THE CONSTITUTIONAL COURT
OF THE REPUBLIC OF LATVIA

Riga, March 14, 2006

JUDGMENT
in the name of the Republic of Latvia

in matter No. 2005 -18 – 01

The Republic of Latvia Constitutional Court in the body of the Chairman of the Court session Aivars Endziņš and the justices Andrejs Lepse, Romāns Apsītis, Aija Branta, Ilma Čepāne, Juris Jelāgins and Gunārs Kūtris

on the basis of the constitutional claim by Oļegs Kožečenkovs

under Section 85 of the Republic of Latvia Satversme (Constitution) and Sections 16 (Item 1), 17 (Item 11 of the first Part), 192 and 281

in written proceedings at February 21, 2006 Court session reviewed the matter

”On the Compliance of the Words ”in Paragraph Three” Included in the Fourth Paragraph of Section 449 of the Civil Procedure Law and Nota Bene of Section 98 of the Land Book Law with Section 92 of the Republic of Latvia Satversme””.

The establishing part

1. On December 22, 1937 the Cabinet of Ministers adopted the Land Book Law. Section 98 of the Law anticipated that ”complaints against resolutions of the head of the Land Book section [..] and his/her actions shall be submitted to the Court Panel within two weeks after announcement of the resolution or after the day when the action to be appealed had taken place, considering the procedure for application of auxiliary complaints in the Civil Procedure Law”. In accordance with Nota Bene to Section 98 when appealing the Court Panel resolutions to the Senate, the security pay in the amount of forty lats shall be paid.

2. After the renewal of the Republic of Latvia independence on March 30, 1993 the Supreme Council adopted the Law "On the Renewal of Validity of December 22, 1937 Land Book Law and the Procedure of it Taking Effect". By this Law the Supreme Council renewed the land book system, existing before the Soviet occupation.

With small amendments, inter alia determining that the resolutions shall be passed by the judge of the Land Book section and not the head of it, the procedure of appealing the resolution of the judge of the Land Book section, determined on December 22, 1937 has been maintained. The valid Nota Bene to Section 98 of the Land Book Law establishes: "When appealing the Court Panel resolutions to the Senate, the security pay in the amount of forty lats shall be paid". An analogous regulation is incorporated also in the Fourth Paragraph of Section 449 of the Civil Procedure Law.

3. The submitter of the constitutional claim – Oļegs Kožečenkovs – requests to declare the legal norm, included in the Fourth Paragraph of Section 449 of the Civil Procedure Law and Nota Bene to Section 98 of the Land Book Law, which anticipates the duty of a person to pay the security pay in the amount of 40 lats when appealing the Court Panel resolutions to the Senate (henceforth – the impugned act) as unconformable with Section 92 of the Republic of Latvia Satversme (henceforth – the Satversme).

The submitter of the constitutional claim points out: Land Book sections are created for registration of real estate and fixing of the rights connected with it, namely, they keep public register. Even though Land Book sections institutionally belong to the judicial power, functionally they are ingredient part of the executive power, as they realize an administrative function – registration of real estate.

Even though for appealing resolutions and activities of the officials of the Land Book section civil procedure and not administrative procedure is determined, the submitter stresses that appealing the resolutions of the judge of the Land Book section on its essence is a complaint about the activity of a State institution and very close to administrative legal relations. Because of the above determination of a considerably higher payment for the possibility to appeal the court resolution to his mind cannot be considered as fair and conformable with Section 92 of the Satversme.

To his viewpoint by the impugned norm the legislator determines a disproportionately big security pay for appealing a court resolution and thus has substantially restricted access to the court to a person, who

holds that its interests are violated by the unlawful resolution by the State official – the judge of the Land Book section.

The submitter of the constitutional claim especially stresses that the Law does not anticipate the possibility of decreasing the amount of the security pay or exempting the person from the payment. In its turn the amount of the security pay determined by the impugned norm for eight times exceeds the State duty for the submission of appellation complaint, established in the Administrative Procedure Law.

The submitter of the constitutional claim points out that the legislator has already substantially restricted the resolutions, adopted by the Land Book section judge. The activity of any other official of the public register may be appealed under the procedure, determined in the Administrative Procedure Law. In difference from the administrative process the legislator has not anticipated the possibility of contesting the resolution of the Land Book section judge under the procedure of subordination, besides the possibility to review the claim of a person about the above resolution on its merit in two court instances has been also denied.

Thus, to the viewpoint of the submitter, determination of additional restrictions with the impugned norm shall not be considered as proportionate and conformable with Section 92 of the Satversme. He holds that the impugned norm anticipates an ungrounded burden for a person for realization of his right to appeal, which has not been substantiated by any rational reason.

