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Constitutional judgment 2-15-17249

JUDGMENT

in the name of the Republic of Estonia

Case number	2-15-17249
Date of judgment	25 January 2018
Composition of court	Chairman: Priit Pikamäe; members: Peeter Jerofejev, Henn Jõks, Hannes Kiris, Lea Kivi, Indrek Koolmeister, Ants Kull, Villu Kõve, Saale Laos, Viive Ligi, Jaak Luik, Nele Parrest, Ivo Pilving, Jüri Pöld, Paavo Randma, Peeter Roosma, Malle Seppik and Tambet Tampuu
Case	Complaint by Inessa Kovaljova against the decision of 5 November 2015 of Tallinn bailiff Elin Vilippus in enforcement matter No 022/2015/3237
Contested judicial decision	Order of Tallinn Court of Appeal of 9 November 2016 in civil case No 2-15-17249
Appellant and type of appeal	Appeal by Inessa Kovaljova against court order

Participants in the proceedings and their representatives in the Supreme Court	Applicant (debtor) Inessa Kovaljova, representative sworn advocate Indrek Västriik
	Person concerned (bailiff) Tallinn bailiff Elin Vilippus
	Person concerned (claimant) AS SEB Pank
	Riigikogu
	Chancellor of Justice
	Minister of Justice
	Estonian Chamber of Bailiffs and Trustees in Bankruptcy
Type of hearing	Written procedure
Date of hearing	10 October 2017

OPERATIVE PART

- 1. To declare unconstitutional and repeal § 35 subsections (2) and (3) of the Bailiffs Act prospectively as of entry into force of this point of the operative part of the judgment.**
- 2. To postpone the entry into force of point one of the operative part by six months from pronouncement of the judgment.**
- 3. To continue adjudication of the appeal by I. Kovaljova after the entry into force of point one of the operative part of the present judgment.**

FACTS AND COURSE OF PROCEEDINGS

1. On 16 November 2015, Inessa Kovaljova (debtor, applicant) lodged a complaint with Harju County Court against the decision of 5 November 2015 by Tallinn bailiff Elin Vilippus (bailiff) in enforcement matter No 022/2015/3237 (contested decision). By her decision, the bailiff had rejected the debtor's complaint against the fact that the bailiff had not agreed to reduce the bailiff's basic fee payable in the enforcement proceedings to the extent requested by the debtor.

2. According to the file, on 1 June 2015 the bailiff initiated enforcement proceedings against I. Kovaljova with AS SEB Pank as the claimant (the claimant). The enforcement instrument was a combined mortgage agreement and the claim according to the application for enforcement was for 162 890 euros and 1 cent. The combined mortgage encumbered a registered immovable co-owned by the debtor and M. Annuk in equal legal shares. On 15 February 2013, M. Annuk had been declared bankrupt.

3. According to the enforcement notice delivered to the debtor, the term for voluntary compliance was ten days. The term started to run on 22 June 2015. Later the bailiff extended the term to 12 July 2015 at the request of the debtor and with the consent of the claimant.

4.After expiry of the term for voluntary compliance, the bailiff and M. Annuk's trustee in bankruptcy agreed on 13 August 2015 that they would dispose of the registered immovable co-owned by the debtor and M. Annuk at auction and would divide the proceeds equally between the bailiff and the trustee in bankruptcy. At the beginning of September, the bailiff announced the auction. However, on 11 September 2015 the debtor applied for consent for the sale of the registered immovable under supervision of the bailiff in line with § 102 of the Code of Enforcement Procedure (CEP) since through a real estate broker she had found an interested person who had agreed to pay 260 000 euros for the immovable. The claimant, the trustee in bankruptcy and the bailiff consented to this method of sale.

5.Before the transaction agreed for 6 October 2015, on 2 October 2015 the debtor applied to the bailiff for agreement to pay half of the bailiff's basic fee because it was the debtor who had found a buyer for the registered immovable. By e-mail of 5 October 2015, the bailiff declined to do so, noting, inter alia, that according to the sum to be collected in actuality the proportionally reduced bailiff's basic fee would be 10 563 euros and 10 cents.

6.On 6 October 2015, a notary authenticated the transaction by which the registered immovable encumbered with a combined mortgage was disposed of in favour of the claimant at a price of 260 900 euros. The transaction was performed under supervision of the bailiff. The bailiff received 127 950 euros to cover the bailiff's fee with the balance to be transmitted to the claimant. Since the claimant's claim was satisfied in part, the bailiff's basic fee that was initially supposed to be higher was also reduced proportionally to the sum of 10 562 euros and 60 cents. In addition, the debtor paid 2500 euros to the real estate broker as well as part of the notary's fee, and the state fee of 412 euros and 16 cents.

7.According to the file, in addition to the enforcement action mentioned above, after delivery of the enforcement notice and expiry of the term for voluntary compliance with the claim, the bailiff also performed the following steps: went to examine the registered immovable, commissioned an expert assessment to establish the value of the immovable, seized the legal share of the immovable, cancelled the already announced public auction, and deleted the notation concerning prohibition in order to enable a notarially authenticated sales transaction.

8.On 12 October 2015, the applicant filed a complaint against the bailiff regarding setting the basic fee. In view of the circumstances of the sale of the registered immovable, she requested a reduction of the collected bailiff's fee to a proportional amount but not less than 50% of the collected fee.

