ISSN 1392-6195

JURISPRUDENCIJA
Mokslo darbai
2008 9(111); 7–19

SOCIAL RIGHTS IN THE JURISPRUDENCE OF THE CONSTITUTIONAL COURT OF LITHUANIA

Toma Birmontienė *[*]

Mykolas Romeris University, Faculty of Law, Constitutional Law Department
Ateities g 20, LT-08303
Tel. (8 5) 271 4546
Email: T.Birmontiene@lrkt.lt

Pateikta 2008 m. gegužės 20 d., parengta spausdinti 2008 m. rugsėjo 23 d.

Summary. In the jurisprudence of the Constitutional Court of the Republic of Lithuania (the Constitutional Court), the doctrine of human rights occupies a particular place; there is hardly a Constitutional Court ruling (act) which would not include statements on the doctrine of human rights. This doctrine is being developed and its new features constantly come into being. The institutions of the constitutional control–the constitutional courts–constantly interpret the rights and freedoms which are enshrined in the constitutions, thus, the final limits of law are drawn by the constitutional jurisprudence. The recognition of the evolution of the official constitutional doctrine, i.e. the recognition that the process of the creation of the constitutional doctrine is continuous and may not be finite, is an important feature of the formation of the jurisprudential constitution which influences the concept of the constitutional freedoms of a person. Constitutional case law (and not the formal amendment procedure) assumes the task of adjusting constitutional norms to changing political and social contexts and of developing those norms beyond the originally intended scope[1] .The recognition of the jurisprudential constitution not only broadens the concept of the constitutional rights, but also increases the possibilities to recognize other rights as constitutional rights. The concept of the jurisprudential constitution materialise the constitution as the concept of interrelation of the two elements of the constitutional normative reality–the constitution and the constitutional jurisprudence[2]. "The human rights rules thus concretised by the courts gain authority from a newly identified social source of law".[3]

Interpreting social rights constitutional courts come very close to the border of policy making. Some authors admit that interpreting the scope and limits of socio-economic rights provides the constitutional courts with the most obvious opportunity to engage in making economic policy judgments[4] . "The constitutional recognition of welfare rights and entitlements has multiple meanings and consequences ranging from setting legitimate budget expenditures to individual rights claims enforceable in a court of justice"[5]

From the jurisprudence of the Constitutional Court of recent years, one could single out the following new tendencies of the development of social rights[6]. formation of the doctrine of constitutional rights which are consolidated explicitly and implicitly, recognition of the principle of integrity and indivisibility of human rights, the recognition of social rights as individual rights for which the judicial defence must be guaranteed (justiciable rights). In this article some aspects of these new trends will be discussed.

Keywords: Social Rights, Social State, Jurisprudence of the Constitutional Court of Lithuania, human rights.

---

[*] Mykolas Romeris University, Faculty of Law, Department of Constitutional law, professor, Justice of the Constitutional Court of the Republic of Lithuania.

[1] Lech Garlicki. Constitutional courts versus supreme courts, 44-68. I – CON, International Journal of Constitutional Law. Volume 5, (Nr.1) (2007) Oxford University Press and New York University school of Law, 47-48.

[2] See Egidijus Jarašiūnas. Jurisprudencinė konstitucija. 24–33. *Jurisprudencija*. Vol.12(90). (2006); Egidijus Kūris. Konstitucinė teisė kaip jurisprudencinė teisė: konstitucinė justicija ir konstitucinės teisės paradigmos transformacija Lietuvoje (*Habilitacijos procedūrai teikiamų mokslo darbų apžvalga*). Vilnius: Vilniaus universitetas, Teisės fakultetas, 2008.

[3] Tom Campbell. Prescriptive Legal Positivism - Law, Rights and Democracy. UCL Press. 2004. P. 191.

[4] Wojciech Sadurski. Rights before courts - A study of Constitutional Courts in postcommunist states of Central and Eastern Europe. Springer, 2005. P. 175.

[5] András Sajó. Implementing Welfare in Eastern Europe after Communism. Yash Ghai, Jill Cottrell. Economic, Social and Cultural Rights in Practice. Commonwealth Secretariat. 2004. P. 57.

[6] More on the tendencies of the modern constitutional doctrine of human rights in the jurisprudence of the Constitutional Court of the Republic of Lithuania, see: T. Birmontiene. Šiuolaikinės žmogaus teisių konstitucinės doktrinos tendencijos. *Konstitucinė jurisprudencija*. Lietuvos Respublikos Konstitucinio Teismo biuletenis. Nr 1(5). 2007. 202-240.

1. THE CONSTITUTIONAL DOCTRINE OF SOCIAL ORIENTATION OF THE STATE

The development of the constitutional doctrine of social rights is closely linked to the recognition of the state as socially oriented - the social orientation of the state could be explicitly expressed in the Constitutional text or being interpreted by the Constitutional control institutions. Nearly all countries in Europe, with the United Kingdom as the most notable exception, are social states, either comprising an explicit "Social State" clause, or an analytical enumeration of social rights in the Constitutions; it is noteworthy that even the explicit inclusion of social rights in the Constitution is not a prerequisite for a polity to be a Social State – with the exception of Finland, the Constitutions of the Nordic countries contain only minimal provisions concerning social rights[7] .

Historically different provisions of social rights were included in the first Constitutions of the Republic of Lithuania (except provisional Constitutions): some social rights were included in the Constitutions of 1922, 1928, 1938. We could appreciate this tendency as a result of the influence of the Constitution of the Weimar Republic (1919), that is well known as the first European constitution that had special provisions on social rights, some of them being very unique. Social rights were included in some other European countries' Constitutions, i.e. Finland (1919), Estonia (1920), Poland (1921), Italy (1927).

The development of the constitutional doctrine of social rights is closely linked to the recognition of the principle of rule of law. Some authors question the principle of rule of law being necessarily connected with social orientation of the state: "The rule of Law - based social security protection (security of welfare expectations as a fundamental dictate of the rule of Law) is not universally accepted."[8]

The social nature of statehood is very important in the aspect of constitutional protection[9]. In some of its recent rulings (of 26 September 2007, 22 October 2007 and 7 February 2005[10]), in which the constitutional doctrine of social rights was further developed, the Constitutional Court, when it interpreted different constitutional provisions underlined the social orientation of the state. Under the Constitution, the State of Lithuania is socially oriented; thus, it has the constitutional obligation and must accept the burden of implementation of certain commitments. The Constitutional Court explained that the social orientation of the State is indicated in various provisions of the Constitution which consolidate economic, social and cultural, as well as civil and political rights of a human being, the relations between the society and the state, the bases of social assistance and social security, the principles of organization and regulation of the national economy, the bases of organization and activity of state institutions, etc;

Social maintenance, i.e. contribution of the society to the maintenance of those its members who are incapable of supporting themselves from work or other means or who are not sufficiently provided as a result of important reasons identified by law, is recognized as a constitutional value. It is important to emphasize the principle formulated in the jurisprudence of the Constitutional Court that in a civil society, the principle of solidarity does not deny personal responsibility for one's destiny[11]. The socially oriented state has the constitutional duty and must assume the burden of implementation of certain obligations. Developing the official constitutional doctrine of socially oriented state, the Constitutional Court has developed the official constitutional doctrine of social security, social maintenance and social support, *inter alia* the constitutional imperatives which must be heeded while regulating the corresponding relations by the legal acts[12].

2. SOCIAL RIGHTS AS INDIVIDUAL JUSTICIABLE RIGHTS

Social rights may be interpreted in different ways– as certain obligations of the state to the society and as individual rights (subjective rights). The term "social rights" is being used as broadly to refer different category of rights which concern social well-being. Though social rights are quite often assessed as programmatic rights of political promises, however, at present, also because of the increased significance of the constitutional jurisprudence social rights are more and more often appreciated as individual rights. Though some authors still express their critical view to the social rights as individual justiciable rights; „ <...> not all social rights have the legal nature of more traditional civil and political rights. Social rights entail claims that are neither necessarily individual nor necessarily enforceable

[7] George S. Katrougalos. The (Dim) Perspectives of the European Social Citizenship. Jean Monnet working paper No 05/07. P. 11.

[8] András Sajó. Ibid. P. 53.

