JUDGE OF THE CONSTITUTIONAL COURT

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**SEPARATE OPINION**

**of Judges of the Constitutional Court**

**Artūrs Kučs and Gunārs Kusiņš**

**in Riga on 30 May 2019**

**in Case No. 2018-17-03**

**"On Compliance of Para 459 of the Binding Regulation of the Riga City Council of 7 February 2006 No. 38 "Regulation on the Use of and Construction in the Territory of the Historic Centre of Riga and the Protection Zone Thereof" with the First, Second and Third Sentence of Article 105 of the Constitution of the Republic of Latvia".**

**1.** On 16 May 2019, the Constitutional Court delivered its judgement in case No. 2018-17-03 "On Compliance of Para 459 of the Binding Regulation of the Riga City Council of 7 February 2006 No. 38 "Regulation on the Use of and Construction in the Territory of the Historic Centre of Riga and the Protection Zone Thereof" with the First, Second and Third Sentence of Article 105 of the Constitution of the Republic of Latvia (hereafter – the Judgement). The contested provision was recognised as being compatible with the superior legal provisions.

In our separate opinion we shall use the abbreviations used in the Judgement.

**2.** We uphold the finding made in the Judgement that the contested provision restricts the fundamental rights, established in Article 105 of the Constitution, of a person – an organiser of gambling. Likewise, the Judgement

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validly points to the criteria that must be verified to ascertain whether the restriction on fundamental rights, established in the contested provision, is justifiable.

To assess whether the restriction on fundamental rights, established in the contested provision, should be considered as having been determined in accordance with law, it had to be clarified whether the Riga City Council had issued the contested provision on the basis of authorisation, granted in law, whether this provision was not contrary to laws and Cabinet regulations and whether it was sufficiently clear, allowing the addressee to understand one's rights and obligations.

**We do not uphold the finding made in the Judgement that the contested provision had been issued on the basis of authorisation, granted by the legislator. Thus, likewise, we do not consent that the restriction on fundamental rights, established in the contested provision, had been determined on the basis of law and, accordingly, also that the contested provision complies with superior legal provisions.**

Our opinion is based on the arguments presented below.

**3.** We uphold the finding made in Para 18 of the Judgement that the legislator may transfer deciding on some matters also into the competence of local governments; however, a local government does not have the discretion of a legislator.

It follows from the principles of legality and the separation of powers that a local government has the right to issue binding regulations only in cases provided for in law, within the framework of law and they cannot be contrary to the

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provisions of the Constitution, as well as other superior legal provisions (*see Judgement by the Constitutional Court of 12 February 2016 in Case No. 2015-13-03, Paras 14.1. and 14.3.*). Binding regulations are the instrument of executive power for the local government council, which it can use to organise the fulfilment of its autonomous functions and regulate other matters if law or Cabinet regulations have authorised the local government to do so (*see Judgement by the Constitutional Court of 15 November 2018 in Case No. 2018-07-05, Para 15.2.*). The Constitutional Court, analysing acts issued by the Cabinet, has repeatedly recognised that the authorisation to regulate a particular sector, granted by the legislator to another institution, should be sufficiently clear and precise (*compare, see Judgement by the Constitutional Court of 21 November 2005 in Case No. 2005-03-0306, Para 10, and Judgement of 18 October 2018 in Case No. 2017-33-03, Para 14*). Likewise, the Constitutional Court has also pointed out that these findings are applicable also to the acts issued by a local government in the framework of *ultra vires* doctrine (*see Judgement by the Constitutional Court of 12 February 2016 in Case No. 2015-13-03, Para 14.3.*).

To ascertain whether the restriction of a person's fundamental rights, envisaged in the provision of a local government's binding regulation, the Constitutional Court had to establish the scope of authorisation granted to a local government in regulatory enactments. To clarify this, all regulatory enactments that regulate the particular matter should be taken into consideration.

We consent that the law "On Local Governments", regulatory enactments in the area of spatial planning and Law on Protection of the Historic Centre constitute a united system of legal regulation and that a local government's right to plan its spatial development and determine restrictions on the use of territory

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follow from them and that, in clarifying the scope of authorisation granted to local governments, the legal regulation on organising gambling also must be taken into account.