The submitter of the constitutional claim also points out that the aim of the restriction to access to court, determined in the impugned norm is not understandable either. As there are not many cases, when the resolutions of the Land Book section judge are appealed, abolition of the impugned norm would increase the number of cases to be adjudicated by the Supreme Court Civil Cases Department of the Senate (henceforth – the Civil Cases Department) only by some dozen.

4. **The Saeima –** the institution, which has passed the impugned act – in its written reply points out that the impugned norm complies with Section 92 of the Satversme and requests the Constitutional Court to declare the claim as ungrounded and reject it.

   The Saeima explains that from the viewpoint of separation of State power functions all the activities, which are neither adjudication nor legislation, are the activities of the executive power. To establish belonging of a concrete activity to some of the functions of the State power one shall take into consideration the nature of the activities to be

carried out and not the institutional subordination of the institution, which carries out the activities. When entering real estates into the Land Book and fixing the rights, connected with them, the Land Book section judge acts within the sector of the State administration.

Even though the Land Book section judge, when taking the resolution on the issue on registration of the real estate or fixing the rights connected with it in the Land Book, acts in the sector of the State administration and his/her resolutions on their essence shall be regarded as administrative acts; the Saeima does not hold that the lawfulness of the Land Book section judge should be verified under the procedure established by the Administrative Procedure Law. The Saeima holds that Section 92 of the Satversme does not in any way regulate under what process this or that case shall be reviewed. Choice of the process for a category of certain cases is the freedom of action of the legislator, and the legislator – when realizing it- adopts the law of the respective process. The legislator experiences the right of determining the kind of the process in general as well as the right of establishing what cases shall be reviewed under this process.

However, freedom of action of the legislator in determining the process is not absolute, as the legislator has to take into account both – consideration of suitableness and the notional essence of the right to a fair court. The chosen kind of the process should allow to review the respective cases as adequately and efficiently as possible, embracing different procedural issues; besides, the chosen type of the process shall not deny the person the right to a fair court either on its essence or substantially restrict the possibility of a person to protect his/her rights.

Choice of the kind of the process to their mind cannot be connected with the amount of the State duty or other payment. In the same way the Saeima does not hold that realization of any function of the State administration should be subjected only to the control of administrative courts. In separate cases, when the activity of the State administration is closely connected with civil issues to be reviewed, it is more appropriate to assess lawfulness of such an activity under the civil procedure.

The Saeima recognizes that the duty of paying security pay, determined in the impugned norm, is the restriction of the rights of a person to a fair court. By this norm one element of the right to a fair court – the right to appeal to the court – has been restricted. However, the respective restriction has been determined to ensure adequate activity of the Civil Cases Department, unburdening it from reviewing ungrounded complaints. When canceling the restriction, determined in the impugned norm, activities of the Civil Cases Department would be burdened.

The Saeima stresses that the determined restriction is proportionate. As has been pointed out in the Saeima written reply, the aim of the security pay is to inflict a fine on a person, who submits ungrounded neighbouring complaint or a cassation claim. The Law does not anticipate the right of a judge to exempt a person from the payment of the security pay, determined in the impugned norm or decrease the amount of it. However, the Saeima holds that the above approach is correct because the whole amount of the security pay shall be paid or it shall not be paid at all.

The Saeima requests to take into consideration that the amount of security pay, determined in the impugned norm, if compared with the Land Book duty, shall be assessed as small. Besides, it shall be also taken into consideration that security pay for appealing the Civil Case Department after the Supreme Court Civil Case Panel (henceforth – the Court Panel) has already reviewed the complaint about the resolution of the judge of the Land Book section. For the submission of a complaint to the Court Panel neither the security pay nor any other payment is anticipated. The Saeima also stresses that the persons, involved in matters of appealing the resolution of the judge of the Land Book section to the mind of the legislator cannot be needy.

The Saeima points out that by the restriction, determined in the impugned norm, procedural economy and adequate activity of the court is promoted. Besides, by the impugned norm interests of other persons, which might be violated in the result of aimless litigation, are protected.

5. **The Republic of Latvia Supreme Court** (henceforth – the Supreme Court) has expressed the viewpoint that the impugned norm complies with Section 92 of the Satversme.

The Supreme Court stresses that Section 98 of the Land Book Law anticipates the possibility of submitting complaints against resolutions of the judge of the Land Book section to the Court Panel. As in this case no State duty, security pay or any other payment has been determined, the Law ensures the protection of the right of a person in an independent court.

The Court states that the security pay is anticipated in cases, when the person is not satisfied with the resolution of the Court Panel and the person appeals the resolution to the Civil Cases Department. The Supreme Court points out that in case, when the Civil Cases Department satisfies the neighbouring complaint of the person about the resolution of the Court Panel, the security pay is refunded. The person loses the security pay only in case if the neighbouring complaint is declared ungrounded.

