

DECISION 27 OF 1991: 20 APRIL 1991
ON COMPENSATION FOR NATIONALIZED PROPERTY:
"COMPENSATION CASE III"

The petitioners sought the review of various legal provisions concerned with nationalization of privately-owned property and the suspension of sales of state-owned land.

According to a series of legal rules on nationalization passed between 1948 and 1952, the liquidation of private property, houses, pharmacies, plants, factories, stores, restaurants, printers, mills and cinemas, together with the equipment and furnishings thereof and the rights belonging thereto occurred without providing any kind of compensation. This in spite of the fact that the various legal rules stated that nationalization would take place with compensation and that a further legal rule would establish the manner and amount of compensation.

Further legal rules from 1957 to 1963 provided the possibility to gain exemption from the state appropriations but in many cases the conditions and limitations for enforcing the claims provided only a formal opportunity to the ostensible owner.

The petitioners submitted, *inter alia*, that (a) the legal rules permitting the taking of their property into state ownership without compensation, including the one on immunity, violated their ownership rights. Taken together the legal rules infringed the Constitution, including Arts. 9(1) and 13 on the protection of property; Art. 13(2) on the provision of compensation; and Art. 70/A the principle of equality before the law; (b) the Government omitted to fulfill its legislative duty by failing to draft the legal rule on compensation promised in the Nationalization Acts; (c)

they were therefore entitled either to the return of their property or to compensation; and (d) the Court should prevent the sale, based on an executive decree, of the property taken from them into state ownership by declaring the decree unconstitutional and to suspend the sales already under way.

Held, granting the petitions in part:

(1) On the basis of Arts. 13 and 70/A, the legal rules on the taking of property into state ownership violated the constitutional prohibition on discrimination. The State retained the right to expropriate property in exceptional circumstances, without any discrimination or grouping of the owners, when this was a matter of public interest, and it was conducted in the manner regulated by the law, under terms of full, unconditional and immediate compensation. In the present case, however, the legal rules on the taking of property limited or deprived people of the right to ownership on the basis of branding them and certain social groups or any other form of discrimination and thus such taking might not be regarded as a public necessity nor permitted as an exception. No such exception could be made even where the State based on its position of power, *ex lege*, ordered the almost complete liquidation of private property since this could not be viewed today as being in the public interest. It therefore followed that as the legal rules governing exemption from the taking of certain real property were closely related to those governing the taking of privately-owned property generally, the former should also be annulled (page 00, lines 00-00; page 00, line 00 - page 00, line 00).

(2) The petitions claiming an omission to legislate on the part of the State would be suspended pending Parliament's consideration of a bill aimed at rectifying the position. It was

clear that until the present judgment neither Parliament nor the Government nor the relevant Minister had drafted an Act or legal rules on the manner and amount of compensation to be awarded to parties injured by expropriation even though in the Nationalization Acts the State undertook the obligation under constitutional law to provide for compensation. This undertaking of an obligation could be freely renewed by Parliament and, as in the cases of those expropriations which occurred on the basis of the now-annulled legal rules, such undertaking was unaffected by the present judgment. The legal rules on nationalization would accordingly be annulled in their entirety including the compensation provisions (page 00, lines 00-00; page 00, lines 00-00).

(3) The exceptional rule contained in s.43(4) of the Act XXXII of 1989 on the Constitutional Court, permitting annulment with retroactive effect, was not applicable. In applying s.43(4), special attention had to be paid to legal certainty although, as in the present case, the interests attached to legal certainty conflicted with one another. Thus legal certainty required there would be no unconstitutional legal rules or, if the drafting or enactment of such rules had already occurred, the repeal of the prejudicial legal consequences thereof. However legal certainty would be seriously infringed if legal rules were repealed which had been in force for a long time and applied in a large number of cases so giving rise to many legal relations dependent upon those rules. Since most of the chattels expropriated on the basis of the now-repealed rules could not be found in the same form in which they were on nationalization, annulment of such rules with retroactive effect would not only result in a failure to provide a remedy in damages for the former owners but would inevitably cause further loss and damage (page 00, line 00 - page 00, line 00).

IN THE NAME OF THE REPUBLIC OF HUNGARY!

The Constitutional Court of Hungary in the case of petitions requesting the Court to exercise constitutional review (retroactive norm control) and to annul certain legal rules; furthermore, to establish the unconstitutionality in an omission to legislate; and to review the procedures of the nationalization which were carried out, to settle questions of property ownership, to provide damages, indemnification; in the case of petitions requesting the suspension of procedures concerning the sale of state-owned real property, with the dissenting opinion of Lábady, J. and with the concurring opinion of Solyom, P., delivered the following

DECISION.

