



THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

JUDGMENT

ON BEHALF OF THE REPUBLIC OF LATVIA

Riga, 22 December 2008

in Case No. 2008-11-01

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,

having regard to the constitutional claim of Ilmars Zandbergs,

based on Article 85 of the Satversme (Constitution) of the Republic of Latvia and Article 16 (1) and (6), the first part of Article 17 (11), Article 19.² and Article 28.¹ of the Constitutional Court Law,

on 25 November 2008 in the Court session examined the case in written proceedings:

“On Compliance of Item 2 of Section 1231 of the Civil Law with Article 105 of the Satversme (Constitution) of the Republic of Latvia”.

The Constitutional Court has established:

1. On 14 January 1992, the Supreme Council of the Republic of Latvia (hereinafter- the Supreme Council) adopted the Law “On the 1937 Civil Law of the Republic of Latvia”. By means of this law, the Supreme Council decided to restore the

1937 Civil Law (hereinafter – the Civil Law) of the Republic of Latvia, as well as to establish a certain procedure and time of coming into force of separate parts of the Civil Law. on 7 July 1992, the Supreme Council adopted the Law “On Time and Procedure of Coming into Force of the Introduction, the Inheritance Rights and the Property Rights of the 1937 Civil Law”, which provided that this law and the part of the Civil Law regarding the property rights would come into force on 1 September 1992.

Section 1231 of the Civil Law, which pertains to the property rights part, provides: “Servitudes may be established: 1) by law; 2) by a judgment of a court; or 3) by a contract or a will.” The Applicant Ilmars Zandbergs (hereinafter – the Applicant) asks to assess whether item 2 of Section 1231 of the Civil Law, which provides for a possibility to establish a servitude by a judgment of a court, (hereinafter – the Contested Norm) complies with Article 105 of the Satversme (Constitution) of the Republic of Latvia (hereinafter - the Satversme).

2. The Vārmes Parish Council of the Kuldīga district, by means of the decision of 28 February 1995, restored the property rights of the Applicant to the land parcel of “Baloži” household in the Vārme parish of Kuldīga district, the total area of which is 38.1 ha. The Applicant’s property right to this parcel was registered in the Land Register on 1 March 1995. In 1999, a piece of land was separated from the parcel of the Applicant. Therefore the total area of the Applicant’s parcel constitutes 32.6 ha.

On 15 June 2000, the Applicant pursued a claim against Eduards Zabarovskis, the owner of Spīķi hydropower station near the real estate “Baloži” (hereinafter – the Owner of Spīķi HPS) at the Kuldīga District Court regarding prevention of property rights violation. The Applicant asked to cease inundation of his land parcel and remove water from it. As it was indicated by the Applicant in the claim statement, in summer of 1996 and spring of 1997, Mr. Zabarovskis and the chairman of the Vārme Parish Council asked for the consent of the Applicant to inundate the “Baloži” land parcel due to construction of the Spīķi HPS. Although the Applicant did not give his consent, 3.6 hectares of farmland and one hectare of woods were inundated at the end of 1997.

On 23 October 2001, the Kuldīga District Court rejected the claim of the Applicant. On 9 October 2002, the Civil Case Panel of the Kurzeme Regional Court (Kurzemes apgabaltiesa) recognized the decision of the first instance court as valid. On 9 October 2002, the decision of the regional court was quashed by the Senate of the Supreme Court and transferred the case for examination at the appeal instance court. On 2 April 2004, the Kurzeme Regional Court satisfied the claim of the Applicant by making the Owner of the Spīķi HPS cease inundation of the land parcel of the Applicant before 2 October 2004. After having examined the cassation claim of the Owner of the Spīķi HPS, the Senate of the Supreme Court decided on 8 September 2004 that the decision of the Kurzeme Regional Court must be quashed. As the Senate indicated, the court has ignored that the Spīķi HPS and the storage pond was included into the land use plan of the Kuldīga district and Vārme Parish. By means of this decision, the case was transferred for examination thereof at the first instance of the Kuldīga Regional Court.

