



THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

JUDGMENT

on behalf of the Republic of Latvia

Riga, 5 March 2019

Case No. 2018-08-03

The Constitutional Court in the following composition: Chairperson of the court hearing Ineta Ziemele, judges Sanita Osipova, Aldis Laviņš, Gunārs Kusiņš, Daiga Rezevska, Jānis Neimanis and Artūrs Kučs,

upon request of the Ombudsman,

pursuant to Article 85 of the Constitution of the Republic of Latvia and Clause 3 of Section 16, Clause 8 of Section 17(1) and Clause 28.¹ of the Constitutional Court Law,

in the written procedure, at the hearing on 7th of February, 2019, the case was examined

„The Binding Regulation No. 27 of the Jūrmala City Council of 4 September 2014 „Regulation on the Operations and Maintenance of the Municipal Cemeteries of Jūrmala City” on Compliance of Paragraph 18 and Paragraph 20 with Section 1 of the Constitution of the Republic of Latvia”.

Establishing Part

1. On 4 September 2014, the Jūrmala City Council, on the basis of Section 43 (3) of the Law "On Local Governments", issued Binding Regulation No. 27 "Regulation on the Operations and Maintenance of the Municipal Cemeteries of

Jūrmala City" (hereinafter - Binding Regulation No. 27), which entered into force on 28 October 2014.

Paragraph 1 of Regulation No. 27 lays down, inter alia, the procedure for the allocation of grave sites. In accordance with Paragraph 18 of this Regulation, the lessee shall acquire the right to lease the grave site by concluding a grave site lease agreement with the cemetery operator. Paragraph 20 of the Binding Regulation No.27 stipulates that the lessee of a grave site shall pay to the cemetery operator an annual grave site rental fee, which shall be approved by the Jūrmala City Council by a decision.

2. The applicant - the ombudsman - believes that Binding Regulations No. 27 Paragraph 18 and Paragraph 20 (hereinafter - the contested provisions) do not comply with Article 1 of the Constitution of the Republic of Latvia (hereinafter - the Constitution).

The Ombudsman has initiated a review case on the contested provisions. In the framework of the above-mentioned case, the Ombudsman has concluded that the contested provisions are unlawful and has called on the Jūrmala City Council to repeal them. However, Jūrmala City Council has refused to remedy the identified deficiencies.

According to Paragraph 2 of Article 15(1) of the Law "On Local Governments", the establishment and maintenance of cemeteries is an autonomous competence of local governments. Although the exercise of autonomous functions is organised and accountable to the local government, the solution chosen must be lawful. Moreover, the performance of these autonomous functions is to be financed from the budget of the local government.

The property of the local government is to be used first of all for the satisfaction of the needs of the inhabitants of the respective administrative territory by putting it into public use, and only that part of the property which is not necessary for the aforementioned purpose may be used by the local government for the generation of economic income, inter alia, by renting it out.

Cemeteries are local government's property put into public use, which serves public needs within the meaning of Article 77 (2) of the Law "On Local Governments". Thus, cemeteries, like roads, streets, squares and parks, have the status of public property. From Binding Regulations No. 27, it follows from Paragraphs 8, 18 and 22 that certain sections of the cemetery (grave sites or family grave sites) may be transferred to the private use of certain natural persons with the right to be buried in these sections or to bury their relatives in them. In order for a person to acquire the right to use a grave site, he must, in accordance with the disputed provisions, conclude a lease agreement and pay an annual grave site fee. However, a local government does not have the right to set a rent for the use of a public object. Thus, by adopting the disputed norms, Jūrmala City Council did not observe the principles of a democratic legal state arising from Article 1 of the Constitution - the principle of the rule of law and the principle of separation of powers.

The Ombudsman considers that local governments are also not entitled to impose a fee for the use of a grave site. Article 2 (4) of the Law "On Taxes and Fees" states: if the binding regulations of local governments contain provisions which provide for compulsory payments which constitute a local government fee but are not provided for in this Law, the application of such provisions shall not be allowed until the relevant amendments to this Law have entered into force. Since Article 12(1) of the Law on Taxes and Fees does not provide for a fee for the use of a grave site, local governments are currently not entitled to impose such a fee. Therefore, Jūrmala City Council, by imposing a new local government fee, i.e. a fee for the use of a grave site, has acted in breach of the limits of its discretion established by law.

3. The institution which issued the contested act, Jūrmala City Council, holds that the contested provision complies with Article 1 of the Constitution.