1. The Constitutional Court established as unconstitutional: Act IV of 1952 on the Taking of Real Property into State Ownership; Act XXV of 1950 on the Taking of Public Pharmacies into State Ownership; Council of Ministers Decree 14/1952 (II.17) MT on the execution of Act IV of 1952 on the Taking of Real Property into State Ownership; Act XXVIII of 1957 on Certain

Provisions relating to Real Property taken into State Ownership and Ministry of Finance Decree 17/1957 (IV.21) PM providing for the execution of this Act, and Act XIII of 1958 amending Act XXVIII of 1957; and Council of Ministers Decree 1027/1963 (XII.17) MT on the Termination of Reviewing Petitions on Returning Certain Real Properties to Private Ownership from State Ownership. The Constitutional Court therefore annuls these legal rules.

2. The Constitutional Court established as unconstitutional Act XXV of 1948 on the Taking of Certain Industrial Companies into State Ownership; Council of Ministers Decree 7080/1948 (VII.3) MT on the execution of this Act and on the amendment of certain provisions regarding the registration of stocks; Act IV of 1949 amending Act XXV of 1948; Act XX of 1949 on the Expropriation of Certain Industrial and Transport Companies. The Constitutional Court therefore annuls these legal rules.

3. The Constitutional Court suspends until 30 April 1992 proceeding with those petitions which claimed as injurious the fact that the competent legislators have not yet drafted the Act concerning the manner and the amount of damages to be awarded to the injured parties by the legal rules listed in Points 1 and 2 and that, therefore, resulted in an unconstitutionality which manifests itself in the omission to fulfill a statutory obligation.

4. The Constitutional Court rejects those petitions which request review in concrete cases of the legality of the nationalization procedures carried out, the settling of issues of ownership in the case of properties affected by these procedures, the provision of indemnification or compensation, the suspension of the sale of certain properties, as those do not belong to the jurisdiction of the Constitutional Court.

5. The Constitutional Court rejects the requests in the petitions which are directed at the review of the constitutionality of Council of Ministers Decree 32/1969 (IX.30) MT on the

Alienation of Real Property in State Ownership with regard to Property taken into State Ownership in the Past, the decrees providing for the execution of this Decree and at the annulment of the same.

The Constitutional Court orders its Decision to be published in the *Hungarian Official Gazette*.

REASONING

I.

According to a large number of petitions, submitted to the Court setting out the objectives as listed in the introductory part, the petitioners consider the taking of their houses, stores, restaurants, resort homes, factories, *etc.*, equipment and other chattels into state ownership without compensation, and the legal rules concerning these things as unlawful, violative of their ownership rights, and, therefore, unconstitutional. A significant number of petitions request the finding as a violation of their ownership rights of the legal rule which regulates the release of real property taken into state ownership, since the possibilities for the enforcement of claims, the limitation periods, the restriction and exclusion of legal remedies prescribed within. The exclusion of certain groups of society from this possibility results in the stigmatization of these groups and this also violates their constitutional rights.

Many petitioners claim as injurious that no legal rules on the promised compensation for the taken property were drafted, and therefore, they have not received compensation. A significant number of petitioners asked the Constitutional Court to return their original property, or to provide compensation or indemnification. In order to ensure all this, many petitioners asked

the Constitutional Court to prevent the sale, which is based on Council of Ministers Decree 32/1969 (IX.30) MT, of the real property taken from them into state ownership by declaring this legal rule as unconstitutional, and until there is a decision to suspend the sales which are under way.

According to the petition submitted by the "Club of the Robbed," which was formed in the Budapest office of the Independent Smallholders, Farmers and Civil Party and signed by 224 of its members, the legal rules concerning the taking of property into state ownership along with the orders providing for their execution and the orders modifying the same, including the legal rule on immunity, shall be declared unconstitutional because they violate the rules on the protection of property contained in the Constitution [Arts. 9(1) and 13(1)], the provision on compensation [Art. 13(2)], the right to inherit [Art. 14], the principle of equality before the law [Art. 70/A], the right to legal remedy [Art. 57(5)], and to complaint [Art. 64], and therefore, shall be annulled.

