JUDGMENT

On Behalf of the Republic of Latvia

Riga, 6 June 2012

Case No. 2011-21-01

The Constitutional Court of the Republic of Latvia, composed of the Chairperson of the Court hearing Gunārs Kūtris, Justices Kaspars Balodis, Aija Branta, Kristīne Krūma, Uldis Ķinis, and Sanita Osipova,

having regard to an application of the Administrative Case Department of the Supreme Court of the Republic of Latvia on initiation of a case,

according to Article 85 of the Satversme [*Constitution*] of the Republic of Latvia, Article 16 1st indent, Article 17 (1) 9th indent and Article 19.[1] and Article 28.[1] of the Constitutional Court Law,

on 15 May 2012 in writing examined the case

„ On Compliance of Section 8 (2) of the Law on Compensation for Losses Caused by State Administration Institutions with the Third Sentence of Article 92 of the Satversme of the Republic of Latvia".

The Facts

1. On 2 June 2005, the Saeima [Parliament] of the Republic of Latvia (hereinafter – the Saeima) adopted the Law on Compensation for Losses Caused by State Administration Institutions (hereinafter – the Compensation Law). Section 8 (2) thereof provides that a

legal person (merchant) shall have the right to compensation only in case of personal losses caused to reputation of its transactions, commercial secret and copyright (hereinafter – the Contested Norm).

2. The Administrative Case Department of the Supreme Court of the Republic of Latvia (hereinafter – the Applicant, or Senate), when examining the Case No. SKA-771/2011 initiated based on an application of the association "Daugavas vanagi Latvijā" (hereinafter – Daugavas Vanagi) regarding repealing of the 8 March 2011 Decision No. RD-11-803-nd issued by the Riga City Executive Director (hereinafter – the 8 March Decision), decided to apply to the Constitutional Court. The Application contains a request to assess compliance of the Contested Norm with Article 92 of the Satversme of the Republic of Latvia (hereinafter – the Satversme).

2.1. In the application, the following facts were indicted: by means of the 8 March Decision, the Riga City Executive Director prohibited Daugavas Vanagi organizing a procession on 16 March 2011. On 11 March 2011, the Administrative District Court received an application of Daugavas Vanagi. In it, Daugavas Vanagi asked to cancel the 8 March Decision, to commit the Riga City Council to present its excuses to Daugavas Vanagi, to publish the apology in newspapers "Diena", „Neatkarīgā", „Latvijas Avīze", „Telegraf", „Čas" and „Vesti segodņa", as well as to provide compensation of personal harm at the amount of 5000 lats and that moral harm at the amount of 5000 lats.

By means of 15 March 2011 Judgment by the Administrative District Court in the case No. A420458811 (A04588-11/23), the application of Daugavas Vantage was partially satisfied: the 8 March Decision was cancelled, whilst the rest of the claims were rejected. The court concluded that the association is a legal person and it does not have the right to request compensation of moral harm. Consequently, there is no reason to apply the Contested Norm.

Daugavas Vanagi submitted a cassation complaint in respect to the 15 March 2011 judgment insofar as it rejects the claims. In the cassation complaint, the association has indicated that the compensation is requested due to the fact that it was the third year running that the Riga Council prohibited organizing their procession on 16 March and organization thereof has been achieved only by addressing the administrative court. Disbursement of the compensation would make the Riga Council to be more accurate when reviewing the issue of permitting organizing the procession.

2.2. The Applicant indicates that the third sentence of article 92 of the Satversme establishes the right to a fair compensation in case of infringement of fundamental rights. The particular norm includes a general guarantee stating that in case if the State has infringed the rights of a natural person, then the latter shall have the right to compensation. The right of a person to compensation in administrative proceedings is established only by Section 92 of the Administrative Procedure Law (hereinafter – the APL), according to which everyone is entitled to claim due compensation for financial loss or personal harm, including moral harm, which has been caused him or her by an administrative act or an actual action of an institution. However, a more detailed regulation on disbursing of compensation in administrative proceedings is regulated in the Compensation Law.

The legislator has mentioned, in the Contested Norm, only three cases in which a legal person may request compensation for non-material harm – if the harm has been done to reputation of its transactions, commercial secret or copyright. The list of the cases is exhaustive rather than illustrative. Consequently, for a legal person to have the right to request compensation for non-material harm, it is necessary to establish any of the cases referred to in the Contested Norm.

Such legal regulatory framework restricts, without reason, the right of a person to receive compensation for infringement of rights. Contrary to the third sentence of Article 92 of the Satversme, the Contested Norm does not permit all courts assessing the facts of the case. Consequently, courts can not assess whether rights have been infringed without reason, which permits a person to exercise his or her right to appropriate (fair) compensation. In the administrative case under consideration, the court did not have the possibility to assess the facts of the case in order to establish whether compensation should be paid to Daugavas Vanagi.

By referring to several judgments of the European Court of Human Rights (hereinafter – the ECHR), the Applicant indicates that a legal person does have the right to receive compensation for non-material harm. The third sentence of Article 92 of the Satversme should also be interpreted in a way that legal persons have the right to receive compensation for personal harm. However, the Contested Norm deprives legal persons of such right because the court should take into consideration the detailed legal regulatory framework on disbursement of compensation for the particular infringement.

3. The institution that adopted the contested act, the Saeima does not agree with argumentation of the Applicant and asks the Constitutional Court to recognize the Contested Norm as constitutional.

It has been indicated in the reply that, first, it is necessary to find out whether the third sentence of Article 92 of the Satversme equally applies to natural persons and legal persons of private law. The fundamental rights included in Chapter VIII of the Satversme, including the third sentence of Article 92 of the Satversme apply, first of all, to natural persons. This is also indicated in the title of Chapter VIII of the Satversme entitled "Fundamental Human Rights".

However, in certain cases, the person subject to the fundamental rights established in the Satversme can also be a legal person of private law. The rights, freedoms and duties of persons established in the Satversme shall also be applicable to legal persons of private law insofar as these rights, freedoms and duties can be applied to legal persons pursuant to their merits.

