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DECISION 28 OF 1994: 20 MAY 1994

ON ENVIRONMENTAL PROTECTION

The petitioner requested *ex post facto* constitutional review of certain laws concerned with land ownership and the environment.

He sought annulment of s. 13(7)(4) of Act II of 1993 on Land Reallocation and Land Distribution Committees. This provision had repealed s. 19 of Act II of 1992 on Transitional Rules and on the Entry into Force of Act I of 1992 on Co-operatives. Section 10 had prescribed that protected areas under the ownership of agricultural co-operatives were to be transferred into state ownership and the management of the environmental protection authorities ("EPA"). In view of the rules governing the acquisition of protected natural areas by the State, he submitted that the repeal violated Art. 70/D since the transfer of such areas into private ownership and the management of co-operatives led to the dismemberment of those areas and the destruction of natural treasures. Annulment thereof would then leave a unconstitutional situation amounting to an omission to legislate which Parliament would be required to rectify.

Held, granting the petition:

(1) The right to a healthy environment under Art. 18 was not an individual fundamental right nor merely a constitutional duty or state goal for which the State might freely choose any means of implementation. Nor did it amount to a social right but rather to a distinct fundamental

right exceedingly dominated and determined by its objective aspect of institutional protection. The right raised the guarantees for the implementation of state duties in the area of environmental protection, including the conditions under which the degree of protection already achieved might be restricted, to the level of a fundamental right. In fact the right to a healthy environment was a part of the objective, institutional aspect of the right to life. In determining the degree of protection as the key factor, one had to consider three matters - the exhaustibility of the natural basis of life; the irreversibility of a substantial part of environmental damage; and the fact that these marked the conditions for the continuance of human life. The right to a healthy environment guaranteed the physical conditions necessary to enforce the right to human life. Thus extraordinary resolve was called for in establishing legislative guarantees for such right (page 000, lines 00-00, page 000, lines 00-00, page 000, lines 00-00).

(2) It therefore followed that the State could not reduce the legislatively-ensured degree of environmental protection unless necessary to realise other constitutional rights or values and even then only in proportion to the set goal. The State was not free to allow any deterioration of the environment or risk thereof. Since environmental damage destroyed non-renewable resources, was often irreparable, and the neglect of environmental protection set in motion irreversible processes, prevention took precedence over all other means to guarantee the right to a healthy environment because subsequent penalties for irreparable damage could not guarantee restoration of the original condition. In enforcing the right, the State was thus constitutionally required not to retreat from the degree of protection already achieved unless the conditions were such that would also allow restrictions on individual fundamental rights. By upholding this degree of protection in the enforcement of the right, the State could not turn from preventative rules of protection to protection

ensured by sanctions although any state action contrary thereto might be compelled by unavoidable necessity and proportionate with this necessity. Increased severity of prohibitions and sanctions were insufficient and instead preventative guarantees were needed that excluded the possibility of damages with the same probability as if the area were owned by the State and managed by environmental protection authorities. Indeed the higher class of protection to which a given area belonged, the lower the possibility to substitute other protective methods for the transfer of ownership to the State and that of management to the said authorities (page 000, lines 00-00, page 000, lines 00-00, page 000, lines 00-00).

(3) The reduction of the legislatively-stipulated degree of environmental protection violated the right to a healthy environment as guaranteed by Arts. 18 and 70/D(2). The amendments to the Tr. Act and the LRC Act which caused this reduction were motivated by the circumstance of the expansion of lands to be allocated, in view of the expected large number of claims for land under the C. Act and the compensation in kind of the joint landowners. This circumstance though could not be set against the constitutional duty of the State to protect the environment. As a result of the amendments, forests were included among the areas which could be incorporated into the land fund with permission from the environmental protection authorities, and the allocation of arable lands located within present and prospective national parks was also allowed. Making ministerial permission a condition of the latter was insufficient as an increase of severity to balance the reduction of protection since it did not exceed the restrictions already available under the current environmental protection legislation. Moreover it contained no provisions beyond mere authorisation which would enforce stricter conditions (page 000, lines 00-00, page 000, lines 00-00, page 000, lines 00-00).

(4) In the interest of the protection of the environment, the relevant provisions were annulled retroactively as of the date they entered into force but this did not automatically affect the proprietary rights obtained under the now unconstitutional provisions or the in-kind designation of the share of property. The constitutional and mandatory degree of protection (now being that as originally stipulated by s.19 of the Tr. Act) formed no obstacle to the expropriation of present and prospective protected natural areas which had meanwhile passed into or had been designated as private property. Although expropriation was not the only means to restore the degree of protection originally determined by the transfer into state ownership and management by the relevant authorities, practically strict preventative supervision could substitute state acquisition only in respect of lower-class protection areas (page 000, lines 00-00).

