No: U-I-46/92-55
Date: 9.12.1993

DECISION AND RESOLUTION

At a session held on 9.12.1994 in a proceeding for assessing constitutionality commenced on the proposal of the companies Jata-meso, Zalog, p.o., Zalog, MIR, Mesna industrija Gornja Radgona, p.o., Gornja Radgona, Mesarstvo Šentjur, p.o., Šentjur, Tima Košaki, Tovarna mesnih izdelkov, p.o. Maribor, Kmetijsko gospodarstvo Rakičan, p.o., Rakičan, Bistriške mesnine, p.o., Slovenska Bistrica, Kmetijstvo Vipava, Agrind., p.o., Vipava, Emona, Mesna indistrija Zalog, d.o.o., Zalog, Ritoznojčan, p.o., Slovenska Bistrica, Kras Sežana, Mesna-predelovalna industrija, p.o., Sežana, Agrotehnika Gruda, Mesarija in prekajevalnica, p.o., Litija, MIT, Meso izdelki, p.o., Trbovlje, Kmetijsko gospodarstvo, p.o., Kočevje, Agrogorica, p.o., Šempeter pri Gorici and Mlinopek Murska Sobota, p.o., Murska Sobota, Mesna industrija Primorske, p.o., Nova Gorica and Vino "Bizeljsko - Brežice", p.o., Brežice, the Constitutional Court

I. found that:

The provisions of the first and third para. of art. 57, first para. of art. 58, articles 59, 61, 62, 64 and 68 of the Law on cooperative societies (Official Gazette RS, no. 13/92) and the provision of article 3 of the Law on amendments and supplements to the Law on cooperative societies (Official Gazette RS, no. 7/93) are not in conflict with the Constitution and the International Pact on economic, social and cultural rights (Official Gazette SFRY, no. 7/71) (Official Gazette SFRY, no. 7/71).

II. passed the following resolution:

The proceeding for assessing the constitutionality of the second and third paragraphs of article 58 and part of the first paragraph of article 59 of the Law on cooperative societies which refer to "the book value of the social capital of a company" (Official Gazette RS, no. 13/92) is terminated.

Reasoning

The proposers proposed an assessment of the constitutionality of chapter X of the Law on cooperative societies. In the deposition they claim that the provisions of articles 57, 58, 59 and 58 of the impugned chapter of the law violate the principle of a legal state (article 2 of the Constitution), because they refer to the Law on the privatisation of companies, which the legislature had not yet adopted, and the effects of the use of the impugned provisions of the law would thus be above all unforeseeable (Kmetijstvo Vipava, Kras Sežana and others and Vino Bizeljsko). The principle of justice is also claimed to be violated since a 45 percent share is determined irrespective of the extent of business cooperation among subjects. This is also claimed to violate the constitutional right to private property (article 33 of the Constitution), because prior to the adoption of privatisation legislation, they encroached on existing social property, which according to this legislation should be transformed such that rights to social assets be recognised for individuals and individual natural persons as private owners (Bistriške mesnine, Emona d.o.o. Zalog, and Mesna industrija Primorske).

All proposers also claim that the provisions of articles 57 and 59 are not in accordance with article 14 of the Constitution; some also claim that they are not in accordance with the International Pact on economic, social and cultural rights (Official Gazette SFRY, no. 7/71) (Jata, Mesna industrija Gornja Radgona, Mercator Šentjur and Tima Košaki).

The cited provisions of the law are claimed to discriminate against employees of the company, mentioned in article 57, in comparison with members of cooperatives. They claim that the permanent right to enjoy the results of their own past work is recognised through indivisible collective ownership. The impugned provisions recognise for cooperative associations and associations of cooperatives a 45 percent ownership share of the book value of bonded assets as capital investment in these companies, whereby it is unclear by what criteria the legislature arrived at a critical period of five years (1.1.1986 to 31.12.1990). The proposer, Kmetijsko gospodarstvo Rakičan, claims that during the preparation and adoption of the Law on cooperative societies, some agricultural cooperatives were

