



# THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

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## JUDGMENT ON BEHALF OF THE REPUBLIC OF LATVIA Riga, 15 April 2009 in the Case No. 2008-36-01

The Constitutional Court of the Republic of Latvia composed of the Chairman of the Court session Gunārs Kūtris, Justices Kaspars Balodis, Aija Branta, Juris Jelāgins, Kristīne Krūma and Viktors Skudra,

based on a constitutional claim of Sonia Traub,

according to Article 85 of the Satversme (Constitution) of the Republic of Latvia, Article 16 (1), Article 17 (1) (11) and Article 19.<sup>2</sup> and 28.<sup>1</sup> of the Constitutional Court Law,

on 17 March 2009 in a Court session examined the case in writing

**“On Compliance of the Words “Apartment Residential Houses” of the Second Part of Section 12 of the Law “On Land Reform in the Cities of the Republic of Latvia” and Para 7 of the Transitional Provisions Thereof, and the First Sentence of the Second Part of Section 54 of the Law “On Privatization of State and Local Government Residential Houses”, and Para 40 of the Transitional Provisions Thereof with Article 1 and Article 105 of the Satversme (Constitution) of the Republic of Latvia”**

## **The Constitutional Court has established**

1. On 20 November 2001, the Supreme Council of the Republic of Latvia adopted the Law “On Land Reform in the Cities of the Republic of Latvia” (hereinafter – the Law on Land Reform in the Cities).

The initial wording of the first part of Section 12 of the Law on Land Reform in the Cities provided that former owners of land or their heirs shall be restored land ownership rights to the plots of land that have previously belonged to them within the boundaries, which are specified in the utilisation projects of cities or individual plots of land approved by local governments, except for the cases provided for in Item 1 and Item 2 of the first part of this Section. The second part of the abovementioned Section provided:

In other cases when the land has been built-up or such objects have been constructed in accordance with the city master plan or building projects that are necessary to meet the interests of the society upon their choice former owners of land or their heirs have the right to:

- request restoration of land ownership rights and to receive a lease payment from the owner of the buildings and structures (in the case of planned construction – the local government of the municipality), the maximum amount of which shall be established by the Council of Ministers of the Republic of Latvia;

- or to request to transfer in their ownership or to allocate for use an equivalent plot of land within the borders of the same administrative unit of the city depending on the planned usage of the land;

- or to receive compensation in accordance with the procedures specified by Law.”

1.1. On 31 March 1994, the Saeima (Parliament) of the Republic of Latvia (hereinafter – the Saeima) adopted a law that provided for a new wording of Section 12 of the Law on Land Reform in the Cities. The second part of this Section obtained the following wording:

“In other cases upon their choice former owners of land or their heirs have the right to:

- request restoration of land ownership rights and to receive a lease payment from the owner of the buildings and structures;

- or to request to transfer in their ownership or to allocate for use an equivalent plot of land;

- or to receive compensation in accordance with the procedures specified by Law.”

**1.2.** On 8 May, the Saeima adopted a law that supplemented Section 12 of the Law on Land Reform in the Cities with a new second part with the following wording:

“If former owners of land or their heirs are restored ownership rights to land, on which the objects referred to in Section 12, Paragraph one, Clause 3 of this Law, as well as apartment residential houses, objects of water supply, heat supply and energy supply belonging to the State or local governments are located, the land lease payment shall not exceed 5% from the cadastral value of the land.”

**1.3.** On 12 December 2007, the Saeima adopted a law that supplemented the Transitional Provisions of the Law on Land Reform in the Cities with Para 7 with the following wording:

“The land lease payment established in accordance with the procedure provided for in the first and the second part of Section 12 of this Law in 2008, 2009, and 2010 shall not exceed the rental fee for the land, calculated for the preceding year, by more than 25 percent.”

**2.** On 21 June 1995, the Saeima adopted the Law “On Privatization of State and Local Government Residential Houses” (hereinafter – the Law on Privatization of Residential Houses). The second part of Section 54 thereof provides:

The land lease payment for the land for owners of a privatized apartment and those of an artist workshop shall not exceed five percent per year of the cadastre value of the land. In all other cases, the land lease payment shall be established by means of an agreement between the owner of a privatized object and the land owner.”

On 12 March 2008, the Saeima adopted a law that supplemented the Transitional Provisions of the Law on Privatisation of Residential Houses with Para 40 with the following wording:

“The land lease payment for a privatized apartment and an artist’s workshop that has been established in accordance with the procedure established in the first sentence of the second part of Section 54 of this Law in 2008, 2009, and 2010 shall not

exceed the rental fee for the land, calculated for the preceding year, by more than 25 percent"

**3. The person who submitted the constitutional claim Sonia Traub** (hereinafter – the Applicant) holds that the words “apartment residential houses” of the second part of Section 12 of the Law on Land Reform in the cities and Para 7 of the Transitional Provisions thereof, as well as the first sentence of the second part of Section 54 of the Law on Privatization of Residential Houses and Para 40 of the Transitional Provisions thereof (hereinafter all together referred to as the Contested Norms) do not comply with Article 1 and Article 105 of the Satversme (Constitution) of the Republic of Latvia (hereinafter – the Satversme).

It has been indicated in the constitutional claim that in the frameworks of property reform the Applicant was restored the rights to a land parcel where a residential house has been located. After submitting the residential house to privatization, compulsory lease legal relations were formed between the Applicant and the owners of the apartments. The land lease payment that is received by the Applicant, may not constitute more than five percent out of the cadastre value of a land parcel per year, whilst in 2008, 2009 and 2010 it may not exceed the rental fee for the land, calculated for the preceding year, by more than 25 percent

The Contested Norms do not allow the owner to let the land parcel he or she owns because it provides for limits of the land lease payment. Consequently, in the result of applying the Contested Norms, the economic value of the land parcel is being reduced and the rights of land owners, the Applicant included, to property as guaranteed in Article 105 of the Satversme are being restricted.