Pursuant to Paragraph 2 of Article 15(1) of the Law "On Local Governments", the legislator has transferred to the autonomous competence of local governments the function to take care of the improvement and sanitary

cleanliness of their administrative territory, including the establishment and maintenance of cemeteries. In order to ensure the performance of this function, pursuant to Article 43(1) of the said Law, the local government council is entitled to adopt binding regulations. Therefore, Jūrmala City Council, by adopting Binding Regulation No. 27, has acted within the mandate given by the legislator.

Paragraph 14 of Article 21(1) of the Law "On Local Governments" allows a local government to charge a fee for the service it provides. Although the contested provisions refer to the payment for the maintenance of a grave site as a rent, in fact it is a payment for a service and its purpose is not to make a profit, but to cover the expenses of the local government.

Jūrmala City Council emphasises that it is entitled to issue such binding regulations from the purpose and content of which it should be clear that they are issued in order to ensure the establishment, maintenance, improvement and sanitary cleanliness of cemeteries. Since the laws and regulations do not regulate the manner in which local governments perform this function, local governments have a wide margin of discretion to choose the most appropriate solution.

Cemeteries are considered to be public places. Charging for the use of a public place is a fundamental principle, not an exception. This follows from Article 5(1) of the Law On Prevention of Squandering of the Financial Resources and Property of a Public Person (hereinafter - the Law on Prevention of Squandering), which prohibits the transfer of a public person's property to a private person or a capital company for gratuitous use.

It is in the public interest that local governments should be able to develop and manage cemeteries in their territory as efficiently as possible, as well as to ensure that they comply with sanitary requirements. The payment of a fee for the use of a grave site is one of the means of achieving this objective. Since local governments build new cemeteries and maintain existing cemeteries entirely from their own budgets, they also have the right to set a fee for the service - the provision of a grave site. There are no other means by which a local government could ensure the performance of a given autonomous function in such a way that this function does not become a disproportionate burden for it.

4. Invited body — Saeima — points out that according to Article 7 (2) of the Law "On Local Governments" the performance of the autonomous functions of local governments is to be ensured first of all from the budget of the local government. Therefore, the discretion of the local government in the exercise of its autonomous functions, inter alia, with regard to the setting of fees for a grave site, is limited by the sources of funding established by the legislator.

Article 12 of the Law on Taxes and Fees exhaustively lists the objects of the local government fees, and if there is a need to provide for a new object of the fee, the Law should be amended and the list should be supplemented. As regards paid services, it should be noted that the Law "On Local Governments" does not exhaustively list the services for which a local government is entitled to impose a fee.

The Supreme Court, analysing the legal nature of the grave site lease agreement, has recognized that such an agreement actually grants permission for burial in a certain place. In setting and charging a fee for renting a grave site, the local government is not acting like any other landowner, but is exercising a service mission of state administration. Consequently, the Supreme Court has concluded that the rent for a grave site is by its nature a local government fee. The fact that the payment for the lease of a grave site should be perceived and provided for as a local government fee has also been pointed out by the State Audit Office in its informative report on cemetery management in Latvia of 7 February 2018. Thus, the payment described in the contested provisions as a rental fee for a grave site is, by its very nature, a local government fee. Therefore, in accordance with the Article 2(4) of the Law "On Taxes and Fees", such local government fee would not be applicable until its object is included in the list of local government fee objects specified in Article 12 of the said Law.

5. Invited body — the Ministry of Justice — holds that the Contested rules comply with Article 1 of the Constitution.

The right to a proper burial is part of the right to private and family life. If a person refuses to sign a lease agreement, then, according to Regulation No. 27, his or her relative is buried in the cemetery in a specially designated place for the burial of the unclaimed. If the deceased has relatives, this cannot be considered a dignified burial. Thus, the local government, by demanding the conclusion of the grave site lease agreement and the rent, violates the principle of the rule of law.

The requirement to pay a lump sum for a grave site is reasonable, but the local government is not entitled to charge an annual rent for the use of a grave site. This is contrary to the principles of a democratic state governed by the rule of law. The conclusion of a lease agreement is only permissible if a person wishes to claim some exclusive services.

The right of a local government to set a fee for the use of a grave site also does not derive from the Law on Prevention of Squandering, as it does not apply to cases where local government property is put to public use.

6. Invited body — The Ministry of Finance — points out that currently, according to the existing regulation, local governments are not entitled to set a fee for the use of a grave site.

The local government council has the right to impose in its administrative territory only the local government fees stipulated in Article 12(1) of the Law "On Taxes and Fees" in accordance with the procedure stipulated by the Cabinet of Ministers Regulations. The local government fee is considered to be a policy-making and regulatory instrument, and it is imposed to achieve certain policy objectives by regulating (controlling, encouraging, restricting) a person's activities. According to Paragraph 3 of Article 1 of the Law "On Taxes and Fees", the amount of the local government fee is not directly related to the coverage of the operating costs of the local government body or its department.