more and others less committed in establishing their interests in relation to registering companies on the list under article 57 of the law, so only those companies were listed in relation to which this was demanded by individual cooperatives or cooperative associations, and companies were not given an opportunity in this to demonstrate with data the extent of their production and business cooperation with potential rightholders. In their opinion, the legislature did not respect the public interest in this, but exclusively the partial interests of cooperatives. This is claimed to have affected the legal equality of subjects, since they are claimed to have been treated differently although having an entirely equal starting position. The principle of justice is also claimed to have been violated, which any legal arrangement of the state must respect. The law gives these rights even to cooperatives which will subsequently be founded. The law is also claimed to have introduced inequality by recognising for cooperatives and organised cooperants, in addition to the right to the return of dispossessed invested material things, also the right to privatisation, which could be interpreted as compensation for lost income, to those which are not recognised as rightful claimants under the law on denationalisation.

In the opinion of the proposers, the principle of participation in income can be based on capital or work. The law does not derive from either one or the other but recognises rights for cooperatives without a legal foundation. Obligatory relations cannot be the basis for recognising capital investments in contractual companies. Obligatory relations are terminated with the completion of the obligations undertaken by the contract parties. The disputed provisions of the law were based in the legislative procedure on rightful claimants not receiving a fair price for goods sold. The proposers draw attention in this to the fact that the predominant share of prices of foodstuffs were determined by the regime of state price fixing. Both producers and processors were affected by this, and great differences still exist between them. A primary producer received payment for the sale of raw materials, and he was no longer concerned with all the processing and marketing risks, production costs, interest on processing facilities, advertising and transport. Rightful claimants did not therefore participate in a number of risks, and equally, the purchase price did not depend on income obtained, still less on losses.

If the legislature proceeded from a real price, so an uncertain market price, even from this point of view the principle of legal equality is violated, since the legislature does not ensure the same rights to all who did not receive a realistic recompense for invested resources and work. Not least, employees were harmed, who did not receive any market valued salary.

The principle of legal equality in their opinion is violated also because it only recognises the right to capital shares for cooperatives and organisations of cooperants, and not for small scale production and other cooperatives which equally cooperated with industrial companies, nor to other agricultural social companies who contributed a considerable share of the raw materials. In that the law determined a unitary standard 45%, without regard to the extent of cooperation between subjects, it is claimed also to violate the principle of justice, since differences cannot be justified only by material and not rational arguments. The companies Tima Košaki, Jata - Meso Zalog, MIT Trbovlje and Mlinopek Murska Sobota also themselves invested in the assets of cooperative rightful claimants, e.g. in the construction of a slaughterhouse.

The proposer, Kmetijsko gospodarstvo Rakičan also impugns the adoption of article 60 of Law on cooperative societies, which determines that the remaining part of the social capital of a company under article 57 of the law, which remains after the 45 percent privatisation, may be purchased in whole or in part by employees, former employees or retired employees of a company or cooperative of rightful claimants, members of cooperatives of rightful claimants and associations of rightful claimants. In the opinion of the proposers, such a legal arrangement signifies unequal treatment of individual citizens or employees in connection with privatisation, for two reasons:

a) Employees in companies which are privatised according to the Law on cooperative societies are in an unequal position in law from employees in other companies in which a discount may be obtained on the purchase of part of the social capital, while such a discount is not available for employees of the proposers, since the disputed provisions of the law do not refer to the Law on the privatisation of companies, which allows this.

b) These provisions of the law are claimed to give members of associations of rightful claimants a privileged position as natural persons in comparison with other citizens, since they will be able to

exchange their ownership certificates directly for shares in companies in which they have never been employed, nor is it necessary for them to have cooperated in business with them, while other citizens do not have this possibility, since they may exchange their certificates for shares only in companies in which they are employed, or for shares in investment trusts.

All the proposers also impugn the provision of article 58 of the law which charges subjects of privatisation to transform into share holding companies within five months of the law taking effect, which is claimed to be in conflict with the provisions of article 74 of the Constitution, which calls for freedom of business, and thus undoubtedly touches on the right to choice of status arrangement in accordance with the law.

The third paragraph of these provisions, which envisages the division of a company, if associations of rightful claimants exercise their rights under article 57, is claimed to be primarily incomplete since it does not define the conditions which must be fulfilled for a division of a company. This could as a result threaten the existence of companies, reduce the range of production and cause a destruction of market confidence in investment.