9.By decision of 5 November 2015, the bailiff dismissed the complaint. In brief, she justified the decision by noting that even though the debtor had found a buyer for the property, the claim was satisfied thanks to carrying out the enforcement proceedings, seizure of the property, and announcement of the auction. The property was sold after expiry of the term for voluntary compliance and the sale took place under supervision of the bailiff, i.e. through her intermediation. The amount of a bailiff's basic fee is set by statute and a bailiff is prohibited by law to change it. The fee does not depend on the method of sale or on the number and substance of transactions carried out in enforcement proceedings. With regard to the debtor's argument that a sum smaller by half could have been paid by law if the claimant had filed an application to terminate the enforcement proceedings, the bailiff noted that no such application had been filed and that no application could still have been filed in the course of the sales transaction since that would have amounted to an illusory transaction.

10.In the appeal lodged with the County Court, the applicant sought that the bailiff's decision be annulled and the case be remitted to the bailiff for reconsideration. The applicant requested a reduction of the bailiff's basic fee by at least 50% (or more, if possible) and a declaration obliging the bailiff to return the overpaid fee. In the opinion of the debtor, the situation was similar to voluntary compliance during enforcement proceedings. A buyer for the property was found by the debtor's broker whose fee the debtor also paid. The bailiff's contribution to the sale of the property and to satisfying the claim was not productive. She only gave consent for the transaction. If property is sold under supervision of a bailiff but it is the debtor who finds a buyer for the property, a reduction in the basic fee is justified under the Bailiffs Act and the Code of Enforcement Procedure as well as in line with the case-law of the Supreme Court. However, if these statutes

cannot be interpreted as allowing reduction of the fee, they should be declared unconstitutional and set aside.

11.The bailiff objected to the appeal lodged with the court. She explained that the legislation provides no possibility not to pay enforcement expenses (including the bailiff's fee) or to reduce enforcement expenses by half if a debtor's property is sold under bailiff supervision. The claimant requested dismissal of the applicant's appeal.

12.By order of 8 July 2016, Harju County Court dismissed the appeal. The County Court left the procedural expenses for the applicant to bear and did not set the monetary amount of the procedural expenses.

13.The County Court reached the opinion that disposing of property under supervision of a bailiff under § 102 of the CEP and satisfying the claim from the proceeds amounts to satisfaction of a claim in enforcement proceedings through a bailiff. The legislator did not envisage special regulation for remunerating bailiffs depending on the method of disposal of property in enforcement proceedings. The law does not envisage reducing a bailiff's fee in the event of disposal of property according to § 102 of the CEP. Nor does the law oblige a bailiff to set the amount of the basic fee by a discretionary decision in this situation, taking account of the amount of work done by the bailiff and the bailiff's contribution to satisfying the claim. Therefore, the bailiff could not reduce the basic fee. The County Court did not deal with the request to declare the Bailiffs Act unconstitutional.

14.On 25 July 2016, the applicant lodged an appeal against the court order with Tallinn Court of Appeal, seeking reversal of the County Court order and entry of a new order annulling the bailiff's decision, and remitting the case to the bailiff for reconsideration.

15.The bailiff objected to the appeal against the order, asking for it to be dismissed. The claimant did not support the appeal against the order either.

16.The County Court dismissed the appeal against the order and referred it to Tallinn Court of Appeal under § 663(5) of the Code of Civil Procedure for examination and adjudication.

17.By order of 9 November 2016, Tallinn Court of Appeal upheld the County Court order. The procedural expenses arising from filing the appeal against the order were left for the applicant to bear. The persons concerned had no procedural expenses in the Court of Appeal for which a monetary amount could have been set.

18.The Court of Appeal agreed with the County Court that disposal of property under § 102 of the CEP is one of the ways of selling property in enforcement proceedings. However, selling property in this manner is not similar to satisfying a claim within a term for voluntary compliance. Including for the reason that, in the instant case, the bailiff performed several procedural steps after delivery of the enforcement notice and expiry of the term for voluntary compliance. Nor did the claimant file an application during the proceedings to terminate the enforcement proceedings. The law does not lay down any distinctions with regard to setting the bailiff's fee depending on how a property is disposed of in enforcement proceedings. Therefore, no basis existed for reducing the bailiff's fee, and the bailiff was entitled to the basic fee in the amount laid down by law. With regard to the applicant's assertion concerning unconstitutionality of the Bailiffs Act, the Court of Appeal noted that the aim of the fee at the established rate is to cover the main enforcement expenses, including the expenses of maintaining a bailiff's office as well as remuneration for the bailiff and their staff. However, sale of property under supervision of a bailiff does not always mean that the bailiff must also perform significantly fewer enforcement steps than in the event of sale of property at auction. In view of the aim of the fee and the number of steps taken in the specific enforcement proceedings, charging the full fee was constitutional even though the sale took place under supervision of the bailiff and the buyer for the property was found by the debtor.

19. On 25 November 2016, the applicant lodged an appeal against the order of Tallinn Court of Appeal, seeking reversal of both the Court of Appeal order and the County Court order and entry of a new order annulling the bailiff's decision and remitting the case to the bailiff for reconsideration. If the court finds that it can decide the amount of the fee, the applicant requests a reduction of the basic fee by at least 50% and that the bailiff be obliged to return the fee in the respective amount. If the court does not consider it possible to enter a new decision, the matter should be remitted to the Court of Appeal or the County Court. The applicant repeated her earlier assertions and arguments.

20. The bailiff did not find the applicant's appeal against the order to be justified.

21. The three-member panel adjudicating the case in the Supreme Court referred the case by order of 29 March 2017 to the full panel of the Civil Chamber.

