

THE IMPACT OF THE PRINCIPLE OF SUBSIDIARITY ON THE IMPLEMENTATION OF SOCIO-ECONOMIC HUMAN RIGHTS IN LITHUANIA: THEORETICAL APPROACH

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Abstract. *Globalisation, repeated economic (financial) crisis and other contemporary social processes are changing the capability of the state to provide individual social security and guarantee human rights. There is therefore a need to review social policy guidelines and their implementation measures. The problem is how to develop the social security system of state, so that human rights are not violated. For the reformation of the social security system to be consistent, it is also necessary to determine the principles on which the social security system should be based.*

This article examines the concept of the principle of subsidiarity and its impact on the implementation of socio-economic human rights. The goal of this research is to explore theoretical aspects of application of principle of subsidiarity for ensuring the protection of socio-economic human rights and development of the policy of social security in Lithuania. In order to achieve this goal, the research starts from the analysis of the concept and origin of the principle of subsidiarity and its impact on the implementation of human rights. Further the constitutional basis and levels of application of this principle for implementation of socio-economic human rights are studied. Lastly, according to the principle of subsidiarity, some relevant issues of Lithuanian social security system are evaluated.

Keywords: *subsidiarity, person, socio-economic human rights, welfare, social security system.*

Introduction

Globalisation, repeated economic (financial) crisis and other contemporary social processes are changing the capability of the state to provide individual social security and guarantee human rights. There is therefore a need to review social policy guidelines and their implementation measures. These issues are relevant for Lithuania not only because of aforesaid social processes, but also because Lithuania is a relatively young independent democratic state, where the social security system has to cope with radical transition from socialism and paternalistic state, suppressing individual activity and initiative of caring for one's own welfare, towards market economy and liberal democratic state, the citizens of which are aware that the social security system is being developed collectively and that the concern for the welfare of members of the society is not only that of politicians or officials but first and foremost is their own duty.

The problem is how to develop the social security system of a state, so that human rights are not violated. For the creation of the social security system or the reformation of its elements to be consistent, it is necessary to determine the principles on which the social security system should be based. The society expects socially just solutions to the problems of social security. The Government emphasises the moment of social solidarity. These principles are certainly fundamental pillars of social policy¹. However, it remains unclear, how these principles should be coordinated and implemented. Therefore, this article proposes considering the principle of subsidiarity as one of the essential principles of social security, which, together with those of solidarity and social justice, allows reconciling different interests of participants of the social security system and implementing socio-economic human rights more effectively.

In the contemporary context, the principle of subsidiarity is more commonly associated with problems of allocation of competences between the European Union and its Member States² or is considered in the context of federalism³, or referred in

- 1 These principles are also the main principles of social security law. See: Bitinas, A.; Tartilas, J.; Litvaitienė, J. *Socialinės apsaugos teisė* [Social Security Law]. Vilnius: Mykolo Romerio universiteto Leidybos centras, 2011, p. 90–92.
- 2 E. g. Kazepo, Y. The Subsidiarization of Social Policies: Actors, Processes and Impacts. *European Societies*. 2008, 10(2): 247–273; Nicola, F. The False Promise of Decentralization in EU Cohesion Policy. *Tulane Journal of International & Comparative Law*. 2011, 20(1): 65–122 etc.
- 3 E. g. Bóka, É. *The Idea of Subsidiarity in the European Federalist Thought (A historical survey)* [interactive]. Budapest, 2005 [accessed 03-12-2011]. <www.ivan-herman.net/Eva/Past/Szubszidiaritaswpaper.pdf>; Organisation for Economic Co-operation and Development. *The Battle Against Exclusion: Social assistance in Canada and Switzerland*. Paris: OESD Publications, 1999; Frevel, B.; Dietz, B. *Sozialpolitik kompakt*. Wiesbaden: VS Verlag für Socialwissenschaften, 2008 etc. Here the application of the principle of subsidiarity is concerned with distribution of social security administration burden among different levels of European Union, national and regional (local) institutions.

the analysis of specific social security issues⁴. Moral aspects of the principle of subsidiarity and its relationship with social policy and human rights are analysed by C. E. Maldonado, D. Fouarge, S. Kahl, D. Engster, M. Brassil, J. A. Coleman⁵ and other authors, and H. Lampert and J. Althamer consider this principle as the significant principle of policy of social security⁶. In Lithuania, V. Kondratienė and E. Šiaudvytienė have properly researched this principle, however, their researches are more focused on relations between the European Union, state and local self-government⁷.

This article examines the concept of the principle of subsidiarity and its impact on the implementation of socio-economic human rights. The goal of this research is to explore theoretical aspects of application of the principle of subsidiarity for ensuring the protection of socio-economic human rights and development of social security in Lithuania. In order to achieve this goal, the research starts from the analysis of the concept and origin of the principle of subsidiarity and its impact on the implementation of human rights. Further, the constitutional basis and levels of application of this principle for implementation of socio-economic human rights are studied. Lastly, according to the principle of subsidiarity, some relevant issues of the Lithuanian social security system are evaluated. The methods of the research are philosophical, linguistic, comparative, systematic analysis, logical analysis and generalisation.