[9] Juozas Žilys. Konstitucijos socialinės prasmės. *Konstitucinė jurisprudencija.* Lietuvos Respublikos Konstitucinio Teismo biuletenis. Nr. 4. 2006. P. 318,

[10] Constitutional Court rulings of 26 September 2007 on State Social Insurance Contributions of Self-employed Persons, 22 October 2007 on the State Pensions of Judges, 7 February 2005 on Acceptance of the Petition of a Petitioner

[11] For the first time this principle was indicated in the Constitutional Court ruling of 12 March 1997 on State Social Insurance Pensions.

[12] Constitutional Court rulings of 10 July 1996 on University Legal Education of Advocates, 12 March 1997 on State Social Insurance Pensions, 23 April 2002 on the State Pensions of Prosecutors and Soldiers, 25 November 2002 on State Social Insurance Pensions, 4 July 2003 on State Pensions of Officials and Servicemen, 3 December 2003 on the Law on State Social Insurance Pensions and the Law on State Pensions, 30 January 2004 on the Procedure of Payment of Onetime Allowances, 5 March 2004 Regarding the Regulations on Granting the Social Allowance and Payment Thereof, 13 December 2004 on the Procedure of Payment of Onetime Allowances, 7 February 2005 on the Acceptance of the Petition of a Petitioner, 26 September 2007 on State Social Insurance Contributions of Self-employed Persons, 22 October 2007 on the State Pensions of Judges, 29 April 2008 on Accidents at Work etc.

in court, at least not in the sense that they will result in remedies available to identifiable right holders".[13]

The process of recognition of social rights as constitutional rights was much slower than of civil and political rights. The dominant opinion was that social rights, despite being important constitutional rights, are positive rights, and that in order to implement them, particular economic efforts of the state were necessary. Instead, the civil and political rights are negative rights, which are kind of "unpaid" for the state: it is hardly disputable that ensuring the right to life, the right not to be tortured, election rights, does not require great expenses and positive actions of the state. It is also clear that some rights implying negative duties upon a state at the same time could require the state action, in particular. the right to equality that has both implications in this regard, and it would be for the judiciary to decide what social and economic guarantees are necessary to ensure the equality of those people who are protected against discrimination on the grounds set out in the catalogue of (constitutional) rights.[14] It could also be stressed that there is nothing inherent in positive rights that renders them non-justiciable and nothing in their justiciability that strains the competence of courts once uncertainty is resolved through the idea of moral membership by a generous deference to the self-governing body.[15]

The conditions necessary for human beings – *inter alia* adequate food, clothing, housing, medical care, education – the constitutional imperatives directly derivable from the constitutional norms and principles. From the perspective of constitutional law, social constitutional rights are so important that their granting or non-granting cannot be simply left to the parliamentary majorities[16]. Some of these rights could be attributed to minimal social rights – the right to an existential minimum, to basic accommodation, to school education, to training for a job, and to a basic level of healthcare, and even though minimal social constitutional rights are to large extent financially significant, the individual rights can outweigh the reasons of the politics of finance**[17].** The social rights that are enshrined in the constitution can also be assessed as *prima-facie* rights.

Problems of justiciability which arise in the context of social rights to some extent are not much different from those which arise in the case of other constitutional rights and the fact that social constitutional rights need expressing through ordinary law is not a determining contradiction, the same applies for other constitutional rights. It is impossible to delimit any clear border between the constitutional law and the rest of the legal system; the former permeates the entire structure of the latter[18]**.** Procedural grounds are also not capable of supporting the non-justiciable thesis of social constitutional rights[19].

While interpreting different aspects of the civil rights being protected by the Convention for the Protection of Human Rights and Fundamental Freedoms the European Court of Human Rights found certain social rights being interrelated with civil rights in some aspects and thus assessed them as individual justiciable rights. The Jurisprudence of the European Court of Human Rights made a great influence on the development of the doctrine of social rights as individual justiciable rights in Europe. In one of its early well known and important case on social rights in the *Case of Feldbrugge v. the Netherlands (European Court of Human Rights judgment of 29 May 1986)* the Court interpreted Article 6(1) whether the right at issue was a civil right, and pointed out that the notion of 'civil rights and obligations' could not be interpreted solely by reference to the domestic law of the respondent State, and did not cover only private law disputes in the traditional sense, that is, disputes between individuals or between an individual and the State to the extent that the latter had been acting as a private person, subject to private law, and not in its sovereign capacity. The Court did not consider that it had to give an abstract definition of the concept of "civil rights and obligations" but on the occasion of the case the Court estimated the right to a certain health insurance benefits as "a personal, economic and individual right, a factor that brought it close to the civil sphere". After this case there were many other cases that proved the position of the Court towards individual character and justiciability of certain social rights while interpreting not only Article 6(1) (Right to a fair trial) but also Article 8 (Right to respect for private and family life), Article 1 (Protection of property) of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms.

The international obligations of the state which arise after joining international agreements, especially those which enshrine human rights, quite often determine the changes of not only ordinary, but also constitutional law. At present, the Convention for the Protection of Human Rights and Fundamental Freedoms and its jurisprudence make the biggest influence not only on the Lithuanian constitutional doctrine of human rights[20], but also on the constitutional doctrine of many other European states. In the Lithuanian legal system, the Conven-

[13] András Sajó. Social rights: A Wide Agenda, *European Constitutional Law Review* 1(2005). 38- 43.

[14] More about the rights as positive duties see: Timothy Macklem. Entrenching Bills of Rights, *Oxford Journal of Legal Studies,* Vol.26, No.1 (2006).107-129.

[15] I. Alan Brudner. *Constitutional Goods*. Oxford University Press, 2007. P. 173.

[16] Robert Alexy. A *Theory of Constitutional Rights.* Translated by Julian. Rrivers. Oxford University Press, 2002, 343.

[17] See Robert Alexy. Ibid. P. 343–344.

[18] Lech Garlicki. Ibid. P. 65.

[19] Robert Alexy. Ibid. P. 345.

[20] Under Paragraph 3 of Article 138 of the Constitution of the Republic of Lithuania of 1992, international treaties ratified by the Seimas of the Republic of Lithuania shall be a constituent part of the legal system of the Republic of Lithuania, therefore, the ratified international agreements, which consolidate human rights, makes influence on the human rights doctrine. The European Convention on Human Rights was ratified by Article 1 of the Republic of Lithuania Law "On the Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Fourth, Seventh and Eleventh Protocols thereof" which was adopted by the Seimas on 27 April 1995.

tion is assessed as having the power of a law;[21] however, it may not be equated with ordinary law. The Convention is applied in the Lithuanian law directly. The Constitutional Court assesses the influence of the jurisprudence of the European Court of Human Rights on the constitutional rights' doctrine as a source of interpretation of law which is also important to the interpretation and implementation of Lithuanian law. In the ruling of 8 of May of 2000[22] the Constitutional Court for the first time singled out the importance of the European Convention on Human Rights as a source for the interpretation the human rights as it stressed, that" <…> the jurisprudence of the European Court of Human Rights as a source of construction of law is also important to construction and applicability of Lithuanian law". Such opinion regarding the role of the Convention was repeated in many other subsequent rulings.

In the jurisprudence of the Constitutional Court social rights are assessed as certain obligations of the state for the society, and as individual rights which are guaranteed to a person by the constitution, these rights are interpreted in both said aspects. The constitutional doctrine of constitutional social rights that is developed by the Constitutional Court is based on the presumption of justiciability of these rights. In the ruling of 22 of October 2007[23], the Constitutional Court, interpreting the nature of the constitutional right to receive old age and some other pensions emphasized that social rights were not only social obligations of the state of the programmatic nature, but also the individual rights, entitling persons to judicial remedies for their violation. The Constitutional Court has held more than once that the imperative arises from the constitutional principle of a state under the rule of law that the person who believes that his rights and freedoms have been violated has an absolute right to an independent and impartial trial and that this right may not be artificially restricted or even denied[24].

