



THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

J U D G E M E N T

On Behalf of the Republic of Latvia

Riga, 25 October 2011

Case No. 2011-01-01

The Constitutional Court of the Republic of Latvia, composed of the Chairman of the Court hearing Gunārs Kūtris, Justices Kaspars Balodis, Aija Branta, Kristīne Krūma, Uldis Ķinišs, and Sanita Osipova,

having regard to the application of the society “Pilsētas zemes dienests”,

according to Article 85 of the Satversme [Constitution] of the Republic of Latvia, Article 16 1st indent, Article 17 (1), 11th indent, Article 11 and Article 19.² and Article 28.¹ of the Constitutional Court Law,

on 27 September 2011 in a closed court hearing examined the case

“On Compliance of Section 1068 (1) of the Civil Law with Article 105 of the Satversme of the Republic of Latvia”.

The Facts

1. On 14 January 1992, the Supreme Council of the Republic of Latvia (hereinafter – the Supreme Council) adopted the Renewed Republic of Latvia 1937 Civil Law Act, according to which the validity of the Civil Law of 1937 of the Republic of Latvia (hereinafter – the Civil Law) was restored. In special laws, the date and procedure for coming into force of parts of the Civil Law were established. On 7 July 1992, the Supreme Council adopted the Act on the Time and Procedure by which the Part of Introduction, Inheritance Rights and Rights on Things of the Renewed Republic of Latvia 1937 Civil Law Act that established that the introduction of the above mentioned law and the Part on Property Law of the Civil Law would come into effect on 1 September 1992.

Section 1068 of the Civil Law, which pertains to the Part on Property Law, provides: “The consent of all the co-sowner is required in order to act with the subject-matter of joint ownership, either as a whole or with respect to stated individual shares and if one of them acts separately then such action not only has no effect, but also imposes a duty on the latter to compensate the others for losses caused them thereby” (hereinafter – the Contested Norm).

2. **A joint stock company „Pilsētas zemes dienests”** (hereinafter – the Applicant) indicates that it is an owner of several immovable properties, namely, land parcels with residential houses with privatized flats on them. Taking into account the fact that no land lease agreements have been concluded with the Applicant, the Applicant has brought an action against the Riga City Council [*Rīgas Dome*] regarding conclusions of the above mentioned agreements.

The Department of Civil Matters of the Supreme Court of the Republic of Latvia (hereinafter – the Senate) established in the judgment of 15 September 2010 in the case No. SKC-174/2010 (hereinafter – the Judgment SCK-174) that co-

owners of land plots of the Applicant located in Riga, Jaunciema 2. šķērslīnija, cadastre No. 0100-114-0077, Lielvārdes Street b/n, cadastre No. 0100-071-2041, and Staraja Rusas Street 7, cadastre No. 0100-049-0075 (hereinafter – the Land Plots) have not given their consent to conclude land lease agreements and no particular procedure regarding the use of the Land Plots has been established. Consequently, based on the Contested Norm, the Department of Civil Matters of the Supreme Court reasonably rejected the claim of the Applicant regarding the Land Plots and adjudicated the matter in a correct way.

It has been indicated in the application that the Contested Norm shall be regarded as restriction of fundamental right to own property established in Article 105 of the Satversme of the Republic of Latvia (hereinafter – the Satversme) because economic value of the Land Plots are reduced in the result of application thereof. Namely, the particular norm prohibits one of the co-owners to lease his undivided share of property or to bring a claim regarding conclusion of a land lease agreement.

The Contested Norm has been established by means of a law adopted according to proper procedure, and its legitimate aim is protection of rights of other co-owners. However, consequences caused by the Contested Norm are non-proportional. According to the Applicant, the Contested Norm is outdated since it has been elaborated about 150 years ago, when no joint ownership or compulsory lease relations existed. However, after 1991 much joint ownership were created and several normative acts were adopted that “in fact, ignored the legal regulatory framework included into the Contested Norm”.

Many State and local government lease agreements, as well as those concluded by the joint stock company “Privatizācijas aģentūra” (hereinafter - Privatizācijas aģentūra) and the state joint stock company “Valsts nekustamie īpašumi” (hereinafter - Valsts nekustamie īpašumi) fail to comply with the Contested Norm. Namely, the above mentioned persons subject to law let their undivided shares of property, whilst the Contested Norm is no more applied to such situations. Other owners of land have also concluded lease agreements with the administrator of

respective residential house, and the Contested Norm had not served as an obstacle for concluding such agreements.

It can be concluded from the aforesaid that taking into account such legal institutions as compulsory lease and flat as property, the prohibition to a co-owner to rent the undivided share owned by it, to receive lease payment, as well as to bring an action before the court is a non-proportional restriction of property right. As a result of the Contested Norm, owners of land parcels pertaining to joint ownership cannot gain profit from their property; moreover, they are bound to pay taxes.

In the frameworks of compulsory lease relations, interests of other co-owners are not infringed because a co-owner only asks to establish payment for fruits of his or her property; he or she “does not encumber the property with any obligations”. Consequently, this does not infringe interests that should be protected and due to which the fundamental rights of the Applicant established in the Satversme should be restricted.

The following has been indicated in the annex to the application: the argument of the Saeima that in case if one of co-owners does not prefer concluding a compulsory lease agreement, another co-owner has the right to compensation of losses incurred in such a way is ungrounded. Namely, the Civil Law establishes the principle of disposition and, in case if any person does not want to conclude an agreement based on certain provisions, this person can not be forced to act otherwise.