On 7 April 2005, the Applicant addressed the Constitutional Court with a pleading to recognize Section 8.3.1 of the second part of the Kuldīga district land use plan of 15 December 1999 regarding the Spīķi HPS and the part of Vārme parish land use plan of 20 February 2003 regarding inclusion of the “Baloži” household into the territory of the Spīķi HPS as non-compliant with Article 105 of the Satversme. Having regard to the constitutional claim of the Applicant, the Constitutional Court initiated the case No. 2005-10-03. By the judgment of 14 December 2005, the Constitutional Court decided, first of all, to terminate proceedings regarding compliance of Section 8.3.1 of the second part of the Kuldīga district land use plan of 15 December 1999 with Article 105 of the Satversme, and, secondly, to recognize that the part of the land use plan of Vārme district of 17 June 2004 regarding permitted use of the “Baloži” household as non-compliant with the second part of Section 41 of the Law “On Local Governments” and invalid as from the date of adopting thereof.

On 3 October 2006, the Kuldīga Regional Court, when re-examining the claim of the Applicant and the counterclaim of Mr. Zabarovskis regarding establishment of servitudes for the benefit of the HPS, rejected both, the claim of the Applicant and the counterclaim of the Owner of the Spīķi HPS. Having regard to the appeals of both parties, the Civil Case Panel of the Kurzeme Regional Court announced a judgment,

wherewith the claim of the Applicant against the Owner of the Spīķi HPS was rejected and the counterclaim regarding establishment of a servitude on the 4.6 ha land parcel of the Applicant for the benefit of the Spīķi HPS was satisfied. After having examined the cassation claim of the Applicant, the Senate of the Supreme Court decided, on 19 December 2007, to leave the decision of the Kurzeme Regional Court unchanged.

3. The Applicant indicates that the principle of separation of powers included in Article 1 of the Satversme allows establishing servitudes only in the cases provided by law, whilst the Contested Norm allows a court, by means of a decision, to establish servitudes that are not provided for by law. Thus a court, by means of a judgment, can create new legal norms and act as a legislator; however this does not comply with Article 64 of the Satversme.

In the case under review, a court of general jurisdiction has established a servitude, the servient property of which is the flooded land of the Applicant and the dominant property of which is the Spīķi HPS. There are no two entities of real estate regarding the established servitude, as it is required by Section 1141 of the Civil Law. The Spīķi HPS is not a real estate, but an aggregation of property. In this aggregation of property only one of the component parts, namely, the land and buildings can be regarded as real estate. Turbines of the HPS and generated power are not real estate. Thus the storage pond located on the land parcel of the Applicant serves for movable property, rather than for real estate.

It has been indicated in the constitutional claim that Article 105 of the Satversme permits restricting property rights only in accordance with law. A court cannot restrict property rights unless it is provided by law.

4. The institution that passed the contested act, the Saeima of the Republic of Latvia (hereinafter – the Saeima) does not agree with the opinion of the Applicant and holds that the Contested Norm complies with Article 105 of the Satversme.

Property rights are being restricted by means of a servitude, whilst the Contested Norm provides for one of the ways of establishing a servitude. Consequently, it can be concluded that the Contested Norm provides for procedure of

restricting property rights established in Article 105 of the Satversme. Therefore it is only necessary to assess whether the procedure established by the Contested Norm complies with the norm included into the third sentence of Article 105 of the Satversme, according to which “property rights may be restricted only in accordance with law”.

The Saeima concludes that neither Article 105 of the Satversme, nor the second sentence of the first part of Section 1 (Protocol No. 1) of the European Convention on Human Rights and Fundamental Freedoms (hereinafter – the Convention) provide for an obligatory requirement to establish any restriction of property rights only by law or an agreement.

The Saeima does not agree with the opinion of the Applicant that the Court, when establishing servitudes, creates laws. Functioning of courts does not confine itself to mechanic application of laws. Courts must carry out an in-depth analysis of legal and factual circumstances and apply legal principles, including the principle of justice. In a law-governed state, the limits of the competence of courts are broad and it is based on rights in general rather than on a particular law. Moreover, establishing of certain servitudes should not be the task of the legislator. The legislator must only provide for general instruction and elaborate an adequate procedure.

In the result of application of the Contested Norm, the court does not pass generally binding normative enactments because establishing of servitudes by means of a judgment for the benefit of a certain person or real estate does not include any peculiarities of adoption of legal norms.