ORDER OF THE SUPREME COURT CIVIL CHAMBER

22. In the order of 14 June 2017 in the instant case (previous number 3?2?1?20?17), the full panel of the Supreme Court Civil Chamber held that, under § 19(4) cl. 3) and § 690(1) (first sentence) of the Code of Civil Procedure and § 3(3) (second sentence) of the Constitutional Review Court Procedure Act, adjudication of the case should be referred to the Supreme Court *en banc*.

23. The final amount of the bailiff's basic fee was formed as a result of the combined effect of § 35(2) cl. 12) and § 32(5) of the Bailiffs Act (BA). The provisions of the Bailiffs Act cited in the appeal against the order cannot be interpreted as allowing reduction of the basic fee. The claimant's claim was not satisfied within the term for voluntary compliance or outside the enforcement proceedings, which would have enabled applying § 41(2) of the BA.

24. In that light, while adjudicating the case the majority of the Chamber developed misgivings that § 35(2) cl. 12) in combination with § 32(5) of the BA might be contrary to §§ 11 and 32 of the Constitution. The bailiff's basic fee collected from a debtor amounts to interference with the freedom of possessing, using or making dispositions regarding one's property ensured to a debtor under § 32(2) of the Constitution. The aim of the bailiff's fee and of the above interference with the fundamental right to property is to finance the activities of bailiffs as representatives of a liberal profession whose assigned competence includes arranging enforcement proceedings under the Code. Enforcement proceedings help to secure the protection of claimants' legitimate interests but also to avoid violation of the debtors' interests through "private enforcement" (i.e. not within the state system) of enforcement instruments.

25. Interference with the debtor's right to property in enforcement proceedings might not be proportional in the narrow sense considering the amount that had to be paid. The Chamber referred to its earlier case-law (see Supreme Court order of 16 December 2015 in civil case No 3?2?1?108?15, paras 27 and 28), according to which a bailiff's basic fee by nature resembles a fee intended to compensate the costs of an act of specific performance under public law, and added that costs of performance under public law must also include remuneration for the bailiff and their office staff, which should primarily be covered from the bailiff's basic fee. From the same ruling, the Chamber also repeated that the system of bailiffs' fees should not lead to a situation where it disproportionately interferes with the right to property of owners, debtors and creditors, among others. If a bailiff's fee is disproportionately high, the amount left over from the sale of property for paying off the debt decreases, which in turn means that a larger debt remains for a debtor regardless of the forced sale of the property. The Chamber also deplored the situation where fees received in proceedings for the sale of mortgage-encumbered registered immovables are used to subsidise enforcement proceedings where the legislator has set significantly lower fees. Even though such cross-subsidisation is possible, this freedom is not constitutionally unlimited.

26. The contested matter also involves sale of a mortgage-encumbered registered immovable. The sale took place in enforcement proceedings but the final transaction was formalised by a notary while the bailiff consented to such sale of property under § 102 of the CEP. Paying the fee in such an amount significantly decreases the debtor's property and impedes free use of that property, in view of the extent and scope of

public performance received as ‘counter-performance’.

OPINIONS OF THE PARTICIPANTS IN THE PROCEEDINGS

27.-53. [not translated]

CONTESTED PROVISIONS

54.Section 32(5) of the Bailiffs Act (RT I 2009, 68, 463; RT I, 26 June 2017, 17) stipulates:

“§ 32. Collection of bailiff’s fee

[...]

(5) If a monetary claim subject to execution is collected partially, a bailiff may collect as basic fee only an amount proportional to the collected sum of the claim.”

55.Section 35 subsections (2) and (3) of the Bailiffs Act (RT I 2009, 68, 463; RT I, 26 June 2017, 17) stipulate:

“§ 35. Rates of basic fees based on amount of claim

[...]

(2) If an enforcement instrument for payment by the debtor to the claimant of an amount exceeding 3200 euros is submitted for enforcement, the bailiff’s basic fee is calculated as follows:

- 1) a bailiff’s basic fee on an amount of claim of 3201–3900 euros is 14.75 % of the amount but not more than 527 euros;
- 2) a bailiff’s basic fee on an amount of claim of 3901–4500 euros is 13.75% of the amount but not more than 548 euros;
- 3) a bailiff’s basic fee on an amount of claim of 4501–5100 euros is 12.25% of the amount but not more than 575 euros;
- 4) a bailiff’s basic fee on an amount of claim of 5101–5800 euros is 11.25% of the amount but not more than 603 euros;
- 5) a bailiff’s basic fee on an amount of claim of 5801–6400 euros is 10.5% of the amount but not more than 607 euros;
- 6) a bailiff’s basic fee on an amount of claim of 6401–13 000 euros is 9.5% of the amount but not more than 1182 euros;
- 7) a bailiff’s basic fee on an amount of claim of 13 001–25 500 euros is 9.25% of the amount but not more than 2300 euros;
- 8) a bailiff’s basic fee on an amount of claim of 25 501–38 400 euros is 9% of the amount but not more than 3355 euros;
- 9) a bailiff’s basic fee on an amount of claim of 38 401–51 200 euros is 8.75% of the amount but not more than 4345 euros;
- 10) a bailiff’s basic fee on an amount of claim of 51 201–63 900 euros is 8.5% of the amount but not more than 5112 euros;

- 11) a bailiff's basic fee on an amount of claim of 63 901–127 800 euros is 8% of the amount but not more than 9586 euros;
- 12) a bailiff's basic fee on an amount of claim of 127 801–191 800 euros is 7.5% of the amount but not more than 13 900 euros;
- 13) a bailiff's basic fee on an amount of claim of 191 801–255 700 euros is 7.25% of the amount but not more than 16 617 euros;
- 14) a bailiff's basic fee on an amount of claim of 255 701–319 600 euros is 6.5% of the amount but not more than 17 575 euros;
- 15) a bailiff's basic fee on an amount of claim of 319 601–383 500 euros is 5.5% of the amount but not more than 18 214 euros;
- 16) a bailiff's basic fee on an amount of claim of 383 501–447 400 euros is 4.75% of the amount but not more than 20 132 euros;
- 17) a bailiff's basic fee on an amount of claim of 447 401–511 300 euros is 4.5% of the amount but not more than 20 451 euros;
- 18) a bailiff's basic fee on an amount of claim of 511 301 575 000 euros is 4% of the amount of the claim.

