CRISIS, THE RULE OF LAW AND HUMAN RIGHTS IN LITHUANIA

Edited by Egidijus Kūris

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VILNIUS UNIVERSITY

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Contents

IN LIEU OF A PREFACE

Egidijus Kūris

The global economic crisis that gripped Lithuania in 2008 has been a key theme in our public discourse for several years. As of the middle of 2015 (when this book[1] was being finalised), no legal acts had as yet been issued by either the Seimas (Parliament) or the Government of the Republic of Lithuania to state officially that the crisis was over; hence, it may be asserted at least in formal legal terms that we are still living amid the economic slump, although notably less severe. Undoubtedly, such an acknowledgement in itself would not change anything – just as 'declarations on the rise of the crisis' would not trigger its onset; likewise, making a 'declaration on the retreat of the crisis' would in no way determine the end of the downturn in the national economy and social sphere. It should only be noted that the beginning of this crisis (more precisely, its unfolding in Lithuania, as it did not originate in Lithuania)[2] was acknowledged at the highest level in the Programme of the 15th Government of Lithuania, which was approved by the Seimas in December 2008 and included the Crisis Management Plan as its constituent

[1] The book is published also in Lithuanian; the Lithuanian version of the book is almost twice longer than its English counterpart.

[2] A figurative comparison between the crisis and an epidemic is not utterly groundless; likewise, there is sense in tracing its outbreak back to the so-called 'zero-patient' (see, *e.g.*, Grosoli, M. '*Ocean* doesn't live here anymore: Steven Soderbegh's contagion and the stock market crash' in Feldner, H. *et al.* (eds.). *States of crisis and the post-capitalist scenarios.* Farnham & Burlington, 2014). The source of contagion of 'the economic epidemic' is usually traced back to the U.S., sometimes specifically to the State of California or New York (where the investment bank Lehman Brothers, which collapsed in 2008, had its headquarters). In general, such attempts to pinpoint the 'zero patient' of the crisis are both equally intriguing and prospectless. The above-mentioned analogy is limited – if it may indeed be claimed that in the event of an epidemic the first to contract the disease and infect other persons is a specific individual, such 'infection' in the event of an 'economic epidemic' derives from the interactions of the hypothetical 'zero patient' with the economic environment; hence, the 'infection' cannot spread without the economic environment, which follows its own logic and cannot be changed by that individual. The cause is the prevalence of the 'sickness' or, at least, the lack of immunity in the economy and society rather than one single individual who 'catches and spreads the disease first'. Anyway, the efforts to spot the source of 'the economic epidemic', albeit unpromising, to some extent counter the accusations made during the election campaign of 2008 (for more on it see below in this Preface) against the political majority of that time for setting off the crisis.

part.[3] The measures laid down in the Programme of the 16th Government, which was formed in late 2012, target the effects of the downturn rather than its containment, yet this does not in itself make them devoid of the anti-crisis (in the broadest sense of the word) content.

It would be tautological and trite to reiterate that the crisis has decreased the financial and administrative capacity of the state to implement (at least to the extent previously foreseen) many of its economic, social, cultural and other programmes and fulfil the commitments assumed for its citizens (and, in general, residents of Lithuania), because a decrease in this potential is inherently implied by a crisis. On the other hand, it would be both academically and politically incorrect to blame the crisis alone for any inability or unwillingness of public authorities to solve the problems – it is known even without a more extensive analysis that a crisis of such magnitude as has been faced may become (and has become) an excuse for the distribution of public goods when a disproportionately low share is apportioned to certain, even vital, needs, while other areas, though possibly unjustifiably, suffer less. It is not a reproach but the acknowledgment of a fact of reality and, more than this, the reality typical not only of Lithuania – decision-(non)makers all over the world tend to rationalise their decisions (or their absence) by their objective conditionality and offer the public the justification that 'there were no possibilities for doing it better under such circumstances'. It has become a common practice to refer to the crisis in all political (not only in terms of *politics* but also, primarily, *policy*) and, hence, also economic and legal decisions, either to justify their necessity or to explain why certain decisions have not been taken and/or implemented. The crisis, as an argument for correcting economic, social, cultural, defence and even foreign policies and their implementation measures, is somewhat reminiscent of the aspirations for membership in the European Union (EU) in 1999–2004, when most decisions were justified by the necessity to approximate the regulation of various areas of life of Lithuania to EU legal regulation and administrative practice: most of those decisions had undoubtedly been predetermined by EU requirements and had been set as a prerequisite for the membership, although, obviously, not all of them. Thus, the global crisis that hit Lithuania in 2008 turned into a factor to justify even most regrettable failures to take action (such reasoning is not necessarily convincing, nevertheless, it is frequently voiced). For example, the crisis is offered as an explanation for the failure to make substantial improvements of the detention and imprisonment

[3] Seimas resolution no. XI-52 'On the Programme of the Government of the Republic of Lithuania' of 9 December 2008. *Official gazette*, 2008, no. 146–5870. The following Governments (hereinafter indicated by their numbers and/or by the names of Prime Ministers) acted during the period under research: the 14th Gediminas Kirkilas Government (6 July 2006 – 9 December 2008); the 15th Andrius Kubilius Government (9 December 2008 – 13 December 2012); the 16th Algirdas Butkevičius Government (13 December 2012 – present). The titles 'Programme' and 'Action Programme' (when referred to the Programme of the 15th Government) are used synonymously and interchangeably.

conditions in the Lithuanian facilities of deprivation of liberty, although the country has been among the 'leaders' in Europe according to the number of detainees and prisoners. Another example: the so-called national stadium, which has already been a 'construction in progress' for three decades and has not been built to date, is also covered up by references to the outbreak of the crisis in an attempt, as it seems, to conceal the true, much more unappealing, reasons behind this failure. One more sadly ironic and odd example: the crisis appears to be an excuse even for the failure to demount, for more than two decades following the re-establishment of independence, the Soviet statues on the bridge in the centre of Vilnius – it was maintained that the removal of the statues was not a matter of priority when faced with the crisis.[4] These are only several random examples showing the attempts to use the argument of the type 'blame the crisis!' as 'magic words' that grant release from political and social liability for the failure to deal with long-standing issues.[5] Despite of the efforts to turn the crisis into an 'indulgence' for absolution, it is true that it has indeed disrupted consistent performance and decision-making in many areas of life of the state and society. The question whether the decisions taken (or, to the contrary, skipped) in the aftermath of the downturn were optimal or at least adequate is likely not only to have a long-term impact on the political practice and political discourse but also to remain an object of an academic analysis.

Understandably, the topic of the crisis of 2008–2014 is still widely discussed in political discourse. It should be noted in this context that the year 2014 has been indicated here as a relative year of the end of the crisis, as the research underpinning this book was limited namely to the period of 2008–2014. However, as it has been mentioned, the end of the crisis has not been officially acknowledged (and, probably, it is not possible to pinpoint the date of its end with sufficient accuracy – in the global world, crises break out and recede giving way to new, even though of a lesser extent, downturns, thus their delimitation is highly relative). The crisis that was in the wake or, to be more precise, about to grip Lithuania in 2008 was undoubtedly one of the most important topics in the discourse in the run-up to the election

[4] The statues were removed in July 2015, when this book was on the way to the printing press.

[5] Avoidance of political or social liability as such (even when successful at the national level) does not eliminate the legal liability of the state. For example, it is stated in the case-law of the European Court of Human Rights (ECtHR) that a lack of resources cannot 'in principle' justify prison conditions which are so poor as to reach the threshold of treatment contrary to Article 3 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (*Nazarenko v. Ukraine*, no. 39483/98, § 144, 29 April 2003; see also *Poltoratskiy v. Ukraine*, no. 38812/97, 29 April 2003) and that it is incumbent on the states to organise their penitentiary systems in such a way that ensures respect for the dignity of detainees, regardless of financial difficulties (*Mamedova v. Russia*, no. 7064/05, § 631, June 2006). It is also emphasised that if the State is unable to ensure that prison conditions comply with the requirements of Article 3 of the ECHR, it must abandon its strict penal policy in order to reduce the number of incarcerated persons or put in place a system of alternative means of punishment (*Orchowski v. Poland*, no. 17885/04, § 153, 22 October 2009).

to the Seimas. The attitude of the political class and the electorate to the approaching crisis had, to a large extent, determined the fact that the election resulted in the victory of the political forces that insisted on recognising that the crisis was inescapable and called for the most austere measures to curb it, rather than the coalition in power at that time, which tried to downplay the scope of the imminent crisis or even deny its likelihood (this was justifiable to some extent, because those in power are not supposed to exacerbate the mood of alarm among the public). Several years later, after the crisis had been partly contained by highly unpopular austerity measures, the issue of measures to overcome the crisis still prevailed in the campaign of the election to the Seimas in 2012, when concerns were increasingly expressed about the necessity for such measures, let alone their effectiveness and fairness. It is unavoidable that the main target of criticism in such discourse is the Government and the ruling majority; it is also true that (negative) criticism usually precedes informed analysis and is often not even analysis-based, hence, it is unprofessional in this sense. On the other hand, similarly to political criticism addressed to the 'mass consumer' where the eloquence and intensity (not to exclude the universal character) of such criticism is not a proof that it is reasoned and correct, so neither does unprofessional criticism mean in itself that it is unreasoned and incorrect in general. For example, although the coalition in power at that time may not be blamed for the fact that the crisis did not bypass Lithuania, it may, more or less justifiably, be attributed with (and, hence, be reproached for) being inadequately prepared for the crisis. Likewise, the new ruling majority, which undertook hasty and austere measures to overcome the crisis at the end of 2008, may, more or less validly, be associated with social insensitivity, the inability to pull the country out of the slump at the minimum cost (not only financial but also social and psychological), mitigate its consequences, *etc.* Even the ruling majority formed in 2008 and the present majority, which was constituted after the election to the Seimas in 2012 (when the rule was regained by the political forces in power until the end of 2008, though in a slightly different 'configuration' – initially with two more and, since the middle of 2014, one more political party joining the former majority), are reproached by some for 'not learning the lesson' – for not getting/being ready for new downturns that may unfold at some point in the future (as they are inevitable due to the cyclic character of capitalism). The future will prove or deny whether such accusations are reasoned. It is obvious, however, that the crisis was a recurrent theme in the daily political discourse; currently, after the recent major crisis has been contained, it has become less pervasive, although it may spring up again in full force on the first possible occasion.

Such unprofessional discourse is partly outweighed by academic one, though the direct impact of the latter on policy is considerably weaker. The crisis has stimulated different research, including, first of all, economic, sociological and political science research to explore the issues related to the suppression of the crisis – the impact of the crisis on the Lithuanian

economy (and its separate branches), demographic situation, public moods, criminogenic situation, political culture, national defence potential, social security, science, research and education, and even on the media, *etc.*; it is not surprising that economic research prevails.[6] No piece of research, if taken separately, is in the position or even makes an effort to embrace the whole 'anatomy' of the crisis, the whole range of its causes and the ensuing problems – any crisis of such magnitude is a crisis of a complex system, and this by definition means that it is manifest in the diverse areas of public life. Therefore, research into the crisis that broke out in 2008 (as into any other turmoil on a similar scale)[7] may not be limited to one of its 'faces', as, for example, only to its economic dimension. A crisis of this magnitude, though, as a general rule, referred to as an economic or financial crisis for the sake

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[6] Here a selective reference is made only to several publications from different scientific disciplines where the impact of the crisis is either a leading topic or an 'unavoidable background' (some of these publications are referred to in this book): Baležentis, A. and Vijeikis, J. 'Krizės valdymo veiksniai ir priemonės Lietuvos įmonėse' [Crisis management factors and measures in Lithuanian enterprises] in *Management theory and studies for rural business and infrastructure development*, 2010, no. 4; Cesniene, I. et al. 'Macroeconomic factors and the perception of criminal justice in society: The role of shadow economies' in *Kriminologijos studijos*, 2014, vol. 1; Čičinskas, J. and Dulkys, A. 'Finansų krizė ir nauji sprendimai Europos Sąjungoje: mažos valstybės atvejis' [Financial crisis and new solutions in the European Union: The case study of a small country] in *Lithuanian annual strategic review (2012–2013)*, 2013, vol. 11; Dobryninas, A. *et al.* 'On perceptions of criminal justice in society' in *Sociologija. Mintis ir veiksmas*, 2012, no. 2; Donauskaitė, D. *Žiniasklaidos vaidmuo skurdo mažinimo politikoje: Lietuvos interneto dienraščių 2008 m. ekonominės krizės metu atvejis* [Media's role in poverty reduction policy: Case of Lithuania's internet dailies during economic crisis of 2008]. Doctoral thesis. Vilnius, 2015; Gruževskis, B. and Bartkus, A. 'Senatvės pensijos draudimo Lietuvoje netobulumai ir jų sprendimo galimybės' [The imperfections of old-age pension insurance in Lithuania and possible solutions] in *Socialinis darbas*, 2010, no. 1; Gruževskis, B. *et al. Lietuvos socialinė raida ekonomikos nuosmukio sąlygomis* [The social development of Lithuania during an economic recession]. Vilnius, 2012; Gudžinskas, L. 'Europeizacija ir gerovės valstybė Lietuvoje: institucinės sankirtos' [Europeisation and the welfare state in Lithuania: Institutional intersections] in *Politologija,* 2014, no. 4; Guogis, A. and Gruževskis, B. 'Ar reikia kitokio Lietuvos visuomenės socialinės raidos modelio?' [Do we need another Lithuanian societal development model?] in *Socialinių mokslų studijos,* 2010, no. 3; Jakeliūnas, S. *Lietuvos krizės anatomija* [*Anatomy* of Lithuania's crisis]. Kaunas, 2010; Kriščiukaitienė, I. *et al.* 'Pasaulinės ekonominės krizės įtakos žemės ūkio sektoriui ES šalyse vertinimas 2008–2009 m.' [The impact of the global economic crisis on selected EU countries in agricultural sector, 2008–2009] in *Management theory and studies for rural business and infrastructure development*, 2011, no. 5; Maldeikienė, A. *Melo ekonomika* [*Economy of lie].* Vilnius, 2013; Pelanienė, N. (ed.). *Lietuvos žemės ir maisto ūkis 2009* [Agriculture and food sector in Lithuania]. Vilnius, 2010; Id. (ed.). *Lietuvos žemės ir maisto ūkis 2013* [Agriculture and food sector in Lithuania]. Vilnius, 2014; Žukauskas, V. 'Lietuvos šešėlinė ekonomika' [Lithuanian shadow economy] in *Lietuvos laisvosios rinkos institutas. Periodinis leidinys,* 2014, no. 3.

[7] There is no consensus globally whether it should be held that the crisis began in 2008 (as, probably, believed by the majority of the researchers and also followed by the authors of this book) or 2007 (as, for example, held by some highly authoritative researchers; see, *e.g.*, Reinhardt, C. M. and Rogoff, K. 'Is the 2007 U.S sub-prime financial crisis so different? An international historical comparison'. National Bureau of Economic Research. Working paper 1376, January 2008. Online access: http://www.nber.org/papers/w13761.pdf [22 March 2015]. However, this is *per se* irrelevant to the issues of Lithuania because the crisis hit Lithuania in 2008. Lithuanian scientific literature as well as official documents refer to the year 2007 as to the pre-crisis year.

of simplicity (as it emanated, primarily, as a financial, *i.e.* economic, crisis), is a crisis of the entire society as a complex system, leaving its footprint on each of its sub-systems; furthermore, due to the global nature of this crisis it is also a crisis of the whole international community. As it has many times been repeated in political discourse and, hence, possibly trivialised to some extent, a crisis is not only a mere dysfunction of the particular system, which reveals its structural inconsistencies, but also a stimulus to transform that system.[8] Thus, it may be claimed that a crisis gives impetus for stepping over self-evident boundaries of different societal research disciplines and works as one more factor encouraging inter-disciplinary research and the integration of different disciplines: in order to give a full picture of the crisis and provide a thorough analysis of its causes, course and consequences, 'pure' economic research should not exclude sociological (because a crisis modifies the societal structure at various cross-sections), demographic (because a crisis, *inter alia*, triggers changes in migration directions and trends), political science (because measures to overcome a crisis follow from the relevant political decisions), cultural (because a crisis activates changes in societal attitudes, moral values, communication models) and other types of research, while the latter should not disregard 'purely' economic considerations.

One of the dimensions of this as well as other 'economic' downturns is, undoubtedly, legal. Firstly, any crisis, as a dysfunction of society as a complex system, shows that the existing legal order is inadequate or otherwise unsuitable for accepting and overcoming the challenges of the changed economic conjuncture. Secondly, efforts to deal with any 'economic' slump require decisions that inevitably take the form of positive law – laws, substatutory legal acts, contracts and other agreements with legal implications, as well as other sources of law, as, for example, legal customs or administrative practice. Thirdly, an 'economic' crisis goes along with the inability of public authorities to fulfil certain previously assumed commitments, most of which were similarly laid down in different sources of law; thus, an economic crisis alters the legal expectations of society members and, at the same time, their attitude to the functions and possibilities of law.[9] This third aspect is mentioned on fewer occasions, sometimes is missed but is not unimportant.

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8 After the crisis broke out, it was often (so often that it appeared to be to some extent trivialised) repeated that it is not only a downturn but also a challenge, an opportunity for the system to undergo restructuring and a stimulus for changes. Such generic understanding of a crisis is also confirmed by the etymology of the word 'crisis' (Greek κρίσις). For example, Hippocrates considered that a crisis is a 'turning point' of a disease, a sudden change for better or worse; Sophocles defined a crisis as trial of skill or strength (in particular, in a competition); Antique authors used the concept of crisis in their works as a synonym for a decision (including a judgment), choice or election, interpretation of dreams or portents (Liddell, H. G. and Scott, R. *A Greek-English Lexicon. Revised and augmented throughout by Sir Henry Stuart Jones, with the assistance of Roderick McKenzie.* Oxford, 1940. Online access: http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.04.0057%3Aentry%3Dkri%2Fsis [14 March 2015].

9 For more see Kūris, E. 'Ekonominė krizė ir teisinė sistema: įtampų triada' [Economic crisis and the legal system: A *triad* of tensions] in *Teisė*, 2015, vol. 94.

Irrespective of the abundance (though not excessive) of scientific research into the global crisis that hit Lithuania in 2008, its legal dimension is hardly visible. It is not surprising, however, bearing in mind that the researchers of the crisis are economists, sociologists, political scientists and representatives of other scientific areas rather than specialists in law. It is much more surprising (and, openly, disappointing) that there is very little published research by legal scholars on the impact of this crisis and anti-crisis measures on the legal system of Lithuania. Nevertheless, it is true that the issues in connection with the crisis under discussion cannot remain unreflected and, indeed, have been reflected from a certain aspect in various scientific publications on different issues of constitutional law, administrative law, labour law, private law, penitentiary law and other areas of law. Irrespective of this, there is not only an apparent lack of integrated research into the impact of the crisis on the legal system but also a lack of publications (sectoral studies) where this impact on a certain area of law is the central axis of the research. Few exceptions[10] only confirm this general assessment. On the other hand, although the global economic crisis of 2008 has been explored in a large number of research studies in different scientific fields (definitely predominantly in economics)[11], yet even at the international level there are few large-volume scientific legal studies dealing integrally with the impact of the crisis on the whole legal system (of a specific country) and human rights, including the concept of a right (and that

[10] See, *e.g.*: Beliūnienė, L. et al. *Aktualiausios žmogaus teisių užtikrinimo Lietuvoje 2008–2013 m. problemos: teisinis tyrimas* [The most relevant problems of ensuring of human rights in Lithuania in 2008-2013: Legal research]. Vilnius, 2014; Birmontienė, T. 'Ekonomikos krizės įtaka konstitucinei socialinių teisių doktrinai' [The influence of economic crisis on the constitutional *doctrine* of social rights] in *Jurisprudencija,* 2012, no. 19(3); Davulis, T. and Petrylaitė, D. 'Tackling the economic crisis: Labour law in Lithuania' in Davulis, T. and Petrylaitė, D. (eds.). *Labour regulation in the 21st century: In search of flexibility and security*. Cambridge, 2012; Gutauskas, A. Economic crisis and organized crime in Lithuania. *Jurisprudencija*, 2011, no. 18(1).

[11] See, *e.g.*, one of the most authoritative studies on economic crises published shortly after the outset of the crisis in 2008: Reinhardt, C. M. and Rogoff, K. *This time is different: Eight centuries of financial folly*. Princeton, 2009. Also see: Farnsworth, K. and Irving, Z. (eds.). *Social policy in challenging times: Economic crisis and welfare systems*. Bristol, 2011; Zai, P. 'The economic crisis and fiscal trends in EU Member States' in *Transylvanian review of administrative sciences,* 2012, no. 35E. For publications of foreign authors dealing with the situation in Lithuania (or, more often, Lithuania and other Baltic states) see, *e.g.*: Demir, E. *et al*. 'The impact of 2008 financial crisis on firm's productivity: Evidence from Lithuania, Latvia and Romania' in *Journal of security and sustainability issues*, 2014, vol. 3, no. 4; Juska, A. and Woolfson, C. 'Policing political protest in Lithuania' in *Crime, law and social change*, 2014, vol. 57, no. 4; Kallaste, A. and Woolfson, C. 'Negotiated responses to the crisis in the Baltic countries' in *Transfer: European review of labour and research*, 2013, vol. 19, no. 2; Kattel, R. and Raudla, R. *Austerity that never was? The Baltic States and the crisis.* Levy Economics Institute of Bard College. Policy note 2012/5; Purfield, C. and Rodenberg, C. *Adjustment under a currency peg: Estonia, Latvia and Lithuania during the global financial crisis 2008–09*. International Monetary Fund. Working paper WP/10/213, September 2010; Sommers, J. and Woolfson, C. (eds.). *The contradictions of austerity: The socio-economic costs of the neoliberal Baltic model*. London, 2014.

of human rights guarantees)[12]. However, there is a considerable amount of publications on the impact of the crisis on the specific types of human rights (segments of the human rights catalogue), as, for example, on social rights, the right of ownership, finance-related rights and the protection of minority rights. In addition, there is a large variety of publications (including those in the public virtual space) that, although formally issued as the documents of different international organisations, are not only close to scientific but often even superior to scientific studies, if not by the depth of the analysis, then at least in terms of the information provided, as those who collected material for such documents could more often than not make use of the administrative leverage and resources considerably exceeding those available to 'ordinary' university scholars.[13] As far as it is known, not many international scientific forums have devoted their 'central' attention to the legal issues discussed here;[14] one of them was held in Lithuania.[15]

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[12] Admittedly, they are available and have been increasing in number. These scientific studies, both those on the individual segments of the human rights catalogue (groups of rights and freedoms) or and on the rights of specific societal groups and those cross-sectoral, note highly negative effects of the crisis and anti-crisis measures pursued by a large number of countries on human rights and on the rule of law in general. This conclusion also prevails in another serious recently published study: the crisis and anti-crisis measures had a devastating effect on human rights; see Nolan, A. *Economic and social rights after the global financial crisis*. Cambridge, 2014; also see: Ramirez, S. A. *Lawless capitalism: The subprime crisis and the case for an economic rule of law*. New York & London, 2014 (the study is not limited to the impact of the crisis on the rule of law, it also explores the 'inverse relation' – the crisis is treated as also stemming from the law in force at the time); Riebel, E. *et al.* (eds.). *Economic, social and cultural rights in international law: Contemporary issues and challenges*. Oxford, 2014; Supiot, A. 'A legal perspective on the economic crisis of 2008' in *International labour review*, 2010, vol. 149, no. 2.

[13] Especially highly informative is this document of the Council of Europe (CoE): The impact of the economic crisis and austerity measures on human rights. Draft feasibility study, doc. no. CDDH(2014)017. Council of Europe. Steering Committee for Human Rights, 4 November 2014. Online access: http://www.coe.int/t/dghl/standardsetting/cddh/CDDH-DOCUMENTS/CDDH(2014)017_EN.pdf [14 March 2015]; in some chapters of this book the initial version of this study is relied upon, *i.e.* The impact of the economic crisis and austerity measures on human rights. Preliminary study on existing standards and outstanding issues, doc. no. CDDH(2014)011. Council of Europe. Steering Committee for Human Rights, 6 June 2014. Online access: http://www.coe.int/t/dghl/standardsetting/cddh/CDDH-DOCUMENTS/CDDH(2014)011_EN.pdf [14 March 2015].

[14] One of them was the seminar 'Implementing the European Convention of Human Rights in the times of economic crisis' organised by the ECtHR on 25 January 2013; see European Court of Human Rights. *Dialogue between judges 2013: Implementing the European Convention of Human Rights in the times of economic crisis*. Strasbourg, 2013.

[15] International scientific conference 'Challenges of economic crisis to human rights' was held by the Faculty of Law of Vilnius University on 10–11 October 2014 within the framework of the research described in this book ('Challenges of the economic crisis to human rights will be explored in the international researchers' conference'. Online access: http://www.tf.vu.lt/struktura/400-lietuviu/naujienos/renginiai/1436-ekonomines-krizes-issukiai-zmogaus-teisems-bus-nagrinejami-tarptautineje-mokslineje-konferencijoje [8 October 2014]). Some of the conference presentations have been further developed in published academic articles (insights from some of them have also been included into this book): Andruškevičius, A. 'Ekonominio sunkmečio poveikis atsakingam valdymui Lietuvos savivaldybėse: teisės aspektas' [Effects of economic crisis in the municipalities of Lithuania

This book aims at filling the above-described vacuum at least to some extent. 'At least to some extent' is a cautious wording, because the authors of this book fully comprehend that the gap is so huge that it cannot be filled by one book. On the other hand, this gap is reduced here 'at least to some extent' in terms of only one aspect: the book explores the impact of the crisis on the rule of law and human rights. Which of these two elements should be written first, could be a matter of an endless dispute – which would hardly be fruitful. The rule of law implies respect for and the ensuring of human rights, while respect for and the ensuring of human rights as such are impossible if the rule of law and, thus, the supremacy of law over political voluntarism, are refused to be recognised. The rule of law and respect for and the ensuring of human rights are the two sides of the same coin. Once this line of research was chosen, it was *a priori* clear to the authors of the book that both human rights and the rule of law are so capacious that it is impossible to cover in one book the whole range of the issues falling under these categories. Therefore, for example, the chapters of the book designated for the specific types of human rights (segments of the human rights catalogue) have to be limited to some of the rights as 'segment studies', while some other rights are discussed only in general terms. A holistic effort to embrace what may hardly be embraced at all would have required a publication at least several times larger than the size of the present book and, accordingly, much more time and other resources, which were unavailable to the authors of the book. Yet nothing is ever finalised in science. Hence, let this book, which is the first step towards a study of the overall impact of the crisis on the legal system, serve as a reference point for other researchers (and, undoubtedly, for the authors of the book themselves, as some of them intend to continue exploring the relevant issues).

Despite the fact that this book deals with the impact of the global economic downturn on the legal system, economics *per se* will be explored least of all

in context of the principle of responsible governance]; Isokaitė, I. 'Ekonominio nuosmukio poveikis neapykantos veikų tendencijoms' [Impact of the economic downturn on hate crime tendencies]; Kūris, E. *Op. cit.*; Lastauskienė, G. 'Ūkinės veiklos laisvė ir krizė: Lietuvos viešosios valdžios veiksmų įvertinimas' [Freedom of economic activity and crisis: Assessment of the actions of the Lithuanian public authorities]; Medelienė, A. and Lukas, M. '*Vacatio legis* mokesčių teisėje' [*Vacatio legis* in *tax law]*; Milašiūtė, V. 'Viešojo valdymo reformų poveikis pilietinėms ir politinėms teisėms Lietuvoje ekonominės krizės metu: teisės į tinkamas kalinimo sąlygas atvejo analizė' [The impact of public administration reforms on civil and political rights in Lithuania at the time of the economic crisis: Case study of the right to appropriate conditions of detention]; Petrylaitė, D. 'Orus darbas ekonominės krizės sąlygomis: grėsmės ir išmoktos pamokos' [Decent work in times of economic crisis: Threats and lessons learned]; Petrylaitė, D. and Petrylaitė, V. 'Socialinės apsaugos garantijų mažinimas krizės laikotarpiu: sprendimai ir teisinis vertinimas' [Reduction of social security guarantees during crisis period: Legal evaluation of the related decisions]; Žalimas, D. 'Taupymo priemonių konstitucingumo kriterijai Lietuvos Respublikos oficialiojoje konstitucinėje doktrinoje' [Criteria of constitutionality of austerity measures in the official constitutional doctrine of the Republic of Lithuania]; Žalimas, D. and Masnevaitė, E. 'Ekonominės krizės iššūkiai teisėjo ir teismų nepriklausomumui' [Challenges of economic crisis to independence of judiciary]. The articles have been published in *Teisė*, 2015, vol. 94.

here. The authors of this book are specialists in law representing various fields of the science of law. The research underpinning this book treats the crisis of 2008–2014 as a matter of fact. The starting point for this research is a well known fact that the global financial, or economic, crisis, which broke out in 2008 and which is also referred to as the Great Recession (not to confuse with the Great Depression of the 1920s and 1930s), hit Lithuania at the time when it had been lulled by its good pre-crisis growth indicators and, as a result (but, most likely, not only because of that), was not very well prepared, to put it mildly, for the crisis. In Lithuania, like in many other countries affected by the crisis, production contracted sharply, some companies went bankrupt, suspended or restricted their business activities, unemployment increased, the rate of securities declined, domestic consumption dropped and the gross domestic product (GDP) substantially decreased. The new ruling majority and the Government, formed after the 2008 election to the Seimas, responded to the crisis hastily, by what may be briefly defined as a combination of two political vectors: (i) by adopting austerity measures – cutting public financing in many areas of life, reducing the obligations the state had given to different groups of society and increasing tax obligations to most taxpayers; and (ii) by taking out (costly and even excessively costly, as considered by the majority) loans on the international market, thus increasing the national debt but (as claimed by the authorities) avoiding any external pressure to take more severe austerity measures. Most of such decisions were drastic not only by their content but also due to their hasty introduction. In late 2008, the new Seimas amended a large number of laws that regulated the national revenue collection and laid down the financial obligations of the state to different groups of society; these obligations were also curtailed (or even withdrawn) in the national budget of 2009 (and also in the budgets of subsequent years). Anti-crisis legislation would be submitted, briefly discussed and adopted immediately (with the majority often disregarding the doubts and objections of the opposition) at the sittings of the Seimas at times lasting until late night hours; hence, such anti-crisis legislation was right away (and, most likely, once and for all) given a jeering label 'the overnight reform'. Such haste was not at all fuelled by the ardour, impatience or arrogance of those newly in power (of which they were widely and not utterly groundlessly accused) – it was driven by a fully realistic threat that the crisis would pick up its pace and, at times, by an irrational fear of those in power that the crisis would become unmanageable. Moreover, the necessity for highly hurried decision-making was heightened by the imperative constitutional regulation (its content should be interpreted in the light of the specific circumstances that prevailed in 1992 when the Constitution of the Republic of Lithuania was being drafted) – every four years the drafting and approval of the national budget takes place at the same time a new government is formed; otherwise stated, the budget is drafted and submitted to the Seimas by the outgoing government, while the government that has to implement it has little time for making any changes

in the draft.[16] The austerity measures chosen affected the absolute majority of the Lithuanian population, firstly and most painfully (as it, unfortunately, happens in such cases and not only in Lithuania) those with lower income and subsistence level, hence, the least secured members of society. A large part of society had a negative, even hostile view of these measures from the very beginning (on 16 January 2009, there was a large-scale riot near the Seimas although, in general, this method is uncommon for Lithuanian people to voice their claims against the authorities and thus 'solve' the existing conflicts); in addition, hostility was fuelled by a rather flawed public communication of the Government. This highly unpopular policy of austerity measures was (and is) called by the public and the media as 'belt-tightening'. The legislative initiatives that aimed at saving public expenditure not only led to the restructuring of the tax system resulting in new tax obligations imposed on taxpayers, as well as to the reduction of salaries, pensions and other social benefits, but also to cuts in funding for public services and public authorities; thus, these initiatives affected various areas of economy and life in general, not excluding health care, culture, education, science, national defence, administration of justice or diplomacy. Drastic austerity measures were justified not only by their economic expediency but also (in some cases) by the need to restore the violated distributive justice because, as it was claimed, part of public finances (public goods) had been distributed not only irrationally but also by favouring certain groups of individuals at the expense of others, hence, disproportionally. The decision-makers believed (or at least claimed to believe) that such legislative initiatives were not only inevitable painful steps to be taken to overcome the crisis, but they also considered them as elements or at least a prelude to more essential structural reforms. The fact that (as it turned out later) some of these legislative initiatives were inconsistent in legal terms or even contrary to the Constitution does not mean in itself that, at the time when the magnitude of the crisis became dramatically evident, the political class was in the position to offer an alternative anti-crisis plan and, especially, that the implementation of such a hypothetic alternative was possible. There were no realistic alternatives to the policy of austerity (although not all the decisions could be flagged as belonging to this policy); despite an eloquent and often loud rhetoric of criticism against it, no systematic political programmes to compete with this policy were developed. Some of these measures were later corrected (to make them somewhat milder, at times after the relevant rulings of the Constitutional Court, although there were not many cases of such indirect judicial intervention into legislation)[17] but the principal direction of

[16] For more see Kūris, E. 'Konstitucija, teisėkūra ir konstitucinė kontrolė: retrospekciniai ir metodologiniai svarstymai' [Constitution, lawmaking and constitutional review: Retrospective and methodological considerations] in Kūris, E. (comp., ed.) and Masnevaitė, E. (comp.). *Lietuvos Respublikos Konstitucijos dvidešimtmetis: patirtis ir iššūkiai* [The twentieth anniversary of the Constitution of the Republic of Lithuania: Experience and challenges]. Vilnius, 2012, pp. 70–72.

[17] For more see Parts III and IV.

the chosen policy towards the saving of public finances had not changed until the end of the term of office of the 15th Government (which so far is the only Government that has worked for the whole four-year term provided for in the Constitution) and, to a large extent, even after its replacement, following the 2012 election to the Seimas, by the 16th Government, which is dominated by the political party that held the majority in the Government also before the crisis and, hence, continues the direction of political representation pursued by the 14th Government.

Thus, this book explores the effect of the economic downturn on the Lithuanian legal system rather than the economic crisis as such. There will be few figures characteristic of the science of economics – only as many as inevitably necessary. This is a legal text prepared on the basis of the legal research where mostly traditional legal research methods have been used. The methods applied will be briefly discussed later. First of all, it is necessary to describe the object, purpose and focus of the research (consequently, also its scope, to be considered separately) and formulate its hypothesis.

In opting for the policy of austerity, Lithuania was not an exception. Austerity was the readjustment chosen by many countries affected by the crisis.[18] The crisis and the measures to overcome it (policy of austerity) also had an impact on those aspects of life where the financial dimension was not 'paramount' at least at a first glance: on the societal structure (including demographic indicators and social stratification), lifestyle and the mentality of people, *etc.* On law, too. Although the long-term consequences of the crisis and the effectiveness of anti-crisis measures are, first of all, a matter of economic and political research analysis rather than that of law, they are also highly important in legal and broader political discourse, as it is widely acknowledged that these measures have posed a threat to the rule of law and human rights. Although it is recognised that the crisis had been (almost) overcome by the end of 2014, concerns regarding a threat to the rule of law and human rights have not eased but are voiced increasingly louder. This mood pervades the documents of the institutions of the United Nations (UN), the EU, the CoE (as already mentioned above)[19]. Therefore, the compliance

[18] See Ortiz, I. and Cummins, M. 'Age of austerity: A review of public expenditures and adjustment measures in 181 countries'. Initiative for Policy Dialogue and the South Centre. Working paper, March 2013.

[19] Like in 'purely' academic publications, the view is that the effect of the crisis and anti-crisis measures on human rights and the rule of law is, in principle, negative. For example, the UN High Commissioner for Human Rights notes a negative impact of austerity measures on economic, social and cultural rights, in particular, on the rights of vulnerable social groups, children, women, and migrants. See Report of the OHCHR on the impact of the global economic and financial crises on the realization of all human rights and on possible actions to alleviate it (A/HRC/13/38), 18 February 2010. Online access: http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-38.pdf [11 November 2014]. This concern is also expressed in the European Parliament resolution on the impact of the financial and economic crisis on human rights (2012/2136(INI)) of 18 April 2013. Online access: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-

of austerity measures with the legal standards of a democratic regime (or, synonymously, a democracy) had to be called into question sooner or later and these doubts had necessarily to prove to be at least partly grounded. No gift of prophecy was required to predict this. Firstly, as mentioned, the policy of austerity, whatever good intentions behind it, affects an absolute majority of the residents of a country and most hits the least protected members of society. Even if such a policy does not violate the rights of individuals, as explicitly laid down in statutory law, it denies their expectations. Secondly, the legislative decisions to overcome the crisis were taken extremely hastily. This, as already mentioned, is not a reproach in itself, because the urgency was necessitated by the magnitude and pace of the crisis. Highly urgent decisions, however, are often hurried decisions, which imply unavoidable mistakes. Thirdly, Lithuania, as many other countries in Europe, has in place the system of the constitutional review of legal acts; this system thus is highly likely to be made use of by the opponents of the policy of austerity and those whose expectations or (especially) rights have been undermined as a result of this policy. It is not by chance that, especially in 2009–2010, the Constitutional Court received an increased number of applications challenging the constitutionality of the so-called economic and social legislation, and that since 2011, after a rather long while, the issues related to economic and social rights as well as public finances once again became predominant in the jurisprudence of the Constitutional Court, although, a few years before, these issues had been secondary or even tertiary by prevalence. In this regard, the situation in Lithuania was not different from that within the European context, because the frequency of such cases also increased in the constitutional jurisprudence of other states.

Unlike research into economic crises *per se* (either global or local), which concentrates primarily on economic analysis (without denying the importance of an interdisciplinary approach), research into the impact of the crisis on a legal system must be bread and butter for specialists in law (although, as mentioned before, there are not many research studies on this subject). The term 'legal system', as used here and in the rest of this book, denotes one of the public subsystems and is not identical to a system of law in the narrow sense – to law as a system of norms and principles. In addition to law as such, the category of a legal system includes: legal institutions and their practice;

0179&format=XML&language=EN [11 November 2014]. According to the CoE Commissioner for Human Rights, more attention should be paid to the impact of austerity measures on human rights as these measures erode human rights; national decisions on austerity measures and international rescue packages have lacked transparency, public participation and democratic accountability, prevent from investing in social protection, health and education programmes. See: 'Austerity 'undermining human rights' says Council of Europe Commissioner'. Online access: http://www.cesr.org/article.php?id=1528 [11 November 2014]; 'Safeguarding human rights in time of economic crisis'. Council of Europe Commissioner for Human Rights. Issue paper, 2013, 2. Online access: http://www.enetenglish.gr/resources/article-files/prems162913_gbr_1700_safeguardinghumanrights_web.pdf [11 November 2014].

law-making and law-implementation processes; legal ideas; legal psychology and national legal mentality; legal culture; legal traditions; legal behaviour; sources of law; legal reasoning and the legitimation of decisions taken by public authorities; legal profession and its ethics; legal education, *etc.* This list is not final and not even sequential, but it is sufficient for this explanation. Law is but one element of a legal system – it is a linking element that imparts a character to and sets a direction for the legal system, though it is not the sole element. Nor is it the only determinant of changes in the legal system as a whole. The legal situation in society may change even without any changes in positive law provisions; likewise, essential changes in statutory law may lead to no changes in the legal situation of society. More often than not, envisaged law reforms fail or yield no positive results also for the reason that a reform of the legal system does not pay enough heed to legal mentality, legal culture, legal education, *etc.*[20] Research into the impact of a crisis on positive law may, in principle, be limited to the changes induced by the crisis in respective statutory law and case-law; it is much more difficult to explore the impact made by a crisis on the legal system as a whole, including such 'less tangible' sources of law as legal customs, legal traditions and administrative practice. The assessment of the latter impact reveals the limits of legal research, unless it is supplemented by the methodology borrowed from other social and humanitarian sciences.

The assessment of the impact of the crisis on legal regulation and on the legal system in general highlights the dimension of economic and social rights. But not only this. The crisis has brought about substantial (even if indirect) restrictions on cultural, civil and political rights of individuals and has a transformative effect on the concept of responsible government.[21] Restrictions in all these areas may be direct – resulting from shrinking funds for the financing of the relevant areas, decreased institutional capacity and the weakened private sector, as well as indirect – resulting from a legislative and/or (more often) administrative intervention in the areas where the public authorities expect, either reasonably or unreasonably, stronger resistance to, or criticism of, the chosen policy of austerity. Which segments of the rights catalogue were subject to more severe restrictions and which were constrained to a lesser extent, should be established by means of thorough sectoral studies, however, the assumption that the whole catalogue has been affected leaves no doubts in general. This applies not only to rights, but also to those expectations that, although not consolidated in the specific legal acts as rights, derived from and were supported by the overall pre-crisis regulation,

[20] For more see Kūris, E. 'Apie (ne)pagarbą teisei' [On (dis)respect for law] in *Notariatas,* 2012, no. 13.

[21] For more see Part II. Hereinafter in this book, the term 'responsible government' is preferred to 'responsible governance' (and 'good government' to 'good governance'), which is also used in legal literature, *inter alia*, in the context of EU law; however, the latter term is occasionally used in this book when the procedural aspect of government has to be emphasised. By the way, both these terms are translated into Lithuanian in the same way as '*atsakingas valdymas*'.

thus, they may also be referred to as legitimate expectations in this broadest sense.

Constraints on rights and legitimate expectations sustained due to the austerity measures to overcome the crisis may be considered as temporary, as it is expected that almost everything should normalise once the crisis is over: if it is impossible to ensure the exercise of a certain right or the fulfilment of a certain expectation during the crisis because of the lack of funds and/or institutional capacity, this will 'anyway' have to be ensured when the funds and/or the institutional capacity become available again after the crisis is over; besides, the losses resultant from the failure to ensure the exercise of a certain right or the fulfilment of a certain expectation will have to be compensated for at least partly. However, it may be hypothetically assumed (not only in the Lithuanian context) that the impact of crises on the law is more profound: they alter not only the content of legal regulation but also the perception of rights and expectations as well as of the law itself – of its purpose, functions, limits and potential. This constitutes a transformative effect. Such a hypothesis is also driven by a nearly permanent (however apocalyptic it may sound) character and intertwinement of crises in the globalisation era as well as by global challenges, such as a very fast growth of world population, the irreversible avenues opened by the internet development for intruding into private life, new threats to the security of persons and societies, *etc.* This is also fuelled by international conflicts, which, regardless of the well-meant utopia that was popular a couple of decades ago and had an appealing title 'the end of history', are no less frequent and intense in the 21st century; they bring along serious economic difficulties as, for instance, those related to economic sanctions and counter-sanctions imposed even on those sectors of national economies that are distant from international politics. Because of all these factors, certain expectations, deriving from the pre-crisis law and certain rights, defended by that law, are reflected anew as excessive, unreasoned and, hence, requiring adjustments. This has to impact not only the content of legal regulation but also the perception of the role of law, hence, also of the legal system as a whole. Even if the effect of the crisis on this change of the legal system is not higher than that of those other challenges, its implications do not diminish in importance and its consequences may hardly be always seen as temporary.

Here, the transformative effect thesis has been offered as a hypothesis. This is not fully accurate. This thesis is also a postulate. What is truly hypothetical in it is not in the 'whether', but 'in which direction', 'how' and 'to what extent': it must be presumed that 'direction' is taken to the lowering of what seems to be the standards of the rule of law (or, synonymously, the law-governed state) and those of the protection of human rights, as universally acknowledged and established in the course of development of the long-standing Western democracy. As a result of the crisis, (i) the legal system is unable to ensure, at least to the former extent, the protection of rights and legitimate expectations; and (ii) some requirements, inherent in the rule of law as a governing idea

of the Western legal tradition, which formerly were applicable to the system of law (relative stability, advance publication/notification, hierarchical consistency, non-contradiction, *ubi ius ibi remedium*, *etc.*)[22], are considered to be less imperative: they are not relinquished, but deviations from them in order to overcome the crisis are not denounced by law and, in this sense, are justified, also in the jurisprudence of courts. There are examples of such *ex post facto* approval of decisions taken by public authorities in the Lithuanian constitutional jurisprudence as well.[23] They are manifestations of a broader phenomenon. Whether this phenomenon also implies *a tendency* (and if yes, how far reaching in scope) is an open question. It was presumed at the beginning of the research that an answer to this question was positive. But this assumption has to be proved or discarded. It may be noted in advance that the research has confirmed this assumption only to some extent, to a much lesser degree than might have been expected by some.

Thus, the research takes off from a seemingly threadbare statement that a large-scale economic breakdown always impacts human rights at least to the extent preventing public authorities from fulfilling their previous commitments. Moreover, it compels both the executive and the legislative power to act promptly, at times recklessly, without due consideration of all available alternatives, and deal with the issues of 'present-day survival' so that fundamental and more complex problems are set aside for the future. In such an event, mistakes are unavoidable and their likelihood is even more increased by the resistance that austerity policies always evoke, hence, the authorities have to take action without waiting for the result of their 'dialogue with the public', which forms the core of a 'deliberative democracy'. Of course, the wrongfulness of law-making decisions and/or those of the application of law taken to manage the crisis and/or to mitigate its effects sooner or later comes to light. Here the word 'wrongfulness' does not mean a moral wrong, on the one hand, or economic, social or political unsuitability and unacceptability because the respective decisions led to more damage than utility, were ineffective, *etc.*; on the other hand, it is used in the legal sense: those decisions were wrong because they were contrary to superior law (the Constitution, the international legal obligations of the state, *etc.*). However, such 'legal wrongfulness', or, otherwise stated, unlawfulness, can be confirmed only according to a specific procedure established in the relevant legal acts, *e.g.*, by constitutional review or any other resolution procedure applicable to legal disputes. Until this has not been done, all accusations that law-making or law-application decisions were unlawful are but accusations

[22] For more see Part I.

[23] See, *e.g.*, Constitutional Court ruling of 15 February 2013. *Official gazette*, 2013, no. 19–938. English translations of all Constitutional Court rulings, conclusions and decisions are available on the Constitutional Court's webpage: http://www.lrkt.lt/en (in this book, some minor changes have been made in translations of citations of the Constitututional Court acts so to ensure their greater correspodence to the original Lithuanian text).

and not legal findings. A judicial mechanism to seek justice is not fast; usually unlawfulness transpires considerably later after the relevant decisions have already been adopted, hence, well after society has put up with the new legal order to a larger or lesser degree and with the fact that some expectations of its members, previously protected as rights, are no longer ensured because they were unreasoned, premature, beyond the realistic possibilities of the state and society, also in some cases were at odds with the imperative of social harmony and amounted to privileges. Otherwise stated, at the time when it is (finally) acknowledged by the court that certain anti-crisis decisions have violated the legal standards of a democratic regime, it may turn out that society has already put up with the fact that the commitments assumed with respect to it are neglected – even those driven by the standards of the rule of law, which, seemingly, had not been questioned by anybody before, but were ignored by practical politics in the face of the crisis. Such acceptance would mean that the legal mentality of society has undergone some changes. Can it be claimed that the standards of the rule of law make it imperative for public authorities to continue fulfilling also those commitments that were beyond the realistic capacities of the state and society? Or should the opposite approach be accepted that a crisis modifies the perception of these standards and that of the rule of law itself?

In summarising, the hypothesis is raised as to whether the world economic crisis that unfolded in 2008 and the anti-crisis measures taken in Lithuania led to the lowering (softening) of the universally recognised standards of the rule of law and human rights, as well as to a lesser protection of certain expectations, which had been safeguarded and protected as rights before the crisis. Political discourse offers a variety of answers, utterly negative among them; the authors of the book, however, sought to get answers based on the analysis of facts and regulation. It should be noted from the outset that it is not impossible that answers will differ for different types of human rights (segments of the human rights catalogue), as well as for separate requirements for law-making and the application of law that stem from the general idea of the rule of law. It would be overly ambitious, unrealistic and unachievable to provide one single final, conclusive, universal and holistic answer to suit the relationship between *any* of these standards and *any* of the rights or freedoms established in the human rights catalogue (also for the reason, as already mentioned, that the capaciousness of the categories of human rights and the rule of law makes it impossible to embrace the whole range of issues covered by them in one single study). Most importantly, such an answer, even if offered, would probably be too assertive and, therefore, incorrect as it would distort both the variety of human rights and the ability of the rule of law to be an imperative, which is not detached from real life and is authoritative as a result, rather than an imposed dogma.

As already hinted, in conducting this research traditional methods of legal research prevailed. These methods, first and foremost, are the methods

of textual (linguistic) analysis and logic; due to the research approach (comparison between positive legal regulation and the standards of the rule of law), the first two methods were supplemented by the method of the general principles of law. The teleological method, that is the one of legislative intent, was also used to a large extent (the *travaux préparatoires* of legal acts are analysed in a number of chapters of the book), and to a lesser extent – the historical and the comparative methods. Extensive reference is made not only to statutory law (*i.e.* the law laid down in normative legal acts), but also to case-law; thus, statutory law is interpreted in the way it is understood and interpreted authoritatively by courts. All this does not exceed the scope of the so-called legal dogmatic method (here this concept is used as a generalising one). On the other hand, the research was not limited to traditional methods of legal research: a representative survey of the public opinion, as well as of particular target groups (including professional lawyers), carried out by the public opinion and market research company Factus (Kaunas) in August and September 2014)[24], was highly important for the research, as it was aimed at identifying significant changes in the perception of law (rights, legitimate expectations, functioning of legal institutions, *etc.*), if any, caused by the crisis. The survey, *inter alia*, sought to find out how the crisis affected the attitude of society and its different groups to the protection of the expectations and corresponding rights supported by the legal system before the crisis. As it could be foreseen, the majority of the respondents stated that the crisis had led to the violations of their own rights, in particular, economic and social rights, and that the violations of the Constitution had become more frequent; they also noted that the state had not made any efforts to safeguard people from the negative effects of the crisis and, where it had tried to introduce safeguards, it did not observe the fundamental principles of law, such as the principle of equality of all persons, *etc.* It is not surprising, therefore, that, apart from a generally negative assessment of the anti-crisis policy, the view of the public is that at least certain rights established in statutory law before the crisis should be restored, hence, the relevant expectations should be further maintained. The relevant survey results have been used in the chapters designated for the individual segments of the human rights catalogue.