Security pay is envisaged also in other categories of civil matters, when cassation complaint or neighbouring complaint in cases envisaged in Section 449 (the second Paragraph) of the Civil Procedure Law is submitted to Civil Cases Department. The Supreme Court stresses: if the Constitutional Court declares the impugned norm as unconformable with Section 92 of the Satversme, the same conclusion shall refer also to other cases, mentioned in the Civil Procedure Law in which payment of the security pay for appealing at the Civil Cases Department is established.

The Supreme Court also points out that the resolutions of the judge of the Land Book Section cannot be regarded as administrative acts and it would be impossible to review the complaints on these resolutions under the administrative procedure.

6. **The State Human Rights Bureau** points out that the impugned norm does not comply with Section 92 of the Satversme.

The State Human Rights Bureau stresses that the right to a fair court means also the right to free access to court. The impugned norm indirectly restricts one element of the right to a fair court, namely, access of a person to a court. The Law does not anticipate the right of the court or the judge to exempt a person from paying the security pay or decrease the amount of it.

The aim of the impugned norm, as the State Human Rights Bureau points out, might be partly compensation of State expenses, needed for ensurance of court activity, as well as preventing of persons from appealing to the court with ungrounded claims. The State Human Rights Bureau holds that the restriction, determined by the impugned norm, has a legitimate aim.

For justification of the restriction it has to comply with the principle of proportionality, namely, balance between the legitimate aim on the one hand and the access of the person to court on the other hand shall be ensured. The State Human Rights Bureau points out that, when assessing conformity of the impugned norm with the principle of proportionality, it is necessary to take into consideration the state socio-economic situation of the State. As the minimum wage determined in the State is only eighty lats, the security pay, determined in the impugned norm is a comparatively big sum of money.

The Bureau stresses that one has also to take into consideration the fact that the legislator has not anticipated the possibility of exempting the person from the security pay or decreasing the amount of it. Thus, when applying the impugned norms, there is no possibility of ensuring a more

considerate application of the restriction, established in the impugned norm.

The measures, chosen by the legislator on the whole are adequate for reaching the legitimate aim; however, they create substantial restrictions to separate persons for realization of their procedural rights. The State Human Rights Bureau stresses, that there are other, more considerate means for reaching the legitimate aim, for example, determination of a smaller amount of the security pay.

7. **The Board of Sworn Advocates of Latvia** holds that the impugned norm complies with Section 92 of the Satversme.

The Board of the Sworn Advocates of Latvia expresses the viewpoint that the amount of the security pay, determined for appealing the resolution of the judge of the Land Book section, cannot be compared with the amount of the State duty to be paid in administrative cases. It is important to dissociate the notions ”security pay” and the ”State duty” as they are different.

In the same way it shall also be taken into consideration that resolutions of the judge of the Land Book section refer to specific issues, which are connected with the rights to real property, thus – they refer also to the issues of person’s property position.

The concluding part

8. Section 92 of the Satversme determines: ”Everyone has the right to defend their rights and lawful interests in a fair court. Everyone shall be presumed innocent until their guilt has been established in accordance with law. Everyone, where their rights are violated without basis, has a right to commensurate compensation. Everyone has a right to the assistance of counsel”.

Even though the constitutional complaint includes the claim on the compliance of the impugned norm with the whole 92 Section, however, it follows from the constitutional complaint that the conformity of the impugned norm with only the first sentence of Section 92 of the Satversme, which guarantees the right of every person to defend their rights and lawful interests in a fair court, shall be assessed.

The first sentence of Section 92 of the Satversme includes both the institutional aspect – the court shall be fair, and the procedural aspect – everybody has the right to free access to court. Both aspects are inseparably connected: fairness of the court would be of no importance,

if access to court were not ensured; and vice versa – access to the court would be unnecessary, if fairness of the court were not ensured.

9. The impugned norm determines that when appealing the Court Panel resolutions to the Civil Cases Department (the Senate), the person shall pay the security pay in the amount of forty lats.

The right to a fair court means also the right to free access to the court (*see the Constitutional Court November 6, 2003 Judgment in case No. 2003-10-01; Item 1 of the concluding part).* Both in the Saeima written reply and the viewpoint of the State Human Rights Bureau it is reasonably pointed out that the right of a person to free access to court is restricted by the impugned norm (*sk. lietas materiālu 36., 77. un 122.-123.lpp; see materials in the matter, pp. 36, 77 and 122-123).* The duty of paying security pay for the submission of a neighbouring complaint shall be considered as the restriction of the right of a person to free access to court.

As the right of a person to free access to court is included in the first sentence of Section 92 of the Satversme, restriction of the fundamental rights, established by the impugned norm shall be assessed.