A bailiff's basic fee on an amount of claim more than 575 000 euros is 23 008 euros + 0.5% of the amount exceeding 575 000 euros.“

OPINION OF THE COURTEN BANC

56.The *Courten banc* has to resolve the dispute over whether the applicant as a debtor had to pay the bailiff's basic fee in the amount of 10 562 euros and 60 cents. If yes, then an issue arises of the constitutionality of the regulatory provisions obliging her to do so.

57.The bailiff arrived at the amount of the contested basic fee by calculating the basic fee under § 35(2) cl. 12) of the BA and reducing it under § 35(5) of the BA (for a more detailed calculation, see para. 14.1 of the Supreme Court Civil Chamber order cited in para. 22 above).

58.The Supreme *Courten banc* agrees with the courts that the obligation to pay the basic fee in the contested amount derived from the provisions cited and that the Bailiffs Act does not contain a basis for reducing the fee. The applicant did not satisfy the claim during the term for voluntary compliance or outside the enforcement proceedings. The Bailiffs Act cannot be interpreted so as to allow reduction of the basic fee for some other reason (see paras 13, 18 and 23 above). Thus, the applicant was required to pay the bailiff's basic fee of 10 562 euros and 60 cents.

59.The constitutionality of the regulatory provisions obliging the applicant to pay the bailiff's fee in the contested amount was called into question by the applicant herself at all the court instances as well as by the Supreme Court Civil Chamber. Next, the *Courten banc* will explain which provisions need to be checked for constitutionality in the instant case (I), what constitutes interference with fundamental rights as a result of those provisions and whether the interference has constitutional aims (II), and will then assess the proportionality of the interference (III). Then the *Courten banc* will resolve the issues concerning entry into force of the judgment (IV) and adjudication of the appeal against the order (V).

I

60.In the light of what was established in paras 57 and 58 above, § 35(2) cl. 12) of the BA is a relevant provision whose constitutionality the Supreme Court is justified in checking (for the relevance criterion, see Supreme *Courten banc* judgment of 22 December 2000 in case No 3?4?1?10?00, para. 10; judgment of 28

October 2002 in case No 3747175702, para. 15). This was the provision that served as a basis for calculating the basic fee. In the event of its constitutionality, the appeal should be dismissed and the bailiff's decision on the fee upheld. However, in the event of unconstitutionality of the provision the appeal could be allowed and the fee reduced.

61. However, in the opinion of the *Courten banc* the instant case cannot be limited narrowly to checking the constitutionality of the fee rate contained in § 35(2) cl. 12) of the BA. This provision contains only one of many rates of the basic fee laid down for monetary claims higher than those established in § 35(1) of the BA. The remaining fee rates are contained in § 35 subs. (2) cls 1)–11) and 13)–18) and subs. (3) of the BA. This forms a uniform regulatory framework established on the same principle that the basic fee for collection of larger claims should also cover the expenses incurred in collecting smaller claims and enforcement measures at a fixed rate. In the opinion of the *Courten banc*, there is ground to doubt the constitutionality of all the rates laid down in § 35(2) and (3) of the BA for the same reasons that caused misgivings in the Supreme Court Civil Chamber (see paras 25 and 26 above).

62. If in these legal circumstances the *Courten banc* were only narrowly to assess the constitutionality of one of the basic fee rates, then bailiffs, debtors, creditors and courts adjudicating disputes concerning bailiffs' fees would continue to harbour doubts concerning the constitutionality of the remaining rates. This might lead to a situation of lack of legal clarity where addressees of the norm would have no certainty as to the substance or the current law, and in the final stage also as to the applicability of that law. Such a situation would inevitably spark disputes over the issue whether the rates corresponding to different amounts claimed are constitutional. Such disputes would be burdensome on debtors and creditors, as well as bailiffs and courts.

63. Review of constitutionality of § 35(2) and (3) of the BA as a uniform whole makes it possible to avoid a situation involving lack of legal clarity, prevents disputes with similar substance, and thus ensures better protection of the fundamental rights of individuals, while also saving the time and expense of courts and participants in proceedings. For these reasons, the *Courten banc* considers it important also to deem § 35 subs. (2) cls 1)–11) and 13)–18) and subs. (3) of the BA as relevant (see also Supreme *Courten banc* judgment of 26 April 2016 in case No 37271740715, paras 36–38; Supreme Court Constitutional Review Chamber judgment of 10 December 2013 in case No 37471720713, paras 43–46). Moreover, the participants in proceedings have also dealt with the issue of rates in their opinions more broadly than simply the rate applicable in the instant case.

