

DECISION

At a session held on 4 July 1996 in proceedings to review constitutionality instituted by the initiative of the Housing Cooperative Mladost, Ljubljana, represented by its president, dr. Bojko Bučar, the Constitutional Court

d e c i d e d :

Provisions of Article 25, Para. 2 and 4 of the Denationalization Act (Official Gazette of the RS, Nos. 27/91 and 91/93) are not inconsistent with the Constitution.

R e a s o n i n g :

A.

1. The initiator challenges the constitutionality of Article 25, Para. 2 and 3 of the Denationalization Act (Official Gazette of the RS, Nos. 27/91 and 91/93, hereinafter: ZDen), according to which a claimant to denationalization is the one who can, at returning of property which value has essentially increased due to new investments, choose among three possibilities: not to have the real estate returned, to have recognized his ownership share on real estate up to the original value of the real estate, or to have this real estate returned conditioned by paying compensation as to the difference in value within a 10 years time limit.

2. According to the initiator's opinion, by the challenged provisions the basis for the interference with property of the claimants entitled to the return of nationalized property to the extent exceeding the statute's purpose was allegedly enacted, since it gives the claimant with a possibility to request the return of such real estate the right to claim more than it was nationalized and to take possession of what was created after the nationalization. At the same time, the obligor who has relied on his retained right in the past, and managed well the property he paid for increasing its value, remains without legal remedies obliged to keep crediting the claimant for at least 10 years. According to the initiator, such a solution is contrary to the just distribution of burdens caused by denationalization, and thereby to social justice.

3. Giving the claimant by the challenged provisions a possibility to choose among various forms of the return of real estate, the obligors' duty is said to, according to the initiator, depend on the claimant's will and not on the legislator's. Such regulation is allegedly contrary to the principle of a state governed by the rule of law, since it allows or introduces arbitrary options to be at claimants' disposal compared to equal factual and legal positions of the obligors.

4. The initiator also asserts that the challenged statutory regulation is not appropriate, and is as such a result of extraordinary circumstances in which the ZDen was enacted.

5. The petitioner proposes to the Constitutional Court to decide on the constitutionality of the challenged provisions, and pending a final decision to stay their execution.

6. She grounds her standing in the position of being an obligor to the proceedings for denationalization of real estate, which value after nationalization substantially increased, and as to which the submitters of the request for denationalization demand its return in kind, compensating for any increased value.

7. The National Assembly as the opposite party did not reply to the initiative.

8. The Ministry of Justice finds the initiator's assertions, that the challenged provisions of the ZDen are contrary to the principle of equality before the law, unfounded. The Ministry points to already two conceptually different factual positions of the obligor to denationalization and the claimant, what also requires different regulation in the ZDen. The difference in positions of the obligors and claimants in

regulating property relations is, according to the Ministry, also conditioned by the fact that the ZDen is originally and regarding its contents an authoritative and interventionist act, by which the state authoritatively interferes with the present property entitlements of the managers of nationalized property, for the state is impossible to return this property because of its transfer in the predominant part to different legal subjects.

However, the Ministry emphasizes that the ZDen consistently respects the protected status of private property, constitutional arrangement, and at the same time principles of a modern social and law-based state. Pursuant to the ZDen, the return of nationalized property in kind is the primary form of denationalization, which is however allowed only if there exists no ownership of natural or civil legal persons on the nationalized property. This rule stands without any exceptions also in the case where the value of real estate increased, although substantially. It is true that the claimant in such cases has three options, still, according to the Ministry, each of these options protects the interests of the obligor as to the increase of real estate's actual value resulted from the new investments in this real estate.

9. The initiator does not agree with the opinion of the Ministry of Justice.

## B.

10. Concerning the fulfilled conditions from Para. 4 of Article 26 of the Constitutional Court Act (Official Gazette of the RS, No. 15/94 - hereinafter: ZUstS), the Constitutional Court accepted the initiative and proceeded with deciding the case on the merits.

11. As the Constitutional Court repeatedly emphasized in its decisions (OdlUS IV, 42 and OdlUS IV, 47), the ZDen is based on the principle of justice as the expression of a state governed by the rule of law and is the result of achieved political consensus in the Republic of Slovenia, that the grievances, done in the afterwar period by the state interference with property relations in the name of so-called revolutionary transformation of the then society with introducing socialist socio-economic relations and settling the accounts with the enemies of the regime of that time, are to be redressed.

12. The grievances are to be redressed in the manner returning to claimants the nationalized property in kind, and only if this is not possible the claimants are entitled to compensation in the form of substitutive property: either securities or money.

13. The next - fundamental as well - principle of the statute is that in redressing the grievances new ones are not permitted to be made. This principle embraces primarily the protection of natural persons who were given the ownership rights as to nationalized property, and the protection of their tenancy, lease and other similar relations on such property. Besides, a standpoint was taken that users of social property could also not be put by statutory solutions in a position that would cause the cessation of their activities or liquidation of their legal entities. Thus, the rights of social legal entities are also protected, if these were given the nationalized property to manage with it on lease and on the basis of some other similar relation resulted from pecuniary legal transactions, recognizing them the right to refund their investments. According to the legislator, for the nationalized property managed or used and disposed of by social legal entities the same principles as in the case of natural persons could not apply, since social legal entities are not the owners but merely managers of the nationalized or social property. They were given property to manage or use it as a rule without paying anything, and if they paid for this property, these funds were still socially owned.