The system of the Compensation Law shows that the legislator has assessed in details the extent, to which the right to a proper solution can be applied to a legal person of private law. Likewise, when expressing its will, the legislator has clearly reflected its considerations in legal norms. For instance, pursuant to Section 9 of the Compensation Law, moral harm can only be done to a natural person in case if physical suffering is assessed to establish such moral harm.

Materials of preparation of the Contested Norm show that the legislator has carefully considered all cases, in which personal harm could be done to a legal person of private law. The legislator could not establish any other such cases. For instance, when comparing cases established in Section 8 (1) of the Compensation Law and those in the Contested Norm, it becomes clear that it is not possible to cause harm to "life, physical integrity, health, freedom, honour and respect, personal or family secret" of a legal person of private law. It is also generally accepted in the literature on administrative law that the commitment of the State to compensate personal harm to legal persons of private law can be more restricted.

It can be concluded from the application that the Applicant wants to achieve that punishment and prevention measures in respect to institutions would become a basic function of compensation. Namely, the Applicant expresses his willingness to refrain an

institution from similar offences in the future by imposing considerable fines. The Saeima questions the fact that change of the compensation function, namely, substitution of restitution or compensation function by fines and prevention system, would comply with the basic principles of the legal system of Latvia. Introduction of a new compensation function into legal acts of the State could only be done on the basis of legal and political decision of the legislator because this falls within the competence of the legislator to deal with the particular issue.

To supplement the opinion expressed in the reply, the Saeima indicates that inclusion of an open enumeration into the Contested Norm would probably cause stronger trust into protection of rights of legal persons of private law. However, if it is not possible to indicate, when particular legal interests or rights that are not included in the Contested Norm and would be subject to disbursement of compensation in case of infringement thereof, such enumeration would be regarded as a declarative one.

4. The summoned person, **the Ombudsman of the Republic of Latvia** (hereinafter – the Ombudsman) holds that the Contested Norm contradicts Article 92 of the Satversme. It restricts the rights of legal persons to compensation for personal harm because it clearly lists cases when such compensation shall be disbursed. The list of the Contested Norm is not exhaustive because other kinds of interests can be infringed in respect to a legal person.

Legal persons of private law are not only merchants but also association. The range of interests to be protected established in the Contested Norm is important in respect to merchants in particular. However, for associations it is important to eliminate possible infringement of other rights, for instance, the right to freedom of speech or the right to freedom of assembly.

Section 8 (1) of the Compensation Law that establishes that, in the meaning of the particular law, it is assumed that personal harm in respect to natural persons, gives a broader enumeration of interests to be protected. Moreover, the above mentioned norm does not establish an exhaustive list of interests when establishing the right to request compensation also for such compensation that "has been done to other non-material rights or interests protected by law".

It follows from the third sentence of Article 92 of the Satversme that, in case of

ungrounded infringement of rights of a person, he or she shall have the right to receive appropriate compensation. Article 92 of the Satversme does not establish that in such cases the right to compensation is conferred only to natural persons. However, the Contested Norm restricts, at a great extent, the right of legal persons to require compensation for non-material harm, and such restriction of rights is ungrounded.

There is no doubt that certain kinds of non-material harm may exist, in respect to which a legal person does not have the right to require compensation, it being, like, harm to health or life of a person. However, by means of an unlawful administrative act or unlawful physical activity, non-material harm can be done to a legal person in other cases that are not established in the Contested Norm. Moreover, a legal person of private law, unless interests referred to in the Contested Norm are not infringed, does not have the right to ask even a written or public apology from an institution.

The primary aim of a fair compensation is indeed restitution or compensation; however, such compensation should also be aimed at withholding the offender from committing similar offences in the future. The particular case is a good example showing that the right to freedom of assembly can be systematically restricted due to the lack of an effective law enforcement mechanism in a local government.

Taking into account the aforesaid, the Ombudsman concludes that the Contested Norm not only fails to comply with Article 92 of the Satversme but also restricts the possibilities to exercise other rights.

5. A summoned person, **the Ministry of Justice** agrees with the opinion of the Saeima, namely, that the fundamental rights established in Chapter VIII of the Satversme, including the right to compensation guaranteed in Article 92 of the Satversme are basically applicable to natural persons. However, pursuant to the modern understanding of human rights, the legislator has also established cases when the right to a fair compensation is likewise granted to a legal person.

The core of the right to compensation enshrined in Article 92 of the Satversme is to compensate harm to a person caused in case of infringement of his or her rights or legal interests. No compensation shall be provided in case if no harm has been done. Consequently, the right to compensation include the following two basic elements:

infringement of rights or interests protected by law, and harm caused in the result of it. If any of the elements misses, then the person does not have the right to compensation in the meaning of Article 92 of the Satversme.

The purpose of Section 8 of the Compensation Law is to distinguish between the two independent legal subjects – a legal person and a natural person. Such necessity is based on the consideration that, according to the modern understanding of law, certain human rights, like freedom of association or freedom of religion, are mutually related to several subjects that the State is committed to protect. First, such subject is an individual who has individual right to the above mentioned freedoms. Second, it is a legal person has been conferred particular right to protect their members (associates). Rights of the above mentioned persons may overlap and thus form a unified body; however, in practice, rights and freedoms of legal persons should be distinguished from rights and freedoms of individuals because they are different as to their merits.

By referring to certain judgments of the ECHR, the Ministry of Justice concludes that compensation is granted to a legal person after having assessed non-material harm caused to its founders and members. Likewise, it can be concluded from the above mentioned judgments, practical instructions of the President of the ECHR and the legal doctrine that it is necessary to distinguish between compensation platform *restitutio in integrum* from the punishing and preventive function of compensation.

In case if an institution has repeatedly acted against judicial conclusions, private person can protect their fundamental rights before the court according to stipulated procedure. In the Latvian legal system, case-law has an argumentatory rather than binding character. In the light of protection of legitimate expectations and ensuring of equality, parties applying legal norms are bound to their previous role in establishing and concretization of content of legal norms. However, case-law is not binding, whilst recognition of legal precedents *per se* does not constitute instructions for reviewing of another case. Consequently, a natural person does not have the right to apply to a court against an institution only because the latter has failed to take into account judicial conclusions.