The provision of article 59 is claimed to be in conflict with articles 67 and 74 of the Constitution because it defines the book value of companies as the primary main capital of the company and the division of this principal into shares, which is claimed to put companies in an unequal position in law, encroah on the freedom of entrepreneurship and the constitutionally proclaimed economic function of ownership. This is said to result in an unequal position of economic subjects on the market.

The provision of article 59 which resolves financial legal relations between subjects of privatisation and rightful claimants, are said to be in conflict with article 23 of the Constitution which determines that everyone shall have the right that a court decide on their rights and responsibilities, and the provision of article 62 with article 25 of the Constitution because it does not permit an appeal and does not arrange the matter of appeal, but provides only the possibility of an administrative dispute, which cannot replace regular court proceedings.

The Assembly of the Republic of Slovenia on 5.12.1992 in answer communicated the opinion of their legislative-judicial commission, which was adopted at a session on 2.11.1992 and in which it considered that the proposals for assessing the constitutionality of chapter X of the Law on cooperative societies were a result of the non-adoption of the Law on the privatisation of companies, since these two laws together represented a contextual and legal system as a whole. On 29.11.1993 the National Assembly of the Republic of Slovenia supplemented the cited submission. In it they stated that the Law on the privatisation of companies had meanwhile been adopted whereby another legal basis had been created for some of the essential facts which the proposers assert in their submissions. In the return of cooperative assets and in the participation of cooperatives of rightful claimants in the privatisation of companies, there were said to be two different foundations, while the Law on cooperative societies is basically founded on the Law on the privatisation of companies in the implementation of ownership transformation of companies from the list. The Law on cooperative societies thus determines priorities in the wider context of privatisation, for the return of cooperative property, which is based on the way of approach to cooperative ownership in the management of individual companies. So the concrete course of privatisation assures all employees of these companies an equal position in law, since the provisions of chapter X of this law enable an internal division of shares to the same extent as other social capital in relation to which privatisation for cooperative rightful claimants is carried out. This in particular had the aim of ensuring an equal position in law also for employees in similar companies, to which discussions during the procedure of adopting the law expressly drew attention. The extent of social capital is thereby reduced, whereby exists a further path to privatisation according to the Law on the privatisation of companies, although this applies for all rightful claimants, also for trusts, and is a reflection of particularities in the business of agro-foodstuff companies (reproduction chain).

Cooperative rightful claimants in companies from the list receive 45% of the social capital established in accordance with the Law on the privatisation of companies. The percentage and list of companies represent the creation of a political consensus on the basis of analysis of actual circumstances, which should contribute to effective implementation of the aims of chapter X of this law. These are (in

relation to the detailed explanation of the draft law) "to provide a material basis for organising cooperatives on classical principles and for the further development of the cooperative movement, so the provisions must enable such solutions as will be implementable in the shortest possible time and by the least complicated procedure on the the basis of possibilities of agreement." It is necessary to draw attention in this to the fact that it is possible according to the third paragraph of article 62 for a cooperative to exempt from privatisation (according to article 59) that part of the assets of a company from the list for which it is established that it does not serve for performing the basic activities of a company.

The impugned provisions were entered into the Law on cooperative societies in order to repair injustices to cooperatives and their members, which were created with the transformation of the cooperative movement and with the equating of cooperatives with organisations of associated labour. In seeking legal solutions for the return of cooperative property and establishing ownership shares of cooperatives in some companies, the starting point was the historical transformation of cooperatives and their property and political definition that the state support the development of the cooperative movement, as well as to repair the wrong which was then done to cooperatives. The return of cooperative property and the participation of cooperatives in the privatisation of certain companies is claimed to establish cooperative ownership again at least to an approximate extent as existed prior to the second world war, and at the same time appropriately to assure that the rights of employees to privatisation of these companies which are arranged by the Law on the privatisation of companies are not affected.

The Constitutional Court found that the impugned provisions of the law are not in conflict with the Constitution and International Pact on economic, social and cultural rights (Official Gazette SFRY, no. 7/71).

