DECISION 16 OF 1991: 20 APRIL 1991

IN THE MATTER OF THE PETITION ON COMPENSATION

"COMPENSATION CASE II"

During the parliamentary debate on the draft Bill on the Settlement of Ownership Issues by providing Partial Compensation for Damages unjustly caused by the State to the Properties of Citizens after 8 June 1949 (hereinafter: the "Compensation Bill"), 52 Members of Parliament petitioned for the preventive norm control of certain provisions.

The petitioners submitted, *inter alia*, that the Bill (a) did not provide a right to full compensation for the damage sustained nor for the equal treatment of victims; (b) unconstitutionally permitted the State to make non state-owned arable land acquirable with compensation vouchers and to limit the circle of those entitled thereto; (c) with the option of the right to purchase, either by contract or by law, amounted to an exproportion of property under Art. 13(2); and (3) in permitting Parliament to distribute social property to private persons and to local governments, did not have any regard to the previous title to the former socialised property.

Held, rejecting the petition:

(1) Preventive norm control could not be used to review the provisions of a bill which had still to be voted on by Parliament. If the constitutionality of a bill was disputed during the legislative process, then such review might prevent the later annulment of an enacted statute already put into practice and, at the same time, protect the prestige of Parliament. The

Constitutional Court Act did not restrict the Court's jurisdiction to reviewing only the final text of the Bill but made preventive norm control possible at any stage of the legislative process. Thus by its rulings, the Court could determine the course of the parliamentary debate while concurrently ensuring the constitutionality of the process. Such a role was irreconcilable with its legal status since it was not an advisor to Parliament but the judge of the results of legislative work. The current Act concerning preventive norm control of bills infringed the principle of separation of powers. Only through amendment by Parliament could the purpose of such norm control (preventing enactment of a unconstitutional statute) be reconciled with the Court's judicial role by permitting review on the merits of the final text of a bill either prior to voting or after voting but before promulgation (page 00, lines 00-00; page 00, lines 00-00).

(2) However, without rendering a decision on the constitutionality of the Bill's provisions, the Court would summarise its theoretical stance on the issue of their constitutionality. The proposed Bill had abandoned the idea of reprivatising land replacing it with the remedy, through a unified "partial property compensation", the "unjust" damages caused in private property by the enumerated legal rules within the given period of time. The general justification of the Bill emphasised that the State acted solely out of moral obligation and that the extent of compensation might not be full. Within the new concept, Parliament had excessive freedom in making distinctions in the details primarily because the State, instead of fulfilling legal requirements, would grant goods to the beneficiaries on the basis of fairness. Within such a scheme, reasonable cause would need to be shown for any unequal treatment, *i.e.* that it was not arbitrary: no-one was entitled to be granted a definite form of *ex gratia* benefit although the Constitution Art. 70/A was also applicable in the controlling of *ex gratia* benefits (page 00, line 00 - page 00, line 00).

(3) The discretion of Parliament in drafting the Bill was limited by constitutional considerations. In the legislation providing for the scheme of compensation, the State could make non-state owned arable land purchasable with compensation vouchers and limit the circle of those entitled to acquire such property thereby. It was also permissible in this process to lay down in respect of such property, priorities which did not violate the rights of others: indeed priorities based on economic policy considerations could create sufficient grounds where such priorities specifically referred to land. However it would be unconstitutional for the State, were it ultimately to provide compensation by land, to determine the distribution of non-state owned arable land in a manner different from that of other property assets serving as a basis for compensation (page 00, lines 00-00).

(4) The option of the right to purchase, either by contract or by law, was not an expropriation of property subject to Constitution, Art. 13(2) but rather an encumbrance on the right of ownership and so subject to Art. 8(2) and Art. 13(1). The change in property depended on whether or not the holder of the right to purchase exercised this right. The owner could still be released from his obligation arising out of the option, under the Civil Code, art. 375(3), if he could prove that since the establishment of the right, a substantial change had occurred in his circumstances that he could not now be expected to comply with such obligation (page 00, lines 00-00).