3. The institution that issued the contested act, the Saeima [Parliament] does not share the argumentation of the Applicant and asks the Constitutional Court to recognize the Contested Norm as compliant with a legal norm of a higher force.

Article 105 of the Satversme provides for the right to freely exercise one’s property right, as well as establishes the possibility to restrict them. Part three chapter 3 sub-chapter 5 of the Civil Law establishes property restrictions, where joint ownership as a restriction applies to ownership in all its scope. Special

ownership, use and action relations emerge between co-owners, and they exercise their rights jointly. Consequently, they are mutually related and, in some way, restricted especially in respect to the subject-matter of joint ownership. Based on the aspect of mutual relations, legal power of each co-owner over the object shall be regarded as restricted in all its scope.

Restriction of power of each co-owner has been established in a legal norm with the purpose to protect interests of owners and to ensure interests of civil turnover. If an object pertains to two or more persons, the State has to elaborate such legal regulatory framework that would ensure equality of all co-owners irrespective of the amount of undivided share owned. This guarantees right of each co-owner over a particular object.

The Saeima indicates that the task of the law is to ensure a reasonable and effective civil turnover, as well as the fact that basic principles for actions of co-owners would be clear and unambiguous to third parties involves in civil turnover. Consequently, the Contested Norm has several legitimate aims, among them protection of rights other persons and welfare of the society.

When assessing compliance of the Contested Norm with the principle of proportionality, it is necessary to take into account the fact that the particular restriction has been established in the field of private law, and the Contested Norm does not apply to actions of co-owners of undivided shares (for instance, when he or she pledges or sells it), or the right to agree on use and utilization of joint ownership.

It follows from the core of joint ownership that restrictions to act with the subject-matter of joint ownership may sometimes lead to loss of interest by co-owners to keep joint ownership. Due to this reason, Section 1074 and Section 1075 of the Civil Law establishes the right of co-owners to request division of joint ownership. This serves as a legal instrument that a co-owner may apply under compulsion to terminate joint ownership relations.

Nonetheless, in cases when one co-owner causes losses to another co-owner as a result of his or her activity (inactivity), the victim shall have the right to request

indemnification of the losses. Such possibility would evidently motivate other co-owners solving the lease issue.

In case of absence of the Contested Norm, each co-owner would have the right to act with the subject-matter of joint ownership as if it was only his or her property. However, if the principle of majority of votes of co-owners was established in respect to joint ownership, this might contradict the economic meaning of property. Consequently, formation of the content of the Contested Norm pursuant to the solution suggested by the Applicant would ruin the legal institution of joint ownership by infringing at large extent rights of other co-owners and eliminating any reasonable balance between rights of all co-owners.

The Judgment SKC-174 does not deny a persons' right to claim in respect to recognition of legal lease relations and recovery of lease payment. The Saeima emphasizes that the above mentioned judgment shall be assessed only pursuant to particular circumstances and tactics selected by the claimant in the particular case. Moreover, the Judgment SKC-174 does not deny the possibility to request concluding lease agreement; it only requires implementing legal proceedings in procedurally correct manner, for instance, by summoning other co-owners as third parties.

The Saeima draws attention of the Constitutional Court to the fact that the present case concerns the issue on failure to apply or inefficient application of legal norms of civil law and civil procedure rather than constitutionality of the Contested Norm.

4. A summoned person, **the Ministry of Justice** indicates that pursuant to Section 1068 of the Civil Law, undivided shares of a land property cannot be a subject-matter of a joint ownership if co-owners have not agreed on procedure of separate use of property or have not given their consent for lease of the entire land plot. However, in cases when relations between co-owners of a land plot and an owner of a residential house raised thereon have been formed on legal basis, the owner of the residential house do not have the right to use the land plot.

The Law “On Privatization of State and Local Government Residential Houses” establishes the right of land plot owner to receive lease payment of a certain amount. Consequently, an important role is played by the fact either only the duty to pay the lease payment and the amount thereof is established without consent of other co-owners, or a lease agreement that regulates also other issues applicable to the subject-matter of joint ownership is concluded. If relations between owner of the land parcel and that of a residential house raised on a particular land plot have been formed on legal basis, then the land plot owner shall have the right to request establishment of the land lease payment amount pursuant to the owned undivided share of the land plot. Such right exist irrespective of consent of other co-owners to submit such request.

The Contested Norm is not imperative, and co-owners can establish, by means of a special agreement, that to act with the subject-matter of joint ownership it suffices, for instance, to obtain consent of the majority of co-owners. Likewise, co-owners may agree, for instance, on transfer the subject-matter of joint ownership to the use of one co-owner or a third party.

The Ministry of Justice shares the opinion of the Saeima expressed in its reply, namely, that in the particular situation the claim of the Applicant was rejected because no material and civil procedure norms have been observed when adjudicating the matter; therefore it could not defend the rights in a wholesome manner. A correct use of material norms and those of civil procedure would have prevented possible infringement of the fundamental rights. Namely, the Applicant had to bring an action in a way that it would not infringe the rights of other co-owners.

5. A summoned person, the Ombudsman of the Republic of Latvia (hereinafter – the Ombudsman) holds that the Contested Norm does not contradict Article 105 of the Satversme. Argumentation of the Ombudsman substantiating the opinion is similar to that of the Saeima.