The Saeima indicates that the Contested Norm does not confer the rights to act unlawfully. If the person involved in proceedings holds that the court has misapplied legal norms or has not fully established the factual circumstances of the case, he or she has the right to appeal against the decision of the court.

5. The Ministry of Justice, the Human Rights Bureau of the Republic of Latvia (hereinafter – the Human Rights Bureau) and a sworn advocate Erlens Kalniņš were asked to provide their opinion in the frameworks of the case under review.

6. The Ministry of Justice indicates that the Contested Norm complies with Article 105 of the Satversme.

There is no doubt that a servitude is regarded as a restriction of property rights. The duty of the State is to select a competent institution for making decisions in the cases when an owner of a real estate does not agree to establishing a servitude. A servitude established in such a way has a legitimate objective, namely, to ensure the rights and interests of other persons. If, for example, no servitude would be established for a real estate, it would occur that owners of an adjacent real estate cannot get to his or her property.

The legislator has made a reasonable and justified choice by providing in the Contested Norm a possibility to establish a servitude by means of a judgment of a court. If a servitude could be established only by means of an external normative enactment adopted for special purpose, such procedure would be ineffective and time-consuming.

The opinion of the Applicant that a court, when establishing a servitude, should not guide itself by a law is ungrounded. In the case under review, a court of general jurisdiction when establishing a servitude has guided itself by the norms of the Civil Law. The statement of the Applicant that the HPS is a movable property and therefore there are no two real estates in the real servitude established by the court is neither justified. The dominant property is said to be the Spīķi HPS which includes buildings and the land.

The Ministry of Justice holds that a court of general jurisdiction, when establishing a servitude, must assess whether the restriction of property rights has a legitimate objective and whether the particular restriction is proportionate with the objective to be achieved. In the case under review, the court of general jurisdiction has carried out such assessment and admitted that the benefit that the inhabitants gain from the Spīķi HPS is greater than the loss that the Applicant incurs because of the restriction of property rights.

7. The Human Rights Bureau indicates that a servitude restricts the rights of the owner to use his or her own property. Since a servitude restricts owner's property

rights, it can be concluded that the Contested Norm, too, which provides for the procedure of establishing servitudes, restricts the property rights of a person.

The Human Rights Bureau emphasizes that observing what has been established in the second part of Article 1 (Protocol No. 1) of the Convention, the rights to property can be restricted according to law taking into consideration general interests.

In order to establish compliance of the Contested Norm with the third sentence of Article 105 of the Satversme, it is necessary not only to assess whether the property rights have been restricted in accordance with law, but also to find out the legitimate objective and establish compliance with the principle of proportionality.

As the Human Rights Bureau has indicated, the norm included in the third sentence of Article 105 of the Satversme implies that property rights can be restricted only according to such procedure and at the extent that is provided by law; moreover, they cannot be restricted arbitrarily. The procedure established in the Contested Norm is clear enough for everyone to understand that a court, observing procedures laid down in normative enactments, is authorized to establish a servitude by means of a judgment. Consequently, restriction of property rights has been established by law.

The restriction of property rights established in the Contested Norm has a legitimate objective, namely, protection of the rights of other persons. Since persons are not always able to agree on establishing of servitudes, the legislator has provided for a possibility to establish a servitude by means of a court judgment and authorizing the court to assess the necessity and area of a servitude in accordance with what has been established in normative enactments.

Since a court judgment is an individual ruling that solves disputes between persons and is adopted for the benefit of any of the participants of proceedings, the Contested Norm has been applied in order to reach the legitimate objective. The Human Rights bureau also indicates that, taking into account the civil law system of Latvia, there is no other more lenient measure that would permit reaching the legitimate objective of the restriction of rights provided for in the Contested Norm.

When assessing whether the benefit that the society gains is greater than the loss incurred by the rights and legal interests of a person, it is necessary to take into account the fact that property rights are individual rights. The rights of one person to

property and the rights of another person to use the property meet in the framework of legal relations regarding servitudes. But the society needs such legal procedure that would balance the rights of persons. Therefore the Human Rights Bureau holds that harmonization of the rights of persons to property and the rights of other persons to use the property is the interest of the entire society, and the benefit that the society gains from such legal procedure is greater than the harm done to a person by restricting his property rights.