The Findings

6. The third sentence of Article 92 of the Satversme provides: "Everyone, where his or her rights are violated without basis, has a right to commensurate compensation."

When interpreting the above mentioned norm, the Constitutional Court has concluded that protection of fundamental human rights as one of the most important guarantees of a law-governed State establishes the duty of the State to ensure an effective protection to everyone whose rights have been infringed. The norm includes a general guarantee stating that if a State has infringed the rights of an individual, the latter have the right to compensation.

As any norm of human rights, the legal norm, incorporated into the third sentence of Article 92 of the Satversme shall be applied directly and immediately. Besides, the norm does not envisage that a special law is needed to specify it. If a person holds that his rights have been groundlessly violated, he or she, making reference just to the third sentence of Article 92 of the Satversme, has the right of submitting a claim at the court of general jurisdiction on receiving a corresponding compensation *(see: Judgment of 5 December 2001 by the Constitutional Court in the case No. 2001-07-0103, Para 1 of the Findings*).

When interpreting the term "commensurate compensation" included in the third sentence of Article 92 of the Satversme, it is important to assure that the scope of this particular fundamental right would not be restricted without reason or applied only to the field of material rights or compensation of losses. The term "commensurate compensation" shall first of all be interpreted as satisfaction appropriate for any kind of infringement of rights that includes both, compensation of losses and indemnification of non-material (moral and individual) harm.

Consequently, the third sentence of Article 92 of the Satversme includes a general guarantee of a fair trial – if rights or legal interests of a person are infringed, then the person shall have the right to receive commensurate compensation.

7. The Applicant, in fact, objects the fact that, in the particular case, the Contested Norm prohibits the court ensuring effective and fair protection of the infringed fundamental rights. Consequently, the Constitutional Court has to assess whether, when adopting the

Contested Norm, the legislator has duly fulfilled its duty established by the guarantee of a fair trial enshrined in the Satversme.

The Constitutional Court has recognized that the right to a fair trial is one of the most important rights of a person (*see: Judgment of 6 October 2003 by the Constitutional Court in the case No. 2003-08-01, Para 1 of the Findings*. The notion "a fair court", incorporated into Article 92 of the Satversme, includes two aspects, namely, "a fair court" as an independent institution of the judicial power and "a fair court" as an adequate process, characteristic to a law-based state in which the case is being reviewed. In the first aspect this notion shall be read together with Chapter VI of the Satversme, in the other – together with the principle of a law-based state, which follows from Article 1 of the Satversme (*see: Judgment of 5 March 2002 by the Constitutional Court in the case No. 2001-10-01, Para 2 of the Findings*).

Both aspects, namely, the institutional aspect – the court shall be fair, and the procedural aspect – everybody has the right to free access to court, are inseparably connected: fairness of the court would be of no importance, if access to court were not ensured; and vice versa – access to the court would be unnecessary, if fairness of the court were not ensured (*see: Judgment of 14 March 2006 by the Constitutional Court in the case No. 2005-18-01, Para 8*). Consequently, the ability of the court to restore justice in each particular case is closely related with the body of procedural and material legal norms adopted by the legislator, according to which a particular case is adjudicated.

Article 92 of the Satversme establishes a substantial basic duty of the State, which is to elaborate such legal mechanism that would ensure that every person whose rights have been unlawfully infringed would be able to obtain an effective protection of his or her rights. However, the third sentence of Article 92 of the Satversme concretizes a certain aspect of the right to a fair trial by establishing that one of the basic tasks of the court is to grant a commensurate compensation for an ungrounded infringement of rights.

Not only the duty of the State to refrain from intervention into the rights of persons but also that to perform all necessary activities to strengthen this right follows from the Satversme (*see, e.g.: Judgment of 23 September 2002 by the Constitutional Court in the case No. 2002-08-01, the Findings, Judgment of 23 April 2009 in the case No. 2008-42-01, Para 10, and Judgment of 7 October 2009 in the case No. 2009-05-01, Para 9 and 10*). As an example of the positive duty of the legislator in the light of Article 92 of the Satversme

should first of all be mentioned the duty to adopt legal norms required by fair trial (*see, e.g.: Judgment of 5 March 2002 by the Constitutional Court in the case No. 2001-10-01, Para 2 of the Findings, and Judgment of 18 October 2007 in the case No. 2007-03-01, Para 22.3*).

Although the third sentence of Article 92 of the Satversme shall be applied directly and immediately, the principle of legitimate expectations commits the legislator to regulating preconditions of practical implementation of the particular norm of the Satversme. Failure to implement the human rights established in the above mentioned norm of the Satversme might threaten procedural guarantees of a fair trial. In a law-based-state the protection of the rights and interests shall be secured, not only declared (*see: Judgment of 27 June 2003 by the Constitutional Court in the case No. 2003-04-01, Para 6 of the Findings*).

Consequently, the first sentence of Article 92 of the Satversme in conjunction with the third sentence of the same norm commits the legislator to a positive duty: to elaborate and adopt such legal regulatory framework that would permit implementing effective legal protection in case of infringement of rights of a person.

8. The Applicant indicates that the Contested Norm denies the court the possibility to grant commensurate compensation to a legal person in case if, in similar situations, a local government has acted in an unlawful manner several times: if it has failed to take into account judicial conclusions and infringes the fundamental rights of a person, namely, the right to freedom of assembly.

8.1. In order to establish whether the Constitutional Court has the reason to assess compliance of the Contested Norm with the Satversme, first of all it is necessary to establish the content of the norm.

By applying the grammatical interpretation method of a legal norm, it can be concluded that the Contested Norm includes an exhaustive list of interests protected by law that grants a legal person the right to compensation of personal harm in case of infringement of interests. This is also testified by the word “only” included in the Contested Norm that restricts protection of non-material rights of a legal person only to reputation of transactions, commercial secret and copyright.

The Constitutional Court has reiterated that the grammatical interpretation method of legal norms is only one of the interpretation methods, and it is not correct to take into consideration only the verbal meaning of a legal norm (*see, e.g.: Judgment of 4 February 2003 by the Constitutional Court in the case No. 2002-06-01, Para 3 of the Concluding Part, and Judgment of 22 April 2005 in the case No. 2004-25-03, Para 6*). Therefore it is necessary to apply other methods, too, to establish the content of the Contested Norm.

