# Constitutional judgment 3-4-1-17-07

**JUDGMENT**
**OF THE CONSTITUTIONAL REVIEW CHAMBER**
**OF THE SUPREME COURT**

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| **No. of the case** | 3-4-1-17-07 |
| **Date of judgment** | 3 December 2007 |
| **Composition of court** | Chairman Märt Rask and members Eerik Kergandberg, Ants Kull, Julia Laffranque and Jüri Põld. |
| **Court Case** | The Tartu Circuit Court judgment of 29 June 2007 declaring § 14(2) of the Act on Amendments to the Republic of Estonia Land Reform Act and Legislation Related to Land Reform unconstitutional. |
| **Hearing** | Written proceeding |
| **DECISION** | **To dismiss the petition of the Tartu Circuit Court.** |

**FACTS AND COURSE OF PROCEEDING**

**1.** The city of Tartu owned a two-storey wooden residential building, situated on a 410m$^2$ plot of land at Kesk 17, Tartu. The Tartu City Government declared the building not necessary for city administration by its order no 1864 of 19 December 1995. On 28 February 1996 Martin Pitman and the Tartu City Government entered into the contract of purchase and sale of the residential building.

**2.** On 28 February 2006 M. Pitman filed an application for the privatisation of the land adjacent to the building of Kesk 17 with the right of pre-emption. By its order no 1846 of 12 December 2006 the Tartu City Government refused to perform the preliminary acts for privatisation, because according to § 14(2) of the Act on Amendments to the Republic of Estonia Land Reform Act and Legislation Related to Land Reform (hereinafter “the LRA Amendment Act”) the applications for privatisation of land with the right of pre-emption had to be filed by 1 January 1998. If applications are not submitted on time, the land will remain in

state ownership, and the right of superficies shall be constituted for the benefit of the owner of the building.

**3.** M. Pitman filed an action with the Tartu Administrative Court, applying for non-application of § 14(2) of the LRA Amendment Act as an unconstitutional provision, for the annulment of the Tartu City Government order no 1846 of 12 December 2006, and for requiring the city government to review his application for privatisation of land with the right of pre-emption.

**4.** By its judgment of 17 April 2007 the Tartu Administrative Court dismissed the action. M. Pitman filed an appeal with the Tartu Circuit Court, applying for the annulment of the Tartu Administrative Court judgment.

**5.** By its judgment of 29 June 2007 the Tartu Circuit Court satisfied the appeal and annulled the Tartu Administrative Court judgment of 17 April 2007. The court rendered a new judgment in the case, annulling the Tartu City Government order no 1846 of 12 December 2006, and requiring the Tartu City Government to re-examine the application of M. Pitman for the privatisation of land with the right of pre-emption. The circuit court declared § 14(2) of the LRA Amendment Act unconstitutional, did not apply it, and sent the judgment to the Supreme Court.

**OPINIONS OF THE COURT AND PARTICIPANTS IN THE PROCEEDING**

**6.** The Tartu Circuit Court is of the opinion that constituting the right of superficies on the basis of § 14(2) of the LRA Amendment Act infringes the ownership right of the owner of the structure, guaranteed by § 32 of the Constitution. When the right of superficies is constituted, it is no longer the structure that a person owns, but the right of superficies for a specified term. The aim of the infringement of the fundamental right is the smooth conclusion of land reform, yet the measure is not necessary for the achievement of the aim. The aim could be achieved by measures less infringing upon the right of ownership, e.g. the prohibition to dispose a structure as a movable as of 1 March 2006, or other such measures.

**7.** The majority of the Constitutional Committee of the Riigikogu is of the opinion that § 14(2) of the LRA Amendment Act is not in conflict with the Constitution. The deprivation of the right to privatise due to overrun of a deadline does not restrict a person’s right of ownership, and the imposition of deadlines is the only possible measure for the conclusion of the reform. The minority of the Committee argues that § 14(2) of the LRA Amendment Act is not constitutional, because the vacatio legis left for the entitled subjects was too short, and the restriction was not necessary as it did not help to conclude the reform (the rights of superficies have not been constituted up to present).

