Constitutional judgment 3-4-1-3-04

JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT

No. of the case	3-4-1-3-04
Date of decision	30 April 2004
Composition of court	Chairman Uno Lõhmus, members Tõnu Anton, Ants Kull, Lea Kivi and Jüri Põld
Court case	Petition of the Tallinn Circuit Court to review the constitutionality of § 152(1) and § 154 (2) of the Law of Property Act Implementation Act.
Basis of proceeding	Judgment of the Tallinn Circuit Court of 22 December 2003 in civil case no. 2-2/1348/03
Court hearing	Written proceeding
Resolution	**1. To declare that § 15^2(1) and § 15^4(2) of the Law of Property Act Implementation Act are unconstitutional to the extent that the owner of an immovable may not demand the removal of a utility works on any other basis but that the works are no longer used for their intended purpose.** **2. To declare § 15^4(2) of the Law of Property Act Implementation Act invalid.** **3. On the basis of § 58(3) of the Constitutional Review Court Procedure Act to postpone entering into force of the second clause of the decision for six months.**

FACTS AND COURSE OF PROCEEDING

1. In 1997 the Tondi Elektroonika AS and the Eesti Energia AS Tallinna Elektrivõrgud entered into a commercial lease contract, pursuant to which the Tondi Elektroonika AS granted the use of rooms located in Tallinn, Pärnu mnt 142, with total area of 66 square metres to the Eesti Energia AS Tallinna Elektrivõrgud without specifying a term. In these rooms was located a 6 kV substation device. The commercial lessee undertook to pay to commercial lessor 30 kroons a month per each square metre rented as of 1 April 1999. Parties to the contract agreed that the amount of rent will change in accordance with the increase of price index.

2. In February 2003 the Eesti Energia AS cancelled the commercial lease contract and stopped paying the rent. The commercial lessee justified the cancellation of the commercial lease contract with the amendments to the Planning and Building Act and Law of Property Act Implementation Act (hereinafter “the LPAIA”), which entered into force on 1 January 2003 and pursuant to which the owner is required to tolerate utility

networks and utility works erected on the owner's immovable or land not yet entered in the land register before 1 April 1999. Under the law the owner of utility networks whose works were erected on the immovable of another before 1 April 1999 is released from payment for performance of the obligation to tolerate utility works until 1 January 2009.

3. On 13 May 2003 the Tondi Elektroonika AS filed an action with the Tallinn City Court against the Eesti Energia AS requesting that the latter be required to pay the rent as of March 2003. Pursuant to the statement of claim the use of industrial premises of an owner of an immovable (or also a movable) for the purposes of erection and servicing of electrical installations, amounts to a lease relation and rent should be paid for the premises owned by the commercial lessor.

4. The Tallinn City Court dismissed the action by its judgment of 14 August 2003. The court based its judgment on § 15^2(1) and § 15^4(2) of the LPAIA. Pursuant to the reasoning of the judgment the free of charge use of the premises that are the object of the contested commercial lease contract proceeds from the obligation to tolerate utility works. The Eesti Energia AS is entitled to use the object of the commercial lease contract free of charge as of 1 January 2003 until 1 January 2009, because a power station is situated on the premises of the Tondi Elektroonika AS.

5. The Tondi Elektroonika AS filed an appeal against the judgment of city court. The appellant argued that the amendment of the Law of Property Act Implementation Act in itself does not result in termination of obligation valid at the time when the Act entered into force. The city court has not referred to any grounds for termination of a commercial lease contract stipulated in the Act. The representative of the plaintiff affirmed at the hearing in the circuit court that the plaintiff does not contest the cancellation of the contract. The plaintiff wants compensation for damage caused by the use of the premises, because the defendant has not vacated the premises upon termination of the contract.

6. By its judgment of 22 December 2003 the Tallinn Circuit Court allowed the appeal of the Tondi Elektroonika AS. The court ordered the defendant to pay the plaintiff the compensation of 7200 kroons and 54 cents and legal costs, on the basis of § 335 of Law of Obligations Act, pursuant to which, if a lessee does not return a thing after termination of the contract, the lessor may demand the rent agreed in the lease contract or rent which is usual in the case of a similar thing in a similar location as compensation for damage for the period of delay. The circuit court declared § 15^2 and § 15^4 of the LPAIA unconstitutional.

7. The circuit court referred its judgment of 22 December 2003 to the Supreme Court for the initiation of a constitutional review proceeding for declaring § 15^2(1) and § 15^4(2) of the LPAIA invalid.