While interpreting the Constitution and emphasizing the importance of the right to healthcare (Article 53 of the Constitution (Paragraph 1)[25]), the Constitutional Court does not single out this right only as a social right of the programmatic nature or only as an individual right and mentions both aspects of this right; however, in the cases when the court interprets this right together with other rights, for example, with the right to information and the right to privacy–traditional individual rights, it distinguishes the said aspects and designates the individual nature of this right. However, due to the text of this constitutional norm, in the jurisprudence of the Constitutional Court the right to healthcare is mostly interpreted as, first of all, social right of programmatic nature which obliges the state to take care of the health of all the society, and not as an individual right to receive certain services of healthcare which are guaranteed by the Constitution. The Constitutional Court construes the function and constitutional duty of the state to take care of the health of people rather widely, as including many spheres. The obligation of the state to care for health has to be based on such constitutional principles, as *inter alia* the principles of the rule of law, justice and social harmony which are entrenched in the Constitution. In the Constitutional Court ruling of 29 April 2008, the Court interpreted the right to health care as an integral part of the constitutional principle of justice in the context of one of the right of the workers to have proper, safe and healthy working conditions[26]. While construing the provisions of the Constitution, the Constitutional Court has more than once underlined that the health of a human being and of society is one of the most important social values[27]. The Constitutional Court has also held that the protection of people's health is a constitutionally important objective, a public interest, whereas taking care of the people's health is to be treated as a state function.[28]

Administration and supervision of health activities are the elements of the aforementioned function. The financing of the said function must be guaranteed from the state budget.[29] Though social constitutional rights are financially significant, and require the legislator to allocate money in the budget, the budgetary competence

[21] In its conclusion of 24 January 1995 (Constitutional Court conclusion of 24 January 1995 on the European Convention for the Protection of Human Rights and Fundamental Freedoms) , the Constitutional Court assessed this Convention in the Lithuanian legal system as having the power of a law. In its ruling of 17 October 1995[21], the Constitutional Court held that the agreements ratified by the Seimas gain the power of a law. While construing the relation between an international ratified agreement and a law in its decisions of 25 April 2002[21] and of 7 of April of 2004[21], the Constitutional Court held that under the Constitution (Paragraph 1 of Article 105 of the Constitution), the Constitutional Court shall consider and adopt a decision whether the laws of the Republic of Lithuania and other acts adopted by the Seimas are not in conflict with the Constitution of the Republic of Lithuania, thus, under the Constitution, the Constitutional Court does not investigate the compliance of a law with the legal act which has the power of a law. The Constitutional Court refuses to investigate the petitions of the petitioners regarding the compliance of the laws with international agreements; however, it investigates the compliance of the substatutory legal acts with the international agreements.

[22] Constitutional Court ruling of 8 of May 2000 On Operational Activities.

[23] Constitutional Court ruling of 22 of October 2007 on Refusing to Accept a Petition for Consideration.

[24] I.e. Constitutional Court ruling of 29 December 2004 on the Restraint of Organised Crime and other rulings.

[25] Article 53 (pa.r.1) of the Constitution provides, that the State shall look after the health of the people and shall guarantee medical aid and services for the human being in the event of sickness. The procedure for providing medical aid to citizens free of charge at State medical establishments shall be established by law.

[26] Constitutional Court ruling of 29 of April 2008 on Accidents at Work.

[27] Constitutional Court ruling of 14 January 2002 on Indicators of State and Municipal Budgets, Constitutional Court ruling of 26 January 2004 on the Law on Alcohol Control and the Rules for Licensing the Production of Alcohol Products, Constitutional Court ruling of 29 September 2005 on Advertising of Medicines.

[28] Constitutional Court ruling of 14 January 2002 on Indicators of State and Municipal Budgets, Constitutional Court ruling of 26 January 2004 on the Law on Alcohol Control and the Rules for Licensing the Production of Alcohol Products, Constitutional Court ruling of 29 September 2005 on the Law on the Pharmaceutical Activities(Advertising of Medicines).

[29] Constitutional Court ruling of 14 January 2002 on Indicators of State and Municipal Budgets.

on the part of the legislation inter alia for the financing of the national health care system is not unlimited: it has to execute its powers in compliance with the competences of other branches of state power, *inter alia* the Government; while preparing a draft of the budget *inter alia* for the national health care system the Government has to take into consideration the existing economic situation, the needs and possibilities of the state as well as other important factors.[30]

The Constitutional Court more often construes some other social rights as individual rights guaranteed by the Constitution, for example, the right to receive a fair pay for work under Article 48 of the Constitution[31] is assessed as an individual social right for which judicial protection must be guaranteed. In its ruling of 20 March 2007[32] the Constitutional Court interprets the said right as the right of the person who has completed a commissioned task to demand to be paid the whole remuneration for work (pay) which is due according to the legal acts, and that it would be paid in due time. In this case, the Constitutional Court also noted that the petitions requesting to investigate the compliance of the corresponding Government resolutions with the Constitution virtually meant that the Constitutional Court was requested to decide the issue of increase of wages of state servants and some other employees; however, the Constitutional Court did not decide as to what size of the minimum monthly wage or what size of remuneration for work was to be established to any employees, *inter alia* state servants; the wages of employees are established by taking account of various economic, social and other factors, the assessment of which is not a matter of constitutional control.

The right of the workers to have proper, safe and healthy working conditions is also enshrined in the Article 48 (part 1) of the Constitution and is also designated as individual right[33].The provisions of Article 52 of the Constitution that *inter alia* determine a right to receive old age pensions and social assistance have been widely interpreted in different aspects in the jurisprudence of the Constitutional Court; the Court also assesses this right as an individual and justiciable.

The Constitutional Court has also interpreted constitutional right to education that is enshrined in the Article 41 of the Constitution, part 3 (**"**Everyone shall have access to higher education on the basis of his abilities. Citizens who study well shall be guaranteed education at State schools of higher education free of charge"). In the ruling of 20 March 2008[34] as also in some other rulings the Court interpreted the right to education as individual right and estimated that that this constitutional right was an important condition for implementation of his various legitimate interests and that it implied a duty of the state to create preconditions to implement this right; according to his abilities, every individual must have access to both state schools of higher education and non-state schools of higher education which are founded under procedure established by the law. When accessibility to higher education according to one's individual abilities is assured, it is necessary to pay heed to the imperatives entrenched in Article 29 of the Constitution that all persons shall be equal before the law, the court, and other State institutions and officials, and that the rights of the human being may not be restricted, nor may he be granted any privileges on the ground of gender, race, nationality, language, origin, social status, belief, convictions, or views. In the said ruling the Constitutional Court paid attention to the fact that the accessibility of higher education to everyone according to one's individual abilities does not at all mean that higher education is universal, and that it also does not mean the establishment of such standards of higher education, which would diminish the quality of higher education. Under the doctrine formulated by the Constitutional Court, the constitutional requirement to assure the accessibility to higher education according to one's individual abilities does not mean that it must be done solely by state funds. While interpreting the said provisions of the Constitution, the Constitutional Court emphasised that the Constitution does not define *expressis verbis* which citizens are to be regarded as being good at their studies. The Constitutional Court, while interpreting the notion "citizens who are good at their studies" emphasised that one is to regard a citizen as the one who is good at his studies, when his learning meets the established criteria of good learning; such criteria (when persons meet such criteria they are regarded as

[30] Problems of the budgetary financing of the Lithuanian National health system were challenged in the Constitutional Court ruling of 11 July 2002 on Long-term Financing of the Healthcare System, of the System of Science and Education, as well as on the Preparation and Forming of the Draft State Budget.

The Government of the Republic of Lithuania, the petitioner, requested the Constitutional Court to determine whether some laws that indicated that every year not less than a certain portion of the national budget and municipal budgets' funds, which is not less than 5% of the gross domestic product value must be allocated to finance the national health system activities were in compliance with the Constitution.

The Constitutional Court elaborated, that such legal regulation restricts the constitutional powers of the Government, in the course of the preparation of the draft budget of the state for a certain year, to take into consideration the existing social and economic situation, the needs and possibilities of the society and the state, the available or potential financial resources and the liabilities of the state, as well as other important factors. Meanwhile the Constitutional Court stressed that the conclusion that Article 39 of the Law on the Health System conflicts with the Constitution may not be interpreted as prohibiting the Government, when it is preparing the draft budget of the state, or as prohibiting the Seimas (Parliament) , when it is considering and approving the state budget, to provide for the funds to finance the national health system activities which would comprise 5% of the gross domestic product value or even more.

[28] Article 48 (par. 1) of the Constitution provides that each human being may freely choose a job and business, and shall have the right to have proper, safe and healthy working conditions, just pay for work, and social security in the event of unemployment.

[32] Constitutional Court ruling of 20 March 2007 on the Minimum Monthly Salary and the Minimum Hourly Pay.

[33] Constitutional Court ruling of 29 of April 2008 On Accidents at Work .