**8.** The Rural Affairs Committee of the Riigikogu is of the opinion that § 14(2) of the LRA Amendment Act is not unconstitutional. The acquisition of right of superficies instead of movable property ownership is not an intensive infringement of the fundamental right of ownership. In 1997, when the deadline for the submission of applications for privatisation of land with the right of pre-emption was set, the aim was to gain an overview of the applications of the owners of structures, so that there would be information about the area of land subject to return as well as about the land subject to privatisation with the right of pre-emption, and it would be possible to find out the so called vacant plots of land. This rendered it possible to implement other forms of land privatisation, such as closed and public auctions. The term for submitting applications was not too short, because the applications could be submitted already from the end of 1991. Later on additional possibilities were created for submitting applications for privatisation of land with the right of pre-emption. The aim of establishing deadlines was to conclude the reform as quickly as possible, and the term has contributed to the achievement of the aim. Some other possibility should be found for an owner of a structure, e.g. the possibility of replacing constituting of the right of superficies with the right of acquisition of land necessary for servicing the structure could be considered. The administration of the right of superficies may prove too expensive for the state.

**9.** The Tartu City Government is of the opinion that § 14(2) of the LRA Amendment Act is in conflict with the Constitution. The right to own a structure as an important part of an immovable, can not be regarded as equivalent to right to own a structure as an important part of the right of superficies. The interest of the state

that land be reformed by the set term is not weighty enough to justify the substantial violation of the right of ownership.

**10.** M. Pitman is of the opinion that § 14(2) of the LRA Amendment Act infringes his right to own the structure as a movable, as well as his right to ownership of the registered immovable located at Kesk 17. The measure seems to be a suitable one for speeding up land reform, but in reality it makes it impossible to achieve one of the aims of the land reform, namely the aim to guarantee that the owner a structure and the plot of land is the same person. The prohibition to dispose of a structure as a movable is an equally effective measure for speeding up the reform. The measure is not proportional in the narrow sense, because a person is deprived of the right of ownership with the aim of avoiding the dragging of a national reform. The infringement of the right of ownership, arising from § 14(2) of the LRA Amendment Act, is not proportional and therefore the provision is unconstitutional. Unlike an owner of a structure, the state has no direct interest to become the owner of the land; at the same time the constituting of the right of superficies brings about expenses for the sate. Constituting the right of superficies would be appropriate if the owner of a structure wished it or refused to privatise land.

**11.** The Chancellor of Justice argues that § 14(2) of the LRA Amendment Act is not a relevant norm. Like § 14(2) of the LRA Amendment Act, § 40 of the Land Reform Act (hereinafter “the LRA”) establishes the deadlines for privatisation of land. Whereas the second sentence of § 40(1) of the LRA can be regarded as a specific norm in regard to the first sentence of § 40(1) of the LRA as well as in regard to § 14(2) of the LRA Amendment Act. Proceeding from the wording of the second sentence of § 40(1) of the LRA and the way it has been amended, it can not be excluded that the legislator wished to embrace – by the second sentence of § 40(1) of the LRA – also the cases where an immovable was acquired before 1 January 1998 and the application for privatisation of land with the right of pre-emption was not submitted by the deadline established by § 14(2) of the LRA Amendment Act. This aim is indicated by the fact that the sentence, which was included in the wording of § 40(1) of the LRA in 2003 and which requires that the applications be submitted within three months as of the acquisition of structures, has been left out of the norm. On the basis of the lex posteriori derogat legi priori principle § 14(2) of the LRA Amendment Act is not valid, it is not a relevant norm, and the second sentence of § 40(1) of the LRA should be applied to the relationship under discussion.