1. The Concept of the Principle of Subsidiarity and its Impact on the Implementation of Human Rights

The concept of subsidiarity is derived from Latin *subsidium* or *subsidiaries*, which initially meant reserve troops. Later on this word acquired broader sense of assistance

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- 4 E.g. Marleau, V. Globalization, decentralization and the role of subsidiarity in the labour setting. In: *Globalization and the Future of the Labour Law*. Craig, J. P. R.; Lynk, S. M. (eds.). Cambridge: Cambridge University Press, 2006, p. 108–142. Here the principle of subsidiarity is analysed as a key principle of collective bargaining.
- 5 Maldonado, C. E. *Human Rights, Solidarity and Subsidiarity: Essay toward Social Ontology*. Washington: The Council for Research in Values and Philosophy, 1997; Fouarge, D. *Poverty and Subsidiarity in Europe: Minimum Protection from an Economic Perspective*. Northampton: Edward Elgar, 2004; Kahl, S. The Religious Roots of Modern Poverty Policy: Catholic, Lutheran, and Reformed Protestant Traditions Compared. *European Journal of Sociology*. 2005, 46: 91–126; Engster, D. Care Ethics and Natural Law Theory: Toward an Institutional Political Theory of Caring. *The Journal of Politics*. 2004, 66(1): 113–135; Brassil, M. The Respect for Dignity in Housing and Welfare Policy. *Southern Political Science Association Conference Papers*. 2010; Coleman, J. A. S. J. American Catholicism, Catholic Charities U.S.A. and Welfare Reform. *Journal of Policy History*. 2001, 13: 73–108.
- 6 Lampert, H.; Althammer, J. *Lehrbuch der Sozialpolitik* [Textbook of Social Policy]. Berlin: Springer-Verlag, 2008.
- 7 Kondratienė, V. *Subsidiarumo principas ir jo taikymas valstybės valdymui ir vietos savivaldai* [The principle of subsidiarity and its application to the state governance and local self-government]. Doctoral Dissertation, Social Sciences, Law. Vilnius: Mykolo Romerio universiteto Leidybos centras, 2011; Šiaudvytienė, E. *Europos Sąjungos subsidiarumo principo paradoksai (I)* [interactive]. Vilnius: VŠĮ „Bernardinai.lt“, 2009 [accessed 2010-01-28]. <<http://www.bernardinai.lt/index.php?url=articles%2F90644>>.

or help and eventually it was used as the principle of autonomy in social organisation⁸. However, this concept can be also associated with the Latin word *substitutus*, which means *the act of putting one thing in the place of another, substitution*⁹.

At present, subsidiarity is one of the most important principles of distribution of powers and competences, which requires ‘<...> to make decisions at their most effective level’¹⁰. This requirement presupposes hierarchy and decentralisation of the structure of the society, i.e. transfer of some functions and responsibilities of the central institution to smaller social units (family, community, local self-government institutions etc.), which can more rationally and efficiently resolve human demands that the state or large-scale organisations cannot satisfy because of the large bureaucratic apparatus, lack of information or other reasons¹¹. The large organisation and the state are hence *substituted* by the smaller¹². But at the same time, subsidiarity as *subsidium* presupposes responsibility of a larger organisation not only to allow the smaller organisations functioning, but also to *support* them when they are not able to do that properly on their own¹³. Consequently, by defining the principle of subsidiarity, two inter-dependent senses are developed. Subsidiarity *in the negative sense* requires that the larger social units, for instance, the state ‘<...> refrain from anything that would *de facto* restrict the existential space of the smaller essential cells of society. Their initiative, freedom and responsibility must not be supplanted’¹⁴. *In the positive sense* subsidiarity can be understood as economic, institutional or legal *assistance* to smaller social units. Therefore, subsidiarity can be regarded as the principle that concerns not only decision-making, but also implementation of decisions.

The principle of subsidiarity is recognised as one of the most important principles of the European Union (EU), which enables determining the areas of competences and responsibilities between the EU and its Member States. In the context of the EU, the principle of subsidiarity was defined for the first time in the Treaty of Maastricht (1992). Art. 3b(3) of the current Treaty of Lisbon claims: ‘Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by

8 Bóka, É., *supra* note 3.

9 Maldonado, C. E., *supra* note 5, p. 75.

10 *Tarptautinių žodžių žodynas* [Dictionary of International Words]. Vilnius: Alma littera, 2003, p. 710.

11 American philosopher and investigator of political economy F. Fukuyama also highlights the local nature of successful decision-making: ‘<...> for the huge amount of information used in the economy, localism is inherent, it is associated with specific conditions, which are usually known only to local representatives. <...> this explains inefficiency of the socialist central planning: <...> any planner cannot summarize all local knowledge’. Fukuyama, F. *Silnoe gosudarstvo. Upravlenie i mirovoj poriadok v XXI veke* [State-Building: Governance and World Order in the 21st Century]. Moskva: Khranitel, 2006, p. 120.

12 Maldonado, C. E., *supra* note 5, p. 75.

13 Though in order to maintain stability of larger organisations and their ability to render assistance, smaller organisations should also support objectives of larger organisations they are subordinated, provide necessary information etc.

14 *Compendium of the Social Doctrine of the Church*. § 186 [interactive]. Libreria Editrice Vaticana, 2004 [accessed 25-10-2011]. <http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html>.

the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level¹⁵ The particular guidelines for the EU institutions and Member States concerning application of the principle of subsidiarity are defined in the Interinstitutional Agreement on the Principle of Subsidiarity (1993), the Protocol on the Application of the Principles of Subsidiarity and Proportionality (1997), and in other documents.

However, the principle of subsidiarity is not the devise of politicians of the EU. The idea of subsidiarity can be traced back to the writings of ancient thinkers¹⁶. Specific content and particular significance of the principle of subsidiarity in regulation of relations of certain strata was provided in the context of catholic social learning. In the Encyclical *Quadragesimo Anno* (1931) Pope Pius XI writes: ‘Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them’¹⁷. The principle of subsidiarity formulated in this Encyclical was explored and interpreted in subsequent documents of popes in relation to different relevant themes.