8.2. It was the Cabinet of Ministers that submitted the draft law "On Compensation for Losses Caused by State Administration Institutions" to the Saeima. Section 9 (2) of the draft law (personal harm) established: "A legal person shall have the right to compensation only in case of personal harm caused to dignity and respect, reputation of its transactions, commercial secret and copyright" (*draft law "On Compensation for Losses Caused by State Administration Institutions", submitted on 13 September 2004, registration No. 931*).

The above mentioned draft law has been reviewed at the Saeima Legal Committee meetings for several times. At the meeting of 2 February 2005, the Committee accepted the opinion of the advisor to the Minister of Justice in administrative legal issues, namely, that a legal person is not characterized by dignity and respect, though it has reputation. Consequently, the reference to personal harm caused to dignity and respect of a legal person was excluded (*see: Minutes of the meeting No. 264 of the Latvian 8th Saeima Legal Committee of 2 February 2005, Case materials, pp. 21 and 22*). A considerable addenda to the Contested Norm was introduced on 12 April 2005 when the Legal Committee accepted the proposition of the Saeima Legal Bureau and the norm was supplemented by the word "(merchant") after the words "a legal person". Namely, the consultant of the Legal Bureau indicated that not all merchants are considered as legal persons, for instance, an individual merchant is not regarded as a legal person (*see: Minutes of the meeting No. 286 of the Latvian 8th Saeima Legal Committee of 1 April 2005, Case materials, pp. 25*).

Consequently, the scope of the Contested Norm was applied to all legal persons and merchants, even those who are not considered as legal persons, like, individual merchant (Section 74 of the Commercial Law), general partnerships (Section 77 of the Commercial Law) and limited partnerships (Section 118 of the Commercial Law).

However, it can not be concluded from minutes of meetings of the Committee that, during its discussions, it would have considered particular consideration that would require

the legislator to have had included an exhaustive list of interests to be protected – reputation of transactions, commercial secret and copyright. When examining the draft law "On Compensation for Losses Caused by State Administration Institutions" at the first, the second and the third reading during the Saeima plenary sessions, this question had never been discussed (*see: Transcript of the 7 October 2004 meeting of the 8th Saeima of the Republic of Latvia, Latvijas Vēstnesis, 14 October 2004, No. 163; Transcript of the 17 February 2005 meeting, 24 February 2005, No. 32; and Transcript of the 2 June 2005 meeting, Latvijas Vēstnesis, 9 June 2005, No. 91*).

Consequently, neither work materials of the Saeima committees, nor transcripts of the Saeima meetings provide evidence on legal consideration regarding the fact why the particular list of interests to be protected have been included into the Contested Norm and whether it is sufficient for protection of the rights of a legal person. When preparing the present matter, the Saeima has failed to substantiate whether application of the Contested Norm has ensured en effective protection of fundamental rights of legal persons.

Consequently, historical interpretation of the Contested Norm permits concluding that the legislator has purposefully included an exhaustive list of interests of a legal person to be protected into the Contested Norm.

8.3. When interpreting the Contested Norm in a systematic manner, it can be concluded that, as to its legal construction, the norm differs considerably from Section 8 (1) and Section 9 of the Compensation Law and Section 92 of the APL.

Section 8 (1) of the Compensation Law provides that, in the meaning of the particular law, personal harm is harm that is done to life, physical integrity, health, freedom, dignity and honour, personal and family secret or a commercial secret, copyright or other non-material rights or legal interests of a person by means of an unlawful administrative act or an unlawful physical action of an institution. However, Section 9 of the Compensation Law provides that, in the meaning of the particular law, moral harm is personal harm in the form of human suffering that has been caused to him or her by a material infringement of rights or legal interests of a particular person. Nonetheless, Section 92 of the APL provides that everyone is entitled to claim due compensation for financial loss or personal harm, including moral harm, which has been caused him or her by an administrative act or an actual action of an institution.

Also in Section 8 (1) of the Compensation Law, the legislator has enumerated the interests to be protected; however, the list is not exhaustive. Namely, it is open, and the executor of law can determine a proper content depending on the case. This is testified by the following words of the above mentioned norm: "to other non-material rights or interests protected by law". However, Section 9 of the Compensation Law does not at all refer to non-material rights of a person that could be possibility threatened when causing moral harm to a person. Consequently, the legislator has left establishing of the content of these interests up to the executors in each particular case individually.

Moreover, the Contested Norm establishes an exhaustive list of those interests to be protected, unlawful infringement of which would confer a legal person the right to compensation of personal harm. Namely, the Contested Norm is based on the *numerous clausus* principle: it provides an exhaustive list of interests, unlawful infringement of which envisages the duty of a legal person of public law to compensate the non-material harm caused to a legal person of private law.

Consequently, the Contested Norm permits granting compensation to a legal person for personal harm only in three cases: if the harm has been done to reputation of its transactions, commercial secret or copyright.

9. The Saeima indicates that it has considered and included, into the Contested Norm, those interests protected by law that are substantial for a legal person and unlawful infringement of which gives the right to compensation. The Saeima has indicated in its reply that the duty of the State to compensate personal harm to legal persons can be more restricted if compared to an analogous duty of the State in respect to private persons. Namely, the fundamental rights included in Chapter VIII of the Satversme, including the third sentence of Article 92 of the Satversme, shall first of all apply to natural persons.

The Constitutional Court has already concluded in its case-law that rights, freedoms and obligations, enumerated in the Satversme shall be applied to legal persons as far as they can be linked with the general objective of the legal persons and the essence of the above rights, freedoms and obligations. The fundamental rights shall be applied also to legal persons of the inland as far as the rights – in compliance with their essence – may be applied to legal persons" (*see: Judgment of 3 April 2001 by the Constitutional Court in the case*

No. 2000-07-0409, Para 1 of the Findings). In the context of the above mentioned conclusion, it is reasonable to consider, for instance, that the right to compensation of moral harm are applied to natural persons insofar as harm means moral or physical suffering.