10. The right to a fair court is one of the most significant rights of a person (*see: the Constitutional Court October 6, 2003 Judgment in case No. 2003-08-01; Item 1 of the concluding part).* Therefore restrictions to this right of a person shall be determined in the most indispensable cases.

The above conclusion is substantiated by the fact that the protection of fundamental rights of a person is one of the most significant obligations of a law-governed state. The State shall ensure efficient protection to any person, whose rights or legitimate interests have been violated (*see: the Constitutional Court December 5, 2001 Judgment in case No. 2001-07-0103; Item 1 of the concluding part).* Ensurance of the right of a person to a fair court is the most important measure for reaching the aim.

11. Fundamental rights of a person, also the right to appeal to the court, may be restricted only in cases, determined by the Satversme, if the protection of significant public interests requires it and if the principle of proportionality is observed.

Section 86 of the Satversme determines that ”decisions in court proceedings may be made only by bodies upon whom jurisdiction regarding such has been conferred by law, and only in accordance with procedures provided for by law”. When interpreting Section 86 of the Satversme as read together with the first sentence of Section 92 of the

Satversme it can be concluded that the right to appeal to the court may be restricted if this restriction has been provided for by law, has a legitimate aim and the restriction is proportionate to the legitimate aim (*see e.g.: the Constitutional Court June 27, 2003 Judgment in case No. 2003-04-01; Item 1.2. of the concluding part).*

12. The impugned norm is incorporated in both – Nota Bene to Section 98 of the Land Book Law and in Section 449 (the fourth Paragraph) of the Civil Procedure Law.

As the impugned norm, which restricts the fundamental rights, anticipated in the first sentence of Section 92 of the Satversme, is provided for by the law, adopted under the established procedure, which has been promulgated under the procedure determined by the Satversme, there is no doubt about the fact that restriction of fundamental rights has been determined by the law.
Thus restriction of the fundamental rights has been determined by law.

13. 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 the Constitutional Court December 22, 2005 Judgment in case No. 2005-19-01; Item 9).*

13.1. In the Saeima written reply it is pointed out that **the legitimate aim,** established by the impugned norm, **is the ensurance of appropriate activity of the Civil Cases Department;** as by canceling the restriction, determined in the impugned norm, the protection of interests of other persons and activity of the Civil Cases Department would be overburdened (*sk. lietas materiālu 38., 79. lpp.; see pp. 38 and 79 of the materials in the matter).*

The Civil Cases Department is a court of cassation instance in civil matters. A substantial feature of the cassation institute in Latvia is like this: in the cassation instance the conclusive importance does not lie in the interests of the parties, which are sufficiently protected when reviewing the first two court instances, but in legal public interests. Only *quaestiones iuris*- i.e. issues on the rightness of appliance of material and procedural norms – are reviewed by the cassation instance (*see the Constitutional Court June 27, 2003 Judgment in case No. 2003-04-01; Item 2.1. of the concluding part).*

In order to ensure that the Civil Cases Department is able to duly carry out its activities, namely, to take decisions on issues of application of material and procedural norms, the legislator shall in

the best possible way unburden it from reviewing of ungrounded complaints. When assessing the competence of the Civil Cases Department one shall take into consideration the importance of the cassation instance.

If the legislator has resolved to determine to the Civil Cases Department not only reviewing of the cassation matters, but also reviewing of neighbouring complaints on the resolutions adopted under the procedure established in Section 98 of the Land Book Law, then the legislator shall determine the above competence in such a way that it does not burden and needlessly load the activities of the Civil Cases Department and thus does not negatively influence realization of the cassation function.

13.2. As has reasonably been expressed in the Saeima written reply, the above duty of ensuring due activity of the Civil Cases Department complies with the interests of other persons. The Civil Cases Department has to principally give interpretation of material and procedural rights, which may substantially influence the rights of many persons at different court processes. Thus it is important that the Civil Cases Department may review matters, in which just the issue on interpretation of legal norms in disputable; as well as it shall be protected from aimless litigation. The restriction, established in the impugned norm, has been determined to deter separate persons form appealing to the court with groundless claims (*sk. lietas materiālu 123. lpp.; see: p. 123 of the materials in the matter).*

13.3. One may agree with the viewpoint of the State Human Rights Bureau that the restriction determined in the impugned norm partly compensates the State expenses, which are needed for the maintenance of court activities (*sk. lietas materiālu 123. lpp.; see p. 123 of the materials in the matter);* however there is a noteworthy difference between the State duty, anticipated for such aim and the security pay anticipated for quite another aim.

Any payment, determined in the court process for the submission of a claim or a complaint serves not only as a certain kind of a barrier to avert submission of groundless claims or complaints but also partially allows covering of the expenses of court maintenance (*see the Constitutional Court January 4, 2005 Judgment in the matter No. 2004-16-01; Item 8.5).*

Thus the restriction of the fundamental rights has a legitimate aim.