[34] Constitutional Court ruling of 20 March 2008 on the Right to higher education.

being good at their studies and due to this, according to the Constitution, they have the right where the state pays their tuition fee in state schools of higher education) are to be established by means of a law. These criteria must be known in advance, they must be clear, objective and transparent, they cannot deviate from the constitutional notion of good learning. This Constitutional Court ruling gave rise to a number of discussions, since the state duty to finance those students, who are good at their studies by state funds in state schools of higher education is interpreted by the Constitutional Court only as a duty to pay only the tuition fee in schools of higher education of those persons who are good at their studies, who were enrolled only in the places the number of which corresponds to the obligation of the state to finance the preparation of a certain number of specialists, and it does not cover the persons accepted for studies in that state school of higher education on other grounds, i.e. the tuition paid by their own funds. It is possible to consider that in this case the Constitutional Court relates the concept of a person who is good at his studies in a state school of higher education not only with qualitative criteria of "good learning", but also with the state needs to support the preparation of specialists of high qualification in a respective area, and a state duty, which does not stem from the Constitution, to guarantee the universal character of higher education.

While deciding cases on the compliance of the legislation *inter alia* on social rights with the Constitution, the Constitutional Court as some other Constitutional courts in other countries has faced problems with inactive legislator and legal gaps, legislative omissions[35] that create difficulties for the implementation of constitutional rights and for the guaranties of their justiciability. The legal gap which is prohibited by the Constitution (or any other legal act of higher power) in the interpretation of the Constitutional Court means legislative omission and it is always the consequence of the action of the law-making subject. In the decision of 8 August of 2006[36] the Constitutional Court stressed that the courts cannot completely remove legal gaps as well as legislative omission, it is a duty of law–making institutions, but, however, there is an undeniable opportunity for courts to *ad hoc* fill a legal gap, as courts enjoy the powers which stem from the Constitution to apply *inter alia* the general principles of law, as well as legal acts of higher power, and, first of all, the Constitution–supreme law; otherwise, one would have to hold that the Constitution itself prohibits the courts from administering justice and certain values that are entrenched in the Constitution, they, under the Constitution, are not properly defended and protected; however, such a court decision does not remove the obligation of the legislator to fill that legal gap. This Constitutional Court decision may be of great significance for deciding cases regarding the social rights, which, in case of their violation, would be impossible to implement and restore if the legislator avoided to properly regulate the corresponding relations by means of an ordinary law[37].

In the ruling of 22 October 2007, while interpreting the nature of the constitutional right to receive old age and some other pensions the Constitutional Court also emphasized that these rights could be assessed as individual rights, and judicial remedies would be available also in those cases when incomprehensiveness in the caselaw, insufficient certainty, and lack of legal clarity of the legal regulation were to be assessed as a legal gap**.**

While filling legal gaps the courts have to follow both legal and moral imperatives. "Particular aspects of the judicial ethics apply to situations where judicial legislation is required: for instance, where there are gaps in legislation and we have nothing but highly general principles to go by and some decision is required to avoid injustice or waste"[38]. Recognition of the legal gaps in relation to constitutional social rights as unconstitutional and the position of the Constitutional Court that proves the justiciability of social rights bring debates, discussions and criticism towards the social rights doctrine that is developed by the Court and allows (bearing in mind and other recent jurisprudence) calling it *an activist court*[39]. From the perspective of the Lithuanian legal developments until recent years, such attitude towards the Constitutional Court activities could be seen as reasonable, however, after the judgment of the European Court of Human Rights of the 11 September 2007 in the case *L. v. Lithuania*[40] this position could be seen now as being not sufficiently grounded, as the Constitutional Court, even though imposing some imperatives on the legislator, has never established the duty to adopt certain legislation in a concrete period of time. For example, while interpreting the state duties, *inter alia* the duty of the legislator to adopt certain legal regulations in the social sphere in the context of the particular case, in its ruling of 14 March of 2002[41] the Constitutional Court interpreted the provision "the State shall take care of people's health" of Paragraph 1 of Article 53 of the

[35] For more see: Problems of Legislative Omission in Constitutional Jurisprudence. General Report and other Reports, presented by the Constitutional Courts. XIV th Congress of the Conference of European Constitutional Courts, Vilnius 2008. (www@lrkt.lt).

[36] Constitutional Court decision of 8 of August of 2006 on the Dismissal of the Legal Proceedings. In this case the court *inter alia* was investigating the problem whether the Law on Remuneration of certain State politicians, Judges and State officials to the extent that, according to the petitioner, it does not establish any legal regulation of remuneration of judges replacing the legal regulation which was recognized as being in conflict with the Constitution by the Constitutional Court do not contradicts the Constitution.

[37] ee Egidijus Kūris. Konstitucija kaip teisė be spragų. *Jurisprudencija*. Vol. 12(90). (2006).P. 7–14.

[38] Tom Campbell. Prescriptive Legal Positivism - Law, Rights and Democracy. UCL Press. 2004. P. 67.

[39] In Lithuanian press there are many discussions and criticism towards „constitutional activism„ of the Constitutional Court, its right to interpret the provisions of the Constitution and to formulate the official constitutional doctrine.

[40] Case *L.v. Lithuania (www.coe.int). The request of the Government of the Republic of Lithuania (pursuant to Article 43 of the European Convention of Human Rights and Rules 73 of Court) to refer. the case to the Grand Chamber was rejected.*

[41] Constitutional Court ruling of 14 March 2002 On the Law on the Pharmaceutical activities.

Constitution as implying that laws and other legal acts must establish such legal regulation of pharmaceutical activities which would make pre-conditions to create a wide network of pharmacies, also that pharmacies would have sufficient stock of high quality, effective and safe medicines, that the system of medicines' supply would operate smoothly, that the prices of medicines would be regulated, that the acquisition of medicines would not be inconvenienced, that the information about medicines and their use would be easily accessible and properly published.

Upon stating the existence of legislative omission, the Constitutional Court usually does not take any additional measures but can postpone the official publication of the ruling as the law-making institution gets some time to adjust the legal regulation before the ruling enters into force, By postponing the official publication of its ruling, the Constitutional Court only provides the legislator with the possibility to harmonize the legal regulation with the requirements of the Constitution on its own initiative.

In the context of the current case L*. v. Lithuania (European Court of Human Rights judgment of 11 September 2007),* we could appreciate the demanded legislation as concerning social rights legislation implicating a right to a special health care treatment. The European Court of Human Rights held that there was a violation of Article 8 of the Convention (the right to respect for the private life) as the Court found that the circumstances of the case revealed a limited legislative gap in gender-reassignment surgery, which left the applicant in a situation of distressing uncertainty *vis-à-vis* his private life and recognition of his true identity. In this Judgment the European Court of Human Rights under the head of pecuniary damage obliged Lithuania in order to meet the applicant's claim within three months of the judgment becoming final (in accordance with Article 44 paragraph 2 of the Convention)to adopt subsidiary legislation to Article 2.27 (Right to gender reassignment) of the Lithuanian Civil Code.[42] . The Court also noted that "Consequently, as an alternative in the absence of any such subsidiary legislation, the Court would award the applicant EUR 40, 000 in pecuniary damage". Bearing in mind the above mentioned jurisprudence of the European Court of Human Rights on the right to private life as a civil right, in a way that is closely linked to the social right to get an appropriate medical treatment - an individual justiciable right to a health care, one could see the creation of new possibilities for strengthening the ideas of the principle of integrity and indivisibility of human rights, the recognition of social rights as individual rights for which the judicial defence must be guaranteed (justiciable rights)

The decision of the Court in the case *L. v. Lithuania* could also be analyzed in the light of the concept of the legal gaps, legislative omissions) concerning fundamental rights, as in this case the compensation for a person was offered when the concrete legislation concerning implementation of a person's right (to change his gender) was missing . The European Court of Human Rights held that whilst affording a certain margin of appreciation to States in this field, states are required, by their positive obligation under Article 8 to implement the recognition of the gender change in post-operative transsexuals through amendments to their civil-status data, with its ensuing consequences. The Court also pointed out that the present case involved another aspect - Lithuanian law recognized a person's right to change not only his/her gender but also the civil status, Court stated that there was a gap in the relevant legislation - as there was no law regulating full gender-reassignment surgery (and until such a law was enacted, no suitable medical facilities appeared to be reasonably accessible or available in Lithuania). In case of failure to adopt such legislation certain compensation had to be paid. This case is an important example of legal remedies for individuals when fundamental rights are violated as a consequence of legal gaps and legislative omissions,.