64. The *Courten banc* does not share misgivings concerning unconstitutionality of § 32(5) of the BA. This provision does not contain an independent rate. It only required a bailiff to reduce the basic fee calculated on the basis of the rate contained in § 35(2) cl. 12) of the BA because the sum actually collected turned out to be smaller than the amount of the claim initially submitted for enforcement. Thus, the provision had to be applied for calculating the final sum subject to payment, but in favour of the applicant and only after the amount of the basic fee had already been set on the basis of § 35(2) cl. 12) of the BA.

65. Thus, the *Courten banc* will next assess the constitutionality of § 35 subs. (2) and (3) of the BA.

66.The obligation to pay the bailiff's fee interferes with ? i.e. negatively affects ? the fundamental right to property under § 32 of the Constitution of persons required to pay the fee. Section 32 of the Constitution is a general norm protecting proprietary rights and its scope of protection also extends, alongside registered immovables and movables, to rights and claims which have a monetary value. The concept designated by the term "property" also includes money (see Supreme Court *banca* judgment of 17 June 2004 in case No 3?2?1?143?03, para. 18). Thus, the basic fee charged to a debtor under § 35(2) and (3) of the BA amounts to interference with the freedom to possess, use and make dispositions with one's property guaranteed under § 32(2) of the Constitution (about the obligation to pay a bailiff's additional fee, see also Supreme Court Constitutional Review Chamber judgment of 15 June 2007 in case No 3?4?1?9?07, para. 22).

67.Although the instant case has arisen from a debtor's complaint against the amount of a bailiff's basic fee and concerns protection of the debtor's fundamental rights, the *Courten banca* notes additionally that fee rates may also interfere with a claimant's right to property. The bailiff's basic fee together with other enforcement costs take priority as regards deduction from the sum received as a result of enforcement proceedings (see § 106(2) (second sentence) and § 174(2) of the CEP). Although to the extent of the basic fee deducted as a priority the claimant maintains their claim against the debtor, collecting the claim may ultimately fail because the debtor lacks assets.

68.Since the contested provisions interfere first and foremost with the debtor's fundamental right to property, under § 11 of the Constitution, what must be assessed is whether the restriction is compatible with the Constitution and necessary in a democratic society and does not distort the nature of the fundamental right to property. Compatibility within the meaning of § 11 of the Constitution also means formal constitutionality, i.e. the provision was adopted by a competent body under appropriate procedure, observing the requirements of form and the principle of statutory reservation, and the provision is legally clear (see, e.g., para. 40 of the judgment in case No 3?2?1?40?15 cited above). In the opinion of the *Courten banca*, the contested provisions are compatible with the Constitution as regards these requirements. Necessary in a democratic society within the meaning of § 11 of the Constitution amounts to a restriction if it was established to attain a constitutionally admissible ? i.e. legitimate ? aim, and is a proportionate measure for attaining it (see, e.g. Supreme Court *banca* judgment of 2 May 2017 in case No 3?2?1?134?16, para. 43).

69.Participants in the proceedings have noted that the aims of establishing the rates, and thus also the aims of the interference, include the need to ensure accessibility of enforcement proceedings and for this purpose to finance the self-sufficient system of bailiffs without using state budgetary resources. More narrowly, it has been implied that the specific rates serve the aim of motivating debtors to comply with their duties voluntarily and to make bailiffs strive towards ensuring that claims by claimants are satisfied to the maximal possible extent.

70.In the opinion of the *Courten banca*, ultimately all these aims come down to the duty of the state derived from §§ 14, 15 and 32 of the Constitution to create a functioning enforcement system for protecting creditors' fundamental right to property. A functioning enforcement system also protects debtors against so-called private compulsory enforcement. Therefore, the above aims can be said to be compatible with the Constitution.

III

71.Even though the legislator established § 35(2) and (3) having in mind legitimate aims, the interference with the fundamental right to property resulting from them can be deemed constitutional only if it is proportionate, i.e. appropriate, necessary and proportional in the narrow sense for attaining the aim (on this, see, e.g., paras 43–47 of the judgment in case No 3?2?1?134?16 cited above).

72.None of the participants in the proceedings have cast doubt on the appropriateness or necessity of the contested provisions for attaining the aims. The *Courten banca* also considers the provisions appropriate and necessary for attaining the aims and will next assess the narrow proportionality of the interference. More

specifically, the issue is whether the contested rates are too high in view of the aims for which they were established.

73.The contested rates range from 566 euros and 40 cents, including VAT (see § 32(3) BA), for a claim of 3201 euros, to 27 609 euros and 60 cents and larger sums for claims of 575 000 euros or higher. In the opinion of the *Courten banc*, the contested rates are high considering the overall economic context, in particular in view of the indicators characterising income. The average gross wage and the median payment in 2015 were 1065 and 807 respectively (see Tax and Customs Board data on the median payment: [https://www.emta.ee/et/kontaktid-ja-ametist/maksulaekumine-statistika/mediaanvaljamakse\[1\]](https://www.emta.ee/et/kontaktid-ja-ametist/maksulaekumine-statistika/mediaanvaljamakse[1]); statistics from Statistics Estonia on the average monthly gross wage: [https://www.stat.ee/stat-keskmise-brutokuupalk\[2\]](https://www.stat.ee/stat-keskmise-brutokuupalk[2])). In the third quarter of 2017, the same indicators were 1201 and 909 euros respectively. The minimum monthly wage was 390 euros in 2015 and 500 euros in 2018 (see also Supreme Court case-law where the same indicators were taken into account in assessing the constitutionality of the amount of state fees in addition to the average estimated cost of a civil case in court: Supreme Court *Courten banc* judgment of 6 March 2012 in case No 3?2?1?67?11, paras 26.2 and 27.2; Supreme Court Constitutional Review Chamber judgment of 18 October 2012 in case No 3?4?1?15?12, paras 32 and 35; judgment of 15 December 2009 in case No 3?4?1?25?09, para. 27). Paying the fees in the amounts laid down by fee rates significantly decreases debtors' assets and thus amounts to intense interference with the right to property.