14. The principle of proportionality requires observation of a proportionate balance between public interests and the interests of a person, if the public power restricts the legitimate interests and rights of a person. To assess whether the measures, chosen by the legislator are adequate for reaching the legitimate aim, whether there are not more proportionate measures for reaching the aim and whether the activity of the legislator is proportionate and adequate. If, after assessing the legal norm, it is recognized that it does not comply with even one of the above criteria, then it shall be considered as not being in conformity with the principles of proportionality and illegitimate (*see the Constitutional Court March 19, 2002 Judgment in case No. 2001-12-02; Item 3.1. of the concluding part).*

15. The legislator has determined that payment of 40 lats for being able to appeal the resolution of the Court Panel to the Civil Cases Department shall serve as a measure for reaching the legitimate aim.

15.1. In Civil Procedure Law the security pay is interpreted not as the expenses of litigation but more than a penalty for groundlessly submitted complaint to the Civil Cases Department (*sk.: Bukovskis V. Civilprocesa mācību grāmata. Rīga: autora izdevums, 1933, 416. lpp.; see: Bukovskis V. Textbook on Proceedings. Riga: edition of the author, 1933, p.416).* It means that the security pay, which has been paid when submitting a complaint to the Civil Cases Department, will be repaid to the person, if the Civil Cases Department satisfies the complaint of the person. In its turn, if the Civil Cases Department rejects the complaint, security pay is not repaid. Thus the legislator, when determining the duty of paying security pay, has tried to ensure that persons shall submit well-considered and motivated complaints in cases, when there are different possibilities of interpretation of the law to be applied; not only to continue the commenced litigation, if it can be clearly seen that the person does not have noteworthy arguments, regarding the fact of how the error of the Court Panel resolution was expressed.

15.2. To assess the suitability of the measure determined in the impugned norm for reaching the legitimate aim it is necessary to additionally take into consideration also the whole procedure of appealing the resolution of the judge of the Land Book section.

First of all, for submission of the complaint to the Court Panel no obligation of paying a State duty or a security pay has been determined as it is determined in the other categories of civil cases. Thus free of charge court control over the legality of the resolution of the judge of the Land Book section is ensured for a person.

Secondly, when elaborating the Land Book Law the legislator has especially tried to achieve that all the disputes on the resolutions of the judge of the Land Book section shall be settled already by the Court Panel. Because of the above reason an important reform was realized, namely, one common appellate instance for all Land Book sections was created.

The Chairman of the Rīga-Valmiera Land Book section Jānis Gobziņš in his commentary on the Land Book Law wrote: ”This reform was more than needed. Up to the present moment for 11 Latvian Land Book sections there were altogether 4 courts of the second instance (regional courts) […] Under such conditions one could not speak about uniformity of adjudicating Land Book cases, as the practice of separate regional courts was not and could not be equivalent. Inconveniences, caused by such a situation, were felt by persons, who had to conduct recording matters in several Land Book sections. Concentration of Land Book cases in one court was a necessity. The Senate supervises correct application and uniform realization of the law at all the State court institutions; but – as concerns Land Book cases, i.e. specific cases – it is necessary to achieve uniformity and equality already in the second instance, as a comparatively small number of cases reaches the Senate. This reform was demanded by the life itself” (*Zemesgrāmatu likums. Likuma teksts ar paskaidrojumiem. Sastādījis J.Gobziņš; The Land Book Law. The text of the Law with explanations. Compiled by J.Gobziņš// Rīga: A.-S. ”Zemnieka Domas”, 1938, 56.lpp.).*

In accordance with the aim of the reform of appealing the resolution of the judge of the Land Book section all disputes on the lawfulness of the judge of the Land Book section resolution shall be solved already at the Court Panel. The legislator has anticipated also the right of a person to submit a neighbouring complaint on the Court Panel decision to the Civil Cases Department, however, the aim of the legislator has not been to load the Civil Cases Department with review of evidently groundless complaints. Therefore the basis for submission of neighbouring claims might be a potential error in the application of a legal norm or the appearing of a new *quaestiones iuris.*

It is necessary to take into consideration that restrictions to submission of neighbouring complaints have not been directly determined, anticipating such or similar bases for the submission of complaints in the *expressis verbis* legal norm. The legislator leaves the assessment of the validity of the neighbouring complaint to be submitted to the free choice of a person; only establishing that in

case of a groundless complaint the person shall lose the paid security pay in the amount of 40 lats.

Thirdly, an unfavorable decision of the judge of the Land Book section does not establish *res iudicata* to a person, namely, the person, by eliminating the faults, pointed out in the resolution of the judge of the Land Book section, may submit the registration request anew.