In the context of catholic social learning, the principle of subsidiarity is founded on the idea of human dignity, which is immediately concerned with personal freedom, activity, responsibility and the principle of reciprocity¹⁸. In the Encyclical *Caritas in Veritate* (2009), Pope Benedict XVI writes: ‘Subsidiarity respects personal dignity by recognizing in the person a subject who is always capable of giving something to others’¹⁹. In this context, the concept of a person has a specific content. According to French personalist²⁰ E. Mounier, if a person as an individual can be considered as an abstraction, a man without ties, a person as personality ‘<...> exists only in respect of others, it knows itself only through others’²¹. As the American sociologist Ph. Selznick notes, ‘<...> Latin and Greek terms (*persona* and *prosōpon*) refer to the masks used in classical drama and, by extension, the part or character represented by the actor. This

15 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OL C 306/1.

16 E.g. Aristotelis *Politika* [Politics]. Vilnius: Pradai, 1997, p. 64–66.

17 *Quadragesimo Anno*. Encyclical on Reconstruction of the Social Order, His Holiness Pope Pius XI, May 15, 1931, § 79 [interactive]. New Advent, 2007 [accessed 25-10-2011]. <http://www.newadvent.org/library/docs_pi11qa.htm>.

18 Encyclical Letter *Caritas in Veritate* of the Supreme Pontiff Benedict XVI, § 57 [interactive]. Libreria Editrice Vaticana, 2009 [accessed 28-12-2011]. <http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate_en.html> and earlier encyclicals.

19 *Ibid.*

20 ‘Personalism is one of the twentieth century Catholic philosophical streams, which treats the creative spring of personality as a spiritual being, and the reality of the world – as a manifestation of the creative activity of the personality’. See: Pivorius, V. Emanuelis Munjē ir prancūzų personalizmo filosofija. In: Munjē, E. *Personalizmas* [Emmanuel Mounier and French Philosophy of Personalism. In: Mounier, E. Personalism]. Vilnius: Pradai, 1996, p. 5–53.

21 *Ibid.*, p. 83.

identification of person with role takes on ethical meaning in the Stoic tradition. It is the duty of moral persons to 'play well' the roles they are assigned <...>²². These roles are constitutive of personal identities, and 'To meet the expectations one's received identity generates is the main criterion of social responsibility. Thus to be a person is to be defined by one's place in the moral order'²³. This conclusion is appropriate not only for moral, but also for social situation in general, when a person acquires rights and assumes duties related to his/her status in the particular society, to members of which he/she is directly related and responsible for the justification of their expectations.

The conception of a person and his/her dignity enables transferring the principle of subsidiarity from the moral to the legal area. In the context of legal personalism, A. Vaišvila distinguishes static and dynamic conceptions of human dignity and stresses that personal dignity must be perceived not only as self-contained, determined by biological existence, but also as dependent on the cultural (social) activity of person. According to A. Vaišvila, dignity is a social worth of person. It is developed by person himself/herself exercising duties to his/her neighbour²⁴. Like philosophical personalism, which is a basis of the principle of subsidiarity, legal personalism emphasises the significance of personal duty, responsibility and freedom to dignity of a person. 'Free man <...> is a responsible one. <...> Freedom is not a being of personality, but the way in which personality is all that it is <...>²⁵ says E. Mounier. According to A. Vaišvila, 'Only a free person assuming his or her duties creates human dignity'²⁶. In other words, a human being is dignified in so far as he/she is able to act freely, i.e., to be responsible for himself/herself and his/her neighbour, to exercise his/her duties, thus justifying the expectations of other members of the society and ensuring the coherence of the society itself. A person who is free to make decisions and implement them is considered as an autonomous person.

Natural human rights, established in constitutions of democratic states, are certainly important for the security of human dignity and autonomy, and 'denial of the individual as the main master of his/her life' is attributable to violation of those rights²⁷ and vice versa. Being superior to the law created by the state, natural human rights reveal personal autonomy, the right to have and pursue interests and goals different from those of the state and its rulers²⁸. Though, no one is self-sufficient and capable to achieve all his/her goals alone. Therefore, to preserve the personal autonomy the assistance of family, society, state or other social institutions remains relevant. The principle of subsidiarity transfers this constitutional function of the protection of personal autonomy to the institutional level. It obliges larger social units to allow and not to disturb smaller

22 Selznick, Ph. *Personhood and Moral Obligation. New Communitarian Thinking: Persons, Virtues, Institutions and Communities*. Charlottesville, London: The University of Virginia Press, 1995, p. 123.

23 *Ibid.*, p. 124.

24 Vaišvila, A. *Teisinis personalizmas* [Legal Personalism]. Vilnius: Justitia, 2010, p. 418.

25 Mounier, E. *supra* note 20, p. 152.

26 Vaišvila, A., *supra* note 24, p. 421.

27 Gumbis, J.; Bacienskaitė, V.; Randakevičiūtė, J. *Human Rights Today. Jurisprudencija*. 2010, 1(119): 131.

28 *Ibid.*, p. 133.

social units (including a person as a smallest social unit) to act independently when dealing with problems of their existence (negative sense of subsidiarity). Though also it indicates responsibility of the state and other larger institutions to provide assistance for smaller social units to assume their duties, realise their rights and guarantee the protection of their legitimate interests, if they can not do it by themselves or larger social unit can do it better (positive sense of subsidiarity).

Thus the orientation of the principle of subsidiarity towards the person suggests that the reason for the application of this principle for regulating the relations of members of the society lies in the concept of natural human rights, and the subsidiarity needs to be regarded as an important principle of law that has a significant impact on the protection of human rights and the creation of secure life in the society.