After the restoration of independence of Latvia, the objective of the initiated land reform was to restructure property relations with a view to create appropriate circumstances for the transition of domestic economy to market economy. The objective of the Contested Norms should be assessed in the context of the land reform, and it is limited to implementation of the land reform. It clearly follows from the wording of the Contested Norms that the objective of limiting the land lease payment is to protect the interests of the owners of privatized objects during the land reform by

thus denying the possibility to the land owners to receive full reimbursement for the use of the land.

The Applicant indicates that, although the objective of the legislator of the time when the land reform was only initiated is clear, the objective of the Contested Norms in present social and economic conditions may not be justified. Owners of privatized objects cannot be regarded as socially less protected persons or weaker participants of civil relations, the interests of whom should be protected. The Contested Norms also apply to low-income persons and owners of such privatized objects whose economic situation is better than that of land owners. Protection of all owners of privatized houses at the expense of land owners in the present situation is not adequate; therefore it is not possible to justify restriction on the land lease payment by means of this objective. The objective chosen by the legislator shall not be regarded as legitimate.

The Applicant holds that the Contested Norms neither comply with the principle of proportionality. The Contested Norms do not provide for a fair balance between the interests of land owners and those of privatized houses. By protecting one of the groups, namely, the owners of privatized houses, the legislator has restricted, in a non-proportionate way, the rights of other groups of the inhabitants, i.e. the rights of land owners.

As it was indicated by the Applicant, it would be possible to reach the objective set forth by the legislator by other alternative measures that would be less restrictive regarding the land owners. Alternative measures for reaching of the legitimate objective, however, have not been considered, which means that a substantial restriction of property rights has been established without discussing the issue. The legislator has not summarized the information on net income of the land owners from the land submitted to compulsory lease. Likewise, the legislator has not assessed whether the absence of the restriction included into the Contested Norms would affect social and economic situation of the State.

The maximum amount of the land lease payment does not constitute an appropriate compensation for the Applicant for the use of the land. The land lease payment for the use of property should reflect economic equality of the liabilities of both contracting parties; whilst because of the Contested Norms the land owners undergo unreasonable loss. For instance, the land lease payment for the use of the land

parcel owned by the Applicant is 34 times lower than the land lease payment compliant with the present market situation. Cadastre value of a land parcel neither is an adequate criterion for establishing the land lease payment for a particular parcel. It would be better to use the market value of a land plot as the basic criterion.

Moreover, it is necessary to take into consideration the fact that the Applicant must pay several taxes for the land parcel and land lease relations with the owners of privatized objects. Consequently, the received land lease payment is only gross income that is taxed.

According to the Applicant, non-proportionality of the Contested Norms is proved by the fact that the maximum amount of the land lease payment established in these norms, namely, five percent per year, does not comply with the actual discount rate of financial market, which constitutes 6 percent per year. According to the refinancing rate established by the Bank of Latvia, the minimum capital gain shall at present be calculated at the amount equal to six percent per year. Likewise, norms of the Civil Law provide that the general interest for the use of capital of other persons constitutes six percent per year.

As the Applicant indicated, the maximum land lease payment in legal relations of compulsory land lease is the only field, in which the State restricts income amount that the owner of the resource is entitled to receive from the user thereof in a non-proportionate way. For instance, gas, electrical power and heat is also delivered to socially weaker participants of the market; however, the rights of the suppliers of these resources to receive an adequate payment are not being restricted.

On the other hand, Para 7 of the Transitional Provisions of the Law on Land Reform in the Cities and Para 40 of the Transitional Provisions of the Law on Privatization of Residential Houses (hereinafter - the Contested Norms of Transitional Provisions) do comply with Article 1 of the Satversme. Since no unlimited property reform as to the temporal aspect is planned, the Applicant has counted on the principle of legal security that the State would find an appropriate solution, within a reasonable time period, to regulate legal relations of compulsory land lease. According to the Applicant, she had the rights to count on the fact that the maximum amount of land lease payment as to the cadastre value of a land plot would not be restricted even more. The Applicant indicates that because of the restrictions included into the

Contested Norms of Transitional Provisions the maximum land lease payment for the land owned by her in 2008 constitutes only 0.48 percent from the cadastre value of the land parcel in the same year.

When establishing restrictions for the maximum land lease payment in the Contested Norms of Transitional Provision, the legislator has not provided for any adequate reimbursement mechanism in favour of the land owners. Moreover, these additional restrictions have been adopted on a rush without providing for reasonable terms for transition to a new regulation.

**4. The institution that passed the contested acts, the Saeima** holds that the Contested Norms comply with Article 1 and 105 of the Satversme.

There is no doubt that in the case of compulsory land lease the rights of the land owner are restricted. Not every restriction, however, is ungrounded infringement of rights, and the rights to property can be restricted in the interests of the society.

The Saeima emphasizes that nowadays the issues regarding ensuring a living place is an indispensable part of State social and welfare policy. The duty of the State is to ensure protection of owners of apartments by at the same time securing the interests of the land owners. The legitimate objective of the Contested Norms is protection of the rights of other persons and ensuring welfare of the society.

The Saeima indicates that land owners and their heirs, when restoring land ownership, were usually informed on compulsory land lease relations by thus giving them the possibility to choose another kind of reimbursement – an equivalent plot of land or compensation. By choosing to restore land ownership, on which a building owned by another person is located, the land owner has indirectly agreed to the restrictions of property right that follow from compulsory land lease relations.