The Constitutional Court shares the opinion of the Saeima that a part of the fundamental rights included in the Satversme can be applied to natural persons only, like the right to life, the right to freely choose one's domicile and the right to hold a state office, the right to social security in case of old age, disability or unemployment, the right to the minimum of medical assistance and other rights. Consequently, the Constitution does not prohibit the legislator to establish reasonable differences between the above mentioned groups of persons by granting such rights to a natural person that would never be conferred to a legal person.

However, legal persons, too, along with natural persons, take part in legal relations, and the public power can infringe the rights of legal persons like it may occur with rights of natural persons. Therefore a general assumption that protection of fundamental rights of legal persons may be implemented at a lesser extent may lead to arbitrate actions of the legislator and threaten the rule of the fundamental rights.

When interpreting norms on human rights, it should be taken into account that the close link of the democracy principle with the fundamental rights means that "as far as possible, the fundamental rights should be guaranteed at full extent by applying available interpretation methods in a way that they would ensure a sufficiently broad application of content of a legal norm" rather than the fundamental rights should be restricted (*see: Ziemele I. Cilvēktiesību īstenošana Latvijā: tiesa un administratīvais process. Rīga, Latvijas Universitātes Cilvēktiesību institūts, 1998, 25 pp*). Consequently, in the field of public rights, the State is responsible not only for losses but also non-material harm caused to natural or legal persons.

The duty of the legislator to assure effective protection of fundamental rights, their observance or guarantee may not be regarded as fully accomplished along with adoption or coming into force of respective legal regulatory framework. The legislator has to ensure *ex officio* after coming into force of a legal norm that it is effective enough when applied. Should it be established that a legal norm fails to function when applied, then it is necessary to improve it. The Constitutional Court has reiterated that, after expiry of a certain term, the

legislator is committed to re-consider whether a particular legal regulatory framework is still effective, appropriate and necessary and whether it should be improved (*see, e.g.: Judgment of 11 November 2005 by the Constitutional Court in the case No. 2005-08-01, Para 9.5, Judgment of 15 June 2006 in the case No. 2005-13-0106, Para 17.3 and 18.8, Judgment of 8 June 2007 in the case No. 2007-01-01, Para 26 and Judgment of 2 June 2008 in the case No. 2007-22-01, Para 18.3*).

10. The notion ”protect” used in Section 103 of the Satversme requires not only non-interference of the State in realization of this right but also the protection of realization of this activity. It means that the State has the duty to ensure that public buildings, streets and squares are accessible to persons, who want to organize meetings, processions or pickets as well as to ensure that persons, who participate in such activities, are protected (*see: Judgment of 23 November 2006 by the Constitutional Court in the case No. 2006-03-0106, Para 34.3*). the word “protect” mentioned in Article 103 of the Satversme establish a broad range of duties of the legislator, one of them being adoption of an appropriate legal regulatory framework and effective judicial control over actions of the executive power when assuring the freedom of assembly.

10.1. The Constitutional Court has concluded that the freedom of assembly shall be regarded as one of the basic rights of a person and fundamental values of a democratic society, as well as a material prerequisite for functioning of a law-governed state. Since the freedom of assembly has been recognized a constitutional value, the duty of the public power is to ensure its effective implementation. The respective right protects both, certain natural persons of private law and certain legal persons of private law.

Freedom of assembly is a vital element of a democratic society, which ensures the public possibility to influence political processes, *inter alia*, also by criticizing the state power and protesting against the actions of the state. When realizing the rights, envisaged in Section 103 of the Satversme persons may together discuss significant problems, express their support to the policy implemented by the State or to censure it. Freedom of assembly ensures for persons the possibility of informing the whole society about their viewpoint or opinion.

The possibilities to effectively use the right to peaceful assembly, as has been envisaged by Section 103 of the Satversme, allow the public members of a civil society to participate in the policy of the state and in public matters. Besides, this right together with other similar rights, for example, freedom of speech, freedom of press, becomes an instrument, which people may use to express their dissatisfaction with the fact that other fundamental rights of a person – enshrined in the Satversme – are not observed *(see: Judgment of 23 November 2006 by the Constitutional Court in the case No. 2006-03-0106, Para 6 and 7*).

The Constitutional Court indicates that, in the present case, an association and a natural person enjoy similar conditions. By means of its ungrounded action, the public power can infringe the rights of a legal persons, as well as a natural person. Namely, in public legal relations, like, by means of administrative acts or actions taken by an institution, the public power has an equal impact of both above mentioned groups of persons.

Both, natural and legal persons have the right to freedom of assembly. Section 3 (1) of the Law "On Meetings, Processions and Pickets" provides that everyone have the right to organize peaceful meetings, processions and pickets according to the stipulated procedure, as well as to take part therein. The term "everyone" used in the above mentioned norm is not limited to natural persons; it includes also legal persons of private right. It would not be reasonable to hold that natural persons having founded an association in order to ensure more effective implementation of their fundamental rights, have less need for procedural guarantees of a fair trial. Consequently, in the case of infringement of rights, both groups of persons have the necessity to have their rights protected.

The ombudsman has also indicated that it is important for associations to be protected against ungrounded restrictions of freedom of speech and assembly (*see: Case materials, pp. 122*).

10.2. The Law "On Meetings, Processions and Pickets" permits an official of a local government to prohibit organizing an event not only by issuing a grounded refusal, but also by issuing an ungrounded one. In 2006, the Constitutional Court has already concluded that the collection of a compensation for violation of fundamental rights of a person does not efficiently function in Latvia (*see: Judgment of 23 November 2006 by the Constitutional Court in the case No. 2006-03-0106, Para 24.6*). Consequently, it is likely that a local

government may prohibit organizing undesirable events, whilst persons would not receive any compensation for infringement of their fundamental rights.

Consequently, in an administrative procedure, both, a natural persons and a legal person enjoy relatively weak legal position if compared to a legal person of public law. This fact has been based on the assumption that, in an administrative procedure, factual possibilities of the parties, them being the State and private persons, are not equal. State and private persons do not enjoy equal conditions because the State has human resources and more material resources if compared to a private person. Therefore the State enjoys structural advantage in directing proceedings. Consequently, objective inequality of the parties should be balanced (*see: Judgment of 11 June 2011 by the Constitutional Court in the case No. 2010-11-01, Para 8*).