3. RECOGNITION OF THE PRINCIPLES OF INTEGRITY AND INDIVISIBILITY OF HUMAN RIGHTS WHILE INTERPRETING SOCIAL RIGHTS

The modern doctrine of human rights is based on the principles of indivisibility of rights and on the equal importance of all human rights. The principle of indivisibility of rights considers the economic, social and cultural rights as being of the same importance like the civil and political rights. The principle of constitutional integrity is also applied to the constitutional rights in the strict sense and to the constitutional principles; one of such principles which is very often interpreted by the Constitutional Court is the principle of the rule of law, which is usually not only inseparable from other constitutional principles, but it is quite often an integral element of the concrete constitutional right of an individual. Social rights could also be interpreted as universal rights[43].

The principle of indivisibility of rights is relevant not only while construing the relation of the concrete constitutional rights which are attributed to one of those spheres; no big discussions and objections arise, as more or less everyone agrees on that. The principle of indivisibility of rights is of particular importance while analyzing the relation between certain rights of different

[42] This rather new practice could be interpreted in a way as the Court has converted the measure usually understood as a general into the individual one and made it difficult for the respondent State to apply its margin of appreciation as regards the execution of the judgment. We could agree with the arguments presented in a partly dissenting opinion of Judge Fura-Sandstrom that in present case by adopting such a solution, the Court risks acting *ultra* vires as it lacks such competences.

[43] Social rights are universal (everybody has these rights) their realization is closely linked with the protection of the interest in adequate living, personal welfare (Ernestas Spruogis. Socialinės asmens teisės ir jų konstitucionalizacija Lietuvoje*. Jurisprudencija*. 2004. T.59 (51), 5–15.

type–civil, political, and social (economic, cultural) rights, especially when there exists a certain myth about the "animosity" of incompatibility (attribution of elements of "pure" positiveness or "pure" negativeness) of these rights. The attitude to social rights as an independent object of legal regulation which is separated from the civil and political rights which has dominated for quite some time, now remains in the past bearing in mind the jurisprudence of the constitutional control institutions and assessing the modern European doctrine of human rights which is also based on the principle of indivisibility of rights. The Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted in Strasbourg on 12 December 2007 is also based on the principle of indivisibility of rights.

The Constitutional Court assesses the constitutional rights and freedoms as comprising a single and harmonious system. In the ruling of 29 December 2004[44] the Constitutional Court underlines that the Constitution consolidates the concept of human rights and freedoms, where the rights and freedoms of one person cohabitate with the rights and freedoms of others. In the ruling of 22 of October of 2007, the Constitutional Court stressed that the official constitutional doctrine of human rights was also based on the principle provision that under the Constitution, one may not establish any such legal regulation whereby a person, while implementing one constitutional right, would lose the possibility to implement another constitutional right[45]. However, this principle does not deny the need, under certain conditions and upon the constitutionally grounded aim, to limit certain rights in order to protect a certain human right; however, such limitation must be necessary in a democratic society, and the means of such limitation must be proportionate to the constitutionally grounded purpose. The Constitutional Court's doctrine of limitation of rights is based on the constitutional imperatives which are grounded on the universally recognized criteria and which are *inter alia* developed in the jurisprudence of the European Court of Human Rights.

In the ruling of 22 of October 2007, the Constitutional Court emphasized not only the interrelations of the different constitutional social rights but also their close connection with other rights. The Court stressed that guarantees of pensions (*inter alia* state pensions) and other social (material) guarantees stem not only from Article 52[46] of the Constitution, but also from other provisions of the Constitution, or, for example, from Paragraph 2 of Article 30[47], Articles 38, 39, 41, 48, Paragraph 1 of Article 51 and Article 146 thereof[48]. In the ruling of 22 of October 2007, while deciding on the constitutionality of the provisions of the law on the Judges' pensions[49], the Constitutional Court developed some elements of the constitutional doctrine of social guarantees of judges and indicated that "The constitutional imperative of the protection of judges' salaries and other social guarantees arises form the principle of independence of judges and courts established in the Constitution (inter alia Article 109 thereof). By this principle one attempts to protect the judges administering justice from any influence of the legislative power and the executive, as well as from that of other state establishments and officials, political and public organisations, commercial economic structures, and other legal and natural persons".

Quite often a concrete right of some kind has certain functions and that is very obvious while analyzing the right of ownership which is attributed to the group of civil rights. On the one hand, it creates possibilities for a person to a corresponding level of life; while on the other hand, it is the ground for independence and freedom. The right of ownership must be followed also by other rights, *inter alia* the right to work and social protection.

The right to work also creates the basis for the person's independence. The Constitutional Court has held more than once that the freedom to freely choose a job and business, entrenched in Paragraph 1 of Article 48 of the Constitution, is one of the necessary conditions for satisfying human vital needs, and of ensuring his appropriate place in society.[50] In this context we could address to the jurisprudence of the European Court of Human Rights that indicates close links of the freedom to freely choose a job or business with the protection of

[44] Constitutional Court ruling of 29 December 2004 On the Restraint of Organised Crime.

[45] In the ruling of 22 October 2007 the Constitutional Court explained that principle that under the Constitution, it is not permitted to establish any such legal regulation under which an opportunity for the person, who has been granted and paid the old age pension, would be restricted, due to this, to freely choose an occupation and business, although he meets the conditions provided for by law so that he would have a certain occupation or conduct certain 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 granted 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. This Principle was also stressed in the Constitutional Court rulings of 30 June 2000 on the Right to Compensation for Damage Inflicted by Unlawful Actions of Interrogatory and Investigatory Bodies, the Prosecutor's Office and Court, 25 November 2002 on State Social Insurance Pensions and 4 July 2003 on State Pensions of Officials and Servicemen.

[46] Article 52 of the Constitution provides, that the State shall guarantee the right of citizens to receive old age and disability pensions, as well as social assistance in the event of unemployment, sickness, widowhood, loss of breadwinner, and other cases provided for in laws.

[47] Article 30 of the Constitution establishes that "the person whose constitutional rights or freedoms are violated shall have the right to apply to court. " (Part 1);"the law shall establish the compensation for material and moral damage inflicted on a person." (Part 2).

[48] Articles 38, 39, 41, 48, Paragraph 1 of Article 51, Article 52 and Article 146 of the Constitution contains provisions of different social rights.

[49] In this case the Vilnius Regional Administrative Court, the petitioner, was investigating an administrative case. By its ruling, the said court suspended the consideration of the case and applied to the Constitutional Court with a petition requesting to investigate whether Item 6 of Article 4 (wording of 2 July 2002) of the Law, to the extent that it establishes that the state pension of judges shall not be granted and the state pension which was granted, shall not be paid if the person has the income from which state social pension insurance contributions are calculated and paid or if he receives state social insurance benefits is in compliance with the provisions of the Constitution.

[50] Constitutional Court rulings of 4 March 1999, 4 July 2003 and 13 December 2004.

the private life. The social right to work as a possibility to seek an employment in the jurisprudence of the European Court of Human rights is also interpreted as an important aspect of a right to respect for the private life. The European Court of Human Rights ruled in a number of cases that "private life" is a broad term not susceptible to exhaustive definition; it has nevertheless also observed that Article 8 of the Convention protects the moral and physical integrity of the individual, including the right to live privately, away from unwanted attention, it also secures to the individual a sphere within which he or she can freely pursue the development and fulfilment of his or her personality; to be no reason of principle why the understanding of the notion of "private life" should be taken to exclude activities of a professional business nature since it is, after all, in the course of their working lives that majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world, etc. In the case of *Sidabras and Džiautas v. Lithuania (European Court of Human Rights judgment of 24July 2004)* the Court also ruled in the context of Article 14 of the Convention that States have a legitimate interest in regulating employment conditions in the public service as well as in the private sector, in this respect it reiterated that the Convention did not guarantee as such the right to have access to a particular profession. The Court underlined that a democratic State had a legitimate interest in requiring civil servants to show loyalty to the constitutional principles on which the society was founded, however, inevitably there was no such a requirement for employment with private companies. In the light of the circumstances of the case the Court considered that the impugned ban on the applicants seeking employment in various branches of the private sector (for reasons of lack of loyalty to the State as it cannot be justified from the Convention perspective in the same manner as restrictions on access to their employment in the public service) affected to a significant degree the applicants' ability to pursue various professional activities and that there were consequential effects on the enjoyment of their right to respect for their "private life" within the meaning of Article 8 (and that there had been a violation of Article 14 of the Convention taken in conjunction with Article 8)[51].