During the proceeding before the Constitutional Court, the Law on the privatisation of companies was adopted and took effect. The claims of the proposers, that the principle of a legal state (article 2 of the Constitution) is violated because of the introduction of the provisions of articles 57, 58, 64 and 68, which refer to legislation which has not yet been adopted and will have above all unforseeable consequences, and that there is a violation of the right to private property (article 33 of the Constitution) because the law interfered in existing social ownership even before the adoption of privatisation legislation, are not well founded.

Also the claim that the legislature violated the principle of justice because it determined a 45 percent ownership share of cooperatives in the privatisation of companies under article 57 of the Law on cooperative societies, and did not in this respect the extent of production and business cooperation among subjects, in the view of the Constitutional Court is not well-founded. The extent of production and business cooperation between companies under article 57 of the law and farming cooperatives or farmin g cooperants did not serve as the criterion for ownership for the legislator. Past and envisaged future cooperation provides only the basis for the expectation that associations of rightful claimants will be motivated to effective managemnt of companies in which they will become co-owners. This is a logical and legitimate and not an arbitrary choice of basis for determining ownership of former social capital. Determining functional owners is one of the basic aims of the privatisation of social property. In view of their activities and their interests, associations of rightful claimants have a motive for constructing processing capacities and thus also for the successful business of existing companies which perform these activities and in which they have an ownership share; in the contrary case, they would begin themselves to build processing facilities, which would lead to irrational exploitation of investment.

The claim of the initiators that the principle of equality is violated

- between workers in companies which are privatised under article 57 of the law, whose past work is not considered in the privatisation, and association members, or cooperants, whose past work is considered; and

- between farming associations and organisations of cooperants, whose share in the privatisation is recognised by the law on the basis of business and production cooperation, and small industry and

other associations and other social companies, who have equally contributed a substantial share of the raw material of the company which is being privatised, whose share is not recognised, while the share of associations which were not yet founded on adoption of the law is recognised, in the view of the Constitutional Court is not well-founded.

The State of Slovenia is in a transitional period in which both political and social systems are being adopted, and, in this connection, it is also in transition from a social ownership to a private ownership concept, with an associated market economy. The legal basis for arranging ownership-legal relations is article 67 of the Constitution. In accordance with this constitutional provision, the legislator determines with individual laws, the ways and conditions of the privatisation of companies. The Law on cooperative societies, or the impugned section X of this law, must be considered in this category of law. Since the impugned provisions of the law refer to the Law on the privatisation of companies, it is also necessary in judging the constitutionality of these legal provisions to consider the entire legislation which arranges this matter. Since the search for ways and conditions for privatisation is, according to the Constitution, in the competence of the legislature, it must have in the transitional period, insofar as it relates to society, sufficient space to implement and establish its legal, economic, social and political aims in a way which it itself considers the most suitable, though it may not, of course, violate basic constitutional principles or constitutional provisions, including the right to equality before the law. It must be stressed, however, that equality before the law is not absolute, but only relative, otherwise it would not be possible to imagine an effective legal system, since the legislature would have no possibility of distinguishing among subjects and situations. The principle of equality binds the legislature to deal equally with related situations, which is not a bar to treating differences differently.

The Law on cooperative societies, or its article 57, directly arranges privatisation for cooperants of rightful claimants (existing cooperative organisations and organisations of cooperants and those associations whose founders register with the courts in 90 days and in which are associated natural persons, on condition that all cooperated on the basis of a production or business contract between 1.1.1986 and 31.12.1990, with the company which is being privatised), while workers in these companies have the right to a free distribution of shares in accordance with regulations on the privatisation of companies.

In the Law on cooperative societies, the criterion for ownership rights of subjects is contract production or business cooperation in the period from 1.1.986 to 31.12.1990, while according to the the Law on the privatisation of companies, only persons who were citizens of the Republic of Slovenia on 5.12.1992 may obtian ownership certificates. Article 23 of this law gives employees, former employees and pensioned employees of the company the possibility of using certificates to obtain ordinary shares to a maximum of 20% of the value of the social capital of the company according to the inaugural balance.