Similar to other petitioners, the "Club of the Robbed" also asked for the finding of unconstitutionality created by the omission to fulfill the legislative duties of the Government as the Government did not draft the legal rule on compensation which was promised in the Acts on Nationalization.

II

The Constitutional Court upon reviewing the petitions and the legal rules attacked therein was able to establish as a fact that a significant proportion of the real property in the country, the pharmacies, factories, plants, stores *etc.* in private ownership together with their furnishings and

fittings, with the property rights belonging to them and with their stocks, became the property of the State between the second part of the 1940s and 1952 without compensating the owners.

Even though all of the legal rules, claimed as injurious, had stated that the taking of property into state ownership would take place with compensation, and that a separate legal rule would establish the manner and the amount of compensation, such a rule has not yet been published. This fact remains even though in some cases, especially in the case of the expropriation of chattels, the affected parties received what appeared to be compensation, and the Hungarian Government made to certain affected parties an advance payment of around HUF 10,000 of compensation.

From the second part of the 1950s, as an indication of the softening of the regime, the legal rules, including Act VIII of 1957, Act XIII of 1958 and Council of Ministers Decree 1027/1963 (XII.17) MT concerning the settling of issues related to the taking of certain real property into state ownership, provided the opportunity to gain an exemption from expropriations by the State. However, in many cases the conditions and limitations for enforcing the claims provided only a formal opportunity to the owner.

It has to be stated that on the basis of the legal rule in force, according to para. 4 of Council of Ministers Decree 1027/1963 (XII.17) MT, there still exists a legal basis, even if in a limited form, for the possible amendment of the nationalization list. (If the conditions exist, then the present legal successor of the Minister of Construction would, on the basis of individual review, grant permission to amend the list.)

It may be concluded that in Hungary until the end of the 1950s, on the basis of the abovementioned legal rules on nationalization, the liquidation of private property, houses, pharmacies, plants, factories, printing shops, mills and movie theatres together with the

equipment and furnishings thereof and the rights belonging thereto took place according to the directives of the then controlling economic policy concept, in order gradually to create a new socio-economic system, without any kind of compensation.

At the beginning, this was directed at the property of certain social groups, then it was executed according to the size of the property, and finally, the nearly complete liquidation of private property took place.

These legal rules, even if the significant provisions directed at the taking of the right to property have already been fulfilled, are still in force even today when in the changed circumstances, according to the Constitution: "Hungary has a market economy in which public and private property are to receive equal consideration and protection under the law." [Art. 9(1)].

Therefore, when the Constitutional Court examined the legal rules in force which were attacked by the petitions, the Court compared those to the provisions of the Constitution relating to property.

The Constitutional Court also emphasizes here, as it has already pointed out in its *Dec. 21 of 1990 (X.4) AB* (MK 1990/98) on the privatization of land, that the Constitution regards and grants equal protection to both private and public property. Article 9(1) shall not be interpreted as meaning that there is a distinction between the types of property but, on the contrary, the protection of property independent of its form. The same protection is guaranteed by Art. 13(1) of the Constitution : " The Republic of Hungary guarantees the right to property." This does not mean that this right may not be limited under any circumstances. This limit is established in Art. 13(2) of the Constitution: "Property may be expropriated only exceptionally when this is a matter of public interest, and only in the cases and in the manner regulated by law, under terms of full, unconditional and immediate compensation."

This rule on expropriation, as the Constitutional Court stated in its abovementioned previous Decision, is such a rule of guarantee, which controls not only expropriation by an individual act of the authorities, but also expropriation on the basis of an Act.

The State has the right to expropriate property exceptionally, without any discrimination or grouping of the owners, when this is a matter of public interest, and only in the cases and in the manner regulated by law, and only under terms of full, unconditional and immediate compensation.

An individual act or a decree based on an Act of Parliament ordering expropriation violates the Constitution when one of these conditions is not present. According to the findings of the Constitutional Court, all the legal rules that order the taking of property into state ownership lack the conditions prescribed by the Constitution. The taking of property by the State, the limitation or the deprivation of the right of ownership on the basis of branding people and certain social groups or any kind of discrimination may not be viewed as a public necessity, and may not be allowed as an exception either.

There can be no exception made even when the State on the basis of its position of power, *ex lege*, orders the liquidation of the overwhelming part of private property. The almost complete liquidation of private property may not be viewed today as in the public interest. The Constitutional Court, therefore, concluded that the legal rules listed in the operative clause, which are still in force, violate Arts. 13 and 70/A of the Constitution, since these rules allow the taking of houses, pharmacies, plants, companies, factories, stocks, shops *etc.*: and the chattels and rights belonging thereto into state ownership not as an exception and not out of public necessity but by violating the prohibition on discrimination. Therefore, the Constitutional Court ordered the annulment of these rules.