JUSTIFICATIONS OF THE COURT AND PARTICIPANTS IN THE PROCEEDING

8. The circuit court argued that restrictions on the right of ownership are established in § 15^2(1) and § 15^4(2) of the LPAIA. It proceeds from the third sentence of § 32(2) and the second sentence of § 11 of the Constitution that ownership may be restricted only in general interests and the restrictions must be necessary in a democratic society. The conformity of norms to the principle of proportionality is to be assessed in relation to the objective of restrictions serving general interests.

In the present case the legislator has failed to determine the circle of entitled subjects in regard to ownership restrictions and thus we are dealing with the right of every owner of a utility works. Nevertheless, the existence of general interests can not be concluded merely from the fact that the particular works is a utility works. Legal norms unjustifiably burden only one party to a legal relationship – the owner of an immovable. Failure to determine the relation between ownership restrictions and general interest, failure to determine the circle of entitled subjects and failure to compensate the owners for ownership restrictions meet neither the provisions nor the spirit of the Constitution, and therefore amount to disproportional infringement into ownership.

The circuit court argues that the infringement into contractual relationships in such a way that all owners of

the utility networks erected before 1 April 1999 are released from payment creates a conflict also with the principle of rule of law, proceeding from § 10 of the Constitution. The legitimate expectation that legal norms forming the basis for legal relationships will remain in force or that immediate and just compensation will be paid upon violation of legitimate expectations, is violated. By exempting one party from contractual obligations on the basis of an Act gives an unjustified preference to one party, and this is not in conformity with the principle of proportionality.

9. The Legal Affairs Committee of the Riigikogu is of the opinion that the obligation to tolerate utility networks and utility works, established in § 15^2 of the LPAIA, was imposed in general interests and is proportional with the desired aim. It is hard to find reasonable alternatives, less restrictive of the right of ownership, to the established provisions. In the interests of legal peace and rational technical solutions it is reasonable to establish a certain obligation to tolerate certain utility networks and utility works.

The Committee supports the view that also those owners of an immovable should be paid for the obligation to tolerate, on whose immovable a utility works was erected before 1 April 1999. As for § 15^4(2) of the LPAIA, in relation to failure to compensate for the restrictions on the right of ownership, the Committee sees a conflict with § 32 of the Constitution.

10. The Chancellor of Justice is of the opinion that § 15^4(2) of the LPAIA is in conflict with the Constitution. The first sentence of § 15^4(2) of the LPAIA is in conflict with the Constitution to the extent that it does not allow to take into consideration the interests of a landowner.

In regard to § 15^2(1) of the LPAIA the Chancellor of Justice points out that although the legislator has not expressed the aim of the contested regulation with sufficient clarity, the aim can be determined by supposition. It can be presumed that the objective of the obligation to tolerate is to secure general customer access to electricity, gas, etc. Guarantee of supply of routes of communication is in general interests and thus a legitimate aim. The first sentence of § 15^2(1) of the LPAIA does not allow to take into account different situations and circumstances. There are no situations where an owner has the right to demand the removal or re-location of a functioning utility works. Thus, the owner has been deprived of the possibility to protect its property against excessive influence. Although the obligation to tolerate utility works is in itself justified by a general interest, the constitutional interests of an owner require that he or she must have a possibility to protect himself or herself against excessive or disproportional influence.

The Chancellor of Justice is of the opinion that by establishing § 15^4(2) of the LPAIA the legislator wanted to avoid drastic price-rise and to give the owners of utility works sufficient time to decide whether the works should be located where they are or whether these should be transferred somewhere else. The Chancellor of Justice has doubts as to the necessity of the measure, because a drastic price-rise could also be controlled by other measures less burdening on persons than deprivation of the owners of registered immovables of payment. Release from payment for the performance of the obligation to tolerate is by no means an ownership restriction proportional in the narrow sense. The mutual rights and obligations of parties are not balanced. There should be weighty reasons for establishing a long transition period, during which the rights of owners of registered immovables are restricted without the right to compensation. No such reasons become apparent from the materials of legislative proceeding of the draft, nor are such reasons made known in some other way. In addition to the obligation to tolerate a person has the duty to pay land tax for the land under utility works.

The Chancellor of Justice is of the opinion that the contested regulation is also in conflict with the principle of legitimate expectation, proceeding from the principle of rule of law, established in § 10 of the Constitution. The provisions of the Act placed a landowner in a situation worse than the situation he or she was in before the provisions took effect.