From all the above, it follows that there is no basis for the initiators' claim that the cited legal provisions are not in accordance with article 7 of the International Pact on economic, social and cultural rights. The pact binds member states to guarantee to all workers the reward whereby at least a just payment and the same reward for work of the same value are assured to them. The impugned legal provisions do not encroach on relations which are the subject of an obligatory nature in employment but arrange the privatisation of companies, which rests on the already mentioned criteria, among which is not included work, or past work.

The legislature, in the impugned provisions of the law, arranged in the Law on the privatisation of companies, the position which legal persons have in the procedure of privatisation - to farming cooperatives, the position which citizens have in this procedure - and especially workers, whereby as criteria for this kind of privatisation work or past work does not serve, but the law only enables workers on the basis of current or past work to exchange their certificates for shares in the company in which they are or were employed.

In this case it concerns different subjects and different circumstances and from this point of view, it is not possible to conclude that the legislature violated the principle of equality, or article 14 of the

Constitution. The level of ownership share is a matter of relativity which the Constitutional Court is not competent to judge.

In connection with the claim that the principle is violated of equality of legal subjects which had business cooperation with companies under article 57 of the law (farming organisations, small industry cooperatives) but have not been included in the privatisation under this law, the Constitutional Court found that the proposers did not in relation to this question meet the procedural condition under point 7 of article 411 of the previous Constitution, which enables a company to be a proposer before the Constitutional Court if its rights determined in the Constitution or Law are affected. In this case, there is no such violation of rights. For the same reasons, a legal interest in an initiative has not been demonstrated.

In relation to the claim that the principle of equality among economic subjects is violated because the right to privatisation of companies under article 57 of the law is also given to cooperatives which did not exist at the time the law took effect, the Constitutional Court found on the basis of the above mentioned criteria which guided the legislator in the privatisation, that the cited legal solutions also directly enable farmers or cooperants who were not members of existing cooperatives in the mentioned period (from 1.1.1986 to to 31.12.1990), but had business and production cooperation with the companies, to be included in the privatisation of these companies through legal subjects (in newly founded farming cooperatives), and thus actively to contribute to the greater economic effectiveness of the companies. Since the legislator determined different ways of privatisation of companies (article 2 of the Law on the privatisation of companies), with the common aim of greater economic efficiency, it is not possible to conclude in this case that the equality of economic subjects has been violated.

The claim of Kmetijska gospodarstva Rakičan that the amendment to article 60 of the law is not in accordance with article 14 of the Constitution, because employees in companies which are privatised according to the Law on cooperative societies cannot enjoy the discount in the purchase of shares for the remaining part of social property and are thus in an unequal position in comparison with workers employed in companies which are privatised according to the Law on the privatisation of companies, is not well-founded.

Article 58 of the Law on cooperative societies determines that the provisions of regulations on the privatisation of companies be sensibly used for the privatisation of companies from the list, insofar as it is not otherwise determined by this law.

Article 2 of the Law on the privatisation of companies determines in the fourth line of the first paragraph that this law shall not be used for companies which are privatised according to the Law on cooperative societies. In the second paragraph it determines that, if determined by special law, this law shall also be used for the privatisation of companies and organisations under the previous paragraph of this article.

From the cited provisions of the Law on cooperative societies and the Law on the privatisation of companies, it is possible to understand that the Law on the privatisation of companies be sensibly used also in the privatisation of companies under article 57 of the Law on cooperative societies, insofar as this is not otherwise determined. Because the changes to article 60 of the Law on cooperative societies only determine that the remaining part of social capital, which is left after the 45% privatisation and after the distribution of ordinary shares to 20% of the entire value of social capital, may in whole or in part be bought by companies or cooperatives of rightful claimant employees, former employees or retired employees ...., and in particular does not determine the conditions for purchase, it is necessary to interpret it such that the provisions of the Law on the privatisation of companies be also sensibly used in relation to purchase, which means that these employees also have the right to a discount.