8. A sworn advocate Mr. Kalniņš indicates that the problems of legal nature that are related with interpretation and application of the Contested Norm, most probably testifies about its non-compliance with Article 105 of the Satversme.

If a servitude has been established by a court judgment, the court must respect the property rights of a person over the object. Therefore the court is allowed to establish a servitude only in the case of necessity. According to the case-law, a claim regarding establishing of a servitude shall be rejected if it is not established that a servitude is indeed indispensable for the dominant real estate.

Mr. Kalniņš indicates that the fact that according to the Civil Law it is also possible to establish such a servitude that is not clearly provided for by law is not the essence of the problem. Since the Civil Law does not provide a list of all kinds of real servitudes, it is also possible to establish other servitudes through fields or leading to buildings that are not explicitly provided for by the law and to which the general provisions of the Law regarding servitudes can be applied. The essence of the problem manifests itself through precise determination of the field of application of the Contested Norm.

When interpreting the Contested Norm, Mr. Kalniņš draws attention to several cases wherein servitudes can be established by means of a court judgment. First of all, when carrying out allocation of joint estate by means of litigation, it can occur that it is necessary to establish real servitudes on one parcel of the land for the benefit of the other parcel. Secondly, establishment of servitudes by means of a court judgment is possible in the case if the parties have concluded a legal deal regarding establishment of a servitude and an action is instituted regarding registration of a servitude in the Land Register.

In both abovementioned cases, registration of a servitude has a certain justification. At the same time, Mr. Kalniņš recognizes that in practice there also exist other cases when establishing a servitude under constraint can be necessary. It is testified not only by the case-law of the end of the 20th century and the beginning of the 21st century especially regarding establishment of a servitude, but also by the regulation included in separate special laws.

Although establishment of servitudes under constraint in separate cases can be justified, the legal regulation included in the Contested Norm and other norms of the Civil Law is not sufficient in order to balance opposite interests in each case. In order to regard the restriction of property rights caused by a servitude established under constraint as proportionate for the purpose of Article 105 of the Satversme, the Civil Law should include such legal regulation that would precisely determine the field of application of the Contested Norm, which would properly balance the opposite interests. Namely, it would be necessary not only to precisely establish cases in which an owner can demand establishment of a certain real servitude by means of litigation, but also to provide for the rights to compensation for the owner of the servient property.

The Constitutional Cour has concluded:

9. 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.”

When establishing the content of the basic rights established in the Satversme, it is necessary to take into consideration the international liabilities of Latvia in the field of human rights. International norms of human rights and the practice of application thereof at the level of constitutional law serves as an interpretative tool for establishing the content and extent of the fundamental rights and principles of a law-governed state insofar as it leads to limitation or restriction of the basic rights

established in the Satversme. The duty of the State to take into consideration the international liabilities in the field of human rights follow from Article 89 of the Satversme, which provides that the State shall recognize and protect fundamental human rights in accordance with this Constitutional, laws and international agreements binding upon Latvia. This article clearly indicates that the objective of the constitutional legislator was to ensure harmony of the norms of human rights with the norms of international human rights (*see: Judgment of 16 December 2008 by the Constitutional Court in the case No. 2008-09-0106, Para 4*).

Article 1 of Protocol 1 of the Convention Provides:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the rights of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payments of taxes or other contributions or penalties. “

Article 105 of the Satversme, like Article 1 of Protocol 1 of the Convention, provides for both, peaceful enjoyment of property rights and the rights of the State to restrict the use of property in accordance with the general interest. Property rights can be restricted if the restrictions are justified, i.e. if they have been established in accordance with law, they have a legitimate objective and are proportionate (*see: Judgment of 20 May 2002 by the Constitutional Court in the case No. 2002-01-03*).

10. The rights to property established in the first sentence of Article 105 of the Satversme include the rights of the owner to use his or her property in such way to gain as great economic benefit as possible (*see: Judgment of 26 April 2007 by the Constitutional Court in the case No. 2006-38-03*). Section 927 of the Civil law also provides that property as full ruling over an object comprise the rights to use it, obtain fruits and all benefits of it.