However, in those cases where the scope of authorisation, granted to a local government, has to be deduced from the provisions of several laws, it is important to clarify, whether and which provisions should be regarded as special norms vis-à-vis other legal provisions, on which the scope of the authorisation depends.

**4.** Regulatory enactments in the area of spatial planning determine the principles to adhere to in spatial planning, as well as the competence of local governments in the area of spatial planning, *inter alia*, determines in general a local government's right to establish conditions and restrictions regarding the use of territory. The legislator has given a local government broad discretion in developing spatial plans (*see Judgement by the Constitutional Court of 12 November 2008 in Case No. 2008-05-03, Para 15.3.*). Additional criteria are defined in the provisions of Law on Protecting the Historic Centre, which apply to the planning of the territory of the Historic Centre, likewise, criteria that a local government must take in account in developing, in particular the local plan for the Historic Centre have been defined. The said regulatory enactments comprise general regulation on a local government's right, under certain conditions, to restrict different types of use of a territory. Whereas Gambling Law, which regulates the procedure for organising gambling, the procedure of providing gambling services and other matters relating to gambling, comprises regulation, drawn up by the legislator, on the scope of a local government's competence exactly in the area of control over organising of gambling

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The purpose of Gambling Law is to ensure protection for public interests and players' rights. *Inter alia*, the procedure for organising gambling and lotteries and for providing gambling services is regulated in this law. Restrictions on organising gambling are also defined in it. I.e., in Section 41 (1) of Gambling Law, conditions, under which organising of gambling is prohibited, are defined, whereas in the second part of the same section the legislator has defined specific venues where organisation of gambling is not permitted.

Local governments' rights in the area of controlling gambling are established in Section 42 of Gambling Law. Pursuant to the second and third part of this Section, a local government, upon receiving an application regarding organisation of gambling at a venue where, pursuant to Section 41 (2) of this law, it is prohibited, refuses to issue a permit. If organisation of gambling in the respective venue is not prohibited in accordance with Section 41 (2) of the law, the local government councils decides on the permit to organise gambling on case-by-case basis and, prior to adopting a decision, examines whether organisation of gambling at the particular venue does not cause substantive infringement on the interests of the State and residents of the particular administrative territory. Moreover, the legislator has provided that a local government's permit is not required for opening a casino at for- and five-star hotels. Pursuant to Section 42 (6), a local government council has the right to withdraw, by a reasoned decision, an already issued permit to open a casino, a gambling hall, a bingo hall, a betting or a wagering shop and to operate the respective gambling on the particular premises, if organisation of gambling at the particular venue causes a substantial infringement on the interests of the State and the residents of the respective administrative territory.

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We hold that the legislator has clearly defined in Section 42 of Gambling Law a local government's particular rights in regulating gambling, i.e., a local government has been envisaged only the right to issue individual permits on a case-by-cases basis, complying with the criteria, defined by the legislator, that a local government must adhere to.

This is proven, first of all, by the history and development of the legal regulation on gambling. Pursuant to Section 20 (1) of the law "On Lotteries and Gambling", which was in effect until 31 December 2005, local governments had the right to define territories where gambling houses could not be located. Whereas, in adopting Gambling Law, the legislator chose new regulation. Various possible solutions were discussed, *inter alia*, authorising a local government to determine territories where gambling would be prohibited [*see, for example, Proposals of the Committee on Budget and Finance (Taxation) for consideration of the draft law "Law on Gambling and Lotteries" (Reg. No 1419) in the 2nd reading. Available: https://www.saeima.lv/L_Saeima8/lasa-dd=LP1419_2.htm, as well as Transcript of the Sitting of the 8th Convocation of the* Saeima *on 17 November 2005. gada. Available: http://www.saeima.lv/steno/2002_8/st_051117/st1711.htm*]. However, when the proposals that envisaged authorising local governments to determine the territories where gambling would be prohibited were voted on, the *Saeima* dismissed them. As concluded also in Para 18.4. of the judgement, the *Saeima* approved of a different wording, according to which control over organising of gambling was in the State's competence and a local government had to assess the substantivity of an infringement on residents' interests, in adopting an individual decision on

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refusal to issue permit to open a gambling hall and to organise gambling at the respective venue or on the withdrawal of such a permit.

