Constitutional judgment 3-4-1-2-96

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**JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT
of 8 November 1996**

Review of the petition of the Chancellor of Justice of 21 June 1996 for the declaration of invalidity of §§ 1(2) and 6(1) of the Privatisation of Dwellings Act and "Re-nationalisation and Privatisation of Property of Co-operative, State Co-operative and Non-profit Organisations Act" Amendment Act.

The Constitutional Review Chamber sitting in a panel
presided over by the Chairman of the Chamber Rait Maruste
and composed of the members of the Chamber Tõnu Anton, Lea Kalm, Jaano Odar and Jüri Põld,
at its session of 16 October 1996,
with the representative of the Riigikogu Mihkel Pärnoja, Deputy Chancellor of Justice-Adviser Aare Reenumäe and the Minister of Justice Paul Varul appearing,
and in the presence of the secretary to the Chamber Piret Lehemets,

reviewed the petition of the Chancellor of Justice no. 2 of 21 June 1996.

From the documents submitted to the Constitutional Review Chamber **it appears, that:**

On 20 December 1995 the Riigikogu passed the Privatisation of Dwellings Act and "Re-nationalisation and Privatisation of Property of Co-operative, State Co-operative and Non-profit Organisations Act" Amendment Act, (hereinafter "the Amendment Act").

On 17 May 1996 the Chancellor of Justice made a proposal to the Riigikogu that it bring §§ 1(2), 6(1) and 7 of the Amendment Act into conformity with § 32 (1) of the Constitution. The Riigikogu, at its session of 28 May 1996, did not accept the proposal. That is why the Chancellor of Justice, on 21 June 1996, made a proposal to the Supreme Court that it declare §§ 1(2) and 6(1) of the Amendment Act invalid.

On 26 August 1996 the Supreme Court *en banc* extended the time limit for the review of this case.

The Chancellor of Justice reasoned his petition as follows:

1. § 1(2) of the Amendment Act, on the basis of § 40 of Republic of Estonia Principles of Ownership Reform Act (hereinafter "the PORA"), deems dwellings to be objects of privatisation regardless of whether these have been obtained from the state for or without charge. § 3(2)3) of the PORA stipulates that property which was formerly transferred by the state without charge to co-operative, state co-operative or non-profit

organisations shall be re-nationalised. The Amendment Act establishes that among the objects of privatisation are also dwellings owned by legal persons in private law - obligated subjects referred to in § 3 Agricultural Reform Act, or obligated subjects of re-nationalisation and privatisation referred to in § 2(3) of “Re-nationalisation and Privatisation of Property of Co-operative, State Co-operative and Non-profit Organisations Act” (hereinafter "Re-nationalisation Act") - and which were owned by them when the referred Acts entered into force, and had not been received from the state without charge. Also, an object of privatisation is a dwelling, which has been transferred from the ownership of an obligated subject of agricultural reform or re-nationalisation to the ownership of its legal successor or to a new legal person formed in the course of reform of obligated subjects of agricultural reform or re-nationalisation. Thus, the obligation to privatise is extended beyond the scope established by § 3(2) of the PORA and constitutes the obligation to expropriate the property of legal persons in private law, as the Constitutional Review Chamber of the Supreme Court has pointed out in its judgment of 12 April 1995.

2. Pursuant to § 32 of the Constitution property may be expropriated in the cases and pursuant to procedure provided by law, only in the public interests, and for fair and immediate compensation. The fact that one private subject has the obligation to give his or her property away to another private subject, can not be considered to be in the public interests. Neither can the compensation offered in the form of public capital bonds be considered to be just, as it is lower than the market price. § 4 of the Amendment Act, supplementing the Privatisation of Dwellings Act (hereinafter "the PDA") with § 19(6), gives the obligated subjects of re-nationalisation the right to use the privatisation vouchers received from privatisation of dwellings for payment for land privatised with the right of pre-emption in full amount, and to buy the Compensation Fund bonds. This right increases the value of the compensation paid in public capital bonds and creates conditions for agreements to pay compensation in privatisation vouchers. Thus, in cases of expropriation of dwellings, the privatisation vouchers obtained under the transaction can be regarded as compensation. At the same time, the land obtained for privatisation vouchers, Compensation Fund bonds or other property obtained through some other transaction, can not be considered as compensation. The use of the compensation, for example for purchasing land, does not constitute a part of expropriation process. The use of the compensation payable in the form of privatisation vouchers does not guarantee the compensation of the normal value of the expropriated dwellings to all owners. Not all persons who have the obligation to expropriate have been granted the right to conclude another deal for obtaining land, and these persons are thus put in an unjustifiably unequal situation. A compensation in the form of privatisation vouchers is just only if the parties thus agree. Compensation in the form of privatisation vouchers has been used in such cases of expropriation of property, which do not take place within the frames of ownership reform. This does not fit in the frames of ownership reform. Payment of compensation in privatisation vouchers against the will of the owner is in conflict with § 32 of the Constitution.