Section 1130 of the Civil Law provides: “A servitude is such right in respect of property of another as restricts ownership rights regarding it, with respect to

utilization, for the benefit of a certain person or a certain parcel of land.” According to Article 1131, a servitude established for the benefit of a specific natural or legal person is a personal servitude; a servitude established for the benefit of specific immovable property, however, so that it is enjoyed by each successive owner, is a real servitude. As to legal relations of a servitude, they distinguish between dominant and servient objects, for the use of which there are restrictions provided. The right of the owner of the dominant object confers him or her certain rights to the servient object and thus restricts the rights of the owner of the servient object (*see: Rozenfelds J. Lietu tiesības. 3. labotais un papildinātais izdevums. Rīga: Zvaigzne ABC, 2004, pp. 155*). Consequently, it can be concluded that the property rights of a person are restricted after establishing a servitude.

As it follows from the Contested Norm, one of the kinds of establishing a servitude is establishing thereof by means of a judgment. Consequently, the Contested Norm provides for the procedure, according to which restriction of property rights of a person is established. It can be concluded that the Contested Norm restricts property rights of those persons whose real estates are encumbered by a servitude established by a court judgment.

A court of general jurisdiction, taking advantage of its competence that is provided to it by the Contested Norm, has established a real servitude by thus encumbering the real estate of the Applicant.

Consequently, the Contested Norm restricts the rights to property established in Article 105 of the Satversme.

11. In order to assess the compliance of the restriction included into the Contested norm with Article 105 of the Satversme, it is first of all necessary to establish whether the property rights restriction has been established for the Applicant in accordance with law, as it is provided by the third sentence of Section 105 of the Satversme.

11.1. As the European Court of Human Rights (hereinafter - the ECHR) has already indicated, the restriction has been established “in accordance with law” if it complies with the following criteria. First of all, the restriction must be established by the national law, secondly, the law must be available to the person and thirdly, it must

have a clear enough wording (*see: Judgment of the ECHR: The Sunday Times v The United Kingdom, judgment of 26 April 1979, Series A no. 30, para 49; Silver and others v The United Kingdom, judgment of 25 March 1983, Series A no. 61, para 86, 87, 88*).

In the case under review, there is no dispute about whether the Contested Norm has been adopted in accordance with a law adopted and proclaimed according to proper procedure and whether it has a clear enough wording for the addressee to understand his rights and duties.

11.2. The Applicant holds that the Contested Norm does not comply with the third sentence of Article 105 of the Satversme because it allows establishing for a restriction of rights by means of a court judgment, rather than in accordance with law.

The ECHR has indicated that the first and the most important requirement of Section 1 of Protocol 1 of the Convention is that every restriction of rights that is established by national institutions must be lawful (*see: Judgment of the ECHR: Iatridis v Greece, judgment of 25 March 1999, no. 31107/96, ECHR 1999-II, para 58; Skrzyński v Poland, judgment of 6 September 2007, no. 38672/02, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=38672/02&sessionid=17139593&skin=hudoc-en>*). On the other hand, the ECHR has not declared that only the legislator has the exclusive competence to restrict the property rights of a person. Such rights are also conferred to other national institutions, including courts provided that the principle of lawfulness is observed. It is also indicated in the scientific literature that property rights restriction complies with Article 1 of Protocol 1 of the Convention not only in the case if it has been provided by law but also in the cases when property rights are being restricted based on a law (*see: Grabenwarter C. Europäische Menschenrechtskonvention. München, C. H. Beck, 2005, S. 365, 369, 370*).

Consequently, it is possible to agree with what has been indicated by the Saeima and the Human Rights Bureau that neither Article 105 of the Satversme, nor Article 1 of Protocol 1 of the Convention provides that property rights can only be restricted by law. Property rights can be restricted according to such procedure and to such extent that is established by law. In addition, they cannot be restricted

deliberately. A competent institution and procedure of decision making that would guarantee protection of lawful interests must be provided by law.