74.As concerns comparison with the cost of enforcing a specific claim, the Riigikogu and the Minister of Justice have affirmed in their opinions that the contested rates were established with a view to exceeding the actual costs of collection. The *Courten banc* has no reason to doubt this. This conclusion is also not undermined by the participants in the proceedings referring to the fact that in specific cases the cost of resolving an enforcement matter may exceed the enforcement fee received. In that case, a bailiff may be able to receive an additional fee under §§ 43–47 of the BA (about the conditions for receiving the fee, see paras 22–26 of the order in case No 3?2?1?108?15 cited above).

75.In the case of the applicant, it should be additionally noted that the claim against her was satisfied by sale of a registered immovable in the procedure under bailiff supervision laid down in § 102 of the CEP. In addition to the bailiff's fee, she therefore also had to pay the notary's fee and the state fee. She also paid the fee for the broker who found a buyer for the immovable (see para. 9 above).

76.The participants in the proceedings have found that the effects of interference caused by the fee rates are alleviated by the fact that, as a rule, the cost of enforcement proceedings is known in advance and can be prevented. Although the cost of enforcement proceedings may be preventable and known in advance for a specific debtor, the rates may nevertheless not be so high as to disproportionately damage the rights of the debtor (see also para. 28 of the order in case No 3?2?1?108?15 cited above).

77.In the opinion of the *Courten banc*, the possibility to be relieved of a large proportion of enforcement costs in the event of voluntary compliance under § 32(4) of the BA does not significantly reduce the intensity of the interference in question. Although the term for voluntary compliance was extended from 10–30 days applicable in 2015 to at least 30 days since 1 January 2017 (§ 25(1) CEP), the *Courten banc* believes this may still prove to be too short. However, extending the term depends on the claimant, who might not be interested in a delay with satisfying their claim.

78.The possibility under § 45 of the CEP to suspend or defer payment of the bailiff's fee has no effect whatsoever on the intensity of interference. This does not enable reduction of the basic fee or relief from paying it (see Supreme Court Civil Chamber order of 12 June 2012 in case No 3?2?1?79?12, para. 11, in which the Civil Chamber emphasised the exceptionality of relying on § 45 of the CEP as well as the fact that payment can only be deferred for a few months but not for years).

79.In the opinion of the *Courten banc*, the aims of establishing the rates (see paras 69 and 70 above) are definitely important. The state is obliged to create an enforcement system, to maintain it directly from the state budget or otherwise, and to ensure that enforcement proceedings in a specific case are possible. Delegating the enforcement procedure to freelance bailiffs does not relieve the state from responsibility for the functioning of the system. The current enforcement system in which the task of arranging enforcement

proceedings has been placed on bailiffs acting in their own name and responsibility as representatives of a liberal profession under public law, who receive remuneration established by law for their work, and whose activities are not financed by the state, has justified itself overall, and in comparison to the earlier system based on state bailiffs has increased the efficiency of enforcement proceedings. This has also been fostered by the system of fees, which is motivational for bailiffs. Nevertheless, in the opinion of the *Courten banc* the above aims cannot justify the size of the rates in question.

80.In the case of a self-sufficient enforcement system, it is important to note that the bailiff's basic fee is a duty in public law that resembles a state fee whose aim is first and foremost to cover the costs of specific performance in public law (about the bailiff's additional fee, see para. 24 of the judgment in case No 3?4?1?9?07 cited above, and about the basic fee para. 27 of the order in case No 3?2?1?108?15 cited above). Reasonable remuneration for a bailiff and their office staff, as well as other reasonable and necessary expenses to which the bailiff in her opinion also referred (see para. 52 above), should also be considered as part of these costs.

81.Cross-subsidisation of enforcement proceedings, i.e. covering the expense of an enforcement proceeding or an enforcement measure from the income received for another enforcement proceeding or enforcement measure is nevertheless admissible (about this in the context of notaries' fees, see Supreme *Courten banc* order of 18 June 2013 in case No 3?2?1?169?12, para. 56). The legislator may establish a system of fees that it deems appropriate. At the same time, the *Courten banc* agrees with the Supreme Court Civil Chamber that the possibility to apply the principle of cross-subsidisation is not constitutionally unlimited (see para. 25 above). This means that the basic fee rates may not be excessively high in comparison to the expected cost of enforcing the relevant claims. However, in the opinion of the *Courten banc* the contested rates are clearly higher in comparison to the expected cost of the proceedings.

82.The participants in the proceedings have also pointed out motivating bailiffs as an aim of the contested rates. However, in the case of the currently applicable rates and the system of fees in general, receiving payment is ensured even where an enforcement matter is not complicated or a bailiff was not diligent and thorough in their activity. The *Courten banc* does not hereby cast doubt on the activity and thoroughness of the bailiff as to the enforcement matter in the instant case.

83.Additionally, it has been asserted that the contested rates are justified by the fact that in the case of a larger claim the amount of work, expense and risk are also larger, so that the fee must also be respectively higher. The *Courten banc* notes that such a generalisation might not be correct, in particular in the case of mortgage-backed claims. No obvious link can be established to the fact that the larger the amount of a claim the higher the costs of enforcing that claim. But the main factor in the instant case is that the participants in the proceedings are unanimous that the current rates exceed the expected costs of enforcement of the claims listed in the contested provisions.