This research is similar to a case-study, as: (i) it explores the situation of one country and one society; and (ii) it investigates the impact of one crisis on the legal system of that country. It makes no claims to any final and, even more so, unquestionable answer to the fundamental question noted in one

[24] Qualitative representative survey of the Lithuanian population and separate target groups: Report-presentation of the research. Project VP1-3.1-ŠMM-07-K-03-085 'Challenges of economic crisis (recession) to the rule of law and human rights' under the global grant of the Research Council of Lithuania. Implemented by the public opinion and market research company Factus, Kaunas, 2014. Online access: http://www.tf.vu.lt/images/dotacija/Ataskaita_Factus.pptx [22 March 2015]. The survey included interviews with decision-makers and representatives of certain areas. References to the survey results (to the report-presentation of the research) are abbreviated 'A/TAP' by indicating the number of the relevant slide.

of the previous paragraphs (where it has been suggested that the lowering of the pre-crisis standards of the rule of law and human rights probably is not only a phenomenon but also a tendency); it may half-jokingly be said that this research makes no claims to become an analogue for the physico-cosmological 'theory of everything', which is still much promising although never comes to completion, especially when such a theory of 'everything' is hardly possible in social sciences, including law. Still, the authors believe that, if anyone ever undertakes to carry out a research beyond the spatial and temporal limits of the present time-limited Lithuanian case in order to come closer to an answer to the aforementioned global question, the findings of such a research might be of use for drawing more general conclusions.

What this research did not aim at was teaching the executive or legislative bodies by providing them with recommendations and proposals how to regulate certain areas of life 'better' and in 'a more proper manner'. The addressees of this legal research, like of any other research in law, are other legal scholars (and those of other sciences), other lawyers, students, doctoral students and anyone whose interest in the development patterns, dynamics, development tendencies and controversies of the legal system is driven, among other things, by an academic interest, the so-called academic curiosity, rather than only by pragmatic considerations; of course, professional politicians or other decision-makers may be among them; definitely, it would be desirable to see more of them, and even more so if the research conclusions induced them to make certain proposals and initiate changes in the legal practice. Furthermore, the thirteen authors do not necessarily agree on all the issues explored. Nor do they have to. A careful reader will notice that the authors' opinions differ on some issues. Therefore, although the research and the book it underpins is a joint effort, linked by the same object, the same goal, the same hypothesis and the same methodology, the separate parts of the book that have been written by individual authors are (however tautological this may sound) works of individual authorship (which explains also certain small repetitions in different parts of the book). A difference in opinions, which is not artificially highlighted, did not prevent the authors from coming to similar conclusions because they followed a general paradigmatic attitude to law and the research methodology.

As to the scope of the research (to some extent already described above), it should be noted that it has been defined in several aspects. Firstly, as already underlined more than once, the research is a legal and not an economic, political science or historical study. Secondly, there are strict chronological limits – 2008–2014; whatever beyond these limits is only the background. As mentioned, 2014 has not been chosen as the year of the end of the crisis in Lithuania, though it would not be utterly unreasoned to claim that it was in the year 2014 that the crisis finally, at least in most areas, came to an end or made a serious bid to become history. 2014 is the time limit predetermined, *inter alia*, by the fact that this research received specific funding, which could not last endlessly. On the other hand, when this book was being finalised (middle of 2015), we could see that there were new legislative and jurisprudential

(courts') decisions directly pertaining to the elimination of the consequences of the receding or already suppressed crisis and/or to the corrections in the anti-crisis policies discussed here, and there are reasons to expect more decisions of this kind. Therefore, the authors do not discard the likelihood that some of their insights or conclusions can (though not necessarily have to) be adjusted by the law-making or law-application decisions that will be passed in the nearest future; the least what one can expect is that the factual (for a legal scholar, the latter is, primarily, statutory and jurisprudential) material, reasoning and conclusions will have to be supplemented. Thirdly (as already discussed rather extensively), the research does not offer any solutions for decision-makers. The book, prepared on the basis of the research, is an academic treatise without 'a programme document' inclusions (on the other hand, the authors certainly would not be against to see their research statements being used to support certain law-making or law-application decisions). And, fourthly, the research explored the impact the crisis had only on those human rights (far from all, as it has been mentioned) that are established in positive law, though not only on the national but also at the so-called supranational level. Thus, the scope of the research excluded different rights that, despite being provided for in the Constitution, have no direct equivalent in the so-called Human Rights Charter, consisting of the Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and their Protocols, as well as the ECHR and its Protocols and the EU Charter of Fundamental Rights of the EU (hereinafter referred to as EU Charter of Fundamental Rights). On the other hand, all the rights enshrined in the aforementioned international instruments of human rights have their equivalents or are reflected in one way or another in the constitutional law system of Lithuania – either in the text of the Constitution or in the official constitutional doctrine developed in the case-law of the Constitutional Court.

Separate segments of the human rights catalogue more or less correspond to the structural parts of the book. This structure, however, was determined not only by the composition of the human rights catalogue. The crisis explored was primarily an economic crisis, and this did not permit excluding from the study those aspects of state governance and regulation of economy that have been most affected by this economic downturn and where the intervention of the anti-crisis legal regulation has been most intensive. Furthermore, in each part of the book designated for a specific segment of the human rights catalogue, the law-making and law-application decisions of the crisis period are compared with the standards of the rule of law (law-governed state) under a democratic regime (in a democratic society); therefore, these standards are described and a general concept of the rule of law is offered at the beginning of the book. All these factors have determined the structure of the book. Apart from this Preface and the Concluding Remarks, where the general research conclusions (not overly emphatic) are presented, the book consists of the following six parts on: (i) the concept of the rule of law;

(ii) the right to responsible government, *inter alia,* ensuring the freedom of economic activities; (iii) regulation of public finances (budgetary process, taxes and contributions, supervision of banks and other financial markets); (iv) social rights; (v) political and personal rights; (vi) independence of courts (hence, also the right to fair trial) and legal dispute resolution. Nevertheless (as it should be repeated), the study does not cover a full range of problems attributable to each of the 'blocks' of governance or rights; for example, in the context of responsible government, municipal or (to a certain degree) energy issues are highlighted; hate crimes and detention conditions are discussed in the context of political and personal rights, *etc.*; and, *vice versa,* the issue of the land tax is excluded from the context of taxes, the issue of elections is left out in the part on political and personal rights, *etc.*

It has already been mentioned that the authors of the book represent diverse areas of law. Their research (and published scientific works) cover a broad range of different areas of law: theory of law, constitutional law, state (institutional) law, constitutional justice procedure, administrative law, administrative procedure, finance law, labour law, social security law, EU law, international law (including ECHR law). The scope of this research, however, is broader than any of these areas or all of them taken together. Hence, in carrying out the research, the authors received assistance, in particular when collecting the relevant initial statutory and jurisprudential material, as well as *travaux préparatoires*, from a large number of their colleagues – legal scholars, mostly doctoral students of the Faculty of Law of Vilnius University. The authors express their gratitude to Dr. Ilona Petraitytė, doctoral students Monika Ambrasaitė, Aušra Bagdonaitė, Daiva Bakšienė, Johanas Baltrimas, Karolina Bubnytė, Martynas Endrijaitis, Justina Januševičienė, Jelena Jonis, Agnė Juškevičiūtė-Vilienė, Airė Keturakienė, Milda Markevičiūtė, Šarūnas Narbutas, Justinas Poderis, Rimantė Rudauskienė, Egidijus Semėnas, Gintarė Tamašauskaitė-Janickė and Aurelija Žiogaitė-Balčiūnė. We are grateful to our colleagues from the Faculty of Law of Vilnius University, Assoc. Prof. Dr. Gintautas Sakalauskas and lecturer Dr. Justas Namavičius, for their valuable insights. The authors also are grateful to Renata Kupčiūnienė for looking over the English translation of the book.

It has been mentioned that the main driving force for scientific research is academic curiosity. It is true, but it is not the whole truth. It would be very simple if scientific research could rest only on the shoulders of academic curiosity. It also needs financing. A financial stimulus for this research was a tender for the global grant announced by the Research Council of Lithuania in 2012. The scholars of the Faculty of Law of Vilnius University developed the research project 'Challenges of economic crisis (recession) to the rule of law and human rights' (contract no. VPI-3.1-ŠMM-07-K-03-085; the head of the project is the author of this Preface) and were awarded the grant. The authors are, therefore, grateful to the Research Council of Lithuania, its members and experts. Also, the authors are thankful to the Council for its patience in waiting until this book (and its longer version in Lithuanian) is published, because, as two playfully formulated although merciless laws rule, it is natural

for scholars to finish their research only under the pressure of the deadline.[25] The authors also express thanks to the Faculty of Law of Vilnius University (Dean Prof. Dr. Tomas Davulis) for providing all the necessary facilities for carrying out the research and for publishing its results in the scientific journals[26] and making them public in scientific conferences in Lithuania and abroad. The authors are grateful to the University (former Acting Rector Prof. Dr. Habil. Jūras Banys and Rector Prof. Dr. Habil. Artūras Žukauskas) for the mediation and other assistance, which has made it possible to receive the grant. It should also be mentioned that any research project needs good management; this work has been carried out by doctoral students (already noted for their help in gathering the research material) Egidijus Semėnas and Gintarė Tamašauskaitė-Janickė – again, their work is highly appreciated.

As it has been mentioned, the important representative survey of the public opinion, as well as of particular target groups (including professional lawyers), has been carried out by public opinion and market research company Factus. The authors are grateful to this company for the revision of the initial questionnaire drawn up by the authors and its adjustment to the methodology of social surveys, with which lawyers are less familiar than with legal texts, which are their daily bread. Appreciation should also be addressed to all known, but mostly unknown respondents who replied to the survey questions. On some occasions, several politicians, lawyers and civil servants in responsible positions have publicly disclosed their involvement as the respondents. Being aware of how busy these persons are, the authors highly appreciate that they considered the research as meaningful and spared their time to express their opinion on the issues relevant to the research.

Separately, even though in advance, thanks should be addressed to the readers of this book. Those of you who are members of an academic community or intend to join one should look at our arguments and insights as an effort to shed some light on what has not received sufficient attention in Lithuania (and elsewhere) so far. It is true (as mentioned already on more than one occasion) that much remains beyond the scope of this research. Therefore, may this research stimulate other studies. It is likely (and, probably, unavoidable) that some of our insights will be modified sooner or later; the academic ambition of the authors of the book will be satisfied also in such an event if the subsequent research, wherein our statements are disputed and countered, will bring more clarity on the issues where, possibly, we did not manage to succeed.

Last but not least, we have to thank our families and our dear ones who received less of our attention while this research was carried out. Our gratitude goes for your understanding and support on behalf of all authors of the book.

[25] The first of these laws is one of the so-called Murphy's Laws that 'all articles are written a week after the deadline', and the second is the so-called Hofstadter's Law, which reads that 'it will always take longer than you expect, even when you take into account Hofstadter's Law'.

[26] Firstly, in the journal of academic works of the Faculty *Teisė* (managing editor Prof. Dr. Habil. G. Švedas, managing secretary Prof. Dr. (HP) J. Machovenko), where as many as ten articles written by the above-mentioned authors of the book during the research have been published.

Part I

STANDARDS OF THE RULE OF LAW

Egidijus Kūris

1. Theory

Dick the Butcher, a rebel of the 'Peasants' Revolt' led by impostor Jack Cade in 'Henry VI', contracted his 'programme' to a call to eliminate physically those who might stand in the way of their rebellion: 'The first thing we do, let's kill all the lawyers'.[27] The suggestion to do away with the lawyers signifies an acknowledgement (albeit negative) of their role in society and, at the same time, a recognition of the importance of law. It is true that critics disagree whether that character of William Shakespeare believed that lawyers deserve death due to being the guardians of justice or due to being corrupt. Of course, neither at that time was, nor especially now is, anyone suggesting killing lawyers as a social group. And law as such is at present universally considered as one of core public values. However, it would be a mistake to think that it is so because law, purportedly, no longer prevents different revolutions or lower-scale initiatives for changing social order or opposes raising certain particular interests over those of the community. To the contrary, law today is more intensive and probably more successful in doing so, and this is one of the major achievements of the Western civilisation. It is acknowledged even by the most radical promoters of the fundamental rearrangement of, in their belief, unfair capitalist society.[28] Dissatisfaction with law and lawyers in general, however, has not disappeared. The tensions between the legal system (in the broadest sense of this term) and other 'cross-sections' of the social reality, *i.e.* other societal subsystems, will have to be revisited later. But, before passing to them and to Lithuanian issues, a more general introduction has to be offered.

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[27] Part 2, Act IV, Scene 2. It may be argued endlessly whether lawyers or 'only' advocates were borne in mind, as the English word *lawyer* in its broadest sense embraces not only an 'advocate' but also anyone who has obtained legal education.

[28] Thompson, E. P. *Whigs and hunters: The origin of the black act*. Harmondsworth, 1977, p. 265. Cited in Krygier, M. 'False dichotomies, true perplexities, and the rule of law' in Sajó, A. (ed.). *Human rights with modesty: The problem of universalism*. Leiden & Boston, 2004, p. 253.

The modern Western civilisation is closely linked to the development of Western law, which produced a specific, unprecedented legal tradition – the so-called Western legal tradition. Its long development process ended (approximately) in the middle of the 12th century, almost three decades before Dick the Butcher bellowed out his extreme call. With reference to one of the most renowned researchers of the Western legal tradition Harold J. Berman[29] the following characteristics of this system may be distinguished. Firstly, a relatively sharp distinction is made between legal institutions and other types of institutions – although law remains strongly influenced by religion, politics, morality and custom, it is, nevertheless, distinguishable from them analytically. Although, custom, for example, may become a legal custom, a custom *per se* is not law; likewise, religion, politics and morals are not law as well; law has a certain relative autonomy in relation to all. Secondly, the administration of legal institutions is entrusted to a special corps of people, who engage in legal activities on a professional basis as a more or less full-time occupation. Thirdly, these legal professionals, whether typically called as lawyers or jurists, are specially trained through the use of professional literature in professional schools of higher education. Fourthly, there is a close relationship between legal institutions and bodies of legal training (learning), since legal literature describes legal institutions, but those institutions, which would otherwise be disparate and unorganised, become conceptualised and systematised and, thus, transformed through what is said about them in learned treatises and articles and in the classroom; therefore, law includes not only legal institutions, but also what legal scholars say about them, *i.e.* it also contains within itself meta-law, through which it can be both analysed and evaluated. Fifthly, law is conceived to be an integrated system, a *corpus juris*; the scholastic technique refined since the 12th century allows reconciling contradictions and deriving general concepts from rules and cases. Sixthly, this internal integration, a coherent body and vitality of law are ensured by the belief in the ongoing character of law and its capacity for growth over generations; it contains a 'built-in' mechanism for organic change. Seventhly, the growth of law has an internal logic; its changes do not simply occur at random as adaptation to the new conditions, but also stem from an inner necessity for the reflection and reinterpretation of the past to meet future needs. Eighthly, law has supremacy over political authorities (it is, in fact, at present referred to as the rule of law); since the Middle Ages it has been considered that the monarch may make law, but he may not make it arbitrarily

[29] References here are made to his most important book Berman, H. J. *Law and revolution: The formation of the Western legal tradition*. Cambridge, Mass. and London, 1983, pp. 7–10. For the invocation of this theory in the Lithuanian legal literature see: Kūris, E. 'Teisinė valstybė, teisinių sistemų įvairovė ir Vakarų teisės tradicija' [Rule of law, variety of legal traditions and the Western legal tradition] in Glendon, M. A. *et al. Vakarų teisės tradicijos* [Comparative legal traditions in a nutshell]. Translated by Kūris, E. *et al.* Vilnius, 1993, pp. xx–xxiii; Machovenko, J. *Teisės istorija* [History of law]. Vilnius, 2013, pp. 29–31.

and until he has remade it, he is bound by it; later this belief was expressed in the idea of 'constitutionalism'. Ninthly, the Western legal tradition embraces the competition and coexistence within the same community of diverse jurisdictions and diverse legal systems; this legal pluralism originated in the differentiation of the ecclesiastical polity from secular polities, and, in its own turn, it reinforced the pluralism of Western political and economic life and has been a source not only for legal but also political and economic growth. Tenthly, there is a tension between the ideals and realities, between the dynamic qualities and the stability, between the transcendence and the immanence of the Western legal tradition; this tension has periodically led to the violent overthrow of the existing legal systems by revolution, but the Western legal tradition was only made stronger by such revolutions.

In terms of the rule of law, the emergence of the Western legal tradition is a starting point, because the idea of the supremacy of law has evolved namely in this tradition. Through the colonisation of the rest of the world, the West imposed its institutions on other civilisations and they became widely assimilated regardless of being subject to significant transformations. Certain elements of the Western legal tradition were implanted into those other civilisations, including an attitude to law as to an integrated system and the understanding that it is superior to political authorities. The rule of law today has become an official slogan even in those legal cultures where the rule of law is, in fact, out of the question. If even the most brutal dictatorships resort to such camouflage, this must in a way signify the importance of the rule of law. In this context, mention should also be made of international law, the supremacy of which (although even openly disregarded at times) is the *conditio qua non* for holding that international relations are correct and harmonious. All this presupposes that the legal tradition predominant in the global world is namely the Western legal tradition, which is the factor uniting and promoting the processes of international integration and globalisation (*inter alia*, via such formations as the UN and the EU)[30].

Berman, though, believed that the Western legal tradition experienced a crisis at the end of the 20th century (when he was writing his *opus magnum*). He considered that only four of the above-discussed characteristics were yet truly inherent in the Western law: it is still relatively autonomous; it is still cultivated by professional legal specialists; legal training centres still flourish; they still develop meta-law based on which legal institutions and rules are evaluated and explained. Meanwhile, all other characteristics of the Western legal tradition, as it is claimed, have been affected by erosion: law has less and less been treated as a coherent whole (with an inherent hierarchy of the sources of law); its growth through reinterpretation has more frequently

[30] For more see: Goldman, D. B. *Globalisation and the Western legal tradition: Recurring patterns of law and authority*. Cambridge, 2008; Teubner, G. (ed.). *Global law without a state*. Brookfield, 1997; Twining, W. *Globalisation and legal scholarship*. Nijmegen, 2011.

been considered as an ideological illusion; changes in law have been viewed as resulting not from the internal logic of the growth of law, but rather due to the pressure of outside forces; the view that law is superior to politics has yielded to the view that law is merely a means of effectuating the will of those who exercise political authority; the plurality of law has considerably been weakened by the tendency 'to swallow up all the diverse jurisdictions and systems in a single central program of legislation and administrative regulation'; the belief that the Western legal tradition transcends revolution, that it precedes and survives the great total upheavals has been challenged by the belief that law is wholly subordinate to revolution and that even if the old forms are retained, they are 'filled with new content'. According to Berman, the crisis of the Western legal tradition is a crisis in law itself, accompanied by contempt for law, cynicism about law, revolt against what is sometimes called legal formalism, yielding to public policy needs; fairness as a legal category is losing its historical and philosophical roots and is 'blown about by every wind of fashionable doctrine'.[31] A parallel description could also be applied to a crisis of the rule of law.

The issue of the destiny of the Western legal tradition would considerably exceed the scope of this research. It should be mentioned, however, that the above insights are not accepted in the same unequivocally enthusiastic way as the construct of the above-discussed Western legal tradition of the same author. The Western legal tradition also has a potential of resistance: it was, namely, at the time when Berman was voicing his insights about the crisis of this tradition that what is referred to by the proponents of the 'resistance of politics to law' as the 'dictatorship of black robes', 'courtocracy', 'juristocracy', 'constitutional theocracy', *etc.* became visible; otherwise stated, the institutions restricting the attempts of politics to dictate to law strengthened within this tradition. Berman had formulated the final version of his doctrine early in the eighties of the 20th century – before the breakup of the Soviet Union, which was creating an 'alternative' legal tradition that was considered by him to have played a certain role in shattering the foundations of the Western legal tradition and was very unstable itself; also before the formation of the EU, whose *alter ego* is a 'new' law, competing and coexisting along with the national law of its Member States and different supranational law systems; and also, before the outbreaks of the recent major military conflicts, which, in view of their geopolitical dimension, purport to confirm the thesis on the clash of civilizations. At this point, let us make a halt: the processes of transformation as well as formation of legal traditions are so global that their direction and magnitude may be reflected on with at least a certain more reliable degree only from the long perspective of time; thus, it is still a long way until the crisis discussed here can be adequately assessed. In approaching more closely the rule of law as one of the principal ideas

[31] Berman, H. J. *Op. cit.*, pp. 37–41.

and features characterising the Western legal tradition, it is clear that the claim about the supposed crisis should not be oversimplified; and it should be based not so much on the factography of the violations of law and the manifestations of the neglect of law, or on the descriptions of that neglect as 'legal cynicism', 'displacement of legal formalism' or 'submission of law to politics', but more on the identification of fundamental changes in the perception of society at large about the mechanism and role of law. The crisis of the Western legal tradition, if it is taking place, is a phenomenon of culture, legal and social psychology in general rather than a crisis at the level of formal legitimacy. As a crisis in itself does not mean any collapse of the tradition (as maintained in the Preface), so likewise, the statement that the Western legal tradition underwent or is undergoing a crisis does not, in itself, imply that this powerful tradition already is or soon will be attributed only to the past. At the same time, we may and have to admit that the idea of the rule of law has not become weaker, especially bearing in mind that, as a value, it has not been overtly rejected. It is not impossible that, as a result of the attacks of the present-day politics against law and the thriving legal cynicism, the Western legal tradition will undergo transformation into something else; on the other hand, it is equally possible that it will revive and strengthen, as it was the case after the previous major upheavals.[32]

In Lithuanian, the idea of the rule of law is usually expressed by the term 'law-governed state' (*teisinė valstybė*). In substance, the concepts 'rule of law' and 'law-governed state' are not identical: a law-governed state (*Rechtsstaat*, *État de droit*, also *law-based state*, which, in fact, are literal translations of the German and French terms)[33] is considered a minimum of the rule of law. In this case, two concepts of the rule of law are meant: (i) that typical of continental Europe (and the countries that have taken over the logic and culture of continental law), and (ii) that characteristic of Anglo-Saxon countries (and the countries that have taken over common law experience). The first implies that the sovereign, albeit bound by law, is, nonetheless, not constrained to the extent precluding him from changing the fundamentals of the law, as long as that law has not been changed; the second means that even the sovereign is not allowed to intervene in the law in force because some rights of individuals are considered inalienable or, otherwise stated, these rights override the will of the sovereign even where the sovereign is the nation and his will reflects

[32] '[I]nstead of the forecasted end of the Western legal tradition, we will see only the beginning of a new stage in its development'. Machovenko, J. *Op. cit.*, p. 33.

[33] The European Commission for Democracy through Law (Venice Commission) underlines in its Report on the rule of law that the notion 'rule of law' is not always synonymous with that of '*Rechtsstaat*', '*État de droit*' or even with 'law-governed state'; nor is it synonymous with the Russian notion '*pravovoe gosudarstvo*' (law-governed state) and '*verkhovenstvo zakona*' (rule of laws). See Report on the rule of law, CDL-AD (2011) 003rev25–26. European Commission for Democracy through Law (Venice Commission), March 2011. Online access: http://www.venice.coe.int/webforms/documents/CDL-AD(2011)003rev-e.aspx [18 December 2014]. This report is discussed to a greater detail in Chapter 2.

the general consensus. The second concept is apparently broader than the first one. The first treats law as superior to political authority, although this superiority is not invincible – it is superior 'as long as', because it depends on the willingness of political authority not to change the foundations of law or, at least, on its inability to make such changes. In a democracy, this indefiniteness means that the supremacy of law may be overridden if the intention of political authority to make a change receives the support of the electorate. The second concept implies the existence of the highest legal standards, which do not lend themselves to any changes either by political authority or by society constituting political authority. These standards, however, do not derive from positive law, which is an expression of the will of the sovereign and other law-making subjects; it emanates from 'somewhere else' – from the idea of justice, religious imperatives, morals, human nature, the experience of a nation, *etc.*; since these standards guide positive law in terms of its content, they are considered to be of legal nature, although not that of a state-made law. It is needless and impossible to discuss in this book, which, after all, is not a treatise on the philosophy of law, different potential sources of the origin of the standards of the rule of law, postulated by various paradigms of law, which compete with other existing paradigms. It will suffice to mention that the issue of the supreme source of law is the apple of discord (not the only one) that sets apart different theories of law that otherwise agree that positive law is not the whole law. On the other hand, one of the most powerful teachings about law, legal positivism or at least some of its directions, do(es) not recognise that supreme standards form a part of law *per se*; but this also does not mean that positivists (as they are sometimes narrow-mindedly and demagogically blamed) advocate immoral and unfair law, the arbitrariness of law-makers, *etc.* However, one marginal version of legal positivism, Hans Kelsen's normativism (pure theory of law), holds that a 'law-governed state' (*Rechtsstaat*) is a tautological concept because a state is capable of expressing its will only in a legal form; hence, any state is governed by law; on the other hand, a law is intrinsically connected with the state, as it appears to be the state's *alter ego*; thus, only the state is, in fact, capable of being governed by law. This concept is rooted in the continental law tradition. The continental law tradition was also a stepping stone for the Soviet legal tradition, which attempted to become an alternative to the continental tradition, but, in principle, retained the same approach to a legal system (and the system of its sources) as that established in other European states; that was probably why the idea of the state governed by law, put forward as a slogan by the Soviet Communist party authorities in 1985 (at that time, it meant one more ideological directive 'imposed' down on the society), was at first interpreted as meaning nothing more but the requirement for the 'most strict lawfulness' or 'dictatorship of laws' – until this interpretation was (very soon) buried by various non-Soviet interpretations of the law-governed state, which spread in the public discourse and legal professional mind. This anomaly of the Soviet legal ideology, however, should not obscure what is most important: a narrower approach to a law-governed state extends beyond the Soviet

tradition and is not so incompatible with the idea, which is otherwise alien to the Western legal tradition, that ultimately law is not superior to political power and that law is not above political will. Where 'necessary', this narrower approach and the said alien idea are made to look as compatible. Claims on the adherence to *Rechtsstaat* were made even by the fascist Germany, where everybody was required to abide by the unswerving state-imposed positive legal order, which, as it is known, was totalitarian. Russia has also proclaimed herself to be a 'law-governed state' – even in the Constitution.

The divide between the continental and the Anglo-Saxon traditions should not be overestimated. One cannot fail to notice that legal positivism gained its position in legal academic thought primarily through the works of the thinkers cultivated in the Anglo-Saxon legal tradition. The three pillars of legal positivism, Jeremy Bentham, John Austin and H. L. A. Hart, who all were English and, thus, represent the legal tradition where, as is well known, the legislator-created positive law has a competitor – who often overrides it! – in the body of the judge-made law, and where courts make law not only by applying laws, but also by applying general principles of law, concepts of justice, customs, *etc.* that are not set in any act of positive law. On the other hand, the United States, where the Anglo-Saxon tradition is followed, gave birth (in the seventies of the 20th century) to the cynical and pretentious direction of legal thought, the Critical Legal Studies Movement, which not only descriptively postulates the non-systemic and inconsistent character of the valid law, but also denies, 'as a matter of principle', the very existence of the latter; although its criticism of the existing legal regulation is often truly strong, this movement views the whole law, as a phenomenon, to be only an expression of power, only politics, only a religion, only an ideology and only a deceit, which needs to be deconstructed, dethroned and thrashed.

The absence of a strict dividing line between the Anglo-Saxon concept of the *rule of law* and the concept of *Rechtsstaat* of continental Europe is also exemplified by the fact that these two concepts have nowadays become very close, that is to say, the continental concept of the rule of law has so much approximated to the Anglo-Saxon concept of the rule of law that today the difference between the *rule of law* and *Rechtsstaat* is only a matter of terminology. For example, the Lithuanian official constitutional doctrine states that the essence of the constitutional principle of a law-governed state is the rule of law;[34] the imperative of the rule of law means that the freedom of state power is limited by law, which must be obeyed by all entities

[34] Consequently (and not surprisingly), the official English translations of the Constitutional Court's acts, as provided by the Court itself, including the one cited here, prefer the term 'the state under the rule of law'; this combination is not the verbatim translation of '*teisinė valstybė*'; neither is, strictly speaking, 'the law-governed state', although it is somewhat closer to the Lithuanian 'original'. The verbatim translation would be 'the legal state' (just as the German *Rechtsstaat*), but that would be too far both from the rule of law and the government by law as an underlying idea. Further in this book, both terms are used interchangeably and synonymously, however, when the Constitutional Court's acts are directly quoted, 'the state under the rule of law' is preferred, and when the English analogue to *Rechtsstaat* is sought, preference is given to 'the law-governed state'.

of legal relations, including law-making entities; the discretion of all law-making entities is limited by the supreme law – the Constitution; all legal acts, decisions of all state and municipal institutions and officials must be in compliance with and not contradicting to the Constitution.[35] This is not a 'discovery' of the Lithuanian Constitutional Court but an expression of a general tendency. The highest standards of the legality of positive law no longer stem from difficult-to-grasp 'supra legal' spheres, regarding whose legal nature different paradigms of law were in a long-standing disagreement, but from the Constitution, which, formally, is a positive law act of the supreme power, though it is something more by its content – a social contract, a formalised expression of natural justice and an anti-majoritarian act, protecting an individual against the dictatorship of the majority.

The bridging between these formerly competing concepts of the rule of law was considerably facilitated by the development of constitutional review in the countries of continental Europe as well as by the growing understanding that law is not limited to what has been determined by political authority but embraces that what is decided by courts through the application of the concepts of justice and the general principles of law, which are not even mentioned in the acts passed by the legislator but are developed by academic legal thought through its interpretation of both the respective Constitution and lower-ranking legal acts in the light of these principles, as well as through transposing the doctrines underpinned by such interpretations from case to case. This anchors the understanding that not less important than statutory law is jurisprudential law and that law is an argumentative rather than axiomatic phenomenon; on the other hand, this underscores rather than eliminates another problem: how to reconcile an arguable character of law and the rule of law?[36] It is one of the eternal questions: how to ensure that the interpretation of law provided by courts is adequate for the legal and factual situation, transparent and not transgressing the line separating courts from the legislator? It is asked what the relationship between the concept of the rule of law and judicial supremacy is, but this is a 'wrong question to ask' because one should better question the moral legitimacy of court decisions.[37] Although this issue has been explored on many thousand pages of scientific literature, it can hardly be said that somebody has already come up with an answer that would be convincing to everybody.

The approximation of the concept of *Rechtsstaat* to that of the *rule of law* was accelerated not only by constitutional review at the national level but also by the activity of international courts, of which separate consideration should

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[35] Constitutional Court ruling of 13 December 2004. *Official gazette*, 2004, no. 181–6708.

[36] MacCormick, N. *Rhetoric and the rule of law*. Oxford, 2010, pp. 14–16.

[37] Himma, K. E. 'What exactly is the problem with judicial supremacy? The rule of law, moral legitimacy, and the construction of constitutional law' in Jovanović, M. and Himma, K. E. (eds.). *Courts, interpretation, the rule of law*. The Hague, 2014; pp. 18–32.

be given to the ECtHR; these courts, when interpreting and applying succinct and neat legal acts, on which their jurisdiction is based, have created a new, jurisprudential, law.

Nevertheless, the divide between the two concepts of the rule of law, although to a large extent already devoid of its geographical dimension, has not completely disappeared yet. It recurs in two approaches (to be relatively referred to as the broad and narrow approaches) to the substance of the rule of law. One author claims that the 'rule of law' has become a 'term of art', for which no one has been able to give a single comprehensive definition.[38] Another labels this term to be a 'hurrah word', which is eagerly exploited by all – conservatives, central liberals and radicals;[39] indeed, the slogan of the rule of law may be employed to justify or criticise any public policy or law-application practice. Indications of the defiance of law and legal cynicism may easily be found in any state; therefore, the billposting of the relevant facts can provide grounds for claiming that the respective state is not governed by law. Such usage or exploitation of the rule of law would eventually turn this concept and the idea it expresses into a cliché useful for nothing else except the rhetoric of struggle for political power. However, the absolute of the rule of law is impossible because in reality no ideal is possible. Even if certain law-making and law-application decisions deviate from the rule-of-law standards, this does not in itself warrant labelling that state in general as not being governed by law. The idea of the rule of law is not designed to describe an unattainable ideal, but it is intended to set guidelines and criteria for the assessment of situations of legal reality. Considerations whether a certain case meets the requirements of the rule of law (and, more broadly, whether the state is governed by law) should rest, according to Martin Krygier, on the famous formula: 'I know it when I see it'; generally speaking, the criterion of divide is simple: it is a contrast between arbitrary power and the rule of law.[40] In order to find out whether a specific situation meets the standards of the rule of law, it is sufficient to verify several elements referred to as the main themes of the rule of law, namely: government limited by law; formal legality; and rule of law, not man.[41] It is the most general description, which needs to be developed and specified.

The theories reflecting the two competing approaches to the substance of the rule of law are classified into 'thin' and 'thick'.[42] They represent, accordingly, the view that the requirement for the rule of law is targeted,

[38] Beatty, D. M. *The ultimate rule of law*. Oxford, 2004, p. vi.

[39] Sampford, C. *Retrospectivity and the rule of law*. Oxford, 2006, p. 39.

[40] Krygier, M. *Op. cit.*, pp. 255–256.

[41] Tamanaha, B. *On the rule of law: History, politics, theory*. Cambridge, 2004, pp. 114–126.

[42] Sampford, C. *Op. cit.*, pp. 45–55. For more on this divide see: Kirchin, S. (ed.). *Thick concepts*. Oxford, 2013; Williams, B. *Moral luck*. Cambridge, Mass., 1985. On the application of this distinction to the notion of the rule of law see Hutchinson, A. and Monahan, P. *The rule of law: Ideal or ideology*. Toronto, 1987, p. 101.

first of all, at the form of law and law-making and law-application processes, and the view that the imperative of the rule of law dictates certain maxims for the content of positive law. Otherwise stated, one notion is functional or procedural and the other is substantive.[43] The core of the thin theories of the rule of law is the idea that 'the rule of law' means literally what it says: the rule of the law.[44] One, truly extreme, apologist of legal formalism offers yet a narrower approach: the rule of law is a law of rules.[45] It sounds effective if judged at a glance, but is trite, since there cannot be a rule of law without rules of law, and only law that consists of rules can be certain and predictable.[46] Meanwhile, the thick theories claim that, for the rule of law to exist, positive law should establish justice, even more – social justice, *i.e.* a 'fair' distribution of public goods (although there will never be one single opinion as to what distribution is fair). Brian Z. Tamanaha tabulates the distinction between the thick and the thin theories (by referring to them as formal and substantive versions) as follows:[47]

Table 1. *Distinction of the concepts of the rule of law (according to Tamanaha)*

Formal versions	Rule-by-law	Formal legality	Democracy + legality
Substantive versions	Individual rights	Right of dignity and/ or justice	Social welfare

The most extreme of the thick theories put an equals sign between the concepts 'law-governed state', 'social state' and 'welfare state' and thereby shift the law-governed state from a legal category to not even a political science category, but a political and ideological one, 'leached out' of its legal essence.[48] Yet, as aptly noted by Tamanaha, 'the rule of law cannot be about everything good that people desire from government'.[49] It would follow from such 'logic' that the states encountering major economic difficulties have no capacity to be governed by law because they do not ensure economic and social welfare to their citizens (residents). Such logic, to be noted as a sad

[43] Himma, K. E. *Op. cit.*, pp. 13–18.

[44] Raz, J. 'The rule of law and its virtue' in *Law quarterly review*, 1977, vol. 93, no. 1, p. 196. These and succeeding wordings, when translated into Lithuanian, lose the multiple layers of their meaning deriving from the fact that the English word *rule* means both a norm and ruling (governance).

[45] Scalia, A. 'The rule of law as a law of rules' in *University of Chicago law review*, 1989, vol. 56, no. 3, p. 1175.

[46] MacCormick, N. *Op. cit.*, p. 12.

[47] Tamanaha, B. *Op. cit.*, pp. 91–113.

[48] On the Lithuanian outwork theory advocating such an extreme approach see Vaišvila, A. *Teisinės valstybės koncepcija Lietuvoje* [*Conception of the law-governed state in Lithuania].* Vilnius, 2000, as well as abundant other publications by that author.

[49] Tamanaha, B. *Op. cit.*, pp. 91–113.

joke, would also considerably simplify the task of the authors of this book: whereas the level of welfare has decreased after the outbreak of the crisis, the answer to the questions whether it was possible to consider that Lithuania (and other countries hit by the crisis and making strenuous efforts to contain it) was a law-governed state at that time and what standards of the rule of law were entrenched there, would be unduly simple: 'No, not possible', and 'No such standards at all'. Such fusion of a law-governed state with a social or welfare state is also flawed from another perspective: economies often develop rather fast under dictatorships, and dictatorial regimes ensure economic and social welfare to their citizens (residents). Should they be deemed to be law-governed states? In general, although the importance of law and its rule is almost universally recognised for all areas of life, including economic progress, it is impermissible to put an equals sign between economic progress and welfare and the rule of law; the significance of law for economics should not be exaggerated, either.[50]

The most extreme thick (hence, too thick) theories treat the distinction between the two concepts of the rule of law to be schematically equivalent to the antagonism of legal positivism and natural law theory, treating the first as a dry formalism characterised by social insensitivity, while reducing the second to an instrument to provide legal justification for a political programme of social justice. Still, it would not be fair to treat all thick theories only as such a misunderstanding. Thick theories are not only speculations about (subjectively interpreted) social justice as a defining feature of law and a measure of its legality. The divide between the thin and the thick rule-of-law theories is not the same as the antagonism between legal positivism and natural law theory. To wit, it was the representative of the school of natural law, Lon. L. Fuller, who formulated the features of the rule of law that legal positivism is armed with today. These features will be considered a bit later. Yet, some representatives of legal positivism (even Friedrich A. von Hayek and Joseph Raz) are deemed as 'moralising' because their understanding of the rule of law, albeit in support of legal formalism, implies certain moral principles. Therefore, it is probably reasonable to classify into thick and thin not all concepts of the rule of law but only those that 'moralise',[51] as those theories that do not assert any moral principles are so thin that they are, in fact, devoid of any substance of the rule of law as the core of the theory.

Regardless of the way different theories of the rule of law are divided, linked, typologised or otherwise grouped for analytical purposes, their deeper analysis demonstrates that differences in their methodologies, reasoning structure and phraseology are not only minor but are also gradually diminishing. The divide between the thin and the thick theories of the rule of law is more an outcome of an analytical experiment and should not create

[50] Upham, F. K. 'The illusory promise of the rule of law' in Sajó, A. (ed.). *Op. cit.*, p. 279.

[51] Neumann, M. *The rule of law: Politicizing ethics*. Aldershot, 2002, pp. 2–3.

an impression that, supposedly, both schools were developing autonomously. Their divide is relative. This may be witnessed, for example, by the fact that both recognise the significance of human rights. Each new major act of human rights – the 1215 Magna Carta, the 1628 Petition of Right, the 1640 Habeas Corpus Act (and its 1679 and 1862 Amendments), the 1689 English Bill of Rights, the 1798 Declaration of the Rights of Man and of the Citizen, the 1789–1791 U.S. Bill of Rights, the 1948 Universal Declaration of Human Rights, the 1950 ECHR, regional human rights acts and various international law (*e.g.*, law of war) instruments not only expanded the concept of human rights but also developed that of the rule of law.[52]

This said, an attempt can be made to purify the standards of the rule of law or the attributes of a state governed by the rule of law. A method for such purification was suggested by Fuller, one of the most notable representatives of the modern school of natural law, about fifty years ago. In his writings about a hypothetical monarch (law-maker), he asked: when would it be possible to hold that there is no rule of law in his state? Fuller came up with the following answers: there is no rule of law if the monarch: (i) tries to make special rules for everyone to suit their particular needs, but this only arouses confusion and anger at differential treatment; (ii) fails to publicise them so nobody knows what laws to follow; (iii) makes all his laws retroactive; (iv) enacts vague or obscure rules; (v) enacts rules that contradict each other; (vi) enacts rules that could not be followed; (vii) fails to apply rules consistently; (viii) changes his laws so often that his subjects cannot rely on them to plan their actions.[53] It is just the reverse that would provide us with the standards of the rule of law, or with the characteristics of a law-governed state.

These specific attributes, irrespective of their diverse variations and at times important supplements, in fact, predominate in all authoritative works of legal theory where the rule of law is constructed as an operational category with the defined legal content rather than as an ideologeme. One notable and popular author, for example, claims that the rule of law should satisfy the following prerequisites. Law – not only statute law but also judge-made law – must be accessible, as far as possible intelligible, clear and predictable. Discretion has to be limited: questions of rights and application of law should be resolved by the application of the law and not by the exercise of discretion. Persons have to be equal before the law, however, this does not deny the possibility of establishing a differentiated legal regulation if objective differences so require. Public officials must exercise their powers in good faith, fairly, only for the purpose for which these powers were conferred, without exceeding the limit of such powers and not unreasonably. Human

[52] *Cf.* Bingham, T. *The rule of law*. London, 2010, pp. 10–33. Also see Tamanaha, B. *Op. cit.*, p. 7 ff.

[53] Fuller, L. L. *The morality of law*. New Haven, London, 1964, 39 ff. Also see: Marmor, A. 'The rule of law and its limits' in *Law and philosophy*, 2004, vol. 23, no. 1; Raz, J. *The authority of law: Essays on law and morality*. Oxford, 2010.

rights, including the right to a fair trial, must be respected. Compliance with international law should also be ensured.[54]

One of the important elements of the rule of law, referred to from one perspective or another by almost all authors writing about the rule of law, is directing a legal regulation to the future – prospectivity (the opposite being retrospectivity) of law. Indeed, the rule of law would be out of the question, if the general law-making practice were to direct the effect of legal acts to the past – in such a case, the addressees of legal rules would be unable to foresee how to behave so that their conduct is not *ex post facto* considered unlawful. The prospectivity of law is closely related to other standards of the rule of law, such as its accessibility, clarity and consistency: there is little value in an advance publication (promulgation) of a legal act as such if the source where it has been published is inaccessible and, even where it is accessible, if the content of the legal act is unclear or contradictory. Yet, during the times of the major downturns, such as the global economic crisis that broke out in 2008, the law-making and law-applying institutions struggle with decisions that are on the verge of retrospectivity. The works of legal theory dealing with the concept of the rule of law try to strike a balance between the imperative of the prospectivity of law and the fact of not abstracted law but real life that, in certain cases, this imperative can become an obstacle for adopting the decisions that save the entire social system. Therefore, this standard of the rule of law is not treated as superior to the others and it should not create the illusion that the perfect predictability of law is achievable.[55] Real life offers a lot of circumstances that in a way (try to) justify (although not necessarily convincingly to everybody) the issuance of a retroactive legal act. Here are a few examples: curative legislation, or routine revision, when errors of a previously issued legal act are eliminated or minor corrections in its wording are made without any impact on the content of the legal act; restorative legislation, *i.e.* filling in gaps in law; validating legislation, where after executive authorities misunderstand and misapply legislation, their decisions are later validated by a new law; overturning of judicial decisions, *i.e.* putting in place such a legal regulation that validates the situation that had existed before the decision was rendered and became enforceable; beneficial legislation, where the retrospectivity of a legal act confers a benefit on those to whom it applies; subordinate legislation, where a subordinate legal act 'refines' the content of the superior legal act; procedural legislation, where a posterior legal act defines the procedure for implementing an anterior legal act; legislation specifying statutes of limitation; legislation establishing

[54] Bingham, T. *Op. cit.*, pp. 37–129. The Report on the rule of law of the European Commission for Democracy through Law (Venice Commission) rests on these 'ingredients of the rule of law' to form the basis for the concept of the rule of law developed by this Commission (for more see Chapter 2).

[55] Sampford, C. *Op. cit.*, p. 47.

subrogation; legislation providing for new legal remedies.[56] Mention is also made of the so-called legislation by press release, when it is announced in advance that a law will be amended and will apply retroactively.[57] To justify such retroactivity, a broad range of arguments is used: the necessary evil argument (retrospectivity is bad, but this measure was necessary because the evil made is lesser than the one that would have been caused had no retrospective act been enacted); the better rule argument (a retrospective rule is better than the previous one); the better institution argument (the enacting authority adopted the previous rule in excess of its powers or had to refrain from enacting due to some other considerations); the efficiency argument; the fairness argument.[58]

Indeed, many exceptions or deviations from the general principle, like those referred to here, may be challenged.[59] This example, however, is meant to show that the standards of the rule of law are not, and most likely should not, be interpreted too straightforwardly, as absolute dogmas. Had they not been interpreted and assessed flexibly, especially when such flexibility is required by the confrontation of the abstracted legal order with the relentless reality, the operational concept of the rule of law discussed here would not be any better than a blind refusal to recognise as law such positive law that differs from someone's understanding (often subjective, as mentioned) of social justice or does not contribute to social welfare.

2. Legal acts

The rule of law (and the law-governed state) has been analysed up to this point as a legal category developed by scholarly legal thought. The concept of the rule of law is, firstly, a product of scientific thought. Its individual elements are, indeed, usually enshrined in the respective Constitution (for

[56] *Ibid.*, pp. 103–164.

[57] *Ibid.*, pp. 156–158.

[58] *Ibid.*, pp. 229–256.

[59] For example, the so-called beneficial legislation, which establishes legal regulations more favourable to specific entities, for instance, mitigates liability of tax payers in cases of failure to fulfil tax obligations, may at times be validly criticised as legitimising the inequality of tax payers before the law and conferring privileges to those in breach of law, also as infringing the rights of all persons entitled to a share in the budget where the relevant taxes have to be paid. No less is doubtful the overturning of judicial decisions by issuing, for example, a law, which, had it been in force for the relations that gave rise for the dispute resolved by the decision, would have led to a different decision; at times, the legislator takes a canny approach and enacts the so-called 'interpretive regulation', supposedly interpreting the provisions of the previous regulation, yet, in fact, changing the existing legal regulation and thereby interfering into the cases already pending at courts. *Cf.* ECtHR judgments in *Stefanetti and Others v. Italy*, nos. 21838/10, 21849/10, 21852/10, 21860/10, 21869/10, 21870/10,14 April 2014; *Azienda Agricola Silverfunghi S.a.s. v. Italy*, nos. 48357/07, 56277/07, 52687/07, 52701/07, 24 June 2014.

example, the requirement that only published legal acts shall be valid or the principle that all persons shall be equal before the law), but such provisions in the text of the Constitution are usually not linked with the concept of the rule of law or that of the law-governed state even where this term is employed in the Constitution itself (typically, it appears in the preamble or in one of the first articles). It is the function of constitutional jurisprudence to unfold the substance of the rule of law (law-governed state) declared in the respective Constitution. No constitutional court has full freedom in this domain as, while elaborating on the substance of the imperative of the rule of law consolidated in the respective Constitution, it must take account of the interpretation of this category developed by the world's legal thought.

The Lithuanian constitutional jurisprudence uses the terms 'the rule of law' (*teisės viešpatavimas*) and 'the law-governed state' (*teisinė valstybė*) synonymously. Disclosing the substance of the constitutional principle of a law-governed state in constitutional jurisprudence is a gradual, rather consistent and never ending process. The individual fragments of the doctrine on a law-governed state (like of the majority of other doctrines formulated by the Constitutional Court) are dispersed over different acts of this Court; thus, in order to describe this principle thoroughly, 'as interpreted by the Constitutional Court', much effort should be made. This gap, to a certain extent, is filled by scholarly publications.[60]

On the other hand, in its ruling of 13 December 2004, the Constitutional Court has partly systematised its earlier case-law (developed for more than a decade) and offered a broad interpretation of the constitutional principle of the law-governed state. Some of the statements of this doctrine will be briefly overviewed here, placing more emphasis on one of the elements of a state governed by the rule of law, namely, on the protection of legitimate expectations (as this issue is one of most relevant to the research carried out as the basis for this book).

It was already in the ruling of 23 February 2000[61] that the Constitutional Court, while elaborating that all constitutional provisions are interrelated and form an integral, harmonious system, held that the constitutional principle of a state under the rule of law is 'a universal one upon which the whole Lithuanian legal system as well as the Constitution of the Republic of Lithuania itself are based' and that its content 'unfolds in various provisions of the Constitution'. By the way, this doctrinal provision echoed with the rather recent, at that time, case-law of the ECtHR, wherein the principle of

[60] See, *e.g.*: Kūris, E. 'Lietuvos Respublikos Konstitucijos principai' [Principles of the Constitution of the Republic of Lithuania] in Birmontienė, T. *et al. Lietuvos konstitucinė teisė* [Constitutional law of Lithuania]. Vilnius, 2002; Murauskas, D. 'Teisinės valstybės principas: sampratos paieškos doktrinoje' [The principle of the state under the rule of law: Search for the conception in the doctrine] in *Teisė*, 2011, vol. 78; Šileikis, E. *Alternatyvi konstitucinė teisė* [Alternative constitutional law]. Vilnius, 2005, pp. 198–210.

[61] *Official gazette*, 2008, no. 17–949.

the rule of law (*prééminence du droit*, *i.e.* the 'primacy' of law) was referred to as 'a concept inherent in all the Articles of the Convention' (*notion inhérente à l'ensemble des articles de la Convention*)[62].

According to the Constitutional Court, the essence of the constitutional principle of a law-governed state ('the state under the rule of law') is the rule of law; this imperative means that the freedom of state power is limited by law, which must be obeyed by all the entities of legal relations, including law-making entities; the discretion of all law-making entities is limited by the supreme law – the Constitution; all legal acts, as well as the decisions of state and municipal institutions and officials, must be in compliance with and not contradicting to the Constitution.

