Constitutional judgment III-4/A-1/95

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**JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT
of 12 April 1995**

Review of the petition of the Tallinn City Court for the declaration of invalidity of §§ 3(1), 6(5) and 6(6) of the Privatisation of Dwellings Act.

The Constitutional Review Chamber sitting in 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 29 March 1995,
with the representative of the Riigikogu Liina Tõnisson and the Chancellor of Justice Eerik-Juhan Truuväli appearing, and
in the presence of the secretary to the Chamber Külli Aren

reviewed the petition arising from the judgment of the Tallinn City Court of 10 February 1995, to declare §§ 3(1), (6)5 and 6(6) of the Privatisation of Dwellings Act invalid.

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

The plaintiffs L. Linsi, E. Vaskmaa and others are occupying apartments in the residential building at 9 Narva Road, Tallinn, which belongs to the Central Association of Estonian Consumer Associations (hereinafter “the CAECA”), on the basis of residential lease contracts.

The plaintiffs presented applications to the Management Board of the CAECA for the privatisation of the apartments in their use. The defendant did not satisfy their applications because, by its Regulation no. 94 of 15 September 1994, it had decided not to transfer residential buildings and apartments belonging to the CAECA and to its enterprises for the working years entered into public capital bonds.

The plaintiffs filed actions with the Tallinn City Court and requested that the court recognise their pre-emptive right to privatise the apartments where they live and obligate the defendant to transfer these apartments to them for the working years entered into their public capital bonds.

The Tallinn City Court decided to dismiss the actions and declared §§ 3(1), 6(5) and 6(6) of the Privatisation of Dwellings Act (hereinafter “the PDA”) unconstitutional and did not apply these. The court justified its decision to dismiss the actions with the fact that § 2 of the Principles of Ownership Reform Act (hereinafter

"the PORA") establishes, among other things, that the purpose of ownership reform is to restructure ownership relations in order to ensure the inviolability of property, and § 3(2) provides an exhaustive list of grounds for changes in the form of ownership of property, and the only possibility of transfer (expropriation) of the property of legal persons in private law is re-nationalisation. The provisions of the same Act regulating privatisation do not include the obligation to transfer the legal person's property to another person.

§ 3(1) of the PDA prescribes the privatisation of the obligated subject's property notwithstanding who funded the construction of the residential building. In the list of obligated subjects of re-nationalisation, approved by the Government of the Republic Regulation no. 258 of 2 September 1992, the defendant occupies ranking 1 in subdivision 1. The city court was of the opinion that § 3(1) of the PDA was in conflict with the following: 1) §§ 3 and 42 of the PORA according to which the property, which was formerly transferred by the state without charge to co-operative, state co-operative or non-profit organisations, shall be re-nationalised; 2) § 32 of the Constitution because the Act does not regulate either the general interests on the basis of which the obligated subject's property is to be expropriated, or how the immediate and fair compensation to the owner is arranged. Everybody is entitled to the right to freely possess, use and dispose of their property. The PDA does not prescribe for the expropriation of the owner's property on the conditions provided by § 32 of the Constitution, instead it obligates the owner to transfer its property to other persons on certain conditions. This obligation has been imposed on the owner irrespective of who funded the procurement of the property. The Tallinn City Court was of the opinion that for these reasons §§ 6(5) and 6(6) of the PDA, too, were in conflict with the Constitution. § 6 of the PDA determines the obligated subjects of privatisation of dwellings for the purposes of the Act. According to § 6(5), the obligated subjects of privatisation of dwellings are the obligated subjects of re-nationalisation in regard to dwellings which belong to the obligated subjects of re-nationalisation. According § 6(6), upon transfer of a dwelling, constituting the property of the obligated subject of re-nationalisation, to the new legal persons formed in the process of re-nationalisation, the rights and obligations of the obligated subjects of privatisation of dwellings as provided by the Act extend to the referred persons.

The Chancellor of Justice was of the opinion that §§ 3(1), 6(5) and 6(6) of the PDA were in conflict with § 32 of the Constitution, but the referred provisions were not in conflict with the Constitution in their entirety. The conflict is manifested in the fact that the object of privatisation is extended to include the property of legal persons in private law, while the constitutional requirements for the expropriation of property are not fulfilled.

The representative of the Riigikogu considered the disputed Act to be in conformity with the Constitution.

Having examined the submitted documents and having given a fair hearing to the Chancellor of Justice, the Constitutional Review Chamber finds that:

I.