When characterising the restriction of five percent established in the Contested Norms, the Saeima indicates that a land owner, on the land of whom a building owned by another person is located, cannot be compared with a land owner who has no such building on his land parcel. Since in the both cases the possibilities of a land owner to act with the property and his or her duties differ considerably, the possibilities to gain income from such land parcels may also differ.

Likewise, repealing of the contested norms would not automatically mean that the property has become vacant and unencumbered or that the owner could demand the amount of the land lease payment he or she wants. Restriction of the land lease payment, which constitutes five percent from the cadastre value of the land parcel, has been applied based on the trends of case-law of the 90s. It is very likely that in the case of absence of the restriction of five percent courts would rule likewise or would provide for a lower land lease payment because the land would be leased for activities that are not related with profit making.

When assessing the restrictions included in the Contested Norms of the Transitional Provision, according to which the land lease payment in 2008, 2009 and 2010 may not exceed the rental fee for the land, calculated for the preceding year, by more than 25 percent, the Saeima indicates that the objective of this restriction is to ensure a fair balance between the interests of land owners and those of construction (building) owners. This restriction is transitional and applicable only during the time period of three years in order to provide for a gradual rather than drastic increase of the land lease payment without changing or diminishing the duties established for the land owners.

The Saeima concludes that the State, according to its inalienable rights and duty, has the right to intervene in the field of domicile by regulating prices. The legislator, when limiting augmentation of the land lease payment, has equally restricted increase of immovable property tax.

When analysing compliance of the Contested Norms with Article 1 of the Satversme, the Saeima indicates that compulsory land lease relations have no provisional character and it was not planned to terminate these relations after a certain time period. The Applicant could not count on the fact that the residential houses built on her land parcel would be located there only temporarily. After having assessed normative acts and other documents related with the land reform, it can be concluded that compulsory lease is a permanent rather than a temporary solution. The Contested Norms comply with the principle of legal security and Article 1 of the Satversme because they provide for a regulation that could create the basis for legal security for the Applicant.

The Saeima holds that in the case of repealing restrictions provided for the land lease payment, those would be the tenants, for instance, owners of the apartments who have counted on invariability of the land lease payment and have planned their expenses, who would be in a problematic situation. Interests of a person in dwelling issues must be protected even more than the interests of the land owner to gain additional income from letting a land parcel where buildings owned by other persons are located.

**5. The Ministry of Justice** as an invited person maintains that the Contested Norms comply with Article 1 and Article 105 of the Satversme.

The Ministry of Justice agrees with the fact that compulsory land lease causes restriction to the rights of a land owner, and the Ministry concludes that the restriction has been established by law and it has a legitimate objective, namely, protection of the rights of the owner of the building. The amount of the land lease payment is being limited with a view to protect the owner of the building from undue expenses.

According to the Ministry, the Contested Norms comply with the principle of proportionality. By providing for a mutual responsibility of the land owner and owners of the building to conclude a land lease agreement and providing for restrictions of the land lease payment, the legislator has selected an appropriate measure for reaching the legitimate objective. The statement of the Applicant that the legislator could have reached the objective of the Contested Norms by applying alternative measures that would restrict the rights of the land owners at a lesser extent is ungrounded. According to the Ministry of Justice, the alternative measures provided for by law that the land owners could apply is the possibility to receive an equal land parcel or an appropriate compensation rather than the possibility to restore property rights. The Ministry of Justice also holds that the restriction of the land lease payment ensures an equal balance between the interests of the land owners and owners of the buildings.

The Ministry of Justice neither agrees with what has been mentioned in the application that the owners of privatized objects cannot be regarded as less protected participants of civil relations. Owners of the apartments can be regarded as socially less protected part of the society if compared to land owners.

The restriction of the land lease payment at the amount of 5 percent out of the cadastre value of the land parcel, as provided for in the Contested Norms, is commensurate with the immovable property tax rate. From 1 January 2008, it would be reduced up to one percent, and from 1 January 2011 – 0.4 percent of the cadastre value of the land. According to the Ministry of Justice, this means that the land owners has a sum of money at his or her disposal that can be regarded as economically and socially grounded and fair compensation for the use of the land.

**6. The Ombudsman of the Republic of Latvia** (hereinafter – the Ombudsman) as an invited person indicates that compliance of the words apartment residential houses” of the Second Part of Section 12 of the Law “On Land Reform in the Cities of the Republic of Latvia” and the first sentence of the second part of Section 54 of the Law “On Privatization of State and Local Government Residential Houses” with the principle of legal security included in Article 1 of the Satversme must be assessed taking into consideration the historical development of the norms. Already at the beginning of the land reform, the legislator has provided that a person who wants to restore property rights to a land parcel has the duty to conclude a land lease agreement with an owner of the buldigns located on the parcel. Moreover, the legislator has provided the person with the rights to choose, namely, either to restore property rights and receive land lease payment, the minimum amount of which is established by the Council of Minsiters of the Republic of Latvia, or to request allocation of an equal land parcel, or to receive complensation according to the procedure established by law. A person should take into acocunt the fact that in the case of restoration of property rights the amount of the land lease payment is restricted in accordance with the effective legal norms.

The Ombudsman admits that a land reform is a terminated process. The legislator, however, has the rights to regulate separate legal relations in the frameworks of the land reform as independent. Subjective views of a person on how a legislator should regulate, within a reasonable time period, compulsory lease relations do not produce any basis for legal security.