The Ombudsman adds that the legislator has established the legal institution of joint ownership as an exception from general regulatory framework regulating property right. A person who obtains an object as joint ownership should consider rights of other co-owners, too. Due to restrictions of the ownership right established by law, the legislator has established the right of co-owners to request separation of joint ownership.

6. A summoned person, Mr Martins Osis, a candidate for doctor's degree at the Faculty of Law of the University of Latvia indicates that, in joint ownership legal relations, an material role is played by the will of all co-owners to act with the subject-matter of joint ownership because any actions with it that contradict the legally important will of another owners are invalid. In the long run, the legal institution of joint ownership has developed and the prohibition to act with the entire joint ownership has obtained a broader content that also includes certain exceptions. The argumentation mentioned in the application, namely, that the Contested Norm is outdated is ungrounded because even at the beginning of the twentieth century varied joint ownership legal relations already existed.

The legitimate aim of the Contested Norm is to establish a fair balance between rights and duties for each co-owner to be able to exercise his or her property right. The Contested Norm is indispensable, and its legal regulatory framework follows from the core of joint ownership, which is to protect the property right rather than to restrict or infringe it.

It follows from the Contested Norm that each co-owner has the right to request indemnification of losses incurred after an ungrounded prohibition to another co-owner to act with the subject-matter of joint ownership. Moreover, a co-owner is entitled to require concluding a compulsory lease agreement in case if this does not concern other co-owners or their consent has been given. Should the Contested Norm be recognized as anticonstitutional, the risk that dishonest action of one co-owner would lead to harm to other co-owners would increase.

Application of the Contested Norm in each civil case depends, at large extent, on the ability of participants of a civil case to substantiate their opinion. The present case is not related to constitutionality of the Contested Norm because the Applicant is not satisfied with ruling of the court of general jurisdiction and aspects of application of the Contested Norm. The Applicant has failed to exhaust all possible civil procedural rights, and this has led to having initiated the present constitutional proceedings. Moreover, it can be concluded from the Judgment SKC-174 that the Applicant has failed to defend his viewpoint at the court.

7. Valsts nekustamie īpašumi informs that, in practice, there are many cases when independent immovable properties owned by several private persons are situated on land plots owned by the State. Likewise, there are cases when an independent property which is a joint ownership of several private persons is located on a land plot owned by the State. In such cases, legal relations are regulated by special legal norms.

It has never occurred in practice when a co-owner of a land plot would raise a claim against unlawful actions by Valsts nekustamie īpašumi and asking to recognize all transactions performed by Valsts nekustamie īpašumi as null and void.

8. Privatizācijas aģentūra indicates that, taking into account circumstances that exist in compulsory land legal lease relations, it concludes agreements and lets the undivided share of the Land Plot without having received consent of other owners of undivided shares of the Land Plot. In cases when land plots owned by the State are let, legal lease relations are regulated by the Civil Law insofar as it is not restricted by special legal norms that establish terms for concluding lease agreements between land and building (construction) owners. When concluding a lease agreement in respect to an undivided share of a land plot owned by the State, Privatizācijas aģentūra acts only with a part of an object rather than the entire object owned by the State. Consequently, consent of other co-owners is not necessary

because no losses are caused to them, and such action does not concern shares of other co-owners.

9. A limited liability company „Rīgas namu pārvaldnieks” informs that it is a legal successor of liabilities of a limited liability company “Kurzemes namu apsaimniekotājs”. It concludes land lease agreements with land co-owners. The company has concluded a lease agreement with a co-owner of the Land Plot in Riga, Staraja Rusas Street 7 (cadastre No. 0100-049-0075) whose undivided share is a half of the particular Land Plot. It was the co-owner who suggested concluding the lease agreement. However, no agreement has been concluded with the Applicant who is a co-owner of the other half of the particular Land Plot. Since the agreement has been concluded only in respect to rent of undivided share of the Land Plot of one of the co-owners, such action does not infringe the rights of the Applicant as the other co-owner of the Land Plot.

The Findings

10. Although the applicant has asked to assess compliance of the Contested Norm with Article 105 of the Satversme, in fact, compliance thereof with the first three sentences of the particular article is disputed, them establishing the following: “Everyone has the right to own property. Property shall not be used contrary to the interests of the public. Property rights may be restricted only in accordance with law.”

The present case does not apply to issues that are referred to in the fourth sentence of Article 105 of the Satversme dealing with expropriation of property for public purposes.

Consequently, the Constitutional Court shall assess compliance of the Contested Norm with the first three sentences of Article 105 of the Satversme.

11. It can be concluded from decisions of courts of general jurisdiction that the Applicant had risen action against the Riga City Council regarding conclusion of land lease agreements in respect to more than 30 immovable properties. The majority of them are owned by the Applicant as the only owner, whilst the Applicant is one of co-owners of eight of the immovable properties and it owns undivided shares of the particular Land Plots.

The Applicant asked the court to establish natural and accidental constituent parts of written lease agreements, including provisions stating that a tenant is bound to assuring maintenance of the land property and the adjacent land, and the tenant has the right to transfer the right to use the land property (factual tenure) to third parties by consent of the owner. Likewise, the draft agreement suggested by the Applicant included a provision that lease agreement would establish servitude pursuant to Section 1142 of the Civil Law (*see, Case materials, Vol. 1, pp. 20 and 21*).