(5) The enforcement of the right to a healthy environment and in particular the prevention of irreparable damage to nature required a consistent legal regulation which mandated the restoration of the original degree of protection. However due to the final changes in ownership which had occurred since the amendment to s.15 and the repeal of s.19, even the retroactive nullification of the unconstitutional provisions and restoration of s.19 was no longer sufficient to re-establish the original degree of environmental protection. Accordingly with respect to all areas under protection and targeted for protection, the absence of rules that prescribed their acquisition by the State and management by the relevant authorities or that guaranteed an equal degree of protection gave rise to an unconstitutional situation for which Parliament was called upon to enact the necessary provisions (page 000, line 00 - page 000, lines 00).

IN THE NAME OF THE REPUBLIC OF HUNGARY!

In the matter of a petition seeking *ex post facto* review of legislation to determine unconstitutionality, as well as its annulment on the basis of unconstitutionality by default, the Constitutional Court, with a dissenting opinion by Ádám and Tersztyánszky, JJ., has made the following

DECISION.

(1) The Constitutional Court declares that the right to a healthy environment, as defined in Art. 18 of the Constitution, incorporates *inter alia* the responsibility of the Republic of Hungary to ensure that the State does not reduce the degree of the protection of nature as guaranteed under law, unless this is unavoidable in order to enforce any other fundamental right or constitutional value. Even in the latter event, the point to which the degree of protection is reduced cannot be disproportionate to the goal to be achieved.

(2) The Constitutional Court declares that the admission of "forest" land use areas into the categories of arable land that can be designated with the permission of the environmental protection authority, as provided by s. 15 (1)(i) of Act II of 1992 on Transitional Rules and on the Entry into Force of Act I of 1992 on Co-operatives, and s. 15(4) of the same Act, are contrary to the Constitution, and therefore annuls retroactively the said provisions of the Act as of the date they entered into force. Section 15 (1)(i) remains in force as follows:

> [Lands as defined under s. 13(a), (b), and (d) of s. 13(2) must, above and beyond the provisions of s. 14, be designated so that--]
> (i) they include no other protected natural areas, with the exception of arable land belonging to inhabited farms, whose designation requires pennission by the environmental protection

authority, no national parks, nor areas under special protection and those protected under international convention; and, further, no arable land -- including ploughed fields, orchards, gardens and vineyards -- whose designation likewise requires permission by the environmental protection authority.

(3) The Constitutional Court declares that s. 13(7)(4) of Act II of 1993 on Land Reallocation and Land Distribution Committees, is contrary to the Constitution; thus it annuls retroactively this provision of the Act as of the date it entered into force.

(4) The Constitutional Court declares that with respect to all areas under protection and targeted for protection - those upon which the provisions of Points 2 and 3 of this Decision do not result in the re-establishment of the original degree of environmental protection - the absence of rules that prescribe their acquisition by the State and management by environmental protection authorities, or the absence of rules guaranteeing an equal degree of protection, where possible, gives rise to a situation contrary to the Constitution. The Constitutional Court therefore calls upon Parliament to meet its legislative responsibility by 30 November 1994.

The Constitutional Court will publish this ruling in the *Hungarian Official Gazette*.

REASONING

I

The petitioner had submitted that s. 13(7)(4) of Act II of 1993 was unconstitutional, and thus sought annulment of the Act. This provision annulled s. 19 of Act II of 1992, which had concerned the entry into force of Act I of 1992 and transitional legislation, and had prescribed that protected areas under the ownership of agricultural cooperatives be transferred to state ownership and the management of environmental protection authorities. According to the petitioner, in consideration

of the regulation on the acquisition of protected natural areas by the State, this led not only to a breach of justice but also to a situation contrary to the Constitution, in that it violates Art. 70/D of the Constitution; for the transfer of protected natural areas to private ownership and to the management of cooperatives leads to the dismemberment of protected natural areas and the destruction of natural treasures. The petitioner thus sought a decision that the failure to create legislation on the acquisition of the affected protected areas by the State is unconstitutional, and a declaration to the legislature to carry out the task.

II

1. The contested legal rule and its legal setting are as follows:

The original s. 18 of Act II of 1992 (hereinafter "Tr. Act," as it addresses transitional rules and the entry into force of Act I of 1992 on Cooperatives) removed those areas under the common use of agricultural cooperatives and, moreover, protected areas and those targeted for protection that have come under their ownership - with the exception of certain cultivated lands with permit - from among them as those which can be designated for transfer to private ownership, as prescribed by Act XXV of 1991 (the Compensation Act, hereinafter "C. Act"), and which foster the partitioning of property under the ownership of joint landowners. According to s. 19, these protected areas must be turned over to state ownership and the management of environmental protection authorities. Compensation is due in exchange for the property of the cooperative, either in the form of other land or monetary compensation.