3. § 6 (1) of the Amendment Act, leaving out the words “to whom state property has been transferred without charge” from § 2 (1) of the Re-nationalisation Act, extends the circle of obligated subjects of re-nationalisation in comparison with the previously valid Act. Among other obligated subjects of re-nationalisation, the Act refers to organisations who, under §§ 3(2) and 40 of the PORA have no obligation to privatise in the course of the ownership reform, as they do not possess property subject to re-nationalisation. The Amendment Act, together with § 2 (3) of the Re-nationalisation Act, retroactively form a lawful basis for the list of obligated subjects, approved by the Government of the Republic Regulation no. 258 of 2 September 1992, which – by violating the then valid law - included 158 organisations, at least 85 of which had not received from the state any property without charge, as the Minister of Finance declares in the appendix to his letter of 25 May 1995. Pursuant to the principle of legal certainty, as a rule, legislation must not have retroactive effect. This principle concerns mainly the acts, which bring along negative consequences to persons, restrict their rights and freedoms, and put obligations on them.

4. Having amended § 2 (1) of the Re-nationalisation Act, after the entry into force of the Constitution, to the effect that it extended the circle of obligated subjects of re-nationalisation to include such persons and organisations, who have not received property prom the state without charge, § 7 of the Amendment Act establishes the obligation for such organisations to re-nationalise through § 6' of the Re-nationalisation Act.

Obliging such organisations, who possess property subject to re-nationalisation, to privatise, whereas privatisation is not effected in regard to the property subject to re-nationaliation but in regard to other property they possess, also amounts to expropriation. Thus, having exceeded the limits of § 3(2) of the PORA, the Riigikogu established the expropriation obligation. § 6(1) of the Amendment Act is in conflict with § 32 of the Constitution to the extent that it establishes the cases of expropriation, i.e. obligatory privatisation of dwellings, not effected in regard to the property subject to re-nationalisation. When providing for expropriation the Riigikogu has not observed the principle of public interest and has not guaranteed just compensation to the owners of property subject to expropriation.

5. Estonia has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms and its additional protocols nos. 1, 4, 7, 9, 10 and 11. Estonia made a reservation when ratifying protocol no 1. § 1(1) of the protocol recognises every person's right to peacefully enjoy his or her property. No one shall be deprived of his possessions except in the public interests and subject to the conditions provided for by law and by the general principles of international law. According to Article 64 of the Convention reservations of general character are not permitted. The reservation and the list of Acts established by § 2 of the Convention Ratification Act do not include the Re-nationalisation Act. Consequently, this Act must be in conformity with the Convention and the additional protocols thereof. § 123 (2) of the Constitution prescribes that if laws or other legislation of Estonia are in conflict with international agreements ratified by the Riigikogu, the provisions of the international agreement shall apply.

For the above reasons the Chancellor of Justice made a proposal that § 6(1) of the Amendment Act be declared invalid in entirety, and § 1(2) of the Amendment Act (§ 3(1) of the PDA) be declared invalid to the extent that it establishes that dwellings owned by a co-operative or a non-profit organisation are the object of privatisation, as privatisation is not performed in regard to property subject to re-nationalisation.

The representative of the Riigikogu considered the contested legislation to be in conformity with the Constitution.

The Minister of Justice, too, considered the contested legislation to be in conformity with the Constitution and argued that although such privatisation of dwellings constitutes expropriation, it constitutes expropriation in the public interests for immediate and just compensation.

Having examined the materials submitted and having given a fair hearing to the representatives of the Chancellor of Justice and the Riigikogu, and to the Minister of Justice, **the Constitutional Review Chamber found the following:**

I. In its judgment of 12 April 1995, having examined the petition arising from the Tallinn City Court judgment of 10 February 1995, the Constitutional Review Chamber had found that § 3(1) of the PDA, which considers that a co-operative organisation's dwelling-house or an apartment irrespective of who founded the building thereof is the object of privatisation, means the obligation to expropriate the property of co-operative organisations as legal persons in private law. The Chamber found that the obligation to privatise property, which had not been obtained from the state without charge, for privatisation vouchers of only limited turnover, was in conflict with § 32 of the Constitution.