In our opinion, it follows from the above that, since 1 January 2006, a local government no longer has the right to regulate this matters by a regulatory enactment. Both Gambling Law and its Section 42 later were amended several times; however, the legislator still retained the regulation providing that a local government adopted individual acts instead of determining territories where organisation of gambling was or was not allowed.

Thus, pursuant to the provisions of Gambling Law, local governments do not have the right to regulate the matter of organising gambling by a legal act, determining general permission or prohibition to organise gambling. Therefore, it can be concluded that, although local governments have broad discretion in the area of spatial planning, the regulation of Gambling Law restricts this discretion with respect to one area. Hence, from the perspective of spatial planning, the regulation of Gambling Law should be deemed to be special regulation, which does not permit local governments to regulate organisation of gambling within its territory by means of binding regulations, *inter alia*, spatial planning. The *Saeima* also points out in its opinion that the delegation, granted to a local government, cannot be interpreted as broadly as to mean that a local government's right to regulate all aspects that could affect residents' staying in the Historic Centre of Riga and its protection zone would follow from Law on the Historic Centre. The *Saeima* also underscores that a local government has been granted broad discretion with respect to substantiation for permitting or prohibiting organisation of gambling in each particular case; however, the legislator has chosen the form of

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the respective decision, i.e., it should be a reasoned decision that can be appealed against in court (*see, Case Materials, Vol. 3, pp. 62–67.*).

In view of all the above, we consider that the authorisation for a local government to determine, by means of spatial planning, prohibition to organise gambling in the respective territory does not follow from the legal regulation.

**5.** We cannot uphold the conclusion, included in Para 18.5. of the Judgement: if a local government had been granted the right, by means of individual decisions, to prohibit setting up of venues for organising gambling in its territory then, even more so, a local government has the right to determine in its spatial plan respective restrictions on the use of territory in accordance with the legal regulation on spatial planning.

Individual and regulatory legal acts differ significantly, likewise, the mechanism for controlling them, referred to in the Judgement, also differs significantly. The Constitutional Court has recognised that fundamental rights may be restricted only by law or on the basis of law, which clearly defines the scope and limits of a restriction on fundamental rights. Determination of a restriction on fundamental rights without a clear authorisation by the legislator is inadmissible (*see Judgement by the Constitutional Court of 21 November 2005 in Case No. 2005-03-0306, Para 10, and Judgement of 12 February 2016 in Case No. 2015-13-03, Para 15.2.*).

The fact *per se* that the legislator has granted to a local government the right to issue such individual acts as permits does not allow deducing also a local government's right to regulate the same matter by means of binding regulations, e.g., a spatial plan, in particular, in situations where the *Saeima* has discussed

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delegating this right to local governments but has rejected this proposal through voting. In such a case, it cannot be considered that a local government would be authorised to issue regulatory legal acts on the matters of organising gambling. Moreover, the Constitutional Court's finding, worded accordingly, included in Para 18.5. of the Judgement could provide grounds for the conclusion that in all instances where law grants the right to local governments to adopt individual administrative acts on case-by-case basis they have, at the same time, the right to regulate the respective matter by means of binding regulation. Such understanding of local governments' rights, *inter alia*, in the area of spatial planning, would make it unfeasible in practice for the legislator to determine for local governments a narrower scope if authorisation without providing in law, every time, direct prohibition to adopt binding regulations in the respective area.

We are of the opinion that according to the principle of supremacy of law, local governments' right to regulate the respective area by means of binding regulation, which is much broader, has not been envisaged by the legislator and, moreover, had been rejected in the legislative process, cannot be deduced from a local government's right, defined clearly in law, to adopt individual administrative acts.

**6.** It is concluded in Para 18.5. of the Judgement that establishment of restrictions on organising gambling in a local government's spatial plan and adoption of individual decisions with respect to particular venues for organising gambling are not mutually exclusive but mutually complementing solutions. In the Judgement, this conclusion has been substantiated only by a statement that both aforementioned legal solutions could function in parallel and ensure a more

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meaningful system for controlling the prevalence of venues for organising gambling.

