REPUBLIKA SLOVENIJA
USTAVNO SODIŠČE

U-I-119/94
Mar. 21, 1996

D E C I S I O N

At the session of March 21, 1996 concerning the procedure for the evaluation of constitutionality commenced on the initiatives of Peter Logar, Tomo Knez and the Association of Owners of Expropriated Property, all from Ljubljana; of Irena Slemnik from Ljubljana, Metka Gabrijelčič Šušteršič, Anton Gabrijelčič, Franjo Žagar, Vid Kranjc, Janez Polak, all from Ljubljana, and Anica Tollazi from Logatec and Niko Kranjc from Australia, all represented by Pavla Sladiš Zemljak and Tanja Kodrič Jurko, lawyers from Ljubljana; of Špela Pirkmajer from Ljubljana and Zdenka Iršič from Maribor, the Constitutional Court

d e c i d e d:

1. Article 18 of the Housing Act (Official Gazette of the RS, No. 19/91, 9/94 and 21/94) is inconsistent with the Constitution, except insofar as it grants the preemption right to those who were holders of the tenancy right with respect to socially-owned apartments at the time of the coming into force of the Housing Act, and shall not be applied to the extent of being inconsistent with the Constitution.

2. Paragraph 5 of Article 54 of the Housing Act shall be abrogated.

3. Provisions of Article 56, Paragraph 2 of Article 113, and of Articles 115 and 117 of the Housing Act are not inconsistent with the Constitution.

4. The following shall be abrogated in Article 125 of the Housing Act:

a) in Paragraph 4 the words: "by which he obtains the right to move another tenant into the said apartment under the conditions identical to those that applied to the previous holder of the tenancy right."

b) Paragraphs 9 and 10 in their entirety.

5. Article 150 of the Housing Act is not inconsistent with the Constitution.

6. The Housing Act is inconsistent with the Constitution insofar as demanding with respect to nonprofit-making apartments and the apartments for which the tenancy right was granted prior to its coming into force that formation of rental be in conformity with the methodology prescribed for the formation of rentals in nonprofit-making apartments, instead of regulating itself the basis of such rental and prescribing a framework for a regulation concerning the methodology of determination of rental, and thus also the extent of restricting the free determination of rental.

The National Assembly shall eliminate this disagreement with the Constitution in 12 months from publication of this decision in Official Gazette of the Republic of Slovenia.

7. Article 155a of the Housing Act shall be abrogated.

R e a s o n i n g:

A.

1. Irena Slemnik disputes Article 125 of the Housing Act (hereinafter: SZ), because it does not allow her to purchase the denationalized apartment with respect to which she was previously a holder of the

tenancy right, and which other holders of tenancy right are also not allowed, which is why, in her opinion, the principle of equality before the law has been violated.

Zdenka Iršič as s tenant in a municipal apartment, which she is unable to purchase according to provisions of SZ, disputes the same Article of amended SZ, because she considers that the provision of its Paragraph 9 has deprived her of her acquired right to inviolability of the tenancy (except for reasons of being suspected of having committed an offence).

The other initiators dispute the provisions of SZ referred to in the holding hereof as the owners of denationalized apartments, claiming that the said provisions are inconsistent with Articles 2, 14, 33, 67, 69 and 155 of the Constitution for restricting, without a justified reason and in part retrospectively, their property right to denationalized apartment, or for disregarding the continuity of the said right. Details of their reasons are presented in the following, where respective provisions are being disputed.

2. On behalf of the National Assembly as the opposite party, the reply to reproaches on discrimination of former holders of the tenancy right in denationalized apartments was provided by its Secretariat for Legislative and Legal Matters. In the opinion of the latter, the statute has made the position of these holders of the tenancy right equal to that of others, insofar as this has been possible with regard to limited material resources, and taking into consideration the rule, that in the case of conflict between property and the tenancy right the former shall prevail. The rest of the initiatives were answered by the Ministry of the Environment and Land Use Planning. The Ministry explains in particular the reasons for the amended Article 125 of SZ: the main reason is the request of the tenants in denationalized apartments for the greatest possible equalization of their position with that of other owners of the tenancy right; at the same time, the legislator also intended to equalize those denationalization claimants whose property could not be returned in kind with others (Paragraph 4 of Article 125); the owner of a denationalized apartment shall be free in deciding on his attitude towards the "models" provided by Article 125 of SZ; the tenant in an apartment referred to in Paragraph 5 of Article 125 shall have the preemption right, and his position may not deteriorate otherwise; concerning the reproaches about Paragraph 5 of Article 54, Article 56, Paragraph 2 of Article 150 and Article 155a, the Ministry claims that what had to be taken as the basis was the previous tenancy right as an accrued right, which may not be interfered with by the legislator. Thus, in the opinion of the opposite party, the disputed provisions are not inconsistent with the Constitution.