2. Application of the Principle of Subsidiarity for Implementation of Socio-Economic Human Rights: Constitutional Basis and Levels

One of the factors adversely affecting human dignity and violating human rights is poverty²⁹. ‘Poor, unemployed, sick, homeless, persons without education are not free, regardless of what rights they are guaranteed by the Constitution’³⁰. Poverty stigmatises (deprived individuals often feel inferior to the rich and are dependent on them), encourages social exclusion (due to scarce resources people are not able to participate in ordinary activities). It can also lead to misbehaviour, reducing the sense of security of members of society etc. Therefore, in order to make sure that the equality of persons, the right to life, dignity and other human rights are not only a formal declaration, it is necessary to ensure a certain level of social welfare.

Although it is possible to calculate some welfare standards³¹ and determine them on the national or international level, the welfare is multifaceted concept, which largely depends on the personal attitude³². Subsidiarity principle just underlines personal freedom and responsibility for caring for welfare. The legislation also states that, despite some exceptions, 18 years old persons have active capacity, which means that they may by their acts, shall have full exercise of all their rights and shall assume obligations (for example, to engage in the market and earn for subsistence) and are able to take consequences for their actions. However, due to various factors (age, illness, unemployment etc.) persons are not always able to ensure certain welfare level independently. The principle of subsidiarity states that in this case a person needs assistance. The legal bases for such assistance are socio-economic (welfare, subsistence) human rights, established in

29 Fouarge, D., *supra* note 5, p. 31.

30 Korsgaard, Ch. M. G. A. Cohen: Equality of What? On Welfare, Goods and Capabilities. Amartya Sen: Capability and Well-Being. *The Quality of Life*. Oxford: Oxford University Press, 2002, p. 58.

31 Sen, A. Capability and Well-Being. *The Quality of Life*. Oxford: Oxford University Press, 2002, p. 40–41.

32 See: Barry, N. *Welfare*. Buckingham: Open University Press, 1999, p. 117; Sen, A. Capability and Well-Being. *The Quality of Life*. Oxford: Oxford University Press, 2002, p. 40.

national constitutions and international legal acts. These rights are directly or indirectly committed primarily to help people to supply their vital needs (food, clothing, shelter, medical aid etc.) and hence personal social safety. But the question is, who and how has to provide this assistance, i.e. who is responsible for the implementation of these rights?

Employment and social security is one of the priorities of the EU policy, but they are not within the exclusive competence of the EU. Thus, according to the principle of subsidiarity, concrete measures to implement the objectives of the EU, must be selected and applied by each Member State, considering the needs and the characteristics of its society, the financial situation etc. Social policy at EU level is coordinated by Open Method of Coordination, combined with the Lisbon Strategy³³, characterised by two priority areas: economic growth and promotion of employment. On this basis, each Member State of the EU must formulate national reform programmes, which incorporate specific measures for ensuring economic growth, creation of workplaces and their preservation etc. Thus, although the EU has developed a series of guidelines of common social policy and is committed to assist Member States in their fight against poverty, where they are not able effectively deal with it³⁴, it is clear that the basic decisions concerning personal welfare are being made at national level.

In their national legislation, modern democratic legal states have embedded and obligated to ensure all the catalogue of human rights. It is interesting to note, that historically formed arrangement of these rights reflects the principle of subsidiarity, which emphasises the primacy of personal autonomy to the requirement of assistance, as often are first established the right to dignity, life, inviolability and other civil and political rights and freedoms, and then the socio-economic rights related to personal initiative and activity (the right to work, safe and healthy working conditions, fair wages etc.) and lastly, rights to social security and health care³⁵, urgent in the face of certain social risks³⁶. Such order of human rights and freedoms is also established in the Constitution of the Republic of Lithuania (the Constitution).

While interpreting the content of the constitutional rights, the Constitutional Court of the Republic of Lithuania (the Court), although indirectly, reveals both senses of the principle of subsidiarity, thus creating a solid jurisprudence of constitutional human rights. E.g. in interpreting the content of human right to inviolability, the Court has held:

33 See: Lisbon European Council 23 and 24 March 2000 Presidency Conclusions [interactive]. Brussels: Council of the European Union, 2000 [accessed 01-11-2011]. <http://www.europarl.europa.eu/summits/lis1_en.htm>.

34 E.g., for keeping with its obligations, Lithuania has the support of the European Social Fund, the European Globalisation Fund, the European Regional Development Fund and the Cohesion Funds. From 2007, smaller programmes designed for specific policy areas are integrated in the EU Employment and Social Solidarity programme PROGRESS, pursued in conjunction with the ESF from 2007 to 2013.

35 This sequence of arrangement of human rights is typical and for international human rights documents, for example, the Charter of Fundamental Rights of the European Union [2007] OL C303/1, etc.

36 'Social risk – factors and circumstances which lead people to experience or they became at risk to experience social exclusion <...>'. Law of the Republic of Lithuania on Financial Social Assistance for Low-Income Residents. *Official Gazette*. 2003, No. 73-3352. Attributable to the social risk factors are also the loss of employment income because of retirement, disability, illness, unemployment, education (retraining), rehabilitation, nursing a family member, inability to meet special needs etc. Bitinas, A., *et al.*, *supra* note 1, p. 46.