11. The Minister of Justice points out that § 15^2(1) of the LPAIA legalises several possibilities of abuse, which may lead to unjust solutions, in conflict with the principles of rule of law and legitimate expectation. Among other things § 15^2(1) of the LPAIA legalises arbitrary action of an owner of a utility network or

utility works. Neither is it acceptable that a private owner should tolerate a utility network or utility works in the case the latter has been erected on the owner's land without authorisation or unlawfully, and that a private owner's obligation to tolerate should differ from what has been agreed between the parties. Thus, although the obligation to tolerate utility networks and utility works, proceeding from law, is not unconstitutional in itself, the regulation legalising arbitrary action and ignoring agreements between persons can be regarded as unconstitutional.

By establishing § 15^4(2) of the LPAIA the legislator has prejudiced private autonomy and has retroactively restricted the rights of an owner of an immovable. Such a restriction is in conflict with the principles of legal certainty and legitimate expectation.

The Minister of Justice is of the opinion that if the Supreme Court decides that § 15^2(1) of the LPAIA is unconstitutional, the provision should be declared invalid not sooner than after six months since the rendering of the judgment. Otherwise the utility networks and utility works and the network services necessary for the society would be endangered.

12. The Tondi Elektroonika AS is of the opinion that the obligation to tolerate utility networks and utility works erected before 1 April 1999, established in § 15^4(2) of the LPAIA, regardless of whether or not the immovable is encumbered with a corresponding real right, is a legal norm restricting the ownership of an owner of an immovable, and does not meet the conditions for imposing restrictions on ownership, established in the third sentence of the second indent of § 32 and the second sentence of § 11 of the Constitution. The imposed restriction is not related to general interests. § 15^4(2) of the LPAIA burdens only one party to a legal relationship and that is why the restriction of ownership is not proportional to the desired aim.

13. Public limited company Eesti Energia is of the opinion that the Tallinn Circuit Court had no right to extend the content of the dispute and to declare unconstitutional a provision on the basis of which the parties had not filed a claim. Application of § 15^2(1) of the LPAIA and dispute about the constitutionality of the provision are not pertinent to the legal dispute, because no claim for removal of the utility works and for recognition of obligation to tolerate has been filed. Only § 15^4(2) of the LPAIA is relevant.

The Eesti Energia AS argues that § 15^2(1) of the LPAIA is appropriate for guaranteeing a legal basis for owning and using the existing utility works, bearing in mind that there are no other alternatives guaranteeing the rights of owners of utility works as effectively as this provision. Due to the very large number of similar legal issues it is necessary to solve the issue by norms of general application, not by solving each individual case separately. The immediate imposition of payment would result in the increase of the cost price of electricity and other services and the service charges for consumers would increase accordingly.

The Eesti Energia AS does not consent to the justifications of the court that ownership may be restricted only when it is necessary in general interests. An ownership restriction can be justified also if it is necessary for the protection of the rights and freedoms of others. The obligation to tolerate, imposed on an owner of an immovable, is essential for the protection of the rights of an owner of utility works, freedom of enterprise and legitimate expectations. Establishment of hundreds of thousands of servitudes would result in an enormous loss of resources in society, taking into account the working hours and expenses of notaries, employees of land registry departments, judges, lawyers and land owners.

The Eesti Energia AS argues that the infringement of the rights of owners of immovables, proceeding from § 15^2(1) of the LPAIA, is also proportional in the narrow sense. The desired and achieved aim of the provision is of utmost importance for the normal functioning of life and economy and the society. The existing solution guarantees the right of ownership to owners of utility networks and utility works, which have been erected on the basis of law, and the right to perform works necessary to service, repair and reconstruct the utility works, guarantees to persons the continuous access to the good proceeding from utility works, and restricts the rights of owners of plots of land in the minimum way possible.

The Eesti Energia AS points out that § 15^4(2) of the LPAIA is a transitory provision of temporary validity, yet it admits that a shorter transitory period could have been established or that the payment could increase step by step.

RELEVANT PROVISIONS

14. The Law of Property Act Implementation Act, which entered into force on 1 January 2003 (RT I 2002, 99, 579), reads as follows:

"§ 15^2. Toleration of utility networks and utility works

(1) The owner is required to tolerate utility networks and utility works (heating, water supply or sewerage systems, telecommunications or power networks, weak current installations, gaseous fuel installations, electrical installations or pressure assemblies and construction works necessary for servicing thereof) erected on the owner's immovable or land not entered in the land register before 1 April 1999 regardless of whether or not the immovable is encumbered with a corresponding real right. Among other things, the owner shall allow work to be performed if it is necessary to service, repair or reconstruct a utility network or utility works (hereinafter utility works). The owner may demand removal of the utility works if the works are no longer used for their intended purpose.