By referring to the Contested Norm, courts of general jurisdiction rejected the claim of the Applicant regarding conclusion of lease agreements in respect to the Land Plots because no consent to such claim that encumbers their rights has been received from other co-owners of the Land Plots. In the Judgment SKC-174, the Senate also indicated that, pursuant to Section 1068 of the Civil Law, if no consent of all co-owners has been received, it is prohibited to act with the subject-matter of joint ownership either as a whole or with respect to stated individual shares and none of co-owners may encumber the subject-matter of joint ownership with property rights, nor alienate it as a whole or in part, nor alter it in some way (*see: Case materials, Vol. 1, pp. 27*).

12. The first paragraph of Section 19.² of the Constitutional Court Law provides: “A constitutional complaint (application) may be submitted to the Constitutional Court by any person who considers that their fundamental rights as defined in the Constitution infringe upon legal norms that do not comply with the

norms of a higher legal force.” Consequently, a person may address the Constitutional Court only in case if a direct link between infringement of rights of the person and the contested norm exists. It follows from the above mentioned provision that infringement of the fundamental rights of a person should be direct and concrete.

When assessing a matter based on a constitutional complaint, the task of the Constitutional Court is to assess compliance of a legal norm with those of a higher legal force if it has infringed fundamental rights of a person. Consequently, when examining a matter initiated based on a constitutional complaint, it is important to pay the most attention to the facts of the matter in particular testifying that a contested norm has infringed fundamental rights of the applicant.

12.1. The Contested Norm establishes a prohibition to a co-owner to unilaterally act with the entire subject-matter of joint ownership or a part thereof. This restricts rights of a co-owner and this is content of all co-owners that serves as precondition for action with subject-matter of joint ownership. As a result, the right of a co-owner to the subject-matter of joint ownership is restricted more than the right of a single owner to an undivided property.

The Contested Norm has been overtaken from Section 929 of Chapter III of 1867 Local Law Collection, which established *expressis verbis* the following: “Acting with a subject-matter of joint ownership in its integrity and parts thereof is permitted only by consent of all co-owners; if any of them act separately then such activity shall not only be regarded null and void, but it shall also commit the latter to reimburse losses caused by his or her actions to others.”

The core of Section 929 of Chapter III of 1867 Local Law Collection is as follows: it establishes the amount of rights and duties of co-owners bound by a joint ownership; action with the entire subject-matter of joint ownership requires unconditioned consent of all co-owners; each co-owner has the right to prohibit other co-owners to act with the subject-matter of joint ownership; in case of non-observance of such prohibition, the co-owner that has suffered from unlawful action of other co-owners shall have the right to receive reimbursement of losses; the

prohibition established by one of co-owners shall be aimed at preservation and promotion of joint property; the prohibition that causes losses to the subject-matter of joint ownership, threatens it or causes negative consequences to another co-owner, shall serve as basis for: a) a claim to divide the subject-matter of joint property; b) in case if co-owners do not want to request division of the subject-matter of joint ownership – a claim to be filed to a court regarding unlawfulness of such prohibition and permission to perform certain actions with the subject-matter of joint ownership; disregarding consent of other co-owners, each co-owner shall have the right to singly use all legally grounded means to refrain third parties from causing any threat to the subject-matter of joint ownership [see: Буковский В. (Сост.) Сводъ гражданских узаконений губерний Прибалтийских (съ продолжением 1912-1914 гг. и съ разъяснениями) въ 2 томах. Томъ I, содержащий Введение, Право семейственное, Право вещное и Право наследования. Рига: Г. Гемпель и Ко, 1914, сс. 398 – 399].

12.2. In the matter under review, the decisive role is played by the fact that the Contested Norm has been applied based on compulsory lease relations established on lawful basis. In such cases, the lessor and the tenant establish their legal lease relations by executing their duty established by law rather than based on a voluntary agreement.

In cases referred to in Paragraphs 1 – 4 of the first part of Section 14 of the Law “On the Time and Procedure for Coming into Force of Introduction of the Restored Civil Law of the Republic of Latvia of 1937, its Parts on Heritage Law and Property Law”, owner of a building (construction) uses a part of a land plot owned by another person based on the law rather than an agreement. However, the first part of Section 54 of the Law “On Privatization of State and Local Government Residential Houses” establishes that owner of a land plot shall conclude a land lease agreement with owner of the privatized object.

The Constitutional Court has already concluded that these legal relations have been established in public interests and their purpose is ensuring access of owners of buildings to their immovable property. When establishing the duty of a land owner

to conclude an agreement with the owner of a building, the legislator has ensured the right of the owner of the building to freely manage and use the building (*see: Judgment of 13 February 2009 by the Constitutional Court in the case No. 2008-34-01, Para 12, 19 and 24*).

12.3. Consequently, when assessing constitutionality of the Contested Norm, it is necessary to take into account the way how the norm is applied in the frameworks of compulsory legal lease relations. The Applicant holds that the Contested Norm fails to comply with a legal norm of a higher legal force since it has caused unfavourable legal consequences to the Applicant being one of co-owners of the Land Plots. This has denied the right the co-owner of the Land Plots acting under compulsory lease relations to receive lease payment.

Consequently, the Constitutional Court shall assess compliance of the restriction of the fundamental rights included in the Contested Norm with the first three sentences of Article 105 of the Satversme insofar as it applies to the legal institution of joint ownership under compulsory legal lease relations.

13. Article 105 of the Satversme provides both, free exercise of the right to property, and the right of the State to restrict use of property in public purposes. Namely, the general principle – undisturbed use of property – shall always be considered in conjunction with the right of the State to restrict property use.