We cannot consent that only because various measures for establishing restrictions on organising gambling are feasible a local government would have the discretion to choose any of these measures. The use of either systemic or teleological method of interpretation, referred to in the Judgement, would not lead to such a conclusion.

A democratically legitimised institution, which has the right to adopt legal provisions, is the legislator, therefore, also the legislator's will is important in interpreting these legal provisions. The party applying law, in interpreting a legal provision, may use various means to clarify its content; however, it should act methodologically, to avoid violating the principle of separation of powers (*see: Sales P. Legislative Intention, Interpretation, and the Principle of Legality. Statute Law Review, 2019, Vol. 40, No. 1, p. 60*). The legislator's will is important, in assessing the limits of the authorisation granted to local governments by law, in particular, in the specific case where this matter had been analysed in the legislative process.

If the legislator has directly regulated, in a special provision, a matter differently than in the general provisions than there are no grounds for applying the general regulation. Accordingly, a local government's authorisation cannot be deduced from provisions that envisage general discretion, if the legislator, in Gambling Law, has defined concretely the competence of local authorities in the area of controlling organisation of gambling. Moreover, the fact that the legislator has envisaged a specific procedure for establishing restrictions on organising gambling is not contrary to the special protection of the Historic Centre. A local

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government has taken into account the requirements that follow from Law on Protecting the Historic Centre in adopting individual administrative acts.

It is recognised in the Judgement, *inter alia*, that determination of a restriction on organising gambling as a limitation on using a territory in a local government's spatial plan ensures foreseeability both for economic operators and society in general to a larger extent than the system of individual permits. Likewise, it is concluded in the Judgement that, in the particular situation, determination of restrictions on setting up gambling halls in Plan of the Historic Centre and adoption of individual decisions, in accordance with Section 42 (6) of Gambling Law, allow reaching the most expedient and fair outcome, which also complies with the legal system the best.

The Constitutional Court has repeatedly found that choice of the politically most expedient solution, first and foremost, is the duty of a directly democratically legitimised parliament (*see Judgement by the Constitutional Court of 7 April 2009 in Case No. 2008-35-01, Para 19.4.*). The Court has the right to review the case only insofar legal (juridical) arguments are applicable to it, separating these from law policy arguments. The matters, for the resolving of which sufficiently strict legal standards have not been defined but the conclusions made on them, predominantly, depend on political expediency, should be decided on by democratically legitimised, political bodies of the State, first of all, by the legislator (*see Judgement by the Constitutional Court of 3 February 2012 in Case No. 2011-11-01, Para 11.2.*). Law policy considerations define the aim to be reached, i.e., economic, political or social changes of general nature. The outcome of legal considerations, in turn, are rules that must be respected not because they *per se* would ensure the desired economic, political or social situation but because

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it is required by the rule of law (*see Judgement by the Constitutional Court of 19 November 2013 in Case No. 2013-09-01, Para 10*).

We hold that the conclusions, included in Para 18.5. of the Judgement, regarding the nature of authorisation granted to local governments, are based on such arguments that cannot be considered as being legal or juridical arguments. However, the Constitutional Court may not substantiate the existence of authorisation by its own considerations regarding the most expedient legal solution in the particular situation. Thus, to our mind, it can be discerned that, in this case, the Constitutional Court has stepped into the sphere of activities by the democratically legitimised legislator and has substituted the legislator's considerations regarding the most suitable legal regulation on controlling the organisation of gambling by its own understanding of the most suitable solution in the particular situation. We hold that such choice is within the legislator's competence.

**Summarising the above, we hold that the restriction on fundamental rights, established in the contested provision, had not been adopted on the basis of law and that the Constitutional Court, in its Judgement, had not met its own requirements regarding the clarity of authorisation, as well as stepped into the legislator's competence, providing considerations of expediency regarding the most suitable legal solution in the particular situation.**

Judges of the Constitutional Court

Artūrs Kučs Gunārs Kusiņš