Since the legal rules regulating the exemption from the taking of certain real properties into state ownership are closely related to the annulled legal rules, the annulment of the former are justified because of their relationship in subject matter. According to the judgment of the Constitutional Court, the annulment of the legal rules concerning the exemption are further justified because these legal rules contain discriminatory provisions in violation of Art. 70/A(1) of the Constitution; furthermore, they violate the right to a legal remedy guaranteed to citizens in Art. 50(2) and Art. 57(5) of the Constitution.

The Constitutional Court established that no Act or other legal rule concerning the manner and the amount of the compensation has been drafted, even though the legal rules on the taking of property into state ownership promised the settling of this issue and referred to the separate route of legal rules. Up to now neither the Hungarian Parliament nor the Government in power, or in the case of pharmacies the Minister of Public Welfare, have drafted the legal rules concerning the manner and the amount of compensation. The Constitutional Court has taken into consideration that the Government has already submitted a bill to Parliament in this matter, although this does not cover the entire period that is relevant in the context of the expropriation of property and referred to in the petitions, and promised the drafting of further bills. In view of this the Constitutional Court suspended the procedure in the case of those petitions which were directed at the Constitutional Court's finding of unconstitutionality manifesting itself in the omission to fulfill an obligation, and to call upon the organ responsible for the omission and to specify a time limit within which the organ in question has to fulfill its legislative duty.

In connection with the omission the Constitutional Court points out to the following:

From the perspective of the Constitutional Court's procedure the legislative procedure, whether it is one Act or a series of Acts connected to one another, is classified as a legal

procedure which in the given case serves as the basis for the suspension of the procedure. In certain legal rules on nationalization, the State undertook the obligation under constitutional law to provide for compensation. According to the opinion of the Constitutional Court, this undertaking of an obligation may be renewed freely by the legislature. Therefore, the abovementioned undertaking of this obligation, similar to those takings of property into State ownership which occurred up to now on the basis of the now-annulled legal rules, is not affected by the Decision of the Constitutional Court. A different interpretation would result in the expropriation of property based on the deprivation of rights remaining in force, and at the same time the State's obligation to provide compensation would vanish. The Constitutional Court annuls the legal rules on nationalization in their entirety, including the provisions referring to compensation. The reason for the annulment of the latter: if in the future on the basis of the annulled legal rules no nationalization may take place, then there is no reason to sustain the rules referring to compensation.

III

The Constitutional Court emphasizes, referring to the part of the petitions on the conflict between the nationalization and the former Constitution, that in the course of judging the case the Court proceeded according to Act XXXII of 1989 on the Constitutional Court. In its Decision, it examined the relationship of the legal rules on expropriation which are still in force and the Constitution in force. It did not examine those individual state administrative decisions which were unlawful from the start and which exceeded the provisions of the legal rules in force at that time which, therefore, even then in the light of the legal rules in force at that time were unlawful.

Accordingly, the Court neither reviewed such individual procedures nor judged the concrete claims for compensation or indemnification, or the suspension of the sale of state-owned real property.

The Constitutional Court has no jurisdiction to judge such matters, therefore, it rejected the petitions concerning these matters. This, of course, is no obstacle for the petitioners to enforce their rights before the competent organs if the legal preconditions for such enforcement exist. The Constitutional Court did not consider the petitions relating to Council of Ministers Decree 32/1969 (IX.30) MT concerning the regulation of the sale of houses in state ownership as well founded. The State, as an owner, as long as its ownership right exists, may dispose of its property. It belongs to the competence of the legislature to decide whether the State may maintain the present system of sale of apartments and other premises in accordance with Council of Ministers Decree 32/1969 (IX.30) MT.

The Constitutional Court has already pointed out in its *Dec. 21 of 1990 (X.4) AB* (MK 1990/98):

The State may privatize or reprivatize those assets which are in its ownership. Both the privatization and the reprivatization are decisions of the owner. According to Art. 10(2) of the Constitution the privatization and the reprivatization right of the State is theoretically unlimited, and this right of the State stems from the freedom of ownership and merely from that.