In terms of specific standards of the rule of law (the law-governed state), the Constitutional Court has named the following ones: human rights and freedoms must be ensured; all state and municipal institutions and officials must act on the basis of law and must obey the Constitution and law, without exceeding their powers; all acts must be in compliance with the Constitution; the requirements established in legal acts must be based on the provisions of a general type (legal norms and principles), and a differentiated legal regulation must be based only on objective differences in the situation of the subjects of public relations regulated by the respective legal acts; in order to ensure that the subjects of legal relations know what law requires from them, legal rules must be predictable, legal acts must be published officially and they must be public and accessible; a legal regulation established in laws and other legal acts must be clear, easy to understand and consistent; formulas in legal acts must be explicit; the consistency and internal harmony of the legal system must be ensured, legal acts may not contain any provisions that at the same time regulate the same public relations in a different manner; in order the subjects of legal relations are able to align their behaviour with the requirements of law, a legal regulation must be relatively stable; legal acts may not require the impossible (*lex non cogit ad impossibilia*); the power of legal acts should be prospective, their retrospective validity is not permitted (*lex retro non agit*) unless a legal act mitigates the situation of the subject of legal relations and does not harm other subjects of legal relations (*lex benignior retro agit*); the violations of law, for which liability is established in legal acts, must be clearly defined; when legal restrictions and liability for the violations of law are established, heed must be paid to the requirement of reasonableness and the principle of proportionality, according to which the established legal measures must be necessary in a democratic society and suitable for achieving legitimate and universally important objectives (there must be a balance between the objectives and measures); the established legal measures may not restrict the rights of the person more than necessary in

[62] *Amuur v. France*, no. 19976/92, § 50, 25 June 1996; *Iatridis v. Greece* [GC], no. 31107/96, § 58, 25 March 1999.

order to achieve the aforementioned objectives, and, if these legal measures are related to the sanctions for a violation of law, they must be proportionate to the committed violation of law; in legally regulating public relations, it is compulsory to pay heed to the requirements of natural justice, comprising, *inter alia*, the necessity to ensure the equality of persons before the law, the court and state institutions and officials; when issuing legal acts, the legislator must pay heed to the procedural law-making requirements, including those established by the law-making entity itself; persons, who believe that their rights or freedoms have been violated, enjoy an absolute right to a hearing of their case by an independent and impartial court to resolve the dispute as well as the right to a due process of law.

The constitutional principle of the rule of law imposes specific requirements on the legislator and other law-making subjects: they must pay heed to the hierarchy of legal acts, stemming from the Constitution – this, *inter alia*, means that it is impermissible to regulate, by means of legal acts of lower power, those social relations that may be regulated only by the legal acts of superior power, also that it is impermissible for the legal acts of lower power to establish such a legal regulation that would compete with that established in the legal acts of superior power; there is no delegated law-making in Lithuania, therefore, the Seimas – the legislator – may not commission the Government or other institutions to regulate, by means of substatutory legislation, the legal relations that must, under the Constitution, be regulated by means of laws, while the Government may not accept any such powers; a legal regulation related to the definition of the content of human rights and freedoms and the consolidation of the guarantees of their implementation may be established only by the law; in cases where the Constitution does not require that certain relations related to human rights and their implementation be regulated by means of a law, these relations may also be regulated by substatutory legal acts governing the procedural relations connected with the exercise of the rights of the person, the order of exercising the individual rights of the person, *etc.*, however, substatutory legislation should not compete with laws under no circumstances.

There is a separate distinction made of the requirements for the application of law: law-applying institutions must follow the requirement of the equality of rights of persons; it is not permitted to punish for the same violation of law twice (*non bis in idem*); liability (sanction, punishment) for the violations of law must be predefined in a law (*nullum poena sine lege*); an act is not considered to be criminal if it is not provided for in a law (*nullum crimen sine lege*); jurisdictional and other law-applying institutions must be impartial and independent and seek to establish the objective truth and render their decisions only on the grounds of law; the judge may not apply any substatutory legislation that is in conflict with the legislation of superior power, *inter alia*, may not apply a law that is contrary to the Constitution; similar cases must be decided in a similar manner (this is directly related with

the constitutional principle of the equality of rights of persons), therefore, the discretion of jurisdictional authorities in solving disputes and applying law is limited; it is also limited by the continuity of jurisprudence; laws must be enforced until the moment they are changed or revoked or declared to be in conflict with the Constitution; consequently, all subjects of legal relations must implement and apply them according to their competence; it is not allowed that the Government, which must itself apply laws and/or ensure that other state and municipal institutions and officials apply them, instead of exercising the duties imposed upon it by the laws and/or ensuring that other state and municipal institutions and officials fulfil the obligations imposed by the laws, would, by its substatutory legal acts, establish such a legal regulation that would exempt the Government and/or other state and municipal institutions and officials from the fulfilment of the mentioned duties.

It has also been held in the ruling of 13 December 2014 that the rule of law also makes it imperative to protect legitimate expectations, ensure legal certainty and legal security, which obligates the State to ensure the certainty and stability of any legal regulation, protect the rights of the subjects of legal relations, as well as the acquired rights, respect legitimate interests and legitimate expectations (otherwise, the trust of the person in the state and law would not be guaranteed), fulfil its obligations to the person. One of the elements of the principle of legitimate expectations is the protection of the rights acquired under the Constitution and under laws and other legal acts that are not in conflict with the Constitution; in the relations involving the state, protection and defence is afforded only to those expectations of the person that arise from the Constitution or from laws and other legal acts that are not in conflict with the Constitution; only such expectations of the person in relations with the state are considered legitimate. The protection of the legitimate interests of the person is to be interpreted inseparably from the necessity to safeguard the trust of law-abiding persons in the state and law, and such trust and the protection of legitimate interests are inseparable from the constitutionality of legal acts and the presumption of legitimacy. Legal acts are considered to be in compliance with the Constitution and legitimate until they are recognised in conflict with the Constitution under the established procedure; thus, the legal regulation established in the respective legal acts is compulsory for the respective subjects of legal relations, and the person who obeys law and complies with the requirements of the laws is protected and defended by the Constitution. There may be factual situations, however, where the person who meets the conditions established in legal acts, having acquired under the respective legal acts the particular rights, gained the expectations reasonably considered as legitimate by this person during the period of the validity of the said legal acts; therefore, this person could reasonably expect that, if he or she obeyed law and fulfilled the requirements

of laws, his or her expectations would be held legitimate and, thus, would be defended and protected by the state. Such expectations may derive even from the legal acts that, under the established procedure, are later declared in conflict with the Constitution. There may also be factual situations where the persons had already exercised their rights arising from the respective legal acts that were subsequently recognised as contrary to the Constitution (laws) and had fulfilled their obligations under those acts in regard to other persons and, due to this, these other persons had gained under the said legal acts certain expectations that they reasonably expect to be defended and protected by the state. In certain cases, quite a long period of time may pass from the moment when such expectations originate and the moment when the respective legal acts are declared to be in conflict with the Constitution. The requirements of legal certainty and legal security do not rule out the possibility of affording, in certain special cases, protection and defence of the rights derived from the legal acts subsequently recognised as contrary to the Constitution; as failure to defend and protect those rights would result in greater harm to the person concerned, other persons, society or the state than the harm inflicted in the case of the total non-defence or non-protection or partial defence and protection of the said rights. In cases where certain legal acts are declared in conflict with the Constitution and, as a result, some persons who obeyed law, complied with the requirements and held trust in the state and its law are likely to suffer negative consequences, the legislator is under the constitutional duty to evaluate all the relevant circumstances and, if necessary, establish such a legal regulation that would provide in the aforementioned extraordinary cases for the full or partial protection and defence of the rights acquired by persons who obeyed law and complied with the requirements of the laws where such their rights derive from the legal acts later recognised to have been in conflict with the Constitution, so that there would be no deviation from the principle of justice enshrined in the Constitution. The Constitutional Court has pointed out, however, that the Constitution does not protect and defend the acquired rights that are privileges by their substance.

A decade has passed since the ruling referred to above has been rendered. It is true that the development of the official constitutional doctrine has not come to a standstill. This is also the case in terms of the constitutional doctrine on the law-governed state. The latter doctrine was significantly developed at least from several aspects in at least a few acts of the Constitutional Court. For example, the Constitutional Court ruling of 1 July 2004 for the first time briefly mentioned the principle of responsible government.[63] This principle was developed to some extent and linked with the constitutional principle of the rule of law in the Constitutional Court ruling of 13 December 2004. Later

[63] *Official gazette*, 2004, no. 105–3894. For the analysis of this ruling, see Raulickytė, A. 'Atsakingo valdymo principas ir jo įgyvendinimas' [Principle of responsible government and its implementation] in *Politologija*, 2006, no. 1.

some elements of the constitutional principle of responsible government, which earlier had been formulated more as *obiter dictum* with a link to the constitutional principle of the rule of law, became highly important as *ratio decidendi* in the relevant cases of the constitutional justice.[64] Mention in this context should also be made of the development of the aforementioned doctrinal rules on the continuity of jurisprudence in the Constitutional Court decision of 8 August 2006 and its ruling of 22 October 2007;[65] they contain an extensive doctrine of judicial precedent as a source of law, where, *inter alia*, the guidelines were laid down as to the compliance with the constitutional requirement that similar cases should be adjudicated in a similar manner. Reference should also be made to the Constitutional Court rulings of 24 January 2014 and 11 June 2014,[66] which set out the doctrine probably not even alluded to in the earlier texts of this Court, namely, the doctrine concerning the requirements for the process of amending the Constitution and also imposing the restrictions on the initiatives to make those constitutional amendments that would distort the consistency of the Constitution so that it would become internally inconsistent. As it has been mentioned, disclosing the substance of the constitutional principle of a law-governed state in constitutional jurisprudence (as well as the formation of the official constitutional doctrine) is a never ending process.

Not only Lithuanian but also the constitutional court of any other state (or any other court with equivalent jurisdiction) develops its official constitutional doctrine of the rule of law (law-governed state) on the basis of, primarily, the Constitution of its own country. Their jurisprudence also contains doctrinal provisions, which have been borrowed as legal ideas from the constitutional jurisprudence of other countries and similarly transplanted into the Lithuanian legal soil. On the other hand, the jurisprudential concept of the rule of law is also developed by international courts, whose doctrinal provisions may and at times do become (not necessarily with relevant references) part of the Lithuanian official constitutional doctrine. It is worthwhile to consider at least briefly how the imperative of the rule of law is reflected in the case-law of the ECtHR.[67]

It should be noted from the outset that the reference to the rule of law in the ECHR is made once – in the Preamble. Moreover, this concept has not been translated into all languages of the Member States namely as the

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[64] Constitutional Court rulings of 9 February 2007 and 22 January 2008. *Official gazette*, 2007, no. 19–722; 2008, no. 10–350 (respectively).

[65] *Official gazette*, 2006, no. 88–3475; 2007, no. 110–4511 (respectively).

[66] *Register of legal acts* (hereinafter referred to as *TAR*), no. 2014–00478, 24 January 2014; no. 2014–10117, 11 July 2014 (respectively).

[67] For more see Lautenbach, G. *The concept of the rule of law and the European Court of Human Rights*. Oxford, 2013. The author is grateful to Paul Lemmens for allowing to make use of his article 'The contribution of the European Court of Human Rights to the rule of law' (to be published).

'rule of law': its French equivalent (the other official language of the ECtHR) means 'primacy of law' (*prééminence du droit*), while the official Lithuanian translation reads 'supremacy of law' (*teisės viršenybė*). Given the character of the ECtHR as an international court and the fact that, unlike constitutional courts, it is not a 'court of norms', its constant emphasis on the margin of appreciation enjoyed by the Member States and the principle of subsidiarity applied by this Court, it is obvious that the case-law of the ECtHR should not universalise such elements of the rule of law (however 'progressive') that are characteristic only of some Member States. The ECtHR has developed an authentic concept of the rule of law, which tallies in some respects with that formulated by the national (constitutional) courts (especially where there is a broad consensus of the Member States on a specific issue), and yet it is far from embracing and cannot embrace the whole comparative jurisprudential variety of this concept.

The ECtHR treats the rule of law as a common heritage of the states, that have created the CoE, as one of the fundamental principles of a democratic society, 'a concept inherent in all the Articles of the Convention'.[68] However, there is no definition of the rule of law in the case-law of the ECtHR (as well as in the case-law of the Lithuanian Constitutional Court). With the similar consistency as followed to discuss the Constitutional Court ruling of 13 December 2004, it is possible to identify the requirements imposed by the imperative of the rule of law consolidated in the ECHR on law-making and the application of law.

The case-law of the ECtHR underlines the obligation of law-making entities to take action – to develop a normative framework for solving a problematic issue encountered. For example, the legislator has a positive obligation to take all measures necessary to protect everyone's right to life (Article 2 of the ECHR)[69]. Likewise, there is a positive obligation to ensure that no one be subjected to torture or to inhuman or degrading treatment or punishment (Article 3)[70]. At times it is required that the normative framework be built for private relations, *e.g.*, pertaining to the right to the peaceful enjoyment of one's possessions (Article 1 of Protocol no. 1)[71] or to maintaining family relations between a single mother and the child and the child's integration in the family (Article 8)[72]. For interference with the relevant right to be held as not constituting a violation of the ECHR, it should be 'provided by law' or be 'in accordance with the law'. Such law is subject to quality requirements; in addition, it should be accessible to the person concerned, sufficiently

[68] *Amuur v. France*, § 50; *Iatridis v. Greece* [GC], § 58 (both cited above).

[69] *Öneryildiz v. Turkey* [GC], no. 48939/99, 30 November 2004, § 89; *Makaratzis v. Greece* [GC], no. 50385/99, § 57, 20 December 2004.

[70] *O'Keeffe v. Ireland* [GC], no. 35810/09, §§ 146, 152, 28 January 2014.

[71] *Kotov v. Russia* [GC], no. 54522/00, § 117, 3 April 2012.

[72] *Marckx v. Belgium* [GC], no. 6833/74, § 31, 13 June 1979.

foreseeable,[73] and the executive power should not enjoy unfettered power in terms of its application.[74]

In terms of the requirements for the application of law, mention should be first of all made of the prohibition on applying law retrospectively. Article 7 of the ECHR sets out this prohibition as absolute[75] in the context of criminal proceedings, however, it may also be (less commonly) extended to the area of private law. The ECtHR is not a 'supranational constitutional court' and applies the prohibition on retrospectivity to the application of law rather than to law-making. Another important requirement for the application of law is that it should be based on a law and be lawful in this regard. A 'traditional' four-step test, applied, in fact, in each case dealing with a potential breach of the ECHR, consists of finding out: (i) whether there had been an interference with a Convention right; (ii) whether the interference was lawful; (iii) whether it pursued a legitimate aim; (iv) whether it was necessary in a democratic society. If it is ascertained that the application of law was not lawful (based on law), a further examination of the case may become unnecessary, as this fact alone may be sufficient to find a violation of the Convention. In terms of the application of law, the states may also be required to take measures in fulfilling their positive obligations, as, for example, in ensuring the legal and practical conditions for citizens to exercise effectively their rights guaranteed by the law of the relevant state in order not to render them illusory and destroyed in their very essence.[76] Within the context of the application of the imperatives of the rule of law, the requirements for the judicial power should also be noted, such as the requirement to ensure the person's right to a fair trial, which includes the right of the accused be able to understand the verdict that has been given,[77] as well as the obligation to ensure the execution of judicial decisions.[78]

This is a very concise (even too concise) overview, limited to only several examples. Nevertheless, it enables parallels to be drawn between the concept of the rule of law formulated in the official constitutional doctrine of Lithuania and the concept of the rule of law set out in the case-law of the ECtHR.

In terms of the international-origin standards of the rule of law, it should be noted that they are not necessarily jurisprudential. Of particular

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[73] *Fernández Martínez v. Spain* [GC], no. 56030/07, § 117, 12 June 2014.

[74] *Maestri v. Italy* [GC], no. 39748/98, 17 February 2004, § 30; *Sanoma Uitgevers B.V. v. the Netherlands* [GC], no. 38224/03, § 82, 14 September 2010.

[75] But *cf. Kononov v. Latvia* [GC], no. 36376/04, § 186, 17 May 2010. But see Article 7 § 2: 'This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations'.

[76] *Broniowski v. Poland* [GC], no. 31443/96, 22 June 2004, §§ 184, 185.

[77] *Taxquet v. Belgium* [GC], no. 926/05, 16 December 2010, § 90.

[78] *Immobiliare Saffi v. Italy* [GC], no. 22774/93, 28 July 1999, § 66; *Brumărescu v. Romania* [GC], no. 28342/95, 28 October 1999, § 61.

importance in this context is (as briefly mentioned) the 2011 Report on the rule of law of the European Commission for Democracy through Law (Venice Commission).

In formal terms, the report is soft law. It is aimed at reconciling different perceptions of the rule of law, in particular those referred to by the term *rule of law*, *Rechtsstaat* and *État de droit*. As there is no single 'final' definition of the rule of law, Thomas H. Bingham's (already cited before[79]) definition has been chosen as 'the most suitable': it reads that the core of the principle of the rule of law is that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts, and makes reference to the 'eight ingredients of the rule of law' introduced by this author. An overview of the national law is also provided and it is noted, *inter alia*, that the rule of law (or a law-governed state) is mentioned in the constitutions of former socialist countries of Central and Eastern Europe more often than in the constitutions of 'old democracies', of which a distinction is made of Spain (also an 'old' democracy?!) and Switzerland (the authors of the report failed to refer, among the states of Central and Eastern Europe, to Lithuania).

The most valuable part of the report is the formulation of what is referred to in this book as the standards of the rule of law or the attributes of a law-governed state and – given the soft-law character of the report – their approval. The Commission has reduced the number of Bingham's 'ingredients of the rule of law' from eight to six, elaborated on and detailed each of them. The six standards of the rule of law are as follows: (i) legality, including a transparent, accountable and democratic process for enacting law; (ii) legal certainty; (iii) prohibition of arbitrariness; (iv) access to justice before independent and impartial courts, including judicial review of administrative acts; (v) respect for human rights; (vi) non-discrimination and equality before the law.

It is unarguable that, due to its conciseness (in particular, due to its extremely brief overview of the evolution of the idea of the rule of law), the Commission's report may not fully satisfy an academic lawyer with a more thorough interest in the issues of the rule of law. But the report did not aim at satisfying anyone's academic interests. It was geared to practical needs and, as seemingly the first instrument of law (albeit soft law) of this nature, reinforces the notion of the rule of law as an operational practicable category at the international level. For the Lithuanian academic discourse on the rule of law (where the thick extreme theories of the rule of law are actively solicited), the significance of the report also lies in the fact that it does detach, in an insistent way, a law-governed state from social welfare or economic policy and treats it as a purely legal category. Such perception is of great methodological significance also for the subsequent research.

79 See Chapter 1.

3. Three fields of tension

In the Preface, the hypothesis has been formulated that the economic crisis that hit Lithuania in 2008 had a transformative effect on the legal system by lowering the universally acknowledged standards of the rule of law (law-governed state) and human rights: as the legal system is not able to ensure, at least to the previous extent, the protection of individual rights and legitimate expectations, certain requirements of the rule of law are considered to be less imperative – they are not relinquished but deviations in order to overcome the crisis have not been denounced by law and, in this sense, have been justified. It is only a hypothesis; it may turn out as not true.

This hypothesis will be tested in the following parts of this book by exploring the separate segments of the human rights catalogue. Yet, before proceeding with these specific issues, some consideration should be given to several macro-level oppositions related to the functioning of a legal system; these oppositions come to light during a global crisis, in particular, when a broad-ranging and radical intervention in legal regulation is undertaken to overcome it. Here they are called tensions; the 'pulling' range in the respective opposition varies from the law standards of the pre-crisis period to the 'resisting' side. If it is presumed that the crisis under consideration and/or the anti-crisis measures have the transforming effect not only on the substance of the legal regulation but also the whole legal system, including the perception of the rule of law and human rights, and heavily contribute to the lowering of the legal standards of a democratic regime along with other factors, theoretical reflection should be given to those points of impact where the aforementioned standards have already lost or risk losing their resistance against the pressure exerted due to the crisis. Such failure or inability to resist means that the crisis not only lowers the expectations of members of society but also leads to narrowing the scope of their protection, although these expectations are perceived and had been protected before the crisis as rights, and that this narrowing is justified from the perspective of the legal standards of a democratic regime, as these standards either have undergone a change or are interpreted so 'flexibly' that they are no longer applicable in certain situations.

The tension between the perception of the rule of law and human rights that had prevailed before the crisis and the perception that corresponds more to the crisis and post-crisis situation is evident in three domains: (i) the entrenched perception of the rule of law and human rights finds itself in opposition *vis-à-vis* the economic reality; (ii) the opposition between law and politics (which has always existed, although has been less relevant in the Western legal tradition during non-crisis times) becomes obvious; (iii) and there is also opposition between law and society.

3.1. Law and economic reality

When a substantial change occurs in the reality, which the law reflects, law should also change. If the reality change is fuelled by a serious dysfunction, the potential of law to be used as a reliable measure for the verification and control of the reality is subject to revision in a time of a crisis. When a crisis weakens the financial and human resources as well as the institutional potential of the state to ensure certain rights, let alone legitimate expectations in the broad sense, the substance or even the *existence* of such rights/expectations tends to be reconsidered: what had been treated by the legal system as a right may no longer be considered as such. This is the tension between the expectations laid down in positive law and protected as rights before the crisis and the objective inability of the public authority to fulfil its commitments to ensure them.

This takes us close to an influential theory, which has in its own right blended together the best ideas of legal positivism and those of its eternal opponent – the school of natural law, *i.e.* namely to Ronald Dworkin's theory of law as integrity.[80] It metaphorically refers to rights as trumps. Even where a specific social goal may be achieved in any other manner, the method to achieve it is dictated by the right-holder. Thus, when that somebody holds the right to doing something or not doing something, the arguments in favour of an alternative weaken: the right is the most powerful argument. In the Western culture where an individual is treated as a self-value, such view does not yield itself to any rational objection. Yet even fundamental rights have their 'dark side' (as they can be abused as well),[81] which becomes visible if Dworkin's 'all or nothing' thesis is treated as an absolute. If this approach is uncritically applied to every situation, it can entail such social consequences that society would find hard to bear. For example, (in the Lithuanian context) when deciding on compensation for owners for the property nationalised by the Soviet authorities, where such property cannot be returned in kind, the wish of owners to receive compensation at the present-day market value of that property would have to be given priority over the interests of other persons (whoever they are) to that property and over the interest of the entire polity to use public finances (which, as it is known, are not unlimited) in such a way that ensures the best possible performance of public functions. The case-law of the Constitutional Court tries to strike the balance between these conflicting rights/interests.[82] Thus, the theoretically faultless concept of rights as trumps has to surrender to reality: the right (of ownership) remains but is

[80] Dworkin, R. *Taking rights seriously*. Cambridge, Mass., 1977; Id. *Law's empire*. Cambridge, Mass., 1986. Also see Id. *A matter of principle*. Cambridge, Mass., 1985.

[81] Sajó, A. 'Preface' in Id. (ed.). *Abuse: The dark side of fundamental rights*. Utrecht, 2006, p. 1; also see Palombella, G. 'The abuse of rights and the rule of law' in *Ibid*., p. 9.

[82] Constitutional Court rulings of 4 March 2003 and 11 September 2013. *Official gazette*, 2003, no. 24–1004; 2013, no. 97–4815 (respectively).

narrower if compared to the scope that could be inferred from its speculative statement. This example, by the way, is not from the case-law of the crisis period. It should not be interpreted, however, that, purportedly, in all cases, where a certain right was not ensured, protected or restored to its full extent, this was done justifiably.

Even more rights lose their aura of trumps when a large-scale economic crisis hits and many of them can no longer be ensured because of insufficient funds and/or institutional capacity, which constitute material guarantees for the exercise of the relevant right. Then not only the scope but also the substance of the right can be encroached upon. May a right be recognised as *existing* if it is *not ensured* – not due to the absence of the good will of the public authority but due to its inability to ensure that right? Such a right is a fake trump and, consequently, not a trump at all. The crisis 'overruffs' it.

In general, legal acts should not provide for rights that cannot be ensured. The question why this is, nevertheless, done should be addressed not to lawyers but rather to political scientists and representatives of other society-exploring sciences. Giovanni Sartori mocked some Latin American countries that had heedlessly included in their constitutions ambitious social commitments of the state,[83] however, were unable to fulfil them when faced with the unfavourable economic conjuncture. Another example is from the field of constitutionalism. Some post-Soviet countries have declared in their constitutions that they are social states (the concept copy-pasted from Germany). One of them is Tajikistan, ranked 125 out of 187 in the UN Human Development Index in 2013. Another is Russia. The fact that authorities are unable to fulfil the assumed commitments and have to make policy corrections is, primarily, a matter of economic and political science reflection. But this issue is no less important from the perspective of the theory of law, as even a declaration of the principles of societal order, let alone the fixation of social commitments in statutory law, means that any failure to fulfil them transcends from the economic and social policy field to that of law and by definition becomes a violation of law. This assessment is drawn from the point of view of legal positivism, which remains to be the prevalent outlook of lawyers. And where there is a violation of law who namely is the violator and what is the *real* legal liability for the violation? These questions are rhetoric but, because of this, they are no less meaningful for abstracted legal thinking.

In this context, mention should be made of the prudence of the drafters of the 1992 Lithuanian Constitution not to use in its text the concepts of a social state or welfare state, although at that time they were highly popular in post-Soviet countries (if indeed they were not used due to rational cautiousness); also noteworthy is the cautious position of the Constitutional Court to use the concept of social orientation, which implies 'only' the commitments of purpose and, therefore, does not presume that certain rights may be

83 Sartori, G. *Comparative constitutional engineering: An inquiry into structures, incentives and outcomes*. Basingstoke, 1994.

enforceable in courts rather than the aforesaid concepts, which imply the commitments of result and the rights corresponding to that result, hence, also the state's obligation to ensure them.[84] However, although there are no such unenforceable rights laid down in the Lithuanian constitutional law, this is not true for some rights established in ordinary law. As an illustration for this, for example, two cases decided by the Constitutional Court in 2013 in relation to the economic crisis that impacted Lithuania can be mentioned.[85]

It would be possible to provide more examples illustrating how the case-law of the crisis and post-crisis period denied the lawfulness of expectations, which before the crisis had been defended by statutory law as rights. A law-governed state has the institutional and procedural mechanisms for correcting or even revoking such statutory law that sets the obligations so susceptible to the risks posed by the changes in the economic conjuncture that the *existence* of the particular rights might be called into question. This is even the more so in the case of legal acts that have the potential to trigger major financial difficulties (even if unrelated with the global recession). No one welcomes the destructive reconstruction of the economic reality dictated by positive law; thus, the aforementioned institutional and procedural possibilities are used not only to verify anti-crisis measures and, possibly, approve them: they may also be used preventively, as an anti-crisis precaution for the national economy (hence, also for other areas of life). Here reference should be made to two cases decided by the Constitutional Court in 2002, where the rulings were rendered recognising as anti-constitutional the legislative provisions that obligated the Government to allocate in a draft national budget and the Seimas to approve the budget where a certain share (expressed in the percentage of the national budget expenditure and even the GDP) had to be allocated for vaguely defined needs – agriculture, higher education, health care, *etc.*[86] In the opinion (as, in principle, supported by the Constitutional Court) of the Ministry of Finance, which initiated the second of these cases, *a priori* ensuring of the allocation of the state budget funds to certain areas of life favoured through informal lobbying would have left almost no funds for financing other public functions outside the privileged list. At that time the country had just come through a painful economic crisis. It is true, however, that the state was rescued from plunging into a new crisis not so much by

[84] See the first from the many relevant acts Constitutional Court ruling of 5 March 2004. *Official gazette*, 2004, no. 38–1236. Unlike the case of the absence of the concept of social welfare in the text of the Constitution (regarding which sufficient information is not available to the author), the concept of social orientation in the case-law of the Constitutional Court is an outcome of a carefully reasoned choice (which can be confirmed by the author, who was a judge of the Constitutional Court at that time).

[85] Constitutional Court rulings of 16 May 2013 and 20 November 2013. *Official gazette*, 2013, no. 52–2604; 2013, no. 120–6079; but *cf.* Constitutional Court ruling of 5 March 2013. *Official gazette*, 2013, no. 25–1222.

[86] Constitutional Court rulings of 14 January 2002 and 11 July 2002. *Official gazette*, 2002, no. 5–186; 2002, no. 72–3080.

virtue of the above-mentioned rulings of the Constitutional Court but due to the fact that the particular laws were not implemented.

The legal standards of a democratic rule, the lowering whereof was predetermined by the global economic crisis (either exclusively by it or along with other factors) and/or by the anti-crisis measures, have already been discussed in the previous chapters. The tension at issue, even if caused by a large-scale crisis, does not mean that all the standards mentioned are at risk of being undermined or seriously distorted. Much depends on the ability of courts to resist the pressure: not only and not so much the possible pressure from the political power (not in all legal cultures political authorities dare exerting pressure on courts) but a non-personified and mute pressure resulting from the crisis itself and the new economic reality produced by that crisis. Such withstanding (or succumbing) is not only a subject for a legal analysis but also a matter of political science and psychology. Justification for any departure from these standards, if courts choose this path, should be reasoned as convincingly as possible; although, at times this is simply impossible. Thus, even in the context of the deepest economic crisis, the courts of a law-governed state do not justify any deviations in the lawmaking or the application of law from certain standards of the rule of law even where these deviations aimed at overcoming the crisis and appeared to have no alternatives. Such rulings on anti-crisis legal regulation have been rendered by the Lithuanian Constitutional Court[87] and the courts of other states, as well as by supranational courts.[88] Still, uncompromising economic realities exclude these standards from the realm of absolute dogmas. For example, 'the overnight reform' amendments to the tax laws were not found to be anti-constitutional, although their timing (adopting them immediately before the approval of the state budget for the coming year) and linking to the 2009 state budget, which was debated at that time, if assessed only formally, allowed the applicants to expect a different outcome in this case.[89] Likewise, the cuts of some social benefits were not held to be anti-constitutional, in particular of those, whose abuse was possible as a result of the earlier legal regulation.[90] Yet, such cases of a more 'flexible' interpretation and application (non-application?) of the previously universally recognised standards of the rule of law do not mean that economic necessity will justify such a legal regulation that makes particular rights merely nominal or denies them completely. However, it is hardly possible to determine a clear-cut point, to which certain standards have been lowered (if at all) and when such reduction is reasonably justified and when probably not.

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[87] See, *e.g.*, Constitutional Court ruling of 1 July 2013. *Official gazette*, 2013, no. 103–5079.

[88] See The impact of the economic crisis and austerity measures on human rights. Draft feasibility study (referred to in the Preface).

[89] See, *e.g.*, Constitutional Court ruling of 15 February 2013 (referred to in the Preface). For more see Part III.

[90] Constitutional Court rulings of 16 May 2013 and 20 November 2013. *Official gazette*, 2013, no. 52–2604; 2013, no. 120–6079 (respectively). But *cf.* Constitutional Court ruling of 5 March 2013 (cited above).

3.2. Law and politics

A large-scale economic crisis also highlights another tension between the pre-crisis perception of the rule of law and human rights and the perception that corresponds more to the crisis and post-crisis situation – the tension between law and politics. The relationship between law and politics is another eternal issue of legal and political theory. On the one hand, statutory law and, at times, also part of jurisprudential law are outcomes of political decisions; on the other hand, in the Western legal tradition, law limits the freedom of political decisions. Moreover, the 'flexibility' of jurisprudence in interpreting and applying (or not applying) certain legal standards to anti-crisis measures is also a response of law to political decisions. Regardless of the extent, to which the autonomy of law from policy is fostered, its vulnerability is higher during the times of a large-scale crisis; higher vulnerability as such, however, does not mean that the autonomy *will be* violated.

The impact of politics on law is not limited to the impact on lawmaking (the statutory law of superior power is created by political institutions) and the application of law (even where it is applied by politically neutral bureaucracy, the targeting of application mostly depends on the content of the statutory law created in the course of political process), but also covers its impact on the interpretation of law as well as on the review of the lawfulness of legislation. The core of the impact of politics on law is its impact on courts. Its relevance becomes even more pronounced where courts deal with the issues of the lawfulness of anti-crisis legislation. One of the best known cases – the 1937 Court-Packing Plan of U.S. President Franklin Delano Roosevelt. Although the plan was not implemented, it allowed overcoming the resistance of the Supreme Court to the New Deal policy, which enabled the U.S. to climb out of the Great Depression. Seeking judicial self-legitimisation politics resorts to different measures to impact courts and, in particular, those with the powers to review the constitutionality of legal acts – from blackmail and threats to suborning and taming. Some of those measures do not step over lawfulness, others are legally unacceptable. One extreme and highly inventive measure stands out among all of them: instead of attempting to impact the substance of judicial decisions they are neutralised so that no decisions are rendered to control the anti-crisis policy (by extension, any policy in general) garbed into statutory law.

The last peak point in the neutralisation of judicial review by politics in Europe was the 2011–2012 constitutional reform in Hungary, which restrained the powers of that country's Constitutional Court. Established in 1989–1990, this Court was seen as one of the most unfaltering and influential constitutional courts all over Europe and at the beginning of its activities – also one of the most activist constitutional courts worldwide. The reform has drastically curtailed its powers to investigate the constitutionality of the so-called economic laws (except the review of their adoption and/or

publication/promulgation procedure): it is in the position to investigate the compliance of laws relating to budget, taxes, contributions, duties, *etc.* with the Fundamental Law[91] only where the issue is related to the right to life or dignity, personal data protection, conscience and religion, rights pertaining to Hungarian citizenship and only if the state debt is higher than the GDP; such laws may be overturned by the Constitutional Court only where they breach any of the aforementioned rights. Astoundingly quickly this innovation was noticed in Lithuania and advertised by the then Chairman of the Budget and Finance Committee of the Seimas, followed by the Prime Minister (they did not foresee that it would soon receive harsh criticism from the EC and EU institutions, as well as international lawyers' organisations), who suggested introducing a similar 'order' in Lithuania as well. This course was not taken but the voices urging to follow the Hungarian suit at that time blended well into the irrational choir of 'revenge and prevention', scaling up, in the public space, the accusations of the powers of the Seimas being usurped by the Constitutional Court. Had this initiative been implemented, such rulings as passed in the cases in 2002 regarding the '(mis)allocation' of the state budget would have been impossible.

The political nature of this initiative set aside, it has to be admitted that the courts' activism can cause problems. The nature of constitutional review and the function of the official interpretation of the Constitution presuppose a moderate activism in the activities of constitutional courts.[92] Their activism, however, is limited by their collegiality. One cannot fail to notice also the opposite tendency – the judicial self-restraint stance of constitutional courts, which is not weaker than the manifestations of judicial activism. This stance is especially vivid in the case-law of the Lithuanian Constitutional Court: this court has undertaken a clear-cut obligation to ensure the continuity of the official constitutional doctrine as developed in its case-law – not to deviate from the case-law of its earlier constitutional justice cases, unless a deviation, reasoned *expressis verbis*, is constitutionally justified; the prerequisites for such justification have also been expressly described in the official constitutional doctrine.[93]

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[91] This is the official name of the Hungarian Constitution. Immediately after its adoption, the Fundamental Law underwent substantial corrections five times. Its consolidated version is available on the website of the Constitutional Court of Hungary at http://www.mkab.hu/rules/fundamental-law. A well-know specialist of Hungarian law, Scheppele, called this restriction of the powers of the Constitutional Court a 'constitutional revenge'; see 'Guest post: Constitutional revenge'. Online access: http://krugman.blogs.nytimes.com/2013/03/01/guest-post-constitutional-revenge/?_r=0 [11 November 2014].

[92] For more see Kūris, E. 'Judges as guardians of the constitution: 'Strict' or 'liberal' interpretation' in Smith, E. (ed.). *Old and new constitutions: The constitution as instrument of change*. Stockholm, 2003.

[93] In particular, see: Constitutional Court decision of 8 August 2006 (referred to above) and ruling of 24 October 2007. *Official gazette*, 2007, no. 111–4549. Obviously, the undertaking of such an obligation and the detailing of conditions for deviating from its case-law as such does not in itself mean that these conditions are always complied with.

From the perspective of judicial intervention in the economic policy (including anti-crisis policy) entrenched in statutory law, the self-restraint stance formulated in the case-law of the Constitutional Court is highly important. Here, it is worthwhile to refer to a longer quote from the Constitutional Court ruling of 31 May 2006:[94]

> '<...> [T]he Seimas <...> and the Government <...> enjoy very broad discretion to form and execute the economic policy of the state <...> and to properly regulate economic activities by means of legal acts, by not violating the Constitution and laws, *inter alia*, not exceeding the powers established in them to the said institutions of state power and by following the requirements of proper legal process which stems from the Constitution and the principles of a state under the rule of law, separation of powers, responsible governance, protection of legitimate expectations, legal clarity, certainty and security as entrenched in the Constitution. <...> [T]he assessment of the content, measures and methods of the state economic policy (*inter alia*, priorities) (no matter who assesses them), also with regard to their reasonableness and expediency, even if it turns out later that there were better alternatives for choosing its economic policies (thus also that the formerly formed and executed economic policy could be assessed negatively with regard to its reasonableness and expediency) in itself cannot be the reason to question the compliance of the legal regulation of the economic activity conforming to the economic policy <...> with the legislation of higher power, *inter alia*, with the Constitution (also with regard to constitutional justice cases initiated at the Constitutional Court), unless the said legal regulation is, at the time it is set out in legal acts, clearly in conflict with the general welfare of the nation, with the interests of society and the State of Lithuania or unless it denies the values entrenched in and defended as well as protected by the Constitution'.

The opposition of law and politics supplements the opposition of law and economic reality in the sense that the courts, when ruling on the lawfulness of anti-crisis measures, are impacted by economic inevitability not only directly (they simply cannot disregard the obvious), but also through a 'political agent' who may take the legislative initiative to free politics from restriction by law. The above example of the political neutralisation of judicial control is an extreme. The fact that Lithuania has not chosen this path shows that this tension is not (no longer? not yet?) very intense. It is likely to weaken in the course of pulling out of the crisis and eliminating its consequences. Though it may also intensify – even in the absence of a crisis, depending on the social environment. Thus, we move closer to the third *macro*-level opposition – tension between law and society.

[94] Constitutional Court ruling of 31 May 2006. *Official gazette*, 2006, no. 62–2283.

3.3. Law and society

The autonomy of law and the legal standards of a democracy may also encounter threats posed by the social environment, depending on the legal culture of society, its mentality or external impact on it. Even if politics (where, particularly at the national level, rationality is inherent) does not easily succumb to the temptation to neutralise the possibility for its judicial control, public views are likely to be more anti-law, even anti-democratic. The author of this part of the book has already expressed his general attitude to a rather high level of legal nihilism in Lithuania;[95] in principle, this attitude has not changed. Nor have any changes in this attitude been encouraged yet by the results of the survey carried out in this project.

The survey, *inter alia*, sought to find out how the crisis affected the attitude of society and its different groups to the protection of the expectations and corresponding rights supported by the legal system before the crisis. It is not surprising that the majority of the respondents believe that their rights, in particular, economic and social rights, have been violated due to the crisis. The large majority also thinks that since 2008, when the crisis hit Lithuania, the violations of the Constitution increased in number. A critical attitude to the state policy in order to overcome the crisis can be seen in the fact that two out of three respondents believe that the state has not taken any effort to protect people from the negative effects of the crisis, while three out of four are of the opinion that the state, while trying to protect them, has not followed fundamental principles of law, such as the equality of rights of persons, *etc.* The overall assessment of the anti-crisis policy is negative.

On the other hand, in view of a larger part of the respondents, at least certain rights established in statutory law before the crisis should be restored, hence, the respective expectations should be further supported. For example, support has been expressed for the restoration of the salaries reduced during the crisis, and most of the respondents think that they should be restored for 'everyone without reservations and to the full extent'. Such an attitude as if signals that the restrictions of rights related to the crisis and the anti-crisis policy are perceived as temporary by society, thus, its impact on the whole legal system, including the notion of human rights and the standards of the rule of law, might not be 'so' transformative as assumed in the hypothesis of the research. Such a conclusion, though, depending on the point of view, may also give hope that the aforementioned standards are deeply rooted in the public mind and show the determination to stick even to those standards that support unrealistic expectations and resist economic advancement. Moreover, this conclusion is not confirmed by the answers of the respondents to the questions about other elements of the rule of law. For example, a large part of the respondents has replied negatively to the question whether courts should control the decisions of the legislative or executive power aimed at overcoming the crisis; on the other hand, when asked (test question) whether

[95] Kūris, E. 'Apie (ne)pagarbą teisei' [On (dis)respect for law] (cited in the Preface).

the respondent would agree that *he/she* should not be allowed to challenge, on his/her own, the laws restricting his/her rights/interests the majority disagreed.

In the context of the powers of courts to control anti-crisis policy, mention should also be made of the prevailing opinion that courts and the prosecutor's office are not independent. This opinion corresponds to the results of the public surveys regularly published in the media and showing that the distrust of society of legal institutions is especially high (*e.g.*, confidence in courts, except the Constitutional Court, does not exceed 20 per cent). Yet, the conclusion that such an opinion might reflect the wish that courts and the prosecutor's office be genuinely independent is, probably, also premature because most of the respondents have answered positively to the question whether judges should be subordinate to political authorities; the answers, though, differed depending on the public authorities – President of the Republic, the Seimas, the Government (none of these institutions, if taken individually, has received absolute majority).

There were also answers received with more direct indications of a negative attitude to the rule of law and human rights. A large part of the respondents have admitted that they do not consider certain rights and freedoms as a value or a value equally important as 'others'. Only half of them, having to choose in a hypothetical situation between democracy and economic welfare, would choose democracy; the question about the probability to ensure economic welfare without democracy has been, probably, needlessly skipped – the answer to it, in particular bearing in mind the historical experience of Lithuania, seemed self-evident. Nine tenths of the respondents are fully or partly disappointed with democracy in Lithuania. If taken in isolation, this answer could be interpreted as criticism with respect to the *Lithuanian* political system. Yet, another answer gives even less hopes: three fourths of the respondents have admitted that they are fully or partly disappointed with a democracy *as a form of governance*. Also, the omission of the question about an organic connection of democracy with the rule of law was probably unreasonable, as it seemed to suggest an obvious answer, although it is likely that the answer would have not been obvious to the respondents, as more than two thirds of them believe that legal nihilism is most inherent in public authorities and representatives of the public sector, and only a small part thinks that it is also characteristic of ordinary members of society. In the context of the answers about judicial powers and independence as well as an attitude to democracy as a form of governance, such a view seems to lack self-criticism.

It is evident that the changes evoked by the crisis in the legal mentality of society (and/or its individual groups) signal the tendency to tolerate the defiance of (at least) some standards of the rule of law and democracy. Only social rights constitute a certain exception. This tendency (if the further analysis confirms that it exists) also creates the psychological and cultural environment favourable for the situation where politics (not only anti-crisis policy) may be much less controlled by law.

Part II

RESPONSIBLE GOVERNMENT

Arvydas Andruškevičius
Deividas Kriaučiūnas
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Society holds the reasonable expectation that, when enacting a regulation determining their status, rights and activities and, in particular, a regulation that is likely to have a negative impact, the State and its institutions will act responsibly and pass lawful, reasoned and the most effective decisions balancing different interests. Although the constitutional principle of responsible government has been interpreted in the jurisprudence of the Constitutional Court and in the case-law of administrative courts, there is still some uncertainty about its content. The development of the content of this principle in Lithuania has been fuelled by the economic crisis – since 2008 the Constitutional Court and administrative courts have on more than one occasion assessed the lawfulness of the actions of public authorities on the basis of this principle by interpreting and developing it. Thus, in this part of the book, an attempt will be made, firstly, to explore the content of the principle of responsible government, the subjects bound by it and its links with the right to good administration, as enshrined in the EU Charter of Fundamental Rights.[96] The main emphasis will be placed on the concept of the principle of responsible government, as developed in the jurisprudence of the Constitutional Court and the administrative courts of Lithuania. Further, the research will focus on the general, the so-called horizontal, requirement stemming from the principle of responsible government as identified by the Constitutional Court – the requirement that the law-making (decision-making) process be regulated in a proper manner. The further chapter will investigate whether the actions of public authorities in regulating business and making other decisions relevant to the business environment were in line with the principle of responsible government. It should be noted that there has been no analytical research carried out in Lithuania so far to investigate and assess the actions of public authorities during the financial-

[96] OJ 2000 C 364.

economic crisis from the perspective of responsible (good) government. For the purposes of integrating the views of the representatives of different fields, the usual legal research methods have been supplemented by the analysis of the public statements made by the representatives of business structures, the media (representing, in their turn, the interests of the former) and other public figures regarding the issues of the business environment.

The specificity of the institution of local self-government makes it necessary to assess not only the constitutional doctrine on responsible government, but also the changes in relation to the financial ensuring of municipal functions. Therefore, the measures introduced by the decisions of Lithuanian municipal authorities to rationalise the use of funds have been chosen as the principal research object in order to identify the nature and scope of their impact on the rights, legitimate expectations and legitimate needs of local residents. In terms of the research methods, mention should specifically be made of the representative survey of the residents and civil servants of municipalities; the survey analysis has allowed obtaining a more thorough picture of the responsibility level in public government and the realistic situation of human rights in the local self-government functioning under the crisis. To date, the institution of Lithuanian self-government has been investigated from different aspects, but the impact of the economic downturn on the local self-government has not been directly addressed so far.

1. The concept of responsible government

The principle of responsible government, as a separate principle, is not directly referred to either in the Constitution or in international human rights instruments and EU legislation. It is obvious, however, that present-day democratic authorities may not exercise the powers conferred on them irresponsibly. Compliance with this principle becomes particularly important when a state encounters economic difficulties and has to resort to solutions unpopular in society.

The principle of responsible government operates side by side with other constitutional principles identified by the Constitutional Court in the constitutional doctrine on the rule of law: the supremacy, integrity and direct application of the Constitution, the sovereignty of the nation, democracy, the equality of persons before the law, the court, state authorities and their officials, respect for and the protection of human rights and freedoms, social solidarity and other. The principle of responsible government functions as a form specifying the principles of a state under the rule of law; and the obligation to govern responsibly stems from the provision established in Article 5(3) of the Constitution under which state institutions serve the people.

Since 2004, when the Constitutional Court explicitly held that the principle of responsible government is consolidated in the Constitution,[97] the content of this principle has been developed further. The jurisprudence of the Constitutional Court discloses responsible government of the state from two, complementing one another, aspects: firstly, it places an emphasis on the trust of the people and the nation in the state, its institutions and the decisions they make, which has to be earned, and, secondly, underlines that, in order to ensure, secure and increase this trust, institutions must act responsibly, *i.e.* they must adopt reasoned and well-balanced decisions that are most effective for the state and least detrimental to subjects within the jurisdiction of the state.

The concepts of responsible government, good administration and smart government are often referred to as the categories of public administration or public management; yet, their principal source is the constitutional principle of responsible government. Responsibility to the public for the decisions made falls not only on the institutions of the executive branch of power and the subjects of public administration; as held by the Constitutional Court, the ensuring of the overall welfare of the public, as well as of the implementation and protection of constitutional and other rights and freedoms of individuals, is an obligation of all branches of state power. While clarifying the provision laid down in Article 5(2) of the Constitution that the scope of power is limited by the Constitution, the Constitutional Court has noted on several occasions that the Seimas, as the legislative institution, is independent inasmuch as its powers and broad discretion are not limited by the Constitution, *inter alia*, by the constitutional principles of a state under the rule of law, the separation of powers, *responsible government*, the protection of legitimate expectations, legal clarity, as well as by other principles. It is clear from the reasoning of the Constitutional Court that the requirement of responsible government similarly binds the Government and equally applies to the Office of the President of the Republic.[98] Furthermore, the Constitutional Court has on more than one occasion emphasised that the requirements deriving from the principle of responsible government are applicable to all institutions.

Regarding the link between the constitutional principle of responsible government and the right to good administration, as laid down in the EU Charter of Fundamental Rights, it should be noted that these provisions are of the same nature: both legal systems – that of the EU and the Lithuanian one – are based on the principle of the rule of law; therefore, both the supranational and national authorities must act within the same framework of *responsible government*. EU law, however, does not lay down any independent principle of *responsible government*, and the Constitutional Court has not affirmed the principle of good administration, which stems from the Constitution (the term 'responsible government' ('good public administration') is, nevertheless,

[97] Constitutional Court ruling of 1 July 2004; see also Rauličkytė, A. *Op. cit.* (both referred to in Part I).

[98] Constitutional Court ruling of 20 December 2007. *Official gazette*, 2007, no. 136–5529.

used in the decisions and rulings of administrative courts). It could be argued that the Charter codifies only one of the expressions of this principle. In the Charter, good administration is mostly linked to administrative procedures in institutions and agencies in the course of which decisions are adopted concerning the implementation of the individual rights and freedoms enshrined in the constitutions of the Member States of the Union, the rights and freedoms stemming from the respective constitutional regulations or the interests protected by the laws of the Member States. It is possible to agree with the opinion of scholars that the right to good public administration, as consolidated in the Charter, is a compulsory *minimum standard* to ensure the effective protection of human rights, as well as that the national legal systems may retain their particular features and exercise law-making discretion.[99]

The principle of responsible government is a relatively recent constitutional principle; therefore, the Constitutional Court has not as yet had many opportunities to examine it thoroughly. Similarly to other provisions stemming from the Constitution, this principle is characterised by dynamism – its content is developing. In its rulings regarding specific requirements for the actions of public authority institutions, the Constitutional Court invokes the principle of responsible government (as well as other principles that it applies) in conjunction with other principles; therefore, it is impossible to determine unequivocally whether a certain requirement stems from this principle or other constitutional principles, or from all of them together. In addition, in its jurisprudence, the Constitutional Court more frequently invokes a more general principle – the rule of law, which is highly capacious and covers many different interrelated imperatives. It should also be noted that it is not always that the Constitutional Court expresses in detail its position on the content of responsible government and, in certain cases, leaves this to be determined by the legislator. Irrespective of this fact, the case-law of the Constitutional Court and other Lithuanian courts is the most significant source for disclosing the *status quo* and the development of this principle before and during the economic crisis as well as in terms of response to the downturn.