Furthermore, the question arises whether § 14(2) of the LRA Amendment Act is in conformity with the principle of legal clarity, because the provision can be found in the electronic Riigi Teataja [state gazette] in the form of original text only, and there is no reference in the LRA that § 14(2) – a regulation of fundamental importance from the aspect of privatisation of land with the right of pre-emption – should be looked for in that Act.

**12.** The Minister of Justice is of the opinion that § 14(2) of the LRA Amendment Act is not a relevant norm. The Tartu City Government should have applied § 40(1) of the LRA. At the time when the application for privatisation was submitted and the administrative legislation was issued § 40(1) of the LRA (in the wording which entered into force on 27 November 2005) provided for the right of the owners of structures to submit applications for the privatisation of land adjacent to the structures.

The Minister of Justice is of the opinion that § 40(1) of the LRA is not in conflict with the Constitution. § 40(1) of the LRA infringes the fundamental ownership right, changing a person’s permanent right to own a structure into a right for a specific term. Nevertheless, the infringement of the fundamental right serves a legitimate aim, and the chosen measure is suitable, necessary and reasonable. The Minister is of the opinion that the constitution of the right of superficies is not a very intensive infringement for an owner of a structure. The right of superficies can be constituted for up to 99 years. An owner of a structure may demand, when the right of superficies is constituted, that the term of the right of superficies be not shorter than the anticipated life of the structure. Considering the conditions for constituting the right of superficies, the right can be regarded as a life-time right for a present owner of a structure. The Minister is of the opinion that the aim of the infringement – to conclude the land reform that has been underway for more than 15 years – is a weighty one.

## CONTESTED PROVISION

**13.** § 14(2) of the Act on Amendments to the Republic of Estonia Land Reform Act and Legislation Related to Land Reform reads as follows:

"A person with the right to privatise land with the right of pre-emption on the basis of the Land Reform Act, who has not submitted a relevant application, shall submit it by 1 January 1998. If the application has not been submitted by the established term, the land adjacent to the structure shall be retained in the state ownership and the right of superficies shall be constituted for the benefit of the owner of the structure."

**14.** § 40(1) of the Land Reform Act, in the wording which entered into force on 27 November 2005, reads as follows:

**"§ 40. Deadlines for privatisation of land**

(1) Applications for the privatisation of land by a right of pre-emption shall be accepted until 31 December 2003 unless an earlier term is provided by law. Applications for the privatisation of land adjacent to a structure acquired as a movable, the transferor of which has not submitted an application for the privatisation of land, shall be accepted until 1 March 2006, and applications for the privatisation of land necessary for servicing a structure shall be accepted until 1 June 2006. The right of superficies shall be constituted, on the basis of a decision of the County Governor and pursuant to procedure and under conditions established by the Government of the Republic, in regard to the land necessary for servicing a structure, if an application for the privatisation of the land adjacent to the structure is not submitted by 2 June 2006. Applications for the privatisation of land under § 22($1^2$) of this Act shall be accepted until 1 June 2006."

## OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER

**15.** A provision the constitutionality of which is examined by the Supreme Court by way of concrete norm control must be relevant. To assess the permissibility of review of constitutionality of § 14(2) of the LRA Amendment Act it must be ascertained first, whether § 14(2) of the LRA Amendment Act is a norm relevant from the point of view of the dispute which served as the basis for initiating this constitutional review case. On the basis of the earlier practice of the Supreme Court only those norms can be regarded relevant which are of decisive importance for the resolution of a case (see e.g. judgment of the general assembly of the Supreme Court of 22 December 2000 in case no 3 4 1 10 00 – RT III 2001, 1, 1, paragraph 10). Those norms are of decisive importance in a case on the basis of which, according to the law, a person's administrative case should have been adjudicated. The norm, applied to a person, which actually regulates the relationship or situation under discussion, is to be considered relevant (see judgment of the Constitutional Review Chamber of the Supreme Court of 2 November 2006 in case no 3 4 1 8 06 – RT III 2006, 40, 337, paragraph 17).