The Constitutional Court interprets the content of the indivisibility of rights, and particularly the content of the constitutional institute of protection of the rights of ownership while taking account not of Article 23 of the Constitution, which enshrines the rights of ownership of a person, but of other provisions of the Constitution which reveal various aspects of the constitutional concept of this right, because the Constitution is a single act, and its provisions comprise a harmonious system. In its ruling of 4 July 2003[52], the Constitutional Court noted that the constitutional protection of the rights of ownership, which arise from the Constitution and the laws that are not in conflict with the Constitution, means the protection of the right to demand the fulfilment of an obligation of property nature to a person. The requirements of a person to pay a fair remuneration for work are defended not only under Paragraph 1 of Article 48 of the Constitution, but also under the provision of Paragraph 2 of Article 23 of the Constitution that the rights of ownership shall be protected by laws, while the requirements of a person to pay the payments of pensionary maintenance established by law are defended not only under Article 52, but also under Article 23 of the Constitution. The Constitutional Court pointed out that in the latter case the right to demand for the payments of pensionary maintenance which are established by the Constitution or laws that are not in conflict with the latter arises also from Article 52 of the Constitution, while under Article 23 of the Constitution the proprietary aspects of this right are defended. The said circumstance determines the specific character of protection of this acquired right according to Article 23 of the Constitution. This specific character *inter alia* means that in case a question arises as to the protection of the acquired right under Article 23 of the Constitution, first of all it should be established whether the requirement to pay the pension is based on Article 52 of the Constitution and/or other norms of the Constitution. Analogous arguments were set forth also while interpreting the right of ownership in the Constitutional Court ruling of 3 December 2003[53].

In its ruling of 13 December 2004[54] and of 20 March 2007[55] the Constitutional Court assessed the constitutional right to receive fair pay for work as a prerequisite for implementation of a great many other constitutional rights, *inter alia* the right of ownership emphasizing that under the Constitution, a person who has completed a commissioned task has a right to demand to be paid in due time the whole remuneration for work (pay) which is due according to the legal acts This right of the person is guaranteed, protected and defended as the right of ownership also on the basis of Article 23 of the Constitution.

The Constitutional Court construed the provision that ownership includes obligations which stem from the Constitution also as related to Article 54 of the Constitution which formulates the principles of natural environment while at the same time enshrining the right of the society to protection of the natural environment. In its ruling of 13 May 2005[56], the Constitutional Court

[51] The Constitutional Court in the ruling of 4 March 1999 stated that the KGB Act restricting the employment prospects of former KGB officers was intended to ensure the protection of national security and proper functioning of the educational and financial systems and justified such a ban.

[52] Constitutional Court ruling 4 July 2003 on State Pensions of Officials and Servicemen.

[53] Constitutional Court ruling of 3 December 2003 on the Law on State Social Insurance Pensions and the Law on State Pensions.

[54] Constitutional Court ruling of 13 December 2004 on the State Service.

[55] Constitutional Court ruling of 20 March 2007 on the Minimum Monthly Salary and the Minimum Hourly Pay.

[56] Constitutional Court ruling of 13 May 2005 on the Law on Hunting.

notes that while enjoying the right to possess, use and dispose of his property the owner of private land lots, forests and water bodies , cannot violate the imperatives of protection of wildlife and its rational use, its restoration and augmentation that are entrenched in Article 54 of the Constitution; implementing its constitutional obligation to take care of wildlife and ensure protection of wildlife as a national value of universal importance, its protection, rational use, restoration and augmentation, the state can establish a corresponding procedure of use of land lots, forests and water bodies, which will have to be followed by all persons, not excluding the private owners. However, the said procedure may not limit the rights and legitimate interests of other persons, including those of the private owners, more than it is necessary in order to achieve the socially important objective.

The Constitutional Court interprets the constitutional right to health care linking the content of this right to and construing it with other constitutional rights, thus, confirming the principle of indivisibility and equal importance of the constitutional rights of the person[57]. The constitutional right to health care which is enshrined in Paragraph 1 of Article 53 of the Constitution and which is attributed to social rights, is also in particular interpreted together with the rights such as the right to information (Article 25 of the Constitution), the right to private life (Article 22 of the Constitution), freedom of individual economic activity (Article 46 of the Constitution) and the right to work (Article 48 of the Constitution). While interpreting the relation between the constitutional rights, the Constitutional Court has more than once noted that the Constitution does not permit such legal regulation which would preclude a person from enjoying one constitutional right in case he exercises another constitutional right. However, the need to protect people's health, together with some other constitutional values, is one of the criteria allowing some constitutional rights of the person to be restricted.

The Constitutional Court often interprets the health of a human being as a constitutional value which is an inseparable part of his other constitutional individual rights. While analyzing the constitutional right to private life, in its ruling of 24 March 2003[58], the Constitutional Court named health of a human being, as his physical and mental state, as being the essential elements of a private life. As to the further development of the interpretation of the interrelation of the rights, the right to respect for private and family life (Article 8) in the jurisprudence of the European Court of Human Rights in connection with a right to access to a certain health care services (artificial procreation) in its recent judgment in *Evans v. the United Kingdom* (*European Court of Human Rights judgment of 10 April 2007) was* appreciated as that the concept of "private life" incorporates the right to respect for both the decisions to become and not to become a parent. The Court also added that the right to decide to become a parent in the genetic sense also fell within the scope of Article 8). The recognition of the interrelation of the different human rights opens new possibilities for the recognition and protection of human rights as the knowledge, technologies in the field of medicine and health care are developed.

4. THE DEVELOPMENT OF THE CONSTITUTIONAL DOCTRINE OF THE RIGHT TO RECEIVE PENSION AS AN IMPORTANT OBLIGATION OF THE STATE AND AS INDIVIDUAL JUSTICIABLE RIGHT

In the jurisprudence of the Constitutional Court the most developed and widely interpreted is a constitutional right to social assistance enshrined in the Article 52 of the Constitution[59]. The right to receive a pension is consolidated in Article 52 of the Constitution, in which it is established that the State shall guarantee to citizens the right to receive old age and disability pensions as well as social assistance in the event of unemployment, sickness, widowhood, loss of the breadwinner, and in other cases provided for by laws.[60] The Constitutional Court has held more than once that the Constitution protects and defends the acquired rights. The provisions of Article 52 of the Constitution have been interpreted in different aspects in the jurisprudence of the Constitutional Court; the Court, as mentioned, also assesses this right as individual and justiciable. Article 52 of the Constitution, which guarantees the right to social assistance to citizens, obligate the state to establish sufficient measures of implementation and legal protection of this right.[61]

In the ruling of 22 of October 2007 the Constitutional Court pointed out that the social orientation of the State of Lithuania obliges the state to pay heed to the guarantees of pensions (inter alia state pensions) and other social (material) guarantees; the imperative of reality, thus, obliges to revise once established (and applied) social (material) guarantees, in particular if they are linked with certain periodic payments (such as pensions), to revise (increase their sizes) in particular if economic or social situation undergoes such changes so

[57] Certain issues related to the development of Lithuanian health law have already been mentioned by the author; see Certain issues related to the Constitutional doctrine of a right to health care have already been discussed by the author; see: T.Birmontienė, The influence of the Rulings of the Constitutional Court on the Development of Health Law in Lithuania, *European Journal of Health Law* 14 (2007) 321–333.

[58] Constitutional Court ruling of 24 March 2003 on Censorship of Convicts' Correspondence.

[59] Kęstutis Lapinskas. Asmens socialinių teisių apsaugos klausimai Lietuvos Respublikos Konstitucinio Teismo jurisprudencijoje. *Asmens socialinės teisės konstitucinių teismų jurisprudencijoje*. Vilnius: Lietuvos Respublikos konstitucinis Teismas, 2007. P. 63.

[60] Constitutional doctrine of a right to receive a pension is also analyzed by the author of this article in: .T. Birmontienė. Konstitucinės teisės gauti pensiją interpretavimas Lietuvos Respublikos Konstitucinio Teismo jurisprudencijoje. *Asmens socialinės teisės konstitucinių teismų jurisprudencijoje*. Vilnius: Lietuvos Respublikos konstitucinis Teismas, 2007. P. 81–96.