The aforementioned constitutional regulation and the related constitutional jurisprudence, the relevant legal doctrine and the content of ordinary legislation reveal certain general attributes of responsible government (good public administration): the content of laws must be such that the regulation laid down therein serves the general welfare of the nation; Government resolutions and other normative acts must be based on the effective and applicable statutory regulation thereby ensuring the internal consistency of ordinary law and the uniform application of legal norms; the acts of public and private law must reconcile personal, public and state interests to an optimum extent; laws and legal regulation following from them must be such as to ensure the

[99] See Paužaitė-Kulvinskienė, J. 'Atsakingo valdymo principas ir jo procesinės garantijos' [The principle of responsible government and its procedural guarantees] in Valančius, V. (ed.). *Administraciniai teismai Lietuvoje: nūdienos iššūkiai* [Administrative courts in Lithuania: Present-day challenges]. Vilnius, 2010, p. 232.

equality of the rights of persons, promote the solidarity of members of society and avoid increasing the exclusion of social groups or creating preconditions for the antagonism of these groups; before adopting any decisions relevant for society or any of its parts, public authority institutions and agencies must consult with the respective groups of stakeholders; state politicians, as well as civil servants of public administration institutions and agencies, must follow the principles stemming from the constitutional regulation and the regulation laid down in the ordinary law regarding their activities, avoid any conflicts of private and public interests, abide by the universally recognised moral criteria and resist the influence of narrow interest groups; the administrative burden carried by economic subjects in a state that adheres to the principle of market economy must be adequate to the objectives pursued by the state and must not preclude the creation of a business-friendly environment; the decisions of the Seimas, the Government and other central power authorities of the state must be such as to enable local authorities to carry out their statutory functions of public administration and provision of public services to an adequate extent and in a quality manner; an optimum system of institutions of control over public government (administration) must be functioning in the state, and this system should be known to all residents and economic subjects of the country; authorities must be responsible to the public, and individuals must have the right to criticise them; public authority institutions must act in a predictable, steady and effective manner; transparency as the principle guiding the activities of public authorities and officials must be ensured; the decisions of public authorities or officials must be reasoned and their reasoning should be rational, clear and comprehensible; the state institutions developing and implementing state economic and financial policies must responsibly and rationally assess the fact that, due to special circumstances (economic crisis, *etc.*), there might occur a particularly grave economic and financial situation in the state, therefore, they must take all possible measures in order to predict the tendencies of the economic development of the state and prepare for the possible occurrence of such particularly grave situations; the legislator must lay down such a legal regulation governing the legislative process that would impose the obligation to carry out a proper assessment of any draft law; the negative consequences resultant from a legal regulation or from its absence must be eliminated immediately, and any decision adopted in this regard may be postponed only for a reasonable time, which must be determined in view of the existing economic and financial situation in the state and in the light of the effects of the extreme situation and the capabilities of the state. Thus, these provisions may be treated as methodological guidelines for ascertaining whether the actions of public authorities during the downturn period met the requirements of the principle of responsible government. Consequently, the principle of responsible government can be viewed as providing an ideal model, the implementation of which to a full extent is hindered by different objective and subjective causes: periodic economic downturns, geopolitical changes, the tendency of some civil servants to deal with private interests taking advantage of their office, the willingness of political parties to ensure

positions in different public power structures, *etc.* Nonetheless, a democratic state governed by the rule of law should strive for progress in public administration and opt for most effective alternatives to ensure responsible government.

2. The pre-crisis situation: an overview

2.1. The regulation of the law-making process

By Decree of 20 December 2000, the President of the Republic approved the composition of the Commission for preparing the law-making model and assigned this commission the task of initiating an integrated scientific research into the situation of law and lawmaking in Lithuania and preparing, on the basis of that research, an optimal law-making model as well as proposals for its implementation. However, the implementation of this initiative was hindered by considerable delays and a large number of problematic issues emerged during the pre-crisis period in Lithuania. At the stage of proposing (initiating) legislative ideas, there was no mechanism making it possible to put forward and consider legal ideas effectively – stakeholder groups had no realistic opportunities to influence this process and only civil servants were, as a rule, involved in the drafting of legislation. The organisation of the work of the Seimas and the Government at the stage of the implementation of the right of legislative initiatives was not optimal. As a result, amendments and supplements to legal acts were unsystematic; draft legislation initiatives failed to adequately assess the necessity of a particular legal regulation, its negative consequences and costs and did not provide any analysis of alternative solutions. The drafting of legal acts used to be inadequately planned and would result in an unsystematic and hasty lawmaking to the detriment of the quality of legal acts. There was no codification or consolidation of the relevant branches of the system of legal acts. Laws often used to enter into force in the absence of the legal acts necessary for their implementation. It should be also noted that there was no integrated monitoring carried out over the legislation system in Lithuania in general.

After the need to reform lawmaking was acknowledged in 2000, the draft Law on the Legislative Framework[100] was submitted to the Seimas only on 10 September 2007, was enacted only on 18 September 2012 and came into force only on 1 January 2014.[101] Thus, the new Law on the Legislative Framework became effective almost six years after the outset of the crisis.

[100] The verbatim translation of the Lithuanian title of this law would be 'Law on the Lawmaking Framework'; however, the authors follow the pattern of translation that is already entrenched in numerous translations of the said title in various official documents. For the same reason, 'Legislative rules' is used instead of 'Lawmaking rules'.

[101] *Official gazette*, 2012, no. 110–5564.

2.2. The freedom of economic activity

The constitutional doctrine on the freedom and initiative of economic activity had already been formed before the period under research; during the researched period, the Constitutional Court did not render any particularly significant rulings changing or otherwise significantly developing the issues in relation to business regulation. The freedom and initiative of economic activity *expressis verbis* was expressed in the Constitution in an inexhaustive manner and was limited only to a reference to this freedom. Such a constitutional regulation was characteristic of most post-socialist states where, at the time when their constitutions were being developed, an overly high level of the activity of the state was viewed with suspicion. It was obvious even before the crisis that the Constitutional Court followed a moderate position in developing its doctrine on the freedom of economic activity: it avoided making an express reference to the freedom of economic activity as to a constitutional human right, was inclined to interpret it as a freedom or a principle and paid more attention not to this category itself but to the factors that made an interference with this freedom lawful (protection of consumer rights, the general welfare of people, *etc.*)

The pre-crisis economic boost was conducive to business development. Until that time, the major public structures representing business interests had already been formed and were operating in Lithuania, including the Lithuanian Confederation of Industrialists, the Lithuanian Business Employers' Association, the Association of Lithuanian Chambers of Commerce, Industry and Craft, the Lithuanian Chamber of Agriculture, the Small and Medium Enterprises Development Agency of Lithuania, the Lithuanian Economic Development Agency and the Lithuanian Business Support Agency. There was also the main market supervision institution – the Competition Council[102] as well as the institutions for the protection of consumer rights: the State Consumer Rights Protection Authority, the State Non Food Products Inspectorate under the Ministry of Economy, the State Food and Veterinary Service, the Communications Regulatory Authority, the European Consumer Institute, *etc.* There were legal (as well as organisational) preconditions for the freedom and initiative of economic activity, for the supervision of the market and competition and for the representation of business interests in place and actually operating in the pre-crisis Lithuania.

The main concerns voiced by business representatives in public discussions were related to the systemic problems of the state and the management of the whole Lithuanian economy. Business representatives criticised: the inadequate and unreasonable control over business activities (according to the data of the research, there were even 152 public or state-authorised regulatory institutions supervising businesses in 2006); the inability to

[102] The Law on Competition came into force on 1 November 1992, *i.e.* one day earlier than the Constitution.

ensure transparency in the area of public procurement; the inappropriate situation in the area of territorial planning and construction; the inability of the state to ensure cheaper energy resources, *etc.* It should also be noted that the state supervision of business was carried out on the basis of the general legal provisions laid down in the Law on Public Administration. Due to the economic downturn, all these issues became even more acute during the period under examination. There were some indications of the upcoming downturn already in the summer of 2007, which has to be linked to the outset of the crisis, although, the representatives of the authorities tended to ignore them. The obvious signs of the approaching crisis were not even grasped by a large majority of Lithuanian businessmen.

2.3. Local self-government

The pre-crisis practice of public administration in municipalities was characterised by dynamic legal regulation and abundant judicial corrections. The Law on Local Self-Government was amended and supplemented by the laws enacted by the Seimas more than seventy times between 1994 and 2008. The quality of local government was highly influenced by the ratification of the European Charter of Local Self-Government in the Seimas.[103] One of the outcomes of the incorporation of this document into the Lithuanian legal system was the adoption of a new wording of the Law on Local Self-Government on 12 October 2000.[104] The law, *inter alia*, for the first time referred to a community representative of a residential area assigned with arranging surveys and meetings with members of the municipal council, the elder and the administrator of the municipality (Article 33(1)(4)). In this way, the law was designed to solve a paradoxical situation resultant from the 1994 Law on Local Self-Government, which identified publicity and response to public opinion as one of self-government principles (Article 2(1)(4)) but did not consolidate any other legal provisions on surveying the public.[105] A detailed regulation of the institution of population surveys was introduced on 15 October 2002, when the Law on Local Self-Government was supplemented with Section 13 'Local population opinion survey', which comprised twelve articles.[106]

The Constitutional Court had more than once to judge on local self-government adopted by the Seimas during the pre-crisis period: upon the verdict of this court, municipal boards, which were in some regard equivalent to municipal councils constituting them, were eliminated from the system of

[103] *Official gazette*, 1999, no. 82–2411.
[104] *Official gazette*, 2000, no. 91–2832.
[105] *Official gazette*, 1994, no. 55–1049.
[106] *Official gazette*, 2002, no. 103–4605.

municipal institutions;[107] also the act of the Seimas regarding the annulment of the institution of Government representatives, who carried out the administrative supervision of municipal activities, was found to be contrary to the Constitution.[108]

The legislation on self-government in force during the pre-crisis period was in some cases declarative, which had a negative impact on the quality of the legal regulation. For example, the Law on Administrative Dispute Commissions, enacted on 14 January 1999, conferred the freedom of discretion on municipal councils in deciding as to the necessity of the administrative dispute commission in their municipalities, but only two out of sixty Lithuanian municipalities established such commissions until 2011. This meant that the residents of the remaining municipalities were in the position to file complaints against the actions and individual administrative legal acts of the public subjects of local self-government only before the administrative dispute commissions of the counties, and even this became possible only in 2004, when the Government resolved to form such commissions. Consequently, between 1999 and 2004, the residents of municipalities could only resort to courts to sue public administration for the inactivity of state and municipal authorities, and this made the defence of their rights more difficult. Furthermore, the declaratory character of the legal regulation at issue was also evident from other aspects, as, for example, in the event of the statutory establishment of those duties for public administration subjects that are particularly difficult to perform. The Law on Local Self-Government provided that it was within the remit of elders (heads of municipal administration territorial subunits) to draw up protocols on the violations of administrative law and to consider the cases regarding these violations. In practice, elders encountered considerable problems in performing this duty, including the collection of evidence related to the violation. Therefore, the aforementioned legislative provisions were enforced very rarely. The latter fact is probably one of the reasons why elders are not indicated as the subjects performing the function of administrative punitive sanctioning in the draft Code of Administrative Violations registered with the Office of the Seimas in 2011.

Criticism should also be addressed to the pre-crisis substatutory legislation relevant for municipalities, as, for instance, the resolution passed by the Government on 25 September 2002, which established the model procedure for providing services to citizens and other persons in public administration and other institutions. This legal act was only of a recommendatory nature for municipalities. This led to a controversial legal relationship where citizens and other persons in state institutions had the possibility of exercising their constitutional right to criticise the work of state institutions and their officials, while, at the municipal level, such a possibility depended on the decision of the local political authority institutions on whether or not to apply the

[107] Constitutional Court ruling of 24 December 2002. *Official gazette*, 2003, no. 19–828.

[108] Constitutional Court ruling of 18 February 1999. *Official gazette*, 1998, no. 18–435.

recommended procedure for providing services to persons. The regulatory defect in question was rectified only in 2007, when the Government adopted a new legal act, which was already binding on the public administration subjects of local self-government.[109]

Despite the aforementioned failures, the local self-government should be considered to have gradually progressed in terms of responsible government due to the efforts of the Constitutional Court, administrative courts and the lawmaking subjects themselves.

3. Recession, responsible government and lawmaking

3.1. The crisis as the impulse to reform lawmaking

Although the Law on the Legislative Framework came into force only on 1 January 2014, the applicable regulation in force during the period between 2008 and 2012 was amended within the limits of the then existing legal possibilities by transposing into the lawmaking the fundamental principles of responsible government and the best practice. The economic downturn in its turn gave an impulse for further lawmaking reforms.

The Action Programme of the 15th Government, which was approved by the Seimas by its resolution of 9 December 2008,[110] included the provisions requiring the following: (i) explanatory notes to draft legal acts (including draft laws submitted by the members of the Seimas), as well as letters (submissions) accompanying legal acts approved by the resolutions of the Government, should outline their actual positive and negative outcomes; (ii) all legal acts should be adopted only after a realistic assessment of their implementation measures, costs and outcomes; (iii) a system for the review of the legislation in force should be developed; (iv) all draft normative legal acts should be stored and should be accessible through a common public internet search system; (v) the drafting of normative legal acts should go along with consultations with society and consultations with the groups targeted by the draft legislation, *etc*. Now it was only necessary to develop the required legal framework and ensure compliance with the rules for good lawmaking.

[109] See Government resolution no. 875 'On the approval of the Rules for considering applications submitted by individuals and providing services to them in public administration institutions, establishments and other public administration subjects' of 22 August 2007. *Official gazette*, 2007, no. 94–3779.

[110] Seimas resolution no. XI-52 (referred to in the Preface). As mentioned, in this book, the titles 'Programme' and 'Action Programme' (when referred to the Programme of the 15th Government) are used synonymously and interchangeably.

3.2. Modernisation of the law-making system: general aspects

The Law on the Legislative Framework, which amended the processes of initiating, drafting, assessing, coordinating and enacting legal acts at the statutory level, was passed in 2012. This law was drafted during the researched period, therefore, its content was undoubtedly predetermined by the legal acts as well as the documents of a recommendatory nature adopted between 2008 and 2012. The Lithuanian lawmaking was supplemented by a number of new provisions and principles, while the faulty practices based on the former regulation were rectified. It was the first time in Lithuania that the monitoring of legal regulation was introduced, the statutory duty to hold consultations with society was established, and the assessment of an anticipated regulatory impact was required as one of the stages of the lawmaking process. The most significant provisions of this law can be viewed as providing for three novelties. First, the Law on the Legislative Framework has laid down the lawmaking principles, which, if complied with, could ensure the compatibility of legal acts and lawmaking with the constitutional principle of responsible government. The lawmaking principles, which are closely linked to the principles of public administration, are set out in Article 3 of the Law on the Legislative Framework, where it is stipulated that lawmaking must be guided by the following principles: (i) expedience (a legal act must be drafted and adopted only if the objectives being sought cannot be achieved by any other means); (ii) proportionality (the chosen measures of a legal regulation must impose as little administrative and other kind of burden as possible and must restrict the subjects of the legal relations no more than necessary to achieve the objectives of the legal regulation); (iii) respect for individual rights and freedoms; (iv) openness and transparency (lawmaking must be public; lawmaking decisions related to common interests may not be made without informing or involving society); (v) effectiveness (the drafting of a legal act must consider all and opt for the best possible legal regulation alternatives; a legal act must provide for the most effective and economical legal regulation measures); (vi) clarity (a legal regulation provided for in legal acts must be logical, consistent, concise, understandable, accurate, clear and unambiguous); (vii) systematisation (legal norms must be compatible with each other). In addition, it may be said that the lawmaking principles form a codified jurisprudence of the Constitutional Court that is related to the interpretation of the constitutional principles of the rule of law and responsible government. Second, Article 5 of the Law on the Legislative Framework has introduced the provisions on the use of legislative information system for lawmaking. This is an advanced and modern solution to ensure publicity and transparency, as well as efficiency and concentration in lawmaking. The legislative information system is used to handle and announce about lawmaking initiatives and to publish draft legal acts, documents accompanying

draft legal acts, the conclusions of the institutions concerned, information on consultations with society and other important documents; this system also provides the possibility for all persons to put forward their proposals regarding the law-making initiatives and draft legal acts published through this system. The third important novelty is transition to the electronic database, *i.e.* the Register of legal acts (*TAR*), which was launched on 1 January 2014 and is used to register and to officially promulgate legal acts.

The Law on the Legislative Framework conforms to best practices in other states and it should be assessed positively. The main fault is the fact that the drafting process of this law was excessively long; thus, the lack of systemised provisions regulating lawmaking during the period of the crisis should be considered a major obstacle to the implementation of responsible lawmaking policy.

3.3. Openness, transparency, interest groups and society

The Constitutional Court has on more than one occasion pointed out that transparency in government is a prerequisite for the trust of the nation, and that this prerequisite also constitutes a precondition for the legitimacy of government (actions).[111] The public, having entrusted the handling of common affairs to certain individuals, must be protected against the arbitrariness of state officials and their acting in their own personal or group interests rather than in common interests. Therefore, transparency must be ensured in lawmaking as a principle governing the activity of public authority institutions and their officials, which presupposes information dissemination and communication, openness and publicity, accountability to the respective community and responsibility of the officials adopting decisions for the decisions they make, as well as that adopted decisions must be well-founded and clear so that they can be rationally reasoned once such a need arises.[112]

Transparency, as one of the requirements for responsible government, must be an inseparable element of the decision-making process. However, the pre-crisis legal regulation, in principle, ignored the involvement of society or its part into the lawmaking process, except for very limited cases. Formed at the end of 2008, the Government assumed the political commitment to ensure that unpublished draft normative legal acts unavailable to society for consideration would not be adopted and provided that, during the drafting of normative legal acts, consultations must be held with society and the groups targeted by the proposed regulation, as well as that each person must be

[111] Constitutional Court conclusions of 5 November 2004, 7 November 2008 and 26 October 2012. *Official gazette*, 2004, no. 163–5955; 2008, no. 130–4992; 2012, no. 125–6285 (respectively).

[112] Constitutional Court rulings of 1 July 2004 and 22 January 2008 (both referred to in Part I).

ensured a real opportunity to provide comments and proposals regarding any draft normative legal act.[113] These political commitments complied with the highest standards of publicity and transparency in lawmaking. With a view to implementing these commitments, on 15 April 2009, the Government laid down a detailed procedure governing the publishing of draft legal acts on the websites of institutions and the Office of the Government: all drafts had to be published on the website of the drafting institution on the same day they were submitted to the stakeholders and other institutions for coordination; the whole accompanying material had to be published as well; and the Government was obligated to publish the draft legal acts on the website of the Office of the Government on the date of their submission to the Government.[114] This procedure improved transparency in the work of the Government and its subordinate institutions:

> 'Once the new procedure has been approved, there will be no possibility of 'forgetting' to inform society about one or another legal act being drafted. This is a fundamental step in ensuring publicity in lawmaking <...> and citizens will have the realistic opportunity to participate in the law-making process; conditions will be created for drafting high-quality legal acts; and the work of the Government will be eased'.[115]

On 30 September 2009, the Legislative rules were approved, including the detailed provisions on consultations with society and the publication (promulgation) of draft legal acts.[116] For the first time in the history of Lithuanian lawmaking, these rules made it compulsory to consult with society in order to find out its opinion about a specific problem and its solutions, envisaged the advisable forms of these consultations and imposed the obligation to publish the summarised findings after the consultations. As it turned out later, however, these good intentions did not become a universal practice.

For the purpose of publishing draft legal acts, the Draft Legislation Information System (TAPIS) was launched on 15 June 2009. It enabled the state and municipal institutions participating in the lawmaking process to initiate, coordinate and submit to the Seimas draft legal acts electronically. During the first year, seventy-two agreements were signed and over fifty agreements were negotiated with the drafting institutions and other public

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[113] Seimas resolution no. XI-52 (cited above and referred to in the Preface). See §§ 73–75 of the Operational Programme enclosed to the resolution.

[114] Government resolution no. 312 of 15 April 2009 amending resolution no. 480 of 8 April 2003 'On the approval of the Description of the general requirements for websites of state and municipal institutions and authorities'. *Official gazette*, 2009, no. 49–1959.

[115] 'Visuomenė apie visus teisės aktų projektus bus informuojama iš anksto' [The public will be informed about all draft legal acts in advance]. Online access: http://www.tm.lt/naujienos/pranesimasspaudai/1018 [2 October 2014].

[116] Government resolution no. 1244 of 30 September 2009 'On the approval of the Legislative rules of the Government of the Republic of Lithuania'. *Official gazette*, 2009, no. 121–5212.

institutions involved in the law-making process, and a total of 1,502 users from state and municipal institutions were registered.[117] These initiatives for public engagement in the law-making process were followed by other examples: on 28 October 2009, the National Agreement was signed and it set out the principal guidelines for the future legal regulation and envisaged that the parties agree to develop regular consultation mechanisms to help effectively resolve other economic, energy sector, transport and social issues as well as agree to hold regular consultations on the implementation of this agreement and the solution of possible implementation problems.[118] The Ministry of Justice came up with an initiative making it possible for individuals to communicate their legislative initiatives (put forward proposals of any content and scope to make changes in an existing or enact new regulation) on the website of the Ministry; over a hundred of such initiatives have been submitted from July 2009 to date.[119] Furthermore, electronic lawmaking was established to make it possible to submit draft legal acts for coordination, issue conclusions and submit drafts to the Government through the Legislative Information System (TAIS) of the Office of the Seimas. Paragraph 37 of the Regulations of the work of the Government included the provision that all stakeholders (citizens, foreigners, associations, enterprises, state and municipal institutions and establishments, other organisations, as well as the groups of these stakeholders) may provide their comments and proposals regarding the draft legal acts published through this system.

The development of the mechanism for providing an access to the public to forthcoming regulation was a significant accomplishment, which definitely was in line with the standards of responsible government. However, it should be admitted that this task was not fully completed; thus, the conditions were created to easily avoid complying with transparency or consultation requirements. The legislation did not provide for any mechanism to prevent adopting drafts, on which no consultations with society had been held. Even during the crisis drafts would be submitted simply at a sitting of the Government without holding any consultations with society because at that time (and at present) the Prime Minister could always exercise the right established in the Rules of Procedure of the Government to include, upon his or her own initiative or upon the proposal of a minister, a new item into the agenda of the sitting of the Government. The absolute majority of drafts did not (and does not) receive any comments or public response even though they were (and are made) available to society. Such a situation could be caused by a

[117] For further information see Activity report of the Office of the Seimas for 2009 of 30 April 2010, Vilnius. Online access: http://www3.lrs.lt/home/ataskaitos/Seimo_kanceliarija_ataskaita2009.pdf [2 October 2014].

[118] Online access: http://www.lrv.lt/bylos/Naujienos/Aktualijos/20091028_susitarimas.pdf [18 December 2014].

[119] For further information see the website of the Ministry of Justice. Online access: http://tm.lt/teisini/pasiul/ [7 January 2015].

number of reasons (the insufficiently active society, an excessive flow of drafts, the system too inconvenient to access draft legal acts, an insufficient period of time to express one's opinion, accompanying explanatory material containing insufficient information or too formal explanations about complicated drafts, *etc.*) but neither of them was analysed and no effort was made to change the situation.

If the applicable procedure were analysed in terms of good administration, such an analysis would show that it had a number of gaps to be eliminated. The study commissioned by the Ministry of Economy[120] in 2009 proposed a scenario for the systemic reorganisation of consultations with society, under which it was necessary: to define the concept of consultations (subsequently, it was defined in the Law on the Legislative Framework); to identify the stages of consultations; to establish the obligation to hold consultations; to consolidate the principles of consultations; to provide for the assessment of the quality of the consultation process; to draft a consultation document (template); to prepare a consultation manual for consultation initiators and a document summarising consultation results. None of these proposals was implemented.

The assessment of the consultation procedure introduced during the period of the economic downturn and the current practice of its application shows that the actions in this field have been inadequate: (i) the principle of openness has not been secured (the tendency has prevailed to keep silent on unfavourable opinions and arguments); (ii) adequate time limits for consultations have not been ensured; (iii) the time chosen for consultations has frequently been inappropriate; (iv) the content of consultations has been unclear; (v) input has not received proper recognition and appreciation; (vi) the balance between the representatives of interest groups has not always been struck; (vii) there have been no guidelines on how the availability and expedience of consultations should effectively be achieved.

3.4. The reorganisation of the system of regulatory impact assessment

The modern law-making process and responsible (public) government in general may not function without an effectively operating impact assessment system. All EU and Organisation for Economic Co-Operation and Development Member States have put in place impact assessment mechanisms; the impact

[120] An analysis of the quality of the assessment of the impact of decisions, the methods and efficiency of consultations with society and interest groups. Final report on the study, prepared by VšĮ Europos socialiniai, teisiniai ir ekonominiai projektai [public company European Social, Legal and Economic Projects] for the Ministry of Economy, 8 April 2009. Online access: http://www.ukmin.lt/uploads/documents/Geresnis%20reglamentavimas/Ataskaitos/SPPV%20ataskaita/SPPV_konsult_tyrim_galut_atask[1].pdf [19 October 2014].

assessment system used by EU institutions is one of the model examples to be followed. The case-law of the Constitutional Court has been developed accordingly (impact assessment has been regarded as necessary).

When Lithuania was hit by the economic crisis, the provisions of the Government resolution no. 276 'On the approval of the Methodology for assessing the impact of draft decisions of 2003' of 26 February 2003[121] were in force. It is a paradox that, although the impact was assessed on a mass scale in Lithuania, unfortunately, nobody was ever able to see any potentially negative impact, even though both public expenditure and the administrative burden on business were growing. During the crisis, the provision of this resolution that it was allowed to skip impact assessment only if a draft decision was of particularly high urgency and aimed at resolving unexpected critical situations acquired a different meaning and application practice – the said provision could be used as a justification for any inadequate impact assessment once the proposed measure was linked with the overcoming of the effects of the crisis.

Following the adoption of the Legislative rules in 2009, a paradoxical situation emerged in Lithuania leading to the assessment of the impact of 'decisions' (under the methodology for assessing the impact of decisions, as approved by the Government resolution) and the assessment of the 'anticipated regulatory impact' (under the Legislative rules). The practice of the application of the 2003 procedure for assessing the impact of decisions was described by the study commissioned by the Ministry of Economy in 2009. The study noted that the existing system was unviable and that impact assessment as such was often perceived as a formal procedural requirement, *i.e.* only as a certificate to be filled after an institution initiating a certain solution had already decided about or even drafted its decision, thus, creating the impression that it was only sought to 'justify' the already adopted decision. It was also pointed out that impact assessment certificates were prepared in a hasty manner, without the required diligence.[122]

In response to this situation, in October 2012 (*i.e.* more than three years after the aforementioned study) the Government approved a new methodology for anticipated regulatory impact assessment.[123] In this methodology, the distinction was made between the assessment of priority legislative initiatives and the assessment of other drafts: the assessment of priority legislative initiatives is planned in advance and carried out in a comprehensive manner, is summarised, presented and published, whereas the assessment of other

[121] *Official gazette*, 2003, no. 23–975.

[122] An analysis of the quality of the assessment of the impact of decisions, the methods and efficiency of consultations with society and interest groups. Final report on the study (cited above).

[123] Government resolution no. 1276 of 16 October 2012 amending resolution no. 276 'On approving and implementing the Methodology for assessing the impact of draft decisions' of 26 February 2003. *Official gazette*, 2012, no. 124–6234.

drafts is carried out in compliance with the principle of proportionality, *i.e.* in a sufficiently concise manner, without investing more funds in the assessment than required for the implemented draft.

3.5. The monitoring of regulatory impact: *ex post* assessment

Although the Constitutional Court, when developing the principle of responsible government, has not established any requirements for the *ex post* assessment of the applicable regulation, there are no doubts that lawmaking subjects have the constitutional duty to carry out the *ex post* regulatory impact assessment. Furthermore, it is sometimes difficult to assess the impact of a legal act at the time of its drafting, consideration and adoption (where it is hard to predict the outcomes due to the novelty of the draft, lack of data or other reasons); thus, impact assessment should be transferred to the subsequent stage where it is possible to prevent or minimise negative outcomes.

In 2008, at the outset of the economic crisis, no *ex post* regulatory impact assessment (also called as the monitoring of regulatory impact) was carried out in Lithuania.[124] This situation increased the risk of overlooking the fact that the undesirable effects caused on the subjects of law by the legal acts, especially urgent ones, passed during the economic downturn were much more severe than anticipated by the legislator or any other lawmaking subject.

The resolution of the Seimas 'On the approval and implementation of the outline for improving the lawmaking of the Republic of Lithuania' of 28 November 2006[125] proposed that the Government should draft the methodology and procedural rules for the monitoring of regulatory impact by 1 July 2007. However, this principal political provision was implemented only in September 2009, when the Government approved the Legislative rules, which provided for the participation of society in the monitoring process, the appointment of the coordinating body (subsequently the Ministry of Justice was appointed to act as the coordinating institution), the drawing up of the lists of the legal acts to be monitored, the establishment of the responsible institutions and the time periods of monitoring.[126]

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[124] At that time, the Methodology for determining and assessing the administrative burden on business was in force as approved by the Minister of Economy on 2 May 2006. Under this Methodology (§ 5.1), it was possible to determine and assess the administrative burden resulting from 'the obligation to provide information (*ex-post* assessment) as consolidated in the legal acts. This assessment shall identify the actual administrative burden'; however, the study did not find any evidence that such *ex post* assessment had been carried out during the pre-crisis period.

[125] *Official gazette*, 2006, no. 134–5066.

[126] Government resolution no. 1244 (cited above).

Although monitoring was carried out by state institutions in 2009 and 2010, it was uncoordinated as the regulation of monitoring was not sufficiently comprehensive, consistent and complete. A number of problems in the entire process were identified: an insufficient participation of society in the monitoring of normative legal acts; ministries did not always take actions to eliminate the negative consequences noted in the monitoring reports and did not always choose the right aspects for the assessment of the normative legal acts under monitoring; the monitoring procedure was not fully clear; the monitoring system was too complicated and inflexible; not all ministries published monitoring results properly, *etc.*[127] Therefore, in order to solve at least part of these problems, the monitoring mechanism was substantially supplemented at the beginning of 2011 by, *inter alia*, providing that ministries were required to draft, approve and publish annual monitoring plans, to set the requirements regarding the publicity of monitoring conduct and monitoring information, to draft monitoring plans, *etc.* The obligation to submit to the Government and publish annual monitoring reports was imposed on the Ministry of Justice as the coordinating institution. In 2012, the Law on the Legislative Framework was adopted, and its Article 23 defined five objects to be focused on in the *ex post* monitoring of regulatory impact.

Thus, the legal preconditions for the development of the monitoring system were created during the period under research. The operational practice of this system, however, revealed major functioning defects. Institutions ran out of enthusiasm and the level of their activity in the monitoring of regulatory impact decreased. The annual monitoring reports provided by the Ministry of Justice make it clear that the number of the legal acts (or provisions) being monitored was decreasing each year: twenty-five legal acts (seventeen of which were laws) were monitored in 2009, *i.e.* within the period of less than a year; eighteen legal acts (twelve of which were laws) – in 2010; twenty-five legal acts (ten laws and eleven orders) – in 2011; seven legal acts (two of which were laws) – in 2012 (the least active year); and twenty-one legal acts (eight of which were laws) – in 2013.[128] The data of 2012 appears to be especially odd because at that time the economic crisis was receding and the initiative should have been taken to review the need for and the effectiveness of the legal acts adopted during the period of the downturn. It follows that, in principle, during that period there was no monitoring of the legal acts transposing the requirements of EU laws; a large number of the aspects that served as the basis for monitoring were not related to the assessment of the administrative burden on business; monitoring covered those legal acts, whose amendment was in any way planned for the given year; based on the information provided by ministries, there was no indication that interest groups were involved in the monitoring process.

[127] See Report on the monitoring of normative legal acts for 2009. Ministry of Justice. Online access: http://tm.lt/dok/2009_metine_stebesenos_ataskaita.pdf [8 November 2014].

[128] See information provided on the website of the Ministry of Justice. Online access: http://tm.lt/teisstebes/atl/ [10 November 2014].

Some criticism should be addressed to the activities of two institutions of critical importance during the time of the economic downturn – the Ministry of Finance and the Ministry of Economy. During this period, these ministries were supposed to have the greatest need for monitoring the effectiveness of the impact of the legal acts adopted to overcome the crisis. The Ministry of Economy stepped into the process with ambition: it monitored three significant legal acts (the Law on Public Procurement, the 2008–2013 Investment promotion programme and the 2009–2013 Programme for innovation in business) in 2009 and found the reasons justifying the need for their improvement. In 2010 and 2011, however, it did not carry out any monitoring at all. During these three years, the Ministry of Finance monitored eight legal acts (during the first year – three legal acts, during the second year – four legal acts and during the third year – one legal act); however, some of the legal acts monitored should not be considered related to the crisis, and part of the decisions did not receive any proposals for their improvement or amendment.

3.6. Initiatives for reducing administrative burden

The Constitutional Court has not specifically stated in its jurisprudence that the reduction of administrative burden is one of the requirements of the constitutional principle of responsible government. However, this requirement can be traced in the interpretation of Article 46 of the Constitution as provided by the Constitutional Court regarding the freedom and regulation of economic activity. As any administrative burden is by definition the restriction of economic activity, it must comply with the criteria identified by the Constitutional Court. First of all, it must be based on the protection of certain common values and be proportionate. Therefore, any initiatives aimed at reducing the burden on business should be, first of all, regarded as the constitutional duty of public authorities.

Nevertheless, Lithuania's actions towards the reduction of administrative burden and better regulation were mainly promoted by the EU rather than the requirements of the principle of responsible government. Having beforehand announced the Lisbon Strategy and approved a number of programming documents for better regulation, in January 2007, the European Commission adopted the EU Action programme for reducing administrative burden in order to determine administrative costs arising out of EU legislation and undertook to reduce administrative burden by 25 per cent by 2012. The respective documents provided that EU Member States should also take actions in order to ensure better regulation and administrative burden reduction.

In Lithuania, the idea to reduce administrative burden was legally formulated for the first time only in 2005, when the Government provided

in the Plan of measures for 2005–2006 for the implementation of the public administration development strategy until 2010[129] that the concept of administrative burden should be defined and the methods for assessing the administrative burden on business as well as the possibilities of reducing administrative burden and streamlining or improving the legal regulation of business should be established. In November 2005, the Government approved the National Lisbon strategy implementation programme,[130] which recognised that a heavy administrative burden on business is one of the major obstacles to business and entrepreneurship development and, in substance, envisaged two principal measures to achieve this objective: to prepare the methodology for determining and assessing the administrative burden on business and, based on this methodology, to analyse the legal regulation of specific business areas.

The approval of the Programme for better regulation[131] was a significant decision during the researched period. This programme outlined the following problems to be solved: the existing institutional system in Lithuania was not sufficiently ready for the implementation of better regulation policy (no institution was appointed to be responsible for the formation of better regulation policy and the coordination of its implementation); the measures of better regulation were planned and implemented inconsistently; the administrative burden resultant form the legal acts was not measured; no measures were put in place for the reduction of administrative burden, *etc.* This programme approved the first plan of measures aimed at achieving better regulation; unfortunately, the absolute majority of the few measures included in this list were scheduled to be implemented in the fourth quarter of 2008, *i.e.* 'after the election'. As the crisis began, these measures were not implemented; likewise, the Plan of measures for reducing administrative burden on citizens of Lithuania and other persons, which was approved late in November 2008 and contained forty-eight specific measures for the first time ever foreseen to reduce administrative burden, was not implemented.[132]

The 15th Government, which was newly formed at the start of the economic crisis, undertook unfaltering initiatives in the area of reducing administrative burden. In February 2009, the Measures for the implementation of the 2008-2012 Programme of the Government, which were intended for this purpose were approved.[133] These measures provided for the drafting of the Methodology for determining and assessing administrative burden on citizens and other persons as well as for the implementation of the plan of measures, as approved by the former Government, for the reduction of administrative burden on citizens and other persons. The Methodology for assessing the

[129] *Official gazette*, 2005, no. 26–830.

[130] Government resolution no. 1270 of 22 November 2005. *Official gazette*, 2005, no. 139–5019 (see Introduction, §§ 24, 25, 58, 60).

[131] *Official gazette*, 2008, no. 29–1024.

[132] *Official gazette*, 2008, no. 140–5544.

[133] *Official gazette*, 2009, no. 33–1268.

impact of draft decisions was supplemented by providing that the assessment of the impact of 'administrative burden on citizens and other persons, except for persons engaged in business', must be carried out and the criteria for such assessments were laid down.[134] In March 2009, the indicator of reduction of the national administrative burden on business in priority areas (by 30 per cent by the end of 2011) was established and the following seven priority areas were approved: tax administration, employment relations, statistics, environmental protection, transport, real estate transactions, territorial planning and construction.[135] The National Agreement, under which the parties agreed 'to reduce the number of business supervisory institutions and achieve that the bureaucratic and administrative burden on business would be reduced by 30 per cent by 2011', was signed on 28 November 2009.[136]

February 2010 saw the establishment of priorities for the activities of the Government for 2010; besides a few concrete measures, the provided measures included eliminating bureaucratic obstacles to business as well as removing any unnecessary and unfounded regulation.[137] In October 2010, the priorities of the Government for 2011 were established; they contained the commitment to reduce the national administrative burden on business in the priority areas by 30 per cent and to lower the amount of the requirements set in the legal acts regulating the activities of institutions supervising economic subjects and the respective supervised areas by 25 per cent.[138]

The implementation of the Services Directive (12 December 2006)[139] during the first year of the economic downturn is worth mentioning as well. This directive and the Law on Services, adopted in December 2009,[140] established the obligation to review, assess and simplify the procedures and formalities applicable in seeking to obtain, or implement, the right to engage in service provision activity, to ensure the 'one-stop-shop' principle, *etc.* When implementing the Services Directive in Lithuania, over one hundred institutions participated in the process, around 2,000 effective national legal acts were reviewed and around 300 of them were amended.[141]

However, at the end of 2010, when the validity of the National Agreement was about to expire, the stakeholders had a negative opinion regarding the reduction of administrative burden; some experts claimed that the

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134 *Official gazette*, 2009, no. 26–1017.

135 *Official gazette*, 2009, no. 28–1092.

136 Online access: http://www.lrv.lt/bylos/Naujienos/Aktualijos/20091028_susitarimas.pdf, p. 6 [18 December 2014].

137 *Official gazette*, 2010, no. 23–1077.

138 *Official gazette*, 2010, no. 123–6285.

139 OJ 2006 L 376, p. 36.

140 *Official gazette*, 2009, no. 153–6901.

141 European week discussion 'The Services Directive – new business opportunities' of 21 April 2010. Seimas Committee on Economics and Seimas European Information Bureau. Online access: http://www.eib.lrs.lt/index.php?970271439 [6 October 2014].

administrative burden on business grew by 4 per cent during the 2009–2010 period, even though the Government promised to businesses to reduce it approximately by one third by 2012. The Government itself admitted its failure in this area: based on the data provided by the Government, the results of the administrative burden on business expressed in monetary terms showed that the efforts of the institutions in reducing administrative burden were insufficient. The major achievements in the reduction of administrative burden were evident in certain priority areas – the administrative burden was reduced by almost 11 per cent in territorial planning and construction, around 10 per cent – in the area of statistics and around 8 per cent – in the area of transport. It was also stated that, in order to achieve the indicator of reduction of administrative burden established by the Government (30 per cent), supplementary actions to reduce administrative burden should be taken.[142]

In 2011–2012, the work of public institutions aimed at reducing administrative burden was further continued: the Methodology for determining and assessing administrative burden on citizens and other persons[143] was adopted in February 2011 and the Government approved the Methodology for determining administrative burden on economic subjects[144] in January 2012. It was provided that in cases where the draft legal acts requiring the assessment of the impact of administrative burden on economic subjects were submitted by the Ministry of Economy, these legal acts must be accompanied by the completed report on the calculation of administrative burden on economic subjects, as well as that the Ministry of Economy had to assess the reasonableness of that burden. Yet, judging from the draft legal acts registered in the Seimas in 2012, it is clear that there was hardly a single draft explanatory note, to which contained the calculation of the resulting administrative burden and its assessment in monetary terms (the draft amendments to the Labour Code could be considered to be the only positive exception, as their explanatory note specified in detail how much money businesses could save as a result of adopting these amendments).

In November 2012, the Law on Administrative Burden Reduction,[145] which came into force on 1 July 2013, for the first time clearly defined at the statutory level administrative burden as well as the measures and principles of its reduction. This law also laid down the obligations of an institutional nature: to approve the plan for the reduction of administrative burden and submit it to the Seimas on an annual basis and to publish quarterly

[142] Report on the implementation of the Programme for better regulation in 2011. Online access: http://www.ukmin.lt/uploads/documents/Geresnis%20reglamentavimas/Ataskaitos/2011_ataskaita.doc [17 December 2014].

[143] *Official gazette*, 2011, no. 24–1163.

[144] *Official gazette*, 2012, no. 8–264.

[145] *Official gazette*, 2012, no. 136–6957.

information on the implementation of this plan; it was the first time that the obligation was established for the executive institutions of municipalities to submit for approval to municipal councils the plan of measures for reducing administrative burden in the given year; the Government was obliged to form a standing Better Regulation Supervisory Commission and, in addition to its annual activity report, to submit to the Seimas the results of the fulfilment of the plan of measures for reducing administrative burden during the reporting period.

As it was indicated by the Government in its first Activity report for 2013, the legal acts adopted in 2013 allowed reducing the administrative burden by LTL 1.5 million[146] and all the measures for reducing administrative burden, which had been implemented since 2009, reduced the administrative burden by LTL 4 million.[147] The drafts that could, when adopted, help reduce the administrative burden by additional LTL 30 million were submitted to the Seimas. Furthermore, following the review of permits (licences) to engage in economic–commercial activities and the analysis of the conditions of their issuance, it was proposed to replace fifty-two types of licences from the 423 types of licences assessed by the measure that would be less restrictive on business, *i.e.* the notice (declaration), so that businesses willing to start up do not need to wait for a period exceeding thirty days. It was proposed to eliminate ten types of licences as excessive or unfounded and to simplify the procedure for issuing licences to businesses, *i.e.* to amend the legal acts regulating another 160 types of licensed activities. These actions should be considered as adequate in seeking to reduce administrative burden on business.

4. The business regulatory framework and the crisis

The 2008–2014 crisis brought about additional challenges to the business environment of Lithuania and other post-Soviet states. The development of the system of interrelations and mutual liabilities between business and public authorities is still underway in Lithuania, and the business environment is particularly sensitive to any factors that may influence it. Thus, the 2008–2014 crisis posed serious challenges to all individuals and their associations related to business, the freedom of economic activity and initiative. It is, therefore, important to clarify whether the actions taken by the Lithuanian Government on the eve and in the wake of the crisis complied with the requirements of

[146] LTL – Lithuanian litas (plural – litai). Litas exchange rate was established at 3,4528 LTL for 1 euro. Euro was introduced in Lithuania from 1 January 2015.

[147] Government resolution no. 257 'On the submission of the Activity report of the Government of the Republic of Lithuania for 2013 to the Seimas of the Republic of Lithuania' of 26 March 2014. *TAR*, no. 2014–0350, 26 March 2014; see Section 6.1 'Improvement of business conditions'.

good (responsible) government, as well as to identify situations, where such requirements allegedly were not observed.

4.1. The freedom of economic activity: a theoretical dimension

The freedom of economic activity in Lithuania evolved within the context of the developments and tendencies taking place in Europe. The text of the Lithuanian Constitution says little about the influence of the state on the national economy and contains no explicit provision that the distribution of wealth in Lithuania is based on the principle of a free market. The Lithuanian Constitution remains silent about wide-ranging obligations of a contemporary state with regard to economic government, which are, as a rule, enshrined in the constitutions of older democracies. Due to the fact that the Constitution is relatively non-inclusive, additional duties have to be assumed by the Constitutional Court, which becomes responsible for providing a more extensive interpretation of the rather concise constitutional provisions. In its interpretation of Article 46 (the key article on the freedom of economic activity) of the Constitution, the Constitutional Court adopts a rather moderate approach. In summary of the *obiter dictum* of the jurisprudence of the Constitutional Court on the issue of the freedom of economic activity, the following may be outlined: (i) the Constitutional Court avoids directly identifying the freedom of economic activity as a constitutional human right; in order to substantiate the constitutionality of this freedom, it is linked to other constitutional human rights and constitutional provisions: individual freedom, inherent rights and the equality of rights, by consistently pointing to the fact that the freedom of economic activity is not absolute and may be subject to limitations; (ii) the content of the freedom of economic activity is further elaborated through the considerations more characteristic of the analysis of a principle rather than of the content of a right, at times even employing the concept of the 'principle of the freedom of economic activity'; (iii) in its interpretation of Article 46(3) of the Constitution that 'the State shall regulate economic activity', the Constitutional Court underlines that this provision means not the right of the State to administer all or certain areas of economic activity at its discretion but rather the right to establish a regulatory framework of economic activity, *inter alia*, conditions, restrictions (prohibitions) and procedures established in legal acts in relation to economic activity; (iv) as the aim of the regulation of economic activity, the ensuring of the general welfare of the nation is referred to most commonly. The general welfare of the nation is not exclusively interpreted as the fulfilment of individual material needs but, instead, it is construed by referring to other categories (social development of the nation,

possibilities for individual self-expression) and by noting that the content of the concept 'the general welfare of the nation' is in every specific case revealed by referring to economic, social and other important factors (the concept of 'the general welfare of the nation' has not been extensively elaborated); (v) it is indicated that the regulation of economic activity is usually based on the general principle of permission: everything that is not forbidden is allowed; the regulation of the freedom of economic activity has not been analysed in greater detail; (vi) the Constitutional Court adheres to the doctrine typical of all Western democracies – the freedom of economic activity may be restricted where it is necessary to protect consumer interests, ensure fair competition and other values enshrined in the Constitution, noting, in particular, that any restriction of the freedom and legitimate interests of an economic subject must be proportionate, as well as that such restrictions may not deny the nature and essence of rights and freedoms; (vii) a regulation of specific relations may not be identical over time but the changing content of a legal regulation may not overrule the principles of the economic regulation of the nation as enshrined in the Constitution; (viii) competition brings about self-regulation within an economy as a system, thus encouraging an optimal distribution of economic resources and their effective use, an increase in economic growth and the enhancement of consumer welfare, as well as obliging the state to ensure fair competition; (ix) legitimate restrictions of the freedom of economic activity include such new categories as human health, environmental protection from harmful impact, sustainable use of the nature, rational use of natural resources and remedying of environmental damage; (x) when assessing the performance of the public authority in the face of emergencies (crisis), the Constitutional Court concluded that under these circumstances the public authority seeking to balance public finances may divert from the usual procedures and standards of lawmaking.

4.2. The freedom of economic activity and the crisis: a horizontal dimension

The crisis was met by the Kirkilas minority Government (although the Government denied at that time it was acting under conditions of the crisis). After the 2008 election, the ruling majority was in principle changed. At the end of 2008, the Kubilius Government faced a rather complicated dilemma – the ruling coalition was made up of the political parties largely pursuing conflicting political ideas, some of the political parties, which came into power, had no previous experience in state government. As it transpired, the state stood on the verge of bankruptcy. Under these circumstances all decisions related to public government had to be dealt with immediately.

However, even at such difficult times the public authorities were bound by the imperative of responsible government. Businesses usually expect from the state the following: clear and stable rules for doing business, stable tax policy, the adequate, targeted and proportionate oversight and control of business and market, uncomplicated conditions for starting up new businesses, transparency in the areas with a huge impact on business (such as public procurement, territorial planning, issuance of construction permits, *etc.*).

The following major achievements by the public authorities could be identified during the crisis period: (i) fixed intensive attempts by the Government to stimulate investments into the Lithuanian economy. The business community acknowledged this fact and were positive of the actions taken; (ii) significant changes were introduced in the area of business administration (in terms of oversight and control), more specifically, both in regulatory framework and in practice. In 2010, the Law on Public Administration was supplemented with Section 4 'Oversight of the activities of economic subjects' aimed at the major overhaul of the very attitude to this area: a completely new concept of oversight was introduced giving priority to consultative and methodological assistance, the introduction of tools to ensure compliance with the statutory requirements rather than penalties for the violations of law; the new principles of business oversight were introduced, such as 'first knock and then check'; the issue of the optimisation of the functions of oversight institutions started to be addressed, *etc.*; (iii) major changes were made in the regulation of public procurement after shifting a considerable share of procurement online and thus simplifying certain types of procurement as well as the verification of supplier competences and introducing other regulatory transformations in this area; (iv) to a certain extent territorial planning was simplified, the procedure for issuing construction permits was liberalised and accelerated, conditions were put in place to simplify the regulation of construction processes; (v) as of January 2010, the procedure was simplified for establishing a sole proprietorship and, as of November the same year – a private company (where it has only one founding member); (vi) a micro partnership was introduced as a form for starting up a new business under a simplified procedure and benefiting from start-up tax reliefs; (vii) significant changes took place in the energy sector: the liberalisation of the electricity market was underway, legal and factual preconditions were put in place to acquire a liquefied natural gas terminal and conditions were set for the use of alternative renewable energy sources, *etc.*

Despite the achievements listed above, business representatives were rather critical about the governmental actions whenever speaking in public. The first signs of disappointment with the Government became evident following 'the overnight tax reform'; later, a similar negative attitude was caused by the business stimulus plan, which had been spoken of by the public authorities at great length ever since the beginning of 2009 but, nevertheless,

was assessed more unfavourably rather than positively.[148] An absolute majority of the respondents in managerial positions claimed that some of the governmental actions taken during the crisis further aggravated attempts to overcome it instead of facilitating its resolution.[149] An identical evaluation of the Government was shared among the business respondents of the present study. When asked whether the Government took decisions to mitigate the consequences of the crisis, 68.4 per cent of the respondents claimed that such decisions had not been made whereas another 10.5 per cent believed that decisions were taken but had no significant influence. The attempts to identify at least some positive decisions taken at that time yielded not a single respondent (0 per cent), who would have claimed that procedures had been simplified. 50 per cent of entrepreneurs indicated that the governmental decisions were more detrimental rather than favourable to their business while 16.7 per cent claimed that these decisions had neither a negative nor a positive effect. Such a critical assessment by business representatives of the actions made by public authorities should be interpreted as a certain social fact, whose root causes need to be analysed.