In the case under review, the legislator has determined a court as the competent institution that is authorized to restrict property rights of a person. A court is an independent institution that has the rights to establish property rights restrictions for a person, as well as to establish servitudes. Section 5 of the Law “On Judicial Power” provides that in civil matters, courts shall adjudicate a trial, adjudicate and decide at setting of the court matters concerning disputes, which are related to the protection of the civil rights, employment rights, family rights, and other rights and lawful interests of natural and legal persons.

By authorizing the court to establish servitudes, the legislator has provided for such procedure for restriction of property rights of a person, which guarantees lawfulness and excludes arbitrariness. This procedure is a legal procedure, wherein the court decides on establishing a servitude. The duty of the court is to hear out the parties involved, carry out factual analysis of the case and assess the necessity for establishing a servitude. When adjudicating a case regarding the necessity of the servitude, the court makes a judgment that must be lawful and well-founded as provided by Section 189 of the Civil Procedure Law. A court judgment is an enactment of legal norm application that creates no new legal norms. The opinion of the Applicant that the Contested Norm allows the court to establish servitudes by means of a judgment on its own initiative and by thus creating new legal norms is ungrounded.

Moreover, in Latvia, there exists a three-instance court system that ensures the possibility to appeal court judgments. An appellate instance court re-examines a case in its terms in the case if the participant of the case holds that the judgment of the first instance court is wrong. On the other hand, the participant of the case may ask a cassation instance court to assess correctness of application of material and procedural legal norms.

Consequently, it can be concluded that property rights restriction has been established in accordance with law.

12. The Constitutional Court must assess whether the restriction that has been established in the Contested Norm according to law has a legitimate objective.

Since a servitude is the right to a property of other person, property rights of one person confronts the rights of another person to use this property in the case of establishing a servitude.

The law provides for three ways, according to which servitudes can be established, namely, by law, by a court judgment, as well as by a contract or a will. Since persons are not always able to agree on establishing of servitudes, the legislator has provided that dispute in such a case shall be solved by the court. Thus persons are protected in those cases when it is necessary to establish a servitude for the benefit of a person or his or her property. If the Contested Norm did not exist, the rights of these persons would not be protected. They could use their property only if the owner of the servant object would agree.

Consequently, the property rights restriction included into the Contested Norm has a legitimate objective - protection of the rights of other persons.

13. In order to assess whether the restriction established in the Contested Norm is proportionate with the legitimate objective, it is necessary to investigate whether in the cases, when a servitude is being established by means of a court judgment, the Contested Norm ensures a reasonable balance between the rights of the owner of the servient object to peacefully enjoy his property and the rights of other persons.

Therefore, in order to assess whether the restriction included into the Contested Norm complies with the principle of proportionality, it is necessary to assess:

- 1) whether the Contested Norm is fit for reaching the legitimate objective;
- 2) whether the Contested Norm is necessary, i.e. can the objective be reached by means of other more lenient measures that would restrict the rights of a person at a lesser extent;
- 3) whether the benefit gained by the society is greater than the loss done to the rights and legal interests of a person.

14. First of all, the Constitutional Court must investigate whether the Contested Norm is fit for reaching the legitimate objective, which is protection of the rights of other persons.

The Contested Norm is being applied in the cases when persons cannot come to an agreement regarding establishment of a servitude and the size thereof. As it has already been indicated, a court is the institution that is competent to solve disputes regarding the rights to use property of other persons including cases on establishment of servitudes. According to the fourth part of Section 16 of the Law “On Judicial Power”, a court judgment that has come into lawful effect, has the strength of a law, it is binding on everyone, and it is treated with the same respect as a law. Thus the binding force of a court judgment is ensured. Also in the case of establishing of a servitude, the court renders a judgment that has the strength of a law and must be observed by both owners, that of a servient property and that of a dominant property.

As it has been justly indicated by the Human Rights Bureau, a law is usually adopted as repeatedly applicable and generally binding instructions that regulate an infinite number of cases. It would not be logic and correct if establishment of each servitude would be established by law. A court is able to assess circumstances of a particular case better than the legislator and thus solve the dispute regarding establishment of a servitude.

Consequently, the Contested Norm is fit for reaching the legitimate objective.

15. Since the Contested Norm is fit for reaching the legitimate objective, the Constitutional Court must now assess whether there exist any other more lenient measures for reaching the legitimate objective.