According to Article 12(1) of the Law "On Taxes and Fees", the common characteristic of the objects of the local government fee is that the person has the right to freely choose the specific activity (service). The amount of the fee payable

for a particular activity is a factor which determines whether a person chooses that activity.

The imposition of a fee for the maintenance of a cemetery is inconsistent with the object of the local government fee, since the task of the local government is not to encourage or restrict the burial of the deceased, but to ensure that the deceased who's last declared place of residence was in the administrative territory of the local government may be buried in the cemeteries established by the local government. Moreover, the burial of a deceased person is not an act which the relatives of that person are entitled, of their own choice, to perform or not to perform. The obligation of the local government to take care of the establishment and maintenance of cemeteries also follows from Paragraph 2 of Article 15(1) of the Law "On Local Governments". According to the Article 7(2) of the said Law, the performance of this function is to be financed from the budget of the respective local government.

7. Invited body — the Ministry of Justice — holds that the contested provision complies with Article 1 of the Constitution.

Cemeteries in Latvia, as in many parts of the world, are one of the visible signs of cultural heritage. The tradition of cemetery care must be seen in its historical context and in the light of the differences that exist in the various historical regions of Latvia. Local governments, taking into account budgetary possibilities, establishing and maintaining cemeteries, determining the procedures for their use, and dealing with issues related to the acquisition of a grave site.

Pursuant to Paragraph 23 of Article 21(1) of the Law "On Local Governments", the local government council is entitled to decide on the procedure for maintenance and management of cemeteries. In order to ensure the fulfilment of this function, local governments are entitled to issue binding regulations, which lay down the procedure for the allocation, care and maintenance of grave sites, the procedure for burials, the procedure for the use of cemeteries, and regulate other matters.

Neither the laws nor the Cabinet of Ministers' regulations regulate exactly how local governments should ensure the maintenance of cemeteries. Therefore, according to Article 7(2) and Paragraph 23 of Article 21(1) of the Law "On Local Governments", the local government council has the competence to determine exactly how this function is to be performed. The performance of autonomous functions of local governments is linked to the amount of funds available in the local government budget. Article Paragraph 14 of 21(1) of the Law "On Local Governments" allows the local government council to set fees for services, if it is not prohibited or established by laws or regulations of the Cabinet of Ministers. The contested provisions were adopted in order to ensure the performance of the autonomous function of the local government in the field of maintenance and management of cemeteries.

Referring to the decision of the Supreme Court Department of Administrative Cases of 20 November 2015 in case No. SKA-1427/2015, the Ministry points out that cemeteries are local government property put into public use, which serves public needs within the meaning of Article 77(2) of the Law "On Local Governments". Cemeteries, like roads, streets, squares or parks, have the status of a public matter. Consequently, the right to access and use a grave site, including the possibility of concluding a contract for the lease of a grave site, is a matter of public law.

8. Invited body — the Latvian Association of Local Governments — shares the opinion of Jūrmala City Council that the contested provisions comply with Article 1 of the Constitution.

The autonomous function of local governments established in Paragraph 2 of Article 15(1) of the Law on Local Governments - the establishment and maintenance of cemeteries - is related to the obligation of local governments to provide infrastructure, not to provide services. It is the responsibility of local governments to use their budgets to create cemeteries and ensure that they are accessible to all. Although cemeteries, as local government infrastructure, are generally put into public use, each specific cemetery is put into individual use.

According to the Law on Prevention of Squandering, individual use of a public object without remuneration is not allowed. Thus, the Jūrmala City Council acted lawfully in setting the rent for the use of the grave site. In addition, grave sites can be traded or inherited. For example, a person who has chosen to bury their deceased loved ones in a private cemetery by paying a lump sum or an annual fee for a grave site.

9. Invited person – *Mg. iur.* Kristīne Jaunzeme - holds that the Contested rules does not comply with Article 1. of the Constitution.

According to Paragraph 2 of Article 15(1) of the Law "On Local Governments", the establishment and maintenance of cemeteries is one of the autonomous functions of local governments. This function is organised and managed by local governments. Moreover, unless otherwise provided by law, according to Article 7(2) of the Law "On Local Governments", the performance of an autonomous function is financed from the budget of the respective local government.