(5) Further, in conformity with current political and economic objectives, Parliament could distribute the burdens or renew the obligations resulting from the different transformations

in property ownership. In the course of breaking down social property, statutes transformed ownership patterns by dividing up the burdens arising from the earlier creation of social property and also the obligations among those acquiring such property free of charge. Both the conversion of co-operative property to the private ownership of co-operative members and the creation of property of local governments conformed with current objectives. While the transformation of ownership remained incomplete, a future owner had no right to have his former social property transformed in to private ownership or to gain new property, without bearing the burden of social transformation. However, once completed, the new property would be fully protected and therefore free of any constitutional possibility, subsequently or retroactively, of being subject to distribution of the burden of transformation (page 00, lines 00-00).

IN THE NAME OF THE REPUBLIC OF HUNGARY!

Based on a petition for the preventive norm control of the constitutionality of certain provisions of the Bill, together with the concurring opinion of Zlinszky, J. concerning Point 3.III of the Reasoning, the Constitutional Court made the following

DECISION.

The Constitutional Court rejects the petition for the preventive norm control of certain provisions of the Bill submitted under No. 1020 and aimed at the settlement of ownership by providing partial compensation for damages unjustly caused by the State to the properties of citizens after 8 June 1949.

This Decision will be published by the Constitutional Court in the *Hungarian Official Gazette*.

REASONING

I

In the course of the debate on the Bill, fifty two Members of Parliament proposed that the Constitutional Court review the unconstitutionality of the following provisions of the Bill (hereinafter: the "Bill") submitted under No. 1020 and aimed at settling ownership issues by the compensation of damages unjustly caused by the State to the property of citizens after 8 June 1949: s. 14; s. 3(1) and (2); s. 8 and s. 1. Furthermore, the Members of Parliament also proposed a preventive norm control of points 1, 3 and 8 of the proposal for modification, submitted under No. 2089 by the leaders of the parliamentary groups of the government coalition concerning s. 12(2); the new s. 8(2) and (3); and s. 4(3) of the Bill.

II

1. The preventive norm control belongs to the exceptional jurisdiction of the Constitutional Court, and serves to prevent the possibility of Parliament enacting an unconstitutional Act of Parliament. If the constitutionality of a bill is disputed already during the legislative procedure, then a preventive norm control may prevent the annulment of an already promulgated and legal rule which has been put into practice and, moreover, the main criterion is that it protects the prestige of the legislature. In countries where there is preventive norm control, the review is most often formal, *i.e.* it is aimed exclusively at examining the constitutionality of the legislative procedure and the legislative authority. The possibility for a review of the merits is much rarer.

In the course of a preliminary review of constitutionality during the legislative process, the Constitutional Court might come into conflict with the separation of powers principle. The only case when this conflict does not arise is when such an abstract problem of constitutional law emerges which may be made independent of the context of the provisions of the bill, and it, in fact, necessitates the interpretation of the Constitution. In this case, however, the Constitutional Court's jurisdiction to interpret the Constitution is available. In all other cases, by exercising preventive norm control, the Constitutional Court becomes a participant in the legislative process, thereby limiting the power of Parliament power to decide and sharing the responsibilities of the legislator.

In resolving the conflict between the purpose of preventive norm control and the enforcement of the separation of powers, the stage at which the Constitutional Court conducts the preliminary review and whether the review is directed at formal issues or that of substance has a decisive role.

2. This was the first time that a petition for preventive norm control of a bill was submitted to the Constitutional Court, and thus the Constitutional Court had to face the contradiction inherent in the nature of norm control. This contradiction is particularly deepened by the shortcomings of Hungarian legal rules.

Section 1(a) of Act XXXII of 1989 (hereinafter the "Constitutional Court Act"), determines the jurisdiction of the Constitutional Court for the preventive norm control of certain provisions of bills. Section 33 lists those entitled to submit such petitions, and lays down the consequences if the unconstitutionality is established by the Constitutional Court: "the organ or the person submitting the bill shall provide for the termination of the unconstitutionality." By virtue of these measures, the procedure is directed at reviewing the constitutionality of contextual issues, and it may be requested at any time from the date when the Bill was submitted.