15.3. The European Court of Human Rights (henceforth – ECHR) has conceded that determination of different payments is a suitable way of restricting the right of a person to address the court as far as the principle of proportionality has been observed (*see e.g. ECHR Judgment in case "Tolstoy Miloslavsky v. United Kingdom" §61).* As concerns the court of cassation instance, ECHR allows greater formalism and determination of restrictions (*see ECHR Judgment in case "Levages Prestations Services v. France" §48).*

Thus determination of the security pay in the impugned norm is an appropriate measure for reaching the legitimate aim.

16. The submitter of the constitutional claim has pointed out that, when assessing the restriction, established in the impugned norm, one shall take into consideration the State duty for the appellate complaint determined in the Administrative Procedure Law, as well as the circumstance that the Administrative Procedure Law does not anticipate State duty or security pay for the submission of the cassation complaint, as the resolutions of the judge of the Land Book section on their essence shall be considered as administrative acts.

16.1. In accordance with Section 42.1. of the Law "On Judicial Power" for the supervision of the Land Registers, regional courts shall have Land Registry offices. Land Registry offices are judicial institutions and the judicial status of judges of these sections shall be equivalent to that of district (city) judges. However, the circumstance that the Land Book sections are judicial institutions in itself does not mean that the judges of these sections adjudicate matters, namely, that their decisions, which are drawn up as court decisions shall be regarded as such also on their essence.

As the Saeima has reasonably pointed out in its written reply, to establish what function of the State power is carried out by the judges of the Land Book section when registering real estates and fixing the rights, connected with them in Land Books, one shall take into consideration the nature of the activity to be carried out but not the institutional affiliation of the judges of Land Book sections to a

certain state power (*sk. lietas materiālu 32.-33., 74. lpp.; see pp. 32-33, 74 of the materials in the matter).*

The Administrative Cases Department of the Supreme Court Senate in its practice has concluded that ”regarding the control of the judicial power over the activities of the executive power the notion ”executive power”, mentioned in Section 2 of the Administrative Procedure Law, shall be understood functionally and not institutionally. The functions of the executive power are all the functions, which are neither the functions of the legislative (i.e. passing of external normative acts of any level) nor the judicial (i.e. adjudication of a matter) power. […] Decisions and actual activities, which are connected with realization of State administration functions by the institutions of judicial power and their officials, are not withdrawn from the court control” (*sk. Par prokurora lēmuma pārsūdzēšanu. Augstākās tiesas Senāta Administratīvo lietu departamenta 2004. gada 9. marta lēmums lietā No. SKA-39; see: On appealing the resolution of the procurator. Administrative Cases Department of the Supreme Court Senate March 9, 2004 Judgment in case No.SKA-39// Jurista Vārds, No.17 (322), May 11, 2004, p. 23).*

In the legal literature it has with good reason been pointed out that adjudication of the matter (court proceedings) means solution of the dispute in a contradistiction process between two and more parties on the basis of legal norms (*sk. Levits E. Administratīvā procesa likuma 2. panta komentārs// Levits E. Rakstu krājums administratīvajiem tiesnešiem. Rīga: Publisko tiesību institūts, 2003, 157. lpp.; see Levits E. A Commentary on Section 2 of the Administrative Procedure Law// Levits E. Collection of Articles for administrative judges. Riga: The Institute of Public Rights, 2003, p. 157).* In the practice of the administrative courts the principle that the performance of the proceedings is mainly characterized by observance of contradistinction process is formulated. Namely, that adjudication of a concrete matter on its essence takes place in a process, in which two parties with adverse interests participate; in its turn the final resolution is made by an independent arbitrator – the court. As soon as the institutions of the judicial power adopt the resolution on its essence in a process, in which observation of contradistinction principle is not envisaged, it no longer is adjudication of the matter, but the activity of State administration; for example, the decision of the district (city) court judge about imposing of administrative penalty under the procedure of Section 213 of the Latvian Administrative Misdemeanor Code (*sk. piemēram, Administratīvās apgabaltiesas 2004. gada 23. augusta sprieduma lietā No. 143/AA751-04/4 9.-10. punktu, lietas materiālu*

95.-96.lpp; see for example the Administrative Regional Court August 23, 2004 Judgment in case No. 143/AA751-04/4, Items 9-10, pp.95-96 of the materials in the matter).

The judge of the Land Book section does not adopt the resolution on the registration of the real estate or fixing the rights connected with the real estate in the Land Book under the procedure of contradistinction process. Thus the Saeima has reasonably pointed out that the judge of the Land Book section, when adopting resolutions on registration of the real estate in the Land Book or fixing of the rights, connected with real estate, acts within the sector of State administration, even though this activity creates civil effects. Such a resolution of the judge of the Land Book section, even though it is drawn up as a court judgment (decision of the judge) on its essence is an administrative act (*sk. lietas materiālu 33, 74. lpp.; see pp. 33, 74 of the materials in the matter).*

16.2. However, the circumstance that these decisions of the judge of the Land Book section are regarded as administrative acts does not mean that the procedure of appealing against them shall obligatory be determined in the norms of the Administrative Procedure Law.