3. On the basis of materials relating to the legislative procedure it is also possible, in addition to the said requests of former holders of the tenancy right with respect to denationalized apartment, to mention as the second reason for the legislator's orientation the realization that the number of requests for denationalization of apartments would be much lower than initially expected.

4. However, when the Government was confronted in the legislative procedure with the proposals of two groups of members of parliament, which proposed even more substantial measures and use of much greater resources aimed at making the position of all former holders of the tenancy right equal, the position of the Government was that such burdens were too high and unacceptable, and the Ministry of the Environment and Land Use Planning explained that, in carrying out housing policy the primary concern was to ensure that the housing problem of as much people as possible be solved, and in this respect the tenants in denationalized apartments should be seen as people whose housing problem has been solved.

B.

5. The Constitutional Court established that all the initiators satisfied the requirement of standing under Article 24 of the Constitutional Court Act (Official Gazette of the RS, No. 15/94 - hereinafter: ZUstS). The cases; however, were joined for the purpose of joint consideration and adjudication.

Article 18 of SZ

6. a) Article 18 of SZ provides that a tenant shall have the preemption right to the apartment which has been rented to him for an indefinite period of time.

b) Insofar as the apartments are concerned in reference with which the legislator has at the same time directly recognized also the property right (Articles 111 through 114), or the apartments in reference with which the property right has arisen or will arise from the Denationalization Act (hereinafter: ZDen), the legislator could not have interfered with the property right, since the latter was not in existence at the time of the coming into force of the said provision. The holders of a tenancy right had, on the contrary, the preemption right to such apartments of that time already on the basis of the former legal system, which is why it is right that their accrued right be recognized to them also by the new Housing Act.

c) On the other hand, if the property right was not created in any of the foregoing ways, the enacting of the preemption right is an encroachment upon the right to own and inherit property (Article 33 of the Constitution) - a violation of freedom of enjoyment of the same, which also includes the disposal with an apartment in legal transactions - and such an encroachment can only be in conformity with the Constitution to the extent that it is justified by the need to ensure economic, social and environmental functions of property (Article 67 of the Constitution), or insofar as this is unavoidable because of the protection of rights of other persons (in accordance with the principle of proportionality). Such reasons as are specified in Article 67 of the Constitution, however, do not exist: no reasons seem to exist for restricting the property right with respect to apartments by the preemption right because of the need to ensure economic function of property; the legislator has taken into consideration with good reason and also in a satisfactory manner the social function when regulating the rental-based relationship; and it cannot be said that ecological reasons for the preemption right exist. Also, no other reasons seem to exist why an interference with the property right with respect to apartments by granting of the preemption right to tenants should be seen as indispensable and at all necessary for the protection of the rights of a tenant. In this portion, then, the enacted preemption right is not in conformity with the Constitution, which is why the disputed provision had to be abrogated in the said part.

Paragraph 5 of Article 54 of SZ

7. a) The disputed Paragraph 5 of Article 54 of SZ provides that the lease contract concluded with a former holder of the tenancy right with respect to an apartment which became general property of the people on the basis of any of the nationalization regulations mentioned in Articles 3 and 4 of ZDen can be terminated for no other reason but those specified in Article 53 of SZ. Thus, such a contract cannot be terminated by the fact that the owner has provided the tenant with another appropriate apartment. Such prohibition, then, applies not only to owners of apartments which have been or will be denationalized, but also to other owners of apartments, if the same were at one time nationalized on the basis of the foregoing regulations. Such restriction was not contained in the original SZ.