When assessing compliance of the Contested Norms of the Transitional Provisions with Article 1 of the Satversme, the Ombudsman indicates that the

principle of legal security protects the rights once conferred. When adopting the Contested Norms of the Transitional Provision, the existing legal relations have not been changed, namely, in fact, the scope of the rights and duties established in the second part of Section 12 of the Law on Land Reforms in the Cities and the first sentence of the second part of Section 54 of the Law on Privatization of Residential Houses has not been amended. Moreover, in the result of adoption of the Contested Norms of the Transitional Provisions, incomes of land owners have increased by 25 percent if compared with the land lease payment amount in the previous year. Since the Legislator has neither disabled, nor reduced the scope of the rights conferred to land owners, it cannot be recognized that the Contested Norms of the Transitional Provisions would breach the principle of legal security.

When analysing compliance of the Contested Norms of the transitional Provisions with Article 105 of the Satversme, the Ombudsman indicates that the restriction of 25 percent regarding lease payment based on the lease payment in the previous year is directed towards protection of the owners of apartment houses by providing for a gradual rather than abrupt increase of the lease payment. The objective of the legislator, when adopting these norms, was to provide the most lenient possible transition to the new cadastre assessment system. Consequently, the restriction of property rights has a legitimate objective.

At the same time, the Ombudsman indicates that the increase of lease payment established in the Contested Norms of Transitional Provisions is not a lenient measure regarding owners of apartment houses because they do not prevent rapid increase of lease payment in 2011. Consequently, it must be recognized that the legislator does not reach the objective set by means of the measures selected. In the result of this, the principle of proportionality is breached and the Contested Norms of Transitional Provisions do not comply with Article 105 of the Satversme.

**The Constitutional Court holds:**

7. After restoration of independence of Latvia, returning of nationalized land to their owners and heirs took place within the framework of land reform. Historical circumstances determine that the land reform shall be a complex, continuous and embracing the whole national economy process. In the course of development the

nationalized land was used for different objectives, also for locating of objects of public significance. The aim of land reform is to reorganize the legal, social and economic relations between city land owners and users in order to promote the city's construction and rational utilization of land (*see: Judgment of 25 March 2003 by the Constitutional Court in the case No. 2002-12-01, Para 1 of the Concluding Part and Judgment of 13 February 2009 by the Constitutional Court in the case No. 2008-34-01, Para 11*).

Although it is possible to agree with the Applicant that the objectives of the land reform are generally implemented, the Land reform in the cities of Latvia has not yet been finished. According to the sixth part of Section 12 of the Law on land reform in the cities, a claim regarding restoration of property rights could be submitted before a court up to 1 September 2008. This means that the legislator must ensure that the legal norms adopted before coming into force of Chapter 8 of the Satversme "Fundamental Human Rights" on 6 November 1998 would comply with the effective norms of the Satversme, including the first sentence of Article 91, and Article 105 of the Satversme (*see: Judgment of 13 February 2009 by the Constitutional Court in the case No. 2008-34-01, Para 11*).

**8.** The Contested Norms can be divided into two groups. It follows from the words "apartment residential houses" of the second part of Section 12 of the Law on Land Reform in the Cities and the first sentence of the second part of Section 54 of the Law on Privatization of Residential Houses that land lease payment may not exceed five percent of the cadastre value of the land if the person has been restored property rights to a land parcel where an apartment house is located. On the other hand, the Contested Norms of Transitional Provisions establish that in such cases land lease payment in 2008, 2009 and 2010 may not exceed the rental fee for the land, calculated for the preceding year, by more than 25 percent. It can be concluded from the constitutional claim that the Applicant contested Section 7 of Transitional Provisions of the Law on Land Reform in the Cities insofar as the restriction of lease payment established therein apply to the land under apartment residential houses.

**Since the Contested Norms of the Transitional Provisions are closely related with both other Contested Norms, compliance of all four Contested Norms should be assessed in conjunction.**

9. The Applicant has asked the Court to assess compliance of the Contested Norms not only with Article 1 of the Satversme, but also with Article 105 of the Satversme because she holds that the restrictions of property rights established in the Contested Norms infringe the rights to own property as established in the Satversme.

According to the first part and Item 1 of the sixth part of Article 19.<sup>2</sup> of the Constitutional Court Law, it is substantial to establish in the case of this constitutional claim whether the basic rights of the Applicant, as established in the Satversme, have been infringed. Therefore the Constitutional Court will first of all assess whether the Contested Norms infringe the basic rights of the Applicant provided for in Article 105 of the Satversme and whether such infringement, if any, is grounded.

10. Article 105 of the Satversme provides: “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. Expropriation of property for public purposes shall be allowed only in exceptional cases on the basis of a specific law and in return for fair compensation.” Section 927 of the Civil Law defines ownership as the full right of control over property, i.e., the right to possess and use it, obtain all possible benefit from it, dispose of it and, in accordance with prescribed procedures, claim its return from any third person by way of an ownership action.” The Constitutional Court has reiterated in several judgments that property rights include the rights to gain all possible benefit from a property, including income and fruits (*see, e.g. Judgment of 20 May 2002 by the Constitutional Court in the case No. 2002-01-03 and Judgment of 12 November 2008 by the Constitutional Court in the case No. 2008-05-03, Para 7*).

According to Section 2112 of the Civil Law, a lease or rental contract is a contract pursuant to which one party grants or promises the other party the use of some property for a certain lease or rent payment. Consequently, one of the ways how a persons can gain material benefit from the land he or she owns, is letting of this

property to other persons for a payment that would permit to maintain the property and provide income for the owner of the property. Provisions of the Civil Law does not restrict the rights of the tenant and the lessor to agree on the lease payment on their own discretion.