One may agree to the viewpoint, expressed by the Saeima, that the first sentence of Section 92 of the Satversme does not in any way regulate the procedure under which process (administrative process, civil process or criminal process) a case shall be reviewed. The legislator, when adopting the laws of the respective processes, experiences freedom of action to determine the process in general as well as what matters shall be reviewed under the procedure of a concrete process.

However, the freedom of action of the legislator is not absolute; namely, its boundaries are determined by efficiency considerations and the essence of the right to a fair court. The chosen kind of the process shall allow review of the concrete case as accordingly and efficiently as possible, embracing very many procedural issues (for example, initiating of proceedings, burden of proof, court specialization and the capacity to adjudicate such matters, the possibility of applying the protection of the secondment court). It is also necessary to take into consideration that the kind of the process, in which respective cases are reviewed, shall not deny a person the right to a fair court on its essence or substantially restrict the right of a person to protect his/her rights. Thus, for example, review of criminal issues under the procedure of civil law shall not be permissible (*sk. lietas materiālu 34., 75.-76. lpp.; see pp. 34, 75-76 of the materials in the matter).*

16.3. The legislator may determine different procedure for appealing the activities of the State administration, taking into consideration efficiency considerations. The legislator may determine that the legality and efficiency of an administrative act shall be assessed in three instances of the administrative court, as it is in majority of cases. However, the legislator may decrease the number of instances [for example when determining that the decisions by the district (city) court judges on imposing of an administrative penalty under the procedure of Section 213 of the Latvian Administration Misdemeanor Code shall be appealed to the Administrative Regional Court; or that the legality of the Minister of the Interior decision on inclusion of a person in the list of unwelcome persons shall be assessed only by the Administrative Cases Department of the Supreme Court Senate]. In the same way the first sentence of Section 92 of the Satversme does not prohibit the legislator to determine that assessment of legality of activities by a certain State administration department shall take place under the procedure of another court process (for example, the Citizenship Law determines the specific procedure for deprivation of citizenship and control of its legality).

Thus it is admissible that person's complaints against the resolutions of the judge of the Land Book section are reviewed by the Court Panel under the civil procedure and not by administrative courts under the administrative procedure. Saeima even in particular stresses that disputes about the legality of the decision taken by officials of public register, including the judges of the Land Book section, which create civil effects, shall be reviewed under the civil procedure; because, to assess the resolution by the official of public register the court shall assess also civil issues and has to be competent in the sector (*sk. lietas materiālu 35., 76. lpp.; see pp. 35, 76 of the materials in the matter).*

As a specific procedure is determined for the assessment of legality of the resolution by the judge of the Land Book section and this procedure is not at variance with the first sentence of Section 92 of the Satversme, the argument of the submitter of the constitutional claim about the necessity of taking into consideration the regulation of the Administrative Procedure Law when assessing the restriction determined in the impugned norm is ungrounded.

17. The restriction of fundamental rights determined in an impugned norm is proportionate only if there are no other means, which are as effectual and by choosing them the fundamental rights will be restricted in a lesser degree (*see the Constitutional Court May 13, 2005 Judgment in case No. 2004-18-0106; Item 19 of the concluding part).*

Even though the obligation to pay security pay is admissible as the restriction to the right of a person to free access to court, however one has to take into consideration that neither the Land Book Law nor the Civil Procedure Law anticipate neither decrease of the amount of security pay determined in the impugned law nor exempt of a person from the payment of the above security pay.

The amount of security pay, established in Note Bene to Section 98 of the Land Book Law has been determined when adopting the Land Book Law on December 22, 1937. In Civil Procedure Law of that time, which determines also the procedure of reviewing complaints against the resolution by the chief judge of the Land Book section, concrete groups of persons, who shall be exempt from the payment of security pay, were determined (*sk.: Civilprocesa likums ar paskaidrojumiem – izvilkumiem no Latvijas Senāta un Tiesu palātas spriedumiem un no attiecīgās zinātniskās literatūras, kā arī dažiem aizrādījumiem uz likumdošanas motīviem. Sastādījuši F.Konradi, T.Zvejnieks u.c. ; see The Civil Procedure Law with explanations – excerpts from the Judgments by the Senate and the Court Panel and from the respective scientific literature as well as from several hints regarding motives of legislation. Compiled by F.Konradi, T.Zvejnieks etc.// Riga, Valsts tipogrāfijas izdevums, 1939, 98.-99., 103.-104. lpp.).*

When adopting the impugned norm the legislator has not ensured application of as considerate as possible restrictions. Namely, the legislator has not envisaged for a person the possibility of requesting the court to completely or partly exempt him/her from the payment of the security pay. In cases of such persons, who do not have the needed financial resources for the payment of the security pay, *quaestiones iuris* may arise, besides, in the decisions, taken by the Court Panel, errors may occur. The legislator has to take into consideration the possibility of such occurrences and envisage more considerate means – the right of a person to request exempting from the payment of security pay or decrease the amount of the security pay. In a democratic law-based state it is inadmissible to make appealing a court judgment dependable only on the financial possibilities of a person. When anticipating a definite payment for appealing against a court judgment to the next court instance, the legislator has at the same time to anticipate also the possibilities for persons, who do not have the financial resources, to protect their rights in a fair court.