‘<...> laws must guarantee that an individual will be protected from any unreasonable, outward encroachment upon his/her life, health, freedom of physical activity and against any attempt on his/her psychological or mental state, his/her intellectual or creative expression which might be carried out by the state, local government institutions, their officials or employees, as well as any other persons’³⁷. In dealing with problems, arising from the implementation of freedom of economic activity, the Court has repeatedly emphasised that an individual economic freedom and initiative, together with private ownership are the values constituting the basis of the national economy³⁸, and the state, municipality, their institutions and officials have a duty ‘<...> not to hinder by any of their decisions or actions any expression and development of initiative of persons, not to disrupt nor bar the way to their economic efforts provided this initiative or economic activities are not harmful to society<...>’³⁹. These prohibitions to restrict a person’s physical activity unnecessarily and to infringe his/her intellectual, creative expression, to interrupt the development of personal initiative exactly reveal the negative sense of the principle of subsidiarity. But here the positive sense of this principle is also disclosed, since Art. 46(2) and 46(3) of the Constitution establish the duty of the state to ‘<...> support economic efforts and initiative that are useful to society’ and to ‘<...> regulate economic activity so that it serves the general welfare of the Nation’⁴⁰ which is not only construed by taking account of the satisfaction of material values by an individual, but also ‘<...> according to the social development of the people and the opportunities of self-expression of an individual’⁴¹. The Court has also repeatedly pointed out that personal freedom to choose an occupation or business (Art. 48(1) of the Constitution) is one of the necessary conditions to satisfy the vital needs and secure a proper position in society for the person and that this constitutional right ‘<...> determines an obligation for the State to create corresponding legal, social and organisational pre-conditions for implementation of this right’⁴².

In its rulings the Court also emphasises a duty of the state to create the social security system that would maintain living conditions, which are in line with personal dignity and, if necessary, provides the person with the required social protection⁴³. The Court prohibits to establish such legal regulation, ‘<...> which would create preconditions for such situation to appear, where a person, who has lost the job due to certain reasons,

37 Ruling of the Constitutional Court of the Republic of Lithuania of 8 May 2000. *Official Gazette*. 2000, No. 39-1105.

38 Ruling of the Constitutional Court of the Republic of Lithuania of 13 May 2005. *Official Gazette*. 2005, No. 63-2235.

39 *Ibid.*

40 Constitution of the Republic of Lithuania. *Official Gazette*. 1992, No. 33-1014.

41 Ruling of the Constitutional Court of the Republic of Lithuania of 6 October 1999. *Official Gazette*. 1999, No. 85-2548.

42 Ruling of the Constitutional Court of the Republic of Lithuania of 4 March 1999. *Official Gazette*. 1999, No. 23-666.

43 Ruling of the Constitutional Court of the Republic of Lithuania of 2 September 2009. *Official Gazette*. 2009, No. 106-4434.

would not receive the corresponding social support⁴⁴. But at the same time the Court specifies that for the promotion of social harmony, assurance for personal freedom and opportunity to prevent problems he/she is unable to cope with, is very important the recognition of mutual responsibility of person and the society⁴⁵ and that '<...> the principle of social solidarity in the civil society does not deny personal responsibility for one's own fate, therefore the legal regulation of social security should be such as to create preconditions for each member of society to take care of one's own welfare, but not to rely solely on the social security guaranteed by the state'⁴⁶. According to the Court, the assistance for the person has to be rendered when it is necessary. It '<...> should not become a privilege, it should not create preconditions for a person not to strive for a higher income, not to search for possibilities to ensure to oneself and one's family by one's own effort the living conditions that are in line with human dignity. Thus the Constitution does not prohibit the legislator from setting by law such bases or conditions of giving social assistance and amount of social assistance as to encourage each person's attempts to take care of one's own or one's family welfare by one's own efforts first of all and to contribute to the welfare of the entire society'⁴⁷. The given examples suggest that the harmony of both senses of principle of subsidiarity revealed in the rulings of the Court creates legal preconditions for the coherence of personal and public interests and a thorough assurance of human rights.

Therefore, the application of the principle of subsidiarity to the regulation of legal relations in the organisation of the state requires: '(1) to create conditions of functioning for subjects, who are able to solve their problems independently; (2) to create the activity model of those subjects, whose goals can be achieved only by acting together; 3) to set the decision-making closest to the community or at that level, where it is most effective'⁴⁸. While analysing the conditions of security of personal welfare, these aspects are revealed through relations of the state and the free market, the state and the institutions of local self-governments and different social units.

The Constitution requires the state not to interfere with personal initiative and self-involvement in the free market, but at the same time, the state has a duty to create optimal conditions for the functioning of the market. N. Barr argues that state's intervention in market relations can be organised in several ways: regulation, finance, production and income transfers. State plays an important role in the development of legal and economic environment of modern market by legislation which regulates the fluent market operations: ensuring free and fair competition, prohibiting monopoly, providing support to small and medium businesses etc. It also supplements or replaces market relations, where they are not effective or non-existent, protects the most vulnerable

44 Ruling of the Constitutional Court of the Republic of Lithuania of 24 December 2008. *Official Gazette*. 2008, No. 150-6106.

45 Ruling of the Constitutional Court of the Republic of Lithuania of 12 March 1997. *Official Gazette*. 1997, No. 23-546.

46 Ruling of the Constitutional Court of the Republic of Lithuania of 3 December 2003. *Official Gazette*. 2003, No. 115-5221 and other rulings.

47 Ruling of the Constitutional Court of the Republic of Lithuania of 5 March 2004. *Official Gazette*. 2004, No. 38-1236.

48 Kondratienė, V., *supra* note 7, p. 34.

parties of these relationships (e.g. consumers, the unemployed). Financial intervention of the state involves subsidies or taxes for certain activities, goods or services. The state should also organise the production of certain goods or services (e.g. education, defence, health care etc.). And the distribution of income allows the most vulnerable members of society (e.g. pensioners, unemployed) to engage in free market relations and to acquire necessary goods and services⁴⁹.