4.3. On the (in)capacity of public authorities to read the signs of the crisis

When resolving a constitutional dispute, the Constitutional Court held that state institutions should undertake all possible measures to forecast tendencies in the development of the national economy as well as to make necessary arrangements in preparation for extremely grave economic or financial situations.[150] Unfortunately, it needs to be concluded that, in 2007-2008, neither the ruling majority nor the opposition voiced any signs of the upcoming crisis in Lithuania despite the fact that such signs should have been obvious to individuals, who had access to the relevant information.

[148] In summer 2010, there was a public debate about the findings of the National Audit Office revealing that the economic stimulus measures for small and medium-sized businesses had been insufficient while most of the measures foreseen had been found to be of a declarative nature. The Office indicated that out of LTL 2.1 billion allotted to the economic stimulus plan to expand business opportunities the amount actually allocated by the decrees of the Minister of Economy a year before had been LTL 1.2 billion while only LTL 155 million had actually reached the market. See Fuks, E. 'Valstybės kontrolė: ekonomikos skatinimo planas nepakankamai veiksmingas' [National Audit Office: Efficiency of the economic stimulus plan is not sufficient] in *Verslo žinios*. Online access: http://archyvas.vz.lt/news.php?id=8897796&strid=1003&rs=0&ss=88746b180c8a41ea1af6e3da95f1038e&y=2010_06_02 [7 January 2015].

[149] Slušnytė, R. 'Vieni džiaugiasi, kiti giriasi, treti ima pykti' [Some are happy, others are boasting, yet others are angry] in *Verslo žinios*, 2010, no. 140, p. 4.

[150] Constitutional Court decision of 20 April 2010. *Official gazette*, 2010, no. 46–2219.

Governmental representatives continuously denied any signs of the crisis. Even after the second international rating agency Fitch Ratings (preceded by Standard&Poor's) downgraded Lithuania's rating prospect from stable to negative (immediately after the approval of a deficit budget in Lithuania), the members of the Government continued maintaining in public that the situation had to be assessed soberly and that there was no imminent danger.[151] Similarly, politicians from the opposition at that time did not state that, by approving a deficit budget and by not taking any possible measures to harness inflation, the Government was paving the way for yet a larger scale of the crisis. The same approach was followed by individuals, who were not members of the political or ruling elite but enjoyed a high degree of authority and special competences, *e.g.*, financial experts of banks, who, in principle, used to dominate and keep on dominating the entire expert market, did not express a clear position on the actual situation of the Lithuanian economy (with only very few exceptions, when attempts were made to draw the attention of the Government to the situation in the national economy). In this regard, representatives of academia should also take their fair share of responsibility for failing to provide in their publications any insights into the looming crisis. Only a handful of public figures of the time dared to be outspoken and signalled the real situation and imminent threats. First of all, the then European Commissioner in charge of financial programming and budget, Dalia Grybauskaitė,[152] criticised the then Government on numerous occasions for an inappropriate utilisation of EU assistance, a lack of fiscal discipline and an unsuccessful fight against inflation.

Two conclusions can be drawn in summary. Firstly, the Lithuanian public authorities must have acted differently at the time of the economic boom and must have accumulated financial safety reserves essential at the time of hardships – the Lithuanian public authorities failed to do this in contrast to the Estonian government. Secondly, the Lithuanian public authorities acted irresponsibly by failing to appreciate the data at their disposal – already at the time of the submission and approval of the 2008 budget there was a sufficient body of evidence depicting the real situation Lithuania was in at that time. An outspoken acknowledgement of the signs of the crisis would have forced the public authorities to change the national government policies and would have dispelled the illusions entertained by some entrepreneurs as well as consumers of the products developed by entrepreneurial business.

[151] Vernickaitė, A. 'Kirsta skaudžiai, bet dar ne iš peties' [A painful blow, but not with all strength] in *Verslo žinios,* 2007, no. 235, pp. 2–3.

[152] Now President of the Republic, elected in 2009 and re-elected in 2014.

4.4. On (non)communication with society during the crisis

The operational methods of the 15th Government were noted for the unwillingness (inability) of its representatives to communicate with society and the groups of stakeholders. The new ruling majority, which left its footprint in Lithuania's history as 'the overnight tax reformist', did not reach out to society, did not coordinate its future decisions with social groups, failed to explain to society its goals and, whenever requested to provide the reasons behind one or another decision, allowed itself a rather blatant behaviour that was not always politically correct. Already at the beginning of 2009, the Government was criticised for lacking a communication strategy. The mass media continuously reiterated that the historical legislation affecting the lives of several million of Lithuania's population had been adopted having not heard a single opinion of business organisations or NGOs; the Association of Lithuanian Chambers of Commerce, Industry and Crafts made public their disapproval of the plan for overcoming the crisis proposed by Kubilius; however, seemingly, no reaction followed.[153] Admittedly, the behaviour of individual figures in public authority was later changing; however, the very fact that the public authority made inappropriate arrangements during the initial phase of its activity determined that the Government acting at the time of the crisis was and still is described as the Government that did not seek to communicate, coordinate or explain its decisions.

The lack of consultation with society was particularly obvious at the time of 'the overnight tax reform', when almost fifty legislative drafts were submitted for consideration under a fast-track procedure, including amendments to over 220 articles, 106 of which were related to the calculation and payment of taxes. As it turned out later, many mistakes were made, which subsequently had to be speedily corrected. The situation brought into the legal system by the representatives of public authorities is best described by the findings of the conducted survey: 70 per cent of the surveyed specialists in law indicated that, at the time of the crisis, priority was given to the speedy accomplishment of law-making procedures rather than the quality of legal acts; moreover, 70 per cent of the latter respondents stated that the adopted anti-crisis legislation was incomprehensive, 72.9 per cent claimed that it was not drafted properly while 60 per cent believed that it was not properly implemented. Interestingly enough, the corresponding survey of civil servants and politicians yielded 82.2 per cent of the responses indicating that the anti-crisis legislation was

[153] Stankevičius, R. 'Mokesčių didinimas – ne tas kelias, kurio dabar reikia Lietuvos ūkiui' [Increase of taxes – not the best way for the Lithuanian economy at the moment]. Online access: http://www.lrytas.lt/-12271828271225706483-mokes%C4%8Di%C5%B3-didinimas-ir-suvienodinimas-ne-tas-kelias-kurio-dabar-reikia-lietuvos-%C5%ABkiui.htm [6 November 2014].

necessary, of which 60.3 per cent expressed the belief that the legislation was drafted inappropriately, 43.8 per cent – that it was incomprehensive, and 52.1 per cent – that it was not implemented properly.

Cooperation with the stakeholder groups of society is essential in seeking to reach an agreement and find compromises; while a failure to comply with this requirement constitutes a violation of responsible government, which, in this particular case, might have caused adversity to the public authority as expressly voiced by society and business representatives in the survey and public discourse.

The analysis of the period of the crisis allows drawing yet another conclusion that business and groups of business representatives often behave in the way as if they were the only contributors to the GDP. The impression is that this sector fails to acknowledge that the public sector contributes to the GDP on a parity basis along with the private sector and that none of these segments is more or less crucial than the other. Thus, a rather negative assessment of the actions of those in public authority could be accounted for by a highly critical and sometimes disrespectful tone assumed by entrepreneurs or related individuals in their discussions about the actions taken by the public authority, which should be similarly avoided in the interest of mutual agreement.

On the basis of the available survey findings a rather unambiguous conclusion can be drawn that the attitude held by society towards the public authority has reached a critical point; the latter group, as well as all other groups shaping the views of society should be obliged to act with particular responsibility if mutual trust is sought and is to be encouraged.

4.5. The freedom of economic activity and the crisis: a vertical dimension

4.5.1. Public procurement

The state acquires goods, services and works on the market through public procurement. It is almost impossible to overestimate the scale and significance of public procurement in the states where EU public procurement comprises approximately 16 per cent of their national GDPs;[154] in Lithuania, in 2012, over LTL 14.5 billion was spent on public procurement (which made up about 13 per cent of the GDP). The key aim of public procurement is to ensure the rational use of national budgets and provide access to quality goods and

[154] European Commission press release database. Online access: http://ec.europa.eu/trade/policy/accessing-markets/public-procurement [6 November 2014].

services necessary for the appropriate performance of state and municipal activities based on the principle 'best value for money whenever procuring from taxpayers' money'.[155] To achieve this goal, a state is obliged to set the rules ensuring equal opportunities and rights to all tender participants. Moreover, public procurement has to be organised in a transparent manner to make (both *ex ante* and *ex post*) control possible in verifying whether a contracting authority has complied with the principles of fair treatment and non-discrimination in respect of potential suppliers. A contemporary state associates public procurement with additional obligations, *i.e.* promoting the implementation of the tasks related to social ecosystems, environmental protection, innovations and other social objectives and aiming at advancement in these sectors. Such goals are pursued by the so-called sustainable public procurement, which makes an impact on all processes taking place on the market. At the time of the crisis, public procurement gained a different meaning – in the context of limitation on loan-granting and suspension of many economic projects funded from private funds, winning a public procurement contract meant an opportunity to secure reliable funding to carry out certain activity and sometimes even the only way to prevent the insolvency of an enterprise. High expectations in this area led to heated conflicts of interests thus, probably for this reason, public procurement was often described as one of the least transparent and most corrupt areas of the national economy during the researched period.

All Governments working during this particular period saw the enhancement of transparency and the rectification of regulatory faults in the area of public procurement as one of their key priorities. The 15th Government paid particularly great attention to public procurement. Various overhauls of the system were planned, with the introduction of a centralised procurement system and the expansion of online public procurement being among most significant. The public procurement information system was developed enabling contracting authorities to organise the entire public procurement process online and facilitating participation for potential suppliers in the procurement procedures in a convenient and simple manner following the 'one-stop-shop' principle. Lithuania was listed as an example of good practice countries in online public procurement in the EU. The 16th Government, however, started its operation by reiterating the statement that public procurement called for immediate overhaul, while business society continued to identify public procurement as one of the least transparent state-regulated areas.

Public procurement was an exceptional area in terms of the abundance of the introduced regulatory amendments. During the period at issue, the Law on Public Procurement was amended nineteen times, of which the law amending/supplementing the Law on Public Procurement was altered three

[155] Soloveičikas, D. 'Viešųjų pirkimų teisės tikslai ir jų įgyvendinimas' [The objectives of public procurement law and their implementation] in *Teisė* 2014, vol. 91, p. 55.

times. During this period, the Director of the Public Procurement Office himself adopted over 150 orders of various degrees of mandatory enforcement regulating situations related to public procurement or amending the previously effective regulation. During the term of the 15th Government in power alone, the law was amended fourteen times. It is obvious that some amendments were enacted in violation of the law-making requirements (*e.g.*, on 23 December 2010, the Seimas adopted as many as three legal acts related to amendments to this law, and this was not the single case). The inappropriate law-making policy transformed public procurement into a chaotic, incomprehensive and unpredictable area. As a result of the irresponsible operation of the public authority, negative consequences affected a huge part of population operating in the public and private sectors.

Lithuania has publicly rejoiced in its increasing achievements in green procurement, but the situation of green procurement is similarly rather questionable. The very principle of calculating the percentage is disputable as the percentages are calculated both for the number of procurement contracts and for the value procured (following the standard requirement for an equal percentage for the both values);[156] the percentage is calculated only on this procurement that is subject to environmental protection requirements; the obligation to carry out green procurement is not universally mandatory – this obligation has been set by a Government resolution and applied to ministries, Government establishments and other subordinate institutions but it is not mandatory for other significant contracting subjects (municipal, utility institutions, other state-controlled bodies); no mechanism for oversight and control over green procurement has been put in place (or stipulated); all accumulated information on green procurement is of an unclear degree of reliability because its validity depends exclusively on the responsibility of a contracting authority; thus, it is difficult to ascertain the real situation in green procurement; whenever green procurement is organised, all attention is focused on the procedural side of public procurement totally neglecting the real ultimate result. It is, therefore, doubtful, whether such a regulation is in line with the genuine objective of integrating environmental protection requirements into the field of public procurement. A completely different approach has been taken by the Lithuanian public authorities to another category of identical nature, *i.e.* to social public procurement. To make this procurement mandatory, the statutory rather than substatutory form of regulation was chosen – the Public Procurement Office has exercised much stricter control over public procurement conducted from social enterprises and establishments and, in practice, has expressed the opinion that the greater attention to these procurement contracts is determined by their regulation at the statutory level.

[156] For instance, the target of 30 per cent for 2014 means that the percentage of green procurement contracts must reach at least 30 per cent, and the value must also be at least 30 per cent of the total value procured.

At times, it may seem that the Lithuanian legislator lacks resolve as to the direction, in which public procurement should be evolving, *i.e.* what objectives are to be given priority. Public procurement cannot be uncomplicated, easily implementable and undemanding in terms of additional costs in respect of contracting authorities and tender participants on the one hand and be maximum transparent, fair, equal and predictable on the other. Therefore, the legislator must be aware, which of these goals constitute the highest priority. On 3 July 2008, a legislative amendment was adopted (and entered into force as of 15 September 2008) bringing a high degree of liberalisation into the area of public procurement: the customary commercial practices were discarded and the new concept of low-value procurement was introduced; the conditions were established to enable contracting authorities to procure below certain procurement thresholds under the publicly announced internal procurement rules set by the authorities themselves; opportunities were created enabling contracting authorities to identify cases when procurement contracts could be concluded orally, *etc.* Contracting authorities were given a high degree of discretion; considering that simplified procurement and, in particular, low-value procurement make a significant share of total procurement, the established new conditions facilitated the spread of various prearrangements and non-transparent awards of contracts predetermined beforehand. Later, the regulatory framework was changed completely to the opposite – additional new requirements were established to ensure higher transparency, which put an additional burden on contracting authorities: the obligation to publish draft technical specifications for all procurement (except for low-value) and announce about any instituted procurement (except for low-value), successful tenderers and any contracts to be awarded or those already awarded on the website of the procuring organisation as well as in the supplement *Informaciniai pranešimai* ['Information notices'] to the official gazette *Valstybės žinios*; only low-value procurement could be cancelled without authorisation of the Public Procurement Office (under the previously effective regulation, all simplified procurement contracts could be cancelled), *etc.* These amendments ensured a higher degree of transparency and more stringent control over the activities of contracting authorities but, undoubtedly, increased the administrative burden on contracting authorities and the Public Procurement Office.

The Butkevičius Government commenced its work at the time of wide media coverage of the chaos and non-transparency prevalent in public procurement giving the impression that the pro-transparency measures applied previously had failed to achieve the desired effects. However, the Government resolved, under the procedure of urgency, to take an additional step towards a further liberalisation of public procurement and proposed increasing the upper thresholds in cases where procurement was conducted under the internal rules set by the procuring organisation itself by twice the amount as established previously – up to LTL 200 thousand for goods and

services and up to LTL 1 million for works (these proposals by their nature further expanded the level of discretion of contracting authorities diminishing transparency in public procurement). The amendments were criticised by the Head of the Public Procurement Office, part of MPs, the Office of the President and Transparency International. Despite criticism, on 22 October 2013, the regulatory framework was amended once again to further expand the threshold of low-value procurement – though exceptionally in respect of goods and services (apparently, some of the voiced concerns might have been heard, after all).

Public procurement constitutes a perfect example of a tension between competing values and goals in the field of law. After having been given a mandate to act in the capacity of a public authority, individuals are obliged to and can decide which of the values is to be given higher priority for the purpose of attaining particular political and social goals. This process, however, should be conscious and rational, driven by the understanding of the ultimate goals. The ultimate goals must be publicly declared, the instruments of the legal regulation selected for the attainment of these goals must be in line with law-making principles, the consequences of any amendments to the applicable legal regulation must be considered, the institutional memory must be maintained, the continuity and succession of the earlier policy must be preserved – this is the behaviour that is required by the principle of responsible government and that appears to have been missing in the area of public procurement during the analysed period.

4.5.2. Territorial planning and the modernisation of buildings

Territorial planning and the issuance of construction permits are the categories directly linked to the assessment of the quality of the business environment. In 2013, a new regulatory framework for territorial planning was introduced in Lithuania (effective as of 1 January 2014), which is sometimes referred to as 'revolutionary'. The preconditions for these processes and eventual results developed during the period under investigation.

The period at issue was noted for a rather critical business attitude towards the regulatory system of territorial planning processes in Lithuania. The outset of the crisis was followed by the publicly voiced information that territorial planning and construction oversight remained one of the most corrupt areas of public administration in Lithuania, that the territorial planning procedure was artificially protracted, unpredictable and dependant on the attitude of civil servants and municipal politicians and that there was no state concept of territorial planning at all. In 2010, the Government approved a new concept of the Law on Territorial Planning, which was publicised as exceptional and aimed at replacing the highly criticised planning system in use since 1995.

The processes that took place during the researched period and were completed at the time following this period reveal certain tendencies that allow assessing the actions taken by public authorities from the aspect of good (responsible) government: (i) the regulatory framework was subject to changes prioritising business interests and at the same time frequently weakening or sometimes even ignoring public interest (the list of cases exempt from the required detailed territorial planning was considerably extended; the procedure for drafting general plans was simplified; the requirements for specialists in charge of territorial planning and construction works were lowered: irrespective of the size of a territory specialists other than architects were allowed to draft projects for the formation of land parcels, *etc.*); (ii) the public authorities introduced stricter liability for the state (municipalities) in the area of territorial planning and construction works (administrative liability for violations in territorial planning and construction works was established for public administration subjects involved in decision-making, municipal civil liability was provided for damage arising from an unreasonable rejection of a detailed plan, *etc.*); however, these changes were made without additional allocations of public funding for municipalities and in the absence of certain legal preconditions, thus potentially violating the principle of good government and the rights to self-government. With the same human and financial resources at their disposal, municipalities were obliged to work more quickly and efficiently; (iii) by lowering qualification requirements for specialists actually involved in drafting and implementing territorial planning and construction projects, the state created the preconditions for the quality of environmental arrangement and buildings to deteriorate as well as for constructions to develop in a chaotic way; (iv) the public authorities developed such a regulation that enabled them to categorise, without any consultation with society, buildings as having the status of an object of special national importance (to grant such a status, a resolution of the Seimas was even not always necessary – sometimes a Government resolution was sufficient); after granting such a status to an object completely different conditions applied to the entire planning process while the involvement of society in the process became even more difficult; through this regulation, the public authorities created for themselves a convenient possibility of adopting decisions at their own discretion; (v) the processes of territorial planning and organisation of construction works were gradually moved to an electronic space and this should be considered as an appropriate development in ensuring greater transparency and publicity of these processes. However, even when amending the legal regulation and practice, no necessary financial and human resources were provided for in order to introduce a new framework, and this resulted in an exceptionally complicated course of the processes and, initially, even in lowered efficiency results.

These tendencies lead to the conclusion that, during the period at issue, the preconditions for new developments in the areas of territorial planning

and construction works were mostly created while acting in the interests of business. From today's perspective, it may be observed that the situation where it was sought to lower requirements and reduce the costs incurred by businesses brought the danger that territorial planning and construction might be developed in an even more chaotic and incompetent manner.

Another economic area on which high expectations were placed by business was the modernisation (renovation) of buildings. The task of the modernisation of buildings (both public ones and blocks of flats) was initially formulated as an objective to increase energy consumption efficiency in Lithuania but, at the period under investigation, the attempts to start and develop the modernisation of buildings were more linked with another objective – the modernisation of buildings had to provide work for the construction sector, which was seriously affected during the crisis, and thus to create new jobs. Since 2009, a large number of legislative amendments were adopted in order to encourage the renovation of buildings in Lithuania. However, already in 2012, it was universally acknowledged that renovation fell well behind the schedule; consequently, this undeveloped process was reasonably regarded as one of the greatest failures of the 15th Government. Despite the objective reasons (the financial-economic crisis, stagnation in the construction market, the lack of public funding, *etc.*), there were obvious mistakes made by the public authorities: while drafting and implementing the building renovation concept, the public authorities did not comply with the requirement to hold consultations with the groups of stakeholders; several regulatory errors were committed, part of which were identified by the public authorities themselves, although only after a while (*e.g.*, initially, concessional loans for the implementation of projects were extended only to owners of apartments and other premises, which meant that an operator of commonly used premises could not be a party to a credit contract); the renovation model developed in Lithuania did not offer (nor offers) any possibility of raising funds for project implementation from the third parties (such as business companies), who could act as intermediaries between apartment owners and contractors as well as undertake risks in favour of the contractors and fund the project.

At the time of the crisis in Lithuania, the renovation of buildings was not undertaken on such a scale that would have had a positive impact on business. It is, therefore, questionable, whether the state assessed its possibilities at the time of the crisis when assuming obligations in building renovation and allocating huge resources for promoting renovation – the crisis period was exceptionally unfavourable for such processes as renovation, and the public authorities could have (must have) predicted the eventual outcomes and should have focussed their efforts on other priorities instead.

4.5.3. The energy sector

The cost of energy resources makes up the largest share of the overall cost of any goods or services therefore the state policy in the energy sector has an exceptional significance for private business. During the analysed period, many significant changes took place in the area of energy. The regulatory framework of the electricity and gas sectors went through a major overhaul. The third EU Energy Package for gas and electricity sectors (involving the unbundling of electricity and gas transmission from distribution, supply and production activities)[157] was implemented, and the implementation of the strategic gas and electricity infrastructure projects was started: power links (LitPol Link, NordBalt), gas links and the project of the liquefied natural gas terminal (LNGT). At that time, the methodology for pricing in the gas and electricity sector as well as the system of control over gas and electricity companies were specified. In the electricity sector, the electricity market was liberalised. In the area of heating, the Government focussed on the expansion of combined heat-and-power plants in cities, the modernisation of heat generation facilities, the further expansion of biofuel and waste usage; decisions were taken to de-monopolise the sector: technical maintenance and ownership of heat generating facilities were separated from heat supply companies; the procedure for fixing heat prices was set out.

On the basis of the study carried out, it may be assumed that the public authorities undertook so many obligations in the energy sector that it was objectively impossible to fulfil them. These commitments were presented to the public as real, equally important and implementable. Huge amounts of funding were allocated for performing these obligations but, seemingly, the actions of the public government in some areas were frequently fruitless. The representatives of the state failed to prioritise objectives and be consistent in following them through – this is true about a larger share of the energy projects undertaken during the researched period. Secondly, the public at large was incapable of appreciating the true stance of the public authority on very important energy projects, such as whether Lithuania should remain a nuclear state and whether it should start extracting shale gas. Thirdly, the analysis of the crisis once again reconfirmed the previous assumptions that the Lithuanian public authority, which functions under a parliamentary form of government (with certain exceptions), was unable to reconcile the interests of all groups of stakeholders and seek the objectives important for the welfare of the entire state; this failure on the part of the public government was particularly obvious in the energy sector. Fourthly, the operation of the energy sector (similarly to other areas of the economy) revealed a striking

[157] Lithuania opted for one of the strictest available implementation models of the Third Energy Package (not chosen by any other state); therefore, the question objectively arises as to the grounds (calculations) based on which it was decided that the said model was the best option for Lithuania.

inability of the public authorities to cooperate and negotiate with stakeholders and specialists; even where some consultation did take place, the choice of consulting parties and the effectiveness of the use of public funding for holding these consultations raise considerable doubts (according to public data, from 2009 to 2012, the Ministry of Energy procured legal services for LTL 22 million and consultation services for LTL 1.5 million although what resulted from these services (and, in particular, legal consultations) paid from public funds were created to the advantage of the projects in the energy sector and society at large) remains unclear. Fifthly, during the period under examination, the public authorities suffered obvious failures which should be directly linked to its insufficiently effective actions, *e.g.*, shale gas exploration and extraction was not launched – the period of the crisis was peculiar in that the conditions for the activity necessary to carry out shale gas exploration and exploitation were worsened: the environmental requirements were made more stringent and the gas extraction fees were increased and, due to that, the activities in question did not start in Lithuania at all (such an outcome could also be ascribed to the inability of the public authorities to work with local communities, in whose neighbourhoods shale gas exploration and extraction was planned).

The energy sector provides a clear illustration confirming the failure of the public authorities to cooperate with private partners as well as their inability to ensure the continuity of policies and accountability to the public. One of the most striking cases was the establishment and closure of LEO LT. The Kirkilas Government believed that the energy project for the establishment of LEO LT was one of their greatest achievements. This project was the first attempt of this kind to join a private equity company and the state into one legal entity for the purpose of carrying out a particularly important activity – building a nuclear power plant and electricity power grids. Since 2009, following the change in the composition of the ruling authority, the stance of the public government in respect of this project changed in principle – a speedy winding-up procedure of LEO LT was instituted. In December 2009, it was announced that the state and NDX Energija had concluded an agreement on the winding-up of LEO LT (information on certain enforcement measures applied by the state, which 'helped the private investor to decide', was publicly announced). Society did not have nor has any information about the circumstances surrounding the development and closure of this project. Nobody has ever given any explanation on the legitimacy of the actions of the public authority officials, whose decisions were essential for establishing LEO LT. A short-lived LEO LT story caused a tremendous harm to Lithuanian society by compromising the idea of a business and state partnership. In this context, confrontation between business and the public sector was further aggravated and this should be regarded as a serious obstacle to economic development.

Despite enormous sums spent from public funding and state-owned companies (according to official statistics, from 2009 to 2012 state enterprise

the Ignalina nuclear power plant procured (mainly legal and consultation) services for LTL 45.55 million), the new ruling majority (which took over at the end of 2008) failed to solve the underlying problem related to the decommissioning of the Ignalina nuclear power plant, *i.e.* its disputes with contractors. An example of the project of the new Visaginas nuclear power plant can speak for itself as well: despite the fact that from 2010 to 2012 UAB [JSC] Visaginas nuclear power plant procured various services for LTL 75.8 million,[158] the issue of the construction of the nuclear power plant was not solved while some large-scale procurement contracts, well above the international public procurement thresholds, were ruled by the Public Procurement Office as unlawful by reason of the violation of the statutory requirements.

Yet another case challenging the capacity of the elite of the public authorities to work consistently for the welfare of the state is the installation of the liquefied natural gas terminal. Even after the strategic goal of acquiring the liquefied natural gas terminal has been achieved, it remains unclear how this project has to be interpreted. When summarising the key events of 2014 for the *Veidas* weekly, President of the Republic Grybauskaitė named the liquefied natural gas terminal as a major achievement of Lithuania pointing out, in particular, the role of the terminal as a safeguard of energy independence and as a possibility for choosing potential suppliers, which altogether contributed to energy security. The President claimed that the presence of the terminal also gave us political independence: a tool of political pressure was eliminated; we gained a wider choice of suppliers and a higher degree of security. The President underscored the role of the terminal: as a regional terminal it safeguards the security of all the Baltic States by contributing to the decrease of gas prices.[159] Public discourse, nevertheless, provides a completely different evaluation: *e.g.*, the *ad hoc* investigation commission of the Seimas led by MP Arūnas Skardžius submitted its opinion on the assessment of the results in the implementation of the objectives formulated in the 2007 National Energy Strategy and the clarification of the situation in the energy market. The said opinion by the *ad hoc* Seimas commission presents an exceptionally negative interpretation of the actions taken by the public authorities in the energy sector and in the process of the installation of the liquefied natural gas terminal.[160] Such and similar facts cause chaos in the public and create a fertile ground for building mistrust of politicians which, in turn, conditions the overall distrust of all public authorities as well as of the state as a form of the organisation of societal life.

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158 Seimas resolution no. XII-817 'Regarding the Conclusion on the implementation of the goals set in the 2007 National Energy Strategy, assessment of the results achieved and the situation in the energy sector' of 10 April 2014. *TAR*, no. 2014–04447, 15 April 2014.

159 Lėka, A. 'Prezidentė: 'Reikalaudama sprendimų turi atsižvelgti ir į geopolitinę situaciją' [President: 'When calling for solutions you should take into account the geopolitical situation'].in *Veidas*, 2015, no. 1, pp. 8–9.

160 Seimas resolution no. XII-817 (cited above).

The state policy on solar power plants as an alternative source of energy has similarly received a controversial assessment in the public. The state set highly favourable conditions supposed to encourage individuals to get engaged in this area of the energy sector. As it turned out later, when planning incentive measures the public authorities failed to take into account all the relevant factors (*e.g.*, the fact that solar collectors would become far less expensive globally in the future, due to which a large number of people would be willing to build such power plants), all resulting in the growing interest in solar power plants to an extent that would endanger public finances of the state. It remains unclear what calculations were used as the basis for such a high feed-in tariff that was fixed and encouraged many people to go into the business in order to earn large and guaranteed profits. To rectify the situation and to prevent energy prices from increasing,[161] legislative amendments were adopted in 2013, which aimed at managing the growing development of solar farms up to 30kW. When amending the regulatory framework the Government provided for the compensatory mechanism to reimburse the costs incurred, which was naturally met with discontent by the people who planned huge and guaranteed profits in this area. The mass media published invitations from several law firms encouraging the aggrieved parties to use their services for drafting procedural documents in preparation for litigation with the state directly referring to outright victories of such proceedings. Against this background, the courts were the institutions tasked with the assessment of the lawfulness of such actions by the state. An expanded panel of the judges of the Supreme Administrative Court in its ruling of 23 December 2013 upheld the decision of the court of first instance and rejected the claimant's request to oblige the Ministry of Energy to establish that the upper price thresholds of feed-in tariffs for electricity generated in a solar power plant should be fixed on the basis of legal acts and the procedures and terms provided therein which were effective at the time of issuing permissions to expand electricity capacities. The court held that the claimant's right to avail of the incentive system was not denied in its entirety and established that the limitation of the rights of the claimant was not disproportionate, that it was based on public interest, consumer protection and the general welfare of the state and decided to dismiss the claim of the claimant on these grounds.[162]

The state policy in the area of the imported gas sector deserves to be mentioned separately. At the time of the crisis, the price paid by Lithuania for natural gas imported from Gazprom was among the highest in the EU.

[161] According to the estimates by the National Commission for Energy Control and Prices, if all investors who had been granted expansion permits by September 2012 would have started electricity generation, LTL 86 million from the Public interest service funds would be necessary to buy back the electricity generated at a higher than the market price, which would eventually result in a 1 ct/kWh more expensive electricity for end consumers. See Markevičienė, E. 'Stojo į kovą su tūkstančiais saulės jėgainių' [Fighting against thousands of solar power plants] in *Verslo žinios*, 2012, no. 189, p. 6.

[162] Supreme Administrative Court ruling no. A143-2834/2013 of 23 December 2013.

As mentioned in the working papers of the European Commission, the price for natural gas paid by Lithuania from 2008 to 2012 increased by 60 per cent. In this context, the public authorities failed to respond with timely measures which might have 'stirred up' the situation. Only in 2011 Lithuania, represented by its Ministry of Energy, lodged a claim against AB [SC] Lietuvos dujos, its general manager Viktoras Valentukevičius and board members Valery Golubev and Kirill Seleznev, and requested to institute an investigation into the activities of AB Lietuvos dujos – the court authorised such an investigation indicating that the claimant had reasonable grounds to question the activities of the managing bodies of the company in the period from 2006 to 2010, when the price for natural gas paid by Lithuania was increasing more than anywhere else in Europe. Moreover, largely overdue, on 3 October 2012, Lithuania resorted to yet another action and instituted an arbitration procedure against Gazprom regarding the surplus amount paid for natural gas from 2004 to 2012. The facts described above allow making an assumption that, as one of the main shareholders of the company, the Republic of Lithuania protracted its actions without trying to identify any measures that might have helped to drag down the price paid for imported natural gas.

In summary, during that given period the public authorities in the energy sector were rather active and undertook actions aimed at energy independence of Lithuania and honouring obligations arising from EU membership. Analysis of individual cases, however, gives reasons to assume that this sector was prone to the systemic faults of public authorities which failed to respect the good (responsible) government principle and which should be used for from bad practices to prevent similar mistakes from happening.

5. The economic downturn and local self-government

Pursuant to the Law on Local Self-Government,[163] municipalities carry out both independent and state functions, *i.e.* those delegated by the state to municipalities. Proper fulfilment of such functions is mainly dependent on financial resources available to municipalities, *i.e.* their budgetary position. As noted by the Constitutional Court, in the event where the state functions have been delegated to municipalities as prescribed by the law and where obligations have been prescribed by the law or other legal acts, the funds required to exercise such functions (obligations) must be also allocated. Also, in the event where municipalities have been delegated other state functions (stipulated obligations) before the end of a budgetary year, the funds must be

[163] *Official gazette*, 1994, no. 55–1049; 2008, no. 113–4290 (new wording); 2011, no. 45 (correction).

allocated as well. Therefore the funds required to ensure successful functioning of local self-government and implementation of municipal functions must be provided for in the state budget.[164]

The global financial-economic crisis of 2008 posed a threat to the rights acquired by the municipal population, their legitimate expectations and legitimate needs. The Law on the Amendment and Supplement of the Law on the Approval of the Financial Indicators of the 2009 State and Municipal Budgets adopted by the Seimas on 7 May 2009[165] obliged municipalities to first of all reduce their budgetary revenue by LTL 338.9 million, their budgetary revenue expected to be received from the personal income tax in 2009. Secondly, by this law, municipalities were bound to repay LTL 100.618 million of the general subsidy compensation to the state budget as of the second quarter of 2009 (Article 2(3)). Due to the amendments of the statutory regulation, the municipal revenue, made available for the exercise of independent functions, decreased by 10 per cent (LTL 405.5 million) in 2009, and the special targeted subsidies for exercising state functions delegated by the state to municipalities went down by 3.7 per cent (LTL 22 million). Mainly for these financial reasons both independent and state functions delegated by the state to municipalities could not be exercised to the previous extent as of 2009.

Taking into account the deteriorating financial situation of municipalities, the Association of Local Authorities in Lithuania (ALAL) and individual municipalities applied to the Seimas and the Government in 2008 and 2009 with a request to resolve, for instance, the following issues: to revise funding subject to new functions assigned to municipalities in implementing the Law on Minimum and Average Child Care and the Law on Plantings; to transfer the obligation to clean and maintain territories of common use from elderships to the actual users of land plots (state land); to reduce the value added tax rate applicable to public passenger transportation services to the previous 5 per cent, thus relieving the burden falling on municipal budgets by means of compensating aggregated losses incurred by carriers due to larger excise duty on fuel; to exempt municipalities from the obligation to cover the expenses of educational establishments set up by the office of the governor of the county and the Ministry of Education and Science; to recognise the function of monitoring compliance with the hygiene standard requirements as a function delegated by the state to municipalities so that the latter are allocated special targeted subsidies for the performance of this function. In many cases, these applications were rejected not only on legal grounds but also on the argument that a similar practice is applied in Latvia and Estonia, or, for instance, that disturbances in the raw material management market affected not only Lithuania but also the EU and other countries due to the global financial crisis.

[164] Constitutional Court ruling of 14 January 2002. *Official gazette*, 2002, no. 5–186.

[165] *Official gazette*, 2009, no. 58–2247.

The financial situation of municipalities got even more complicated as a result of the administrative reform of the management of counties launched in 2009-10. Having liquidated the offices of the governors of the counties, part of their functions were transferred to municipalities; moreover, budgetary authorities owned by the aforementioned 122 offices had also to be assigned to municipalities. This led to additional challenges – further assurance of funding of assigned functions and authorities, building renovation, management of authorities, *etc.* In response to this situation ALAL, in its appeal to the Seimas and the Government,[166] noted that failure to coordinate the actions of assigned public institutions with the municipal councils did not comply with the state-municipal partnership principle and violated the provision of the European Charter of Local Self-Government stating that local authorities shall be consulted, insofar as possible, in due time and in an appropriate way in the planning and decision-making processes for all matters, which concern them directly (Article 4(6)).[167]

The situation caused by the economic crisis forced municipalities to look for more rational ways of spending available financial resources. The majority of municipalities provided for the following austerity measures: not to fill in vacancies with new employees; not to pay bonuses for substituting in the event of sick leaves and holiday leaves; to save business trips, in-service training and representation expenses; to reduce appropriations allocated to budgetary authorities by a certain percentage; to suspend the implementation of certain educational, cultural and health projects; to limit lighting of streets in cities and settlements; to reduce funds allocated to environment management in cities and settlements; to increase tuition fees for pre-school child care establishments and non-formal educational institutions; to discontinue free meals arrangement in schools; to allocate fewer funds for school bus transportation services; to revise reduced rates for passenger transportation; to reduce appropriations allocated to small and medium-sized enterprise support funds, gifted children and youth support funds; to reduce social benefits; to discontinue measures of financial social support for poor families and single individuals; to stop allocating social security benefits, housing heating compensations and subsidising hot water supply; to stop purchasing social housing (flats), *etc.*

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166 'Regarding the transfer of functions from county governors' administrations and budgetary organisations to municipalities' of 23 February 2010 (document in possession of the authors).

167 The mutual tension between the state and local self-government during the economic crisis is also evidenced by the appeal to the Parliament and the Government adopted by the representatives of the ALAL 'Let us work together and trust each other' of 20 May 2009 and the resolution 'On the situation of local self-government in Lithuania' of 24 May 2011 (documents in possession of the authors). In these documents, the focus is placed on the increasing centralisation trends in Lithuania and attempts to reduce the powers of local self-government, which is in violation with the principle of subsidiarity established in EU and national law.

It should be noted that municipal population and their communities had a weak impact on the selection of the said anti-crisis measures.[168] This makes one wonder to which extent these anti-crisis decisions, which were basically adopted unilaterally by municipalities, could be justifiable in the light of the human rights protection standards?

Proportionality is one of the fundamental principles of law. Namely this principle, under the conditions of the economic downturn, was pointed out by the Steering Committee for Human Rights on the grounds of the interpretation held by the ECtHR that lack of resources cannot in principle justify insufficient protection of the rights guaranteed by the ECHR and that it is essential to find the balance between these two criteria, that is to say, financial resources restricted by the crisis and the duty of a state to respect human rights.[169] This interpretation of the Court means that, in the state under the rule of law, human rights are a non-negotiable and immutable fundamental value under any conditions of the existence of the state. On the other hand, the economic crisis is a fact of reality which cannot be ignored. However, the immutability of human rights stands for the duty of the state and municipal institutions to implement these rights under any conditions at best; in other words, the measures taken by the state or local authority to mitigate the consequences of the economic crisis must be as rational as possible with a view to ensuring human rights.

It would hardly be reasonable to treat the anti-crisis measures, chosen by local authorities in 2009, as the decisions that 'seriously compromised' the human rights protection standards. They did not, in principle, refute any constitutional or another right or freedom of individuals. The applied austerity measures resulted in reduced scopes of public services provided to municipal population in the areas, where residents or businesses were able to cope with the burden of the economic downturn. The crisis should not be seen only as challenges to be tackled by the state or local authorities: due to the economic recession residents themselves should assume some responsibility for their personal conduct. For instance, a shorter period of street lighting in settlements means that residents and other traffic participants have to take an extra care and adequate actions in response to the new situation. Or, for example, limitations for business support and other funds, free bus transportation services for school pupils and funding of special educational needs constituted a partial shift of the financial burden caused by the economic

[168] This is evidenced by the results of the representative public opinion poll on challenges of the economic crisis (recession) to the rule of law and human rights conducted on the basis of the global grant project VP1-3.1-ŠMM-07-K-03-085 carried out by the Research Council of Lithuania in 2014. For example, 95.2 per cent and 88.1 per cent of the respondents respectively negatively responded to the questions whether the public was aware of any initiatives to tackle the crisis, which had been taken in the municipality in 2009 to 2012 and whether the public was aware of the crisis management action plans drafted in the municipality.

[169] See The impact of the economic crisis and austerity measures on human rights. Preliminary study on existing standards and outstanding issues (referred to in the Preface).

crisis onto businesses and individuals; however, this did not eventually cause bankruptcy of businesses or households but only temporarily aggravated the availability of the state financial support and public services.

In the areas where individual existential needs, such as social support to poor individuals or families, or people who lost their jobs, were manifested, municipalities provided financial support in proportion to the funds available. At the same time, a more stringent eligibility screening of applicants for social security benefits was introduced; unemployment benefits were made conditional on community services. Residents who disagreed with individual legal acts adopted in these areas had an opportunity to verify their legitimacy and validity with the institutions investigating administrative disputes following the procedure prescribed by the law.

It seems that it would be speculative to consider that municipal entities of public administration could have established other proportions in their crisis management plans, for instance: to reduce internal administrative costs by a larger percentage rate; to provide for longer unpaid leave of public servants; to limit funds allocated for business trips and in-service training, *etc.* The task to find reliable criteria of such proportions in the absence of the national legislation package designed for extreme conditions is hardly possible in the first place.

It would not be reasonable to associate one or other deviation from the human rights protection standards in municipalities with lack of finances alone. When assessing the scale of the crisis impact on local self-government and municipal population, it is necessary to draw the line between the functions of local self-government dependent on the available public funding and the functions, which are not directly related to the financial status of a municipal budget. Therefore, the failure of public servants of municipalities to exercise those public administration functions that are not directly dependent on the funding as prescribed by effective legal acts cannot be justified. For instance, the Law on Public Administration provides for the general requirements for an individual administrative act, including the requirement that it must specify the appeal procedure (Article 8(2)). In spite of this, very often the standard template of 'This decision may be appealed against following the procedure established in the Law on Administrative Proceedings' is used in practice of municipal entities of public administration. Or, for instance, persons of retirement age residing in more remote municipal areas would call the elder, for example, for an opportunity to clean the access road to the village or farmstead and more than once would encounter situations, where an employee simply would not bother to explain that the eldership did not have any technical possibilities to do that. Such behaviour of public servants of municipal offices clearly does not correspond to the rules on customer service in public administration institutions and bodies established by the Government[170] and it cannot be justified by, for example, a likely weakened

[170] Government resolution no. 875 of 22 August 2007 (cited above).

motivation of such servants to fulfil their duties in a responsible manner due to decreased salaries and bonuses during the economic downturn.

Nevertheless, it must be noted that residents of municipalities do not tend to overly dramatise the effects of the economic crisis on local self-government. For example, 40.4 per cent of the respondents to the conducted public opinion poll to the question whether public services in the municipality became more accessible to the public during the crisis responded that such services became neither more nor less accessible, and 40.6 per cent of the respondents did not have their opinion on this. The response to the question on the work of the municipality in 2009 to 2012 was neither positive nor negative by 51 per cent of the respondents.

Every economic crisis leaves its negative footprint on human rights, legitimate expectations and legitimate needs of individuals. However, as mentioned above, regardless of the circumstances the state and municipalities should do whatever it takes to minimise this effect.

Legal mechanisms, such as opinion polls or the institution of subeldership, could have been put to better use as far as handling the challenges of the economic crisis is concerned. The results of the representative public opinion poll show that consulting the public still remains the Achilles' heel of municipal institutions: for instance, 55 per cent of the respondents indicated that municipal institutions consult the public on serious matters insufficiently, and 34.9 per cent of the respondents had no opinion on the issue. A low level of consultations with local population to find optimal anti-crisis solutions shows that 94.8 per cent of the respondents did not have their opinion on the question whether the establishment of the poll institution in the Law on Local Self-Government[171] (Chapter IX, Local population poll) proved a success. Therefore it must be presumed that this institution has not been exercised within a broader scope to mitigate a negative impact of the economic crisis on the self-government of Lithuania.

Conclusion

In all cases public authorities are bound by the obligation to act for the welfare of the entire nation finding compromises among different interests of stakeholders, to have a clear strategy of action and to make such decisions that are legitimate and necessary for the attainment of the goals and are taken in due course. By referring to the ideal government we claim that the public authority must adhere to the requirements of good (responsible) government. At the time of the financial-economic crisis, tensions within society and a growing focus on the actions taken by public authorities create even higher requirements for public authorities as the state has fewer financial resources

[171] *Official gazette*, 2008, no. 113–4290 (new wording).

at its disposal and any wrong decisions made may pull the economic crisis further down into recession.

The principle of responsible government is a constitutional category, which is often invoked by the Constitutional Court and administrative courts when exercising their competences. The period under investigation was exceptional in that this principle was much more widely applied by all courts as the basis for assessing actions by public authorities. The principle of responsible (good) government has not been explicitly enshrined in none of the constitutions – either that of Lithuania or those of other European states. No such conceptual wording can be found in any legal acts of international law or EU human rights instruments. Nevertheless, the duty of public authorities to govern the state in a responsible (good) manner is beyond doubt, and the content of this principle is disclosed while analysing specific forms, in which other constitutional principles manifest themselves. The duty of responsible government is determined by the provision contained in Article 5(3) of the Constitution that 'state institutions shall serve the people' (this provision presupposes that the highest priority from the point of view of the interests of public authorities must be given to a human being and to the duty of the state to ensure the overall welfare of the nation); moreover, the duty of responsible government is presented as a much wider manifestation of a more general constitutional principle of the rule of law. In the jurisprudence of the Constitutional Court, responsible government is analysed from two complimentary aspects: firstly, the trust of people and the nation in the State, its institutions and decisions is emphasised; this trust has to be earned by the state and state institutions; secondly, while seeking to safeguard, maintain and enhance this trust, state institutions have to act in a responsible manner, *i.e.* they must adopt reasonable, well-balanced and most effective decisions acting in the best interest of the state and inflicting the least possible damage on subjects within their jurisdiction. From the doctrine formulated by the Constitutional Court and other courts, it follows that the principle of good government is binding not only on the executive branches of the Government and public administration subjects but that it rather imposes obligations on any form of public government, including the Seimas as one of the existing branches of authority.

Alongside the principle of responsible government, court rulings and doctrine invoke the concept of good administration. The EU Charter of Fundamental Rights enshrines the human right to good administration. After analysing the case-law of the European Court of Justice interpreting and invoking this right, it may be assumed that the Charter uses a narrow definition of good administration as administrative procedures undertaken in institutions and agencies on the basis of which decisions are taken to implement human rights and freedoms stemming from the respective EU national constitutions or constitutional regulatory frameworks as well as decisions to implement the respective statutory interests. In this respect, the principle of responsible government, which is analysed and applied in the

jurisprudence of the Constitutional Court and that of other national courts, must be construed as a broader category that can be related to the assessment of the appropriateness of actions taken by public authorities (including local subjects exercising public authority) on the whole.

The representative public survey conducted during the study revealed an exceptionally negative attitude of society to actions taken by the public authorities at the time of the crisis. These findings allow making an assumption that in some cases public authorities acted inappropriately (irresponsibly) at the time of the crisis.

One of the key areas of activity of public authorities is the organisation of the overall regulatory framework because it is the key means for influencing developments happening within society. The new Law on the Legislative Framework, which established the new concept of legal regulation, was adopted in autumn 2012, *i.e.* at the time when the crisis was receding, and entered into force on 1 January 2014; during the period covered in this study, a large number of actions were taken by the Lithuanian public authorities that laid down the conditions for good government and good administrative practice in lawmaking. The economic crisis gave an additional stimulus to push forward lawmaking reforms which had been procrastinated. Following the adoption of the Law on the Legislative Framework, the jurisprudence of the Constitutional Court and good government practice in lawmaking were systematised: the underlying principles of lawmaking were formulated; the use of the legislative information system for the management of the entire process of lawmaking was established (it was determined to publish initiatives, draft legislation and accompanying documents, conclusions of stakeholder institutions, information on consultations with the public as well as other documents thus ensuring the 'one-stop-shop' principle within legislature); the register of legal acts was founded. Nevertheless, there are some issues still remaining in this area, such as: the failure to establish an effective system for public consultations (such a system could develop (reinforce) the relationship between society and public authorities, which is a must for contemporary states); the failure to install an effective mechanism for the assessment of the impact of decisions: despite the fact that towards the end of the examined period legal preconditions were put in place for *ex post* monitoring of the regulatory framework, in real life institutions themselves pick and choose subjects to be monitored, which instead of expanding only narrows the monitoring scope; the goals repeatedly reiterated since 2006 and provided for in the Programme of the 15th Government to consolidate and codify specific areas of law remain unaccomplished. Therefore, there is no yet a reasonable reason for drawing the conclusion that Lithuania already has 'smart' legislation (the way it is described in the EU) because the system still has systemic errors, which have to be eradicated.

The crisis itself produced many phenomena which posed serious challenges to businesses and the business environment in general. There were possibilities for public authorities to mitigate the consequences of these phenomena and

these possibilities have become the focus of this analysis from the point of view of responsible government. In terms of public authority actions in the economic regulatory framework, the following achievements can be identified: changes were introduced in business administration (both oversight and control) in the regulatory framework and in practice; vital developments were initiated in the area of public procurement regulation by transferring a large share of procurement online, simplifying some procedures and verifications of competences of suppliers as well as by undertaking other regulatory changes; territorial planning was to some extent simplified; the procedure for issuing construction permits was liberalised and accelerated; conditions were put in place to simplify the regulatory framework of construction processes; since 2010, arrangements were made to simplify the process of establishing sole proprietorships and, in some cases, also private companies; the form of a micro partnership was established enabling to start up a business under a simplified procedure while benefiting from tax reliefs for start-ups; major developments happened in the energy sector: liberalisation of the electricity market was set in motion, regulatory and actual preconditions were put in place to enable the acquisition of the liquefied natural gas terminal, conditions were created for facilitating the use of renewable energy resources, *etc.*

Nevertheless, businesses were rather critical in their comments about the actions of public authorities at the time of the crisis. Several tendencies were identified during the study that may be behind such an exceptionally negative attitude. Firstly, the irresponsiveness of public authorities was evident in their failure to accumulate a safety cushion at the time of economic prosperity and their failure to identify obvious signs of the upcoming crisis when these started to emerge or their inability to change the course of policies under implementation. Secondly, the 15th Government and the ruling majority of the time left a historical footprint as a public authority with very poor communication skills in its public relations, incapable of listening to views of stakeholders and interest groups. Thirdly, the analysis of the pre-crisis, crisis and post-crisis periods allows making the assumption that the individuals vested with public authority in Lithuania were unable to set themselves strategic goals and follow them through; the analysis of the events demonstrates that often very narrow political interests rather than the underlying goal of the welfare of the nation becomes the decisive argument for decisions. Fourthly, while drafting and enforcing changes within the regulatory framework in various sectors of economic management, the public authorities did not realise what the ultimate goals were pursued through the changes thus developing a chaotic, controversial and incomprehensive regulatory framework (in the areas of public procurement, territorial planning and construction, energy and elsewhere). Fifthly, there is a lack of analysis of the transparency and impartiality of the actions by public authorities in Lithuania that would enable assessing various decisions of public authorities that subsequently become the source of controversies. Sixthly, with an ineffective monitoring system for the assessment of the impact of decisions

taken and the regulatory framework, there are no leverages that could allow making a rational assessment of decisions taken by public authorities in the area of economic government, which is the fact that enables those in power to come up with populist explanations of the actions whose legitimacy is extremely difficult to verify. Seventhly, during the researched period, a very clear confrontation between the public and private (business) sectors became apparent, which might have been triggered by the irresponsible behaviour of the public authority and the rhetoric of individuals behind business interests, which was not always politically correct and which might have been further reinforced by failures in the implementation of some public and private partnership projects. All these factors should be seen as systemic errors of the public authorities and as possible root causes behind an extremely negative public response towards the actions in business regulation during the examined period.