The claim that members of cooperatives of rightful claimants are in a privileged position in comparison with all other citizens, because they may directly exchange their ownership certificates for shares in companies in which they have never been employed, is also not well-founded. The impugned provision of the amendments to article 60 of the Law on cooperative societies enables members of cooperatives of rightful claimants only participation in the purchase of the part of the social capital

which remains after the privatisation of 45% of the social capital and after the distribution of ordinary shares to 20% of the entire social capital in accordance with the Law on the privatisation of companies. This provision does not permit members of associations of rightful claimants to exchange their certificates for shares in companies privatised according to article 57 of the Law on cooperative societies. Certificates may be exchanged for company shares only by employees, former employees and retired employees of companies which are privatised, or for the remaining shares to 20% of the value of social capital of companies, which were not distributed during the previous itemisation, as well as closer family members of employees (article 23 of the Law on the privatisation of companies). The claim of the proposers that the provisions of articles 59 and 62 are not in acordance with articles 23 and 25 of the Constitution because the decision on property relations is transferred to the competence of administrative bodies, and according to the Constitution only a court is competent to decide on this, is not well-founded.

Article 23 of the Constitution determines that everyone has the right that an independent, impartial and lawfully founded court decide on his rights and obligations and on complaints about these, without unnecessary delay. From article 157 of the Constitution it derives that a competent court shall decide in an administrative dispute, on the legality of final individual acts whereby state bodies, bodies of local communities and bearers of public authority decide on the rights or obligations and legal benefits of individuals and organisations, unless other legal protection is envisaged by Law for specific matters.

A direct obligation that all rights must be assured legal protection with full jurisdiction does not follow from the cited constitutional provisions.

Such legal protection is guaranteed by article 6 of the European Convention on Human Rights, which Slovenia has not yet ratified. From legal practice of the European Court for Human Rights it derives that legal protection with full legal jurisdiction must be guaranteed at least in the final proceeding, even when according to national legislation on certain property rights in the initial phases of a proceeding, administrative or other non-judicial bodies decide.

The Supreme Court of Slovenia judges the legality of administrative acts in an administrative dispute, generally on the basis of actual circumstances which have been established in the administrative procedure. Exceptionally, the court may itself decide on an administrative matter on the basis of actual circumstances, established in the administrative procedure, or on the basis of actual circumstances which it establishes for itself. In such cases, the court decides in an administrative dispute with full jurisdiction. Since the court has the possibility of deciding on factual, and not only on legal questions in reaching decisions under article 59 of the Law on cooperative societies, the provision of article 23 of the Constitution is not violated.

The Constitutional Court also found that article 62 of the Law on cooperative societies is not in conflict with article 25 of the Constitution, which determines that everyone is guaranteed the right to an appeal or other legal resource. Under "other legal resource" is also included the right to take an administrative dispute before the Supreme Court of Slovenia, which is guaranteed to the proposer in this case.

The Constitutional Court did not assess the constitutionality of those parts of the provisions of articles 58 and 59 of the law, which the proposers claim are in conflict with articles 67 and 74 of the Constitution. The impugned provisions of article 58 of the law, which determined that companies under article 57 shall be transformed in five months after the adoption of the law, has been changed according to the same law; such companies shall be transformed in a time limit of one year into share companies or limited liability companies in accordance with legal conditions. Also the provisions of article 59, which binds the balance sheet of companies to the book value of companies, has been changed and adjusted to regulations on privatisation. Since according to article 161 of the Constitution, the Constitutional Court may only annul laws or their individual provisions with forward validity, and since the proposers did not impugn the changes to the provisions of the law, the Constitutional Court did not assess the impugned provisions of the law which had ceased to apply.

The Constitutional Court adopted this resolution on the basis of the first paragraph of article 160 of the Constitution and article 7 of the Constitutional Law for Implementing the Constitution of the Republic of Slovenia by the use of the second line of the third paragraph of article 25 of the Law on proceedings

before the Constitutional Court SR Slovenia (Official Gazette SRS, no. 39/74 and 28/76), composed of: president Dr Peter Jambrek and judges Dr. Tone Jerovšek, Mag. Matevž Krivic, mag. Janez Snoj, Dr. Janez Šinkovec, Dr. Lovro Šturm, Franc Testen, Dr. Lojze Ude and Dr. Boštjan M. Zupančič. The resolution was adopted with five votes for and four against. Judges Krivic, Šinkovec and Ude provided a dissenting opinion.

President
Dr. Peter Jambrek