In order to ensure personal social security, the state also organises support of individuals to one another by creating, maintaining, and/or controlling such institutions, which redistributes common resources for persons at social risk. Namely these are institutions of private insurance and, in particular, the fund of the state social insurance (SSI), forming part of the social security system of the Republic of Lithuania. These insurance systems promote personal responsibility for one's own fate, and the SSI also promotes solidarity of generations, because paying contributions to the SSI not only entitles a person to certain social security benefits in the future, but these contributions are also used for paying benefits to those at social risk today.

For the persons that have not paid contributions to the SSI, who have no means of subsistence and who, for objective reasons, are unable to take care of themselves, financial social support and/or social services are provided. In this case, a part of duties of such person is taken over by the state, municipalities, their institutions, civil society, since the costs are covered by the state or municipal budgets. The goal of this kind of social assistance is to provide the necessary living conditions for persons (families) that allow them to take care of themselves⁵⁰. Financial social support is mostly provided after evaluating the assets and income of poor families and single persons, when they exhaust all opportunities to receive income⁵¹.

It should be noted that unlike the case of the SSI, where benefits are calculated on the basis of contributions of a particular person, the payment period, and paid for a particular person or, in the event of his/her death, for children and his/her spouse meeting the statutory requirements, both individuals and families can be the beneficiaries of social support. Family is an important constitutional institution. Its right to social security derives from Art. 39(2) of the Constitution. However, the wording of Art. 38(6) and 38(7) also allows maintaining that caring for family members is not only a moral but also a legal duty⁵².

P. L. Berger and T. Luckmann emphasise that it depends on the family how physical, emotional and social development of the human being will continue throughout his/her life⁵³. For this reason, family is an important social institution affecting personal

49 Barr, N. The Role of Government in a Market Economy. *Labor Markets and Social Policy in Central and Eastern Europe. The Transition and Beyond*. Oxford: Oxford University Press, New York, 1994, p. 34–35.

50 Resolution No. 360 of the Government of the Republic of Lithuania on the Concept of Social Support of 9 May 1994. *Official Gazette*. 1994, No. 36-653.

51 Law of the Republic of Lithuania on Financial Social Assistance for Low-Income Residents. *Official Gazette*. 2003, No. 73-3352.

52 The right and duty of parents to maintain their children as well as the duty of children to respect their parents and diligently perform their duties towards their parents is also established in the Civil Code of the Republic of Lithuania. *Official Gazette*. 2000, No. 74-2262.

53 See: Berger, P. L.; Luckmann, T. *Socialinis tikrovės konstravimas* [Social Construction of Reality]. Vilnius: Pradai, 1999, p. 165.

autonomy, responsibility, attitude towards oneself and others. According to V. Kondratienė, the social purpose of the family is ‘<...> to protect and care for each part of it <...>, to take care equitably of all members of the family, so that no unfairly disadvantaged <...> or unattended <...> individuals emerge from it’⁵⁴. Therefore, in analysing the potential application of the subsidiarity principle for solving problems of personal social security, family should be considered not only as a beneficiary but also as a provider of support.

Although the principle of subsidiarity recognises the right of a person and family to solve their existential problems, but these social units are not always able to exist and meet their needs entirely independently. This motivates them to conjoin into larger social units, such as community (society), purpose of which in the context of the principle of subsidiarity is twofold: on the one hand, they must refrain from taking action in those areas where persons (families) can act on their own, but also to note ‘<...> that the most vulnerable individuals are adequately protected and to take positive action to ensure the full development of capacities of its members’⁵⁵. Structural institutions of society that are the closest to people can notice the need for assistance promptly and apply the most effective means of support: cash payments, social services etc.⁵⁶ Therefore, for the realisation of the principle of subsidiarity, activity of communities, municipalities⁵⁷, non-governmental organisations, organising support for individuals and families, is very important. According to the principle of subsidiarity, such institutions should not replace the family for a person, by taking over its duties, but encourage the family to help its members if they have already exhausted possibilities to help themselves. In other words, the goal of the assistance is not a realisation of the specific personal objectives, but the necessary support, sufficient to restore the full functioning of the family (its solidarity and concern for each other), and/or to provide or rehabilitate personal ability to pursue his/her own goals independently: to have full exercise of all of his/her rights, to assume duties and to be able to take consequences for his/her actions.

3. Evaluation of Certain Issues of Social Security in the Context of the Principle of Subsidiarity

Highlighting the primacy of activity of smaller social units (and primarily, person) in caring for their welfare, the principle of subsidiarity requires larger social units: (a) to refrain from active actions, where smaller social units can act independently; (b) to render assistance for smaller social units when they are not able to assume their

54 Kondratienė, V., *supra* note 7, p. 80.

55 Fouarge, D., *supra* note 5, p. 26.

56 F. Fukuyama argues that successfully solutions of problems of public administration have to be local in a certain sense, since the vast of information used in economy is local and associated with specific conditions, which are usually known only to local representatives. Fukuyama, F. *Silnoe gosudarstvo. Upravlenie i mirovoj porjadok v XXI veke* [State-Building: Governance and World Order in the 21st Century]. Moskva: Khranitel, 2006, p. 120.

57 More about the functions of these institutions in rendering assistance to residents see: Law of the Republic of Lithuania on Local Self-Government. *Official Gazette*. 1994, No. 55-1049.

duties and take care of themselves properly. These two kinds of obligations of the principle of subsidiarity (negative and positive senses) are related with the constitutional duty of the state to secure human rights and revealed in the interpretation of the content of these rights. How this principle can be applied for development of coherent national social security policy and solving particular issues that arise when pursuing to ensure the constitutional right of individuals to social security?