b) The initiators claim that this provision is in disagreement with the principles of a state governed by the rule of law (Article 2 of the Constitution) and of equality before the law (Article 14 of the Constitution), as well as with the prohibition of retrospective effect of legislation (Article 155 of the Constitution).

c) Contrary to the principles of a state governed by the rule of law, the disputed provision changes tenancy relationships established on the basis of regulations in force at the time of their creation, that is, on the basis of the Act on Housing Relationships and of SZ; it changes these by subsequently making their changing or termination more difficult or impossible. In this way it interferes, to the benefit of tenants and not to public benefit, with the rights of lessors acquired in the same way by cogent rules or on the basis of these, lastly by Article 147 and Paragraph 1 of Article 54 of SZ.

č) The disputed provision is inconsistent with the Constitution also because, for no reason whatsoever which would rightly arise from provisions of Paragraph 1 of Article 67 of the Constitution (economic, social and environmental functions - in this respect the same applies as in section 6-c of this reasoned opinion), it restricts disposal with apartments, this being a way of enjoyment of the property right to the same, and because it discriminates in this way against the owners of once nationalized apartments in comparison with the owners of other apartments. It discriminates against them regardless of the way in which ownership of an apartment was acquired by a person (on the basis of SZ, of ZDen or otherwise), and to the benefit of tenants under Articles 147 or 56 of SZ, also without regard for the

possibilities which these may have had or will have concerning the purchase of an apartment upon the completion of the denationalization procedure or expiry of the period set for its commencement.

d) Although the disputed provision only partly applies to rental-based relationships between the owners of denationalized apartments and those former holders of the tenancy right with respect to the said apartments who did not have a possibility of purchasing the apartment under SZ, the only justification of the other opposite party, that its intention was to make equal as far as possible the position of former holders of the tenancy right with respect to denationalized apartments with that of other former owners of the tenancy right, can not be defended in this case: for it brings about inequality between these two categories of former holders of the tenancy right, for Paragraph 1 of Articles 54 of SZ, which applies to the latter, does not apply to the former. The legislator has thus differentiated between those who are in equal position.

e) After the foregoing explanation, Paragraph 5 of Article 54 should be deemed to be inconsistent with the principles of a state governed by the rule of law under Article 2 of the Constitution, with provisions of Article 33 of the Constitution concerning the right to own and inherit property in conjunction with Article 67 on property, as well as with provisions of Paragraph 2 of Article 14 on the equality before the law, which is why it had to be abrogated.

Article 56 of SZ

8. a) Article 56 of SZ provides that the owner of an apartment must, in the case when a tenant has died, conclude a lease contract with his or her spouse, or with a person with whom the said person has lived for a longer period of time as unmarried couple, or with one of closely related family members specified in the lease contract.

b) This provision is being disputed by the initiators for supposedly violating the right of the owners of (denationalized) apartments to own and inherit property granted under Article 33 of the Constitution.

c) There is no doubt that the disputed provision restricts the enjoyment of an apartment as property. But such restricting is in line with Article 67 of the Constitution. The extension of a rental-based relationship, or its transition to some other family member on the occasion of death of a tenant is a measure aimed at ensuring the social function of a dwelling (apartment). A dwelling (apartment) is not only the essential component of a personal but also of family's social position. And it is the duty of the state to protect the family (Paragraph 3 of Article 53 of the Constitution). This is why, also under the former legal system, the tenancy right used to be transferred, on the basis of the statute, from the deceased holder of such a right to his or her near ones as co-users of the apartment. Insofar as the former holders of the tenancy right are concerned, as well as the co-users of the apartment, the opposite party rightly points out that the tenancy right under former legislation should in actual cases be deemed to be an acquired right, which should be respected in line with the principles of a state governed by the rule of law. If the legislator had enacted the exception precisely to the benefit of the owners of denationalized apartments, he would have violated the constitutional principle of equality before the law (to the prejudice of tenants in their apartments). And, lastly, the legislator enacted the said restriction already prior to the creation of the property right with respect to apartments under ZDen, and denationalization claimants already had this information at their disposal when they decided on whether to file their requests for denationalization.