Article 43(3) of the Law "On Local Governments" provides that the local government council may adopt binding regulations to ensure the performance of autonomous functions. Also, according to Article 21(1)(g) of the said Law, the local government council may set fees for services, if it is not prohibited by law or Cabinet of Ministers regulations. The above-mentioned legal norms empower the local government to determine the procedure for the establishment, maintenance and operation of cemeteries in its administrative territory, including the establishment of the related paid services. Until the most important issues related to burial and the establishment of grave sites are universally regulated in the country, it is up to each local government to decide on the form in which a particular grave site is allocated or reserved. The mere fact that cemeteries are public places and serve public needs does not in itself prevent the local government council from imposing charges for the use of cemeteries.

Concluding Part

10. The Ombudsman considers that two provisions of Binding Regulation No. 27 are incompatible with Article 1 of the Constitution.

Paragraph 18 of Binding Regulation No. 27 establishes the procedure for granting a grave site to a person. To get a grave site, a person must sign a grave site lease agreement with the cemetery operator. Paragraph 20 of this Regulation, in turn, stipulates the obligation of a person, after being allocated a grave site, to pay the cemetery operator an annual rental fee, the amount of which, according to the decision of the Jūrmala City Council, is *EUR* 0.83 per year per square metre. The contested provisions are interrelated as part of the legal framework regulating issues related to the acquisition of a grave site. In particular, they imply that a person acquires the right to use a grave site upon conclusion of a grave site lease agreement and that an annual fee is payable for the lease of a grave site.

Consequently, the Constitutional Court, when examining compliance of the contested provisions with a legal norm of higher legal force, will assess them as a single regulation.

11. Article 1 of the Constitution determines the following: “Latvia is an independent democratic republic.”

The Constitutional Court has already recognised that the scope of Article 1 of the Constitution includes the general principles of law derived from the fundamental norm of a democratic state governed by the rule of law, including the principle of the rule of law (*see Paragraph 15.1 of the Judgment of the Constitutional Court of 29 June 2017 in Case No. 2016-23-03*). The substantive meaning of the rule of law is the recognition and protection of the universality of fundamental rights. The fourth paragraph of the introduction to the Constitution states that Latvia, as a democratic state governed by the rule of law [...] is founded on human dignity. Human dignity and the worth of each individual are at the heart of fundamental rights. Therefore, in a democratic state governed by the rule of law, both the legislator, when adopting legal norms, and the legislator, when applying them, must respect human dignity (*cf: Barak A. Human Dignity: The*

Constitutional Value and the Constitutional Right. Cambridge: Oxford University, 2015, p. 108).

As a constitutional value, human dignity characterises the human person as the supreme value of a democratic state governed by the rule of law. It must be protected in relations between the state and the individual, in relations between people, and after a person's death, i.e. the body must be treated with respect even after death. The European Court of Human Rights has recognised that the State must protect a person's dignity, identity and integrity both during life and after death (*see paragraph 142 of the Judgment of the European Court of Human Rights of 13 January 2015 in Elberte v. Latvia, application No. 61243/08*). This is why, for example, Articles 139 and 228 of the Latvian Criminal Law also criminalize offences against the body, grave and corpse of a deceased person. The German Federal Constitutional Court has also stressed that it would be incompatible with the inviolability of human dignity, which underpins all fundamental rights, for a person to be deprived of his dignity after death or for his body to be humiliated. The State's duty to protect human dignity does not end with a person's death (*see the decision of the German Federal Constitutional Court of 24 February 1971 in Case 1 BvR 435/68*).

The protection of human dignity after death is also based on cultural and religious traditions, which are embodied in the Latvian way of life mentioned in the fifth paragraph of the Introduction to the Constitution. The Latvian cultural canon, which is a collection of cultural values, also includes the tradition of cemetery care as a value. As stated in the Canon, cemeteries are one of the visible signs of cultural heritage. They not only serve as resting places for the deceased, but also demonstrate the desire and need to pay tribute to our deceased loved ones. In many places, the burial places of the dead are considered sacred. A special form of grave site care is the cemetery festival, which includes both public and individual rituals of remembrance. They affirm and maintain values, and promote people's belonging to their local community (*see: Mellēna M. Kapu kopšanas tradīcija. Available at: <https://kulturaskanons.lv/>*).

The fifth paragraph of the Introduction to the Constitution states that Latvia's identity in the European cultural sphere is [...] formed by universal human values. Everyone is looking after themselves and their loved ones. These universal human values, including human dignity, require that when a person dies, he or she should be buried, a duty that falls first and foremost on the relatives of the deceased. In Latvia, burials are traditionally carried out by burying the dead in cemeteries. Human dignity also includes a person's right to make decisions about his or her own body. This means respecting a person's wishes during life to be buried in a certain way or to donate their body for scientific research after death.

A democratic state governed by the rule of law is therefore obliged to protect human dignity after death when regulating the burial of a deceased person.