Property right can be restricted if the restriction is justifiable, namely, the Constitutional Court shall assess:

- 1) whether the restriction of fundamental rights has been established by law;
- 2) whether the restriction has a legitimate aim;
- 3) whether the restriction is proportional with the legitimate aim (*See: Judgment of 20 May 2002 by the Constitutional Court in the case No. 2002-01-03, and judgment of 19 November 2009 in the case No. 2009-09-03, Para 12*).

13.1. The restriction of the fundamental rights has been established by law, namely, the Contested Norm has been included into the Civil Law that was restored on 14 January 1992 by the Law “On the Time and Procedure for Coming into Force of Introduction of the Restored Civil Law of the Republic of Latvia of 1937, its Parts on Heritage Law and Property Law” of the Supreme Council. The court file contains no materials causing doubt on the fact that the Contested Norm would not have been adopted according to proper procedure.

Consequently, the restriction of property right has been established by law.

13.2. Circumstances and arguments why it is needed shall be the basis for any restriction of fundamental rights, namely, the restriction is determined due to significant interests – the legitimate aim (*see, e.g. Judgment of 22 December 2005 by the Constitutional Court in the case No. 2005-19-01, Para 9*).

First of all, this is the institution that has adopted the contested act, which is the Saeima in this case, that has the duty to draw attention to and substantiate legitimate aim of such restriction in constitutional proceedings.

In its reply, the Saeima has indicated that the legislator is committed to protect the rights of each co-owner. Consequently, the Contested Norm has been adopted with the purpose to protect the rights of other persons. The Applicant admits that the legitimate aim of the Contested Norm is protection of interests of other co-owners.

Joint ownership emerges based on a legal transaction, a law, a court ruling or an administrative act. Consequently, the Contested Norm plays an important role in other fields of the legal system, for instance, family law, inheritance law and liability law.

Like any rights of owners, the rights of co-owners are characterized by both, positive and negative aspects. The negative content of the rights of co-owners is the right to protest against actions of a co-owner or those of the rest of co-owners aimed at encumbering the subject-matter of joint ownership by property right, alienating it in its integrity or in parts thereof, or changing it whatsoever. The positive character

of the rights of co-owners, however, manifests itself in the right to manage and use the subject-matter of joint ownership and to act with it in its integrity and in certain parts thereof, the latter being permitted only based on a consent of all other co-owners (see *Rozenfelds J. Lietu tiesības. 4. labotais, papildinātais izdevums. Rīga: Zvaigzne ABC, 2011, pp. 52 – 53*).

On the one hand, the Contested Norm restricts the freedom of action of a co-owner. On the other hand, however, the particular regulatory framework is based on the core of the legal institution of joint ownership and ensures such legal state that the rights of each co-owner, the Applicant included, are protected, whilst justice is ensured in mutual relations between the co-owners. The Contested Norm establishes such action model that restricts and at the same time protects the right of each co-owner to the subject-matter of joint ownership.

The Constitutional Court shares the opinion of the case participants that the purpose of the Contested Norm is to ensure a fair distribution of rights and duties for each co-owner to be able to exercise their right to own property.

Consequently, it can be concluded that the legitimate aim of the restriction established in the Contested Norm is protection of rights of other persons.

14. To establish whether the restriction is proportional with the legitimate aim that the State wanted to reach by establishing the restriction, it is necessary to investigate whether a fair balance is assured between the restriction of the fundamental rights of a person and interests of the society is assured. Namely, it is necessary to evaluate whether the restriction included into legal norms adopted by the legislator comply with the principle of proportionality:

first of all, if the means, used by the legislator are suitable for achieving the legitimate objective;

secondly, if such an activity is required, i.e., if it is not possible to attain the objective by other means, which would less limit the rights and legal interests of an individual;

thirdly, if the activity of the legislator is proportionate or adequate, i.e., if the benefit, obtained by the society, is greater than the loss incurred to the rights and lawful interests of an individual.

If, after evaluating the legal norm, it is acknowledged that it does not comply with even one of the above criteria, then it shall be considered as not being in conformity with the principle of proportionality and illegitimate (*see, e.g.: Judgment of 19 March 2002 by the Constitutional Court in the case No. 2001-12-01, Para 3.1 of the Findings*).

14.1. In order to assess whether the Contested Norm is appropriate for reaching of the legitimate aim, it is necessary to take into account the fact that, according to the Contested Norm, action of one or several co-owners with the subject-matter of joint ownership in its integrity or a part thereof without consent of the rest of co-owners is null and void. Pursuant to the second paragraph of Section 1068 of the Civil Law, each every co-owner has the right to protest against such actions by one or all the other co-owners that applies to the subject-matter of joint ownership in its integrity or a part thereof. Moreover, co-owners who have dealt with the subject-matter of joint ownership without consent of the rest of co-owners shall be committed to compensating all losses caused by such action. Consequently, the Contested Norm establishes the “absolute veto” right of each co-owner irrespective of the undivided share owned that he or she can exercise without receiving consent for the action with the subject-matter of joint ownership (*see: Grūtups A., Kalniņš E. Civillikuma komentāri. Trešā daļa. Lietu tiesības. Īpašums. Otrais papildinātais izdevums. Rīga: Tiesu namu aģentūra, 2002, pp. 254*).