14. Main solutions to the ZDen are based on these aforementioned basic principles. Among them the statute envisaged primarily the return of property to the claimants in kind, i.e. into ownership and possession, by reinstating the ownership right or ownership share. Only if this is not possible, denationalization is carried out through the system of compensation. As a rule, the claimants have the right to choose the form of denationalization and type of compensation. - The obligors to the return of things and reinstatement of ownership shares are legal entities having in their property things that are being, according to this statute, returned to claimants. If the legal entity paid for this thing, it is entitled by the rules on expropriation to be recompensed for the taken real estate. Not being returned is the real estate necessary for performing the activities of state bodies or public services, if their return would essentially curtail the possibility of such services' operations; if they are an inseparable

part of infrastructure; if the return of real estate could cause bankruptcy or liquidation of a legal entity, and if the return would substantially injured the complex of environment or the nature of using lands and real estate. The statute also prescribes that real estate cannot be returned in ownership and possession, if this would cause substantial damage to its technological function.

15. Returning of real estate which value has after the nationalization due to investments essentially increased, is regulated by the challenged provisions of Article 25 of the ZDen. These follow the general rule that real estate, if all other conditions are fulfilled, is to be given to the claimant irrespectively of its value changed from the period of nationalization to the time of deciding on the denationalization request. The claimant has three possibilities: to request compensation, to request the reinstatement of his ownership share, or to claim the return of real estate in ownership and possession, paying compensation for the difference in value.

16. The described statutory solution follows the fundamental principles on which the statute is based. First, in spite of the so-called "essentially" increased value of real estate it gives the claimants a possibility to achieve the return of unjustly taken property in kind. The possibilities of claimants in selecting a form of the return of nationalized real estate are provided in the statute enumeratively and are equal for all the claimants. Thereby, all the obligors to the return of real estate are in an equal position compared to the claimants.

17. The obligors to the return of real estate are, according to the provisions of the ZDen and consistent with the basic principles, entitled to compensation. Those who were given socially owned real estate to manage it, and payed for this, are pursuant to Article 73 of the ZDen entitled to compensation according to the regulations on expropriation and compulsory transfer of socially owned real estate. Those who increased the real estate's value substantially are provided by Para. 2 of Article 25 (even more) compensation in the amount of increased value. Concerning the described regulation, giving also the obligors from Subpara. 3 of Para. 2 of the challenged Article 25 of the ZDen the right to be recompensed for their investments, the basic principle of the statute - referred to the protection of social legal entities which payed for the nationalized property they were given - is therefore realized. At the same time, the challenged provisions from the same reason, also in connection with the position of obligors as to particular subparagraphs of Para. 2 of Article 25 of the ZDen, cannot be seen as violating the constitutional principle of equality.

18. In Para. 3 of Article 25, special regulation is provided as to the payment of compensation for the difference in real estate's value. The claimant's gradual paying of compenstation for not less than ten years is provided. According to the initiator, such regulation forcing the obligor to credit the claimant is contrary to the just distribution of burdens caused by denationalization, and thereby social justice.

19. The Constitutional Court finds the challenged provisions also in this part not to be contrary to the Constitution.

Compulsory postponment of paying compensation is considered to be regulation built on the presumption of poorer pecuniary circumstances in the case of the claimants compared to the obligors, as the consequences caused by the nationalization of their property. While the claimant remained after the nationalization without taken property and therefore without income deriving thereof, the obligor has used this property and realized, or at least had the possibility to realize, income.

To receive the realized income from the nationalized real estate or to suffer "lost profits", is the one, who is getting his real estate back, pursuant to Article 72 of the ZDen, not entitled.

Therefore, it is sound that the payment of compensation, conditioning the return of real estate, is accordingly relieved or postopned. The Constitutional Court believes that precisely the regulation requesting prompt payment of compensation would be contrary to the principle of justice, for the claimants in the majority of cases would not be able, regarding their financial situation, to select the type of denationalization that to the highest degree ensures the redress of inflicted grievances - and that is the returning of real estate in kind.

20. Pursuing the challenged Para. 3 of Article 25, the statute leaves the detailed regulation of the conditions as to compensation to be determined by the organ deciding on denationalization. Accordingly, in a denationalization decision the amount of compensation as well as the beginning of paying it off, the dynamics of payments and interest rate, are determined. Following Article 6 of the ZDen, in the matters regulated by the ZDen, general property and tort laws respectively are to be applied if not inconsistent with this statute. The organ deciding a denationalization case is thus, considering the limits set by the ZDen, bound by the principle solutions determined as to compensation in the Obligations Act (Official Gazette of the SFRY, No. 29/78 hereinafter: ZOR): so it is bound by the leading principle as to the recovering of damages done to property, providing that the damaged person is to recover as much damages as he suffered losses. The damaged person has to be put in a position, according to the general principles, as no event inflicting him damages occurred ever (Article 190). The administrative organ, setting the conditions for payment of compensation on the part of the claimant, has to approach this objective to the greatest extent, according to obligatory principles and provisions of the ZOR respectively and considering the circumstances of every single case, for the realization of ZOR's further principle - the principle of justice, pursuant to which in determining compensation the position or financial situation of the responsible person is considered (Article 191), was to a high degree provided by the legislator, that foresaw bad financial situation of the claimants and therefore prescribed the minimum ten years period as the compulsory delayed payment of compensation.

21. Since the Constitutional Court accordingly found the consistency of the challenged statutory regulation with the Constitution, it did not decide on the proposed stay of the challenged statutory provisions' implementation.

#### C.

22. The Constitutional Court decided the case on the basis of Para. 1 of Article 40 of the ZUstS, composed of: dr. Tone Jerovšek, President, dr. Peter Jambreč, mag. Matevž Krivic, mag. Janez Snoj, dr. Janez Šinkovec, dr. Lovro Šturm, Franc Testen, dr. Lojze Ude, and dr. Boštjan M. Zupančič, the Judges. The decision was come to unanimously. The concurring opinions were given by Judges Krivic and Ude.

President of the Constitutional Court:  
Dr. Tone Jerovšek