1. The definitions of re-nationalisation and privatisation were given by the PORA, passed on 13 June 1991. § 3(2)3) of the Act established that the property, which was formerly transferred by the state without charge to co-operative, state co-operative or non-profit organisations, shall be returned to the Republic of Estonia (re-nationalisation of property). In the case of re-nationalisation the entitled subject of the property reform is the state and the obligated subject is the person who, according to the Act, is obligated to return the property to the entitled subject. According to § 32 of the PORA privatisation means 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. Thus, the object of privatisation is the property in state or municipal ownership (§ 33). The obligated subjects of privatisation are the enterprises whose property is being privatised (§ 34(4)). Consequently - the state or municipal enterprises. According to § 40(1) of the PORA the Supreme Council of the Republic of Estonia had the right, with its decision, to require that a cooperative organisation privatise the property in its ownership pursuant to the procedure established in that Act or in some other Act of the Republic of Estonia.

2. On the basis of §§ 40 and 42 of the PORA, on 4 June 1992, the Re-nationalisation and Privatisation of the Property of Co-operative, State Co-operative and Public Organisations Act was passed (hereinafter "the Re-nationalisation Act"). According to § 2 of this Act the obligated subjects of re-nationalisation and privatisation were also the organisations of the system of the CAECA. With the Government of the Republic Regulation no. 258 of 2 September 1992 the ECA was included in the list of obligated subjects of re-nationalisation. According to § 3 of the same Act it was possible to re-nationalise the state property (in the meaning of a thing) preserved in its former distinct condition, that was given to the obligated subject without charge. According to § 6(3) it was necessary, in the course of inventory check, to establish the property in possession of the obligated subject which was to be privatised as the property received from the state without charge.

3. The Principles of Ownership Reform Act considers the transfer of state or municipal property with or without charge to other person's property as privatisation (§ 32), and also defines as privatisation the transfer of co-operative property with or without charge into private possession. Consequently, the PORA has proceeded from the old Soviet law system according to which there existed: 1) socialist property - the state property; the property of collective farms and other co-operative organisations, their associations; the property of non-profit organisations; 2) private property (§ 96, the Civil Code of the ESSR). In § 40(2) of the PORA privatisation is defined as the transfer of property into private ownership, bearing also in mind the contrasting to socialist property.

4. When the Constitution of the Republic of Estonia entered into force, according to § 2(1) thereof legislation in force in Estonia at that time remained valid in so far as it was not in conflict with the Constitution or the Constitution Implementation Act and until it was either repealed or brought into conformity with the Constitution. § 32 of the Constitution provides 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. Everyone has the right to freely possess, use and dispose of his or her property. Restrictions shall be provided by law.

5. The Privatisation of Dwellings Act was passed on 6 May 1993. Being an Act passed after the entry into force of the Constitution it must be in conformity with the Constitution irrespective of the fact that the PDA was drafted on the basis of the PORA and the Re-nationalisation Act.

According to § 3(1) of the PDA the object of privatisation is a residential building or an apartment which is in the ownership of the state, local municipality or an obligated subject of re-nationalisation, enumerated in § 2(3) of the Re-nationalisation Act, irrespective of the fact in which legal person's ownership (balance sheet) it is or who funded the construction of the houses or apartments. Consequently, according to § 3(1) of the PDA a co-operative organisation is obligated to privatise its property - houses and apartments - irrespective of who funded the construction thereof. At the same time § 8 provides that privatisation takes place for public capital bonds, vouchers issued in compensation for illegally expropriated property, for money or the working years entered into public capital bonds or for the employment share in the property of a collective farm or an inter-enterprise organisation, which is an obligated subject of re-nationalisation. The buyer may pay for a dwelling with one or several means indicated above. Consequently, § 3 and §§ 6(5) and 6(6) of the PDA have extended the object of privatisation after the Constitution entered into force in comparison with the PORA and the Re-nationalisation Act. According to these Acts only the property given by the state, without charge, to the referred organisations, can be re-nationalised or privatised.

6. § 2(2) of the Law of Property Act (hereinafter "the LPA") Implementation Act, which entered into force on 1 December 1993, establishes that the restitution, compensation and privatisation of property, and the retention in state ownership, municipalisation and re-nationalisation of property in the course of ownership reform is effected on the bases of and pursuant to procedures provided for in the PORA, unless otherwise provided in the Act.

II.

To decide the constitutional review matter, an opinion must be given on the fact whether it is in conformity with § 32 of the Constitution that the objects of privatisation - according to § 3 the PDA - are houses and apartments in the ownership of co-operative organisations (the former organisation in the system of the CAECA), which they have not received from the state without charge, but which they are obligated to transfer for the payment indicated in § 8(1) of the same Act, and that - pursuant to §§ 6(5) and 6(6) of the PDA - they are the obligated subjects of privatisation concerning the property which they have not received from the state without charge.