It would not be reasonable to interpret the third sentence of Article 92 of the Satversme in a way that, in certain cases, it would permit a person subject to law to be completely released from the duty to compensate non-material harm caused to a legal person. In such a case, a legal person of private law would enjoy worse legal situation if compared to a natural person. Likewise, it would not be reasonable to consider that, in the frameworks of an exhaustive or closed list, the legislator would be able to envisage all possible situations where harm could be caused to non-material rights of a legal person.

In its opinion of 26 September 2007 on the draft law "Amendments to the Law on Compensation for Losses Caused by State Administration Institutions", the Saeima Legal Bureau has suggested to provide such wording of the Contested Norm that would establish an open list of interests to be protected. Namely, it was suggested to amend the Contested Norm by providing that "in the meaning of the particular law, personal harm of a legal person (merchant) shall be harm that is caused to reputation of transactions, commercial secret, copyright or other non-material rights of interests protected by law by means of an unlawful act or unlawful action of an institution." It is indicated in the opinion: "Taking into account the fact that Section 8 (2) [of the Compensation Law] establishes compensation to a legal person in respect to such kinds of personal harm only as reputation of transactions, commercial secret or copyright, whilst neither the Satversme nor the Administrative Procedure Law establishes the possibility to restrict the compensation commitment in case of personal harm, we find it as indispensable to coordinate legal norms of these normative

acts" [*see: Opinion No. 12/17-1-161-(9/07) of the Saeima Legal Bureau of 26 September 2007, Para 6, Case materials, pp. 100*).

10.3. The Constitutional Court has reiterated that the purpose of the legislator has not been to oppose norms of human rights to those of international law (*see: Judgment of 30 August 2000 by the Constitutional Court in the case No. 2000-03-01, Para 5 of the Findings*). The chance and even necessity to apply international norms for interpretation of the fundamental rights, incorporated in the Satversme, inter alia follow from Article 89 of the Satversme, which determines that the State shall recognize and protect fundamental human rights in accordance with the Satversme, laws and international agreements binding upon Latvia. It can be seen from the Article that the aim of the legislator has been to achieve the harmony of norms, incorporated in the Satversme with international human rights norms (*see: Judgment of 13 May 2005 by the Constitutional Court in the case No. 2004-18-0106, Para 5 of the Findings*).

The right to a fair trial established in Article 92 of the Satversme should be interpreted in accordance with international legal norms binding upon Latvia.

Article 41 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention) establishes the commitment of the State to compensation of losses (harm) caused to a person related to their material and also non-material aspect. Such compensation duty shall be applicable in cases when the ECHR recognizes, by means of its ruling, infringement of rights or freedoms guaranteed in the Convention or its protocols. Article 34 of the Convention provides that every person, both natural and legal, shall have the right to apply to the European Court of Human Rights. Consequently, the compensation established in Article 41 of the Convention can be granted to both, natural and legal persons.

According to case-law of the ECHR, the determinative criteria for granting compensation for non-material harm is the fact whether rights and freedoms of a person established in the Convention have been infringed without reason rather than the fact whether the concerned party is a natural or a legal person. Having establishing infringement of the right to assembly and association enshrined in Article 11 of the Convention, the ECHR has ruled several times that legal persons should be granted compensation for infringement of non-material rights.

For instance, in the judgment in the case *Christian Democratic People's Party against Moldova*, the ECHR established infringement of Article 11 of the Convention when a political party was prohibited organizing a protest demonstration, and it was granted 3000 euro to compensate its non-material infringement [*see: Judgment of 2 February 2010 by the ECHR in the case „Christian Democratic People's Party against Moldova", application No. 25196/04, Para 3. (a) (i) of the Findings*]. Having established infringement of the above mentioned article, in the case *Hyde Park and others against Moldova*, the ECHR assigned to the applicant who was a legal person, compensation of non-material harm at the amount of 6000 euro [*see: Judgment of 14 September 2010 by the ECHR in the case „Hyde Park and others against Moldova", applications No. 6991/08 and No. 15084/08, Para 6. (a) of the Findings*]. However, in the case *The United Macedonian Organisation Ilinden and Ivanov against Bulgaria*, the ECHR established infringement of Article 11 of the Convention in relation to repeated prohibitions to organize meetings, and assigned compensation of non-material harm at the amount of 9000 euro in favour of the applicants, one of them being a legal person, due to caused "suffering and disappointment" [*see: Judgment of 18 October 2011 by the ECHR in the case „The United Macedonian Organisation Ilinden and Ivanov against Bulgaria", application No. 37586/04, Para 3. (a)(i) of the Findings*].

Consequently, the third sentence of Article 92 of the Satversme grants a legal person, it being an association, an equivalent level of protection of its fundamental rights if compared to a natural person. Ungrounded or unlawful actions of subjects of public law that prohibit an association implementing its freedom of association may cause such infringement of fundamental rights that requires compensation in accordance with the third sentence of Article 92 of the Satversme.

11. The Saeima holds that the Applicant wants to assure that penalization of a legal person of public law would become a basic function of compensation. It can be questioned that change of the compensation function, namely, substitution of compensatory function with the penalizing one, would comply with the fundamental principles of the Latvian legal system. In any case, such change of compensatory function is a legal and political decision that is granted to the legislator only.

11.1. The Constitutional Court indicates that a commensurate compensation fulfils several functions. First of all, this is compensatory function, conciliation function, as well as general and special prevention function. The purpose of the above mentioned functions is to ensure effective restoration of justice and protection of fundamental rights because only such compensation that is also considered as legal remedy shall comply with the third sentence of Article 92 of the Satversme (*see: Judgment of 1 March 2007 by the Senate in the case No. SKA-54/2007, Para 8, and judgment of 5 April 2011 in the case No. SKA-25/2011, Para 11; the judgments are available: http://juridika.tiesas.lv, consulted on 22 May 2012*).