(2) As of 1 April 1999, encumbrance of immovables with a corresponding real servitude or personal right of use is required for the erection of utility works on the immovable of another. For the erection of utility works on land not entered in the land register or land in state or local government ownership, unattested or notarised agreement of the owner of the land is sufficient."

"§ 15^4. Payment for tolerating utility works

(1) The owner of an immovable has the right to demand payment for tolerating a utility works erected on the immovable of the owner regardless of whether the obligation to tolerate arises from law, the encumbrance of the immovable with a servitude or a personal right of use. The size of the payment shall equal the amount of the land tax corresponding to the area of the protected zone of the utility works multiplied by the factor prescribed for the intended purpose of the land. The Government of the Republic shall establish the period and procedure for payment and the factors prescribed for the intended purposes of land.

(2) The owner of utility works whose works were erected on the immovable of another before 1 April 1999 is released from payment for performance of the obligation to tolerate utility works until 1 January 2009.

(3) The owner of utility works whose works were erected on a legal basis on the immovable of the state or a local government before 1 April 1999 is released from payment for the obligation to tolerate utility works until 1 January 2009."

OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER

I.

15. The circuit court did not apply §§ 15^2(1) and 15^4(2) of the LPAIA to the dispute between the Tondi Elektroonika AS and the Eesti Energia AS, because the court held that the provisions disproportionally restrict the right of ownership. The court satisfied the claim for compensation of the Tondi Elektroonika AS on the basis of the first sentence of § 335 of the Law of Obligations Act (hereinafter "the LOA"), pursuant to which, if a lessee does not return a thing after termination of the contract, the lessor may demand the rent agreed in the lease contract or rent which is usual in the case of a similar thing in a similar location as compensation for damage for the period of delay.

16. In the building owned by the Tondi Elektroonika AS is situated a power station device of 6 kV, owned

by the Eesti Energia AS. The parties to the dispute concluded a commercial lease contract in June 1997, pursuant to which the premises were leased to the Eesti Energia AS. The latter paid to the Tondi Elektroonika AS for using the premises. The situation remained the same until 18 February 2003, when the Eesti Energia AS cancelled the contract. It stopped paying the rent, but continued to use the power station. The Eesti Energia AS was of the opinion that under §§ 15^2(1) and 15^4(2) of the LPAIA it was entitled to use the power substation, but that it was released from payment until 1 January 2009. The Tondi Elektroonika AS filed an action with a court, claiming payment for the continued use of the premises.

17. The Chamber is not competent to assess whether the amendment of law terminated the obligation to pay, deriving from the contract under the law of obligations entered into between the owner of the utility works and the owner of the immovable, or whether the amendment justified the unilateral termination of the contract by the owner of the utility works. The Supreme Court proceeds from the facts ascertained in circuit court and from the assessment rendered by the court on the nature of the relationship between the parties to the dispute. It appears from the judgment of the circuit court that the Tondi Elektroonika AS did not contest the cancellation of the contract. It only wanted compensation for the fact that the Eesti Energia AS had not vacated the premises upon termination of the contract. When adjudicating the dispute the circuit court proceeded from the fact that the commercial lease relationship between the parties to the proceeding had ended. That is why the circuit court considered §§ 15^2(1) and 15^4(2) of the LPAIA to be relevant.

18. The Eesti Energia AS calls into question the relevance of § 15^2(1) of the LPAIA, because the parties to the proceeding did not file a claim for removal of the utility works and for the recognition of the obligation to tolerate. The only claim of action was the claim for payment, and that is why it would have been sufficient for the satisfaction of the action if the circuit court had refused to apply only 15^4(2) of the LPAIA. The application or non-application of § 15^2(1) of the LPAIA did not affect the decision concerning the satisfaction of the claim. The Eesti Energia AS is of the opinion that the Supreme Court can not declare the provision unconstitutional and invalid.

19. According to the established practice of the Supreme Court a provision the constitutionality of which can be reviewed by a court must be of decisive importance for the resolution of a concrete case (*see judgment of the Supreme Court en banc of 22 December 2000 no. 3-4-1-10-00 – RT III 2001, 1, 1, paragraph 10*). An Act is of decisive importance when in the case of unconstitutionality of the Act a court should render a judgment different from that in the case of constitutionality of the Act (*see judgment of the Supreme Court en banc of 28 October 2002 in matter no. 3-4-1-5-02 – RT III 2002, 28, 308, paragraph 15*).