**16.** M. Pitman has contested the Tartu City Government order no 1846 of 12 December 2006, which is based on § 14(2) of the LRA Amendment Act, stipulating the deadline for submitting applications for the privatisation of land with the right of pre-emption. The referred provision entered into force on 30 November 1997. At the same time, the time-limits for submitting applications for the privatisation of land with the right of pre-emption are also regulated by § 40(1) of the LRA, which entered into force on 27 November 2005. Thus, both provisions were in force at the time of submission of the application for privatisation (28 February 2006) and at the time of issue of the administrative legislation (12 December 2006).

**17.** Next, the Chamber must ascertain which of the two provisions is applicable in the present case and – through this – decide on the relevance of the provision declared unconstitutional by the Tartu Circuit Court, i.e. § 14(2) of the LRA Amendment Act.

**18.** Both norms referred to establish the deadline for submitting applications for the privatisation of land with the right of pre-emption. According to § 14(2) of the LRA Amendment Act an application for the

privatisation of land with the right of pre-emption was to be submitted before 1 January 1998, and according to the first sentence of § 40(1) of the LRA the applications for the privatisation of land with the right of pre-emption were accepted until 31 December 2003, unless an earlier term was provided by law. Consequently, § 14(2) of the LRA Amendment Act, establishing an earlier term, excludes the application of the first sentence of § 40(1) of the LRA.

**19.** The second sentence of § 40(1) of the LRA provides, at the same time, that applications for the privatisation of land adjacent to a structure acquired as a movable, the transferor of which has not submitted an application for the privatisation of land, are accepted until 1 March 2006, and applications for the privatisation of land necessary for servicing a structure are accepted until 1 June 2006. Consequently, this is a specific norm in regard to the first sentence of § 40(1) of the LRA, applicable in the cases when a structure has been acquired as a movable and the transferor of the structure has not submitted an application for the privatisation of the land adjacent to the structure.

**20.** In the case under review M. Pitman acquired the structure situated at Kesk 17 as a movable from the city of Tartu who – being the transferor – had not submitted an application for the privatisation of land. Consequently, the second sentence of § 40(1) of the LRA is applicable in the present case.

**21.** § 40(1) of the LRA was inserted in the Act by the amendments that entered into force on 15 March 2003. The wording of the first sentence of § 40(1) of the LRA has not been amended; the second sentence was amended by the wording that entered into force on 27 November 2005. Until the latter amendment in 2005, § 40(1) of the LRA established that applications for the privatisation of land adjacent to a structure were to be accepted also after the referred date (i.e. 31 December 2003), but not later than three months after the acquisition of the structure as a movable. By the amendment which entered into force on 27 November 2005 the provision was inserted in the Act in its present wording. This replaced the second sentence of § 40(1) of the LRA, which established a three months' term for submitting applications for the privatisation of land adjacent to a structure as of the date of acquisition of the structure, with the possibility of submitting applications for the privatisation of land adjacent to a structure until 1 March 2006 and applications for the privatisation of land necessary for servicing a structure until 1 June 2006.

**22.** As in the present case the same issue is regulated by both provisions § 14(2) of the LRA Amendment Act as well as § 40(1) of the LRA – the principle of lex posterior derogat legi priori requires the application of the later norm, that is § 40(1) of the LRA. Consequently, § 14(2) of the LRA Amendment Act is not of decisive importance for the adjudication of the case and the Court can not analyse the constitutionality of this norm. In this case it is § 40(1) of the LRA, which actually regulates the situation under review and on the basis of which the administrative case of the person should have been adjudicated pursuant to law, that is to be regarded relevant.

**23.** As § 14(2) of the LRA Amendment Act, which was declared unconstitutional by the Tartu Circuit Court, is not a relevant norm, there is no ground to evaluate the constitutionality of the referred provision and the petition of the Tartu Circuit Court is to be dismissed.

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