The Tr. Act was based on the provision already prescribed by s. 18 of the C. Act for the designation of land funds to further the acquisition of landed property by members and employees

of cooperatives. Accordingly, the arable land to be transferred to private ownership must be designated from outside the protected natural area. If the land available outside the protected natural area is insufficient - with the exception of national parks, lands that fall under the protection of international conventions, and those which are specially protected - then even those protected areas may be designated which include ploughed fields, gardens, orchards, vineyards, and forest land-use areas under the ownership of cooperatives. The environmental protection authority must consent to the designation. These provisions also apply to areas targeted for protection. The Tr. Act extended the scope of protection to lands under the common use of agricultural cooperatives, and simultaneously, to the partitioning of property under joint ownership [s. 13(3)]; meanwhile, it removed forest land-use areas from among those which could be designated with permission [s. 15 (1)(i)].

The June 1992 amendment to the Tr. Act (s. 4 of Act L of 1992) already relaxed protection, by expanding the range of exceptions; this includes forests among those cultivated lands that can be designated for exception, and moreover, with ministerial permission, it allows the designation in-kind of land under the ownership of joint owners even in national parks and proposed national parks. As earlier, however, neither specially protected lands nor those protected under international conventions can be designated [s. 15 new (1)(i), new (4) and (5)]. According to s. 15(5), the state-owned share of those lands which still cannot be designated must be transferred from the use of the cooperative to the environmental protection authority.

This amendment induced an ambiguous relationship between ss. 15 and 19. The new s. 15(5) can be interpreted as enforcing the provision of s. 19 as it applies to state-owned lands - by way of the in-kind augmentation of the state-owned share with respect to protected areas, and their transfer to the management of the environmental protection authority. In the absence of an explicit

amendment, the transfer to state ownership and management, as per s. 19, continues to apply to protected areas under the ownership of cooperatives and joint landowners.

Section 13 (7)(4) of Act II of 1993, on land reallocation committees (hereinafter "LRC. Act"), abolished s. 19 of the Tr. Act. Since this did not affect s. 15, the land-use right of cooperatives can continue to be abrogated on lands under state ownership ineligible for designation. Lands under cooperative ownership that are specially protected or protected under international conventions, however, unequivocally remain in the use of the cooperative; lands in the use of the cooperative that are otherwise protected or targeted for protection may be designated for partitioning as the property of joint landowners - that is, with the exception of national parks, to be transferred to private ownership.

Although compared with the original provisions of Tr. Act, the amended version of Tr. Act significantly relaxed the rigidity of protection (although it did make an exception of the most strictly protected state-owned lands), it was in fact the LRC. Act that rescinded the original concept - the transfer of all protected areas to state ownership and management.

2. The petitioner seeks constitutional review of s. 13(7)(4) of the LRC. Act. Due to its close bearing upon the subject matter at hand, however, the Constitutional Court extended its review to s. 4 of Act L of 1992, which amended Tr. Act, or rather to s. 15(1)(i) and (4) of Tr. Act as now in force.

III

1. Article 18 of the Constitution lays down that the Republic of Hungary acknowledges and enforces the right of all individuals to a healthy environment. It follows from Art. 70/D(2) that one

way in which the Republic of Hungary implements the human right to "the highest possible degree of physical and mental health" [Art. 70/D(1)] is the protection of the constructed and natural environments.

In *Dec. 996/G/1990 AB* (ABH 1993, 533), the Constitutional Court ruled that from a reading of the above constitutional provisions, the State was to establish and operate specialised institutions to enforce the right to a healthy environment. It declared furthermore that neither the wording of Art. 18 (the right to a "healthy environment"), nor the embedding of the duty of the State to protect the environment among the means to enforce the right to health could be interpreted as a restriction on the right to a healthy environment. The duties of the State must include the protection of the natural basis of life and must extend to the establishment of institutions for the management of non-renewable resources (*Dec. 996/G/1990 AB*: ABH 1993, 533 at 535).

Concerning the objective, institutional protection of fundamental rights, *Dec. 64 of 1991 (XII.17) AB* (MK 1991/139) of the Constitutional Court declares that the range thereof may exceed the protection guaranteed by the given fundamental right when operative as an individual right. This objective protection both exceeds and differs qualitatively from a sum of the protection of the individual rights. The duty of the State to provide objective, institutional protection extends to human life in general - to human life as a value, that is - and this includes ensuring the conditions for the lives of future generations (*Dec. 64 of 1991 (XII.17) AB*: MK 1991/139 at 2812-2813).

2. The right to a healthy environment differs from all other fundamental rights and responsibilities established in the Constitution, due both to its particular relation to individual rights and its specific content.