If an apartment residential house is located on the land parcel and the land owner has lease relations with the owners of the apartments, the Contested Norms restrict the rights of the land owner to request an appropriate lease payment for the use of the land parcel. Namely, the words “apartment residential houses” of the second part of Section 12 of the Law on Land Reform and the first sentence of the second part of Section 54 of the Law on Privatization of Residential Houses provides that in such cases lease payment shall not exceed five percent of the cadastre value of the land parcel. On the other hand, the Contested Norms of the Transitional Provisions establish that land lease payment in 2008, 2009 and 2010 shall not exceed the rental fee for the land, calculated for the preceding year, by more than 25 percent.

The Applicant owns a land parcel where an apartment residential house is located. Since she has compulsory lease relations, as provided by law, with the owners of the apartments, the restriction of the land lease payment established in the Contested Norms apply to the Applicant. Therefore she is not able to gain the highest possible benefit from her property.

**Consequently, the Contested Norms restrict the rights of the Applicant to own property provided for in Article 105 of the Satversme.**

**11.** Article 105 of the Satversme, like Article 1 of Protocol 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, provides for both, free exercise of property rights and the rights of the state to restrict the use of property in favour of interests of the society. Property rights can be restricted if the restrictions can be justified, namely, if they have been established by law, if they have a legitimate objective and if they are proportionate (*see: Judgment of 20 May 2002 by the Constitutional Court in the case No. 2002-01-03 and Judgment of 12 November by the Constitutional Court in the case No. 2008-05-03, Para 8*).

In the case under review, there is no dispute whether the Contested Norms have been established by a law that is adopted and proclaimed according to appropriate procedure.

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

**12.** Circumstances and arguments why it is needed shall be the basis for any restriction of fundamental rights, namely, the restriction is determined because of significant interests – the legitimate aim (*see: Judgment of 22 December 2005 by the Constitutional Court in the case No. 2005-19-01, Para 9, Judgment of 14 March 2006 by the Constitutional Court in the case No. 2005-18-01, Para 13, Judgment of 22 November 2008 by the Constitutional Court in the case No. 2008-07-01, Para 10 and Judgment of 4 February 2009 in the case No. 2008-12-01, Para 10.2*). The duty to provide and justify the legitimate objective of such restriction in the Constitutional Court proceedings applies, first of all, to the institution that has issued the contested act, which in this case is the Saeima.

**12.1.** When explaining the legitimate objective of the words “apartment residential houses” of the second part of Section 12 of the Law on Land Reform and the first sentence of the second part of Section 54 of the Law on Privatization of Residential Houses, the Saeima has indicated in its reply that home is regarded as primary social need, and the duty of the State is to ensure protection of the owners of apartments. Consequently, the objective of these Contested Norms is protection of the owners of apartments and ensuring welfare of the society. The Ombudsman, in its opinion No. 3 of 8 May 2009 (hereinafter – Ombudsman Opinion No. 3), wherein compliance of the second part of Section 12 of the Law on Land Reform in the Cities with Article 105 of the Satversme is assessed, has also indicated that the legitimate of this norm is to protect owners of apartments from undue expenses of house maintenance in the case of compulsory lease (*see: case materials, Vol. 1, pp. 77*).

Consequently, the legitimate objective of the restriction of rights established in the Contested Norms is to protect owners of apartments from undue expenses of house maintenance.

**12.2.** As it was indicated by the Saeima, the legitimate objective of the restriction of rights established in the Contested Norms of the Transitional Provisions is to ensure a fair balance between the interests of land owners and owners of buildings (constructions) (*see: case materials, Vol. 1, pp. 98*).

The norms of Transitional Provisions are similar, though they have been adopted in different time. The amendments to the Law on Land Reform in the Cities, wherewith Para 7 has been introduced into the Transitional Provisions, have been adopted by the Saeima on 12 December 2007. On the other hand, the amendments to the Law on Privatization of Residential Houses, wherewith Para 40 was introduced into the Transitional Provisions, has been adopted on 13 March 2008. Since Para 7 of the Law on Land Reform in the Cities has been adopted before adoption of Para 40 of the Law on Privatization of Residential Houses, these are the materials of elaboration and adoption of Para 7 of the Transitional Provisions of the Law on Land Reform in the Cities that provide for the best justification of the restriction of property rights included in both Contested Norms of the transitional provisions of the laws.

The draft law “Amendments to the Law “On Land Reform in the Cities of the Republic of Latvia”” submitted by the Cabinet of Ministers provided for supplementing the transitional Provisions of the Law on Land Reform in the Cities with Para 7. It is indicated in the annotation to this draft law that, according to the information provided by the State Land Service, the updated data base of cadastre values came into effect in 2008, and the cadastre value and land lease payments for all groups of real estate is expected to raise. This means that land lease payments for a certain part of land tenants in the cities would raise more than five times in 2008. In order to prevent substantial land lease payment increase in 2008 for such tenants and to ensure a gradual lease payment increase in subsequent years, it is necessary to establish a transitional period. On the other hand, when analyzing the effect of the draft law on the macro-economical environment, it is indicated that “the draft law will prevent substantial rise in land lease payment for dwelling” (*annotation to the draft law “Amendments to the Law “On Land Reform in the Cities of the Republic of Latvia””, [http://www.saeima.lv/saeima9/lasa?dd=LP0544\\_0](http://www.saeima.lv/saeima9/lasa?dd=LP0544_0)*). When the Saeima was considering the draft law at the second reading, the member of the Parliament Anna Seile indicated that the Agricultural, Environmental and Regional Policy Commission

"regards it as indispensable to normalize payments of tenants" (*Transcript of the 9<sup>th</sup> Saeima meeting of 6 December 2007, <http://www.saeima.lv/steno/Saeima9/071206/st071206.htm>*).