1. Considering the fact that pursuant to § 32 of the PORA privatisation means transfer of property in state or municipal ownership for a charge or without charge into the ownership of other persons, the object of privatisation as provided by this Act does not coincide with the object of privatisation as provided by § 3 of the PDA. § 3 of the PDA extends the object of privatisation to include the property of co-operative organisations, which has not been obtained from the state without charge, and considers all the houses and apartments belonging to co-operative organisations to be the objects of privatisation. § 40 of the PORA defines the expropriation of the property of a co-operative organisation as privatisation. Disparity has been caused by the fact that the Law of Property Act, which entered into force on 1 December 1993, began to make distinction between legal persons in private law and in public law.

The state and the units of local governments participate in civil law relationships as legal persons in public law, and when they transfer their property to a private law legal person, privatisation takes place for the purposes of the Law of Property Act and the General Part of the Civil Code Act. At the same time, § 1(2) of the LPA Implementation Act emphasises that the re-nationalisation and privatisation in the course of ownership reform are effected on the bases of and pursuant to procedures provided for in the PORA and legislation arising therefrom. When the PDA obligates co-operative organisations as obligated subjects of re-nationalisation to privatise also the property which it had not obtained from the state without charge, then this actually constitutes expropriation of the property of co-operative organisations which, according to § 32 of the Constitution, may be effected in the cases and pursuant to procedure provided by law, in general interests and for fair and immediate compensation. On this occasion it is not important in solving the case of constitutional review that according to § 47 of the Immovables Expropriation Act the deprivation of property in the course of ownership reform is not expropriation, and this Act does not apply to such cases.

2. According to § 1(2) the LPA Implementation Act and §§ 2 and 40 of the PORA privatisation is the regulation of ownership relations in the course of ownership reform, whereas co-operative organisations were regarded as the owners of property. In the present case the object of privatisation is the house or an apartment of a co-operative organisation. The PDA is an Act passed after the Constitution entered into force and it must to be in conformity with the Constitution as of adoption. Nevertheless, this Act provides for the possibility to require that a co-operative organisation transfer its property, not received from the state without charge, whereas the property will not be compensated for according to market prices, as provided by § 29(2) of the LPA, but with public capital bonds.

3. In interpreting the general interests the Court takes into consideration § 2 of the PDA according to which the aim of the privatisation of dwellings is to give natural and legal persons a possibility to obtain dwellings they are leasing, but also unused dwellings, and thus to guarantee better maintenance and preservation of residential buildings. Obligating co-operative organisations (legal persons in private law), in connection with the ownership reform, to privatise or transfer their dwellings, which they have not received from the state without charge, is considered by the Court as a violation of the principle of general interest. Obligating one subject of private law to give away its property to another subject of private law cannot be considered observance of general interest.

4. Pursuant to the Constitution property may be expropriated without the consent of the owner only for fair and immediate compensation. According to § 8 of the PDA, payment may take place in several ways. The buyer may pay for a dwelling either with one or several means referred in § 8. Consequently, the Act gives

the buyer of a dwelling the right to choose the means of payment. Pursuant to the Act the buyer has the right also to pay with public capital bonds. § 10 of the PDA establishes that the equivalent of one working year is one square meter of the total space of an apartment in a nine-storied panel-building (standard 121-02-E). The estimated value of one working year is thus 300 kroons. According to § 29(1) of the LPA a thing shall be valuated on the basis of usual value or the special interest of the possessor. According to § 29(2) the usual value of a thing is its average local selling price (market price). Considering the fact that when paying with public capital bonds the buyer does not cover the usual value a dwelling, the compensation offered to the owner cannot be regarded fair, because it is lower than the market price. The owner of the property which is to be expropriated is placed in an unequal situation when compared with these owners who have no obligation to transfer property, and who can sell their property on the basis of free demand and offer.

On the basis of the above arguments the Court concludes that § 3(1) of the PDA is in conflict with § 32 of the Constitution. Considering the fact that § 6(5) and 6(6) of the PDA deal with the obligated subjects of re-nationalisation, they are in conflict with the Constitution only in conjunction with § 3(1) of the PDA, and with the elimination of the conflict of the latter provision the unconstitutionality of the former provisions is eliminated without repealing them.

On the basis of the foregoing and pursuant to § 152 (2) of the Constitution and § 19(1)2) of the Constitutional Review Court procedure Act,**the Constitutional Review Chamber has decided:**

to partly satisfy the petition arising from the judgment of the Tallinn City Court of 10 February 1995, and to declare § 3(1) of the Privatisation of Dwellings Act invalid to the extent that it deems residential buildings and apartments of co-operative organisations to be objects of privatisation for the purposes of the Act, irrespective of who funded the construction thereof.

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

Rait Maruste
Chairman of the Constitutional Review Chamber