This solution in the Constitutional Court Act may permit the Constitutional Court to be involved in the legislative process at any stage and on any number of occasions. This way, the Constitutional Court, by its decision, influences, and, by ruling out certain solutions, even determines the course of the debate in such a way that at the same time it secures the constitutionality of the legislative process. However, such a role is irreconcilable with the legal status of the Constitutional Court. The Constitutional Court is not an adviser to Parliament but the judge of the result of Parliament's legislative work. The purpose of preventive norm control, *i.e.* preventing the enactment of an unconstitutional Act of Parliament, and the judicial function of the Constitutional Court may be reconciled in case of a review on the merits if the final text of the Bill is submitted to the Constitutional Court either prior to voting on the Bill or after voting but still before promulgation.

This is how the preventive norm control is exercised in every legal system which has adopted the institution of preventive norm control of legal texts. (Article 61 in the French, Art. 278 in the Portuguese, Art. 26 in the Irish Constitutions; prior to promulgation, Art. 127 of the Italian Constitution makes similar provisions for review in case of violations of the legislative power. For the preventive norm control of international treaties, Art. 78 of the Spanish Act on the Constitutional Court requires that the text of the treaty is previously finalized; similar conditions and regulations applied to the preventive norm control of Bills until 1985 when this jurisdiction of the Constitutional Court as intervention in the legislative process was annulled.)

Only the Constitutional Court Act does not contain such restrictive conditions. The object of review in Hungary is a bill the text of which may be reformulated by the party submitting it until the end of the general debate. If modifications of the bill are also suggested, then the subject of the voting remains uncertain until the beginning of the voting, and the final text of the future Act is formulated definitively only after the voting on the proposals for amendment.

The constitutionality of "certain provisions," which are subject to review may not be assessed in general terms, by being taken out of the context of the Act. The result of such an isolated investigation might lose its validity when considered in some other context. Review of the constitutionality on an uncertain and isolated basis of comparison involves particularly great dangers in Hungarian parliamentary practice, where concepts contrary to, or radically different from, the original petition are also presented as suggested amendments rather than alternative bills. The Constitutional Court also observes in the present case, that the proposals for amendments involve the most divergent concepts and that even in comparison to quantitative amendments, the judgment on the discriminative character of the various provisions might come out differently. By the rules of the Constitutional Court Act nothing can guarantee that the

preventive norm control undertaken by the Constitutional Court may in effect fulfill its purpose of preventing the enactment of an unconstitutional Act of Parliament.

In the course of its practice hitherto, the Constitutional Court has taken meticulous care to maintain the separation of powers principle and interpreted its own jurisdiction accordingly. In its *Dec. 31 of 1990 (XII.18) AB* (MK 1990/128), the Constitutional Court stated with an authoritative ruling that in interpreting jurisdiction of the Constitutional Court on the interpretation of certain provisions of the Constitution, "primary consideration should be given to the separation of powers principle, which is the most important basic organizational and operational principle of the Hungarian state organization," and consequently, "the jurisdiction of the Constitutional Court referred to should be interpreted in a restrictive manner." The broad interpretation would "inevitably result in the Constitutional Court assuming the responsibility of the legislative, and even of the executive, powers and thereby some sort of governance by the Constitutional Court would be created which is in utter contradiction with the principles of state organizations as specified in the Constitution." The Constitutional Court has, therefore, defined the conditions necessary for a procedure of interpreting the Constitution. The Constitutional Court follows this principle in the case of the preventive norm control as well.

The legal rules in force provide that the Constitutional Court may not bind the preventive norm control to a "final text," *i.e.* to that stage of the legislative process which is prior to voting on the whole of the Bill. This could only be made possible by a amendment of the Act of Parliament. The Constitutional Court should acknowledge the fact that the Constitutional Court Act includes a norm control which is possible over the entire, though not defined, state of the Bill. In view of all these considerations, the Constitutional Court performs the preventive norm control of certain provisions in the Bill in such a way as to minimize the contradiction between its

own legal status, particularly its position within different branches of power and the previous norm control provided by the Constitutional Court Act and to prevent the results of its own review from becoming disfunctional. For this reason, the Constitutional Court limits itself in this Decision to summarizing its theoretical stance on the issues of constitutionality of the provisions of the Bill in question, without rendering a decision on the constitutionality of these provisions in the reasoning of the Decision.