One of the debatable issues of social security is the state social insurance old-age pension payment for the employed. The Constitutional Court of the Republic of Lithuania has stated in its ruling that ‘<...>it is not permitted to establish the legal regulation under which an opportunity for the person who has been awarded and paid old age pension, would be restricted, due to this, to freely choose an occupation and business <...>. The legal regulation under which the person cannot freely choose an occupation and business due to the fact that upon the implementation of this right he would not be paid the awarded old age pension or part thereof which was paid until then, also must be considered as a restriction of an opportunity to freely choose an occupation or business’⁵⁸. The suspension of payment of awarded pension would certainly violate legitimate expectations of a person receiving the pension, but the pension reform and improvement of the legislation should take into account the claim of the principle of subsidiarity do not derogate from personal initiative, responsibility and let a person do whatever he/she can and must do. Thus the state should not prohibit the work of people who have reached their retirement age, if they are able and willing to do so, but the state social insurance benefits for the person may be awarded only when he/she is not able to take enough care of himself/herself. In other words, persons able to work and deliberately choose to do so, should not claim benefits of state social insurance while they receive insured income for their activities, and the determination of an insured event should take into account not only the person’s age, insurance record, but also the existence (or absence) of insured income⁵⁹.

58 Ruling of the Constitutional Court of the Republic of Lithuania of 25 November 2002. *Official Gazette*. 2002, No. 113-5057.

59 In the course of proceedings between Mr Palacios de la Villa and his employer, Cortefiel Servicios SA (‘Cortefiel’), concerning the automatic termination of his contract of employment by reason of the fact that he had reached the age-limit for compulsory retirement, set at 65 years of age by national law, the Grand Chamber of the Court of Justice of the European Union (the Grand Chamber) has established that ‘<...> the Member States and, where appropriate, the social partners at national level enjoy broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it’. And ‘It does not appear unreasonable for the authorities of a Member State to take the view that a measure such as that at issue in the main proceedings may be appropriate and necessary in order to achieve a legitimate aim in the context of national employment policy, consisting in the promotion of full employment by facilitating access to the labour market. Furthermore, the measure cannot be regarded as unduly prejudicing the legitimate claims of workers subject to compulsory retirement because they have reached the age-limit provided for; the relevant legislation is not based only on a specific age, but also takes account of the fact that the persons concerned are entitled to financial compensation by way of a retirement pension at the end of their working life, such as that provided for by the national legislation at issue in the main proceedings, the level of which cannot be regarded as unreasonable’. (Judgment of the European Court of Justice (the Grand Chamber) of 16 October 2007. *Félix Palacios de la Villa v. Cortefiel Servicios SA*. Case C-411/05).

According to the principle of subsidiarity, these means of promotion of employment, when the government

Entitlement to the maternity (paternity) allowance should be assessed similarly, i.e. it should be paid only for the child-care leave period, when a person does not have the insured income or the insured income is less than the maternity (paternity) allowance, to compensate a part of the lost income from employment due to maternity (paternity). The latter goal is also laid down in Art. 2 of the Law of the Republic of Lithuania on Sickness and Maternity Social Insurance⁶⁰. Additional costs incurred when raising a child (children) are fully or partially compensated by various measures of social support⁶¹. One of them is child benefit, paid on the basis of the Law of the Republic of Lithuania on Child Benefits⁶² and depending on the child's age, the number of children and the amount of income per month for one member of the family. Child maintenance is the constitutional duty of parents. But the Constitution also states that 'The State shall take care of families that raise and bring up children at home, and shall render them support according to the procedure established by law'⁶³. It can be assumed that, according to the principle of subsidiarity, only when the family (parents) has difficulties to carry out its constitutional duties, these duties have to be taken by the state (or its authorised institutions). Thus, the relationship between child benefits and income of persons raising these children (in particular, the amount of income per month for one member of the family) can be justified from the point of view of the principle of subsidiarity, but the differentiation of benefits according to a child's age and the number of children remains a matter of debate. It is also debatable whether cash payments are the most appropriate way to provide (restore) the self-sufficient functioning of a family.

The above-mentioned and other social issues cannot be solved solely with reference to the principle of subsidiarity. This principle must also be combined with other principles, in particular those of social justice and solidarity. Namely, it should be noted that common public resources allocated for social security are collected solidarily and that in order to implement social justice, clear and reasonable criteria need to be set for the distribution of these resources. In this case, the subsidiarity principle is important because it balances the rights and duties of the members and institutions of society, highlights the autonomy of a person (smaller social units). Thus it defines the limits of solidary assistance and allows avoiding the problem of free riders. Whereas by obliging

does not make possibilities and even forbids working for a person who is eligible and willing to work is debatable. However, it must be noted that the Grand Chamber was well disposed towards a national employment policy of the Spanish government, which applicable measures restrict the right to work for the person who has reached the age-limit for retirement. Thus the Grand Chamber not only brings the public goals over the individual ones, but also emphasises necessity to reconcile interests of different (in this instance the young and the old generation) members of society. Such an approach is relevant for Lithuania, because rising youth unemployment, gaps of the State Social Insurance Fund budget, which is solidarily formed by the members of society, determine a necessity to review the means of implementation of the right to work and the right to receive a pension.