At the same time, the judgment of the Supreme Court did not and does not prevent anyone from disposing of his or her dwelling or other property on mutual agreement also for privatisation vouchers or for some other form of compensation, which the parties agree upon.

II. On 20 December 1995 the Riigikogu amended the PDA and the Re-nationalisation Act, bringing § 3(1) of the PDA into conformity with the Constitution. At the same time, § 3 was supplemented with subsection 1'. Pursuant to that amendment, on the basis of § 40 of the PORA, the object of privatisation is a dwelling owned by obligated subjects established in § 3 of the Agricultural Reform Act or obligated subjects of re-nationalisation, and was in their ownership at the time the pertinent Acts entered into force. The words "except Compensation Fund bonds" were omitted from § 19 (6) of PDA. The end of the same subsection

was supplemented with the following sentence: “Obligated subjects of re-nationalisation have the right to use the privatisation vouchers, received from privatisation of dwellings, for payment for land privatised with the right of pre-emption in full amount”. The words “to whom state property has been transferred without charge” were omitted from § 2(1) of the Re-nationalisation Act. Thus, the Riigikogu supplemented § 3(1) of the PDA with subsection 1', and amended the Re-nationalisation Act to the effect that the referred subjects are obliged to privatise all the dwellings they own, and which they owned when the pertinent Acts entered into force.

III. The complexity of restructuring of ownership relations, the ambiguity of social agreements, time limits and small experience have created inconsistencies and - to certain extent - controversies in legal regulation of ownership reform.

Pursuant to the general provisions of the Principles of Ownership Reform Act (§ 2), the purpose of ownership reform is to restructure ownership relations in order to ensure the inviolability of property and free enterprise, to undo the injustices caused by violation of the right of ownership and to create the preconditions for the transfer to a market economy. This must not prejudice the interests protected by law of other persons or cause new injustices. According to § 3(2) of the Act, in the course of ownership reform, the form of ownership of property shall be changed through municipalisation, re-nationalisation and privatisation. For the purposes of the general provisions of the Act (§ 3(2)2)) privatisation of property means transfer of property in state ownership or property transferred into municipal ownership for or without charge into private ownership.

Thus, privatisation of dwellings in the sense of the Amendment Act is not in conformity with the purpose, content and object of ownership reform as established in the Principles of Ownership Reform Act.

According to § 1 of the Re-nationalisation Act, this Act provides for the re-nationalisation and privatisation procedures pursuant to §§ 40 and 42 of the PORA. § 40 of the PORA appears under chapter IV of the Act, entitled “Privatisation”. In this chapter (§ 32) privatisation is defined as transfer of property in state or municipal ownership in the course of ownership reform for a charge or without charge into the ownership of other persons as a result of which the owner of the property changes. Pursuant to § 40(1) of the PORA, on the basis of law, also co-operative, state co-operative and non-profit organisations may be required to privatise property in their ownership. Thus, § 40(1) of the PORA is not in conformity with the purpose, content and object of ownership reform and with the definition of privatisation for the purposes of the Principles of Ownership Reform Act.

§ 2(1) of the Privatisation of Dwellings Act provides that the purpose of the privatisation of dwellings is to give the legal and natural persons the possibility to obtain the dwellings they are leasing, and also dwellings that are not being used, and thus to guarantee better maintenance and preservation of dwellings. This goal differs greatly from the purpose of ownership reform.

Pursuant to § 6(5) of the Privatisation of Dwellings Act the obligated subjects of privatisation of dwellings are obligated subjects of re-nationalisation, in regard to dwellings they own. On the basis of § 3(1) of the Re-nationalisation Act only such property (in the meaning of a thing) may be re-nationalised, which had been transferred to obligated subjects without charge, and which has been preserved in its former distinct condition. It can be questioned whether such organisations can be considered obligated subjects of privatisation before it has been established that the organisations own property subject to re-nationalisation.

IV. On the basis of the petition of the Chancellor of Justice the Constitutional Review Chamber is exercising abstract norm control in the present case. This proceeding has not been initiated by a petition arising from a court judgment in a concrete individual case, as it was the case in the constitutional review proceeding which was concluded by the judgment of the Chamber of 12 April 1995. Within abstract norm control the constitutionality of a disputed legislation or a part thereof is evaluated generally, *in abstracto*. Pursuant to § 15 of the Constitution and irrespective of the results of this abstract norm control, everyone shall still be entitled to contest the constitutionality of the legal basis for the expropriation of his or her property.