20. The Chamber is of the opinion that the court could apply § 335 of the LOA because it did not apply §§ 15^2(1) and 15^4(2) of the LPAIA. If the court had considered §§ 15^2(1) and 15^4(2) of the LPAIA constitutional, it should have rendered a different judgment or should not have applied § 335 of the LOA. Furthermore, the contested provisions have effect in their conjunction and it is not justified to assess them individually.

II.

21. The circuit court pointed out that the contested provisions of the Law of Property Act Implementation Act impose restrictions on the right of ownership and therefore assessed the conformity thereof to the first and second indents of § 32 of the Constitution. The Chamber shares this opinion. The obligation of an owner, established by an Act, to tolerate a utility works erected on his registered immovable or on his land not yet entered into registry before 1 April 1999, without payment, infringes upon the right of every person to freely possess, use, and dispose of his or her property, stipulated in the first sentence of the second indent of § 32 of the Constitution.

The Chamber admits that the contested provisions may also infringe upon other fundamental rights, including the right to engage in enterprise referred to in § 31 of the Constitution and the contractual freedom included in the general right to freedom established in § 19(1) of the Constitution, but the Chamber shall first and foremost review the conformity of the infringement to the principle of protection of ownership.

22. The term “property” of § 32 of the Constitution embraces both immovables and movables. Thus, irrespective of whether the building in which a utility works in situated is a part of a registered immovable or an immovable owned by a person, this will amount to property for the purposes of the Constitution. The concept of utility networks and utility works was included in the Law of Property Act (hereinafter “the LPA”) by the amendment which entered into force on 1 April 1999.

In relation to § 32 of the Constitution the Chamber observes that the protection of the provision extends to the owners of movables and immovables on whose registered or yet unregistered immovable the utility network or works is situated, as well as to the owners of utility networks and utility works.

23. The first sentence of the second indent of § 32 of the Constitution empowers every person to freely possess, use, and dispose of his or her property. The contested provisions of the Law of Property Act Implementation Act may create a collision between the interests and rights of the owners of immovables and the owners of utility works. Nevertheless, this does not amount to a dispute under private law between two persons. The legislative power has interfered into relationships between persons by establishing essential restrictions on the right of ownership in favour of one owner.

III.

24. In a society based on market economy property is of essential importance. The right to freely possess, use, and dispose of one’s property and equal protection of property guarantees a free market. At the same time free possession, use, and disposal of property infringes upon the rights, freedoms and interests of other owners and non-owners and of the public in general. That is why the Constitution allows the legislator to impose restrictions on the right of ownership and establishes the principle that property shall not be used contrary to the public interest (§ 32(2) of the Constitution).

25. As referred above the concept of utility networks and utility works was included in the Law of Property Act by an amendment which entered into force on 1 April 1999. Since then the law differentiates between those utility works which were erected on other persons’ land before 1 April 1999 and those utility works that were erected after that date. Such differentiation affects the relationships between land owners and owners of utility works. The wording of the Law of Property Act Implementation Act which entered into force on 1 January 2003 requires that a land owner tolerate the utility works erected on his or her land before 1 April 1999, irrespective of whether or not the immovable is encumbered with a corresponding real right, and the owner of such utility works is released from payment for the performance of the obligation to tolerate the utility works until 1 January 2003. In the case of utility works erected after 1 April 1999 it is required that immovable be encumbered with a real servitude or a personal right of use, and the private owner of an immovable has the right to demand payment for tolerating a utility works.

26. According to the information from the Eesti Energia AS the electric power lines are situated on about 180 000 registered immovables. Whereas 98.7% of transmission networks and 95% of distribution networks, i.e. almost all electricity transmission lines, have been erected before 1999. 86.4% of the 17 871 power substations have been erected before 1999. As telecommunications lines, gas pipelines, heat transmission pipelines and other lines, the considerable number of which have been erected before 1 April 1999, are also utility works, the obligation to tolerate without payment affects a great number of owners of registered and not yet registered land.

27. As the second indent of § 32 of the Constitution does not refer to the aims which justify the restriction on free possession, use, and disposition of property, any aim of the legislator which is not in conflict with the Constitution may serve as a legitimate ground for restricting this right.

28. The contested provisions of the Law of Property Act Implementation Act, by which the obligation to tolerate utility works erected before 1 April without payment was imposed on land owners, were added to

the Planning Act, which entered into force on 1 January 2003. The explanatory letter to the draft of the Planning Act does not give any explanations about the necessity to amend the Law of Property Act Implementation Act, because the original version of the draft did not include these amendments. The amendments were added during the legislative proceeding of the draft, yet the aim of these does not become clear from the shorthand notes of the Riigikogu sittings.