When analysing the functionality of the principle of responsible government at the municipal level, account should be taken of the fact that municipalities perform both independent and state functions (delegated to them by the state). The Constitutional Court has ruled that, whenever municipalities are delegated certain duties by virtue of laws or other legal acts, necessary funding should be allocated for the performance of such functions (obligations). Already in 2007–2008, municipalities had to struggle with insufficient funding and the situation got even worse when the crisis hit. Municipalities were obliged to continue performing their obligations without having necessary public funding at their disposal. In addition, the analysed period was special also in that respect that, despite a complicated financial situation, municipalities were delegated new functions: the remit of municipalities was expanded in the area of the implementation of the Law on Minimum and Average Child Care, the Law on Plantings and other legal acts of the national dimension; in 2009, following the administrative reform of the counties, part of the functions were transferred to municipalities; following the changeover of the regulatory framework of territorial planning and construction into the system that required additional financial resources, any arrangements related thereto were delegated to municipalities, which were supposed to implement them without any additional financial and human resources allocated to them. Therefore, the conclusion has to be drawn that the principle of responsible government was first of all ignored by the national authority and, while doing so, it did not make necessary arrangements to ensure proper functioning of municipal institutions. This problem may not and should not be linked to the crisis – some universal principles of municipal funding have to be sought that would be functional under whatever circumstances; unfortunately, this problem in particular, has to be considered as the most striking one during the period under research.

It is noteworthy that the majority of the decisions related to municipalities was made by the central authorities with very little or no coordination with the municipalities themselves; municipal staff noted on many occasions that

such behaviour of the central authorities was in violation of the principle of partnership to be followed by the state and municipalities as well as in breach of the European Charter of Local Self-Government. During this particular period, municipalities repeatedly addressed the Seimas and the Government Office requesting to resolve the complicated situation with specific proposals but the central authorities did not adopt any decisions to alleviate the situation of municipalities, while public debate further illustrates that the central authorities did not pay consideration to the issues raised. In this way, the inability of the ruling majority to communicate with society, as mentioned earlier, was obvious once again, only this time this was the inability to communicate with local self-government.

The situation triggered by the crisis forced municipalities to look for more rational ways of utilising limited financial resources, which often implied savings while performing public functions and using appropriations for internal administration: empty vacancies were cancelled or not filled with newcomers; supplements for deputising during sick or annual leaves were cut; costs for business trips and proficiency training or mobile telephones were cut as well. Some of the anti-crisis decisions made by municipalities directly affected population and businesses: fees for child care services in pre-school and after-school activity centres were increased; free meals were suspended for pupils from needy families; public transportation benefits were revised; and allocations to funds promoting small and medium-sized businesses, gifted children and youth, *etc.* were reduced. All this have undoubtedly lowered the quality of the services provided to population and narrowed the protection of human rights; such outcomes should be objectively justifiable as a natural consequence of limited public finances at the time of the crisis, while there are no grounds to claim that human rights were narrowed disproportionately.

The crisis management plans adopted by municipalities, in principle, constituted programmes for a more rational use of available resources; therefore, it is logical and reasonable to expect that such plans had to be adopted. However, it needs to be admitted that these crisis management plans were drafted without involvement of municipal population, who was directly affected by the consequences of these plans once they started to be implemented – such behaviour by municipal institutions should be considered as an obvious violation of responsible government.

The conclusion can be drawn that the analysis of municipal actions during the crisis revealed the systemic errors of public authorities, the largest of them being the absence of communication by the central authorities with municipal institutions on the one hand, and the absence of communication between municipalities and their population on the other. Public debate and fine-tuning of decisions with relevant stakeholders and the accountability of the public authority would not have eliminated the inevitable negative consequences of the crisis but, at least, could have helped to avoid such a negative response to the actions taken by the authorities, as this may determine the distrust of population of public authorities in general.

Part III

PUBLIC FINANCES

Mindaugas Lukas
Aistė Medelienė

1. The concept and issues of the national financial system and public finances

1.1. The concept and structure of the financial system

The national financial system is a broad and multilayer institution encompassing a wide range of different yet inherently inter-connected elements of the financial activity and institutional set-up of the state. The emergence of financial activity, as a specific area of state activity, is determined by particular societal (public) needs, which can be better satisfied when tackled collectively rather than individually and, in order to be satisfied, require considerable financial resources, which can be accumulated only by such a structure as a state. When performing financial activity through its established, administered and regulated instruments, a state redistributes its national revenue and the GDP to meet the needs of individuals, collective needs of certain groups of individuals or common needs of the entire society, which, according to J.-J. Rousseau, are entrusted to the care and responsibility of the state under a social contract *(contrat social)*. In its rulings of 24 May 2013 and 5 July 2013,[172] the Constitutional Court held that any economic activity conducted in the area of finances, *inter alia*, the provision of financial services, is one of the specific areas of economic activity; it is characterised by a direct impact that it has on the national financial system and, hence, on the national economy as a whole. The Constitution, *inter alia*, Article 46(3) thereof, reads that, when regulating economic activity so that it serves the general welfare of the nation, the legislator must establish such a regulatory framework that ensures the security, stability and reliability of the national financial system. While doing so, the legislator must respect the Constitution, *inter alia*, the imperatives arising from the constitutional principle of the rule of law.

[172] *Official gazette*, 2013, no. 55–2760; 2013, no. 73–3679.

The financial system is both a legal and economic category. From the legal point of view, the national financial system is, first of all, a regulatory and institutional framework of national financial activity (the system of funds and institutions implementing national financial activity within the established remits of their competences); it also implies societal relations arising in the course of managing (collecting, distributing, using and controlling) national financial resources; it includes legal regulations governing payments and settlements, the functioning of the financial market, participants in this market and the turnover of financial instruments; in addition, it involves the legal fundamentals of the monetary policy; then, to a certain extent, this is the regulation and oversight of public and private institutions (the national central bank, private commercial banks, other financial institutions and actors of the financial market) whose activities are important for the financial activities carried out by individuals; and, ultimately, it covers the regulation of the provision of financial services. At the same time, from the point of view of finance law, financial activity as an area of state activity may be defined as 'organisational activities carried out by competent subjects of the public sector in the course of forming, distributing and utilising public sector monetary funds, as well as their activities in the process of performing the oversight of other monetary funds used for public needs in order to ensure that general public needs are satisfied'.[173]

Finances as an economic category mean the entirety of economic relations arising during the establishment, accumulation and distribution of monetary funds. Finances constitute the entirety of those monetary-type economic relations as a result of which the GDP and national revenue are distributed and redistributed and monetary funds, necessary to perform the functions of the state and ensure conditions for economic development, are formed.[174] The concept of the national financial system practically covers such economic relations that actually comprise the content of the aforementioned legal relations. Further on in this part, the national financial system, as well as its individual elements, will be primarily analysed as legal categories, whereas its economic concept, characteristics and aspects will be addressed insofar as they are relevant to the analysis of the research object or the assessment of specific regulatory decisions from the point of view of the rule of law and the protection of human rights.

The accumulation of the national funds of monetary resources, as well as their utilisation for funding the activities and functions of the state (in the broadest sense), is an activity vital for the state as a political organisation since it is the most visible activity frequently associated and identified with the state itself and recognised as the key and most important component of the national

[173] Medelienė, A. and Sudavičius, B. 'Finansų ir mokesčių teisė kaip mokslinio tyrimo objektas' [Finance and tax law as a subject of scholarly research] in *Teisė,* 2011, vol. 78, p. 108.

[174] Meidūnas, V. and Puzinauskas, P. *Finansai* [Finances]. Vilnius, 2003, p. 9.

financial system. According to B. Sudavičius, the establishment of such an independent element of the financial system, along with the creation of its regulatory mechanism, should be seen as one of the essential preconditions for sovereign independence of the state.[175] This part of the national financial system evolves alongside with the state and is one of its *conditio sine qua non* ensuring normal implementation of other functions of the state, *i.e.* the implementation of the functions delegated to and goals pursued by the public authorities and the social, health care, educational, national defence and other systems of the state, as well as the implementation of the underlying purpose of the state as a social-political formation (*inter alia*, ensuring of the rule of law and the protection of human rights).

The core elements of the legal and economic processes involving the accumulation and use of national financial resources are, of course, national monetary funds. In Lithuania, this is, primarily, the state treasury,[176] which is the central instrument for the management of national financial resources, followed by the State Social Insurance Fund (Sodra) and the Compulsory Health Insurance Fund,[177] the Privatisation Fund and the Reserve (Stabilisation) Fund. In its essence, though, a monetary fund is no more than a technical legal (institutional) instrument or an infrastructure enabling the collection and use of resources in particular areas of the life of the state (the Compulsory Health Insurance Fund is used to finance the health care system, the State Social Insurance Fund – the social insurance system, the state treasury – all other general areas of state activity not covered by specialised funds) and providing the key mechanisms for management and administration of monetary resources and expenditures allocated to the respective fund. The basis for each of such funds is an annual financial plan of revenue and expenditure drafted and approved by a relevant legal act: on the state budget or municipal

[175] Sudavičius, B. 'Trumpalaikis ir ilgalaikis biudžeto planavimas Lietuvos Respublikoje' [Short and long-term budgetary planning in the Republic of Lithuania] in *Teisė,* 2013, vol. 87, p. 7.

[176] Despite the fact that in the Law on State Treasury (*Official gazette*, 1994, no. 100–2001 (as last amended)), the state treasury is defined as a *system* covering the general account of the state treasury with the Bank of Lithuania and the systems making possible the performance of state treasury functions (such as accumulation and disbursement of national monetary resources, also accounting, control and annual reporting of these activities, management of the obligations assumed on behalf of the state and management of Government securities, forecasting of cash flows, investments and other means of utilisation of recoverable national monetary resources that are temporarily freely disposable); in its sense, it is the largest permanent and major monetary fund of the state and the management instrument of available financial resources and financial liabilities. The state treasury is frequently associated with the state budget, with both concepts used interchangeably (*e.g.*, by B. Sudavičius, A. Medelienė and D. Vasarienė). Nevertheless (without seeing any faults or misunderstandings in such an approach but rather construing it as a pragmatic choice and a different angle of perception), in accordance with the Law on the Budget Structure (*Official gazette*, 1990, no. 24–596 (as last amended)) and the jurisprudence of the Constitutional Court (*e.g.*, rulings of 14 January 2002 (referred to in Part I) and 11 July 2002 (*Official gazette*, 2002, no. 72–3080)) the budget is, first and foremost, defined not as a monetary fund but rather as a financial plan for a given period.

[177] In some translations also called the National Health Insurance Fund.

budgets, the budgets of the State Social Insurance Fund, the Compulsory Health Insurance Fund, as well as the estimates for the Reserve Fund and the Privatisation Fund. These plans are used for setting goals for the said funds (and public institutions ensuring their functioning) according to the national strategic objectives, national political, economic and social directions and, naturally, according to the financial possibilities of the state and form the basis for realising the functions and purposes of the respective funds. The central and most significant budget, having a multifaceted impact on all other plans, the framework of and directions for the whole body of national financial activity, is, of course, the state budget. The state budget performs a multitude of functions in market economies: it is a certain decision-making plan, a mechanism for the allocation and redistribution of expenditures, a tool for maintaining economic environment stability, an approval and establishment of the responsibility of the state for specific areas at a concrete level, an accounting tool for national revenue and expenditure, a major instrument of the national economic policy, a regulatory tool for economic growth, as well as a means of balancing competing political interests.[178]

In accordance with Article 2(20) of the Law on the Budget Structure, a state budget means a plan of national revenue and expenditure approved by the Seimas for a budgetary year. It is a plan of public resources and redistribution of planned revenue for a period of twelve months, which, pursuant to Article 129 of the Constitution, starts running as of 1 January and comes to an end on 31 December every year. The Constitutional Court has ruled[179] that, from the legal point of view, a state budget is a law on the basis of which

> 'the Seimas approves national revenue and appropriations based on the assessment of the needs and possibilities of society and the state. It follows from the constitutional concept of the budgetary process that all sources of national budgetary revenue, planned revenue and expenditure for which budgetary appropriations are allocated, the sizes of these appropriations, and the beneficiaries of budgetary appropriations must be stipulated in a law on a state budget'.

As the central element of the national financial system, the state budget is directly related to such areas of national financial activity as taxes, sovereign borrowing, provision of sovereign guarantees, the financial independence and limits of self-government. As established in the Constitution and confirmed consistently in the constitutional case-law,[180] the process of drafting and implementing the budget is not only an institution of economic modelling and planning, balancing between political interests and financial management, but it is also one of the institutions directly realising the constitutional principle

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[178] Vasarienė, D. 'The constitutional foundations of the financial system of the State of Lithuania' in *Jurisprudencija*, 2012, no. 19(3), pp. 988–989.

[179] *Inter alia*, Constitutional Court ruling of 14 January 2002. *Official gazette*, 2002, no. 5–186.

[180] *Inter alia*, Constitutional Court rulings of 3 June 1999 and 11 July 2002. *Official gazette*, 1999, no. 50–1624; 2002, no. 72–3080 (respectively).

of the separation of powers. The provisions of Articles 67 (14), 94(4), 130 and 131(1) of the Constitution and the earlier indicated constitutional case-law, which identifies and interprets the interplay between these provisions, draw very clear limits of the powers and competences vested in the executive (the Government) and the legislature (the Seimas) in terms of their balance in the processes of budgetary planning, drafting, adoption and execution. These institutions may not waive or transfer to each other any of the rights and duties vested in them by the Constitution in the budgetary process; acting otherwise, as noted by the Constitutional Court, would violate the constitutional principle of the separation of powers and Article 5 of the Constitution.[181]

The universally recognised main method for collecting national revenue is taxing, which historically dates back to the origins of the state. Through taxes, a statutorily established part of private ownership of an individual living within the community of a state is transformed into public ownership by transferring it in its monetary form to the state, which subsequently utilises the funds so collected to meet public needs and to finance public expenditure. First and foremost, the obligatory nature of taxes is based on the obligatoriness of law itself, *i.e.* the obligatoriness of the general state-established taxation rules or the related state-approved behavioural rules, as well as on the threat of coercion by the state. In this context, the normative concept of the law is most frequently emphasised, *i.e.* the legality and not the legitimacy of the regulations. However, narrowing the scope of taxation relations up to subordinate legal relations between a taxpayer and the state (or even more so – a tax administrator) does not fully reflect the essence and nature of one's duty to pay taxes. It has already been a long time since a state is no longer perceived as a completely independent formation existing *per se,* for which members of the population, according to A. Žilėnas, must 'pay back' for the services or care provided.[182] If, as noted by G. Užubalis, in non-democracies (where the law itself is only a tool for enforcing political decisions), the key purpose of taxes is to build economic might empowering the functioning of the authority, within democracies, the duty to pay taxes is, first of all, linked to the need of individual members of society to protect and realise their inherent, social, economic and other rights with the assistance of the state.[183] According to A. J. Menéndez, the duty to pay taxes may be compared against such cornerstones of a democratic political community as mandatory military service, citizenship or political rights and duties. In the first place, taxes should be regarded as the institutionalisation of the necessity

[181] Constitutional Court ruling of 11 July 2002 (referred to in Part I).

[182] Meidūnas, V. and Puzinauskas, P. *Mokesčiai: teorija, vaidmuo, raida* [Taxes: Theory, role and evolution]. Vilnius, 2001, pp. 9–10.

[183] Užubalis, G. *Mokesčių teisės paskirtis ir funkcijos (apmokestinimo teorijų kritinė analizė)* [The role and functions of tax law (critical analysis of taxation theories)]. Doctoral thesis. Vilnius, 2012, p. 171.

to share duties arising from the existence of a political community among its members. As mentioned before, the existence of a political community – the state – *per se* triggers the need for certain resources, which are vitally important for it to function: as, for instance, defence and administrative resources, the public infrastructure and, naturally, shared financial resources. It is namely by means of taxes that these shared duties are monetarised and the resulting taxation burden is accordingly distributed among members of society; thus, solidarity, social harmony and public interests are ensured; and a respective share of national revenue, generated from the commonly used co-funded political, legal, economic and social infrastructure, is redistributed.[184]

In theory, the right of the legislator to impose taxes may seem to be one of the most uncontrolled powers within its authority. Taxation is founded on the idea that the legislator is granted the constitutional powers to disregard private ownership rights. This idea is supported by Article 1 of Protocol no. 1 to the ECHR, where it is stipulated that:

> 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions, except in the public interest and subject to the conditions provided for by the law and by the general principles of international law. 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 principle or to secure payment of taxes or other contributions or penalties'.

One of the key principles of a representative democracy is that there should be no taxation without representation. It follows from this principle that whenever mandatory taxes are imposed upon taxpayers by the law, the taxpayers should be able to participate through their representatives. In this way, expropriation without compensation is also legalised (but not legitimised *per se)*. Yet, as noted by Hans Gribnau,[185] in accordance with the principle of the rule of law, the imposition of taxes is not solely an issue of governmental policy and wholly within the absolute discretion of the legislator. When quoting Aharon Barak, he emphasises that democracy is not just the law of rules and legislative supremacy; democracy is based on legislative supremacy and on the supremacy of principles, values and human rights. Hence, the evaluation of whether the fundamental duty to pay taxes does not violate human rights or democratic principles (either at the time of economic boom or recession) would be neither meaningful nor logical if it did not include the analysis of the ways and means used to materialise and implement this duty.

Apart from taxable income, which forms the most substantial part (usually accounting for over 60–70 or more per cent) of revenue collected for

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184 Menéndez, A. J. *Justifying taxes: Some elements for a general theory of democratic tax law*. Dordrecht, 2001, pp. 117–139.

185 Gribnau, H. 'Equality, legal certainty and tax legislation in the Netherlands: Fundamental legal principles as checks on legislative power: A case study' in *Utrecht law review*, 2013, vol. 9, pp. 52–53.

public functions (particularly, in such a country not rich in natural resources as Lithuania), there are scarcely any other taxable sources (revenues for services, dividends of public companies, interest on credits extended by the state, proceeds from the realisation (privatisation) of property, a share of profit transferred to the state treasury by the Bank of Lithuania, *etc.*) that, if taken in isolation, would exceed 1–2 per cent of state budgetary revenue, and, if taken together – would usually be above a 10 per cent threshold. Thus, in Lithuania, another source of funding that might be singled out as a category of its own is only EU financial assistance, which used to account for 15 per cent (2008), 28.6 per cent (2009), 26.9 per cent (2010), 26.1 per cent (2011), 26.1 per cent (2012), 24.7 per cent (2013) and 28.5 per cent (2014) of the national annual revenue during the latter years.[186]

Any difference between budgetary revenue and appropriations (*i.e.* budget funds made available for expenditure and investments in a respective year) where appropriations exceed revenue constitutes a budget deficit, whereas the reverse scenario of revenue exceeding appropriations means a budget surplus. While the latter sets the necessary conditions for the state to accumulate additional financial reserves and reduce the accrued sovereign debt (by means of early repayment of the debt, by reducing the borrowing needs for the refinancing of the debt, *etc.*), a budget deficit signals the need for either using up the accumulated financial reserves or looking for additional sources of funding, most frequently through borrowing. Since the restoration of its independence, Lithuania has never had a budget surplus. This might be the main reason why the Law on the Budget Structure does not expand on a budget surplus *(inter alia*, priorities of its utilisation), whereas a surplus in the public sector is referred to only as an objective. And conversely, a budget deficit both in financial plans (specific laws approving budgetary indicators for the state budget and municipal budgets) and during budgetary execution is a common occurrence. It directly affects the need of the state to borrow; therefore, the legal regulation governing the relations in connection with sovereign debt is a significant part of the regulatory framework covering the national financial system and the turnover of public funds.

It is noteworthy that in public discourse (and rather often also in academic papers), sovereign borrowing with the ensuing accumulated debt is usually described as the shifting of the financial burden on future generations. This fact, which is aggravated even further if the funds borrowed are aimed at not long-term productive investments but rather at covering running expenditure by the state (social benefits, salaries, goods and services, *etc.*), is often judged as a rather controversial and negative issue. Moreover, the possibilities of the state to repay these debts are frequently linked with the necessity to increase

[186] Data on state budget implementation. Ministry of Finance. Online access: http://www.finmin.lt/web/finmin//auktualus_duomenys/biudzeto_pajamos/valstybes_biudzetas [5 January 2015].

taxes in the future.[187] The decision on financing expenses from current tax revenue or from borrowed funds may be made on the basis of several different considerations, such as: any benefit received should be paid for by the actual beneficiaries; owing to technological advancement and economic growth future generations will be relatively wealthier; any debt will inevitably have to be covered from tax revenue, thus, in this case, the question is how to distribute taxes within the future timeframe and what impact one or another distribution in time may have on economic efficiency; by taking the functional financial approach whereby taxes and a budget deficit are considered as measures for maintaining demand at an appropriate level, and the choice is deemed to be dependent on such indicators as unemployment and inflation; and, finally, by following the moral and political considerations that, by its nature, borrowing is not a moral and responsible behaviour, whereas a balanced budget encourages the government to perform a more thorough analysis of costs and benefits precluding the development of the public sector beyond its optimal size.[188] On the other hand, at this point, it is possible to remember the idea expressed more than once by Ingrida Šimonytė, the Minister of Finance of 'the crisis Government' (*i.e.* the 15th Government), that, under certain circumstances, there is simply no choice whether to borrow or to tax.[189]

Besides the state (its governing bodies), municipalities and budgetary institutions (for public administration and administration of justice) traditionally falling within the public sector, the Law on the Accountability of the Public Sector[190] extends to (thus, includes into the range of subjects that have public finances at their disposal) the public establishments of health care, education, research and social security that are controlled by the national, municipal and budgetary institutions, also to other public establishments that are controlled by the public sector bodies and administer the projects and programmes funded from the state budget (including EU and other international assistance), as well as to public enterprise Lithuanian national

[187] For example, see: Grižibauskienė, E. 'Prasiskolinusi ir praskolinta Lietuva' [Heavily indebted and debt-ridden Lithuania]. Online access: http://ekonomika.balsas.lt/naujiena/prasiskolinusi-ir-praskolinta-lietuva-653.html] [6 January 2015]; Tracevičiūtė, R. 'Skolų našta slėgs vis sunkiau' [Debt burden will be harder to bear]. Online access: http://lzinios.lt/lzinios/Lietuvoje/skolu-nasta-slegs-vis-sunkiau/136722 [6 January 2015]; Gylys, P. 'Kai biudžeto deficito vanagai užtemdo viešąsias gėrybes' [When budget deficit hawks overshadow public values]. Online access: http://www.delfi.lt/news/ringas/lit/pgylys-kai-biudzeto-deficito-vanagai-uztemdo-viesasias-gerybes.d?id=38645789 [6 January 2015].

[188] Rosen, H. S. *Public finance*. New York, 2005, pp. 461–471.

[189] Šimonytė, I. 'Iš Seime vykusios diskusijos apie finansinę konsolidaciją ir valstybės skolinimosi suvaldymą' [From the discussion in the Seimas on financial consolidation and management of sovereign borrowing]. Online access: http://www3.lrs.lt/pls/inter/w5_show?p_r=4445&p_d=110377&p_k=1 [6 January 2015]; Id. 'Apie „nedaskolintą" Lietuvą' [About 'debt-ridden' Lithuania]. Online access: http://simonyte.popo.lt/2013/09/03/apie-nedaskolinta-lietuva [6 January 2015].

[190] *Official gazette*, 2007, no. 77–3046.

radio and television. From a broader perspective, in accordance with the provisions contained in Article 125(1) of the Constitution[191] and Article 1(2) of the Law on the Bank of Lithuania,[192] the scope of public finances should also be deemed to include the capital of the Bank of Lithuania, which, based on the provisions of the aforementioned law concerning the specific purpose and status of this institution, both from the economic and legal point of view, is a body rather isolated from the remaining public finances. From the economic point of view, resources at the disposal of state and municipal enterprises, as well as state- and municipality-owned companies, may be considered to be public funds, which, thus, have to serve the common interests and benefit of the state and society.

Traditionally, the financial activity of private subjects is not considered to be part of the national financial system. Such activity falls under the regulatory scope of private rather than financial law. However, one should not underestimate the role of private bodies and private financial activity for the state nor the impact that private activity has on national financial activity, the turnover of public funds or on the functionality of the national financial system. First of all, when implementing its functions and managing public funds, the state (central and local government public administration institutions, national monetary funds, state-controlled enterprises, establishments and organisations) make(s) wide use of financial services offered by private financial bodies (such as banks and insurance companies) and more often than not compete(s) with them in the market through the entities controlled by the state. Secondly, when regulating private financial activity through administrative measures in such a manner that, as prescribed in Article 46 of the Constitution, it serves the general welfare of the nation, *i.e.* so that the systemic risks that may arise due to the peculiarities of financial activity and may affect the entire state or a considerable part of its population, are properly managed, the state also assumes certain (first of all, financial) liabilities for the potential consequences. Thirdly, the state is an active player on financial markets: it issues securities, uses other instruments to borrow funds, self-insures against currency and interest risks, invests temporary free funds and reserves (thus, not only receives the necessary funds and manages financial flows but also regulates the economic processes) and even transfers part of functions traditionally associated with the state, such as the accumulation of old-age pensions to private financial institutions. Therefore, an analysis of the financial system of the state, including the legal regulatory framework and operation of that system, should not be completely detached from the issues that are relevant to the private financial sector.

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[191] 'In the Republic of Lithuania, the Bank of Lithuania shall be the central bank which belongs to the State of Lithuania by right of ownership'.

[192] 'The ownership of the State of Lithuania in the Bank of Lithuania shall be expressed by the capital of the Bank of Lithuania. The assets of the Bank of Lithuania shall belong to it by right of ownership. The Bank of Lithuania shall manage, use and dispose of its assets in accordance with legal acts of the European Union and this Law'. *TAR*, no. 2014–00716, 30 January 2014.

1.2. The scope of the study

The public (and the whole) financial system (both in the legal and economic sense), which is nothing else but the lifeblood of a living organism of the state, is among the first ones to face and recognise the looming challenges of an economic crisis. The financial system is most frequently that element of the national institutional set-up through which – as a result of decreased available financial resources, disrupted financial flows, ineffective mechanisms for redistributing national revenue and sharing taxation burden, failure to properly regulate or implement financial market supervision and risk prevention, *etc.* – the economic crisis is transferred into other areas of public life of the state, such as social, educational, health care, public administration, state investments, *etc.*, as well as the private lives of individuals.

In view of the fact that the key aim of this entire study is to analyse and assess the impact of the crisis on the legal system of Lithuania, this part will further expand on the Lithuanian legal regulation of public finances that was directly affected by the decisions made from 2008 to 2014 in connection with the fundamental principles and operation of the national financial system while seeking to respond to the causes of the economic crisis (the causes underlying its nature and scope) and control its course, as well as to manage the consequences of the crisis and restrict their spread. In responding to an emerging or looming crisis in the area of public finances, economic and financial decisions frequently assume greater importance if compared to legal ones. Mainly economic and financial decisions provide preconditions and grounds for, as well as determine, the content of legal decisions. Mostly economic reasons, motives, forecasts, preconditions and factual circumstances determine the particular measures that are opted for and consequently adopted in the form of law-making and law-application decisions in response to a crisis. The object of a legal analysis, first and foremost, includes concrete law-making and law-application decisions, whose content may be assessed by employing the methods and criteria applicable to legal research. Therefore, the economic and financial preconditions, motives and goals of the given law-making and law-application decisions, or the choices of a non-legal character determined by them, are taken for granted and their legal analysis is carried out only in the cases where and only insofar as such choices or means of their implementation (law-making and law-application forms and processes) are clearly incompatible with the effective legal regulation or obviously in conflict with the fundamental legal principles and legal standards of a democratic society.

As far as the nature and scope of the study is concerned, the researchers have not set themselves the goal of analysing and assessing all law-making and law-application decisions adopted in relation to the national financial system in Lithuania from 2008 to 2014. The focus is placed on those

decisions that, as believed by the authors, were most important for the legal regulatory framework of the national financial system and public finance management in Lithuania and most significant from the point of view of the legal standards of a democratic society (*i.e.* the rule of law and the protection of human rights). The analysis has been conducted in three directions, which will be covered one-by-one in the following chapters: firstly, consideration is given to the process of drafting and adopting the laws on the approval of the financial indicators of the state budget and municipal budgets as well as to the related rights and duties and the corresponding constitutional obligations of the Seimas and the Government; secondly, the analysis proceeds to identify and assess the changes in the legal regulation and administration of taxes and other contributions paid to the state social funds (the State Social Insurance Fund and the Compulsory Health Insurance Fund); and thirdly, an assessment is carried out of the regulation and supervision of the banking and financial sector, including the mechanisms for preventing public interest risks associated with this sector and managing the potential negative consequences. In particular, the present analysis focuses on the decisions taken primarily due to the crisis, *i.e.* crisis-triggered decisions, which served as an intervention into the existing legal regulation; the analysis does not amount to a thorough examination of various other decisions adopted during the period of 2008–2014, even if those other decisions received a wide public response and had a huge impact on the national systems of finances and law.

1.3. The level of scientific analysis of the problem. The sources of reference

The economic and political causes and consequences of the crisis in Lithuania, including the regulatory and managerial deficiencies in the financial system and public finances that further multiplied the repercussions of the economic crisis or failed to facilitate attempts of handling it, have been considered both in scholarly discourse and public space (in publications and statements by economists, analysts, financial experts and politicians). Publications, comments and reports by J. Čičinskas, B. Gruževskis and A. Bartkus, S. Jakeliūnas, R. Kuodis, N. Mačiulis, G. Nausėda, S. Šiaudinis, I. Šimonytė and R. Vainienė dwell upon budgetary formation, choice between expenditure reduction and increase of revenue (taxes), borrowing, the issues related to social funds, gaps in the pre-crisis mechanism and practice applied to the supervision of banking activity and the resulting impact on the national financial system and the possibilities of the state to properly perform its functions *(inter alia*, to ensure the rule of law and the protection of human rights), as well as the

issues of changes in the system of taxes and social contributions.[193] At the same time, however, there is, in principle, no legal analysis that would evaluate the regulatory changes triggered by the crisis in the Lithuanian financial system, in the area of taxation and social contributions or in the financial sector, let alone the significance of these regulatory changes for the protection of human rights and the principles of the rule of law. References can only be made to the article titled '*Vacatio legis* in tax law',[194] written by the authors of this part of the book, which examined the developments in the Lithuanian tax legislation at the time of the crisis, also an article by T. Birmontienė on the impact of the economic crisis on the constitutional doctrine of social rights,[195] and, last but not least, an article by M. Lukas, A. Medelienė and A. Paulauskas on the impact of EU membership on the national tax system of Lithuania, as well as an article by B. Sudavičius and V. Vasiliauskas on the impact of EU membership on the budgetary planning of Lithuania, both published in the compilation of articles 'Lithuanian legal system under the influence of European Union law'[196] by the scholars of the Faculty of Law of Vilnius University.

The impact of the lawmaking and general regulatory decisions in the areas of the national financial system, public finances, taxes and financial activity on the rule of law and the protection of human rights is analysed, first of all, by assessing the laws and substatutory legislation on the budgetary process, national monetary funds, taxes, social contributions and the mechanisms of supervision in the financial and banking system by giving particular attention to the relevant legislative amendments initiated due to the crisis in 2008–2014; the analysis also draws on the publicly available documents of the law-making

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193 *E.g.*: Čičinskas, J. and Dulkys, A. *Op. cit.*; Gruževskis, B. and Bartkus, A. *Op. cit.*; Jakeliūnas, S. *Op. cit.*; Kuodis, R. 'Valdžios „Titanikui" – emigracijos ir nedarbo ledkalnis' [An iceberg of emigration and unemployment for the executive 'Titanic']. Online access: http://top.scbmedia.eu/iq-zurnalas/r-kuodis-valdzios-titanikui-emigracijos-ir-nedarbo-ledkalnis/?psl=0 [6 January 2015;]; Mačiulis, N. 'Per krizę daugiau lietuvių ne emigravo, o tik registravo savo emigraciją' [During the crisis there were more Lithuanians who did not emigrate, but only registered de facto emigration]. Online access: http://www.delfi.lt/news/daily/emigrants/nmaciulis-per-krize-daugiau-lietuviu-ne-emigravo-o-tik-registravo-savo-emigracija.d?id=48850416 [6 January 2015]; Laučius, V. and Kuodis, R. 'Provincialumas gelbsti Lietuvą nuo finansų krizės' [Provincialism saves Lithuania from the financial crisis]. Online access: http://www.delfi.lt/verslas/verslas/rkuodis-provincialumas-gelbsti-lietuva-nuo-finansu-krizes.d?id=18998661 [30 December 2014]; Šiaudinis, S. 'What drove the 6-month VILIBOR during the late-2000's economic crisis?' in *Pinigų studijos,* 2010, no. 2; Šimonytė, I. 'Asmeninis tinklaraštis' [Personal blog]. Online access: http://simonyte.popo.lt [11 January 2015]; Vainienė, R. 'Sveikatos reforma nuo mokesčių galo' [Health reform: Tax dimension] in *Mano sveikata*. Online access: http://www.manosveikata.lt/lt/aktualijos/naujienos/vainiene-sveikatos-reforma-nuo-mokesciu-galo [6 January 2015].

194 Medelienė, A. and Lukas, M. '*Vacatio legis* mokesčių teisėje' [*Vacatio legis* in *tax law]* (referred to in the Preface).

195 Birmontienė, T. 'Ekonomikos krizės įtaka konstitucinei socialinių teisių doktrinai' [The influence of economic crisis on the constitutional *doctrine* of social rights] (referred to in the Preface).

196 Švedas, G. (ed.). *Lithuanian legal system under the influence of European Union law*. Vilnius, 2014.

(drafting and legislative deliberation) process, the relevant jurisprudence of the Constitutional Court (in particular, its rulings of 29 June 2012, 15 February 2013, 16 May 2013, 5 July 2013 and 19 December 2014),[197] including earlier rulings forming part of the constitutional doctrine in the respective areas, the relevant case-law of the ECtHR as well as the aforementioned (and other) publications by Lithuanian specialists in law and economics. The context of the developments in the Lithuanian regulatory framework of public finances is also illustrated by invoking the documents of international institutions and the publications of foreign scholars and analysts (Ioannis Glinavos, Hans Gribnau, Thomas Hemmelgarn and Gaëtan Nicodeme,[198] *etc.*), as well as by making use of the findings of the representative opinion poll of the public and individual target groups conducted during the research preceding this study. Among other things, the analysis is based on the first-hand experience of the authors of this part of the book, who themselves were directly involved in some of the analysed law-making and law-application processes during 2008–2014.

2. The budgetary process and national monetary funds

Generally speaking, the budgetary process in Lithuania is arranged in accordance with the procedure provided for in the Constitution, with due account of the constitutional postulates formulated in the doctrine of the Constitutional Court *(inter alia*, its rulings of 9 July 1999, 14 January 2002, 11 July 2002, 4 December 2002),[199] the provisions contained in the Law on the Budget Structure and the Law on the Methodology for Determining Municipal Budgetary Revenues, the Statute of the Seimas,[200] the procedure for drafting and implementing the state budget and municipal budgets as well as of other legal acts. The legal regulation of the budget in 2008 could, in principle, be described as well-established, sufficiently mature and stable. Even the circumstance that the process of drafting and adopting a law on the approval of the financial indicators of the state budget and municipal budgets every four years coincides with parliamentary elections held in autumn and the subsequent change of the Government did not cause any exceptional

[197] *Official gazette*, 2012, no. 78–4063; 2013, no. 19–938; 2013, no. 52–2604; 2013, no. 73–3679; *TAR*, no. 2014–20117, 19 December 2014.

[198] Glinavos, I. 'Regulation and the role of law in economic crisis' in *European business law review*, 2010, vol. 21, issue 4; Gribnau, H. *Op. cit.*; Hemmelgarn, T. and Nicodeme, G. 'The 2008 financial crisis and taxation policy'. CESifo working paper no. 2932, European Communities, 2010.

[199] *Official gazette*, 1999, no. 61–2015; 2002, no. 5–186; 2002, no. 72–3080; 2003, no. 19–828.

[200] *Official gazette*, 1994, no. 15–249; 1999, no. 5–97 (as last amended).

unclarities or legal uncertainties before that time:[201] for instance, the 2005 state budget, which was approved at the end of 2004 (the same year when the parliamentary election took place), was adopted relatively early, on 9 November 2004, by the outgoing Seimas of the 2000–2004 term of office. Prior to 2008, which is the starting point for our research, the Lithuanian economy had gone through critical upheavals. The latest one that was most severe until that time was the 1998–1999 Russian financial crisis, whose processes, in principle, did not coincide with the constitutional political cycle. Whereas the economic crisis that hit Lithuania towards the end of 2008 and was explicitly referred to not only in the Action Programme of the 15th Government, but also in the formally still valid Government resolution no. 1295 'On the Economic Downturn' of 14 October 2009,[202] coincided with the end of the term of office of the 2004–2008 Seimas and the governmental changeover. The situation was not made any easier (but rather even more complicated) by the fact that the electoral results substantially reshaped the ruling political landscape in the Seimas. Therefore, the adoption of the law on the approval of the financial indicators of the 2009 state budget and municipal budgets posed a serious challenge both to the political and legal systems of the country.

The 2008 Seimas election took place in Lithuania on 12 October. The 14th Government, formed of the majority (though having shrunk by then) of the outgoing Seimas of the 2004–2008 term of office, approved the draft law on the 2009 state budget during its sitting of 14 October 2008,[203] and the draft law was registered in the Seimas on 17 October 2008,[204] *i.e.* on the last day permitted by Article 130 of the Constitution.[205] The report of the Government on the draft state budget was heard and the budget deliberation under the procedure prescribed by the Statute of the Seimas started only on 28 October 2008, although the provision of Article 172(4) of the Statute of the Seimas prescribed (and still prescribes) that the report of the Government on the draft budget must be heard in the nearest sitting of the Seimas. Such a 'nearest' sitting of the Seimas then took place on 20 October 2008. The first deliberation of the draft Law on the Approval of the Financial Indicators of the 2009 State Budget and Municipal Budgets was held by the outgoing Seimas only on 13 November 2008, *i.e.* at the last scheduled sitting of the

[201] However, such a possibility always remains open. For more see Kūris, E. 'Konstitucija, teisėkūra ir konstitucinė kontrolė: retrospekciniai ir metodologiniai svarstymai' [Constitution, lawmaking and constitutional review: Retrospective and methodological considerations] (cited in the Preface), p. 70–72.

[202] *Official gazette*, 2009, no. 125–5380.

[203] *Official gazette*, 2008, no. 121–4592.

[204] Online access: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=328906 [11 January 2015].

[205] 'The Government shall draw up a draft State Budget and present it to the Seimas not later than 75 days before the end of the budget year'.

2004–2008 Seimas.[206] In accordance with Article 177 of the Statute of the Seimas, the 2009 draft Law on the Approval of the Financial Indicators of the State Budget and Municipal Budgets was returned to the Government for revision on the basis of the received proposals and comments. Under Article 177(1) in its then effective wording of the Statute of the Seimas, the revision should have been carried out within no longer than fifteen days. The newly elected 2008–2012 Seimas convened for its first sitting on 17 November 2008, whereas the new Government was empowered to begin its work only after the Seimas had approved the Programme of the 15th Government on 9 December 2008. Thus, it was precisely on that day, following the signing of the relevant decree[207] by the President of the Republic, that the powers of the 14th Government, which, since 17 November 2008, had been the acting Government, ceased. Therefore, it was namely the outgoing 14th Government that had the duty, as established in the Statute of the Seimas, to revise and submit for reconsideration in the Seimas an amended draft Law on the Approval of the Financial Indicators of the 2009 State Budget and Municipal Budgets. This task, however, was fulfilled by the 15th Government.

The 15th Government submitted an amended draft Law on the Approval of the Financial Indicators of the 2009 State Budget and Municipal Budgets to the Seimas on 15 December 2008. It is true that, from the point of view of its content, the newly submitted draft law could hardly be regarded as an amended version of the first draft law, revised on the basis of the comments and proposals submitted by the Seimas, but rather as a completely new draft law reflecting the latest economic realities instead. On 16 December, amendments to the Law on the Budget Structure[208] and the Statute of the Seimas[209] were made, *inter alia*, temporarily (basically, for the procedure of the adoption of the 2009 state budget) postponing until 23 December the ultimate deadline for the deliberation of the second draft budget (Article 177 of the Statute of the Seimas[210]), whereas the final deadline for the approval of the state budget was postponed until the end of the calendar year (Article 20 of the Law on the Budget Structure). As the second consideration of the draft

[206] On 14 November 2008, one extraordinary sitting was held.

[207] *Official gazette*, 2008, no. 143–5694.

[208] *Official gazette*, 2008, no. 146–5867.

[209] *Official gazette*, 2008, no. 146–5868.

[210] The earlier version of Article 1 used to read as follows: 'A second consideration of a draft state budget shall be arranged not later than within 15 days of the first consideration; for the second consideration, the Government shall submit a draft state budget as amended on the basis of the received proposals and comments'. The new temporary version read as follows: 'A second consideration of a draft state budget shall be arranged not later than on 23 December. During the second consideration, the Government shall submit a draft state budget as amended on the basis of the received proposals and comments'. This new provision was officially proclaimed and entered into force on 21 December 2008; its period of validity was determined until '28 February 2009', as of '1 March 2009, the previously effective wordings of Article 177(1) of the Statute of the Seimas <...>, which were valid prior to the entry into force of the new Statute, shall be effective'.

budget took place on the very same day of 16 December 2008 (in the evening session), the aforementioned amendment to the Statute of the Seimas, which entered into force only on 21 December 2008, was, in principle, only a formal retroactive 'legalisation' of the fact that had already taken place. In addition to the Law on the Approval of the Financial Indicators of the 2009 State Budget and Municipal Budgets, tens of other related legal acts affecting the content (planned revenues and necessary assignations) of the 2009 budget were adopted at the end of 2008, which were drafted, deliberated, adopted, entered into force and started to be applied within a matter of several weeks.

Even such a brief chronology of the events illustrates that the process of the deliberation of the 2009 budget was hardly compatible with most of the imperatives that the legislator, legislative initiators and the executive were bound to comply following the constitutional principle of the rule of law. Under usual circumstances, the process of the approval of the 2009 budget and the adoption of the related legal acts that took place at the end of 2008 could hardly be considered in compliance with the customary (perhaps even minimal) principles of the protection of legitimate expectations, legal certainty and security, the protection of acquired rights, *vacatio legis,* the right of access to draft amendments and the possibility of adjusting relevant requirements, let alone the fundamental principles and main procedures for drafting laws on the approval of the financial indicators of the state budget and municipal budgets. Nevertheless, considering the circumstances prevailing at that time, *inter alia*, the signs of the underperformance of the 2008 budgetary revenue plan, which were already evident at the end of summer 2008,[211] also the conclusions of the National Audit Office of 13 November 2008 on the apparently over-optimistic budgetary revenue forecasts contained in the preliminary draft law on the 2009 state budget,[212] as well as the fact that, following the review of the preliminary draft budget and the adoption of a number of amendments to tax legislation, the public sector deficit planned for 2009 (which was initially estimated at 2.7 per cent) did, in fact, rise in 2009 as high as up to 9.4 per cent (and if no revenue and expenditure consolidation measures had been applied, *i.e.* the measures for increasing national revenue and reducing public costs, the deficit might have even exceeded 16 per cent),[213]

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[211] Staniulytė, T. 'Manipuliavimu biudžeto duobės nepaslėpsi' [The budgetary gap cannot be hidden by manipulation]. Online access: http://archyvas.vz.lt/news.php?strid=1002&id=1852880 [20 December 2014].

[212] On the Draft Law of the Republic of Lithuania on the Approval of the Financial Indicators of the 2009 State Budget and Municipal Budgets. Conclusion no. VA-24. National Audit Office, 13 November 2008. Online access: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=330917 [20 December 2014].

[213] Speech by the Chairman of the Board of the Bank of Lithuania Vitas Vasiliauskas of 19 December 2013 addressed to the Council of the European Union on new European governance setting, fiscal adjustment and experience of Lithuania; Council closes excessive deficit procedures for Italy, Latvia, Lithuania, Hungary and Romania. Communication from the Council of the European Union 11230/13 PRESSE 271. 21 June 2013. Online access: europa.eu/rapid/press-release_PRES-13-271_en.doc [21 December 2014].

it is obvious that certain particular extraordinary decisions and actions were necessary, though there was certainly very little time at the disposal of the newly elected Seimas and, even the more so, the new Government, appointed only on 9 December 2008.

Against the background of the exceptional circumstances and the public agitation at the end of 2009 triggered by the legislative process (in particular, in the area of public finances), it is not surprising that the issue of the constitutional compliance of the Law on the Approval of the Financial Indicators of the 2009 State Budget and Municipal Budgets and several related acts (adopted as a single package in December 2008) *(inter alia*, on the grounds of the improper adoption procedure) was contested in the Constitutional Court. In its ruling of 15 February 2013, the Constitutional Court held that:

> 'Since the Government, while preparing a draft state budget, and the Seimas, while considering and approving it, are bound by valid laws that affect the amount of planned state revenue and expenditure and, alongside, have the duty to predict the tendencies of the development of the economy of the state, to assess the needs and possibilities of society and the state, the necessity may arise to amend those laws respectively. It needs to be noted that in cases amendments to such laws established duties or limitations with respect to persons, one should heed the constitutional requirement to provide for a proper *vacatio legis*, *i.e.* enough time should be left before the entry into force of those amendments (the beginning of application thereof) so that the interested persons could properly prepare for them'.

Any derogation from these requirements may be possible 'only in exceptional circumstances, if it is justified by an important public interest', as in the event of the need to ensure the stability of public finances and prevent an excessive budget deficit due to a serious economic and financial situation. The ruling underscores that the duty to respond to vital changes in the economic and financial situation of the state when an extremely difficult economic and financial situation is caused by the economic crisis also derives from the Constitution; the Constitutional Court ruled that the Government is under the duty to base the budgetary revenue and allocations provided for in a draft state budget on the analysis of the needs and possibilities of society and the state; the criteria used for the evaluation of an economic and financial situation must be communicated to society so that it is aware of the reasons behind the planning of budgetary revenue and expenditure and the necessity to amend relevant legislation, in particular, where duties or restrictions are established. The Constitutional Court noted that any derogation from the said requirements may only be justifiable when a severe economic and financial situation breaks out suddenly, leaving no time to prepare in advance; therefore, such a justification may not be applied too often, and less so, annually, when a state budget is approved.

It is beyond doubt that the process of adopting the draft Law on the Financial Indicators of the 2009 State Budget and Municipal Budgets in December 2008 did not entirely follow the principles and procedures as prescribed by the Constitution and effective laws, and that this might have negatively affected the rights and legitimate interests of individuals, as well as might have undermined legal security and certainty. The ECtHR in its decision as to the admissibility of the application in *Credit Bank and Others v. Bulgaria*[214] noted that such situations may be non-compliant with the requirements of clarity and foreseeability applicable to legal regulation; however, in each case specific circumstances have to be taken into account. In the situation under discussion, as it transpires from the arguments of the Constitutional Court, the public interest and the values that were sought to be protected were extremely significant in adopting concrete decisions at the time in question. It may, therefore, be assumed that had the respective legislative decisions not been taken, the resulting damage to the interests of the state and individual members of the national community might have been even more severe compared to the damage caused as a result of adopting those decisions.

When analysing the possible non-compliance of the content of the draft Law on the Approval of the Financial Indicators of the 2009 State Budget and Municipal Budgets (as well as of other legal acts contested in that case) with the constitutional imperatives, the Constitutional Court noted that a state budget has to be a real one, *i.e.* it must include revenue and expenditure based on the evaluation of the needs and possibilities of society and the state. The Government, when preparing a draft state budget, and the Seimas, when considering such a draft and approving a state budget, must have regard of the functions of the state enshrined in the Constitution, the economic and social situation, the needs and possibilities of the state and society, as well as the available and actually accessible financial resources and liabilities. In addition, the Constitutional Court emphasised that the sufficiency of the provided budgetary resources necessary to address certain needs is an issue of social and economic reasonability, evaluation of the needs of the state and society, as well as compromise between these needs and the actual possibilities.[215] As indicated in the rulings of 31 May 2006,[216] 21 December 2006[217] and 15 February 2013, the Constitutional Court does not resolve these issues because they cannot be analysed in terms of legal criteria. An exception can be made only in very few extraordinary cases where, in the absence of

[214] No. 40064/98, 30 April 2002.

[215] *Inter alia*, Constitutional Court rulings of 14 January 2002, 11 July 2002 (referred to in Part I), 20 April 2010 (referred to in Part II) and 15 February 2013 (cited above and referred to in the Preface).

[216] *Official gazette*, 2006, no. 62–2283 (cited also in Part I).

[217] *Official gazette*, 2006, no. 141–5430.

alternative constitutionally feasible sources of funding, the regulation of a budget law provides for obviously scarce or no funds at all to perform certain functions of the state (to fulfil the essential constitutional goals) and, thus, violates the interests of the state and society and undermines human rights or other values enshrined in the Constitution.