12. The Ombudsman has requested the Constitutional Court to assess the compatibility of the norms of the binding regulations of the local government with the Constitution. The contested provisions establish the payment for the use of a grave site and have been issued with reference to Article 43 (3) of the Law "On Local Governments" in order to ensure the fulfilment of the autonomous function of the local government established in Paragraph 2 Article 15(1) of the same Law - to take care of the establishment and maintenance of cemeteries.

12.1. The autonomous functions of a local government are those functions for which local governments exist in the first place (*see: Levits E. Concept of the Law on Local Governments, 2003, paragraph 15*). This ensures the broadest involvement of local residents in the achievement of common goals and interests (*see Paragraph 11 of the Constitutional Court's Judgment of 29 June 2018 in Case No. 2017-32-05*).

According to Paragraph 2 of Article 15(1) of the Law "On Local Governments", one of the autonomous functions of a local government is the establishment and maintenance of cemeteries.

If the legislator has established a function as an autonomous function of a local government, the local government is obliged to perform it. The local

government has a duty to ensure, within the limits of its competence, that citizens' rights are implemented in the most appropriate way. Article 7 (2) of the Law "On Local Governments" stipulates that the performance of an autonomous function shall be organised and the responsibility for it shall lie with the local government. The scope of the autonomous functions is determined by legal norms. Therefore, in exercising its autonomous functions, a local government enjoys freedom of discretion insofar as it is not restricted by legal norms (*see Paragraph 21.1 of the Constitutional Court's Judgment of 24 September 2008 in Case No. 2008-03-03*).

12.2. Article 7 (2) of the Law "On Local Governments" stipulates that the performance of autonomous functions is financed from the budget of the respective local government, unless otherwise provided by law. The autonomous function of the local government - to establish and maintain cemeteries - is also financed from the local government budget.

Local governments draw up their budgets independently (*see Article 46 of the Law "On Local Governments"*). It follows from Article 13 of the Law "On Local Government Budgets" that at the initial stage of drawing up local government budgets, the Cabinet of Ministers shall agree with local governments the total amount of state budget grants for the purpose of equalisation of local government finances, the total amount of state budget for the planned financial year and its distribution among local governments. The revenues of local government budgets, which are used to ensure the performance of autonomous functions established by law, consist of deductions from state taxes and fees, local government fees, state budget grants and target allocations, grants from the Local Government Financial Equalisation Fund, settlements with local government budgets, payments for services, deductions from profits of capital companies, revenues from the lease (rental) of local government property, sale of property and other revenues established by law (*see Article 21 of the Law "On Local Government Budgets"*).

If it is not prohibited or stipulated by law or Cabinet of Ministers Regulation, the local government is entitled to set fees for services, as well as to provide for the introduction of local government charges (*see Article 21 of the Law*

"On local governments"). Thus, in certain cases, the local government council has the right to set fees for services in binding regulations issued in accordance with Article 43 of the Law "On Local Governments", as well as to provide for the introduction of local government fees.

However, the legal norms that a local government issues to ensure the exercise of its autonomous functions must be legal. In other words, the principle of the rule of law requires the subordination of the local government to the law and the rights, because the activities of the state administration must first of all comply with the general principles of law (*see Paragraph 14 of the Constitutional Court's Judgment of 29 June 2018 in Case No. 2017-32-05*). Local governments are subject to the law both procedurally and substantively. The procedural aspect of the principle of the rule of law stipulates that a local government has the right to issue binding regulations only in cases established by law and within the framework of law, while the substantive aspect - that binding regulations issued by a local government must comply with the norms of the Constitution, as well as other substantive legal norms of higher legal force [*cf: In the Judgment of the Constitutional Court of December 29, 2014, Case No. 2014-06-03 Article 21; Levits E. Article 14. Likuma prioritātes princips. Book: Administratīvā procesa likuma komentāri. A un B daļa. Briede J. (sc.ed.) Rīga: Tiesu namu aģentūra, 2013, p. 197*].

The Ombudsman points out that the local government does not have the right to set a fee for the use of a grave site. Moreover, even if the local government had such a right, it was not entitled to impose a fee for a grave site, since such a fee, according to Article 2(4) of the "On Local Governments", should first of all be established by a relevant law (*see vol. 1 of the case file*). pp. 2 - 5). In its reply, the Jūrmala City Council, in turn, indicated that it was entitled to establish a fee for the use of a grave site and, therefore, the contested provisions were compatible with Article 1 of the Constitution (*see vol. 1 of the case file*). pp. 43-44).

Consequently, the Constitutional Court will assess whether the local government was entitled to adopt the contested provisions in order to ensure the performance of the autonomous function.