29. The Chamber agrees with the opinion of the Chancellor of Justice that the objective of the obligation to tolerate is to secure general customer access to electricity, gas, etc., because whole Estonia is covered with utility networks. The legal status of those utility works which had been erected before the entry into force of the Law of Property Act was not regulated until 1 April 1999. The regulatory framework that was in force from 1 April 1999 until 31 December 2002 established that the owners of the utility works which had been erected before 1 April 1999 had the right to require that a real servitude or a personal right of use be established within ten years as of the land under utility works was entered into land registry. The owners of utility works located on land entered into land registry had the same right until 30 December 2008. If during that term the owner of a utility works does not require that a real servitude or a personal right of use be established or does not remove the utility works, the owner of the plot of land was entitled to demand that the utility works be removed and that the owner of the utility works compensate for the damage caused by the works.

The Chamber is of the opinion that the contested regulatory framework has a legitimate aim.

30. Pursuant to § 15^4(1) of the LPAIA, valid from 1 April 1999 until 31 December 2002, those owners of utility works in whose favour a real servitude or a personal right of use had been established, were released from payment until 1 January 2009. Subsection (2) established that after the expiry of the aforementioned term the payment requested by the owner for real servitude or personal right of use must not exceed the ordinary local amount of the payment. At that time the exemption from payment was justified in the explanatory letter by the aim of avoiding a drastic rise of prices. Pursuant to the wording which entered into force on 1 January 2003 an owner of a utility works is released from payment until 1 January 2009, irrespective of whether his or her immovable is encumbered with a real right or not. Thus it can be presumed that the amendment was meant to achieve the same aim.

The Chamber presumes that the restriction on the ownership right with the aim of avoiding a drastic rise of consumer prices for electricity, gas, water, sewerage, communications and other services, is also legitimate.

IV.

31. Upon weighing whether the restrictions of ownership right are in conformity with the second sentence of § 11 of the Constitution, which stipulates that the restrictions of fundamental rights must be necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted, the Chamber recollects the established control scheme: “The Chamber reviews compatibility with the principle of proportionality on three levels - firstly, the suitability of a measure, then the necessity and, if necessary, proportionality in the narrower sense. […] A measure that fosters the achievement of a goal is suitable. The requirement of suitability is meant to protect a person against unnecessary interference of public power. A measure is necessary if it is not possible to achieve a goal by some other measure which is less burdensome on a person but which is at least as effective as the former. […] In order to determine the reasonableness of a measure the extent and intensity of interference with a fundamental right on the one hand and the importance of the aim on the other hand have to be weighed.” (*judgment of Constitutional Review Chamber of 6 March 2002 in case no. 3-4-1-1-02 – RT III 2002, 8, 74, paragraph 15*).

§ 15^2(1) of the Law of Property Act Implementation Act

32. The Chamber agrees with the Chancellor of Justice that the provision guarantees that the existing utility works remain where they are presently located, and creates preconditions to service, repair or reconstruct

these. The imposition of an obligation to tolerate utility works is a measure suitable for supplying the consumers with electricity, gas, water, sewerage, heating, and other necessary supplies.

33. To assess the necessity of a measure it is to be weighed whether the regulatory framework that was in force until 1 April 2003, which gave the owners of utility works the right to require that a real servitude or a personal right of use be established within ten years as of the land under utility works is entered into land registry, was a measure less burdening on persons for the achievement of the aim. The Eesti Energia AS argues that as the electricity, gas and telecommunications networks cover the whole territory of the country, with the addition of routes of heating and water communication in settlements, the solution of issues under law of property with thousands of owners of registered movables constituted an insurmountable practical problem of law for the owners of utility works. The establishment of thousands of servitudes would provide work to notaries, employees of land registry departments, lawyers, but that would bring about big expenses for the owners of land and utility networks and for the state, and possible disputes would burden the court system.

The Chamber consents to this argument and holds that the imposition of the obligation to tolerate was a measure necessary for the achievement of the referred aim.

34. To decide whether the restriction of the right of ownership is proportional in the narrow sense the interests of the owners of registered immovables burdened with the obligation to tolerate have to be weighed against the public interest to consume electricity, gas, water, heat and other services. The interests of the owners of utility works must be taken into account upon weighing these interests.

35. The Chancellor of Justice is of the opinion that the regulation of the obligation to tolerate does not take into consideration different situations and facts, as it empowers an owner to require the removal of a utility works only if it is no longer used for its intended purpose. § 153(1) of the LPAIA, which was in force from 1 April 1999 until 31 December 2002, gave an owner of a registered immovable the right to refuse to establish a real servitude or a personal right of use when the further use of the utility works on the registered immovable essentially prevented the use thereof and the loss of the owner due to the utility works was bigger than the costs of relocating the utility works, also in the case the owner covered all the costs of relocating the utility works and gave a prior and sufficient guarantee to that effect to the owner of the utility works. The circuit court has also pointed this out and has written in its judgment that the existence of a general interest can not be concluded from the mere fact that we are dealing with a utility works.