When assessed from the present-day perspective and against the background of the known economic circumstances and the subsequent law-making decisions (primarily those related to the adjustments of the 2009 state budget following its approval),[218] the regulation of the Law on the Approval of the Financial Indicators of the 2009 State Budget and Municipal Budgets could hardly be considered to fall within the scope of the aforementioned exceptional cases, *i.e.* as a budget that provided for obviously scarce or no funding at all for the vital functions of the state or allocated the available resources (appropriations) in such a way that *ex ante* obviously violated the universally recognised legal standards of a democratic society and the constitutional imperative of respect for human rights or distorted an equitable balance between the interests of the whole community and fundamental rights of individuals. Meanwhile, the procedural aspects of the budgetary formation, which caused serious concerns before the resolution of the case at the Constitutional Court, remain problematic to this day: during the period of two years following the adoption of the aforementioned ruling by the Constitutional Court on 15 February 2013, no amendments were introduced to allow the Government and the Seimas, by means of resorting to the procedure *expressis verbis* established in advance, to adopt such law-making and law-application decisions as might be necessary in critical situations; therefore, in the event of a future crisis, there would be no way to deal with it by means other than the earlier mentioned derogation from constitutional imperatives. This remains all the more relevant considering that, in accordance with the Constitution, the situation that the formation of a new ruling Seimas majority and a new Government every fourth year overlaps in time with the submission, consideration and approval of a new draft budget should definitely not be regarded as exceptional. Even without trying to speculate on the possibility of a future recurrence of a situation similar to the one at the end of 2008, it is clear that, from the constitutional point of view, parliamentary elections and the formation of a new Government taking place in autumn is nothing more than a natural political changeover process (albeit devoid of some rationality).[219] Therefore, there is always the possibility (unless particular constitutional amendments are introduced) that a newly elected Seimas will seek to deliberate and adopt, and a newly formed Government (in particular, if it is not composed on the basis of the former political majority) –

[218] *Official gazette*, 2009, no. 58–2247; 2009, no. 93–3987.

[219] Kūris, E. *Loc. cit.*

to enforce a plan of state revenue and appropriations for the next calendar year as prepared by them rather than by the outgoing political parties. And this would be justifiable both in political and legal terms.

Under the Constitution, in cases where salaries and pensions reduced due to the economic crisis are still applied, the legislator has the duty every year to reassess the actual economic and financial situation in the state and decide whether it is still severe, *inter alia*, whether the collection of budgetary revenue is still disrupted to such an extent that prevents the state from fulfilling the assumed commitments and, if that is the case, to continue during the next budgetary year to apply the legal regulation under which reduced salaries and pensions are paid (Constitutional Court decision of 20 April 2010). In view of this, the 2011–2015 laws on the approval of the financial indicators of the state budget and municipal budgets were supplemented with the preambles specifying (describing) the main economic and legal circumstances that were decisive in the assessment of the financial possibilities of the state and determined the principal choices made by the Government and the Seimas regarding the budgetary structure for the given year. Nevertheless, it is noteworthy that since the end of 2013 (following the adoption of the 2014 budget), the reasoning of these arguments has become less concrete and explicit, and the description of relevant circumstances has been gradually changing into abstract political declarations. It should also be noted that yet another (aforementioned) obligation – established in the Constitutional Court ruling of 15 February 2013 and binding on the Government and the Seimas in the way that these institutions must communicate to the public the concrete criteria based on which an economic and financial situation in the state is assessed in order to plan budgetary revenue and expenditure and decide on the necessity to accordingly amend the relevant laws and, in particular, those that impose certain obligations or restrictions on individuals – has been, in fact, ignored by both the Government and the Seimas; there have been no initiatives undertaken to implement this obligation, even though the practice of amending tax legislation 'alongside the budget' has 'successfully' continued to this day.

In consolidating public finances during the crisis, one of the key steps, taken primarily in order to ensure the financial stability and functionality of the State Social Insurance Fund, was the reduction of the share of social insurance contributions transferred by employees and the employers to the private pension companies (funds). In accordance with the Law on the Reform of the Pension System,[220] as of 1 January 2004, residents covered by the state social insurance were entitled to accumulate part of their state social insurance contribution (cumulative pension contributions) in pension fund companies of their choice. In 2004, the share of state social insurance contributions that could be accumulated in private pension funds amounted to 2.5 per cent, in

[220] *Official gazette*, 2002, no. 123–5511 (as last amended).

2005 – 3.5 per cent, in 2006 – 4.5 per cent, and as of 2007 – was supposed to reach 5.5 per cent. This had a considerable impact on the financial flows of the State Social Insurance Fund: the revenue for running payments was diminishing immediately upon the transfer of cumulative contributions, whereas the related obligations to pay respectively smaller old-age pensions to individuals who were transferring part of their contribution to private pension funds were expected to decrease only in the future. Sharply decreasing revenue of the fund and steady (or very slowly decreasing) obligations to pay old-age pensions and other social benefits at the time of the crisis could profoundly limit the possibilities of the fund to comply with various particularly sensitive commitments, let alone to implement the pension system reform on the previous scale. Consequently, Article 4(1) of the Law on the Reform of the Pension System establishing the amounts of cumulative contributions was amended and supplemented several times from 2009 to 2011: initially, it was amended by reducing the transferable share of social insurance contributions down to 3 per cent as of 1 January 2009 and, then, down to 2 per cent as of 1 July 2009.[221] Later, in December 2011,[222] it was decided that the transferable share of contributions must be further reduced to 1.5 per cent in 2012 and to be increased up to 2.5 per cent in 2013. Finally, in November 2012,[223] it was determined that the share of state social insurance contributions transferable to private pension funds had to be set at 2 per cent as of 2014.[224]

The compliance with the Constitution of the aforementioned reduction of the share of state social insurance contributions transferable to private pension funds raised many doubts. For instance, it was argued whether such a regulation did not violate the principle of the inviolability of property of both the participants of the cumulative pension system and the companies providing cumulative pension services, which is enshrined in Article 23 of the Constitution (and Article 1 of Protocol no. 1 to the ECHR), all the more so as both the Constitutional Court and the ECtHR in their jurisprudences have linked the right to a pension to the right to acquire property.[225] Likewise, doubts were raised as to the compliance of some provisions with Article 52 of the Constitution, according to which the state is obliged to guarantee its

[221] *Official gazette*, 2009, no. 6-160; 2009, no. 54–2136.

[222] *Official gazette*, 2011, no. 160–7574.

[223] *Official gazette*, 2012, no. 136–6969.

[224] In addition, the amendments to the law contained special provisions applicable to self-employed persons (engaged in individual activity under business certificates) who were newly included into the social insurance system and were subject to a lower tax rate during the transitional period. *Official gazette*, no. 25-971.

[225] For instance: Constitutional Court rulings of 25 November 2002, 4 July 2003. *Official gazette*, 2002, no. 113–5057; 2003, no. 68–3094; Constitutional Court decision of 20 April 2010. *Official gazette*, 2010, no. 46–2219; Constitutional Court ruling of 29 June 2010. *Official gazette*, 2010, no. 134–6860; ECtHR judgments in *Rasmussen v. Poland*, no. 38886/05, 28 April 2009; *Carson and Others v. the United Kingdom* [GC], no. 42184/05, 10 March 2010; *Khoniakina v. Georgia*, nos. 17767/08, 17767/08, 19 June 2012.

citizens the right to receive old-age pensions. The amendments to the Law on the Reform of the Pension System were claimed to have possibly violated such constitutional provisions stemming from the principle of a state under the rule of law as the protection of legitimate expectations, the imperatives of proportionality and solidarity, as well as Article 23 of the Constitution, which prohibits discrimination.

The Constitutional Court considered this problem in two constitutional justice cases, in which rulings were adopted on 29 June 2012 and 19 December 2014, respectively.[226] The Constitutional Court held that the legislator, while having regard to the Constitution, has a broad discretion as to the choice of the framework of the pension system, including the system based on the partial accumulation of contributions for future old-age pensions in special pension funds. Such an interpretation, in principle, is in line with the doctrine of the margin of appreciation as consolidated in the case-law of the ECtHR. Having chosen this model, though, the legislator is also bound by the provisions of Article 46 of the Constitution, obliging the state to support economic efforts and initiative that are useful to society and to regulate economic activity (in this particular case, the activity of pension fund companies) in the way that it serves the welfare of the entire nation. At the time of an economic crisis when an economic and financial situation is deteriorating to the extent that the state is no longer capable of accumulating funds necessary for the payment of old-age pensions, it must be temporarily permitted – provided the imperatives of constitutional justice, reasonableness, proportionality and the equality of rights are respected and the essence of the cumulative pension is not denied – to reduce the share of these funds transferable to special pension funds for the sake of safeguarding the public interest. At the same time, a distinction is made between the part of income accumulated for old-age pensions in the pension funds, the amount of which does not depend on the amount of personal income, on the one hand, and the cumulative pension as protected under Article 23 of the Constitution (personal resources actually accumulated in the funds, *i.e.* payments that are to be received), the amount of which also depends on the results of the economic activity (investment) of the economic entities administering pension funds, on the other. Consequently, as the share of state social insurance contributions that is transferable to pension funds is reduced, the corresponding share of funds allocated to state social insurance old-age pensions is increased. Therefore, the reduction of the share of state social insurance contributions transferable to pension fund companies was not (reasonably, as believed by the authors) held to have been in violation of the principle of the inviolability of property, which is enshrined in Article 23 of the Constitution.

Due importance should also be given to other imperatives stemming from the Constitution: justice, the protection of legitimate interests, legal certainty, legal security, as well as the prohibition on denying the essence

[226] *Official gazette*, 2012, no. 78–4063; *TAR*, no. 2014–20117, 19 December 2014.

of the cumulative pension through disproportionate reduction. Although the necessity to reduce contributions can be constitutionally justified, individuals who choose to participate in the cumulative pension system should not suffer (unreasonably) high losses. Therefore, according to the Constitutional Court, after the amount of cumulative pension contributions had been reduced to 2 per cent, a mechanism of compensation for the reduced cumulative pension contributions should have been put in place, since individuals (particularly those who had before the reduction accumulated contributions at 5.5 per cent) had the right to reasonably expect that their pension entitlements would be secured and implemented during the established time period. In this context, it should be mentioned that, on 30 June 2010 (thus, before the cases under discussion were decided by the Constitutional Court), the Law on the Reform of the Pension System was amended by providing that the Government, having ascertained the end of the extraordinary situation in the state, was to submit to the Seimas draft laws on the increase of the rate of cumulative pension contributions. In its ruling of 29 June 2012, the Constitutional Court construed this provision as an obligation on the part of the legislator to all participants of the cumulative pension system to increase the amount of cumulative pension contributions, *i.e.* as a precondition for compensation for the reduced contributions. This act was seen as a proper protection of the legitimate expectations of the individuals who had joined the cumulative pension system before 1 July 2009 and who, as judged by the Constitutional Court, had incurred a substantial reduction of their contributions from 5.5 to 2 per cent. Nevertheless, this obligation, which seemingly helped to avoid declaring the reduction of the amounts of cumulative pension contributions as anti-constitutional on the grounds of failure to comply with the imperatives of legitimate expectations and proportionality, was later neglected. On 20 December 2012, only half a year following the adoption of the Constitutional Court ruling of 29 June 2012, the aforementioned obligation was revoked[227] on the basis of the argument that the entire procedure for funding the cumulative pension system was to be changed. Consequently, all participants of the cumulative pension system were placed on an equal footing. However, it was forgotten or, perhaps, ignored that the damage inflicted on the individuals who had joined this system before 1 July 2009 was a fact verified by the Constitutional Court; and the obligation to fairly compensate for that damage with due account of the economic and financial possibilities of the state was held to be a constitutional imperative. Therefore, it can hardly be maintained that all the issues pertaining to cumulative contributions reduced at the time of the crisis have already been conclusively resolved.[228]

[227] *Official gazette*, 2012, no. 154–7922.

[228] Even more so, as the Constitutional Court ruling of 19 December 2014 *expressis verbis* rules that the reformed cumulative pension systems (*i.e.* the Law Amending Articles 1, 2, 3, 4, 7 and 8 of the Law on the Reform of the Pension System, as adopted on 14 November 2012, which did not stipulate any compensation mechanisms or obligations) were not the subject matter of this particular constitutional case. Although not explicitly stated, the hint was more than obvious.

3. Taxes and contributions

3.1. General overview

Apart from a few exceptions related to EU law,[229] a model of a taxation system, the variety of taxes, their rates and content, calculation and payment procedures are mainly domestic matters of a state. By setting up a certain taxation system, every state seeks to encourage certain behaviour of taxpayers or to prevent any unfavourable developments in the public finance sector, to support particular social groups or areas of activity, *etc*. However, it should not be forgotten that taxable revenue, which every state is interested to collect, is paid by taxpayers, who are free to choose a form of economic activity and quite often the operating jurisdiction as well. In the present study, the taxation system is analysed within the context of developments that were triggered by the crisis, which was officially 'proclaimed' at the end of 2008 and so far has not been officially declared over. Before embarking on an overview of loads of various legislative amendments in the area of taxation (the references to which were formulated by the 15th Government in its Programme, which, as already mentioned, included the Crisis Management Plan) made alongside with the 2009 state budget at the end of December 2008 and commonly referred as the 'overnight' tax reform', it can be said that the 'overnight' tax reform has definitely overturned and disturbed the entire taxation system. This view is also shared by companies investing in Lithuania.[230] When the tax reform was completed at a lightning speed, both entrepreneurs and ordinary residents were lost in regulation bewildered by ignorance as to how much and for what they were supposed to pay taxes. It took as many as two years to rectify the mistakes of the reform.

Investors, both domestic and international, are extremely sensitive to the predictability and stability of taxation burden. Any amendments in the taxation legislation should be undertaken with extreme caution, only after a thorough and systemic analysis of the drawbacks of the existing system, the scope of the taxation burden and the potential impact of amendments on the general business environment in Lithuania. These are self-evident truths, truisms. Has the disruption of the taxation system, which was consistently applied since 2003–2004, done any good for the state budget? In view of the subsequent corrections and comparing the additional revenue that might

[229] Lukas, M. *et al*. 'Impact of Lithuania's EU membership on the national tax system' in Švedas, G. (ed.). *Op. cit*.

[230] 'Siekiant Lietuvos mokesčių sistemos stabilumo ir konkurencingumo: 7 nuodėmės (ko nedaryti) ir 10 įsakymų (ką daryti)' [Aiming at stability and competitiveness of the tax system of Lithuania: 7 sins (what not to do) and 10 commandments (what to do)]. Investors' Forum. Online access: http://www.investorsforum.lt/files/LT_leidinys_A4_final.pdf [30 December 2014].

have probably been received against the lost investments, business trust and reputation, the most likely answer is 'no'.[231]

Nevertheless, considering the research object and character of this legal study, it is not meant in essence to investigate into whether the taxation reform under discussion and other material changes made in the taxation laws as of the end 2008 were beneficial or harmful to the national economy or the promotion of investment in Lithuania. It suffices to say that Lithuanian tax law still lacks a systemic approach to the economic and psychological impact of the taxation regulatory framework on society and continuously ignores the significance of constructive public consultations. This claim can be proved by such novelties introduced in legal acts that are hardly comprehensible to taxpayers and weaken their 'tax' motivation as well as diminish their trust in lawmaking and public authority institutions, whereas winning back the trust once lost may be very hard at times. It should be noted that the Constitutional Court, even after 'approving' the adoption of the challenged tax legislative amendments alongside with the state budget, also noted that society should be given clear reasons and arguments as to why in the case of certain legal acts the exception from the general rule of the six-month *vacatio legis* had to be applied.

Thus, one of the highly sensitive areas is the stability, predictability and continuity of the tax legislation, allowing taxpayers to plan their activities and be aware of their future obligations towards the state in advance. Legal tax relations are continuous legal relations because taxes are paid for past activities, which cannot usually be changed. Thus, any change in the tax regulation should avoid denying the earlier acquired entitlements as well as be prospectively oriented, *i.e.* they should not deny any legitimate expectations. Where urgent changes are necessary and unavoidable, as in the case of an economic crisis, legal imperatives as well as the economic interests of the state and society require that the possible damage should be brought down to the minimum.

One of the key principles of tax law, which can significantly contribute to the minimisation of damage that may result from tax legislative amendments, is ensuring an appropriate *vacatio legis*. *Vacatio legis* is a universally recognised concept denoting a technical-procedural term that refers to the period between the official promulgation of a law or other legal act and the time the law takes legal effect and (or) is started to be applied. On the other hand, the selection of an appropriate *vacatio legis* in the process of legislation is one of the main preconditions ensuring not only the legality but also legitimacy of legal acts. It is important in seeking to ensure the protection of legitimate expectations, the retroactive invalidity of legal acts (*lex retro non agit*) and the rule of law, in general. New rules should not 'surprise' people to whom they are to be applied but should create preconditions and allow

[231] *Ibid.*

for the time necessary for them to adjust to the newly introduced changes and reconsider their future actions.[232] This is a rather universal position in the comparative constitutional jurisprudence. It is also followed by the Constitutional Court,[233] consistently emphasising the importance of trust in the state and its law, as well as the constitutional duty of law-making subjects to maintain and promote this trust. On the other hand, from a purely formal point of view, in terms of an appropriate *vacatio legis,* the entry of laws and other legal acts into force in Lithuania is problematic, because the explicit provisions of Article 70 of the Constitution[234] are worded in the way that may give the impression that a minimum *vacatio legis* can also be tolerated in cases where, for example, the adoption and signing of a law barely outpaces its official promulgation and the law enters into force with immediate effect.

At the level of statutory law, a normative basis for *vacatio* legis in Lithuania should be considered to be established in Article 20 of the Law on the Legislative Framework,[235] which was initiated by the 14th Government in 2007[236] but was adopted by 15th Government ('the crisis Government') only in 2012, *i.e.* towards the end of its term of office. In accordance with Article 20(1), normative legal acts enter into force on the following day of their official promulgation in the Register of Legal Acts, unless a later date of entry into force is specified in the legal act; with regard to taxation legal acts, Article 20(3) lays down special rules:

> 'In the Republic of Lithuania, tax laws imposing new taxes, new tax rates, tax reliefs and sanctions for the violation of tax laws, or substantially changing the taxation procedure of a certain tax or the principles of the taxation regulatory

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[232] Robertson, D. *The judge as political theorist: Contemporary constitutional review*. Princeton, 2010, p. 104.

[233] For instance, in its ruling of 15 February 2013 (referred to in the Preface), the Constitutional Court ruled that 'the changes in the legal regulation must be made in such a manner that the persons whose legal status is affected by those changes would have a real opportunity to adapt to a new legal situation. Therefore, while seeking to create conditions for persons not only to familiarise with the new legal regulation prior to the beginning of its validity, but also to adequately prepare for the provided changes, it might be necessary to establish a later date of the entry into force of the law (the beginning of its application)' and, namely, that 'the legal situation of persons, to whom the new legal regulation is applicable, should be regulated by means of transitional provisions in such a manner that they would be given enough time to finish the actions started by them on the grounds of the previous legal regulation in expectation that the latter legal regulation would be stable, and that they might implement their rights acquired under the previous legal regulation'.

[234] 'The laws adopted by the Seimas shall come into force after they are signed and officially promulgated by the President of the Republic, unless the laws themselves establish a later date for their coming into force.

Other acts adopted by the Seimas and the Statute of the Seimas shall be signed by the Speaker of the Seimas. The said acts shall come into force on the day following their publication, unless the acts themselves establish another procedure of coming into force'.

[235] *Official gazette*, 2012, no. 110–5564 (as last amended).

[236] *Official gazette*, 2007, no. 97–3920 (submission to the Seimas); 2010, no. 59–2888 (revocation).

framework or its application, shall enter into force not earlier than after a six-month period of the day of their official promulgation. This provision shall not be applied to the laws and legal acts that amend (supplement) tax laws of the Republic of Lithuania and are related to the law on the approval of the financial indicators of the state budget and municipal budgets in a given year and whereby Lithuanian national law is being harmonised with European Union law'.

These provisions, in principle, reiterated the provisions contained in Article 3(3)-(4) of the Law on Tax Administration[237] effective since 1 May 2004 and recognised that material, *i.e.* not merely technical, amendments to tax laws have a special status within the regulatory framework; on account of their impact on society as a whole and its individual members, as well as on individual rights and duties, a rather lengthy period – of six months – has been fixed for postponing the entry into force of these laws. This approach resolved a potential conflict between the interest of the state (the public interest) and the rights and interests of an individual taxpayer in favour of the latter. Notwithstanding the above, two exceptions have been made: the first exception derives from the obligation to comply with international commitments in the area of transposition (enforcement) of EU law and/or the second exception is linked to legislative tax amendments related to the law on the approval of the financial indicators of the state budget and municipal budgets of a given year;[238] these two exceptions are subject to a uniform one-day *vacatio legis*. The introduction of these two exceptions has shifted the balance to a large extent in favour of the state and the public interest (as understood by political authorities) and has set the preconditions for the Government and the Seimas to reform the mechanism for the accumulation of public resources and funding without any delays.

The Lithuanian *vacatio legis* derives, firstly, from Article 70(1) of the Constitution, under which the laws adopted by the Seimas enter into force after they are signed and officially promulgated by the President of the Republic, unless the laws themselves establish a later date for their entry into force, and secondly, from the constitutional principle of the rule of law. When clarifying the obligation of the legislator to set a sufficient *vacatio legis*, the Constitutional Court has held that, in each particular case, its duration should be assessed in view of the entirety of circumstances (*i.e.* the purpose of the legal act and its status within the system of law, the nature of the societal relations under regulation, the range of subjects to whom it applies and their possibilities to adjust to the changes, reasons due to which the legal act must come into force with immediate effect, *etc.*) It is recognised that a significant public interest and the aim to protect constitutional values may outweigh an individual

[237] *Official gazette*, 2004, no. 63–2243 (as last amended).

[238] 'Related' refers to the goals and contents of the legal regulation: this relationship must always be justified; definitely, anything considered 'related' should not be interpreted as something 'deliberated at the same time' or 'adopted at the same time', *etc.*

interest to have more time for adjustment to the new legal regulation and, thus, determine an urgent entry into force of a law even without any *vacatio legis;* however, such an entry into force of laws introducing new obligations or restrictions should be an exception based on extraordinary objective circumstances rather than a widely applicable rule.[239] The Constitutional Court has held that where the effective regulatory framework is materially changed to such an extent as to have a negative impact on the legal situation of individuals, both a sufficient *vacatio legis* and a transitional period should be mandatory to allow individuals the time necessary to complete the actions started on the basis of the previously effective legal regulation and implement the previously acquired rights.

Apart from the formal entry into force of newly adopted or amended tax laws, the beginning of actual application of the law is even more important. Tax laws are related to continuous economic relations and circumstances, *i.e.* the possession of property; changes in property value; investments with an expected future return; activities generating income; work remunerated for at the end of the pre-set period; one-off decisions with long-lasting economic consequences (granted or extended credits, savings, investments, acquisition of property on an instalment basis, *etc.*) Therefore, the application of tax laws and tax relations are usually divided into time segments, known as taxable periods (which vary depending on the type of taxes). As a result, the actual commencement of legal effect of many newly adopted normative legal acts in the area of taxation is usually defined not by a formal date of their entry into force but rather by the date of the beginning of their application, indicating a taxable period subject to tax calculation under the newly adopted regulatory provisions. In these situations, both the *de jure* and *de facto* risk of retroactiveness is a very real one.

A retroactive (retrospective) effect of a law may be (i) purely formal where certain (or all) provisions of the law are applicable also during the period preceding its entry into force or (ii) material where, in the absence of a transitional period, the newly established rules come into force with immediate effect and change the legal consequences of or have an impact on the activities or developments that took place before the legislative amendments.[240] In the first case, focus is on transitional provisions, which are supposed to guarantee that the transition from the previous to new legal regulation, including the ensuring of individual rights and legitimate interests, is as consistent and smooth as possible, while *vacatio legis* becomes more a secondary issue; in the second case, there is actual retroactive validity and application of the new legal regulation.

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[239] Birmontienė, T. 'Konstitucinės teisės šaltinių doktrinos raidos bruožai' [Features of development of the doctrine of the sources of constitutional law] in Šapoka, G. (ed.). *Teisės raida: retrospektyva ir perspektyva. Liber amicorum Mindaugui Maksimaičiui.* [Legal evolution: Retrospective and perspective. Liber amicorum Mindaugas Maksimaitis]. Vilnius, 2013, pp. 436–437.

[240] Gribnau, H. *Op. cit.*, p. 71.

Frequently, the application of tax laws as of the beginning of an already running taxable period is justified and a *vacatio legis* shorter than the mandatory six-month period is defended by the argument that the new legal regulation is supposed to facilitate the situation of the taxpayer (*e.g.*, by cutting the tax rate, extending due deadlines, providing for wider reliefs, *etc.*) In this context, the Constitutional Court ruling of 21 April 1994[241] is worth citing:

> 'In legislation, the adoption of retroactive norms of laws is an exception. This occurs only when the law itself specifies its retroactive validity, or when laws nullifying the punishability or administrative responsibility or mitigating the punishment or administrative penalty for certain acts are adopted. In other spheres of law, adoption of a retroactive law can have a negative impact on persons' rights. A retroactive law interferes in the sphere of regulation of the previously effective law and changes persons' rights and duties prescribed by the previous law. Due to this, the legal consequences appear that may be favourable to one party and unfavourable to another. Thus, it would be wrong to believe that a law improving the status of a person (except criminal and administrative responsibility) has always retroactive validity, because in ownership law, upon improving the status of one party of legal relation, the status of the other one can become worse'.

This supremacy of the *lex retro non agit* rule over its exception *lex beningnior retro agit* is relevant not only to private law, but also to tax law: the regulation of tax relations is directly related to business commercial environment; therefore, even those legislative amendments that 'only' formally introduce new tax reliefs to one group of taxpayers without any changes for other groups may disturb the established competitive balance and, thus, indirectly worsen the situation of other taxpayers. Therefore, it should not be taken for granted that the principles of *lex retro non agit* or a sufficient *vacatio legis* are allegedly not so imperative to all laws reducing the rate of taxes or facilitating their payment conditions. Quite to the contrary, an impact of every tax legislative amendment must be assessed against its potential impact not only on the direct addressees but also other taxpayers and the overall business environment.

It should be noted that, in assessing the constitutional compliance of tax laws, the Constitutional Court does not strictly differentiate between the moments when a law enters into force and when it becomes applicable. This can be accounted for, firstly, by the existing approach (which is not characteristic of the Constitutional Court alone but is rather a peculiarity of the whole national law-making tradition, though, at this point, no clarification is sought as to whether this tradition is authentic or borrowed/inherited), according to which the entry into force of laws is regarded as the possibility to apply them, and, secondly, by the fact that Article 70 of the Constitution

[241] *Official gazette*, 1994, no. 31–562.

makes reference only to the entry into force of laws and other legal acts but not to their application.[242] Such an omission to make the difference in question (even if it gives rise to certain problems in the theory of law) is a positive eventuality at least from the point of view of tax law because, in the constitutional jurisprudence, the criteria of *lex retro non agit* and a sufficient *vacatio legis* have the potential of being equally stringently applied to both moments – the entry into force and the beginning of the application of laws.[243]

3.2. Amendments in tax laws and *vacatio legis*

When the global economic crisis broke out in Lithuania in 2008, in an attempt to balance public financial flows and manage the budget deficit, the Government initiated and the Seimas adopted many hasty yet material legislative amendments, which affected the rights, duties and legitimate interests of various groups of individuals. Substatutory acts were also amended. From December 2008 to end December 2009 alone, over twenty material amendments to the main tax laws (on corporate income tax, value-added tax (VAT), personal income tax, excises) were adopted. This area, due to its direct connection to private property, business initiative and long-term plans of taxpayers, is particularly sensitive to any abrupt changes, while most other areas of life are even more sensitive to changes in taxation; therefore, a high number of amendments within one year is indeed remarkable. This alone raises concerns about the compliance of these amendments with the imperatives of legal certainty and stability.

The Law on Corporate Income Tax was amended eight times and all these eight amendments had one circumstance in common: the six-month mandatory *vacatio legis* was not a mandatory rule but rather a rare exception: the first four laws[244] were adopted and entered into force in parallel with the law on the approval of the 2009 budget; the law of March 2009[245] was

[242] But also see Constitutional Court ruling of 19 September 2002. *Official gazette*, 2002, no. 93–4000.

[243] Even in the ruling itself, which did not recognise that a failure to observe a *vacatio legis* stipulated *expressis verbis,* implies that the particular provision does not comply with the constitutional principle of the rule of law, it was held that heed must be paid to 'the constitutional requirement to provide for a proper *vacatio legis, i.e.* enough time should be left before the entry into force of those amendments (the beginning of their application) so that the persons concerned might properly prepare for them'. Constitutional Court ruling of 15 February 2013 (cited above and referred to in the Preface).

[244] *Official gazette*, 2008, no. 149–6000; 2008, no. 149–6001; 2008, no. 149–6002; 2008, no. 149–6030.

[245] *Official gazette*, 2009, no. 25–976.

applicable retroactively; as regards another two laws, the respective periods for entry into force and/or application[246] were one month and four days short of a six-month target; the last two laws[247] were adopted in December 2009 along with the law approving the 2010 budget; out of the eight amendments, only one[248] observed the requirement for the six-month period: a truly beneficial provision for taxpayers concerning the carry-forward of tax losses within companies belonging to a group was introduced with regard to tax losses calculated in 2010, *i.e.* applicable only as of 2011.

The Law on Personal Income Tax was amended seven times in 2009; an additional eighth amendment modified one of the previously adopted amendments. In terms of the procedure for the entry into force, the amendments to the Law on Personal Income Tax were almost no different from the amendments to the Law on Corporate Income Tax. The amendments adopted at the end of the given year and linked to the law on the approval of the state budget for the upcoming calendar year became applicable as of the beginning of that upcoming calendar year, in fact, not later than within one-two weeks of the adoption of the law. The procedure for a transitional period, which partially substituted the *vacatio legis* function, was more or less identical: the relevant provisions in a rather limited way targeted certain socially and politically most sensitive groups and their income and liabilities (income from agricultural activity, income from activity under business certificates, tax reliefs on housing mortgage interest, PC acquisition expenses, tuitions, life insurance benefits), whereas the period of six or more months, postponing the date of application, was applied in full only with regard to the introduction of the accrual accounting principle for calculating income from individual activity. Two laws amending the Law on Personal Income Tax[249] adopted on 19 February 2009 entered into force retroactively, *i.e.* as of 1 January 2009. However, on 15 February 2013, the Constitutional Court ruled that none of the two was unconstitutional in terms of the procedures for the adoption and entry into force of laws.

From December 2008 till end December 2009, the Law on Excise Duty was amended three times. As was common for that time, all the three amendments were adopted as laws related to the respective law on the state budget. And only one of the three amendments,[250] providing in advance for the future gradual increase of excise duty rates on cigarettes, entered into force and became applicable in full compliance with the mandatory *vacatio legis*.

Over the same period, the Law on Value Added Tax was amended six times. Some of the amendments were adopted in order to implement the

[246] *Official gazette*, 2009, no. 93–3979; 2009, no. 93–3980.

[247] *Official gazette*, 2009, no. 153–6880; 2009, no. 153–6881.

[248] *Official gazette*, 2009, no. 153–6880.

[249] *Official gazette*, 2009, no. 25–977; 2009, no. 25–977.

[250] *Official gazette*, 2008, no. 149–6005.

provisions of the new EU VAT Directives.[251] In the law amending the Law on Value Added Tax by transposing the EU VAT provisions[252] no crisis-triggered adjustments were included; hence, out of all the laws amending the Law on Value Added Tax and adopted during the thirteen-month period, five were 'inspired' by the crisis. The purpose of the first amendment was to revoke the law amending the Law on Value Added Tax that had been adopted earlier but had not entered into force yet,[253] thus, the application of *vacatio legis* with regard to this amendment might have been problematic. As far as all the subsequent amendments to the Law on Value Added Tax are concerned, the period between their official promulgation and entry into force was not the mandatory six months period but rather not more than five weeks.

For the sake of even greater clarity, it might have been necessary to assess not the chronology of laws amending tax legislation in general, but rather the adoption, official promulgation, entry into force and the beginning of the application of each tax innovation. However, given a large number of the amendments in question, the resulting analysis would need to be much broader in scope. On the other hand, though, the authors of the study believe that the review of lawmaking provided in the present and other parts of the study clearly illustrates the prevailing approach of the executive and legislative institutions towards such an element of the protection of individual constitutional rights as *vacatio legis*. The concept of *vacatio legis* was evidently regarded as a political promise, a *bona fide* pledge by the legislator, or as an exclusively technical, only formally mandatory, imperative, the adherence to which was within the discretion of the legislator. The requirement for an appropriate *vacatio legis* in the legislative process is very modestly linked to the deep-rooted origins of this principle. This argument is confirmed by the fact that the general principle of *vacatio legis* was ignored not only in respect of the amendments that had a considerable impact on taxable income (*e.g.*, modifying the tax rates) and whose necessity as part of the overall crisis management action is seemingly beyond question, but also in respect of almost all other amendments, which had no major impact on public finances and, therefore, cannot be regarded as vital or unavoidable, but which, nevertheless, were important to their addressees, who incurred not only material consequences but also additional administrative duties (first and foremost, the duty to properly adjust to the abrupt changes). The said is particularly true of the tax legislation amendments that changed the taxation procedure for in-kind income received by residents, increased the taxable property (shares, housing, other immovable property) value, corrected the taxation procedure for non-

[251] *I.e.* Council Directive 2008/8/EC of 20 February 2008 (OJ 2008 L 44); Council Directive 2008/9/EC of 12 February 2008 (OJ 2008 L 44); Council Directive 2008/117/EC of 16 December 2008 (OJ 2009 L 14).

[252] *Official gazette*, 2009, no. 151–6772.

[253] *Official gazette*, 2008, no. 149–6004.

residents, or unbundled compulsory health insurance contributions (initially, only in 'technical' terms) from personal income tax.

In the aforementioned ruling of 15 February 2013, the Constitutional Court assessed rather a large number of tax legislative amendments adopted before the end of April 2009. The Court ruled that none of the three investigated laws (amending tax legislation) – including those with retroactive effect, *i.e.* adopted *ex post facto* – was unconstitutional in terms of the procedure established in the Constitution for the adoption and entry into force (or only entry into force) of laws (and those amendments whose compliance with the Constitution was reviewed in terms of their content – ruled not in conflict in terms of their content). Notwithstanding the above, with due account of the official constitutional doctrine developed on *vacatio legis* and the analytical criteria applied in the ruling, it would be difficult to give an indisputable evaluation of the constitutional compliance of the adoption and entry into force of the subsequent laws amending tax legislation. In such constitutional justice cases, various issues of a more complex and general character might arise, which so far have not been answered in the jurisprudence of the Constitutional Court (although, on the whole, it gives certain rather clear guidelines directing towards the legal consequences of the recognition of the unconstitutionality of legal acts (or their provisions) that had been applied and created material effects before they were ruled unconstitutional). For instance, what legal consequences would arise as a result of the recognition of a tax law as unconstitutional in terms of the procedure of its entry into force? Would this law become 'absolutely' null and void? And, in this case, if the legislator still wished to lay down the same rules, would it be obliged to readopt an identical law, though, this time, already observing the requirement of *vacatio legis* for the entry into force of tax laws? Or would the recognition of the unconstitutionality of such a law be legally significant only in terms of its entry into force, *i.e.* would the legal act remain in force and would the rights and duties arising under it become applicable (most probably, retroactively) only after the mandatory *vacatio legis* would have come to an end, provided, of course, that it had not come to an end at the time of the official announcement of the Constitutional Court ruling? On the other hand, considering the precedents in other constitutional justice cases not related to the field of taxation, it may be questioned whether any material (rather than formal) legal consequences would arise at all. Also, given that the consideration of a constitutional justice case often starts after a significant time lag following the end of the dispute-related taxable period (quite often, even after more than two or three taxable periods), the application of the particular statutory legal provisions amending the particular regulation of tax relations, though resulting in deviation from the requirement for *vacatio legis* and remaining challenged in terms of constitutional compliance, would still provide certain – even though not final – stability to the tax system.

As it has already been mentioned, in its ruling of 15 February 2013, the Constitutional Court 'approved' derogation from the general requirement for the six-month *vacatio legis* established for the entry into force/application of tax laws only under certain particularly extraordinary circumstances (an economic/financial crisis covering the entire country). At the same time, when providing, *inter alia*, its interpretation on the derogation from *vacatio legis* (established in Article 3(4) of the Law on Tax Administration[254] and reiterated in Article 20(3) of the Legislative Framework, which was not invoked in the ruling in question) in respect of laws adopted in parallel with a law on the state budget, the Court ruled that 'such a legal regulation should be applied only in exceptional circumstances', as well as that

> 'the exception <...> laid down in the Law on Tax Administration <...> should not be assessed as permission to ignore <...> the established term for the entry into force of tax laws when adopting a law on the state budget'.

In assessing this doctrine as a whole, there are grounds to maintain that the established period of six months was seemingly (and reasonably, as believed by the authors) found to be sufficient and, thus, was indirectly 'approved' by the Constitutional Court. Admittedly, derived from the Constitution, the very principle of *vacatio legis* has been upgraded to the level of a constitutional principle by the constitutional doctrine. However, the duration of the general *vacatio legis* (six months), as well as its exception, has been consolidated in ordinary statutory law, which may be subject to change by the legislator, who is bound by this *vacatio legis*. Nevertheless, the Constitutional Court has noted on more than one occasion that the Seimas is bound by its own laws (until amended), as well as that all amendments to these laws must be in compliance with constitutional imperatives, even more so as these imperatives have been rather explicitly interpreted in the official constitutional doctrine. If the legislator decided to radically change the currently effective general statutory six-month *vacatio legis* applicable to the entry into force/application of tax laws, as, for instance, by cutting it short to a certain irrelevant period of time (but at the same time retaining the formal institution of *vacatio legis* in statutory law), it is likely that such a provision itself could become an object of an effective constitutional review. Similarly, the constitutional review could (and perhaps should) be called for in the event of such a hypothetical legislative amendment whereby the derogation from the general *vacatio legis,* as 'approved' by the Constitutional Court, would be expanded to cover a wide range of factual and/or legal situations.

From the first sight, this evolution of the *jurisprudentio posteriori* of the Constitutional Court should be regarded as consistent and in line with the principle and standards of the protection of legitimate expectations of individuals. One should not be tempted to criticise or even deny the Constitutional Court ruling of 29 November 2007 (either the arguments or resolution); this ruling should be assessed in the light of the then legal

[254] *Official gazette*, 2004, no. 63–2243 (as last amended).

and factual situation (as well as in the context of the preceding regulatory framework, international covenants and practices), considering that the contested legislative amendment had as its reasonable goal, *inter alia*, to eliminate preconditions for abusing loopholes in the previously effective legal regulation. Any wider analysis of that legal regulation would go beyond the scope and chronological frames of the present study.

3.3. Changes in the regulation of taxes and contributions

3.3.1. Value-added tax

Before the crisis, Lithuania charged the VAT at the standard rate of 18 per cent, set by the first Law on Value Added Tax of 1994,[255] and at the reduced rates of 5 and 9 per cent, applicable to more than ten groups of goods and services. Most of those groups, *e.g.*, fresh and chilled meat, live, fresh and chilled fish, hotel services, regular passenger transport services, *etc.* were subject to the VAT rate of 5 per cent, while the rate of 9 per cent was applied only to residential housing construction, renovation and insulation services.

Following the approval of the Action Programme of the 15th Government of Lithuania in parallel with the Crisis Management Plan as part of it, it was decided to increase the VAT rate to 19 per cent (§ 12) and to eliminate the reduced rates for all goods and services. The only exception was central heating, where the reduced VAT rate was to continue until the beginning of the new heating season in autumn 2009 and was to be replaced by 'an efficient compensatory mechanism in respect of the persons with low and medium income' (§ 15). December 2008 witnessed the adoption of two laws amending the Law on Value Added Tax,[256] the provisions of which were consistent with the crisis management solutions foreseen in the Action Programme of the Government. These two laws abolished the majority of the VAT reductions, including the reduced and not yet effective VAT rate for fruits and vegetables, but retained the reduced VAT rate for heating (by virtue of the subsequent amendments to the Law on Value Added Tax, this reduced rate is applicable to this day),[257] books, other printed matter and reimbursable drugs. On 1 September 2009, the standard VAT rate was raised once again up to 21 per cent,[258] and at this rate the VAT was still applicable as of 1 January 2015.

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[255] *Official gazette*, 1994, no. 3–40.

[256] *Official gazette*, 2008, no. 149–6004; 2008, no. 149–6034.

[257] *Official gazette*, 2009, no. 93–3988; 2013, no. 101–4978; *TAR*, no. 2014–19664, 12 December 2014.

[258] *Official gazette*, 2009, no. 93–3978.

From December 2008 till the end of December 2014, the Law on Value Added Tax was amended sixteen times. Two amendments of 2008 were made in relation to the state budget for 2009. Years 2009 and 2014 saw four amendments each, 2010 and 2012 – two amendments each, 2011 and 2013 – one amendment each. Four amendments[259] were made to transpose the provisions of EU law into the statutory law of Lithuania, one amendment was made in relation to the introduction of the Euro,[260] and as many as six amendments concerned the reduced VAT rates. As mentioned before, most of the VAT reductions were abolished from 1 January 2009, except for the reduced VAT rate for central heating of residential housing. After the first extension until 31 August 2009, the reduced rate for heat energy was then prolonged until 31 August 2010,[261] and then – several more times until 1 July 2015.[262] The reduced VAT rate of 5 per cent on reimbursable drugs and medical products similarly survived 'the overnight taxation reform': at first, the reduced rate was fixed to last until 30 June 2009, but, later, it was prolonged for an indefinite period[263] (the same rate was also extended to technical aids for the disabled and for repairing such aids).[264] Developments in the tourism sector, however, were somewhat different. The pre-crisis reduced VAT rate of 5 per cent applicable to hotel-type and special accommodation services was eliminated as of 1 January 2009, but, in 2011, the reduced VAT rate of 9 per cent was reintroduced for these services;[265] from 1 January 2015, it became applicable to accommodation services for an indefinite period of time.[266] The situation in respect of books and non-periodical publications was quite similar: from 2010, the reduced VAT rate of 9 per cent became applicable for an indefinite period of time,[267] and, from 1 January 2013, a 9 per cent rate was reinstituted on newspapers, magazines and other periodical publications, as well as on regular passenger transport services.[268] The law that abolished the reduced VAT rates contained some transitional period provisions. For instance, the reduced VAT rate was still applicable to accommodation services booked in advance before 31 December 2008, also to publications subscribed to before 31 December 2008.

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259 *Official gazette*, 2009, no. 151–6772; 2010, no. 148–7562; 2011, no. 161–7616; *TAR*, no. 2014–17215, 20 November 2014.

260 *TAR*, no. 2014–13630, 3 October 2014.

261 *Official gazette*, 2009, no. 93–3988.

262 *Official gazette*, 2010, no. 86–4541; 2011, no. 161–7616; 2012, no. 153–7828; 2013, no. 101–4978; *TAR*, no. 2014–19664, 15 December 2014.

263 *Official gazette*, 2012, no. 153–7828; 2013, no. 101–4978.

264 *Official gazette*, 2012, no. 79–4090.

265 *Official gazette*, 2010, no. 148–7562.

266 *Official gazette*, 2013, no. 101–4978.

267 *Official gazette*, 2010, no. 148–7562.

268 *Official gazette*, 2012, no. 79–4090.

In spite of much criticism, the decision to revise VAT rates, perhaps, was one of the least debatable issues in the Government and the Seimas. On the other hand, the majority of the respondents of the survey conducted during the research reported that they deemed these decisions to be most important.[269] While increasing VAT rates, the legislator was clearly aware of a possible negative impact of these increases, such as subsequent increases in prices. However, in the context of the economic slowdown and a sluggish growth of remuneration and consumption, it was expected that only part of the burden resulting from the increased VAT rate would be shifted on consumers as competition for customers was bound to suppress this process.[270] Public opinion about the impact of this decision was controversial. Some believed that an increase in the VAT rate was highly detrimental to the Lithuanian economy as VAT revenues were considerably lower than planned. Others maintained that those countries who had reduced the standard VAT rate or introduced new reliefs when faced with the crisis had sought to stimulate their domestic consumption; however, Lithuania could not opt for these means of stimulating its economy as only countries with sufficient reserves could afford to stimulate their economy by reducing tax rates, whereas '[we] have never had such reserves and we always spent more than we had'. Moreover, there was no possibility of borrowing at a 'reasonable price' either; thus, Lithuania could hardly opt to reduce a standard VAT rate.[271] And it must be said that Lithuania was not the only EU Member State that tried to patch holes in its budget by a higher rate of the VAT[272] during the crisis.

The increased standard rate of the VAT created a few ambiguous situations for taxpayers. One of the examples of such situations was the practice of the revision of price stipulations in public procurement contracts following an increase of the VAT rate. The Supreme Court stated that the procuring authority could choose either of the two ways to determine the value of a contract: to indicate a specific fixed price or to set the rules for calculating a price.[273] In the first case, as there was a fixed price without any recalculation rules, any revision of the price should be regarded as a modification of the contract in the sense of Article 18(8) of the Law on Public Procurement; therefore, in this

[269] A/TAP 378, 383, 389, 392.

[270] Explanatory note. Online access: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=333092 [25 January 2015].

[271] 'Lietuvos valdantieji mokesčius kėlė, tačiau pagalbą pamiršo' [While raising taxes state officials forgot about help]. Online access: http://www.veidas.lt/lietuvos-valdantieji-mokescius-kele-taciau-pagalba-pamirso [25 January 2015].

[272] 'Biudžeto skylės kamšytos didesniu mokesčiu' [Budgetary gaps plugged by a higher tax]. Online access: http://iq.lt/dienos-grafikas/biudzeto-skyles-kamsytos-didesniu-mokesciu [25 January 2015].

[273] Supreme Court ruling of 20 March 2012 in the civil case *UAB „Autokausta" v. Kauno regiono atliekų tvarkymo centras* [JSC Autokausta *v.* Kaunas Region Waste Management Centre] no. 3K-3-132/2012.

case, it was necessary to consider the feasibility and legitimacy of the need to revise a fixed price of a contract due to new circumstances, such as changes in the taxation framework.[274] In the second case, a public procurement contract stipulated not only the price, but also the recalculation (pricing) rules for both increasing and decreasing the price in the presence of certain events stipulated in the contract, *e.g.*, change in the VAT rate. If such events did not occur during the implementation of the contract, the price remained the same; if they occurred, the price was to be revised accordingly.

The state uses tax reliefs to influence a certain market, to support a specific sector or consumers, to encourage certain behaviour or, conversely, to deter it. As the regulatory tax framework in general is, first and foremost, a matter of (economic, social, *etc*.) politics rather than of law, so is a regulation of tax reliefs. A tax system is an instrument of a certain policy pursued by the government in a particular area of its governance, where tax reliefs are aimed at increasing employment, demand or supply, supporting certain social groups or reaching other goals.[275] In its national audit reports, however, the National Audit Office found that the political decisions to introduce certain tax reliefs were frequently made by the legislator in the absence of sufficient grounds or in pursue of abstract aims, such as the aim 'to create more favourable conditions for business' or 'to increase competitiveness', *etc*.[276] According to the National Audit Office, there was a risk that tax reliefs could distort the tax system, reduce its transparency, give incentives to abuse reliefs, hamper the administration of taxes or favour certain producers or service providers while discriminating against others. It was also maintained that the reduced rates rendered the VAT even more complicated, caused economic distortions, created 'tax loopholes', as well as impeded the reduction of the general taxation level.[277] The organisations of investors were consistent in expressing similar opposition towards the reduced VAT rates.[278]

In general, the reduced rate of the VAT should offer a direct benefit to the consumer through a lower price of goods and services and through higher supply and demand; otherwise tax reliefs would turn into a direct aid to

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[274] Supreme Court ruling of 4 January 2013 in the civil case *UAB „Iksados" gamybinis ir techninis cechas v. Priešgaisrinės apsaugos ir gelbėjimo departamentas prie Lietuvos Respublikos vidaus reikalų ministerijos* [JSC Iksada manufacturing and technical centre *v.* Fire and Rescue Department under the Ministry of the Interior of the Republic of Lithuania] no. 3K-3-75/2013.

[275] *Cf.* Application of reduced VAT rates. Report no. 8000-7P-31. National Audit Office, 19 December 2006. Online access: http://www.vkontrole.lt/audito_ataskaitos.aspx?tipas=2 [15 January 2015].

[276] Tax reliefs. Report no. VA-P-60-3-7. National Audit Office, 7 June 2013. Online access: http://www.vkontrole.lt/audito_ataskaitos.aspx?tipas=2 [15 January 2015].

[277] Report no. VA-P-60-3-7 of the National Audit Office (cited above).

[278] *E.g.*, 'Siekiant Lietuvos mokesčių sistemos stabilumo ir konkurencingumo: 7 nuodėmės (ko nedaryti) ir 10 įsakymų (ką daryti)' [Aiming at stability and competitiveness of the tax system of Lithuania: 7 sins (what not to do) and 10 commandments (what to do)] (cited above).

business and a means of subsidising it.[279] The decision to abolish the reduced rates of the VAT was also based on the economic research data indicating that reduced rates had no direct impact on the prices of goods and services (*i.e.* no impact at all or only a short-term impact), and that the reduced VAT rates mostly benefited producers and service providers rather than consumers of the goods and services subject to the reduced rates of VAT; although, the application of tax reliefs should have been of major benefit to consumers.[280] The same conclusion was reached by the National Audit Office.[281] Despite drawing much criticism from certain sectors, from the legal point of view, the abolishment of the reduced VAT rates is deemed to be a prerogative of the legislator; therefore, neither the reduction of the VAT rate nor the abolishment of the majority of the VAT reliefs *in itself* constitute a violation of any constitutional right of or guarantee for individuals, as it is unreasonable to have the legitimate expectation that taxes would never be changed.[282]

In this context, the position of the ECtHR should be mentioned. *E.g.*, in *Burden v. the United Kingdom*,[283] the ECtHR (invoking its extensive case-law) maintained that, in the area of taxation, national government institutions are responsible for the assessment of the means to be employed and aims sought to be realised and that the state has a wide margin of appreciation when it comes to general measures of an economic or social strategy.[284] Governments try to balance the need to increase income and the pursuit of other social aims in their taxation policy. Because of their immediate awareness of society and its needs, the national governing bodies, in principle, are better (than the ECtHR) placed to appreciate what is public interest of social or economic nature, therefore, the ECtHR has high regard of the political decisions by national legislators in the area of taxation, except in cases where such decisions clearly lack justification and provided that neither the development nor implementation of taxation schemes will discriminate taxpayers by means that are in breach of Article 14 (prohibition on discrimination) of the ECHR.[285] Consequently, as long as the state does not discriminate against certain groups of taxpayers in favour of others or does not create situations where taxation may amount to an unjustified expropriation of property, it is

[279] Report no. VA-P-60-3-7 of the National Audit Office (cited above).