Article 113, Paragraph 2 of Article 115, Article 117 of SZ

9. a) Article 113, and consequently also Article 115, of SZ is disputed by the initiators because it makes the nationalized property pass into ownership of municipalities and other legal entities, which is in their opinion in disagreement with ZDen, which grants the property right with respect to the nationalized property to former owners and returns it to them.

b) Such view is wrong. As the Constitutional Court has repeatedly explained, ZDen does not abrogate the regulations which had served as the basis for nationalization but regulates property relations with prospective effect anew. Rightful claimants can with respect to nationalized property directly be granted the title, on the basis of ZDen, by a final denationalization decision. Articles 113 and 115,

then, regulate the issue of property just temporarily, so that possibilities could be ensured for denationalization: the new owner is at the same time the obligor within the framework of the denationalization procedure.

10. This also applies to Article 117, which the initiators dispute "insofar as applying to denationalized apartments". From Article 115 of SZ used in connection with Article 88 of ZDen, which prohibits all disposal with real estate with respect to which the obligation of return under this statute exists, it clearly follows that the obligation of sale under Article 117 of SZ does not apply to the denationalized apartments. In this regard, then, the initiative is obviously unfounded.

Article 125 of SZ

11. a) The provisions of Article 125 present in a more or less mandatory sequence a number of possibilities ("models"), so that the former holders of the tenancy right could buy or build their apartment and, in part, so that, in the event of occupancy of the apartment by some other person, they could also vacate it.

b) One of the initiatives criticizes the provisions of this statute, stating that they still fail to make equal, to a sufficient degree, the position of a former holder of the tenancy right to a denationalized apartment and that of other holders of the tenancy right, and that this is a violation of the constitutional principle of equality before the law. The majority of the initiatives, on the contrary, criticize them for interfering with the retrospective effect and in a discriminatory manner, with the property of owners of denationalized apartments, which is claimed to be inconsistent with the constitutional prohibition of retrospective effect of legislation, the constitutional right to own and inherit property and the principle of equality before the law; the provision on prohibition of, and "imposition of penalty" for legal transactions with denationalized apartments is also criticized for being inconsistent with the principle of a state governed by the rule of law; in yet another initiative it is stated that the provision which allows that the tenant be moved out of the apartment of a denationalization claimant without tenants's consent jeopardizes the accrued right of the tenant, which is why it is in disagreement with the principles of a state governed by the rule of law.

c) The legislator states that the aim of such legal regulation was to make equal the legal position of former holders of the tenancy right, and gives as a subsequent reason for it the requests on the part of the former holders of the tenancy right to denationalized apartments, as well as the fact that the number of denationalization cases would be lower than expected, which was why a lesser amount of earmarked public funds would have to be used for that purpose. Pressures exerted by interest groups on the legislative body and within the same are of course legitimate, but they cannot serve as an argument for legislative regulation or its modification. In the same way, a greater or smaller scope of funds that are required for a particular legal system cannot be decisive with respect to the question of constitutionality of statutory provisions.

č) The legal position of both categories of former holders of the tenancy right with regard to rental-based relationship, which has replaced the former tenancy right, has been made equal. Legal position of both categories of holders concerning the possibility of purchasing the apartment with respect to which a tenant had the tenancy right, on the other hand, cannot be made equal: for privatization of these apartments has already been carried out by denationalization. The Constitutional Court already decided (OdlUS, I, 35) that the fact, that a former holder of the tenancy right cannot purchase the denationalized apartment because of the preemption right to it which belongs to the expected claimant of the property right, does not discriminate against the former holder of the tenancy right, because different actual statuses are concerned. This is why the constitutional principle of equality before the law has not been violated.

d) Provisions of Article 125 violate the property right of owners of denationalized apartments - and the expectations, based on SZ, of those who have in time filed requests for the denationalization of apartments and who will on the basis of a final denationalization decision become their owners, in as far as Paragraph 10 of the said Article refuses them the right to free disposal with the apartments owned by them for a period of 5 years, in the case of their disagreement with any of the models specified in Paragraphs 5 through 9 of the same Article, and insofar as pressure is being exerted on

them that they should consent to the model being offered by the former holders of the tenancy right. Also in violation of the property right is the provision which, within the model specified in Paragraph 4 of this Article, deprives the owners of apartments of their freedom to decide with whom they will conclude a lease contract for their apartment.