36. The Chamber is of the opinion that the general obligation to tolerate is constitutional, but upon imposing this obligation the legislator should have established more guarantees for the landowners.

The existing regulatory framework prefers the rights of the owners of utility works, allowing to consider the rights of the owners of registered movables only when the utility works are no longer used for the intended purposes. At the same time the Act does not differentiate between utility works erected on a legal basis and those erected without a legal basis. Neither does the Act differentiate between utility works for which there is a manifest general interest (essential power transmission lines, heating lines, etc), and between the utility works for which there is no such interest. Neither does § 15^2(1) allow to weigh the interest of an owner of a registered immovable to terminate or change the obligation to tolerate (e.g. to build a house on the present location of the utility works or start using the land as arable land) against the interest of an owner of a utility works that the latter remain where it is.

37. The unlimited obligation to tolerate utility works may prevent the purposeful use of registered immovables, it may also essentially decrease the market value of registered immovables and, in certain cases, render the possibility of selling registered immovables doubtful. The Chamber is of the opinion that a possibility to weigh interests must inevitably be a part of a constitutional regulation.

It should be possible to contest the obligation to tolerate also when the loss of the owner of a registered immovable is significantly bigger than a public interest or the interest of an owner of a utility works, for

example when the obligation to tolerate prevents the purposeful use of the registered immovable and it would be possible to relocate the utility works without major additional expenses. Such a regulation would enable for a more flexible solution of the cases when an owner of a registered immovable holds that his or her rights are disproportionally prejudiced.

38. Proceeding from the aforesaid the Chamber is of the opinion that the restriction provided for in § 15^2(1) of the LPAIA is not proportional in the narrow sense, because it does not allow the owners of registered immovables to contest the obligation to tolerate and allows to demand the removal of utility works only if the works are no longer used for their intended purpose. This provision disproportionally restricts the fundamental right of owners of registered immovables to free possession, use and disposition of property, established in the first sentence of § 32(2) of the Constitution, and is thus unconstitutional. The legislator must provide for an additional mechanism for the protections of the rights of owners of registered immovables and allow for weighing different interests.

§ 15^4(2) of the Law of Property Act Implementation Act

39. The circuit court found that by releasing the owners of utility works from payment for ten years unjustifiably burdens only one party to a legal relationship. In the explanatory letter the submitter of the draft Act justified the release from payment with a general interest, because the immediate imposition of payment would result in a drastic rise of prices.

The Chamber is of the opinion that such a measure may be suitable for guaranteeing a general interest.

40. The Chancellor of Justice is of the opinion that the release from payment is not necessary, because as a rule the utility works are owned by enterprises holding a monopoly and the price of services transmitted via utility networks and utility works has been taken under state control by specific laws (the Electricity Market Act, the District Heating Act, the Public Water Supply And Sewerage Act, and others).

The Chamber is of the opinion that the state control may prove insufficient for the prevention of a price rise.

41. The Chamber is of the opinion that the restriction of ownership right, by which an obligation to tolerate utility networks and utility works without payment until 1 January 2009 was imposed on owners of registered immovables, is not proportional in the narrow sense. This restriction does not conform to the principle of proportionality proceeding from § 11 of the Constitution, because it burdens the landowners more than is justifiable by a general interest and the interests of the owners of utility works. The owners of registered immovables are forced to pay land tax also for the land under utility works and land necessary for the servicing of the works, irrespective of the fact that they are not able to partially use the registered immovable. The reduction of payment for a certain time period would have been justified, but total release from payment until 2009 is not justified.

42. The Chamber is of the opinion that § 15^4(2) of the LPAIA is in conflict with the first sentence of § 32(2) of the Constitution, and that is why the provision is to be declared invalid. The Chamber shall postpone the entering into force of the judgment in regard to declaration of invalidity for 6 months, to give time for bringing the regulation into conformity with the Constitution.

The Chamber also points out that the fact that § 15^4(2) of the LPAIA is declared invalid does not result in the obligation of the owners of utility works to retroactively pay compensation to the owners of registered immovables for their performance of the obligation to tolerate utility works.

43. As § 15^2(1) and § 15^4(2) of the LPAIA are in conflict with the first sentence of § 32(2) of the Constitution, the Chamber considers it unnecessary to assess the conformity of these provisions to §§ 19(1) and 31 of the Constitution.