III

1. The Constitutional Court draws again attention to *Dec. 21 of 1990 (X.4) AB* (MK 1990/98) of the Constitutional Court concerning the issue of the Bill. According to the proposal judged in this decision, the original ownership of arable lands would have been restored in kind, while the other earlier owners and parties suffering damages would have received partial financial compensation. The Constitutional Court ruled at that time that these two solutions may not be considered as different methods of the same compensation. The Constitutional Court also stated that the issue of whether the discrimination remains within the constitutional bounds may only be examined in the objective and subjective context of the prevailing regulations.

The present Bill concerns something different. "The given regulatory concept," within which, according to the Constitutional Court, constitutional reasons are required for making distinctions, is narrower and more homogeneous. The proposed Bill abandoned the idea of reprivatizing land and intends instead to remedy through a unified "partial property compensation" the "unjust" damage caused to private property by the enumerated legal rules

within the given period of time. The general justification of the Bill emphasizes that the State is acting out of moral obligation, and that the extent of compensation may not be full.

The Constitutional Court points out that within the new concept, the legislator has an excessive freedom in making distinctions in the details: primarily because the State, instead of fulfilling legal requirements, grants goods to the beneficiaries on the basis of fairness. Thus, if the distinction is not among the entitled parties, then the limitation of this distinction is the theoretical limit of positive discrimination: the unconditional observance of the treatment of people having equal dignity, and the non-violation of the fundamental rights defined in the Constitution (see *Dec. 9 of 1990 (IV.25) AB* (MK 1990/36)). Within this scheme, the only thing which may be required is that a reasonable cause for any unequal treatment shall be shown, *i.e.* to show that such treatment does not qualify as arbitrary. It shall be taken into consideration that no one is entitled to be granted a definite form of *ex gratia* benefit. On the other hand, the contents of Art. 70/A of the Constitution are also applicable in and determinative of the *ex gratia* benefits.

2. Legislation shall be provide for the cover of the compensation scheme. If it is feasible in a constitutional manner, there may be no objection made to the State making arable lands not in state ownership obtainable with compensation vouchers.

If the State provides a possibility for compensation, ultimately, by land then it is in itself not constitutional if the distribution of this limited coverage with special legal status is determined in a way different from the other property assets serving as the basis for compensation. In itself, it is not unconstitutional either if the circle of those entitled to acquisition of property through the system of compensation vouchers is limited when arable lands not in state ownership are involved. In the course of this, no objection can be made against the drawing up of priorities which do not violate the rights of others. By virtue of legislative discretion, the

preferences based on economic policy considerations, for example, might create sufficient grounds if these preferences specifically refer to land.

The Constitutional Court emphatically draws attention to the condition stipulated in its *Dec. 21 of 1990 (X.4) AB* (MK 1990/98) that in support of the constitutionality of a distinction, the Constitutional Court "may not accept such arguments concerning preferred groups which do not apply exclusively to these groups (*e.g.*: creation of entrepreneurial economy remedying farms, unjust measures). On the other hand, the proof of equal treatment requires the complete presentation, along with the mode of assessment and of both the preferred and the disadvantaged groups' own arguments."

3. *Decision 21 of 1990 (X.4) AB* (MK 1990/98) stated that Art. 13(2) of the Constitution is such a rule of guarantee which controls the expropriation of property not only by the individual act of the authorities but also through legal provisions. The right of purchase, either by contract or by law, however, is not an expropriation of property subject to Art. 13(2) of the Constitution but it is an encumbrance on the ownership right.

Article 13(2) of the Constitution applies to expropriations, and is applicable only as regards such legal institutions where the expropriation of property is accomplished either through an individual act of the authority or by legal provision. Such legal expropriation of property is, for example, nationalization. Through the expropriation of property under Art. 13(2), the property generally goes into public ownership, and only in exceptional cases may the property be taken into private ownership, but even in this case, only for public interest purposes.

The right of purchase, on the other hand, is a limitation of the ownership right. The change in property, depends on whether or not the holder of the purchasing right exercises this right. The court may release the owner from his obligation arising out of the purchasing right, if

the owner proves that since the establishment of the right of purchase, such a substantial change occurred in his circumstances that it may not be expected from him to comply with this obligation (art. 375(3) of the Civil Code).

The constitutionality of the right of purchase shall be judged according to Art. 13(1) and Art. 8(2) of the Constitution. Even if it were unconstitutional, the right of purchase based on an Act of Parliament would not qualify as expropriation or into some other legal institution of the same effect; in such cases, the Act of Parliament establishing the right of purchase should be repealed.