(a) The right to a healthy environment in its present form is not an individual fundamental right, nor merely a constitutional duty or state goal for which the State may freely choose any means of implementation whatsoever.

As generally recognized, the right to a healthy environment cannot be included among the classic, protective fundamental rights. It is instead classified as a so-called "third generation" constitutional right, the character of which is still under debate and which has been adopted by [UNDER/IN?] only a few contemporary constitutions. This right, however, goes beyond the bounds of a constitutional duty or state goal. The right to a healthy environment is named as a "right" in the Constitution, and is "acknowledged" and "enforced" by the State as such exactly as the inviolable and unalienable fundamental human rights are in Art. 8(1); whereas the Republic of Hungary "protects," "acknowledges," "supports" and "respects" state goals and responsibilities - according to the wording of the Constitution - without classifying them as rights. What are called constitutional responsibilities or state goals are realized primarily through the enforcement and state protection of the specific individual rights stipulated in the Constitution. If the right to a healthy environment were to be interpreted as a state goal, it could not be filled out by other fundamental rights in the same manner as the content of a market economy as a state goal is constituted by numerous fundamental rights (see *Dec. 21 of 1994 (lV.16) AB*: MK 1994/40 at 1407).

(b) The right to a healthy environment cannot be compared to social rights, either. Although the latter primarily entail the duties on the State to take adequate measures in areas such as social welfare, job creation, and the establishment of educational and cultural institutions, the relations between such state responsibilitiess and individual rights are both close and extensive. Social rights are implemented both by the formation of adequate institutions and by the rights of individuals to have access to them, which rights are to be specified by the legislature. In a few exceptional cases,

however, individual rights have a direct bearing on certain social rights to be found in the Constitution.

(c) Hence, although "everyone" or at least every citizen is entitled to social rights, in the course of their implementation it is possible to identify the persons holding the individual rights that provide for their enforcement. This is true even in the case of state goals included in the Constitution which prescribe the establishment of complex institutions (*e.g.*, a "market economy"); for in this case there are persons entitled to the individual fundamental rights that implement the state goal. Both the individual fundamental rights and the individual secondary rights of access to the social, cultural, and other institutions the State is constitutionally obliged to establish are necessary instruments to implement the given constitutional task and social right; the institutional guarantees of the State and of individual rights have approximately equal weight and complement each other.

3. Despite the preceding examples, the right to environmental protection *per se* is primarily an independent and self-contained protection of institutions - that is, a distinct fundamental right exceedingly dominated and determined by its objective aspect of institutional protection. The right to a healthy environment raises the guarantees for the implementation of the state duties in the area of environmental protection, including the conditions under which the degree of protection already achieved may be restricted to the level of a fundamental right. Due to the distinctive features of this right, what the State ensures by the protection of individual rights elsewhere it must ensure in this case by providing legal and institutional guarantees.

(a) Naturally, individual rights must also be formulated by the legislature to ensure enforcement of the right to a healthy environment, but most of these are only indirectly related to environmental protection. For example, a violation of proprietary rights may be redressed by a civil

action for compensation of damages. There are individual rights related explicitly to environmental protection but they are primarily procedural in nature, such as the right to participate in the licensing procedure. The majority of the individual rights utilized in the area of environmental protection do not serve specifically the purpose of environmental protection, but can be employed for this purpose among many others. Such a right is a civil action to prohibit conduct involving the risk of damages, or the constitutional right of access to information of interest to the public.

The right to a healthy environment is most closely related to the right to life; for the right to a healthy environment is, in fact, a part of the objective, institutional aspect of the right to life. The responsibility of the State to maintain the natural basis of human life is isolated and named as a separate constitutional "right." If Art. 18 of the Constitution were absent, the state duties in the area of environmental protection could also be deduced from a broad interpretation of Art. 54(l) of the Constitution.

The independent declaration of the right to a healthy environment bestows a special constitutional weight upon the consequences which necessarily follow from the state responsibility involving the objective protection of life. These objective state duties are broader than the sum total of the individual rights to life. The right to a healthy environment formally detaches them from the individual right to life, which makes it easier for the right to encompass state responsibilities of other origins necessary for the implementation of the duty, and facilitates the adaptation of those duties to the special area of environmental protection.

The right to a healthy environment is unique in that its proper subjects could be identified as "mankind" and "nature."

Efforts to bestow "rights" upon "nature" or its representative elements - such as animals and plants - and the assertion of the "rights of yet-unborn generations" are eloquent illustrations of the

same problem. However, legal responsibilities toward "nature" and "present and future mankind" can be determined without resorting to figurative language and legal constructs of this sort.