The third paragraph of Section 1068 of the Civil Law establishes an exception from the restriction enshrined in the Contested Norm, and it permits a co-owner to introduce such amendments to the joint property without consent of the rest of co-owners that is required by necessity. Such changes into the joint property shall be made to preserve its essence or protect it against complete destruction, collapse or devastation. Each co-owner shall have the right to make such changes even if none of the rest of co-owners agree to introducing necessary changes, although taking into

account the nature of the joint property, they have the duty to introduce them (*see: Blaese H., Mende S. Das Sachenrecht. Lettlands Zivilgesetzbuch vom 28. Januar 1937 in Einzeldarstellungen. Bd. II, 2. Riga: Verlag der A/G „Ernst Plates”, 1940, S. 120*).

Consequently, it can be concluded that causal relationship exists between the Contested Norm and its legitimate aim. Namely, the Contested Norm prohibits co-owner to act separately on their own with the subject-matter of joint ownership in its integrity. However, such prohibition is in causal relationship with its aim, which is not to infringe and to protect the right of each co-owner to the subject-matter of joint ownership.

Consequently, the Contested Norm is appropriate for reaching of the legitimate aim.

14.2. The restriction of fundamental rights determined in the impugned norm is proportionate only if there are no other means, which are as effectual and by choosing them the fundamental rights will be restricted in a lesser degree. When assessing whether the legitimate aim may be reached in a more lenient way, the Constitutional Court takes into consideration that a more lenient means are not any means, but only such by which the aim may be reached in the same quality (*See: Judgment of 13 May 2005 of the Constitutional Court in the case No. 2004-18-0106, Para 19 of the Findings*).

The Constitutional Court has reiterated that it shall not assess whether the chosen solutions are suitable for dealing with the current situation (*see: Judgment of 13 February 2009 by the Constitutional Court in the case No. 2008-34-01, Para 22*).

The Applicant has failed to indicate that other equally effective alternative means exist that would permit reaching of the aim of the Contested Norm at the same quality. Likewise, the court file contains no materials that would refer to any alternative means that would permit reaching the legitimate aim at the same quality.

In the research on modernisation of the part on property law of the Civil Law, no necessity has been established to develop the legal regulatory framework of the

Contested Norm by establishing single right of a co-owner to act with the subject-matter of joint ownership (*see: Research of 2007 executed by the Ministry of Justice “On the Necessity to Modernize the First, the Second and the Third Part of Property Right Chapter of the Civil Law”, 00. 28 – 31, <http://www.tm.gov.lv/lv/ministrija/imateriali/petijumi.html>, consulted on 14 October 2011*).

The Contested Norm equally protects rights of all co-owners and ensures that each of them would be able to implement their property right in a fair way.

Consequently, the Contested Norm is necessary for reaching of the legitimate aim.

14.3. The Applicant has indicated that the Contested Norm restricts his rights at a greater extent if compared to the amount of benefit gained by the society. Therefore the Constitutional Court will assess how the negative consequences caused to a co-owner are manifested and investigate whether other means that would permit protecting one’s right or prevent restrictions that follow from the legal institution of joint ownership exist.

When assessing whether the benefit gained by the society is greater than the detriment caused to rights and legal interests of a person, in the case under consideration, the decisive role is played by the fact that the Contested Norm has been applied on legal basis in the frameworks of compulsory lease relations already existing.

14.3.1. In his constitutional complaint, the Applicant indicated the fact that the Contested Norm is outdated and is not appropriate for regulation of modern legal relations as his main argumentation. Namely, the Contested Norm has emerged in the middle of the nineteenth century and at the beginning of the twentieth century, when joint ownership and compulsory lease relations did not exist.

One can not deny that, since introduction of the Contested Norm into the Civil Law, legal reality has changed considerably. Context of economic, social, political and legal relations of the State has undergone material changes. However, time

period that has lapsed since the day when the Contested Norm was adopted cannot serve as basis for recognizing a norm as non-compliant with legal norms of a higher legal force. Only in case when a contested norm fails to comply with the factual social reality or contradicts legal relations that have become dominating ones as a result of development of the society, it is possible to reassess constitutionality of a particular norm.

The Constitutional Court indicates that it is not reasonable to relate the legal regulatory framework included in the legal institution of joint ownership and enshrined in the Contested Norm with the middle of the nineteenth century or beginning of the twentieth century. In their researches devoted to this particular legal institution, legal scientists relate its origin with the Roman law (*see, e.g.: Schmid, A. C. J. Handbuch des gegenwärtig geltenden gemeinen deutschen bürgerlichen Rechts, Band 1, Leipzig, 1847, SS. 4, 5; Konradi F., Walter A. Civillikumi ar paskaidrojumiem. Otrā grāmata. Lietu tiesības. Rīga: Grāmatrūpnieks, 1935, pp. 193 – 200*). The Roman law has been applied when elaborating the project of the Local Law Collection (*see: Нольде А. Э. Очерки по истории кодификации местных гражданских законов при графе Сперанском. Вып. 2. Кодификация местного права прибалтийских губерний / А.Э. Нольде. – СПб.: Сенатская типография, 1914, с. 136*).

The opinion that the legal institution of joint ownership in the Local Law Collection and the Civil Law has been overtaken from the Roman Law has been expressed *expressis verbis* in several matters (*see, e.g.: Tieslietu ministrijas juriskonsultācijas locekļa V. Dāvida runuaradiofonā. Valdības Vēstnesis, 17 Marhc 1937, Nr. 62; Grūtups A., Kalniņš E., 247. lpp.; Tieslietu ministrijas pētījums, pp. 29*).