60 Law of the Republic of Lithuania on Sickness and Maternity Social Insurance. *Official Gazette*. 2000, No. 111-3574.

61 See: Bitinas, A., *et al.*, *supra* note 1, p. 307–325.

62 Law of the Republic of Lithuania on Child Benefits. *Official Gazette*. 1994, No. 89-1706.

63 Constitution of the Republic of Lithuania. *Official Gazette*. 1992, No. 33-1014.

to provide support to those who are not able to care of themselves, the principle of subsidiarity enables implementing the principle of social justice.

Conclusions

1. The orientation of the principle of subsidiarity towards a person suggests that the reason for the application of this principle to regulation of societal relations lies in the concept of natural human rights. Combining negative and positive senses of the principle of subsidiarity – giving preference to promotion of personal (smaller social units) activity and initiatives and supporting those who are unable to function and take care of themselves independently, – the balance of rights and duties, which expresses the essence of the law, is maintained and the autonomy of smaller social units and rights of each member of the society is ensured. Therefore, the principle of subsidiarity can be regarded as the relevant instrument for the legal regulation of social relations.

2. The principle of subsidiarity enables conceiving the catalogue of human rights as a coherent system intended to ensure personal dignity, autonomy and security. In the interpretation of the content of the constitutional rights, the Constitutional Court of the Republic of Lithuania, although indirectly, reveals both senses of the principle of subsidiarity thus creating a solid jurisprudence of constitutional human rights.

According to the principle of subsidiarity, the fundamental level of guarantee of personal welfare is the person himself/herself, the family, the community and its institutions. Guarantee for the fluent practice of smaller social units in implementing socio-economic human rights is a duty of the state. For this purpose, the state, not only intervenes in the free market, where necessary, but also organises support of persons for each other by creating, maintaining, and/or controlling the institutions that redistribute common resources for persons at social risk. This social assistance for smaller social units should not be an end in itself, but should create conditions for restoring (increasing) their autonomy.

3. The principle of subsidiarity is significant for the development of coherent national social policy and helps highlighting its priorities. Together with the other principles of social security (social justice, solidarity), it contributes to the protection of socio-economic human rights and the stability of social relations. The violation of the balance of senses of the principle of subsidiarity (too much care or, conversely, disregard of problems) can lead to the violation of rights both of a particular person and of all members of the society. These assumptions allow applying the principle of subsidiarity for coping with social problems and to consider it as one of the principles of social security, which enables efficient implementation of socio-economic human rights.

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SUBSIDIARUMO PRINCIPO POVEIKIS SOCIOEKONOMINIŲ
ŽMOGAUS TEISIŲ ĮGYVENDINIMUI LIETUVOJE:
TEORINIS POŽIŪRIS

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Santrauka. Globalizacijos, vis dažnėjančių ekonominių krizių bei kitų dabarties socialinių procesų sąlygomis keičiasi valstybės galimybės užtikrinti socialinį žmogaus saugumą ir jį garantuojančias žmogaus teises. Todėl kyla būtinybė keisti socialinės politikos kryptis

ir įgyvendinimo priemonės. Tam, kad valstybės socialinės saugos politiką įgyvendinančios socialinės saugos sistemos kūrimas ar atskirų jos sričių reforma vyktų nuosekliai ir nepažeistų žmogaus teisių, būtina nustatyti, kokiais principais ši sistema turėtų būti grindžiama.

Šiame straipsnyje tiriama subsidiarumo principo samprata ir jos poveikis socioekonominių žmogaus teisių įgyvendinimui. Tyrimą sudaro trys dalys. Pirmiausiai analizuojama subsidiarumo principo samprata, kilmė ir reikšmė žmogaus teisių įgyvendinimui, toliau nagrinėjami šio principo taikymo įgyvendinant socioekonominės žmogaus teises konstituciniai pagrindai ir lygmenys bei, vadovaujantis subsidiarumo principu, įvertinama keletas Lietuvai aktualių socialinės apsaugos problemų.

Atliktas tyrimas atskleidžia, kad subsidiarumo principo taikymo reguliuojant visuomenės narių santykius pagrindimas glūdi prigimtinių žmogaus teisių koncepcijoje. Šis principas leidžia pažvelgti į žmogaus teisių katalogą kaip į nuoseklią sistemą, skirtą asmens orumui, autonomijai ir saugumui užtikrinti.

Derinant negatyviąją ir pozityviąją subsidiarumo prasmes – pirmenybę teikiant asmenų (žemesnių socialinių vienetų) aktyvumo ir iniciatyvos skatinimui bei remiant tuos, kurie negali savarankiškai vykdyti savo funkcijų ir (ar) savimi pasirūpinti, – palaikoma teisės esmę išreiškianti teisių ir pareigų pusiausvyra, užtikrinama žemesnių socialinių vienetų autonomija ir kiekvieno visuomenės nario teisių apsauga. Šių prasmų balanso pažeidimas (per didelę valstybės globa arba, priešingai, socialinių problemų ignoravimas) gali nulemti ne tik atskiro žmogaus, bet ir visų visuomenės narių teisių pažeidimus. Aiškindamas konstitucinių teisių turinį, Lietuvos Respublikos Konstitucinis Teismas, nors to tiesiogiai ir neįvardindamas, atskleidžia abi subsidiarumo principo prasmes tokiu būdu kurdamas vieningą konstitucinę žmogaus teisių jurisprudenciją.

Kartu su solidarumo ir socialinio teisingumo principais subsidiarumo principas leidžia suderinti skirtingus socialinės saugos sistemos dalyvių interesus ir veiksmingai įgyvendinti socioekonominės žmogaus teises, todėl gali būti laikomas vienu iš socialinės saugos principų.

Reikšminiai žodžiai: subsidiarumas, asmuo, socioekonominės žmogaus teisės, gerovė, socialinės saugos sistema.

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