Later the Constitutional Court rejected, for other reasons (*Dec. 836/8/1990 AB* (ABH 1991, 732), the petition aimed at the finding of unconstitutionality of Council of Ministers Decree 32/1969 (IX.30) MT and it concluded that the provisions claimed as injurious, "concern the State's decision on the sale of which valuable assets in state ownership does the State, as an owner, consider as justified." Since the legal rules specified in the operative clause may not be

applied after this decision is published in the *Hungarian Official Gazette*, according to s. 43(2) of the Act on the Constitutional Court, the annulment of these legal provisions does not affect the legal relationships formed before the publication of this Decision and the rights and duties originating therefrom. Therefore, the annulment does not affect the ownership right of the State based on the state administrative resolution enacted within the framework of the execution of these legal rules, and the right to disposal originating from its ownership right. (Similarly, the annulment does not affect private property, the possession of which was recovered on the basis of the state administrative resolution on the exemption of taking property into state ownership.)

Although according to s. 43(2) of the Act on the Constitutional Court, the Constitutional Court generally annuls unconstitutional legal rules on the day of publishing its decision; subs. (4), as an exception, provides the opportunity for annulment with retroactive effect. In the present case the Constitutional Court examined with particular attention the question whether the legal grievances resulting from the execution of unconstitutional legal rules may be remedied by the annulment *ex tunc* of the abovementioned legal rules. In the course of such a review, the Constitutional Court concluded that the preconditions for an annulment with retroactive effect were not present. When applying s. 43(4) of the Act on the Constitutional Court, as the justification of the bill pointed out, extra attention shall be paid to legal certainty. In certain cases the interests attached to legal certainty conflict with one another. On the one hand, legal certainty demands that there will be no unconstitutional legal rules, or if the drafting or enactment of such take place anyhow, the prejudicial legal consequences thereof shall be repealed; on the other hand, it would be a grave violation of legal certainty if legal rules which were in force for a quite substantial time and which were applied in a great number of cases, and the legal relations which developed on the basis of the legal rule are in part firmly grounded, in part transformed

significantly during the years, were repealed. Most of the chattels taken into state ownership on the basis of the now- repealed rules cannot be found in the form, with regard to its state or its property relations, in which it was at the time of the nationalization. Certain properties were destroyed, *e.g.* because of city planning or for other reasons, others were in the meantime altered to a great extent, other properties deteriorated, and finally, a number of properties are no longer in the ownership of the Hungarian State. In such circumstances, the annulment of such legal rules with retroactive effect would not only leave no remedy for the damages of the former owners, but would inevitably cause further damages in mass proportions. In view of all this, the Constitutional Court found that the exceptional authorization contained in s. 43(4) of the Act on the Constitutional Court is not applicable in the present case. Therefore, the examination of whether the annulled legal provisions were unconstitutional at the time of their enactment or whether they became unconstitutional later and then at what point is unnecessary.

On the basis of reasons already discussed in an earlier part of the reasoning "in this context" the petitions directed at the retroactive finding of unconstitutionality of Council of Ministers Decree 32/1969 (IX.30) MT were rejected.

The publication of the Decision in the *Hungarian Official Gazette* is based on s. 41 of the Act on the Constitutional Court.

LÁBADY, J., dissenting: In agreement with the Constitutional Court that the legal rules listed in the Decision ordering the expropriation of property in the course of the nationalization are unconstitutional and with the annulment of these legal rules and the reasons for the annulment, in my opinion, there are no procedural or material - constitutional - reasons for the

suspension of the proceedings in those cases where an omission to fulfill an obligation has resulted in the unconstitutionality.

1. In theory, proceedings are suspended when suspension is the precondition for an outcome in some other legal proceedings which are under way, or is a preliminary question to be resolved before rendering a decision in the case. In order to avoid the conflict between these two proceedings, the procedural legal measure of suspension blocks the proceedings in the case, and thereby there is an opportunity to wait until the conclusion of the other proceedings. When this happens, the suspension of the suspended proceedings has to be listed, and by utilizing the outcome of the other already completed proceedings, the case has to be concluded.