13. By the contested provisions the Jūrmala City Council has established in the binding regulations the rental fee for the use of a grave site. The Ombudsman, as well as the invited body the Saeima and the Ministry of Justice, state that the Jūrmala City Council is not entitled to set a rent for the use of a grave site (*see vol. I of the case file. p 4., p 68 and 72-73.*).

A local government is a legal entity derived from public law, which basically operates in the field of public law, implementing the public functions assigned to it. According to Article 1(2) of the Law on State Administration, a local government may have its own property. According to Article 77 (2) of the Law "On Local Governments", local government property shall be used to satisfy the needs of the inhabitants of the respective administrative territory, both by transferring it for public use and by establishing institutions and local government capital companies that ensure the rights of the inhabitants and provide the services they need.

Local government activity in the field of private law is an exception. However, in order to ensure its activities and pursue the public interest a public body may also carry out private law activities. The part of the property that is not needed to satisfy the needs of the inhabitants of the respective administrative territory, may be used by the local government for the purpose of generating economic income or for privatisation or expropriation in accordance with the procedure established by law (*see Article 77 (4) of the Law "On Local Governments"*).

According to Article 14 (1) of the Law "On Local Governments", local governments, in performing their functions, have the right to establish local government institutions in accordance with the procedure established by law. In the present case, Jūrmala City Council has established Jūrmala City local government Limited Liability Company "Jūrmalas kapi", the purpose of which is to ensure the performance of the autonomous function of the local government - to establish and maintain cemeteries. The said company, inter alia, concludes the lease agreements of the grave site and collects the lease fee (*see Paragraph 1, 7*

and 9.13 of the Jūrmala City Council Decision No. 48 of 12 November 2015 "Regulations of the Jūrmala City Local government Institution "Jūrmalas Kapi"").

The conclusion of a lease agreement is an activity in the field of private law. According to Article 2112 of the Civil Law, a lease is a contract by which one party grants or promises to another the use of a thing for a certain rental. The subject-matter of a lease may be any corporeal thing that may not be alienated, as well as rights (*see Article 2113 of the Civil Law*).

When analysing the legal nature of the agreement on the lease of a grave site, the Supreme Court Department of Administrative Cases has pointed out that cemeteries and grave sites for the burial of deceased persons have traditionally not been used for trading or leasing for economic gain. Namely, they have traditionally not been the subject of circulation (*see Paragraph 8 of the Decision of the Supreme Court, Department of Administrative Cases, of 20 November 2015 in Case No. SKA-1427/2015*). The legal literature also points out that the circulation of objects intended for burial purposes and for the remembrance of the dead is restricted, i.e. cemeteries, individual grave sites, tombstones, chapels and other objects which, according to religious customs and traditions, serve these purposes. As a general principle, these things cannot be used for secular purposes for which they were not intended (e.g. disposal for profit) (*cf. Grūtups A., Kalniņš E. Civillikuma komentāri. Trešā daļa. Lietu tiesības. Īpašums. Otrais papildinātais izdevums. Rīga: Tiesu namu aģentūra, 2002, p. 33*). The invited body, the Ministry of Justice, also agrees with this opinion, stating that the right to bury the dead is to be especially respected and protected, and in such a case, the general principles of civil law circulation are not applied to them. (*see vol. 1 of the case file p. 71*).

Entering into a lease is a private activity, the purpose of which is to generate income. However, cemeteries and individual grave sites traditionally serve the purpose of giving a dignified burial to the deceased. In the present case, the local government, by transferring a separate grave site to the individual use of a person and providing for payment for it, does not act as any owner, but performs a service mission of state administration, namely, to ensure the performance of its autonomous function - the establishment and maintenance of cemeteries. By

renting out cemeteries, the local government acts contrary to Article 77 (2) of the Law "On local governments", as cemeteries are local government property put into public use, which serves the needs of the community and therefore cannot be rented out for income generation.

Thus, a local government is not entitled to lease out grave sites in order to fulfil its autonomous function of establishing and maintaining cemeteries.

14. In its reply, Jūrmala City Council points out that the payment established in the contested provisions, although it is called a rent, is in fact a payment for the provided service and the local government is entitled to demand such payment in accordance with Paragraph 14 of Article 21(1)(g) of the Law "On Local Governments" (*see vol. 1 of the case file*). pp. 32 - 33).

Thus, the Constitutional Court must establish whether the fee requested by the Jūrmala City Council for a grave site essentially corresponds to a payment for a service.