[61] Constitutional Court rulings of 25 November 2002 on State Social Insurance Pensions; 13 December 2004 on the Procedure of Payment of Onetime Allowances; 22 October 2007 on the State Pensions of Judges.

that the said established (and applied) guarantees depreciate a lot, moreover, if they become nominal in general (in this case, one must also have in mind the reservation regarding the proportionality and temporary reduction of payments when it is necessary for the protection of other constitutional values).

Interpreting the constitutional formula "the State shall guarantee" used in Article 52 of the Constitution, in the ruling of 26 September 2007[62], the Constitutional Court *inter alia* pointed out that various types of social assistance are guaranteed for the persons on the bases and by the amounts that are established in laws, while the persons who meet the conditions provided by the law have the right to require that the state grant and pay this pension to them. After the types of pensions, the persons entitled to the pension, the bases of granting and payment of pensions, their amounts, and the conditions have been established by laws, a duty arises for the state to follow the constitutional principles of the protection of legitimate expectations and legal certainty in the area of pensionary maintenance relations; even in the exceptional cases (for example, economic crisis, natural disaster, etc., when there is objective lack of funds necessary for the payment of pensions), the reduced pensions may only be paid on a temporary basis (i.e. only when there is an extraordinary situation in the state). The Constitutional Court also pointed out that the legislator not only may but also must establish such legal regulation which would create preconditions for the state to implement its constitutional duty to guarantee the right of citizens to social security and would ensure the accumulation of funds necessary for pensions and social assistance and which would ensure the payment of these pensions and rendering of social assistance. On the other hand, the burden of the obligations undertaken by the state falls upon the entire society; thus, such legal regulation must create preconditions to distribute the corresponding burden which falls upon the state–of course, taking account of *inter alia* the constitutional principle of solidarity and the constitutional imperatives of social harmony and justice–among the members of society, however, so that the implementation of the duty to pay the contributions of the state social insurance would not become too much of a burden for a person and that because of the fact that a person implements this duty, a person himself would not become socially maintained. It needs also to be emphasized that a person, who contributed to the accumulation of funds for the state social security, must influence the size of the old age pension for himself; a person, who by paying fees contributed to the state social security more, must have tangible benefit.

The Constitutional Court consolidated that social right to receive a pension has also close links with the right to ownership. This position could be seen as being influenced by the Jurisprudence of the European Court of Human Rights. In the ruling of 4 July 2003[63] the Constitutional Court grounded its arguments on why these rights are interrelated also on the case law of the European Court of Human Rights. The Constitutional Court held that *inter alia* in the jurisprudence of the European Court of Human Rights, the protection of the right of every natural and legal person to dispose of his property as established in Article 1 of the First Protocol[64] is applied not only to the objects of the right of ownership which are *expressis verbis* specified by civil laws of states, but also to economic interests. As the Constitutional Court pointed out, the European Court of Human Rights has recognized that, under the European Convention for the Protection of Human Rights and Fundamental Freedoms, property or possessions which belong to a person are defended as well as legal demands (claims) on the basis of which the claimant may argue that he has at least "a legitimate expectation" to dispose of the property. (*European Court of Human Rights, admissibility decision in Malhous v. Czech Republic of 13 December 2000.)*

Upon assessment of all circumstances of a case, the guarantees of the right of every natural or legal person to dispose of his property found in Article 1 of the First Protocol have been applied also in the protection of economic interests arising from the receiving of social benefits, as well as stocks, real property, management of land, *etc.* The Constitutional Court also emphasised that according to the jurisprudence of the European Court of Human Rights (*European Court of Human Rights admissibility decisions in Schwengel v. Germany of 2 March 2000; in Jankovic v. Croatia of 12 October 2000; in Skórkiewicz v. Poland of 1 June 1999)* Article 1 of the First Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms may not be referred to if a special privilege of property nature which had been granted on the basis of political motives was reduced or abolished.

According to the Constitutional Court, the jurisprudence of the European Court of Human Rights also proves the possibilities of the states to reorganise pensionary maintenance and social security systems as the European Court of Human Rights has stated *(European Court of Human Rights admissibility decision in Jankovic v. Croatia of 12 October 2000.),* the state, while regulating social policy, is in possession of sufficiently broad opportunities to change amounts of pensions; however, it is clear from the jurisprudence of the European Court of Human Rights that it is necessary to observe certain requirements while amending legal regula-

[62] Constitutional Court ruling of 26 September 2007 on State Social Insurance Contributions of Self-employed Persons.

[63] Constitutional Court ruling of 4 July 2003 on State Pensions of Officials and Servicemen.

[64] Paragraph 1 of Article 1 of the First Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter also referred to as the First Protocol) provides that every natural or legal person is entitled to the peaceful enjoyment of his possessions, and that no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. Paragraph 2 of this article provides that the preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

tion of this field; the European Court of Human Rights has noted that the applied means must be in conformity to the objective sought, that, taking account of Paragraph 2 of Article 1 of the First Protocol, interference by the state must ensure the balance between the general interest of society and the requirement to protect fundamental rights of the person. (*European Court of Human Rights, the case Sporrong and Lönnroth v. Sweden of 23 September 1982*, *European Court of Human Rights, the case Spadea and Scalabrino v. Italy of 28 September 1995).*

In the ruling of 22 October 2007 the Constitutional Court interpreted the nature of the constitutional right to receive old age and some other pensions and summarized the previous jurisprudence on this subject. The Court noted that failure to pay heed to these provisions which stems from the Constitution may determine that the corresponding legal regulation may (and must) be recognized as in conflict with the Constitution; the Constitutional Court also stressed that in the corresponding constitutional justice cases the legal position of the Constitutional Court (*ratio decidendi*) has the significance of a precedent. While deciding on the constitutionality of certain provisions of the Laws regulating pension relations, the Constitutional Court formulated the following elements of the official constitutional doctrine in the rulings of 10 July 1996, 23 April 2002, 4 July, 3 December 2003, 30 January 2004, 5 March 2004, 13 December 2004, 7 February 2005, 26 September 2007, 22 October 2007.[65] In the ruling of 29 April 2008, as in some other previous acts the Constitutional Court *inter alia* emphasized that pensions and social assistance under the Article 52 of the Constitution were a form of social protection; that Article 52 of the Constitution, which guarantees a citizens' right to social maintenance, obligate the state to establish sufficient measures to implement and legally protect this right.

[65] While deciding the constitutionality of certain provisions of the Laws which are designed to regulate pension relations, following provisions of the official constitutional doctrine formulated inter alia in Constitutional Court rulings of 10 July 1996 on University Legal Education of Advocates, 12 March 1997 on State Social Insurance Pensions, 23 April 2002 on the State Pensions of Prosecutors and Soldiers, 25 November 2002 on State Social Insurance Pensions, 4 July 2003 on State Pensions of Officials and Servicemen, 3 December 2003 on the Law on State Social Insurance Pensions and the Law on State Pensions, 30 January 2004 on the Procedure of Payment of Onetime Allowances, 5 March 2004 Regarding the Regulations on Granting the Social Allowance and Payment Thereof, 13 December 2004 on the Procedure of Payment of Onetime Allowances, 7 February 2005 on the Acceptance of the Petition of a Petitioner, 26 September 2007 on State Social Insurance Contributions of Self-employed Persons, 22 October 2007 on the State Pensions of Judges, 29 April 2008 on Accidents at Work and in other acts of the Constitutional Court are of great importance for the further development of the constitutional doctrine of social rights. In these acts Constitutional Court inter alia emphasized that pensions and social assistance provided for in Article 52 of the Constitution are one of the forms of social protection; that the provisions of Article 52 of the Constitution guaranteeing citizens' right to social maintenance, obligate the state to establish sufficient measures to implement and legally protect the said right.

CONCLUSIONS

The development of the constitutional doctrine of social rights is closely linked to the recognition of the state as socially oriented. The social nature of statehood is an important aspect of constitutional protection. The Constitutional Court has formulated the official constitutional doctrine of social security, social maintenance and social support, and certain constitutional imperatives which must be heeded while regulating the corresponding relations.