84.One of the aims pointed out with regard to the rates is also to motivate debtors to comply with claims voluntarily. But even in the case of this ? in itself considerable ? aim it is important that the rates should not become a sanction against the debtor for not voluntarily complying with a claim. In particular in a situation where the possibilities for voluntary compliance in enforcement proceedings already initiated might not be broad. It is worth reiterating that, regardless of whether the system of fees is intended to influence the conduct of debtors or bailiffs, it may not lead to disproportionate interference with the right to property of debtors or also owners and creditors (para. 28 of the order in case No 3?2?1?108?15 cited above).

85.In conclusion, in the opinion of the *Courten banc* the obligation to pay the bailiff's basic fee at the rate contested cannot be considered a narrowly proportional measure for attaining the aims. Protection of property outweighs the aims sought if they are sought at the price in question.

86.In view of the foregoing, the *Courten banc* declares unconstitutional and repeals § 35 subsections (2) and (3) of the Bailiffs Act prospectively as of entry into force of this judgment. Prospective repeal is justified by the principle of legal certainty arising from § 10 of the Constitution and, first and foremost, by the need to protect bailiffs from reversal of decisions concerning fees already enforced. This is also supported by the need to avoid burdening bailiffs and courts with disputes over refunding enforcement fees.

IV

87.Under § 58(3) of the Constitutional Review Court Procedure Act, the *Courten banc* postpones the entry into force of the declaration of unconstitutionality and repeal of § 35(2) and (3) of the BA by six months as of pronouncement of the judgment. If the judgment were to enter into force as of its pronouncement, in the case of claims listed in the contested provisions it would no longer be possible to set or collect the bailiff's basic fee. In such a situation, it might prove complicated in practice to arrange new enforcement proceedings. This would prejudice bailiffs' right to a fee and claimants' interest in satisfaction of claims. In order to avoid such a situation during the period that it takes the Riigikogu to adopt provisions complying with the Constitution, the entry into force of the judgment must be postponed.

88.Until the entry into force of the judgment, § 35(2) and (3) of the BA remain valid in their current form and must be applied in setting the bailiff's basic fee and in adjudicating disputes concerning the fee. In this case, the need to avoid the situation that might emerge in the event of immediate repeal of the provisions outweighs the injustice that debtors may perceive if in their case the provisions are applied which the Supreme Court has considered to be unconstitutional. However, the legislator may also establish the new regulatory framework retroactively for persons who had contested the amount of the bailiff's fee by the time of pronouncement of the present judgment and in respect of whom the dispute was pending, i.e. the court decisions had not become final, and persons in respect of whom the decision on the bailiff's fee is made after pronouncement of the judgment of the *Courten banc*.

89.In six months after pronouncement of the judgment the provisions declared unconstitutional lose effect and may no longer be relied on for setting the bailiff's basic fee.

90.The *Courten banc* adds that the system of bailiff's fees must be balanced and take account of the interests of all the different participants in enforcement proceedings, while also ensuring sufficient income to bailiffs as well as their ability to arrange proceedings. If for social or political reasons the state keeps some of the fees related to enforcement measures artificially low, it must also find other possibilities for compensating the related costs than funding them entirely at the expense of debtors against whom larger claims have been filed. For example, the legislator may consider whether to raise the fee for commencing enforcement proceedings or the fees for enforcement measures at a fixed rate, to provide for an opportunity similar to procedural assistance for some claimants and debtors, to leave part of the bailiff's fee for a claimant to bear, or to finance some enforcement measures partially from the state budget. The sustainability of the current enforcement system should be assessed more broadly, seeking possibilities to reduce costs, inter alia, by optimising the number and tasks of bailiffs.

V

91.The *Courten banc* considers adjudication of the appeal by I. Kovaljova possible when it is clear what will be the new substance of the provision amending or replacing § 35(2) cl. 12) of the BA, in combination with § 32(5) of the BA. At the time of making the current judgment, no such clarity exists. Therefore, by way of analogy, relying on § 450 of the Code of Civil Procedure, the *Courten banc* delivers a partial judgment on the issue of declaring unconstitutional and repealing § 35(2) and (3) of the BA. The *Courten banc* will resume adjudication of the appeal against the order after entry into force of the judgment on this issue

in six months as of pronouncing the judgment.

Dissenting opinion of Supreme Court Justice Hannes Kiris in case No 2?15?17249

1. Unlike the majority of the Supreme Court *en banc*, I do not see the incompatibility of § 35(2) cl. 12) of the Bailiffs Act (BA) with the Constitution and, therefore, I find that the Tallinn Court of Appeal order of 9 November 2016 (upholding the Harju County Court order of 8 July 2016) should have been upheld and the appeal against it dismissed. I also find that in the instant case the Court *en banc* unjustifiably declared unconstitutional and repealed § 35 subs. (2) cls 1)–11) and 13)–18) and subs. (3) of the BA. I justify my position briefly as follows.

2. I completely agree with those participants in the proceedings who noted that the bailiff's fees have been established to ensure accessibility and effectiveness of enforcement proceedings, including for sufficient financing of the activity of bailiffs. The system of fees has been created so that some fees for labour-intensive enforcement measures are low and do not cover the expenses related to enforcement, while some fees are higher than the expenses related to enforcement. The aim of the bailiff's fee is also to motivate debtors to comply with their obligations in time and to avoid enforcement proceedings. If sufficiently diligent, a debtor can take preventive steps to avoid enforcement proceedings and the consequent interference with the fundamental right to property.