44. In addition, the Chamber considers it necessary to point out that the legal opinion rendered on § 15^2(1) and § 15^4(2) of the LPAIA pertains also to other provisions concerning utility networks and utility works,

and thus it may prove necessary to revise the regulatory framework pertaining to utility works in its entirety.

DISSENTING OPINION
of justice Jüri Põld

1. Proceeding from § 14(2) of the Constitutional Review Court Procedure Act the Supreme Court may declare invalid or unconstitutional legislation of general application or a provision thereof which is relevant for adjudication of a case. In paragraph 19 of the judgment the Chamber, when determining the relevance, referred to the practice of the Supreme Court, pursuant to which a provision the constitutionality of which can be reviewed by a court must be of decisive importance for the resolution of a concrete case; an Act is of decisive importance when in the case of unconstitutionality of the Act a court should render a judgment different from that in the case of constitutionality of the Act.

I am of the opinion that the regulation of the Law of Property Act Implementation Act in regard of which the circuit court initiated a constitutional review court proceeding and the constitutionality of which the Constitutional Review Chamber reviewed was not relevant in the present case. In regard to relevance the Supreme Court is not tied to the opinion given to a provision by a court which initiated a constitutional review court procedure.

2. I am of the opinion that § 15^2(1) and § 15^4(2) of the LPAIA, the constitutionality of which was analysed by the Chamber, do not refer to utility works situated in rooms. What are referred to are utility works erected on the land of another. Interpretation of subsections (1) and (2) of § 154 of the LPAIA brings me to this conclusion.

The first sentence of § 15^4(1) of the LPAIA establishes that an owner of an immovable has the right to demand payment for tolerating a utility works erected on his or her immovable regardless of whether the obligation to tolerate arises from law, the encumbrance of the immovable with a servitude or a personal right of use. The second sentence of the same subsection stipulates: “The size of the payment shall equal the amount of the land tax corresponding to the area of the protected zone of the utility works multiplied by the factor prescribed for the intended purpose of the land. The Government of the Republic shall establish the period and procedure for payment and the factors prescribed for the intended purposes of land.”

In case of utility works situated in a room it would be unthinkable that the size of the payment would equal the amount of the land tax corresponding to the area of the protected zone of the utility works multiplied by the factor prescribed for the intended purpose of the land. Also, the payment established under public law, based on land tax and the factor prescribed for the intended purpose of the land, would be in manifest conflict with the guarantees of the ownership right established in § 32 of the Constitution. Land tax and the factor prescribed for the intended purpose of the land are in no way related to ordinary rent for a similar thing in a similar location. Thus, there is no ground to think that in § 15^4(1) of the LPAIA the legislator referred to utility works situated in rooms.

15^4(2) of the LPAIA releases the owner of utility works whose works were erected on the immovable of anther before 1 April 1999 from payment for performance of the obligation to tolerate utility works until 1 January 2009. Thus, from 1 January 2009 the relationship between the owner of utility works referred to in 15^4(2) of the LPAIA and the owner of an immovable shall be regulated by § 15^4(1) of the LPAIA.

As § 15^4(1) of the LPAIA, which shall take effect on 1 January 2009, is not applicable to utility works situated in rooms, subsection (2) of the same section can not possibly be applicable to the referred utility works at present.

3. The utility works of the Eesti Energia AS are situated in a 66 square metre room in a building of the Tondi Elektroonika AS (see paragraph 1 of the judgment of the Chamber). Thus, 154(2) of the LPAIA could not be relevant either in the civil matter or in the constitutional review court procedure.

I am of the opinion that it would have been possible to adjudicate the civil matter under § 335 of the Law of Obligations Act without declaring individual provision of the Law of Property Act Implementation Act unconstitutional. § 335 of the Law of Obligations Act stipulates: “If a lessee does not return a thing after termination of the contract, the lessor may demand the rent agreed in the lease contract or rent which is usual in the case of a similar thing in a similar location as compensation for damage for the period of delay, unless the lessee justifiably withholds the thing in order to ensure payment for the expenses incurred thereby. This does not preclude the right of the lessor to demand compensation for damage caused to the lessor by the delay in the return of the thing in an amount which exceeds the amount of rent.”

4. As 15^4(2) of the LPAIA is not relevant, § 15^4(1) of the same Act can not be relevant, either.

5. For these considerations I am of the opinion that in the present matter the Chamber had no possibility to assess the constitutionality of § 15^2(1) and § 15^4(2) of the LPAIA.