e) The initiative rightly disputes also the provision of Paragraph 9 of Article 125 of SZ, according to which a tenant in the obligor's apartment that the former holder of the tenancy right to the denationalized apartment has decided to purchase is obliged to move into the said denationalized apartment. From Paragraphs 5 and 7 of this Article it clearly follows, inasfar as the subject matter is concerned, that for the tenant this could imply deterioration of up to 30% concerning the so called integral elements of valuation of apartments, and among other things also the change of location of residence. And even without this, it means a substantial deterioration of the rental-based relationship - with the tenant all the time threatened by the possibility that, upon the request of a third party, he will have to leave the rented apartment and move the house. For a tenant in an obligor's apartment this means above all a violation of the principles of a state governed by the rule of law, in particular of the trust in law and of justice.

It also means a violation of the right of equality before the law: this category of tenants is unjustly subject to discrimination in comparison with other tenants, which can be moved only under such conditions as are prescribed by the (amended) Article 54 of SZ.

Article 150 of SZ

12. a) Article 150 is disputed by the initiatives, insofar as prescribing, also with respect to denationalized apartments the tenancy right to which was granted prior to the coming into force of SZ, that a rental shall be formed in conformity with the methodology prescribed for the formation of the rental in nonprofit-making apartments, which means that formation of these rentals is restricted, that is, in the same way as in all other cases where the tenancy right is being transformed into the rental-based relationship.

b) It is claimed in the initiative that such regulation is contrary to the right of equality before the law, for treating more favourably the tenants than the owners, for discriminating against the owners of denationalized apartments in comparison with other private owners and in comparison with other lessors (of business premises, farmland), for making equal two completely different categories of lessors - the nonprofit- making organizations for the provision of housing and owners of denationalized apartments; that it violates provisions of Articles 33 and 67 of the Constitution by creating several different categories of property without having any justification for this in Article 67; that it violates Article 69 of the Constitution by restricting the property right without ensuring appropriate compensation; that (modified Paragraph 2), in violation of Article 155 of the Constitution, it has retrospective effect, because such restricting of the owners of denationalized apartments was not included in the original text of Article 150; and that it is in disagreement with the principles of a state governed by the rule of law, because it is vague and because it is not clear who it concerns; because the legislator has redressed the wrongs by ZDen, while at the same time with (amended) SZ causing new wrongs; and because it imposes upon the owners of denationalized apartments the obligations which they will be unable to cover by a nonprofit rental. This is also true in the case of nonprofit-making organizations for provision of housing, claim the initiators, but these will be supported through earmarked funds of the government, which is not the case with the owners of denationalized apartments.

c) The restriction which is disputed in the initiatives was enacted already by the original text of Paragraph 1 of Article 150 of SZ. This is why it did not interfere with the property of the owners of denationalized apartments, because the said property, which is created on the basis of final denationalization decisions, could not have been in existence at that time; but also unjustified is the reproach on a retrospective effect of the statute. Interference with the formation of a rental, in particular the restricting of the latter, is one of the measures aimed at ensuring the social function of house property, and is of particular importance in the process of transition from the legal system based on the tenancy right to one based on rentals, and is justified on the basis of Article 67 of the

Constitution. Thus, the reasons for disputing this part of Article 150 in the initiative cannot be accepted.

č) There is no doubt that the restricting of the rate of rentals, insofar as applying to the owners of apartments, is interference with the property right, and in this way norms are set with respect to the enjoyment of such property. The Constitution prescribes that such interference shall only be regulated by a statute (Paragraph 1 of Article 67), which means that the legislator cannot transfer such function to other bodies. At least with respect to the subject matter, SZ has undoubtedly enacted a nonprofit rental (in Articles 4, 63, 93 and 150) as a restriction of free formation of rentals, this being a typical fructus civiles from house property, but has failed to define it in any way and to provide a framework for such restriction, but has left this matter entirely to the head of central administrative authority by imposing on the latter the duty to prescribe a methodology for the formation of the rentals for nonprofit-making apartments (Article 11 of SZ) and by ordaining that such methodology be used - which at the same time means that such restrictions should be observed in the case of all apartments to which the former tenancy right was attached (Article 150). The Constitutional Court had to point out this non-conformity with the Constitution and instruct the legislator to eliminate the same.