The statement of the Applicant that in the middle of the nineteenth century and at the beginning of the twentieth century joint ownership did not exist is neither grounded. Even before the Civil Law was adopted, three different kinds of joint ownership existed, namely quitrent (*obroks*), hereditary lease and *cinšs* [payment of tax in cash]. Pursuant to Section 943 of the Local Law Collection, joint property was

established either based on a law or a private order. Although reasons for emerging of compulsory lease relations and joint property differ, this does not influence the meaning of joint property: the major owner keeps the right to the core of the subject-matter of joint ownership. This right to the core of the subject-matter of joint ownership is manifested in the fact that, as soon as user's right expires, the major owner has the right to obtain the property in its complete ownership, except for case if the immovable property has been granted to a user with ownership right for ever (*see: V. Dāvida runa radiofonā*).

The wording of Section 37 effective at the time of coming into force of the Civil Law and Transition Provisions provided that the major owner does not have the right to arbitrarily increase lease payment limits of quitrent (*obroks*), hereditary lease and *cinšs* [payment of tax in cash] exceeding the amount established by law. It was also established that such relationship of major owners would remain in force even after coming into force of the Civil Law and up to full liquidation of joint property (*see: Likumu par Civillikuma spēkā stāšanās laiku un pārejas noteikumiem. Valdības Vēstnesis, 21 September 1937, No. 213*).

Existence of joint ownership can be proven by the fact that, for instance, within administrative boundaries of Riga, there were only a few properties with full property right. As to the majority of properties, it was the Riga city that had the major property right. Cities as major owners had the pre-emption right in case if subordinate owners sold their right.

Along with adoption of the Civil Law, they started trying to give up the legal institution of jointed ownership. When the Civil Law took effect, this aspect has been particularly emphasized by indicating that one of the most important novelties in the part on property right of the new Civil Law is the so-called “giving up of jointed ownership” (*see: V. Dāvida runa radiofonā*). On 15 December 1938, the Law on Annulment of Joint Property was adopted that was never implemented due to historical circumstances (*see: Likums par dalītā īpašuma tiesību atcelšanu. Valdības Vēstnesis, 16 December 1938, No. 286*).

Consequently, it can be concluded that the legal institution of joint ownership and the legal institution of joint property in Latvia has existed also at the end of the nineteenth century and the beginning of the twentieth century. Not only private persons but also the State and local governments were a party to these legal institutions.

Likewise, it is not correct to consider that, although its application is nowadays regulated by other legal norms and special laws, the legal institution of joint ownership in modern legal relationships should be regarded as outdated.

14.3.2. It has been indicated in the application that the Contested Norm establishes a non-proportional restriction of fundamental rights of a person because it prohibits bringing an action before a court and receiving lease payment for undivided shares of the Land Plot, the owner of which is the Applicant.

Moreover, the Saeima and the summoned persons of the present case, namely, the Ministry of Justice and M. Osis agree that the Contested Norm does not have such content and that the infringement of fundamental rights of the Applicant originates from unskilful exhaustion of civil procedural legal remedies or failure to exhaust them rather than from application of the Contested Norm. Namely, this is not the Contested Norm but wording of the claim set forth in the application that applies to use of the subject-matter of joint ownership and satisfaction of which would encumber rights of other co-owners, has served as the grounds for rejection of the application by the court of general jurisdiction.

The Constitutional Court concludes that, contrary to what has been indicated in the constitutional complaint, the Applicant has brought the action in a way that infringes the rights of other co-owners in respect to the Land Plots that are subject-matters of joint ownership. The agreement provisions suggested by the Applicant applied to a broader scope of issues regarding establishment of lease payment in the frameworks of legal lease relations based on law.

It can be concluded from the case materials that the Applicant had purchased undivided shares of all Land Plots. Consequently, he has become one of the co-owner of the Land Plots as a result of his free will. The Applicant had to take into

account the fact that the extent of rights and duties of a co-owner established in the Civil Law differs from that of single owners. Consequently, when protecting them according to the procedure established in the Civil Law, rights of co-owners shall be exercised taking into account the different nature of joint ownership legal relations.

Moreover, in the present matter, the rights and duties of a co-owner, as well as the procedure of exercising them is influenced by other legal acts, including the Law “Land Reform in the Cities of the Republic of Latvia” and the Law “On Privatization of State and Local Government Residential Houses”. Consequently, the Applicant could and had to take into consideration legal consequences and possible legal preconditions for exercise of his rights acting as a co-owner, as well as actual difficulties related to exercise of the rights.

In such cases, if possible, co-owners should agree on the procedure of divided use of immovable property being a subject-matter of joint ownership. Also in case when compulsory lease relations that exist on legal basis, a co-owner does not have the right to act with the subject-matter of joint ownership in its integrity if such action may concern other co-owners and the latter have not given their consent to such action, or divided use is not authorized in respect to a particular immovable property.

If relations between the owner of a land plot and that of a building raised on a particular land plot have been established on legal basis, namely, the so-called compulsory lease relations have been established, then the owner of the land plot shall have the right to request lease payment established by law proportionally to the undivided share of the land plot owned by him or her disregarding the fact whether a consent of other co-owners has or has not been received in respect to such request (*see: Opinion of the ministry of Justice, case materials, pp. 108*).

Consequently, the opinion of the Saeima and the summoned persons that the action brought by the Applicant was not satisfied because of legal remedies selected by the Applicant rather than because of the Contested Norm is grounded.