The Constitutional Court considers social rights as certain obligations of the state for the society, and as individual rights which are guaranteed to a person by the Constitution. The constitutional doctrine of social rights that is developed by the Constitutional Court is based on the presumption of justiciability of these rights and on the understanding of social rights as an integral part of the constitutional catalogue of rights. The Constitutional Court views the Constitutional rights and freedoms as comprising a single and harmonious system. Apart from emphasizing the interrelations of the different constitutional social rights, the Constitutional Court has drawn attention to a close connection between social rights and other rights guaranteed by the Constitution, and the principle provision that the Constitution does not permit such legal regulation which would preclude a person from enjoying a constitutional right in case he exercises another constitutional right

The Constitutional Court views social rights as individual rights and ensures judicial remedies also in those instances when legislation contains legal gap as a consequence of incomprehensive caselaw,, insufficient certainty and lack of legal clarity of the legal regulation.

The Constitutional Court has formulated a broad official constitutional doctrine of pensionary welfare and social security and has found that social right to receive pension is closely interrelated with other constitutional rights. The Court assesses this right as an important individual and justiciable constitutional right. This finding of the Constitutional Court (*ratio decidendi*) has the significance of a precedent.

The doctrine of social rights as individual justiciable rights has been greatly influenced by the Jurisprudence of the European Court of Human Rights. While interpreting the civil rights under the Convention for the Protection of Human Rights and Fundamental Freedoms, the Court found that in some aspects certain social rights were interrelated with civil rights and viewed them as individual justiciable rights. In the jurisprudence of the Constitutional Court of Lithuania the European Convention on Human Rights is very important for the construction and application of Lithuanian law as a source of interpretation of human rights.

LITERATURE

1. Alexy, R. *A Theory of Constitutional Rights.* Translated by Julian. Rrivers. Oxford University Press, 2002.
2. Birmontienė, T. Konstitucinės teisės gauti pensiją interpretavimas Lietuvos Respublikos Konstitucinio Teismo juris-

prudencijoje. *Asmens socialinės teisės konstitucinių teismų jurisprudencijoje.* Vilnius: Lietuvos Respublikos konstitucinis Teismas, 2007.
3. Birmontienė, T. The influence of the Rulings of the Constitutional Court on the Development of Health Law in Lithuania, *European Journal of Health Law* 14 (2007).
4. Birmontiene, T. Šiuolaikinės žmogaus teisių konstitucinės doktrinos tendencijos. *Konstitucinė jurisprudencija*. 2007. Nr 1(5).
5. Brudner, A. *Constitutional Goods*. Oxford university press, 2007.
6. Campbell, T. *Prescriptive Legal Positivism - Law, Rights and Democracy.* UCL Press, 2004.
7. Garlicki, L. Constitutional courts versus supreme courts,. 44-68. I – CON. *International Journal of Constitutional Law.* Volume 5, (Nr.1) (2007) Oxford University Press and New York University school of Law.
8. Katrougalos, S. George The (Dim) Perspectives of the European Social Citizenship. Jean Monnet working paper No 05/07.
9. Kuris, E. Konstitucija kaip teisė be spragų. *Jurisprudencija*. 2006. Vol . 12(90).
10. Lapinskas, K. Asmens socialinių teisių apsaugos klausimai Lietuvos Respublikos Konstitucinio Teismo jurisprudencijoje. *Asmens socialinės teisės konstitucinių teismų jurisprudencijoje.* Vilnius: Lietuvos Respublikos konstitucinis Teismas, 2007.
11. Macklem, T. Entrenching Bills of Rights. *Oxford Journal of Legal Studies,* Vol. 26, No.1 (2006).
12. Jarašiūnas, E. Jurisprudencinė konstitucija. *Jurisprudencija*. 2006. T. 12(90) P. 24–33; Kūris, E. Konstitucinė teisė kaip jurisprudencinė teisė: konstitucinė justicija ir konstitucinės teisės paradigmos transformacija Lietuvoje (*Habilitacijos procedūrai teikiamų mokslo darbų apžvalga*). Vilnius: Vilniaus universitetas, Teisės fakultetas, 2008.
13. Sadurski, W. Rights before courts - A study of Constitutional Courts in postcommunist states of Central and Eastern Europe. Springer, 2005.
14. Sajó, A. Implementing Welfare in Eastern Europe after Communism. Yash Ghai, Jill Cottrell. Economic, Social and Cultural Rights in Practice. Commonwealth Secretariat. 2004.
15. Spruogis, E. Socialinės asmens teisės ir jų konstitucionalizacija Lietuvoje. *Jurisprudencija*. 2004. T. 59(51).
16. Žilys, J. Konstitucijos socialinės prasmės. *Konstitucinė jurisprudencija.* 2006. Nr. 4.
17. Constitutional Court ruling of 8 of May 2000 On Operational Activities.
18. Constitutional Court rulings of 25 November 2002 on State Social Insurance Pensions; 13 December 2004 on the Procedure of Payment of Onetime Allowances.
19. Constitutional Court ruling of 14 March 2002 On the Law on the Pharmaceutical activities.
20. Constitutional Court ruling of 14 January 2002 on Indicators of State and Municipal Budgets.
21. Constitutional Court ruling of 24 March 2003 on Censorship of Convicts' Correspondence.
22. Constitutional Court ruling 4 July 2003 on State Pensions of Officials and Servicemen.
23. Constitutional Court ruling of 3 December 2003 on the Law on State Social Insurance Pensions and the Law on State Pensions.
24. Constitutional Court ruling of 29 December 2004 On the Restraint of Organised Crime.
25. Constitutional Court ruling of 13 December 2004 on the State Service.
26. Constitutional Court ruling of 13 May 2005 on the Law on Hunting.
27. Constitutional Court ruling of 22 of October 2007 on Refusing to Accept a Petition for Consideration.
28. Constitutional Court ruling of 20 March 2007 on the Minimum Monthly Salary and the Minimum Hourly Pay.
29. Constitutional Court ruling of 26 September 2007 on State Social Insurance Contributions of Self-employed Persons.
30. Constitutional Court ruling of 29 of April 2008 On Accidents at Work.
31. Constitutional Court ruling of 20 March 2008 on the Right to Higher Education.
32. Case *L.v. Lithuania (www.coe.int).*

SOCIALINĖS TEISĖS LIETUVOS RESPUBLIKOS KONSTITUCINIO TEISMO JURISPRUDENCIJOJE

Toma Birmontienė*
Mykolo Romerio universitetas

S a n t r a u k a

Straipsnyje nagrinėjama konstitucinių socialinių teisių samprata ir jų konstitucinės doktrinos raida. Konstitucinio Teismo jurisprudencijoje žmogaus teisių doktrina užima ypač svarbią vietą, ji nuolat plėtojama. Neabejotina, kad kai kurioms naujosioms socialinių teisių tendencijoms daug įtakos turėjo anksčiau sukurta konstitucinė doktrina ir vis didėjanti žmogaus teisių svarba bei naujai atsiskleidžiantys žmogaus teisių aspektai, kuriuos rastis skatina ir moderniųjų technologijų plėtra. Straipsnyje analizuojamos tokios Konstitucinio Teismo jurisprudencijoje išryškėjusios tendencijos: socialinių teisių pripažinimas individualiomis asmens teisėmis ir jų teisminio gynimo galimybės; socialinių teisių pripažinimas svarbiomis žmogaus teisėmis, jų ir kitų (pilietinių ir politinių) žmogaus teisių nedalomumo principo konstitucinis įtvirtinimas. Teisių nedalomumo principas, grindžiamas visų žmogaus teisių svarbumu ir integralumu, laikomas vienu svarbiausių šiuolaikinės žmogaus teisių doktrinos ypatumu. Straipsnyje aptariama ir legislatyvinės omisijos problema bei teismo įgaliojimai, kai sprendžiant su asmens konstitucinėmis teisėmis susijusias bylas susiduriama su teisės spragomis. Aiškinantis socialinių teisių konstitucinės doktrinos raidos naująsias tendencijas straipsnyje nagrinėjamos ir kai kurios Europos Žmogaus Teisių Teismo jurisprudencijos tendencijos, veikiančios arba galinčios ateityje paveikti socialinių konstitucinių teisių doktrinos raidą.

Pagrindinės sąvokos: socialinės teisės, socialinė valstybė, žmogaus teisės ir laisvės, Lietuvos Respublikos Konstitucinio Teismo jurisprudencija.

* Mykolo Romerio universiteto Teisės fakulteto Konstitucinės teisės katedros profesorė, Lietuvos Respublikos Konstitucinio Teismo teisėja.