(b) The constitutional right to a healthy environment entails the responsibility of the State to protect the environment and maintain the natural basis of life. At present, specific individual rights are only incidental to the implementation of this right; their role is even quantitatively negligible when compared to the corresponding role of individual rights in the implementation of social rights. The State must therefore provide additional legislative and organisational guarantees to substitute for the function of individual rights. The legislative function of providing guarantees is not simply more important in the area of environmental protection than in the case of other constitutional rights where the court (*i.e.*, the Constitutional Court) may provide direct protection of fundamental rights or may acknowledge individual rights. Instead, it must provide all the guarantees - within the limits of dogmatic possibility granted by the Constitution in the area of individual rights.

(c) Hence, the degree of institutional protection ofthe right to a healthy environment is not arbitrary. Besides the dogmatic peculiarities outlined above, the key factor in determining the degree of protection is the three-prong *raison d'etre* of environmental protection - the exhaustibility of the natural basis of life, the irreversibility of a substantial part of environmental damages and, finally, the sheer fact that these mark the conditions for the continuance of human life. The right to a healthy environment guarantees the physical conditions necessary to enforce the right to human life. In light of the above, extraordinary resolve is called for in establishing legislative guarantees for the right to a healthy environment.

IV

It follows from both the object and the dogmatic particularity of the right to a healthy environment that the State must not lower the legislatively ensured degree of environmental protection unless necessary to realise other constitutional rights or values. Even in the latter case, however, the degree of protection must not be reduced disproportionately with the goal set forth.

1. The practice of the Constitutional Court has allowed the legislature relatively great liberty in determining the methods and degrees by which it enforces constitutional principles and social rights. A constitutional quandary may arise in the borderline case when the enforcement of a constitutional goal or that of a protected institution or right are clearly rendered impossible by either interference by the State or, more frequently, the neglect of the State to fulfil a constitutional responsibility. Above that minimal requirement, however, there are no constitutional criteria - except for the violation of another fundamental right - to determine whether legislation providing for a state goal or social right is constitutional or not.

The right to a healthy environment differs from constitutional duties and social rights in this respect as well. *Dec. 996/G/1990 AB* (ABH 1993, 533) declares that the State may freely choose the fundamental principles and methods by which it protects the environment; the State is free, moreover, to determine what specific legislative and governmental measures are to follow from the particular state responsibility to assure a healthy environment (*Dec. 996/G/1990 AB*: ABH 1993, 533 at 535). It follows, however, from the distinctive features of the right to a healthy environment, as stated in the present Decision, that the State is free neither to allow any deterioration of the environment nor a risk thereof.

Indeed, there are objective criteria - a range of which are defined as mandatory by international norms - which in effect prescribe the necessity of the protection of nature. Environmental damage destroys non-renewable resources, is often irreparable, and the neglect of

environmental protection sets in motion irreversible processes. The enforcement of the right to a healthy environment thus cannot be subjected to such quantitative and qualitative fluctuations caused by economic and social circumstances as that of social and cultural rights, in the case of which restrictions arising from circumstances may subsequently be redressed. Due to these distinct features, prevention has precedence over all other means to guarantee the right to a healthy environment, for subsequent penalties for irreparable damages cannot ensure restoration of the original condition. The enforcement of the right to a healthy environment constitutionally obliges the State - so long as legal protection is indeed necessary - not to regress from a degree of protection already achieved unless the conditions are such that would also allow restrictions of individual fundamental rights. The enforcement of the right to a healthy environment by upholding the degree of protection also compels the State not to regress from preventive rules of protection to protection ensured by sanctions. Similarly to the previous rule, any action by the State contrary to this requirement must be compelled by unavoidable necessity and proportionate with this necessity.

2. The Constitutional Court notes that several means of guaranteeing the given degree of legal protection are known with respect to individual rights, such as the protection of vested rights and the protection of confidence. The practice of the Constitutional Court has seen numerous examples of the above. Thus, the termination of the right of management enjoyed by social institutions - constitutionally, that is - cannot leave those previously entitled without protection (*Dec. 17 of 1992 (III.30) AB*: MK 1992/32 at 1163-1164); earlier contracts may only be changed by legislation according to such conditions of the *clausula rebus sic stantibus* which would be acknowledged in civil court (*Dec. 32 of 1991 (VI.6) AB*: MK 1991/61 at 1137 and 1139). Even concessions granted in the interest of economic policy without any previous individual entitlement or previous state responsibility may only be restricted or withdrawn at short notice if the State is

compelled to do so, due to major changes which have occurred in the course of the long time which has elapsed since the passing of the legislation. If such conditions are absent, a longer period of adaptation must be made available for those concerned. (*Dec. 9 of 1994 (II.25) AB*: MK 1994/21 at 722-723). The guaranteeing of the degree of protection is of all the more relevance to the right to a healthy environment when the matter at issue is not a protection of confidence, but the execution of a special state responsibility arising from a particular fundamental right - a responsibility which embraces the guarantees of the fundamental right with a "universal subject" by making them function as responsibilities.