14.1. Jūrmala City Council states in its reply that the conclusion of a lease agreement grants a person permission to perform burials in a specific place - the leased grave site or the family grave site. So, with this contract, a person is granted the right to individually use a public matter. The fee for the use of a grave site, on the other hand, is established to compensate for the expenses incurred by the local government in the performance of its function under its autonomous competence - the establishment and maintenance of cemeteries. This fee is not set for profit, in order to generate additional funds for the local government budget. Moreover, the payment received does not fully cover the costs involved (*see vol. 1 of the case file pp. 33 - 38*).

The Supreme Court has recognised that cemeteries have the status of a public matter (*see Paragraph 7 of the decision of the Supreme Court Department of Administrative Cases of 20 November 2015 in case No. SKA-1427/2015*). Public matters are generally public, i.e. they can be used by the general public without special permission. However, in some cases, the public's right to use a public matter may be limited by granting the right to use it to a particular person or

persons. In such a case, the case acquires the status of a public matter of special use (see Paragraph 16.1 of the Decision of the Supreme Court, Department of Administrative Cases, of 22 February 2010 in Case No. SKA-101/2010). A file acquires its special status as a public matter by means of an allocation, followed by its actual use for the purpose for which it was allocated. The legal literature explains that the individual or special use of a public matter requires an individualised authorisation in the form of an administrative act or administrative contract (cf: Briede J., Danovskis E., Kovaļevska A., *Administratīvās tiesības. Textbook. Riga: Tiesu namu aģentūra, 2016, 244. lpp.*).

Although cemeteries are open to all and can be used without special permission, a particular grave site is only used by a specific person who has been granted the right to use it. Thus, in order to fulfil the obligation of burial, certain sections of the cemetery - grave sites or family grave sites - may be transferred to the special use of certain persons with the right to be buried in these sections or to bury their relatives in them (see paragraph 8 of the decision of the Supreme Court Department of Administrative Cases of 20 November 2015 in case No. SKA-1427/2015).

Consequently, the contested Paragraph 20 of the Binding Regulation No. 27 establishes a fee for the grant of individual use of a public matter.

14.2. Paragraph 14 of Article 21(1) of the Law "On Local Governments" provides for the right of a local government to set fees for services, if it is not prohibited or established by laws or Cabinet of Ministers regulations. According to Paragraph 10 of the Cabinet of Ministers regulation of May 3, 2011 No. 333 "The procedure for planning and accounting for revenues from paid services and the expenses related to the provision of these services, as well as the methodology for determining the prices of paid services and the procedure for approving the prices", the price of a paid service includes all costs incurred in providing this service.

Paragraph 14 of Article 21(1) of the Law "On Local Governments" stipulates that the local government council has the right to set fees for the following services: 1) use (lease) of local government land, other real estate and

personal property; 2) rent (lease) of local government residential and non-residential stock; 3) use of local government water supply and sewerage; 4) local government heat supply; 5) local government waste collection; 6) issue of licences (permits); 7) other services.

The services specified in Paragraph 14 of Article 21(1) of the Law "On Local Governments" are aimed, inter alia, at ensuring and protecting the right to health of every resident of the local government, the right to live in a favourable environment, as well as at enabling the pursuit of various economic interests. The purpose of charging for services is to cover the cost of the local government's investment in building, creating, improving, updating and developing its facilities, which create better conditions for their users (*see: Seer R. Finanzverfassungsrechtliche Grundlagen der Steuerrechtsordnung. In: Seer R., Hey J., Montag H. Steurrecht. 22., neu bearbeitete Auflage. Cologne: Schmidt, 2015, S. 44.*). The services specified in Paragraph 14 of Article 21(1) of the "On Local Governments" are not comparable to a local government's allocation of a specific grave site, as the allocation of a grave site is essential for the dignified burial of the deceased. Universal human values, including human dignity, require that, after death, the relatives have a duty to bury the deceased, and the allocation of a grave site is a necessary precondition for ensuring that the obligation to bury is fulfilled. The action of the local government in granting a grave site to a person is not a service by its nature, because there is a burial obligation, which does not provide the relatives with options, that is, the body of a deceased person, when laid in a grave, must be buried in a cemetery. The fact that the local government charges a fee for the allocation of a grave site as a service charge contradicts the rule that even after death, the body must be treated with respect.

Taking into account the aforementioned, the Constitutional Court concludes that the allocation of a grave site is not a service for which the local government council would be entitled to establish a fee in accordance with Paragraph 14 of Article 21(1) of the Law "On Local Governments."

14.3. The Ombudsman, as well as the invited body – Saeima, consider that the "rent fee" set by the Jūrmala City Council is essentially a local government fee (*see vol. 1 of the case file*). p. 4-5 and 69).