2. The procedural legal institution of suspension was created in the temporary rules of the Constitutional Court. Its creation, according to the reasons for the rules that are the basis for this construction, was necessitated by legislative activities under way (or ordered by the Constitutional Court because of an omission). If the subject of the constitutional norm control procedure and the establishment of norms, which is at a sufficiently developed stage, by the Constitutional Court is the same, it is advisable to wait until the end of the legislative procedure which - because of its possibilities - may not only eliminate the unconstitutionality of the legal rule in force but instead may also create a new constitutional, legal arrangement. In contrast, the Constitutional Court because of its limited resources is restricted only to the finding of unconstitutionality and the annulment of the legal rule; therefore, its decision may create a legal lacuna, or possibly cause legal uncertainty. Whatever the outcome of the legislative process is, the suspension of the proceedings shall be lifted after the establishment of a norm, and the Constitutional Court shall hand down a decision ending the proceedings and concluding the case.

3. In the present nationalization case, the order of the suspension of the proceedings contradicts from a procedural legal aspect that part of the Decision which annuls the unconstitutional legal rules. The Constitutional Court in Points 1 and 2 of its Decision annuls the legal rules therein in their entirety, accordingly, the provisions of the legal rules establishing a legislative obligation to compensate the owners, to establish the extent and the manner of the compensation. (s. 10(1) of Act IV of 1952; s. 1 of Act XXV of 1952; s. 14 of Act XXV of 1948; and s. 12 of Act XX of 1949.)

According to s. 42(1) of Act XXXII of 1989 on the Constitutional Court ("Constitutional Court Act"), with due regard to s. 40, when the Constitutional Court finds a legal rule unconstitutional and annuls it, the legal rule will be void on the day the decision is published. According to s. 43(1), the legal rule that is annulled by a decision of the Constitutional Court may not be applied from the time the decision is published in the *Hungarian Official Gazette*. In the case of annulled legal rules or legal rules becoming void upon their annulment, there is no need to suspend the Constitutional Court's procedure since the proceedings "are depleted," "null and void," there is nothing to be suspended. Similarly, when the reason for suspension is no longer present, there is nothing that can "be raised," there is nothing about which the Constitutional Court can decide. In reality, there is no longer a case since with the decision on the merits - with the annulment of the challenged legal rules - the case is concluded, the proceedings are terminated. The suspension of the proceedings is by its nature, in relation to the decision on the merits, *a priori*. In the current Decision of the Constitutional Court, however, it is *ex post facto*.

4. The reason for the decision on the suspension with respect to the petition submitted concerning an omission to fulfill an obligation that resulted in an unconstitutionality, is that the so-called "Compensation" Act relating to this subject matter has already been passed by

Parliament and, further, the Government has promised the drafting of bills concerning this matter. Accordingly, the failure to draft the Acts on compensation or, at the latest, after 30 April 1992, would permit the Constitutional Court to resume proceedings and decide whether the omission to fulfill an obligation had resulted in an unconstitutionality.

According to s. 49(1) of the Constitutional Court Act, there are two preconditions for the finding of unconstitutionality in the case of an omission to fulfill a duty: one is that the legislative organ has failed to perform its legislative role that is authorized by a legal rule, the other is that thereby it has resulted in an unconstitutionality.

In my opinion, by the annulment of the provisions of the legal rules that establish the legislative task, the first precondition for the finding of unconstitutionality as a result of an omission, *i.e.* the legislative duty based on the authorization of a legal rule, ceases, and this fact terminates the existence of an unconstitutional situation.

Theoretically, this also happens, without any doubt, so when the Constitutional Court finds unconstitutionality as a result of an omission to fulfill a duty simultaneously with the annulment of the legal rule. The situation is even more similar when the Court suspends proceedings concerning the omission. Since the legislative duty is established by the annulled legal rules, when those are suspended, there will be no legal rule in force that would prescribe the legislative duty. Consequently, in the future in such a case the Constitutional Court may only make such a decision that declares there is no longer an omission because of the absence of the legal preconditions, therefore, the petition has to be rejected.

5. The only route that is feasible to adopt from a dogmatic point of view is for the Constitutional Court to keep as effective those provisions of the legal rules which promise compensation, by exempting those from the group of legal rules which are to be annulled,

because even though the provisions which ordered the nationalization are unconstitutional, those that offer compensation are not unconstitutional. However, even a decision with such a construction would not provide a comforting solution.

5.1. First, because the other precondition for unconstitutionality that is a result of an omission to fulfill a duty, *i.e.* the unconstitutionality is created by the omission itself, does not exist in this case either.

According to those reasons of the Decision of the Constitutional Court, with which I am also in agreement, unconstitutionality exists not because of the absence of full, unconditional and immediate compensation but because of Art. 9(1) (the equality of public and private property) and Art. 13 (the guarantee and the protection of the right to property, the lack of exceptions and public necessity) of the Constitution. To phrase it differently: nationalization which was based on the annulled legal rules would not become constitutional even by immediate and full compensation, therefore the unconstitutionality was not created by the omission.