It is possible to conclude from what has been established above, that the Contested Norms of the Transitional Provisions have been adopted with a view to protect owners of privatized apartments from rapid increase of land lease payment.

**Consequently, it is possible to conclude that the legitimate objective of the restrictions established in the Contested Norms of the Transitional Provisions is to protect the rights of other persons, namely, owners of apartments.**

**13.** The Constitutional Court has already concluded that To evaluate whether the legal norm complies with the proportionality principle one has to ascertain if the means, used by the legislator are suitable for achieving the legitimate objective and if it is not possible to attain the objective by other means, which would less limit the rights of an individual as well as show whether the activity of the legislator is proportionate. If, after evaluating the legal norm, it is acknowledged that it does not comply with even one of the above criteria, it is unconformable with the principle of proportionality and illegitimate (*see: Judgment of 19 March 2002 by the Constitutional Court in the case No. 2001-12-01, Para 3.1 of the Concluding Part and Judgment of 27 June 2004 in the Case No. 2003-04-01, Para 3 of the Concluding Part*).

**14.** The Constitutional Court must investigate whether the Contested Norms are appropriate for reaching the legitimate objective.

**14.1.** Under the words "apartment residential houses" of the second part of Section 12 of the Law on Land Reform and the first sentence of the second part of Section 54 of the Law on Privatization of Residential Houses, owners of apartments must pay not more than 5 percent of the cadastre value of the land parcel per year. Although land lease payment is only one of the payments that owners of apartments must make for maintenance of the residential house, establishment of the maximum amount of lease payment in the law is one of the ways how to protect owners of apartments from unduly high expenses for the maintenance of the apartment house.

Consequently, the abovementioned Contested Norms are appropriate for reaching the legitimate objective.

**14.2.** When assessing conformity of the Contested Norms of the Transitional Provisions for reaching of the legitimate objective, it is necessary to take into consideration the fact that cadastre value of immovable property is affected by the situation in the real estate market.

Under Section 71 of the State Immovable Property Cadastral Law, cadastre value shall be calculated taking into account such data registered into the Cadastre Information System as the base of cadastre value, object of cadastre and data characterizing real estate tax, purposes of the use of immovable property and encumbrances of the immovable property object. It follows from Section 67 and the second part of Section 69 of the abovementioned Law that the base of cadastre values has been elaborated based on the real estate market information on transactions within real estate market during at least two previous years. Taking into consideration the trends in the real estate market and increasing prices of immovable property at that time, the legislator has prognosticated that cadastre value of the land would also raise rapidly, which would also increase lease payments. If this prognosis would come true and the Contested Norms of the Transitional Provision would not have been adopted, expenses of the owners of apartments for the maintenance of the house would raise considerable within a short period of time.

The Applicant has justly indicated that the restriction to increase the land lease payment, which has been established for the period of three years by the Contested Norms of the Transitional Provisions, would not provide for a long-term solution for the situation. However, one cannot agree with the statement of the Applicant that at the end of the transitional period the increase of lease payment would be of the same amount if compared to the situation if no restrictions would have been provided (*see: case materials, Vol. 1, pp. 15*). Taking into consideration the present situation in the State, it is difficult to prognosticate prices for immovable property and the change in the cadastre values in 2011 based on these changes. On the other hand, it is difficult to prognosticate the increase of land lease payment in 2011 because lease payment in the case of compulsory lease depends directly on the cadastre value of the land parcel.

Thus the Contested Norms of the Transitional Provisions ensure gradual rather than rapid increase of land lease payments for the owners of apartments in 2008 to 2010.

**Consequently, the Contested Norms of the Transitional Provisions and the Contested Norms are in general appropriate for reaching of the legitimate objective.**

**15.** The Applicant indicates that the legislator could reach the legitimate objective by selecting alternative measures that would restrict the rights of land owners at a lesser extent.

The Constitutional Court has reiterated in its judgment that it must not assess at what extent other alternative solutions would or would not be more appropriate for solution of a situation (*see: Judgment of 8 March 2006 by the Constitutional Court in the case No. 2005-16-01, Para 15.8 and Judgment of 13 February 2009 in the case No. 2008-34-01, Para 22*). However, it falls within the scope of the Constitutional Court to assess whether the legislator, when restricting the rights of a person or a group of persons, has sufficiently assessed whether in the particular case there exist other alternative measures that would restrict the basic rights of persons established in the Satversme at a lesser extent.

**15.1.** Documents that reflect the course of adoption of the Contested Norms show whether the legislator has assessed whether in the case under review the legitimate objective could be reached by other means that would restrict the rights of persons at a lesser extent.

Initially, the restriction of lease payment at the amount of five percent of the cadastre value of the land was established in the second part of Section 54 of the Law on Privatization of Residential Houses. Such a restriction has already been established on 21 June 1995 by adopting the Law on Privatization of Residential Houses. On the other hand, the amendments to the Law on Land Reform in the Cities providing for restriction of lease payment in the case of compulsory lease were introduced later, namely, on 8 May 1997. Thus it can be concluded that the legislator, when adopting the Law on Privatization of Residential Houses, had to assess thoroughly how would

the protection of the property rights of one group of inhabitants, i.e. owners of the apartments, would affect those of another, i. e. land owners.