Thus it is possible to also determine more considerate measures for restricting the right of the person to a fair court in a lesser degree, at the same time ensuring efficient activity of the Civil Cases Department.

18. The restriction of the right of a person to free access to court, established in the impugned norm, is provided for by law and it has a legitimate aim. The measure, chosen by the legislator is adequate for reaching the legitimate aim, namely, ensurance of appropriate activity of the Civil Cases Department.

However, the legislator, when determining in the impugned norm the obligation of payment of security pay, had the possibility of anticipating also more considerate means for reaching the legitimate aim. Thus the benefit, gained by the public is not greater than the loss caused to rights and lawful interests of an individual.

As the legislator, when adopting the impugned norm, has not observed the principle of proportionality, the impugned norm is unconformable with Section 92 of the Satversme.

19. In accordance with Section 32 (the third Part) of the Constitutional Court Law any legal norm, which the Constitutional Court has determined as incompatible with the legal norm of higher legal force, shall be considered invalid as of the date of publishing the judgment of the Constitutional Court, unless the Constitutional Court has ruled otherwise.

19.1. As the Law does not envisage for the judge the possibility of completely or partly exempting the person from the payment of security pay by taking into consideration his/her financial position, the Constitutional Court holds that the period up to July 1, 2006 shall be determined for preclusion of unconformity.

19.2. In order to avoid violation of the fundamental rights, established in the Satversme, by applying the impugned norm to other persons till July 1, 2006, in such cases the general principle of civil procedural rights, which has been fixed in Section 43 (the fourth Paragraph) and Section 458 (the fourth Paragraph) of the Civil Procedure Law, shall be applied by procedural analogy. Namely, the court on the request of the person and by taking into consideration the financial position of him/her experiences the right of taking the decision on completely or partly exempting the person from the payment of security pay.

19.3. Taking into consideration the fact that the fundamental rights of the submitter of the constitutional complaint have been violated by the impugned norm, the duty of the Constitutional Court is to preclude violation of the fundamental rights of the submitter of the constitutional complaint, which has arisen by application of the impugned norm.

In this case it is possible from the moment when the impugned norm has violated the rights of the submitter of the constitutional complaint. On February 10, 2005 the Court Panel adopted the resolution in the matter, which was initiated on the neighbouring complaint of the submitter of the constitutional complaint on November 25, 2004 resolution by the judge of the Limbaži Land Book section (*sk. lietas materiālu 7.-10.lpp; see pp. 7-10 of the materials in case)*. The submitter of the constitutional complaint appealed against the resolution of the Court Panel, however on February 23, 2005 the judge of the Court Panel made the decision not to develop the neighbouring complaint for the reason that no documents, confirming the payment of the security pay, were attached to the complaint (*sk. lietas materiālu 11. lpp.; see p. 11 of the materials in the matter).*

Thus, for the submitter of the constitutional claim to be able to realize his rights, if they have been restricted because of his financial position, it shall be declared that he experiences the right of appealing against February 10, 2005 resolution of the Court Panel by expressing the request to completely or partly exempt him from the payment of security pay.

The operative part

On the basis of Sections 30 -32 of the Constitutional Court Law the Constitutional Court

hereby rules:

1. **To declare the words ”and in the third Paragraph”, included in Section 449 (the fourth Paragraph) and Nota Bene of Section 98 of the Land Book Law as unconformable with Section 92 of the Republic of Latvia Satversme and null and void from July 1, 2006.**

2. **To determine that till July 1, 2006 in the category of these cases the general principle of civil procedural rights, which has been fixed in Section 43 (the fourth Paragraph) and Section 458 (the fourth Paragraph) of the Civil Procedure Law, shall be applied by procedural analogy.**

3. **To determine that the submitter of the constitutional complaint – Oļegs Kožečenkovs – experiences the right of appealing against the Civil Court Panel of the Supreme Court February 10, 2005 resolution and request to**

completely or partly exempt him from the payment of the State duty.

The Judgment is final and allowing of no appeal.

The Judgment shall take effect on the day of its publishing.

The Chairman of the Court session A.Endziņš