The notion "commensurate compensation" included in the third sentence of Article 92 of the Satversme shall not be interpreted in a way that it represents money payment. The above mentioned term includes any fair contentment that is proportional with particular infringement of rights of a person. Consequently, taking into account, for instance, kind and nature of the infringement, the legal interest threatened, the legal subject concerned or gravity of harm, "commensurate compensation" may also be a non-material compensation. The Ombudsman reasonably indicates hat, pursuant to Section 14 (4) of the Compensation law, written or public excuse may also be regarded as compensation for personal harm. However, unless reputation of transactions of a legal persons of private law, its commercial secret or copyright is infringed, the Contested Norm does not give the right to request excuse from the institution (*see: Case materials, pp. 123*).

Granting of a proportional compensation, in fact, includes all the above mentioned functions. This is the court that decides which of the functions should be implemented at a greater extent and to which one attention should be paid more, with the purpose to protect the fundamental rights of a person concerned. When establishing compensation, the court expresses the opinion of the State in relation to importance of rights infringed and the infringement of rights as such (*see: Judgment of 16 February 2010 by the Senate in the case No. SKA-104/2010, Para 18, the judgment is available: http://juridika.tiesas.lv, consulted on 22 May 2012*).

Section 94 (4) of the APL provides that the duty to compensate may be fulfilled by the relevant public legal entity by renewing the situation, which existed before the loss or harm was caused, or if that is not possible or fully possible or is not adequate, by paying the appropriate compensation in money. The above mentioned suggests that one should take

into consideration priorities of the legislator when selecting the type of compensation, i.e. first of all it is necessary to restore the situation that was in force between particular losses or harm were done, and only then compensation in money shall be paid to a private person, provided that the particular situation can not be restored or the losses or harm are too excessive. If it is possible to restore the former situation of the person concerned, then natural restitution is preferable. This would not only ensure elimination of unfavourable consequences but also save budget resources of the subject of public rights, it being a local government or the State, which is of great importance (*see: Gredzena I. Valsts atbildība un tās veidi. Zaudējumu atlīdzība administratīvajā procesā. Rīga, Providus, 2004, pp. 46*).

11.2. It is possible to agree with the opinion indicated in the Saeima reply, namely that compensatory function that is fulfilled by ensuring commensurate satisfaction to the person concerned if compared to the kind and nature of the infringement, is of great importance.

The Applicant has also indicated that the compensatory function is important. This function means compensation of harm in money or otherwise, for instance, *restitutio in integrum*, when the former legal situation is restored as far as possible, or reduction of penalty in cases related to application of penalty (*see: Judgment of 1 March 2007 by the Senate in the case No. SKA-54/2007, Para 8; the judgment is available: http://juridika.tiesas.lv, consulted on 22 May 2012*).

When examining the present case, the Court does not only have the right but also the duty to consider all material issues that are related to establishment of fair compensation. If, in the present case, restoration of justice requires also ensuring prevention measures with the purpose to protect the fundamental rights, it would not be grounded to relate case adjudication only with application of commensurate compensation as measure to implement the compensatory function. Namely, compensation should not only satisfy a person concerned but also restrain the institution from committing similar infringements in the future (*see: Judgment of 4 November 2008 by the Senate in the case No. SKA-470/2008, Para 20, and judgment of 16 February 2010 in the case No. SKA-104/2010, Para 18, the judgments are available: http://juridika.tiesas.lv, consulted on 22 May 2012*).

Likewise, the Ombudsman and the representative of the Cabinet of Ministers before international human rights institutions have recognized that the primary aim of compensation is restitution or reimbursement; however, compensation should no doubt be aimed at preventing another similar infringements by the offender (*see: Case materials,*

pp. 123 and 142). It has also been literature referring to responsibility of the State that compensation or reimbursement has a dual function, namely, compensation serves not only as satisfaction for the party concerned but also as a prevention for offenders that makes them refrain from similar actions in the future. Therefore the duty of judges is not to establish the sum to be disburse to compensate non-material harm but to consider how a particular judgment would impact future actions of subjects of legal relations (*see: Gredzena, pp.90*).

11.3. The Constitutional Court has recognized that one of the fundamental principles of a democratic state is the principle of separation of powers. It follows that there exists control of the judicial power over the legislative and executive power. No legal norm or activity of the executive power shall remain out of control of the judicial power, if it endangers interests of an individual. The principle of justice and legality that requires that cases shall be considered in accordance to a procedure, which ensures fair and objective adjudication thereof, and that the result of every criminal, civil, and administrative procedure is equitable (*see: Judgment of 9 July 1999 in the case No. 04-03(99), Para 1 of the Concluding Part, Judgment of 22 February 2002 in the case No. 2001-06-03, Para 1.2 of the Concluding Part, and judgment of 11 April 2007 in the case No. 2006-28-01, Para 12*).

The purpose of the basic purpose of the law established in Section 2 (2) of the APL, which is to subject actions of executive power relating to specific public legal relations between the State and a private person to the control of an independent, impartial and competent judicial power, is to ensure a comprehensive procedural and substantial control by the judicial power over all actions of the State that are aimed at a particular person. Therefore measures referred to in the particular section shall be understood in a broad manner in order “not to leave gaps” where certain actions of the executive power in respect to a particular person would be left without judicial control (*see: Levits E. Administratīvā procesa likuma 2. panta komentārs. Rakstu krājums administratīvajiem tiesnešiem. Rīga, Publisko tiesību institūts, 2003, pp. 156).*

Judicial power over decisions of the executive power is one of the fundamental principles of a law-governed state that follows from the idea of separation of powers. An application to a court is regarded as the most powerful instrument, by means of which a person can control decisions of the executive power. The task of administrative courts is to

control lawfulness and validity of administrative acts applicable to particular persons or actions of institutions or officials. (*see: Administratīvais process tiesā. Dr. iur. J. Briedes vispārīgā zinātniskā redakcijā. Rīga, Latvijas Vēstnesis, 2008, pp. 21).*

Even if solution of a particular issue depends on political decision of the legislator, it does not release the legislator from the duty to observe the fundamental rights and general legal principles established in the Satversme. In such cases, the legislator is committed to observe principles of a law-governed state (*see: Judgment of 18 October 2007 by the Constitutional Court in the case No. 2007-03-01, Para 15*).