When preparing the draft law “On Privatization of State and Local Government Dwelling Fund”, which was the initial title of the Law on Privatization of State and Local Government Residential Houses, the member of the Parliament Jānis Lagzdīņš indicated at the meeting of the Environmental Board and Local Government Commission of the 5<sup>th</sup> Saeima that: “If the house is located on the land of former owner that has been entered into the Land Register, the owner of the apartment must provide land lease payment to the land owner.” It was likewise suggested in the abovementioned meeting "to regulate compulsory lease at the national level and to provide for the maximum amount of it" (*see: case materials, Vol. 1, pp. 126 and 127*). It was for the first time mentioned at the meeting of 7 February 1995 of the State Administration and Local Government Commission that “the maximum amount of the lease payment shall be established by the Cabinet of Ministers” (*see: case materials, Vol. 1, pp. 133*).

Only in the suggestions for examination of the draft law “On Privatization of State and Local Government Residential Houses” summarized and provided by the State Administration and Local Government Commission one can find a proposition to supplement Section 54 of the draft law with the following text: “land lease payment for the deemed part of property for the common use during the land reform shall not exceed five percent per year from the cadastre value of the land” (*see: case materials, Vol. 1, pp. 162*). As it can be seen in the documents at the disposal of the Constitutional Court, before that no such suggestion has been made and no discussions have taken place on this issue. However, it follows from the transcript of the 26 April 1995 meeting, which, among the rest things, reflects examination of the draft law "On Privatization of State and Local Government Residential Houses” at the second reading, that the proposition regarding the restriction of the land payment up to five percent per year from the cadastre value of the land parcel has been approved without any debates (*see: [http://www.saeima.lv/steno/st\\_955/st2604.html](http://www.saeima.lv/steno/st_955/st2604.html)*). The Saeima has not assessed how the abovementioned restriction of land lease payment would affect the situation of land owners. It has neither considered the possibility to select more lenient measures to reach the legitimate objective. Likewise, when adopting the second part of

Section 12 of the Law on Land Reform in the Cities, the legislator has taken into consideration the interests of the residents of apartment houses without legislating for the legal interests of the land owners.

**15.2.** The first normative acts that regulated land reform were adopted in 1991. However, since the adoption of the Contested Norms more than 10 years have passed. During this time period, both actual and legal situation has changed; therefore the legislator had the duty to assess whether the legitimate objective of the Contested Norms could be reached by applying other measures that would restrict the rights of land owners at a lesser extent.

The necessity of such assessment is also mentioned in the Ombudsman Opinion No. 3. As the Ombudsman has concluded, this is the primary duty of the State to ensure the interests of the State and the society. The State is not entitled not to fulfil this duty by restricting in a non-proportionate manner the rights of any social group, for instance, land owners. Consequently, the State must select such means for ensuring these legal relations that would lessen the social burden on the land owners (*see: case materials, Vol. 1, pp. 80*).

On the other hand, in its letter to the Ombudsman, the Agricultural, Environmental and Regional Policy Commission, when assessing the abovementioned Opinion of the Ombudsman, has drawn attention to several measures that should be taken in order to attain a reasonable balance between the rights and interests of the society and those of the land owners. The Commission has even indicated to alternative measures that would restrict the rights of the land owners at a lesser extent in the case of compulsory lease. The Commission also mentioned the possibility to include a norm into the Law on Land Reform in the Cities that would provide that in the case of compulsory lease the tenant pays taxes related with the immovable property. Likewise, the possibility to apply allowances to personal income tax and property tax or even to exempt from taxation the lease payment received by the land owners has also been mentioned in the letter of the Commission (*see: case materials, Vol. 1, pp. 96 and 97*).

The Applicant has also drawn attention to alternative measures that would, according to her mind, restrict her rights at a lesser extent. Namely, the legislator could have provided for a state-funded mechanism or other support measures in order to

protect owners of privatized objects, or allowances of personal income tax or property tax to the land owners in order to reduce the social burden of them and compensate the losses occurred in the result of application of the Contested Norms (*see: case materials, Vol. 1, pp. 16*).

The Constitutional Court agrees with the opinion of the Saeima that the real estate market value is not an appropriate criterion to establish the amount of lease payment in the case of compulsory lease. Market value is changeable and establishment thereof would require not only additional resources but it also could be contested. Consequently, establishment of lease payment for a particular property would constitute difficulties or could even be impossible in certain cases. Moreover, cadastre value of immovable property depends on the market value because, when establishing the basis of the cadastre value, the information on the situation in the real estate market is taken into consideration.

Likewise, it is possible to agree to what has been indicated by the Applicant that one of the possible alternative measures for reaching the legitimate objective could be increase of the maximum lease payment by providing a higher land lease payment instead of five percent per year of the cadastre value of the immovable property. As the Saeima has indicated, this threshold, namely, five percent, has been selected based on the trends of case-law of the mid 90s, and it was included into the Contested Norms with a view to prevent uncontrolled increase of lease payment in the future (*see: case materials, Vol. 2, pp. 36*). As it has already been mentioned, actual and legal conditions have changed since that time.

**15.3.** The Constitutional Court agrees with the opinion of the Applicant that at present not all owners of apartments can be regarded as socially less protected participants of civil relations if compared to land owners. Economic situation of owners of apartments in many cases can be better than that of land owners.

It is not possible to agree with the opinion of the Saeima that the lease payment that land owners receive from owners of the apartments in the case of compulsory lease in accordance with the Contested Norms fulfils remuneration function, which is characteristic feature of a lease agreement (*see: case materials, Vol. 2, pp. 37*). Taking into consideration the amount of the lease payment, expenses of the land owner for maintenance and management of the land parcel and the duty of the land owner to pay

the property tax, the maximum lease payment established in the Contested Norms cannot be regarded as the one that would fulfil the remuneration function.

The Constitutional Court concludes that there exist two alternative measures, by means of which it would be possible to reach the legitimate objective by restricting the rights of land owners at a lesser extent.