3. The Constitutional Court lays great emphasis on the fact that it declared the responsibility to guarantee the *status quo* of protection in consideration of the protection of nature - based on the distinctive features of the right to a healthy environment; hence, the same responsibility, due to the differences identified above, does not apply to social rights.

V

1. The guarantees applying to the use of nature preserves - permit requirements, as well as use-related prohibitions and restrictions - were stipulated in Law Decree 4 of 1982 on the protection of the environment. Section 4(1)(1) of Law Decree 24 of 1976 on expropriation allows the expropriation of property for the purpose of the protection of the environment if protection cannot be ensured otherwise.

The effect of s. 19 of the Tr. Act - which prescribes that those protected areas and areas targeted for protection specified in s. 15 must be transferred to state ownership and the management of environmental protection authorities - is equal to such expropriation. The State considered this

the only possible way to ensure the necessary protection, and made the expropriation of the protected areas identified in the Tr. Act compulsory.

2. The existence of legal grounds for the expropriation ofproperty for the purpose of the protection of the environment does not mean that the State cannot fulfill its responsibility otherwise.

It follows from Art. 18 of the Constitution that the degree of protection already achieved is not to be reduced. Theoretically, the use of the protected areas could be retransferred from the management of environmental protection authorities to private owners, just as protected areas and areas targeted for protection could be privately owned or managed by private owners; the severity of the obligations imposed on the users must be increased in all of these cases so that there is no decrease in the degree and efficiency of protection. The Constitutional Court calls attention to the fact that the increased severity of prohibitions and sanctions does not suffice; such preventive guarantees are needed that exclude the possibility of damages with the same probability as if the area were owned by the State and managed by environmental protection authorities. Furthermore, the Constitutional Court emphasises that the higher the class of protection to which a given area belongs, the lower the possibility to substitute other protective methods for the transfer of ownership to the State and that of management to environmental protection authorities. The necessary preliminary guarantees required in the case of certain areas - those in a higher class of protection or protected by international conventions as well as those targeted for such protection - may restrict the owner's right of use and disposal, and the "peaceful enjoyment of his possessions" as provided by art. 1 of the First Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms, to such a degree that the restrictions may constitute a deprivation of property by the standards of constitutional law - without a deprivation of proprietary rights as under civil law, that is without "classic" expropriation and thus may only be stipulated

constitutionally in any given case if compensation is provided. [Concerning the relation of property under civil law and the constitutional protection of propety, see *Dec. 64 of 1993 (XII.22) AB* (MK 1993/184 at 11077-11079)].

3. However, regression occurred in the given case without any change of the regulations pertaining to the protection of the environment. Consequently, the amendment of the Tr. Act and the LRC. Act - with the stipulations described in Point 2 above - unequivocally reduced the protection of nature preserves.

The Constitutional Court has not found any acceptable justification for even a consideration of the unavoidable necessity of restricting the right to a healthy environment. The circumstance which clearly motivated the reduction in the degree of protection both in the Tr. Act and the C. Act was the expansion of lands to be allocated, in view of the expected large number of claims for land under the C. Act and the compensation in-kind of the joint landowners. This circumstance, however, may not be set against the constitutional responsibility of the State to protect the environment.

Compensation is not founded on any constitutional responsibility of the State. Constitutional restrictions are especially absent when it comes to the State's determination of the possessions it offers as compensation. Similarly, no one has any constitutionally guaranteed right to acquire land of any given size by enforcing a right of acquisition at an auction. The Constitutional Court emphasises once again that all of the provisions ofthe C. Act which aim at the restoration of the original state of land beyond the general degree of compensation were found contrary to the Constitution (*Dec. 15 of 1993 (III.12) AB*: MK 1993/29 at 1577). Likewise, the given method of transferring lands under cooperative ownership into private ownership does not follow from the Constitution and cannot justify any restriction of the constitutional right to the environment and the respective duty of the State to protect it. With respect to those having obtained private property from

cooperative property as well as those entitled to compensation, the C. Act itself takes into account the limited size of the areas which may be used for this purpose. Section 22 of the C. Act provides for the rules of procedure to be followed if the gold-crown value due any joint owner were not available.

Section 19 ofthe Tr. Act declared the necessity of a transfer into state ownership and management by environmental protection authorities with respect to all protected natural areas irrespective of the identity of the specific owner. The Constitutional Court calls attention to the fact that the distinct legal status of joint owners - namely, since in theory they previously enjoyed proprietary rights, only the in-kind designation of the nominal share of property must be effected in their case - may and must be taken into account by the legislature in the designation of property, expropriation of protected natural areas, or the enforcement of the regulations ensuring the degree of protection stipulated by s. 19. These distinctive traits may not justify any decrease in the degree of environmental protection, just as they were indifferent to the stipulation of the earlier degree of protection.