15.1. A court is able to assess circumstances of civil disputes better than the legislator and thus can find out whether it is necessary to establish a servitude in each particular case. A court is the institution that can better establish the kind and size of the servitude to be established.

15.2. It can be concluded from the constitutional claim that the applicant holds that such regulation that would allow the court to establish the kinds of servitudes that are not *expressis verbis* provided for by law, as well as would enumerate the cases

when it is allowed to establish servitudes would be a more lenient measure for reaching the legitimate objective.

Mr. Kalniņš has indicated in his opinion submitted to the Constitutional Court that it would be preferable to include such legal regulation into the Civil Law that would precisely provide for the area of application of the Contested Norm and allow balancing of the opposite interests (*see: case materials, pp. 74*).

The Constitutional Court agrees with the opinion of Mr. Kalniņš, that the Civil Law contains no exhaustive list of kinds of real servitudes. Such conclusion follows from both, provisions of the Civil Law that regulate real servitudes, and from conclusions made in the scientific literature (*see: Rozenfelds J. Lietu tiesības, pp. 157; Sinaiskis V. Latvijas civiltiesību apskats. Lietu tiesības. Saistību tiesības. Rīga: Latvijas Juristu biedrība, 1996, pp. 82*).

Despite the fact that the Civil Law does not precisely provide for the cases when a servitude must be established does not regulates all possible kinds of real servitudes, it does not manifests that the Contested Norm is incomplete or anti-constitutional. The task of the legislator is not to mention in a law all possible kinds of real servitudes and all cases when a court is authorized to establish a servitude. Therefore factual circumstances of each case may differ, as well as servitudes to be established may be of different kind and size.

15.3. Meanwhile the Constitutional Court indicatest that the are of authority of the Constitutioanl Court is established in Article 85 of the Satversma and Article 1 and 16 of the Constitutional Court Law. Assessment of application of norms does nto fall withing the scope of responsibility of the Constitutional Court. Consequently, the Constitutional Court is not entitled to reassess court decisions adopted in the framweorks of civil procedure. Nether it is entitled to decine on whether the court of general jurisdiction, whjen examining a certain case, has appropriately observed material and procedural norms (*see: Judgment of 2 June 2008 by the Constitutional Court in the case No. 2007-22-01, Para 18.1*).

On the other hand, a court of general jurisdiction, when passing a judgment, must observe what has been established by law. A court, when establishing a servitude, is provided a broad freedom of action, however it is related with effecitive law and it must justly balance the opposite interests of the parties involved. When

balancing the interests of the parties, the court, as far as it is possible, must observe the rights of the owner of a servient property. This follows from the norms of Section 928 and Section 1132 of the Civil Law that include provisions regarding the scope of property rights and a servitude. A lenient approach to restriction of the rights of the owner of a servient property is particularly important in the cases when the owner of a servient property completely loses his property or a part thereof in the result of establishing a servitude.

Consequently, the Constitutional Court concludes that the Contested Norm is the most lenient measure for reaching the legitimate objective of the restriction included therein.

16. In order to establish whether the Contested Norm complies with the principle of proportionality, the Constitutional Court must assess whether the benefit that the society gains from the restriction of property rights of the Applicant is greater than the loss done to the rights and legal interests of a person.

The regulation included in the Contested Norm ensures legal procedure because, according to it a court becomes the institution that is authorized to establish servitudes by thus solving disputes regarding the use of the property of another person. As it has already been indicated, otherwise it would not be possible for a person participating in a civil dispute regarding the use of real estate to exercise his or her rights and interests protected by law. Therefore a court is the most appropriate institution for solving such disputes. The procedure established by law that provides for coordinating the different interests of different person complies with the general interest, and the benefit gained by the society from such procedure is greater than the loss done to a person by restricting his or her property rights.

Consequently, it can be concluded that the benefit that the society gains from the contested norm, is greater than the loss done to the rights and legal interests of a person.

17. Since the Contested Norm complies with the principle of proportionality, it does not contradict the property rights of a person as provided in Article 105 of the Satversme.

The Constitutional Court

based on Articles 30 – 32 of the Constitutional Court Law

holds:

Item 2 of Section 1231 of the Civil Law complies with Article 105 of the Satversme of the Republic of Latvia.

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