**Consequently, the words “apartment residential houses” of the second part of Section 12 of the Law on Land Reform and the first sentence of the second part of Section 54 of the Law on Privatization of Residential Houses do not comply with the principle of proportionality and thus with Article 105 of the Satversme.**

**16.** In order for the Constitutional Court to assess compliance of the Contested Norms of the Transitional Provisions with the principle of proportionality, the Constitutional Court must first of all investigate what are the legal consequences for the fact that these norms are mutually related with other Contested Norms.

**16.1.** The Contested Norms of the Transitional Provisions are mutually related with the restriction of the amount of lease payment established in other Contested Norms. Under the Contested Norms of the Transitional Provisions, in 2008, 2009 and 2010, too, the land lease payment is preserved at the level established according to the procedures provided for at the first and the second part of Section 12 of the Law on Land Reform in the Cities and the first sentence of the second part of Section 54 of the Law on Privatization of Residential Houses, provided that its amount in each of the mentioned years may not exceed by more than 25 percent the amount of lease payment calculated for the previous year.

The Constitutional Court has already established that the second part of the Law on Land Reform in the cities and the first sentence of the second part of Section 54 of the Law on Privatization of Residential Houses does not comply with the principle of proportionality and thus with Article 105 of the Satversme. Since the Contested Norms of the Transitional Provisions are mutually related with the other Contested Norms, the Contested Norms of the Transitional Provisions neither comply with the principle of proportionality.

**16.2.** Already before the adoption of the Contested Norms, namely, on 8 November 2007, the Saeima has introduced amendments to the Law “On Real

Property Tax”. Para 22 of the Transitional Provisions of this Law provided that the amount of the immovable property tax in 2008, 2009 and 2010, if the purpose of the use of the land is not changed, shall not exceed the by more than 25 percent the amount of tax amount calculated for the previous taxation year. The legislator, without carrying out sufficient assessment of actual and legal conditions, has provided for exactly the same restriction of the increase of lease payment in the case of compulsory lease.

It is necessary to agree with what has been indicated by the Applicant that the Legislator has not assessed how the Contested Norms of the Transitional Provisions would affect the rights of the land owners. The amendments to the Law on Land Reform in the Cities, including Para 7 of the Transitional Provisions thereof, have been discussed at the meeting of 6 December 2007. Neither the transcript of the abovementioned meeting, nor the annotation to the draft law proves that the legislator would have considered the ways not to establish a fair balance between the interests of the land owners and those of the owners of residential houses.

The Contested Norms of the Transitional Provisions do not ameliorate the situation of land owners because, due to the increase of the cadastre value of the land, the percentage difference between the lease payment and the cadastre value of the land would rapidly decrease. For instance, the Applicant has indicated that, in 2008, the lease payment for the land owned by her constituted only 0.48 percent of the cadastre value of the land of the same year (*see: case materials, Vol. 1, pp. 17 and 18*). One can conclude that the legislator, when trying to prevent substantial increase of lease payment, has not considered the possibility to apply measures that would restrict the rights of the land owners at a lesser extent.

**Consequently, Para 7 of the Transitional Provisions of the Law on Land Reform in the Cities, insofar as the restrictions of the lease payment established therein apply to apartment residential houses, and Para 40 of the Transitional Provisions of the Law on Privatization of Residential Houses do not comply with the principle of proportionality and thus with Article 105 of the Satversme.**

17. The Applicant has asked the Court to assess compliance of the Contested Norms with Article 1 of the Satversme. The Constitutional Court, however, has no

necessity to assess compliance of the Contested Norms with Article 1 of the Satversme because the non-compliance of the Norms with Article 105 of the Satversme has already been established.

**18.** Under the third part of Article 32 of the Constitutional Court Law, any legal norm (act) which the Constitutional Court has determined as incompatible with the legal norm of higher force shall be considered invalid as of the date of publishing the judgment of the Constitutional Court, unless the Constitutional Court has ruled otherwise.

The Constitutional Court has reiterated that in the cases if immediate recognition of the Contested Norms as invalid and repeal thereof would constitute even greater restriction of the basic rights, the Constitutional Court must establish the term of execution of a judgment (*see: Judgment of 22 October 2002 by the Constitutional Court in the case No. 2002-04-03, Para 3 of the Concluding Part and Judgment of 21 October 2008 in the case No. 2008-02-01, Para 12*).

The Constitutional Court shares the opinion of the Saeima that it is necessary to assess better ways not to ensure fair balance between the opposed interests of the land owners and owners of privatized apartments, as well as to introduce respective amendments into the normative acts. At the same time, the Constitutional Court emphasizes that already on 8 May 2009 the Saeima has received the Ombudsman Opinion No. 3, wherein the attention was drawn to the non-compliance of the Contested Norms with the Satversme. Therefore the infringements of the basic rights established by the Constitutional Court in this Judgment should be eliminated as soon as possible.

### **The Constitutional Court**

based on Articles 30 – 32 of the Constitutional Court Law

**h o l d s :**

**the words “apartment residential houses” of the second part of Section 12 of the Law “On Land Reform in the Cities of the Republic of Latvia” and Para 7 of the Transitional Provisions thereof insofar as the restrictions of the lease payment apply to the land under residential apartment houses, and the first sentence of the second part of Section 54 of the Law “On Privatization of State and Local Government Residential Houses”, and Para 40 of the Transitional Provisions thereof do not comply with Article 1 and Article 105 of the Satversme of the Republic of Latvia and are invalid as from 1 November 2009.**

The Judgment is final and not subject to appeal.

The Judgment takes effect as on the date of publishing it.

The Presiding Judge

G. Kūtris