Analysing the legal nature of the fee established in Paragraph 20 of the Binding Regulation No. 27, the Supreme Court Department of Administrative Cases has recognised that the fee established by the Jūrmala City Council by its nature is considered to be a local government fee (*see Paragraph 8 of the Supreme Court Department of Administrative Cases decision of 20 November 2015 in case No. SKA-1427/2015*). The Constitutional Court will examine whether the local government had the right to establish a fee for the use of a grave site.

Article 10(1) of the Law "On Taxes and Fees" provides that local governments are entitled to impose local government fees by their binding regulations. Article 2(4) of the same Law stipulates: if the binding regulations of local governments contain norms that provide for a compulsory payment, which corresponds to the term "local government fee" referred to in Article 1 of this Law, but which is not provided for in this Law, the application of such norms shall not be allowed.

The objects of local government fee are defined in Paragraph 11 of Article 12(1) of the Law "On Taxes and Fees". The law does not give the local government the right to set a fee for the use of a grave site.

The Constitutional Court has already recognised that the local government council is entitled to issue external legislative instruments only in the cases and to the extent established by law (*see, for example, Paragraph 14.1 of the Judgment of the Constitutional Court of 12 February 2016 in Case No 2015-13-03*).

Therefore, Jūrmala City Council is not entitled to impose a fee for the use of a grave site. Paragraph 3 of the Cabinet of Ministers Regulation of 28 June 2005 No 480 "Regulations on the Procedure by Which Local Governments May Impose Local Government Fees" also provides that fees shall be imposed in accordance with the binding regulations issued by the City Council only on the objects of fees specified in Article 12 (1) of the Law "On Taxes and Fees".

Thus, by adopting the contested provisions, Jūrmala City Council has violated its competence established in laws and regulations and has not respected the subordination to the law and rights.

Consequently, the contested provisions are compatible with Article 1 of the Constitution.

15. In accordance with Article 32(3) of the Constitutional Court Law, a legal provision which the Constitutional Court has declared inconsistent with a legal provision of higher legal force shall be deemed invalid from the day of publication of the Constitutional Court Judgment, unless otherwise determined by the Constitutional Court.

The legislator has given the Constitutional Court a wide margin of discretion to decide from which moment the disputed provision, recognized as inconsistent with a legal norm of higher legal force, loses its validity. The Constitutional Court, exercising the power conferred upon it by Article 32 (3) of the Constitutional Court Law, must also ensure, within the limits of its possibilities, that the situation which may arise from the moment when the contested provision is declared not in effect does not lead to an infringement of the fundamental rights guaranteed to persons by the Constitution nor does it cause significant harm to the interests of the State or society (*see Verdict of the Constitutional Court of 16th of December, 2005 in Case No. 2005-12-0103, Paragraph 25 and Verdict of 16th of April, 2015 in Case No 2014-13-01, Paragraph 22*).

In a democratic state governed by the rule of law, the principle that legal norms adopted by a local government in breach of its competence, or *ultra vires*, shall be declared unlawful and null and void from the moment of their adoption (*cf: Paragraph 25 of the Constitutional Court's Judgment of 9 October 2007 in Case No. 2007-04-03 and Paragraph 17 of the Judgment of 12 February 2016 in Case No 2015-13-03*). In such cases, it is presumed that the unconstitutional law has never been in force because it was not duly enacted and therefore cannot produce legal effects (*cf: (Constitutional Court Judgment of 2nd of March, 2016,*

in Case No 2015-11-03, Paragraph 25). However, in exceptional cases, derogations from this presumption are permissible. In such cases, the Constitutional Court should establish important circumstances that would justify the establishment of the said exception (*cf: (Constitutional Court Judgment of 21st of February, 2018, in Case No 2017-11-03, Paragraph 18)*).

In the case under consideration, recognition of the contested provisions as invalid from the moment of their issuance would lead to such a situation that the Jūrmala City Council would have to repay the fee received for the use of grave sites. Such a ruling would have a significant impact on the budget of the local government and would thus jeopardise the rights and legitimate interests of its citizens. Therefore, in this case, retroactive force cannot be established for the cancellation of the contested provisions, and the contested provisions are considered invalid from the date of publication of the Constitutional Court's Judgment.

Substantive Part

Article 30 to Article 32 of the Law on the Constitutional Court, the Constitutional Court

decided:

to declare Paragraphs 18 and 20 of the Jūrmala City Council Binding Regulation No. 27 of 4 September 2014 "Regulation on the Operations and Maintenance of the Municipal Cemeteries of Jūrmala City" as incompatible with Article 1 of the Constitution of the Republic of Latvia.

The Judgment is final and not subject to appeal.

The Judgment shall enter into force as of the date of its publication.

Chairperson of the court hearing

I. Ziemele