Article 155a of SZ

13. a) Article 155a of SZ provides that, on the occasion of vacating an apartment, the former holder of the tenancy right or the right to use of apartment, or a person specified in the lease contract, shall be entitled to be paid back undepreciated part of his investments into the renewal and improvement of the apartment, based on the value obtaining on the date of moving out of the apartment. This provision has been introduced by the Act on Amendments and Supplements to SZ.

b) The initiators point out the inconsistency between this Article and Article 61 as well as Subparagraph 5 of Paragraph 1 of Article 53 of SZ. They consider that the new Article has caused confusion and unclarity, because it discriminates against the lessor in comparison with the tenant, and because of its supposed retrospective effect.

c) Both in the Act on Housing Relationships (Official Gazette of the SRS, No. 35/82 and 14/84) and SZ, modification of apartment rooms and of built-in equipment, for which the costs have been borne by the tenant, but for which no consent has been obtained from the lessor, is considered as a prohibited act of management on the part of the tenant, which is why the latter has been denied the right to be recompensed. In SZ, such conduct on the part of the tenant has even been specified as the reason which justified the termination of a lease contract, unless a tenant has removed the modification upon written request of a lessor (Paragraph 2 of Article 53 of SZ).

č) The more recent Article 155a has replaced Article 61 that regulates the same matter differently. It does not derogate the above mentioned provisions of Article 53 of SZ, but is, as an amendment to the statute, in an internal conflict with the same concerning the valuation of investments without an approval. And such a conflict between the two norms (of the same statute) is not in agreement with the principles of a state governed by the rule of law.

d) Article 155a applies to all investments of the said category carried out at any time in the past, and insofar as they will not be depreciated already at the time of vacation of the apartment. In this sense, it also has a retrospective effect, although this will only be triggered by an event that may occur in the future, that is, by vacation of the apartment. But this is not required on the basis of public interest, and the provision is inconsistent with Article 155 of the Constitution. e) But the disputed provision also interferes substantially, with the posterior effect, with property right to an apartment: for it simply does not allow the owner to let the apartment without in this way running the risk that the tenant will, against his will, but (also) to his prejudice, change the characteristics, the value even, of his apartment. For such interference with the right to own and inherit property (Article 33 of the Constitution), there is no justification in Article 67 of the Constitution. It cannot, among other things, be justified by considering the tenancy right to be an accrued right, for we are, on the contrary, dealing with a new, subsequent entitlement which was not granted to the holder of the tenancy right either by the Act on Housing Relationships or by SZ. The legislator as the opposite party did not provide any other justifications, and neither can the latter be inferred from the materials relating to the preparation of the Act on

Amendments and Supplements to SZ. Thus, the said provision had to be abrogated for its being contrary to the Constitution.

C.

14. This decision was made on the basis of Articles 21, 24, 30, 43 and 48 of ZUstS by the Constitutional Court in the following composition: Dr. Tone Jerovšek, President, and Dr. Peter Jambrek, Matevž Krivic, M.L., Janez Snoj, M.L., Dr. Janez Šinkovec, Dr. Lovro Šturm, Franc Testen and Dr. Lojze Ude, the Judges. Section 1 of the holding hereof was adopted with 5 votes in its favour and 3 votes against it (votes against were cast by Judges Jerovšek, Jambrek and Šturm); section 2 of the holding hereof was adopted with 5 votes in its favour and 3 votes against it (votes against were cast by Judges Krivic, Šinkovec and Testen); section 3 was adopted unanimously; section 4 of the holding hereof was adopted with 7 votes in its favour and 1 vote against it (vote against was cast by Judge Šinkovec); section 5 of the holding hereof was adopted with 7 votes in its favour and 1 vote against it (vote against was cast by Judge Šturm); section 6 was adopted unanimously; section 7 of the holding hereof was adopted with 6 votes in its favour and 2 votes against it (votes against were cast by Judges Krivic and Testen). The dissenting and concurring opinions were given by Judges Jerovšek, Krivic, Snoj and Testen.

President of the Constitutional Court:
Dr. Tone Jerovšek