3. Hearing of the instant case by the Supreme Court *en banc* was due to a suspicion that the Supreme Court Civil Chamber entertained when adjudicating the case that § 35(2) cl. 12) of the BA (in combination with § 32(5) BA) might be unconstitutional. Therefore, under § 3(3) of the Constitutional Review Court Procedure Act, the Supreme Court *en banc* primarily had to deal with resolving that specific civil dispute and the resulting issue of constitutionality of § 35(2) cl. 12) of the BA in the context of enforcement proceedings initiated against Inessa Kovaljova on 1 June 2015. However, the issue in question has not been dealt with and, instead, by expanding the range of relevant provisions to include § 35 subs. (2) cls 1)–11) and 13)–18) and subs. (3) of the BA the Court *en banc* embarked on an abstract assessment of constitutionality of the regulatory framework of bailiff's fees as a uniform whole. In my opinion this was done without justification and unsuccessfully.

4. In the context of enforcement proceedings initiated against I. Kovaljova on 1 June 2015, § 35 subs. (2) cls 1)–11) and 13)–18) and subs. (3) of the BA are irrelevant. The arguments provided in paras 61–63 of the Supreme Court *en banc* judgment do not convince me to the contrary. For example, § 35 subs. (2) and (3) of the BA cannot be considered as forming a uniform regulatory framework established on the same principle that the basic fee for collection of larger claims should also cover the expenses incurred in collecting smaller claims and enforcement measures at a fixed rate. On the contrary, the provisions at issue only lay down part of a uniform regulatory framework because the basic fee rates depending on the amount of claim listed in § 35 of the BA cannot be viewed separately from other bailiffs' fee rates. Nor do § 35(2) and (3) of the BA cover all the basic fee rates dependent on the amount of claim because the rates laid down in § 35(1) of the BA have not been included in the review. However, excluding the latter leads to the situation where the bailiff's basic fee of approximately 472 euros on a claim of 3201 euros (§ 35(2) cl. 1) BA) is contrary to the Constitution while at the same time the bailiff's basic fee of 519 euros on a claim of 2601–3200 euros (§ 35(1) BA) is found to be perfectly constitutional. Similarly unconvincing is the argument that by excluding § 35(2) and (3) of the BA as relevant in their entirety, doubts would remain about the constitutionality of the remaining rates and a situation lacking legal clarity would develop. Rather, a situation of lack of legal clarity can be better prevented by stable legal regulation supporting a properly functioning enforcement system, and if the court finds that one or another provision of that regulatory framework is contrary to the Constitution, it should be set aside when adjudicating a specific case.

5. The Court *en banc* found that the contested provisions were appropriate and necessary for attaining their

aims, while in assessing the narrow proportionality of the interference the court found that the rates contained in them were too high. In para. 81 of the judgment, it is noted fully justifiably that cross-subsidisation of enforcement proceedings, i.e. covering the expense incurred in relation to one enforcement proceeding or an enforcement measure from the income received for another enforcement proceeding or enforcement measure was admissible and that the legislator may establish a system of fees that it deems appropriate. One can only agree with this. Just as one can agree with the fact that the possibility to apply the principle of cross-subsidisation is not constitutionally unlimited, i.e. the bailiff's basic fee rates should not be excessively high in comparison to the expected costs of enforcing the relevant claims. However, no solid justification can be found in the judgment for why the rate laid down in § 35(2) cl. 12) of the BA (or also the rates in other provisions that were deemed to be relevant) should be considered "too high" or "excessively high", as well as what might be the rate which, on the one hand, would be constitutional on a claim of 127 801–191 800 euros in the context of enforcement proceedings initiated on 1 June 2015 against I. Kovaljova and, on the other hand, would ensure effective functioning of the current enforcement system which overall has justified itself.

6. In para. 73 of the judgment, it was noted that the contested rates are high considering the overall economic context, in particular in view of the indicators characterising income. In the abstract, one can of course agree with that assertion. Apparently no one also needs to be convinced of the fact that the rate set out in § 35(2) cl. 12) of the BA, i.e. 7.5% of the amount of claim but not more than 13 900 euros, is significantly higher than the minimum monthly wage, gross wage and the median payment in 2015 given in para. 73 of the judgment – 390, 1065 and 807 euros respectively. It is also understandable that the applicant's annoyance may have been exacerbated by the obligation to pay the notary's fee, state fee and broker's fee (para. 75 of the judgment) in addition to the obligation to pay the sum arising from § 35(2) cl. 12) of the BA. Nonetheless, based merely on these circumstances I am unable to reach a conclusion of excessiveness of the rate laid down in § 35(2) cl. 12) of the BA, let alone unconstitutionality of this or the other rates laid down in § 35(2) cl. 12) of the BA. Unfortunately, no other sound arguments can be found in the judgment. Of course, it may be asserted that the term for voluntary compliance might be longer (para. 77 of the judgment) or the law should envisage a possibility to reduce the bailiff's fee in a situation where the volume and complexity of a bailiff's work are minimal, or a bailiff is not diligent or thorough (paras 32 and 82 of the judgment). Even though these options would probably help to somewhat increase the effectiveness and flexibility of the currently functioning system, their existence alone does not imply incompatibility with the Constitution either.

7. On the basis of the foregoing, I find that in view of the aim of paying the bailiff's fee and the number of enforcement steps taken in enforcement proceedings initiated against I. Kovaljova on 1 June 2015, Tallinn Court of Appeal reached the right conclusion as concerns both the justifiability of the bailiff's fee and its constitutionality.

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