Having received the application, the Ministry of Justice and the Ministry of Environmental Protection and Regional Development drafted a bill to facilitate the transfer of areas presently protected or targeted for protection by s. 15 (1)(i) and (3) of the Tr. Act back into state ownership and the management of environmental protection authorities. Although Parliament decided that the matter merited urgent debate, no resolution was passed prior to the expiry of the mandate of Parliament.

4. The degree of protection ensured by the original ss. 15 and 19 of the Tr. Act was reduced by the amended and extended text of s. 15 - as defined by s. 4 of Act L of 1992, which amended the Tr. Act. Forests were included among the areas which could be incorporated into the land fund with

permission from the environmental protection authorities, and the allocation of arable lands located within present and prospective national parks was also allowed. Making ministerial permission a condition of the latter is insufficient as an increase in severity to balance the reduction of protection, since it does not exceed the restrictions already available under the current legislation pertaining to the protection of nature. Moreover, it contains no provisions beyond mere authorization which would enforce stricter conditions.

The protection ensured by s. 19 of the Tr. Act, according to which present and prospective protected areas managed by cooperatives must be transferred into state ownership and the management of environmental protection authorities, was abolished by s. 13(7)(4) of the C. Act with the exception of areas in state ownership which currently or prospectively belonged to a higher class of protection or fell within the scope of international conventions.

It follows from the above that such decreases of the legislatively stipulated degree of environmental protection violate the right to a healthy environment as guaranteed by Arts. 18 and 70/D(2) of the Constitution. The Constitutional Court therefore annuls these provisions retroactive as of the date they entered into force.

The retroactive nullification was required in the interest of the protection of the environment.

5. The settled legal relations resulting from the legally-binding allocation of protected natural areas into land funds, the transfer of a number of such areas into private ownership, and a physical designation thereof as private property, constitute no obstacle to retroactive nullification. However, the retroactive nullification does not automatically affect either the proprietary rights obtained under the unconstitutional provisions or the in-kind designation of the share of property. The constitutional and mandatory degree of protection is that originally stipulated by s. 19 ofthe Tr.

Act. Property owned by entities other than the State ought to have been expropriated for this purpose; detailed provisions were only included in the Tr. Act with respect to the means of full compensation in exchange for the expropriated cooperative property, whereas the ordinary rules of expropriation were applicable to joint owners.

There is no constitutional obstacle to the expropriation of present and prospective protected natural areas which have in the meantime passed into private ownership or have been designated as private property.

Expropriation is not the only means to restore the degree of protection originally determined by the transfer into state ownership and management by environmental protection authorities. Practically, however, strict preventive restrictions and supervision may substitute acquisition by the State only in the case of areas which belong to a lower class of protection.

6. The enforcement of the right to a healthy environment and more specifically, the prevention of irreparable damage to nature, require a consistent legal regulation which mandates the restoration of the original degree of protection.

Section 19 of the Tr. Act did not merely authorize a transfer into state ownership and management by the environmental protection authorities, but made it mandatory; therefore, the Decree (tvr) on expropriation cannot serve as a substitute. Due to the final changes in ownership which have occurred since the amendment to s. 15 and the nullification of s. 19, even the retroactive nullification of the unconstitutional provisions and the restoration of s. 19 of the Tr. Act no longer suffice for the purpose of restoring the original degree of protection - that is, the violation of Art. 18 of the Constitution can still be ascertained due to the absence of adequate legislation. The Constitutional Court defined the constitutional requirements for legislation pertaining to the protection of nature and clarified within what limits the legislature may diverge from the original

means of protection when attempting to restore the degree of protection. In view of the fact that the legislation aiming to redress the consequences of the annulment of s. 19 neither stipulates the mandatory restoration of the original degree of protection nor points in this direction; moreover, in view of the fact that the reduction in the degree of environmental protection resulting from the unconstitutional provisions of s. 15 of the Tr. Act are to be redressed - irrespective of the identity of the owner, the Constitutional Court deemed it necessary to call upon the legislature expressly to incorporate into a law provisions which would ensure conditions which comply with the Constitution.

ÁDÁM and TERSZTYÁNSZKY, JJ., dissenting:

1. We do not concur with all aspects of the majority opinion as it pertains to the interpretation of Art. 18 of the Constitution. In our opinion, the Constitutional Court should have dismissed the application.

It cannot be determined based on Art. 18 of the Constitution that it is the duty of the Republic of Hungary to ensure that the State "cannot reduce the degree of environmental protection guaranteed by legislation, unless it is unavoidable in order to enforce other fundamental rights or constitutional values."