V. § 32 of the Constitution establishes that the property of every person is inviolable and equally protected. Property may be expropriated without the consent of the owner only in the public interests, in the cases and pursuant to procedure provided by law, and for fair and immediate compensation. Thus, the Constitution sets three requirements to protect ownership. These are: allowing for expropriation only in the cases and pursuant to procedure provided by law, observance of public interests, and immediate and just compensation for the expropriated property. The fact whether the Chancellor of Justice's petition is justified should be evaluated considering these requirements and the amendments the Riigikogu has made to the Acts following the judgment of the Constitutional Review Chamber of 12 April 1995.

Public interest is an evaluative criterion changing in time. Privatisation of dwellings owned by co-operative, state co-operative and non-profit organisations as compulsory privatisation amounts to expropriation, which actually takes place in the course of ownership reform. As a rule, obliging a person in private law to give away property can not be conceived as promoting public interests. In the case of compulsory privatisation of dwellings the general and individual interest are interwoven. Public interest is primarily expressed in the need for an ownership reform. Ownership reform was planned and provided for by the Supreme Council. The fact that the Riigikogu has, by adopting two Acts, expressed its unambiguous legislative will to privatise dwellings, indicates that there is a weighty public interest. That is why the Constitutional Review Chamber finds that within the framework of abstract norm control it has no right to dispute the observance of public interest.

Pursuant to § 8 of the Privatisation of Dwellings Act, dwellings may be privatised for public capital bonds, for privatisation vouchers issued during compensating for unlawfully expropriated property, for working years entered into public capital bonds, or employment shares in the assets of organisations uniting agricultural enterprises who are obligated subjects of re-nationalisation. The Chancellor of Justice only disputed one means of payment, namely payment for expropriated dwellings with public capital bonds (privatisation vouchers).

As for the compensation offered in the course of privatisation of dwellings, the Riigikogu has, following the Constitutional Review Chamber judgment of 12 April 1995, acted in accordance with the spirit of the judgment and has found additional possibilities for compensating for expropriated dwellings. The Supreme Court considers the fact that the obligated subjects of privatisation of dwellings have also the possibility to use the privatisation vouchers - received for the privatisation of dwellings - for privatisation of land with the right of pre-emption, as the increase of the value of privatisation vouchers. Within the framework of ownership reform this can also be viewed as just compensation, if the parties thus agree. In the process of general norm control it is not possible to assess whether such compensation is just and satisfactory to the parties in each concrete case.

Pursuant to the requirement of immediate compensation, stipulated in § 32 of the Constitution, the obligated subjects of expropriation are entitled to just compensation at least by the time the expropriation is completed. In case of disputes the property may be expropriated only after a pertinent court judgment has taken effect and after the receipt of the amount awarded by the judgment. If, nevertheless, property was expropriated before the dispute was settled or before receiving the amount awarded by the court judgment, § 32 of the Constitution provides that everyone, whose property has been expropriated without his or her consent, has the right of recourse to the courts and to contest the expropriation of property, as well as the compensation or the amount thereof.

For the above reasons the Constitutional Review Chamber is of the opinion that the petition of the Chancellor of Justice should be dismissed.

VI. On 13 March 1996, when ratifying the European Convention on Human Rights, Estonia made a reservation in respect of protocol no 1 thereof. The reservation admits that Estonia, having just restored its independence, is unable to carry out "wide economic and social reforms" in full conformity with the Convention. According to Article 64 of the Convention it was indicated in the reservation that § 1 of

Protocol 1 was not extended to reform Acts enumerated in the reservation. Pursuant to the spirit of the reservation the Estonian state admitted the need to complete the undertaken ownership reform, and the possibility that the reform was not in full conformity with the universally recognised principles of protection of ownership embodied in the Convention. The Convention Ratification Act is effective and the reservation has been recognised as acceptable by the State Parties. According to the spirit and interpretation practice of the Convention, the reservations may be temporary and, when making a reservation, the states undertake to eliminate the inconsistencies. Estonia has admitted the possibility of inconsistency of the ownership reform with the internationally recognised principles of ownership protection, and has undertaken to eliminate these drawbacks. To admit an inconsistency does no mean a possibility to ignore the requirement that laws must be in conformity with the Constitution.

On the basis of § 19(1)1) of the Constitutional Review Court Procedure Act, **the Constitutional Review Chamber has decided:**

to dismiss the petition no. 2 of the Chancellor of Justice of 21 June 1996.

The judgment is effective as of pronouncement, is final and is not subject to further appeal.

Rait Maruste
Chief Justice of the Supreme Court
