judgement is partially based upon Section 115 of the Civil Code, the decisive provision is Section 121 para. (3) of the Civil Code remaining in force until 1991 that excluded the acquisition of ownership by way of adverse possession in the respect of State property. It was a rule unconditionally applicable to real estates. [Another condition of maintaining the State's ownership claim was the statutory increase of the period of adverse possession in respect of real estates from ten to fifteen years in 2001.]

Thus, in the present case, the *direct cause* of the unconstitutionality were not the two decrees, but the provision of Socialist law excluding the acquisition of ownership by way of adverse possession in the respect of State property. It is doubtless that this rule is contrary to Article 9 para. (1) of the present Constitution, according to which "public property" (including State property) and private property shall receive equal protection under the law. Section 121 para. (3) of the Civil Code in force until 1991 would surely fail the above constitutionality test. The petitioner-complainant alleged that judgement violates (in addition to Article 9) Article 13 of the Constitution, that is, the constitutional protection of the right to property [Decision

64/1993 (XII. 22.) AB, ABH, 1993, 373, 380; Decision 35/1994 (VI. 24.) AB, ABH, 1994, 197, 201]. Indeed, the court reached the challenged unconstitutional conclusion by applying the rules of the Civil Code on property. According to the established practice of the Constitutional Court, Article 13 of the Constitution only protects the property already acquired and in the case concerned, the complainants considered the property to be acquired with regard to the long term of possession "their own", as termed in the Civil Code. Therefore in the case concerned it is justified to extend the scope of the constitutional protection of property to the possessor as well, especially since in the standing practice of the Constitutional Court, the subject of the constitutional protection of property is not the same as property defined by civil law.

This resulted in violating the fundamental right of the petitioners-complainants to have their (contingent) property protected. Nevertheless, the most direct cause of violating a fundamental right was to be found in Section 108 para. (2) of the Act XXXVIII of 1992 on Public Finance obliging the State (that is, the Treasury Property Directorate representing the State, to be exact) to enforce this ownership claim by requiring that "(...) only in the manner and in the case specified in Act of Parliament – in the case of a local government, in local government decree – may a claim for the benefit of the sub-systems of State finances be waived". If this statute had not obliged the Treasury Property Directorate [in accordance with Section 28 para. (1) of CC and the Minister of Finance's Decree 45/2002 (XII. 25.) PM on the representation of the Hungarian State in the case of inheritance by the State and the exercising of other rights entitling the State] to enforce the property claim, there would be no obstacle of the complainants acquiring ownership by way of adverse possession.

In this decision, the Constitutional Court actually defines a *constitutional requirement* for the State's property management organs and for the courts acting in matters under civil law. Accordingly, the State may not enforce such civil law claims against private individuals that are based on odious statutes (statutes that are not simply unconstitutional but that negate the moral foundations of the state under the rule of law). In the matter concerned, the application of the constitutional requirement specified above would presumably lead to the defendant's winning the lawsuit and his acquisition of the ownership but it is the task of the court in charge to decide according to Section 360 and the subsequent sections of the Act on Civil Procedure. This decision of the Constitutional Court may in no way be interpreted as one resulting in the invalidity of the State's titles of ownership acquisition as it only means that in the course of exercising the State's rights under civil law (even property rights as the case

may be) the State may not enforce a claim that would not exist without a statute negating the moral fundaments of the constitutional rule of law. Consequently, the constitutional requirement established in the decision affects the conduct of the State and it may not be applied to other claims under civil law.

Budapest, 19 November 2007

Dr. András Bragyova

Judge of the Constitutional Court

Constitutional Court file number: 675/D/2004.

Published in the Official Gazette (*Magyar Közlöny*) MK 2007/159