Consequently, the third sentence of Article 92 of the Satversme permits the court, based on rational legal considerations, deciding all issues that are related to establishment of a commensurate compensation. Such action is based on the guarantee of a fair trial rather than on the legal or political decision of the legislator.

12. In the present case, the application is submitted by the Senate as the higher judicial institution for administrative cases. The Constitutional Court has already concluded in its case-law that the cassation instance has a special function, which establishes the specifics of the process of the cassation court. In difference from the "Soviet" cassation model the essential feature of the Latvian cassation institute is the fact that the conclusive importance does not lie in the interests of the parties, which are sufficiently protected when reviewing the case in the first two instances of the court, but in legal public interests. Only *quaestiones iuris* – i.e. issues on the rightness of appliance of material and procedural norms – are reviewed by the cassation instance. The cassation principle is of a legal public nature as it is directed to uniform application and interpretation of legal norms throughout the State (*see: Judgmetn of 27 June 2003 by the Constitutional Court in the case No. 2003-04-01, Para 2.1*).

A uniform case-law is substantial from the point of view of the right to a fair court. Courts have the duty to adjudicate similar cases in a similar manner, whilst different cases – differently based on the principle of equality. The right to a fair trial is guaranteed in case if the higher judicial instance of the state ensures uniformity of case-law (*see: Judgment of 7 October 2010 by the Constitutional Court in the case No. 2010-01-01, Para 15.3*).

Consequently, the Senate plays an important role in interpretation and application of legal norms in accordance with the Satversme.

Article 19.[1] of the Constitutional Court Law permits a court of general jurisdiction to submit an application to the Constitutional Court in case if all other measures have been applied though no result has been achieved. Application of legal norms, which comply with the Satversme, includes finding the right legal norm and adequately interpreting it; assessment of inter-temporal and hierarchic applicability, use of appropriate judicature as well as further advancement of the law (*see: Judgment of 4 January 2005 by the Constitutional Court in the case No. 2004-16-01, Para 17*).

The Constitutional Court indicates that those are administrative courts, including the Senate who are informed on factual and legal circumstances of a particular case, which testifies existence of such rights and interests of a person that should be protected by granting a commensurate compensation. Likewise, this is the court that is able to assess, at what extent commensurate compensation should be granted in a particular case. Taking into account the fact already established in the present judgment, the Constitutional Court does not have the reason to question legal considerations provided by the Senate it its application, namely, the fact that the Contested Norm does not provide a person the possibility to ensure the guarantee of a fair trial and grant a commensurate compensation for ungrounded infringement of his or her fundamental rights.

Consequently, when adopting the Contested Norm, the legislator has failed to completely fulfil its duty established in Article 92 of the Satversme, which has led to infringement of the above mentioned norm of the Satversme.

13. According to Article 32 (3) of the Constitutional Court Law, a legal norm (act) that the Constitutional Court has declared as non-compliant with the norm of a higher legal force, shall be regarded as not in effect from the day of publication of the Constitutional Court judgment, if the Constitutional Court has not determined otherwise.

The Constitutional Court holds that there is no reason to recognize the entire Contested Norm as anticonstitutional. By including the words “reputation of transactions, commercial secret and copyright” into it, the legislator has fulfilled its duty, though only partially. However, the word “only” of the Contested Norm considerably narrows the scope of the

norm and leas to the situation when the list of non-material interests to be protected is exhaustive rather than descriptive. This prohibits the court the possibility to ensure a comprehensive protection of infringed non-material interests. Consequently, the insufficient list of non-material interests to be protected included in the Contested Norm shall be regarded as non-compliant with Article 92 of the Satversme.

In accordance with Clause 11 of Article 31 of the Constitutional Court Law, if the Constitutional Court has decided that a legal provision is unconformable to a legal provision of a higher legal force, the Court is obliged to set the moment when the contested provision becomes invalid. Determining the exact moment from which the contested provisions lose validity, the Constitutional Court, on the basis of its previous practice, would consider the following issues: whether the invalidation of the contested provisions with retrospective effect is required for the protection of fundamental rights of the Applicants; and whether there are any considerations due to which the contested provisions would have to be invalidated with retrospective effect only in relation to the Applicants (*see: Judgment of 21 December2009 by the Constitutional Court in the case No. 2009-43-01, Para 34*).

In the present case, recognition of the Contested Norm as null and void as from the date of its adoptuion in respect to the application of the administrative case is the only possibility to protect the fundamental rights of the person. However, it can not be excluded that there is another private person who has applied to an administrative court with the view to protect its infringed fundamental rights. Therefore the Contested Norm shall lose its force as from the date of its adoption in respect to all those persons who have initiated protection of their infringed rights.

Since the third sentence of Article 92 of the Satversme provides a general protection of rights of a person against ungrounded infringement, the legislator is committed to amending the Contested Norm in a way that it would comply with legal norms of a higher legal force.

In order to assure that the Contested Norm would cause no infringement of fundamental rights of other persons before coming into force of a new wording of the Contested norm, State administration institutions shall be committed to observe the particular nom in compliance with Article 92 of the Satversme by analogically applying the list of non-material rights and interests included in the words “or other non-material rights or interest protected by law” included in Section 8 (1) of the Compensation Law.

The Ruling

Based on Article 30 – 32 of the Constitutional Court Law, the Constitutional Court

h o l d s :

1. The word "only" of Section 8 (2) of the Law on Compensation for Losses Caused by State Administration Institutions do not comply with Article 92 of the Satversme of the Republic of Latvia and shall be declared as null and void as from the date of its adoption.
2. Section 8 (2) of the Law on Compensation for Losses Caused by State Administration Institutions shall be applied by analogically applying the list of non-material rights and interests included in the words "or other non-material rights or interest protected by law" included in the first paragraph of the same section.

The Judgment is final and not subject to appeal.

The Judgment shall come into force on the date of publishing it.

Presiding Judge G. Kūtris

Translated by E. Labanovska, translator of the Constitutional Court