5.2. Secondly, this route may not be adopted because in the case of finding an omission and ordering the fulfilment of the legislative duty of compensation, the Constitutional Court, in my opinion, may find only those compensation rules constitutional which are in accordance with Art. 13(2) of the Constitution.

Throughout the decision of the Constitutional Court, the fact that the Constitutional Court in the course of its Decision "only examined the relation between the legal rules in force on the appropriations by the State and the Constitution in force." The Constitutional Court could not have proceeded differently, the Act on the Constitutional Court obliges, as also the reasoning of the decision points out, the Court to do this. If, in fact, the Constitutional Court on the main issue

of the case, the unconstitutionality of the nationalization, proceeds according to the current Constitution, it may only do the same in the collateral, compensation, issues.

The argument that the parties affected by the nationalization are not entitled to full compensation because the nationalization did not take place under the current Constitution and the legal rules did not promise full compensation, in my opinion, may not be utilized because even the "limited" promise was unconstitutional; the Constitutional Court for this very reason annuls these provisions of the legal rules.

The Constitutional Court may not base its decision, with regard to the decision of unconstitutionality of the nationalization, on the Constitution in force, and in the issues of compensation related to this, on the legal rules that were declared unconstitutional and therefore annulled.

Promising full and unconditional compensation would be damaging from the point of view of politics and would provide an impracticable and impossible solution from the economic perspective.

6. Finally, I would like to emphasize that this decision of the Constitutional Court is closely related to *Dec. 21 of 1990 (X.4) AB* (MK 1990/98) (the so-called "Land Case"). The Constitutional Court in that Decision declared that:

The legal basis for the partial compensation is fairness solely: the State has no obligation to provide compensation and nobody has a subjective right to compensation. As reprivatization is not a claim originating in the nationalization or the organisation of co-operatives, the compensation is not that either, it depends solely on the sovereign decision of the State.

The connection between the constitutional review of the nationalization and *Dec. 16 of 1991 (IV.20) AB (MK 1991/42)* (the so-called "Compensation Case") is even closer. In that Decision the Constitutional Court stated the following:

The legislature in the course of the different property transformations may divide differently the various burdens which originate from the past. The legislature may also renew, similar to the model of novation, the obligations that have various bases, as for example, the compensation promised by the legal rules of the nationalization, and maintains essentially the same debt under a new legal title, to a new extent and with new conditions. Such a novation is present in the so-called Compensation Bill, „in which the new legal basis is fairness...[T]his, therefore, excludes reference to the old legal titles.”

The present Decision affects this connection. Despite this, it maintains a pending legal situation with regard to the obligation of compensation of the State that resulted from the unconstitutional nationalization.

However, the Constitutional Court will contradict the statements of the quoted decisions if it declares that the parties damaged by the unconstitutional nationalization have in the present case a subjective right to compensation, and the State has with regard to this a legislative duty and an obligation to compensate based on the legislative duty. Naturally, it is a completely different issue as to what extent do moral and humanitarian reasons oblige the State to remedy the material and other damages suffered in the old regime. Resolving this, however, is not within the competence of the Constitutional Court.

SÓLYOM, P., concurring:

1. The Constitutional Court relying on the fact that the drafting of a Compensation Act has begun, suspended the proceedings on the issue of compensation promised for nationalisation

but never effected which is the subject of the petition. Since the compensation for nationalization, and "indemnification" on the basis of fairness have different legal bases, the Constitutional Court indicated that the State may renew the legal basis of its obligation. Thereby the Constitutional Court referred to the analogy of novation as it has already done in its *Dec. 16 of 1991 (IV.20) AB* (MK 1991/42), which was closely related to the problem of nationalization. However, behind such a use of novation, a problem of constitutionality of the transformation (change of regime) remains hidden. Since in the present case, the application of novation in this sense became the basis for the decision on the merits of the case, I find it necessary to point out that the renewal of the obligation of the State is not unrestrictedly and unconditionally constitutional; the State may not, even in extraordinary circumstances, alter the legal title, conditions or extent of its obligations. Because of this, the Constitutional Court has to clarify in each case the conditions that are constitutional for the modification of the obligations on the basis of the model of novation.