Likewise, it can be concluded from decisions of the court of general jurisdiction that, in case if, in the frameworks of lease relations existing on legal

basis, a land owner brings an action on establishment of a lease payment and this claim does not apply to use of the entire property and does not infringe rights of other co-owners established by law, the Contested Norm would never serve as obstacle for satisfying such claim (*see: Judgment of 30 March 2009 by the Civil Case Panel of the Riga Regional Court [Rīgas apgabaltiesas Civillietu tiesu kolēģija] in the case No. C30234305, and judgment of 29 September 2010 in the case No. SKC-182/2010, case materials, Vol. 1, pp. 191 – 195*).

Consequently, the Contested Norm prohibits a co-owner of a land plot being a subject-matter of a joint ownership bringing an action before the court and obtaining establishment of a lease payment amount and recovery thereof in the frameworks of legal relations existing based on law even in case if no agreement has been reached with other co-owners. It should also be taken into account that common lease relationships exist between owners of a land plot and those of residential houses or their representatives, and these relationships concern the entire land plot.

14.3.3. When assessing proportionality of the Contested Norm and establishing whether benefit gained by the society from the Contested Norm is greater than the restriction of the fundamental rights of the Applicant, the Contested Norm shall be considered in conjunction with other legal mechanisms that the Applicant may exercise to prevent restriction of his fundamental rights. Namely, taking into account preconditions for exercising the rights and fulfilling the duties of a co-owner that follow from the core of the legal institution of joint ownership, the Contested Norm shall be considered in conjunction with legal regulatory framework in respect to termination of legal relations of joint ownership and agreement of co-owners on action with the joint property. In certain cases, factual or legal preconditions for action with the subject-matter of joint ownership may lead to the fact that co-owners lose their interest into preserving their legal status.

Due to this reason, Section 1074 of the Civil Law establishes the right of a co-owner to require division of joint ownership at any time. This is a legal instrument that a co-owner may apply on compulsory basis to terminate joint ownership. However, if division of a particular land plot is not admissible or possible, Section

1075 of the Civil Law establishes other legal remedies, by means of which a court may terminate joint ownership. Namely, the above mentioned norm provides: if the co-owners are not able to agree regarding the form thereof, then a court, considering the characteristics of the subject-matter to be divided and the circumstances regarding the property, shall adjudge to each of the co-owners actual shares, imposing certain servitudes, where necessary, on one share for the benefit of another share, give the whole property to one co-owner, with a duty to pay the others for their shares in money, determine that the property be sold, and the moneys received divided among the co-owners, or decide the issue by drawing lots, especially where it must be decided which of the co-owners is to keep their property themselves and which of them is to be satisfied monetarily. In such case, the court is committed to establish the most appropriate and fairest way of dividing joint ownership based on characteristic features of property (*see, e.g.: Judgment of 12 May 2010 by the Senate in the case No. SKC-122/2010, Para 9*).

Moreover, to solve problems that follow from joint ownership and concern use thereof, the co-owners can also agree on a separate procedure of use of the subject-matter of joint ownership, its transfer to use of one co-owner or a third person, its divided use or individual use in turns. Moreover, when granting an imperative character to the Contested Norm, the legislator has left up to co-owners to decide the issue whether consent of all co-owners is required to act with the subject-matter of joint ownership by concluding a respective agreement.

The Constitutional Court indicates that the legal regulatory framework included in Section 1074 and 1075 of the Civil Law is important because joint ownership is not the most desired form of property (*see: Čakste K. Civiltiesības. Rīga: [b.i.] 1937, pp. 42*). The core of joint ownership causes inevitable difficulties that apply to, for instance, agreement of co-owners on the use of the subject-matter of joint ownership or obtaining fruits thereof. The case under consideration testifies that joint ownership of the Land Plots has encumbered exercise of the rights of the Applicant.

Consequently, the nature of legal relations of joint ownership permits termination of joint ownership and agreement of co-owners on action with the subject-matter of joint ownership.

15. Article 105 of the Satversme grants the legislator a broad margin of appreciation when establishing general public needs that require restriction of use of property right. When examining a constitutional complaint, the duty of the Constitutional Court is to verify whether the legislator, when exercising its freedom of action, has restricted, in a non-proportional way, the fundamental right of persons to free enjoyment of property right established in the Satversme.

It can be concluded in the present case that it is not possible to protect public interests by applying other less restrictive means because, by broadening the right of one co-owner to act with the subject-matter of joint ownership, this would reduce the extent of rights of other co-owners. The law, however, establishes other possibilities of a certain co-owner to use his or her property insofar as rights of other co-owners are not infringed. The legal institution of joint ownership in conjunction with compulsory lease relations determines the legal procedure and coordinates the different interest of various persons. The Contested Norm is indispensable to ensure, as far as possible, balance between interests of all co-owners. The benefit gained by the society from the Contested Norm is greater than the restriction of fundamental rights of a particular co-owner, and the legislator has elaborated an appropriate regulatory framework for regulation of mutual legal relations between co-owners.

Consequently, the Contested Norm does comply with the first three sentences of Article 105 of the Satversme.

The Ruling

Based on Article 30-32 of the Constitutional Court Law, the Constitutional Court

h o l d s :

The first part of Section 1068 of the Civil Law does comply with Article 105 of the Satversme of the Republic of Latvia.

The Judgment is final and not subject to appeal.

The Judgment shall come into force on the day of publishing it.

Presiding Judge

G. Kūtris