In determining the basis for this opinion, one must take into account the deviations that exist between the domain, forms of implementation, and constitutional basis of general environmental protection as enforced by the State. The duty of the State to enforce the right to a healthy environment, as defined by Art. 18 of the Constitution, embraces primarily the State's determination of quality indices, or limits, that affect all elements of the human environment, and in the interest of maintaining the integrity of the indices, the carrying out by the State of its tasks in the areas of

supervision, control (*i.e.*, the taking of measurements), facilitation, imposition of penalties, and implementation of corrective measures.

It follows from the above that with respect to environmental protection, Art. 18 encompasses only those state duties that serve to ensure the general quality of the natural environment. The protection of nature applies only to those aspects of the human environment which are of unique value and which require special protection, as defined both by international and domestic legal standards. The special protection of natural areas that require such protection, as determined by the various degrees of protection laid down in law, entails the implementation of measures in the spheres of regulation, management organization, commercial activity, control, and coercion over and above those necessary to enforce the right to a healthy environment. The legislature can freely define the contents of such measures, however, only once [IS THIS OK?] it has taken into consideration the limitations imposed by the relevant stipulations in international documents, the right to a healthy environment, and the fundamental right to health.

2. According to Art. 18 of the Constitution, "The Republic of Hungary acknowledges and enforces the right of all individuals to a healthy environment." As for the instruments of enforcement, this provision, contrary to the provisions found in Arts. 70/D, 70/E and 70/F of the Constitution, does not include detailed regulations.

As provided by Art. 18 of the Constitution, the State unequivocally upholds its right to enforce the right to a healthy environment. The relevant provision of Art. 18 directly authorizes and requires the State to pursue action on this front. This right gives rise to the articulation of state goals and the acceptance by the State of its responsibility for enforcement. Its implementation requires material resources. It is the law on the state budget that allots these material resources for the use of the relevant state organs.

Article 18 of the Constitution requires neither the maintenance of a given degree of duties the State accepted and enforced voluntarily in the past, nor that of a standard that arose from a system of conditions.

Within the domain of environmental protection, the constitutionality of legislation concerning the protection of the natural environment - beyond the necessity of meeting international obligations, as prescribed by Art. 7(1) of the Constitution - can come into question only in extreme cases. Such an extreme case would arise especially if there is reasonable cause to believe that the effect of the regulation would summon forth a considerable and irreversible deterioration in the natural basis for life.

A change in duties undertaken previously by the State, as it appears in a reduction in the degree of protection, thus does not provide due grounds to declare the contested provisions of law unconstitutional.

It is essential to the understanding of the matter ruled on by the Constitutional Court to note that forests are subject not only to environmental protection, but to commercial activity. From a constitutional perspective, the determining factor with regard to environmental protection is what rights and responsibilitiess apply to the owner of the forest. The review of the matter at hand has failed to demonstrate whether the protection of forests can be realized exclusively by their coming under state ownership, or by way of new regulations aimed at raising the degree of protection required under law.

3. According to s. 19 of the Tr. Act, protected areas ineligible for designation should have been transferred to state ownership. The implementation of this provision would have necessitated further state decisions and the initiation of procedural processes aimed at the expropriation of non-state property. The Tr. Act prescribed no deadline with respect to such measures.

Although the expropriation of properties into state ownership with the aim of protecting the natural environment is possible under the stipulations laid down in Art. 13(2) of the Constitution, it does not follow from Art. 18 of the Constitution that such a duty is compulsory.

This means also that the State is not bound by its decision to prepare for the acquisition of land into state ownership, but can review and modify it at any time.

A modification to the provision prescribing the acquisition of property by the State - in the matter at hand, the annulment of s. 19 of Tr. Act - does not necessarily reduce the degree of protection actually attained and guaranteed under law. According to the operative law - s. 4(1)(1) of Law Decree 24 of 1976 - the State can expropriate land even in the absence of a distinct legal provision. From a constitutional perspective, the enforcement of the right to a healthy environment in and of itself does not constitute grounds for the transfer of land into state ownership. Indeed, it cannot generally be demonstrated that the State is necessarily a more mindful owner of protected natural areas than other entities.

It can be assumed in principle and with cause neither with respect to the State, nor a non-state entity, that the owner will or will not abide by legislation stipulating the rights and responsibilities of the owner.

The acquisition of land for state ownership with the aim of protecting the natural environment is justified, however, and may be unavoidable, if environmental protection laws limit the use of the property not under state ownership to such an extent that the limitation would be constitutional only given the required provision for expropriation and its implementation. (The legislation on expropriation expresses this by stipulating that property can be expropriated in the interest of environmental protection only if protection can be guaranteed in no other way.)