The Bill grants the right of purchase to a defined circle of entitled parties for acquiring arable lands owned by the State or by co-operatives which were expropriated in a manner under the force of an Act of Parliament. The constitutionality of this right of purchase in terms of the co-operatives shall be adjudged in the following context:

Social property constituted the economic and political basis of the earlier political system (see Art. 6(1) of the Constitution amended by Act I of 1972 and contained in a unified structure). The Constitution in force is the constitution "of peaceful political transition into a constitutional state implementing the social market economy": (Preamble). A necessary precondition to this transformation is the dismantling of the social property, *i.e.* the creation of ownership patterns of equal rights from this and instead of this. This process naturally involves mostly the transformation of the earlier social property into private property but new forms of ownerships will be created as well the source of which will also be provided to a significant extent by social property, *e.g.* the property of local governments.

There is no constitutional obstacle to the procedure that in the course of breaking down social property the Acts of Parliament which were enacted to transform ownership patterns divide

up the burdens arising from the earlier creation of social property and also the obligations which are due as a result of the constitutional amendment of 23 October 1989 be among those who acquire the social property free of charge. This apportionment of burdens is, of course, neither a civil law legal succession, nor a proprietary act - since only a part of the burdens is legal obligation, the other part is the social cost of transformation; furthermore, it is not an automatic or mechanical process because it is to be implemented by legislation transforming the ownership pattern in conformity with current political and economic objectives. Such an objective is, for example, the conversion of the present co-operative property to the private property of co-operative members; the creation of the property of local governments is a similar task. As long as the transformation in respect of the property parts concerned is not completed, the future subject of the new ownership form has no right to have his former social property transformed into private ownership or to gain new property without bearing this burden. Once the process of transformation is completed, the new property is, naturally, fully protected, that is, in this respect there is no longer any constitutional possibility to distribute the burden of social transformation in subsequently or in a retroactive manner.

The burdens that might be considered include, for example, the compensation envisaged in the legal rules on nationalization as well as the burdens arising from property expropriation increasing co-operative property executed according to the legal rules appearing in the Annex of the Bill. The legislation may distribute the different burdens resulting from the different ownership transformations in a variety of ways. The legislator may also renew the obligations of different bases, according to the pattern of novation: essentially the same debt is preserved but under a new title and new conditions and to a new extent. Such a novation is also suggested in the Bill where fairness constitutes the new title. This, therefore, rules out reference to the old titles.

4. Because of the *ex gratia* character of compensation, no constitutional complaint may be made if the process of compensation takes place in different phases.

5. A statement concerning the unconstitutionality of the possible discrimination arising from the extent of compensation may be made only with the knowledge of the final context of the wording of the Bill. Since the property assets affected by the Bill are different, the different methods of calculation used to establish the value serving as the basis for compensation is not unconstitutional in itself. If, however, the different methods of calculation result in striking differences in the compensation for the various property assets, then this might lead to the finding of unconstitutionality.

ZLINSZKY, J., concurring: Referring to the statements in *Dec. 21 of 1990 (X.4) AB* (MK 1990/98), it should be emphasized again that the opinion expounded therein concerns public property which was nationalized in accordance with legal rules. In respect to the illegal expropriation of property, the legal remedy is within the competence of the ordinary courts; this remedial procedure has been available since 1 April 1991, and may be initiated at any time within the statute of limitations. The civil law regulations provide the possibility to reclaim property illegally expropriated from both the State and from public institutions or private persons who acquired such property from the State free of charge. From the principle of constitutional equal protection for state, co-operative, municipal and private property it follows that: the party acquiring property free of charge which was illegally expropriated and gratuitously granted to him has to bear responsibility towards the former owner of this property. According to Art. 13(2) of the Constitution, a full and unconditional compensation may not be considered in the case of a

party acquiring the property for free because the party acquiring the property free of charge suffers no damage upon the return of the property.

In protecting co-operative and municipal properties, a distinction should therefore be drawn between property acquired for valuable consideration and property acquired for free. The protection of the former and the latter is the same as that of the similarly-acquired private property, the onerous property being protected by own right, while the freely acquired property is protected by the right to legal succession of the original owner.