2. In the course of the State's unilateral modification of certain obligations, reference to the renewal of a contract is permissible. The reason is the identical mode of problem solving; the original obligation ceases to exist, and its contents, along with the desired modifications, are transferred into a new obligation (as it is expressed in the Roman law definition of novation). Any further analogies between novation of a contract and the assumption of an obligation by the State would be misleading.

Therefore, it is particularly impossible to avoid the dogmatic difficulties in connection with the compensation for nationalization by way of novation. [???In this case the cessation of the obligation for compensation, but even the obligation to compensate fully may be deduced from the possible interpretations of s. 43 of Act XXXII of 1989 on the Constitutional Court, and

in part because of the issues of interpretation on which the outcome of the case depends arising in the present case???SENSE]. Such a problem, *e.g.* whether the assumption of an obligation on the basis of a legal rule is a "legal relationship" in the application of s. 43(2); whether the obligation remains despite the annulment of the basic legal rule, precisely because it has not yet been satisfied, *i.e.* whether the consequences of an annulment in the case of finding an omission are different, whether the fact of expropriation of property created claims to compensation.

The interpretation has to lead to a constitutional result. For example, it is a constitutional issue that has to be decided whether, on the one hand, it is in accordance with the idea of a constitutional state if the expropriation of property remains uncompensated; or, on the other hand, whether this idea demands the assumption of obligations that come with full compensation. The application of novation provides only a seeming solution to this problem, since the identical questions arise when judging the constitutionality of novation.

3. Novation in the case of compensation promised for nationalization but not effected is permissible because of the extraordinary nature of compensation.

These nationalizations may not be regarded as permitted and customary in a constitutional state in the case of which the legitimising through the public interest is, *e.g.*, the reorganisation of certain industries, the maintenance of public utilities or the suppression of foreign capital/investment. The Nationalization Acts of 1948-1952 may only be judged in their entirety; this is how their role in the transformation (change of regime) becomes apparent, and because of their unconstitutionality it will become apparent that they were not exceptional measures, but comprehensive and systematic ones that were aimed at the liquidation of private property, an ownership form that is today constitutionally protected. This is the reason why the absence of compensation was part of their essential nature: compensation based on fairness would have

frustrated the purpose of the nationalization. The reviewed nationalizations were not, therefore, the usual nationalizations and their unconstitutionality results precisely therefrom.

When judging the permissibility of novation, it has to be taken into consideration that compensation arises at the time of a new transition (change of regime), in the course of restoring constitutionality, when other obligations also have to be satisfied, and the division of burdens and benefits arising out of the transition (change of regime) also have to be constitutional. Due regard has to be paid to the fact that compensation has become relatively independent from the basic question of the constitutionality of nationalization; the payment of compensation would not render nationalization constitutional, and the absence of it would not affect the property acquisition of the State. Compensation, therefore, appears as the unfulfilled side of a contractual relationship. This justifies consideration of the passing of time and the changing of the circumstances.

In principle, it may not be regarded as unconstitutional if the Act instead of the guarantees in the case of the usual nationalization provides differently - because of the exceptional circumstances - for the protection of property and the enforcement of constitutional principles. Novation in the given case is a suitable and permissible tool for the legislator to consider the extraordinary character and circumstances of nationalization in the past and that of its present review. On the other hand, since the Constitutional Court may not enforce the points of view resulting from the extraordinary character of the case according to the general rule of the legal consequences of the annulment of an unconstitutional legal rule, if these points of view have adequate weight, the Court may accept a solution independent of these rules.

4. The renewal itself may not violate a constitutional right or principle. If the guarantee of an immediate, full and unconditional compensation (Art. 13(2) of the Constitution) by way of

novation is not enforced with regard to the compensation promised forty years ago, the special character of the nationalization of that time does not exclude the protection of the right to property, which under Art. 13(1) becomes the State's obligation. Similarly, the prohibition of discrimination has to be enforced. On the basis of the protection of property and the principle of the constitutional state, the State has to settle, in a way that none of the affected groups is put into a disadvantageous position - even by way of renewal - its obligations that resulted from nationalization in the past. The constitutionality of certain Acts related to this may only be resolved upon their concrete review.

In the case of compensation for nationalization, the Constitutional Court only decided on the question of the permissibility of novation as a matter of principle. It was justified to suspend the the adjudication of the petitions concerning an omission to fulfil an obligation, after passing the Compensation Act containing the first novation and an undertaking of an obligation for further ones, because this enables the Constitutional Court to review the constitutionality of the renewal of the obligations of compensation while proceeding with the original case.