[280] Explanatory note. Online access: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=333092 [15 January 2015].

[281] Report no. VA-P-60-3-7 of the National Audit Office (cited above).

[282] Lukas, M. 'Kai teisė – tik tarnaitė' [When law is only a servant]. Online access: http://iq.lt/komentarai/kai-teise-tik-tarnaite?psl=0 [25 January 2015].

[283] [GC], no. 13378/05, §§ 60–65, 29 April 2008.

[284] See, *mutatis mutandis*, *James and Others v. the United Kingdom* [Plenary], no. 8793/79, 21 February 1986; *National and Provincial Building Society v. the United Kingdom*, nos. 21319/03, 21449/93, 21675/93, 23 October 1997.

[285] See, *mutatis mutandis, Stec and Others v. the United Kingdom*, nos. 65731/01, 65900/01, 12 April 2006.

competent to decide on the priorities of its taxation policy, social groups to be supported, behaviour to be encouraged or that that should not, *etc*. Such discretion *in itself* is not incompatible with the imperative of the rule of law and the duty of the state to ensure respect for human rights.

Some research publications in financial law contend that the primary aim of the December 2008 tax legislation amendments was mostly fiscal, *i.e.* to maximise budget revenues by ignoring the key principles of taxation regulation, as set out in the Law on Tax Administration and, in particular, its Article 8(2), which refers to the principle of fair taxation. Any failure to comply with this principle leads to a violation of a proportionate distribution of tax burden, as a significantly increased general tax burden (the accumulation of all increased taxes), first of all, hits the most socially vulnerable groups of society. Thus, the principle of fair taxation is the main legislative prerequisite for justifying the lawfulness of the establishment of tax reliefs.[286] The assessment of the previous tax regulations in the light of such an approach (*i.e.* consideration of whether the previously established tax reliefs had not unjustifiably favoured certain groups of taxpayers, whether those reliefs had been socially oriented and whether they had pursued any such goals that otherwise could not have been achieved) gives reasons to believe that most of the VAT reliefs aimed at supporting certain sectors and did not benefit the final consumer (most vulnerable groups of society) in any tangible way. Among other things, the state did its utmost to try to protect the interests of the most vulnerable groups of population by retaining the socially-oriented reduced VAT rates for central heating, press, passenger transportation and reimbursable dugs. It must be noted that the European Commission also recommended eliminating the reduced VAT rates.[287] Thus, all the above hardly gives any grounds to categorically maintain that the relevant legislative decisions were legally defective, even though some of them later proved to be hasty or unfounded.

A different picture emerges when the amendments to the Law on Value Added Tax are assessed against the standards governing the adoption and entry into force of legal acts. In this respect, the position of the Constitutional Court regarding the compliance of the amendments to the Law on Value Added Tax and other tax laws with the Constitution has already been thoroughly described in this chapter. Nevertheless, account should be taken of the fact that the Constitutional Court did not analyse the constitutional compliance of all the tax legislation amendments made during the period under discussion; the constitutional review covered the legislative amendments made in late 2008 and early 2009, when the situation was indeed extraordinary. Irrespective of their target, the majority (but not all!) of the amendments

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286 Sudavičius, B. 'Mokesčių lengvatos Lietuvos mokesčių teisės kontekste' [Tax reliefs in the context of the tax law of Lithuania] in *Teisė,* 2010, vol. 76, pp. 105–106.

287 'Briuselis siūlo naikinti PVM lengvatas ir verčiau mažinti jo tarifą' [Brussels recommends to scrap VAT reliefs and to reduce the standard VAT rate instead]. Online access: http://lzinios.lt/lzinios/Ekonomika/briuselis-siulo-naikinti-pvm-lengvatas-ir-verciau-mazinti-jo-tarifa/28461 [1 February 2015].

made to the Law on Value Added Tax until the end of 2014 also entered into force before the required period of six months of their adoption. And despite a positive outcome for the legislator in the constitutional justice case in which the 15 February 2013 ruling was adopted, the stability of the legal regulation governing the VAT relations and ensuring adequate *vacatio legis* still remain problematic.

3.3.2. Excise duty

In its Crisis Management Plan, the Government committed to raising the excise duty on oil at least up to the minimum levels set in the EU, at least doubling the excise duty on liquefied gas, increasing the excise duty on tobacco and alcohol, as well as abolishing the reduced excise duty rate on beer produced in small breweries (§ 16).

The Law on Excise Duty was amended eighteen times during the period from December 2008 till the end of 2014. The law was amended once in 2008 and 2013, twice – in 2009 and 2012, three amendments were made in 2011, four – in 2010 and as many as five – in 2014. In most cases, the amendments concerned the rise of the excise duty rates for different excised goods (alcohol, tobacco and fuel) and provided for a new regulation of the excise duty on electricity.[288] It must be noted that the excise duty rates for gas-oils raised during 'the overnight tax reform' were cut already on 1 August 2009[289] based on the reason that the increased rates were higher than the minimum EU rates, as well as having regard to a 'favourable situation in the oil market' and the aim to 'stabilise the state finances'.[290] Only on 1 January 2013, the excise duty on gas-oils was put up to the minimum level set in the EU.[291] From 1 January 2001, a relief from the excise duty (*i.e.* no excise duty) was set for natural gas used as fuel for local regular urban and suburban passenger buses,[292] and from 1 January 2012, no excise duty was charged on coal, coke and lignite in cases where they were sold or otherwise transferred to the ownership of individuals and also public legal bodies that were the recipients of charity under the Law on Charity and Sponsorship.[293]

It must be stated once again that, in the context of the rule of law, these amendments fall into the broad discretion enjoyed by the state in the area

[288] *Official gazette*, 2010, no. 45–2174.

[289] *Official gazette*, 2009, No. 91–3926.

[290] Explanatory note. Online access: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=349195 [1 February 2015].

[291] *Official gazette*, 2012, no. 153–7830.

[292] *Official gazette*, 2010, no. 148–7560.

[293] *Official gazette*, 2011, No. 150–7047.

of taxation (obviously, to the extent allowed by the EU regulations). Most of these amendments, as well as many other amendments to tax laws, failed to observe the requirement for *vacatio legis*. Compared to other taxation laws, however, the entry into force of the amendments to the Law on Excise Duty was most often delayed, allowing the required six months to pass from the official publication of the amendment until its entry into force.[294]

3.3.3. Corporate income tax

Until the end of 2008, Lithuania imposed corporate income tax at the rates of 0, 10, 13 and 15 per cent. The standard tax rate of 15 per cent was applicable to the taxable profit of the majority of entities, as well as to income from distributed profit.

The Crisis Management Plan, a constituent part of the 15th Government Programme, set the corporate tax rate at 20 per cent and introduced a relief from this tax for entities investing in technological modernisation (§ 23). The Programme also provided for the removal of reliefs applicable to certain business areas.[295] On the other hand, the Government had no choice but to introduce a new important relief. Prior to 'the overnight tax reform', the relations regulated by the Law on Corporate Income Tax were rather stable. However, policymakers and the legislator were criticised for the absence of any reliefs from taxes on investments.[296] The Crisis Management Plan did provide for a reduced corporate income tax rate for companies investing in essential technological modernisation with a view to raising productivity levels and envisaged the possibility of reducing taxable profit by the amount of such investment (§ 23). Thus, the amendment was made to allow companies to reduce their taxable profit up to 50 per cent where the company was implementing an investment project during the taxable period, *i.e.* making

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294 *E.g.*, the 30 November 2010 Law Amending Articles 3, 9, 10, 15, 16, 18, 19, 21, 30, 31, 37, 43 of the Law on Excise Duty and Annex 3 and adding Article 58^1 was officially promulgated on 18 December 2010 (*Official gazette*, 2010, no. 148–7560) and came into effect on 1 January 2013; the 2 July 2013 Law Amending Articles 23, 24, 25, 26, 30, 31 of the Law on Excise Duty was officially promulgated on 16 July 2013 (*Official gazette*, 2013, no. 76–3846), its provisions came into effect from 1 March 2014 or 1 April 2014, and, finally, the 5 June 2014 law no. IX-569 amending Article 37 of the Law on Excise Duty was officially promulgated on 11 June 2014 (*TAR*, no. 2014–07397) and entered into force on 1 January 2015.

295 Explanatory note. Online access: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=333063 [29 January 2015].

296 'Pramonininkai ragina sugrąžinti lengvatą investicijoms' [Industrialists urge to reintroduce a tax relief for investments]. Online access: http://www.delfi.lt/verslas/verslas/pramonininkai-ragina-sugrazinti-lengvata-investicijoms.d?id=8837820 [29 January 2015]; 'Be mažesnių mokesčių investicijų nebus' [Without lower taxes there will be no investments]. Online access: http://archyvas.vz.lt/news.php?id=462042&strid=1003&rs=0&ss=&y=2006%2004%2006. [1 February 2015].

investments in long-term assets with a view to producing new or additional products and services, expanding production (or service provision) capacity, introducing a new production (or service provision) process, essentially modifying the running of the production process or its part, or introducing technologies protected by international patents for inventions. Investments for the sole purpose of replacing the long-term assets in possession with other analogous long-term assets did not qualify as an investment project (or its part). This novelty of 'the overnight taxation reform' was initially put in place only for a limited period, *i.e.* from 2009 till 2013; however, this period was later prolonged until 2018, inclusively, and the list of investment objects was expanded, too.[297]

The most important and most criticised amendment to the Law on Corporate Income Tax was the increase of the tax rate from 15 to 20 per cent. Many experts believed that the decision to increase the rate was simply not reasonable. It was maintained, for instance, that

> 'the decision was allegedly made to solve the 2009 budget problems, however, it was forgotten that the impact of the decision, if any, would only be felt in September of 2010, as corporate income tax is payable nine months after the end of the year. Moreover, companies were not profitable anyway during the years of the crisis; thus, the increase in the corporate income tax rate brought no financial benefit, while the psychological damage was great'.[298]

According to researchers in the field of economics, the decision to increase corporate and income tax rates is the most detrimental decision that can be made during the period of the economic and financial recession.[299] The measures to be used to deal with the budget deficit should concern not only income, but also expenditure. During the crisis, some of EU Members States consolidated their financial measures deciding on such priorities as better collection of taxes, fighting tax evasion, directing public expenditure towards the improvement of the investment climate and labour market conditions, *etc*.[300] It is not surprising, therefore, that, in December 2009, it was decided to go back to the 15 per cent rate as of 2010.[301]

As many as twenty-one amendments to the Law on Corporate Income Tax were adopted from December 2008 till the end of 2014. Four amendments were made in December 2008,[302] the next five – in 2009,[303] then two

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[297] *Official gazette*, 2013, no. 75–3757.

[298] 'Lietuvos valdantieji mokesčius kėlė, tačiau pagalbą pamiršo' [While raising taxes Lithuanian officials forgot about help]. Online access: http://www.veidas.lt/lietuvos-valdantieji-mokescius-kele-taciau-pagalba-pamirso [29 January 2015].

[299] See, *e.g.*, Zai, P. 'The economic crisis and fiscal trends in EU Member States' in *Transylvanian review of administrative sciences,* 2012, no. 35E, p. 258.

[300] *Ibid.*, p. 259.

[301] *Official gazette*, 2009, no. 153–6880.

[302] *Official gazette*, 2008, no. 149–6000; no. 149–6001; no. 149–6002; no. 149–6030.

[303] *Official gazette*, 2009, no. 25–976; no. 93–3979; no. 93–3980; no. 93–3989; no. 153–6880; no. 153–6881.

amendments were made annually in 2010,[304] 2011[305] and 2014,[306] followed by another three each year in 2012[307] and 2013.[308] Among these amendments, the more significant ones included the expansion of the list of allowable deductions (*e.g.*, by including expenditures for the benefit of employees where such expenditures are subject to personal income tax),[309] the qualification of tantièmes (profit based bonuses) as allowable deductions,[310] and the consolidation of the carry-forward of tax losses.[311] These amendments truly alleviated the corporate tax burden. In this context, it should be mentioned that only one amendment, introducing a new tax relief for film makers[312] to encourage 'investments in film industry', was compliant with the requirement for *vacatio legis*.[313]

From 2014, amendments to the Law on Corporate Income Tax were developing in a different direction. The tax payment deadlines were shortened by three months; limits were imposed on the carry-forward of tax losses.[314] Initially, it was suggested that the deductible amount of tax losses carried forward should not exceed 50 per cent of the income of the taxpayer during the taxable period, calculated as total income minus tax-free income, allowable deductions and allowable deductions of a limited amount (except losses from the taxable periods of previous years); after deliberations, the threshold was raised up to 70 per cent. By way of exception, this rule did not apply to small enterprises (in order to retain consistency with the application of reliefs to small business). The rule was also not imposed on tax losses incurred as a result of transferring securities and derivatives, as the carry-forward of such losses was already subject to restrictions (*i.e.* such losses could be carried forward for a maximum of five consecutive taxable periods (not applicable to financial institutions) and could be covered only by income earned from transfers of securities and/or derivatives). As the economy was growing, these restrictions on the carry-forward of tax losses ensured that companies, even though they had suffered losses during the crisis and had the accrued

304 *Official gazette*, 2010, no. 145–7413; no. 145–7414.

305 *Official gazette*, 2011, no. 146–6844; no. 146–6852.

306 *TAR*, no. 2014–13610, 3 October 2014; no. 2014–21227, 31 December 2014.

307 *Official gazette*, 2012, no. 76–3941; no. 83–4339; no. 153–7829.

308 *Official gazette*, 2013, no. 68–3407; no. 75–3757; no. 140–7046; *TAR*, no. 2013–00368, 31 December 2013.

309 *Official gazette*, 2009, no. 153–6880.

310 *Official gazette*, 2010, no. 145–7413.

311 *Official gazette*, 2009, no. 153–6880.

312 *Official gazette*, 2013, no. 68–3407.

313 Explanatory note. Online access: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=418514 [29 January 2015].

314 *Official gazette*, 2013, no. 140–7046.

tax losses, paid corporate income tax on a share of their taxable profit when it was calculated. The authors of the amendment claimed their proposal was consistent with international practice, whereby only a few states (Ireland, Sweden, Latvia) did not limit the carry-forward of tax losses, while others imposed restrictions on either the period (in most cases up to 5 years, like in Poland) or the percentage of taxable profit (*e.g.*, France, Germany, Denmark, Italy, Austria, Portugal, Hungary, Slovenia).[315] Thus, with the economic crisis coming to an end, the legislator was broadening the framework of corporate income tax to oblige recovering businesses to share their profits with the state even though they had suffered considerable losses during the crisis. This legislative novelty was introduced exclusively for the purpose of increasing state budget revenues. But it remains questionable whether the post-crisis economy was sufficiently prepared to face such changes. This question, however, should be dealt with in an economic rather than legal analysis.

The decision to include agricultural entities into the system of corporate income tax deserves to be mentioned separately.[316] As established in the Crisis Management Plan (§ 19), from 1 January 2009, the taxable profit (or part of taxable profit) of cooperative companies (cooperatives), proportionate to the value of the contribution shares of the shareholders, whose farms or holdings complied with the criteria set out in the Law on Personal Income Tax, on the last day of the taxable period, was subject to a 0 per cent rate of corporate income tax (*i.e.* was not taxed) in cases where such an economic entity met one of the two alternative conditions: (i) more than 50 per cent of the income of the cooperative company (cooperative) during the taxable period consisted of income from agricultural activities; or (ii) more than 85 per cent of the income of the cooperative company (cooperative) during the taxable period consisted of income from agricultural activities and/or income obtained from the sale of the agricultural products produced by and purchased from its members, and/or from the sale to its members of fuel, fertilizers, seeds, feed, pesticides, herbicides and tangible assets intended to be used solely for the agricultural activity of its members. For the remaining part of taxable profit, *i.e.* the part to which a 0 per cent rate did not apply, a 5 per cent rate was set for the running taxable period of 2009, 10 per cent – for the running taxable period of 2010, and 20 per cent – for the subsequent taxable periods. In respect of agricultural enterprises subject to a 0 per cent rate of corporate income tax, the taxable profit calculated for the running taxable period of 2009 was subject to the rate of 5 per cent, while, for the running taxable period of 2010, the rate of 10 per cent was set, provided that over 50 per cent of their income during the relevant taxable period was generated from agricultural activity.

[315] Explanatory note. Online access: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=457769 [29 January 2015].

[316] *Official gazette*, 2008, no. 149–6000.

The above amendments caused huge opposition from entrepreneurs engaged in agricultural activity.[317] On the other hand, the gradually increasing tax burden for agricultural entities was aimed not only at collecting taxes, but also combating the shadow economy. Moreover, the amendments did not fully abolish the tax reliefs applicable to subjects engaged in agricultural activity.[318] It is necessary to recognise that there are strong arguments that justify the decision of the legislator to include agricultural entrepreneurs in the system of corporate income tax both in terms of ensuring social justice and in terms of the necessity to secure the state budget revenue.

A fact that deserves attention is that, already in 2011, the system of corporate income tax of Lithuania was positively assessed by investors. It was described as a 'classical system', where the framework of corporate income tax had not changed much since 2001. The strongest points of the system, as identified by investors, included: one of the lowest corporate tax rates in the EU; one of the most attractive dividend taxation regimes in the EU; an attractive exemption for participation of holding companies; non-taxable income received from an increased value of the property of non-residents when selling companies in Lithuania; attractive rules for the carry-forward of losses,[319] including transfers within the company group, *etc*. Investors were of the opinion that the system of corporate income tax did not need any major changes; on the contrary, they claimed that no substantial changes should be made in the system.[320] Therefore, it is possible to conclude that the analysed amendments to the Law on Corporate Income Tax, with the exception, perhaps, of the hasty temporary rise of the tax rate up to 20 per cent, were legally sound from the point of view of non-discrimination, respect for legitimate expectations and other aspects.

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317 'Ūkininkai nenori mokėti pelno mokesčio' [Farmers don't want to pay profit tax]. Online access: http://www.alfa.lt/straipsnis/10321576/?Ukininkai.stoja.piestu.pries.pelno.mokesti=2010-03-17_15-52 [31 January 2015].

318 Even now Article 5(6) of the Law on Corporate Income Tax provides that the rate of 5 per cent shall apply to the taxable profit of entities receiving during the taxable period more than 50 per cent of their income from agricultural activity, including the income of cooperative companies (cooperatives) from the sale of agricultural products produced by and purchased from its members. *Official gazette*, 2010, no. 145–7413 (as last amended).

319 These restrictions later came under strong criticism from investors. *Investuotojai pasiūlė, kaip permaišyti mokesčių sistemą.* [Investors suggested how to stir the tax system]. Online access: http://lzinios.lt/lzinios/ekonomika/investuotojai-pasiule-kaip-permaisyti-mokesciu-sistema/182102 [31 January 2015].

320 'Palanki ir aiški Lietuvos mokesčių sistema visiems' [Favourable and clear tax system in Lithuania for all]. Investors' forum. Online access: http://www.investorsforum.lt/files/documents/Investors_forum_LT.pdf [29 January 2015].

3.3.4. Personal income tax

The regulation of personal income tax had been rather stable since the adoption of the Law on Income Tax of Individuals (or Law on Personal Income Tax)[321] in 2002 despite the fact that as many as fifty-eight amending laws had been passed since then.

In its Crisis Management Plan, the 15th Government promised to break down the 20 per cent rate[322] applicable at the time in order to form a direct 5 per cent pre-tax health insurance contribution instead of directing it to the Compulsory Health Insurance Fund through the redistribution of personal income tax (§ 13). The Government also promised to review other reliefs from this tax (including the tax free allowances) and leave only socially grounded and saving-oriented exemptions (§ 15). Furthermore, the Government planned to revise the list and tax rates of the activities undertaken under business certificates, except business certificates for craftsmen, by abolishing business certificates that had a distorting effect on the labour market and created unequal business conditions. The intention was to achieve, gradually and consistently, that individuals carrying out activities under business certificates would work according to the taxation rules applicable to individual activity. Also, the Government declared its commitment to simplify the administration and accounting procedures for individual activity (§ 17), to revise the procedure for the application of the tax-exempt minimum income by increasing it for low-income individuals and eliminating it for individuals whose income was above average (§ 21).

Since the beginning of the crisis, the essential changes in the regulation of personal income tax that have caused most discussions are those related to the rates of this tax, reliefs and tax-free allowance. Benefits in kind have been yet another important topic for discussions; from 2010, the principle of subjection to taxation for benefits in kind was changed from 'benefits in kind shall include' to the principle 'benefits in kind shall not include'. The regulation of the taxation of income from individual activity deserves a separate mention.

From 1 July 2006 until 31 December 2007, Lithuania had two rates of personal income tax, *i.e.* 15 per cent and 27 per cent; from 1 January 2008, these rates were replaced by the rates of 15 per cent and 24 per cent, respectively. The 15 per cent rate was applicable to the types of income included in the

[321] *Official gazette*, 2002, no. 73-3085 (as last amended). This law replaced the Provisional Law on Personal Income Tax that came into force as early as in 1991 (and was amended many times) (*Official gazette*, 1990, no. 31–742). The verbatim translation of the title of the old law would be the Provisional Law on Income Tax of Physical Persons, and the verbatim translation of the title of the new law would be the Law on Income Tax of Residents of the Republic of Lithuania, however, the titles used in this book are the ones which are, as a rule, used in various official documents in English.

[322] Such a rate was supposed to be set as a single rate according to the Crisis Management Plan instead of the two rates of 15 and 24 per cent as applicable then.

exhaustive list, such as: the royalties of athletes and performers; income from property rent; income from individual activity where a taxpayer decided not to make use of any allowable deductions; income from the sale or other transfer of assets other than the assets of individual activity. Other types of income, including income from individual activity after allowable deductions, were subject to the personal income tax rate of 27 per cent, later replaced by 24 per cent. Thus, although formally the standard personal income tax rate for any type of personal income (except income from distributed profit) was reduced from 24 per cent to 15 per cent, in reality the 24 per cent rate was broken down into the personal income tax rate of 15 per cent and the compulsory health insurance contribution rate of 9 per cent. Then in 2011, the personal income tax rate of 5 per cent was introduced on income of individuals carrying out individual activity (with the exceptions of the activities of 'liberal professions'),[323] and, in 2014, the personal income tax rate on distributable profit was reduced to 15 per cent, as well.[324] Exceptions for 'liberal professions' were based on the argument that changes in their taxation schemes should always be assessed in terms of the interchangeability of these activities with labour relations.[325] It is interesting to note that advocates, notaries, bailiffs and their assistants were also grouped under the category of 'liberal profession', though their forms of activity are subject to limitations imposed by the legislation regulating their professions.

Until 1 January 2009, the tax-free personal allowance for all individuals was the same and amounted to LTL 320; a higher or additional personal allowance was set for certain social groups of population and parents of children below eighteen years of age. The amendments to the personal income tax regulation introduced during 'the overnight tax reform' resulted in a complete overhaul of the application of tax-free personal allowances. From 2009, certain rules typical of progressive income taxation came into effect: a higher tax-free personal allowance was set for low-income individuals, and no tax-free allowance at all was provided for high earners. Actually, high earners did retain their entitlement to the 'additional' personal allowance for the number of children they had, which was not linked to their earnings. This 'progressive taxation type' character of the tax-free personal allowance has continued up to now, and it is sometimes even used as an argument in the discussions on the need to introduce progressive personal income taxation;[326] the proponents of such a system have argued that certain elements of progressivity have already been present in the income taxation system of Lithuania.

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323 *Official gazette*, 2010, no. 145–7410.

324 *Official gazette*, 2013, no. 75–3756.

325 Explanatory note. Online access: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=383369 [1 February 2015].

326 'Palanki ir aiški Lietuvos mokesčių sistema visiems' [Favourable and clear tax system in Lithuania for all'] (cited above).

The analysis of the personal income tax reliefs that existed from the end of 2008 till the end of 2014 reveals that, before 'the overnight tax reform', Article 17 of the Law on Personal Income Tax provided for over fifty types of income tax exemptions; individuals could also reduce their taxable income by the amounts paid not only as contributions under life or pension insurance schemes, or as interest on tuition fees, or one mortgage loan, but also by the amount spent to buy one PC with software and/or internet access during 2004–2009 (up to LTL 4.000). As already mentioned before, the key statutory prerequisite for the establishment of any tax reliefs or lawfulness of their application is the principle of fair taxation, *i.e.* the principle of a proportional distribution of tax burden, as prescribed in Article 8(2) of the Law on Tax Administration.[327] The principle of fair taxation may take the expression of either a horizontal or vertical justice model, but a taxation system, nevertheless, requires to be organised in such a way as to ensure a fair and proportionate distribution of tax burden among the taxpayers of a particular tax, whether legal or natural persons, and to seek that every subject shares part of their income with the state in proportion to their abilities.[328]

The pre-reform system of expenses deductible from taxable income of persons was much criticised from different aspects; thus, the reform introduced certain limitations on such expenses. During 'the overnight taxation reform', account was taken of the fact that, due to a rapid growth of housing prices, deduction of housing mortgage interest from taxable income lost its social purpose, *i.e.* to facilitate the acquisition of housing by low-income individuals. It was argued that the abolition of such tax relief would have no significant impact on the nearest-term inflation rates, as well as that in the long run it would help to prevent increase in housing prices above the economically justifiable level.[329]

The removal of this tax relief was 'partial' from a certain aspect: today, at the beginning of 2015, it is still allowed to deduct from taxable income the amount of interest paid on one housing loan if it was granted before 1 January 2009. For the sake of comparison, the tax relief for the acquisition of PCs was eliminated already in 2009. In addition, despite an extension of the minimum retention period from three to five years[330] for real estate acquired after 1 January 2011 to avoid taxation of the premium with personal income tax upon disposal, an additional new tax relief was introduced already on 1 January 2009: no tax on income from the sale of housing even though the minimum retention period was not respected.[331]

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[327] Sudavičius, B. 'Mokesčių lengvatos Lietuvos mokesčių teisės kontekste' [Tax reliefs in the context of the tax law of Lithuania] (cited above), p. 103.

[328] *Loc. cit.*

[329] Explanatory note. Online access: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=333070 [1 February 2015].

[330] *Official gazette*, 2010, no. 145–7410.

[331] Explanatory note. Online access: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=333070 [1 February 2015].

To implement the Crisis Management Plan, 'the overnight tax reform' proposed to exempt from personal income tax only the income of those farmers (or their partners) who received it from agricultural activity, or of those individuals who received income from the sales of agricultural products farmed on the land owned by right of ownership, leased or otherwise granted according to the legislation, or from the sales of agricultural products farmed so and processed, if the respective farms or holdings did not exceed 4 European size units (ESU). At the same time, however, with the aim to gradually phase increase in the tax burden falling on farmers and other individuals who received income from the sales of agricultural products, the legislator levied personal income tax at the rate of 5 per cent in 2009 and, then, at 10 per cent – in 2010.[332]

The subsequent amendments to the Law on Personal Income Tax brought further changes to the list of tax-exempt types of income. These changes were contradictory: they supplemented the list with new categories of tax-exempt income (*e.g.*, gifts from grandchildren),[333] while abolishing or essentially modifying the non-taxation of income from the transfer of interest and securities.[334]

Special consideration should be given to the amendments made in the regulation governing the taxation of income earned from individual activity; these amendments were unceasing and manifold. In addition to the already mentioned changes in the tax rates, it was decided that the lease and sales of real estate,[335] as well as transactions on financial instruments,[336] no longer belonged to individual activity. From 2010, it was allowed to recognise individual activity income on an accrual basis (except in the case of the activities carried out by performers and athletes or under a business certificate); furthermore, along with the possibility for the deduction of part of representation expenses, the possibility was established for a 30 per cent allowable deduction of income received from individual activity without the obligation to keep any supporting documents to justify the amount of such deductions.[337] The amount of irrecoverable debts accrued over the taxable period was similarly recognised as an allowable deduction (provided certain conditions were met in relation to these debts),[338] and the carry-forward of tax losses was allowed, too.[339] As a result, the taxation of income from individual activity was approximated to that applicable to small enterprises, and, thus, these changes should be viewed as a rational approach.

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[332] *Official gazette*, 2009, no. 25–977.

[333] *Official gazette*, 2010, no. 145–7410.

[334] *Official gazette*, 2013, no. 75–3756.

[335] *Official gazette*, 2010, no. 145–7410.

[336] *Official gazette*, 2013, no. 75–3756.

[337] *Official gazette*, 2009, no. 93–3977.

[338] *Official gazette*, 2010, no. 145–7410.

[339] *Official gazette*, 2008, no. 149–6033.

In 2008–2009, the Law on Personal Income Tax was amended seven times;[340] in 2010 – six times;[341] twice annually – in 2011[342] and 2012[343]; as much as 5 times – in 2013;[344] and four more times – in 2014.[345] Thus, during the 2008–2014 crisis, the provisions of this law and the personal income taxation policy were not stable. Only two amendments (of 9 May 2013 and 27 June 2013, which came into force on 1 January 2014)[346] complied with the requirements for *vacatio legis*; on the other hand, not all of the non-compliant amendments were essential, and part of them were made in relation to the adoption of other laws.[347] Nevertheless, there were as many as three amendments to the Law on Personal Income Tax that entered into force with retroactive validity.[348] Not only the amendments of December 2008, but also the amendments of 23 November 2010 were related to the state budget of the following calendar year[349] (some of the new provisions applied to income received in 2010). It seems that all these amendments, together with the law passed on 27 June 2013,[350] consolidated the principal changes made to the regulation of personal income tax during the crisis years. The latter law was yet another step towards the abolition of the reliefs previously applicable to personal income tax, justified by the aim of seeking to consolidate a greater 'progressivity' element in taxation of income and property.[351]

Despite the instability of this regulation, it was assessed positively, at least, by investors: the rate of personal income tax was considered to be among the lowest ones in EU Member States; the conditions for taxing income earned from individual activity were judged as favourable; and the applicable tax reliefs were recognised to stimulate the long-term accumulation of assets (investment-linked life insurance, pension funds)[352]. On the other hand, at

340 *Official gazette*, 2008, no. 149–6028; no. 149–6029; no. 149–6033; 2009, no. 25–977; no. 25–978, no. 93–3977; no. 153–6882.

341 *Official gazette*, 2010, no. 34–1614; no. 41–1931; no. 125–6386; no. 145–7410; no. 145–7411; no. 145–7412.

342 *Official gazette*, 2011, no. 86–4143; no. 153–7206.

343 *Official gazette*, 2012, no. 83–4340; no. 136–6966.

344 *Official gazette*, 2013, no. 46–2251; no. 54–2678; no. 75–3756; no. 75–3759; no. 140–7047; *TAR*, no. 2013–00354, 31 December 2013.

345 *TAR*, no. 2014–13613, 3 October 2014; no. 2014–13614, 3 October 2014; no. 2014–15178, 30 October 2014; no. 2014–21225, 31 December 2014.

346 *Official gazette*, 2013, no. 54–2678; 2013, no. 75–3759.

347 *Official gazette*, 2013, no. 46–2251; 2012, no. 83–4340; 2011, no. 86–4143; 2011, no. 153–7206.

348 *Official gazette*, 2009, no. 93–3977; 2010, no. 145–7410; 2013, no. 46–2251.

349 *Official gazette*, 2010, no. 145–7410.

350 *Official gazette*, 2013, no. 75–3756.

351 Explanatory note. Online access: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=450986 [27 January 2015].

352 'Palanki ir aiški Lietuvos mokesčių sistema visiems' [Favourable and clear tax system in Lithuania for all] (cited above).

times, but mostly before elections, politicians start outspokenly criticising the system of personal income tax for, as usually maintained, not being progressive, or for exhibiting just a negligible element of progressivity.

3.3.5. Compulsory health insurance contributions

Much reaction in the public was stirred by the amendments to the Law on Health Insurance[353] passed during 'the overnight tax reform' when, along with the relevant modifications to the Law on Personal Income Tax, changes were made in the mechanism for financing compulsory health insurance. Until that time, the financing of the Compulsory Health Insurance Fund had, in principle, been ensured by direct national budget grants, by transferring part (30 per cent) of personal income tax (referred to as tax on the income of 'natural persons' until 2003) contributed from the income paid to employees by tax withholding companies, establishments and organisations, or paid by self-employed persons and those who received earnings under authorship agreements, plus 3 per cent of the state social insurance rate. Persons who did not pay for compulsory health insurance from the income they received had to pay compulsory health insurance contributions equal to 10 per cent of the national average monthly earnings (calculated by the Department of Statistics); 2 per cent contributions were payable by partners of general partnerships and owners of individual enterprises. The decreased contributions of 3.5 per cent and 1.5 per cent of the minimum monthly salary were paid by farmers. The amendments to the Law on Health Insurance, which were enacted on 22 December 2008 and came into force as of 1 January 2009,[354] as well as the subsequent revisions of this law, introduced the stand-alone compulsory health insurance contributions of either 6 per cent or 9 per cent (calculated on the base of state social insurance contributions). Specifically, remuneration for work and equivalent earnings, as well as income under authorship agreements and from sports or performing activities were subject to 6 per cent contributions payable by the insured and 3 per cent contributions to be made by the insurer (*i.e.* the entity that pays the income); 9 per cent social insurance contributions from personal income were introduced for self-employed persons engaged in individual activity (except very small farmers who were subject to the rate of 3 per cent, calculated from the minimum monthly salary), partners of general partnerships and owners of individual companies; a 6 per cent rate applied to other income subject to personal income tax. The minimum annual amount of a compulsory health insurance contribution applicable to all (except persons with income from employment) was 9 per cent of twelve minimum monthly salaries and was due even by those permanent residents of Lithuania who did not receive any taxable income and were not covered by the state funds. In

[353] *Official gazette*, 1996, no. 55–1287; 2002, no. 123–5512.

[354] *Official gazette*, 2008, no. 149–6022.

addition, the law amending the Law on Health Insurance,[355] which was passed on 19 February 2009, came into force on 5 March 2009 and was applicable from 1 January 2009, defined the maximum threshold ('ceiling') of earnings for self-employed persons to be used as a reference amount for calculating compulsory health insurance contributions. Between December 2008 and the end of 2014, twenty-five laws amending the Law on Health Insurance were passed with corrections of the new provisions introduced during 'the overnight reform' of compulsory health insurance; the revisions concerned the scope of the obligations of specific groups of subjects, the tax payment procedure, the withdrawal of contributions from earnings not related to active work (interest, dividends, income from the sale of property), the mechanism for the administration of contributions and the bodies administering them (the functions of the State Tax Inspectorate were gradually transferred to the State Social Insurance Fund), *etc.*

As it was widely and justifiably believed, these reforms, in principle, meant a shift from the health care system, financed solely by the funds of the state (general budget allocations or specific earmarked budget tax revenues), as a public good, to the insurance-based financing model of health care.[356] In respect of some groups of persons, however, the amount of this solidarity-based obligation increased. The changes made in the contributions to be paid by self-employed persons, performers, authors and athletes were complained about as unjustifiable, unreasonable and unfair and drew nearly the strongest response from the public. Fierce criticism was also addressed to the obligation to pay compulsory health insurance contributions imposed on persons who had no income and were not covered by public health insurance; the controversy in this case was stirred up not so much by the amount of this contribution (it had been actually even higher for this group of persons before 'the overnight reform'), but by its mandatory character, uncertainty, the genuine or apparent lack of clarity as to who and when should pay it.[357] Wide-ranging public discussions on the obligation to pay compulsory health

355 *Official gazette*, 2009, no. 25–985.

356 See, *e.g.*, Vainienė, R. *Op. cit.*

357 See, *e.g.:* 'Kūrėjai ieško kompromiso su valdžia' [Authors seek compromise with the authorities]. Online access: http://zebra.15min.lt/lt/naujienos/lietuva/kurejai-iesko-kompromiso-su-valdzia-143860.html [6 January 2015]; Semoškaitė, E. 'Meno kūrėjai nori stažo, NPD ir rentų' [Art creators willing to get social insurance record, non-taxable incomes and annuities]. Online access: http://www.delfi.lt/news/daily/lithuania/meno-kurejai-nori-stazo-npd-ir-rentu.d?id=22109439 [6 January 2015;]; 'Siūloma keisti PSD taikymą menininkams' [Changes in compulsory social insurance for artists proposed]. Online access: http://www.delfi.lt/verslas/verslas/siuloma-keisti-psd-taikyma-menininkams.d?id=32107135 [6 January 2015]; 'Absurdiškom PSD įmokom už NIEKĄ – NE. Peticija' [NO to absurd social insurance contributions for NOTHING. Petition]. Online access: http://www.peticijos.lt/visos/3265 [6 January 2015]; 'Sveikatos draudimas daugeliui žmonių tapo bausme' [Health insurance as punishment to many persons]. Online access: http://www.delfi.lt/verslas/verslas/sveikatos-draudimas-daugeliui-zmoniu-tapo-bausme-atnaujinta.d?id=30658425 [6 January 2015]; Lapinskas, A. 'PSD peticijos autoriai neskaitė įstatymų' [Authors of the compulsory health insurance petition ignorant of laws] Online access: http://www.delfi.lt/news/ringas/lit/alapinskas-psd-peticijos-autoriai-neskaite-istatymu.d?id=31075069 [6 January 2015].

insurance contributions were centred around several issues: the obligations of schoolchildren and students who completed schools and studies and lost their state financed health care coverage;[358] the obligations of emigrants;[359] the obligations of the persons who did not get any (official) earnings and did not qualify for state financed health care coverage; the obligation of the persons (pensioners, students, registered unemployed persons) insured by the state to pay contributions from additional earnings received by them; the obligation to get 'multiple' insurance, *i.e.* to pay contributions from all earnings received from several different income sources.[360]

The reform of the health insurance system at issue mostly raised concern (and frenzy) over the legitimacy, constitutionality, fairness and soundness of its fundamental principle – individualisation of the obligation to finance the health care system (underpinned by solidarity from this perspective only), which had been funded through the state budget. It changed the *status quo* established among the categories of different insured persons who had to contribute to the financing of the state health system. The substance of the scheme, which was effective until 2009 and was not loudly promoted, was a different degree of solidarity in contributing to clearly defined and nominally the same for all and equally accessible services – this balance seemed acceptable and was taken for granted in the mass consciousness for one reason or another.

It was not without public opinion pressure that the Constitutional Court had to rule on these issues in 2010.[361] The case was initiated by a group of

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358 See, *e.g.*: 'Mokslus baigusių moksleivių ir studentų laukia PSD prievolė' [Schoolchildren and students facing compulsory health insurance after studies]. Online access: http://www.delfi.lt/verslas/verslas/mokslus-baigusiu-moksleiviu-ir-studentu-laukia-psd-prievole.d?id=33003983#ixzz3PTqt3JE3 [6 January 2015]; 'LSAS: ne visiems studentams PSD priskaičiuotas teisėtai' [Lithuanian Students' Union: Not all students had their compulsory health insurance calculated correctly]. Online access: http://www.delfi.lt/news/daily/education/lsas-ne-visiems-studentams-psd-priskaiciuotas-teisetai.d?id=30893513 [6 January 2015]; 'PSD mokestis kirto ir studentams' [Compulsory health insurance also hit students]. Online access: http://www.delfi.lt/news/daily/education/psd-mokestis-kirto-ir-studentams.d?id=30842247 [6 January 2015]; 'Mokslus baigę ir neįsidarbinę studentai bei moksleiviai PSD neturės mokėti iki spalio' [Graduate and unemployed students and schoolchildren will be exempt from compulsory health insurance until October]. Online access: http://www.delfi.lt/verslas/verslas/mokslus-baige-ir-neisidarbine-studentai-bei-moksleiviai-psd-netures-moketi-iki-spalio.d?id=33051741 [6 January 2015].

359 See, *e.g.*, 'J. Razma: Emigrantams reikia sudaryti galimybę deklaruoti išvykimą atgaline data'. [J. Razma: Emigrants should be allowed to declare their departure retroactively]. Online access: http://www.delfi.lt/news/daily/emigrants/jrazma-emigrantams-reikia-sudaryti-galimybe-deklaruoti-isvykima-atgaline-data.d?id=30674953 [6 January 2015].

360 See, *e.g.*, Raibytė, G. 'Privalomasis sveikatos draudimas – mokestis už orą?' [Compulsory health insurance – payment for air?]. Online access: http://www.15min.lt/naujiena/aktualu/lietuva/privalomasis-sveikatos-draudimas-mokestis-uz-ora-56-354077 [6 January 2015].

361 Saukienė, I. 'Seimas svarsto galimybę dėl PSD įmokų kreiptis į Konstitucinį Teismą' [The Seimas considering an appeal to the Constitutional Court concerning compulsory health insurance contributions]. Online access: http://www.delfi.lt/verslas/verslas/seimas-svarsto-galimybe-del-psd-imoku-kreiptis-i-konstitucini-teisma.d?id=31588681 [6 January 2015]; 'Seimo narių grupė kreipiasi į KT dėl PSD įmokų teisėtumo' [A group of Seimas' members address the Constitutional Court on the issue of lawfulness of compulsory health insurance contributions]. Online access: http://www.delfi.lt/news/daily/lithuania/seimo-nariu-grupe-kreipiasi-i-kt-del-psd-imoku-teisetumo.d?id=39198619 [6 January 2015].

members of the Seimas (the petitioner challenged the constitutionality of both the provisions of the Law on Health Insurance and the provisions of the Law on State Social Insurance as well as the Law on Sickness and Maternity Social Insurance). In the opinion of the petitioner, freelance professionals (authors, performers, athletes) should not be subject to either compulsory health insurance or state social insurance, because it was necessary to respect their own choice and also take into consideration the fact that authorship fees were the earning of a 'different nature'; as required by the provisions of Article 52 of the Constitution,[362] the state must create legal preconditions for such persons to take care of their social welfare in cases of old age, illness, disability or in other cases, although it may not obligate them to participate in compulsory social insurance schemes; by compelling such participation and acquiring the right to claim, on this basis, a share of the income legitimately earned by such persons, the state redistributes their earnings unjustifiably and in violation of the principle of the inviolability of property set out in Article 23 of the Constitution.

These doubts were dispelled by the Constitutional Court in its ruling of 16 May 2013.[363] All the contested provisions were held to be in compliance with the Constitution, except one: the equality of persons under Article 29 of the Constitution was undermined by the provision of the Law on Health Insurance establishing that the coverage available under compulsory health insurance for the persons who received income under authorship agreements, or from sports or performing activities, could become effective only in the next month and only if compulsory health insurance contributions were paid by them or on their behalf for three months in succession, or only after such persons paid a contribution equal to three minimum monthly salaries, while compulsory health insurance of other persons was held to be effective as of the day when compulsory health insurance contributions started to be paid on their behalf or by them. It is hardly likely that this provision of a more 'technical nature' was inspired by the crisis, and even less so that it was considered as one of the means to overcome the crisis or an important element of the reform of the health insurance system. It is more important in this case that more fundamental legislative provisions at issue were held to be compatible with the Constitution, including those that introduced compulsory insurance (compulsory health insurance, state social insurance, sickness and maternity social insurance) of self-employed persons and persons who received income under authorship agreements, from sports or performing activities.

It was stated in the ruling that, when choosing a healthcare funding scheme, the legislator was bound not only by its duty to provide, in the

[362] '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'.

[363] Also see Constitutional Court decision of 26 February 2014, where the provisions of this ruling are interpreted. *TAR*, no. 2014–2176, 27 February 2014.

state budget, for the funds necessary to render free of charge medical aid to citizens, but also by other constitutional obligations of the state and its financial capabilities. It should also be noted, in this context, that the ECRH provides for the positive obligation of the state to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives.[364] The Constitutional Court held that the health care financing scheme, which disregards balanced needs of society and the state, the financial capabilities of the state and its potential to implement such a scheme, is not allowed under the Constitution because it would violate to the balance of constitutional values and the constitutional imperatives of social cohesion and responsible government. Where it is impossible to allocate adequate state budget funds to ensure sufficient accessibility of healthcare services to individuals not covered by the free of charge medical aid guaranteed to citizens irrespective of their income, the state not only may but also must provide for another solidarity-based method for accumulating the necessary public funds, *inter alia*, choose compulsory health insurance. The amount of insurance contributions should depend on the income of persons and should create preconditions for accumulating the funds necessary to ensure sufficient accessibility of quality healthcare services. Once compulsory health insurance is chosen as the financing scheme of health care services, the obligation to pay compulsory health insurance contributions, as established by law, becomes a constitutional duty and in itself may not be treated as a limitation of the rights of a person.

The obligation of persons who receive income under authorship agreements, from sports or performing activities (as well as of their insurers), equally as the obligation of all other contributors to compulsory health insurance, creates preconditions for accumulating the funds necessary to finance health care and for ensuring medical aid and services in cases of illness of such persons. This precondition also constitutes the obligation to pay compulsory health care contributions by the persons who receive no earnings from active work (employment or service relations, self-employment, under authorship agreements, *etc.*) and are not covered by state funds. In its ruling, in assessing whether the same obligation applies to the persons who are insured from state funds (minors, persons who receive social benefits from the state, unemployed persons registered with the Labour Exchange, *etc.*), the Constitutional Court held that there are no grounds to consider that this obligation extends to the persons who are unable to pay such contribution due to objective reasons; the persons who have no earnings (although are self-sufficient and do not qualify for state-financed health care coverage) or persons with income that is *per se* exempt from compulsory health insurance contributions are not released from the imperative constitutional solidarity and social cohesion. Meanwhile, those who have departed (emigrated) from

[364] *Calvelli and Ciglio v. Italy* [GC], no. 32963/96, 7 January 2002.

Lithuania and do not claim any health care services only have to comply with the obligation to declare their (long-term or final) departure under the Law on Personal Income Tax in order to have no obligation to pay compulsory health insurance contributions.

It must be admitted, however, that, at least at the beginning, the new compulsory health insurance scheme lacked clarity. The related discussions, more often than not leading to poorly motivated emotional accusations against the authorities, were most active between 2009 and the beginning of 2010. At that time, specific uncertainties in the new regulation came to light. All this shows that awareness-raising prior to decision-making was inadequate, though better awareness-raising could hardly be expected at the time in view of, *inter alia*, the political context (change in the Seimas majority and the Government in late 2008) and also considering the need to react to the crisis with high urgency. In the long run, these uncertainties were gradually (at least partly) eliminated, although the 2011 National Audit Report by the National Audit Office[365] still highlighted a large number of irregularities. The identified shortcomings included the limited functionality of the register of insured persons, which should be one of the key instruments to control how persons comply with their obligation to pay compulsory health insurance contributions and to monitor whether the equality of persons before the law and the constitutional obligation of solidarity are ensured in this field.

3.3.6. State social insurance contributions

Public debate as wide-ranging as that caused by the reform of the compulsory health insurance system was generated in relation to the expanded range of subjects falling under compulsory state social insurance and the amended scheme of state social insurance contributions, including their amounts and payment procedure. The reform of the state social insurance system received considerable criticism from the journalists, performers and authors surveyed during the research, who, when providing their services under authorship agreements, had been exempt from the obligation to pay these contributions before the reform.

From December 2008 until late December 2014, the Law on State Social Insurance[366] was amended more than forty times (this issue will be considered later). Not all amendments pertained to the payment of contributions; some introduced corrections in the functions of the Sodra board or in the administration of collected contributions.[367] Major changes

[365] Compulsory health insurance. Report no. VA-P-10-2-3. National Audit Office, 10 March 2011. Online access: http://www.vkontrole.lt/failas.aspx?id=2309 [6 January 2015].

[366] *Official gazette*, 1991, no. 17–447 (with subsequent amendments).

[367] *Official gazette*, 2009, no. 77–3171; 2010, no. 67–3343; 2010, no. 181–4227.

were brought about during 'the overnight reform', *i.e.* in December 2008:[368] (i) by expanding the range of subjects who were to pay contributions and to be compulsorily covered by state social insurance, including the persons who had not participated in the system before, *i.e.* those who provided services under authorship agreements, also athletes and performers; and (ii) by expanding the scope of compulsory social insurance to persons who had been compulsorily covered only by state social insurance for old-age pensions, *i.e.* to other self-employed persons, including farmers and owners of individual enterprises.

Although the Constitution obligated the legislator to lay down such a legal regulation that would ensure the accumulation of funds necessary to make social disbursements, quite a large number of persons with income other than from employment or civil service had not participated or had participated only partly in the solidarity-based social insurance system at the time; thus, they had not contributed to the pooling of revenue for the pensions of their parents and grandparents and had also excluded themselves from social insurance guarantees. This argument shows how relevant was the idea of solidarity in the face of the crisis (as supported by the respondents surveyed during the present research). Nonetheless, the overriding driver for a shift to the new scheme, emphasised when making changes in the scope of coverage, was just those difficult to grasp future social guarantees to those formerly excluded from state social insurance.[369] That was probably why public discussions concerning the relevant changes did not place emphasis on a rather abstract idea of solidarity (in relation to those in employment or in civil service who paid these contributions to full extent and fully contributed to the maintenance of the social insurance system and the payment of old-age pensions to all their recipients) but highlighted specific changes and individual motivation – the obligation to give out more in order to receive more later.

It was envisaged that the persons who had not participated in the social insurance system until that time would pay social insurance contributions at a reduced rate in 2009 and 2010 and would move to the full rate in 2011. The amendments to the law came into force on 1 January 2009 and were right away subject to corrections. The majority of subsequent amendments were useful to the new payers of contributions as they alleviated their burden

368 *Official gazette*, 2008, no. 149–6019.

369 'Naujovės valstybinio socialinio draudimo srityje 2009 metais' [New features in state social insurance in 2009]. Ministry of Social Security and Labour. Online access: http://www.socmin.lt/lt/naujienos/pranesimai-spaudai/archive/p20/naujoves-valstybinio-socialinio-a3je.html [25 January 2015]; 'Visi autorines pajamas gaunantys kūrėjai neliks nuskriausti' [Authors with authorship income will not be disadvantaged]. Online access: http://www.teisesgidas.lt/modules/news/article_storyid_490.html [25 January 2015]; 'Sportininkai ir atlikėjai sulauks ramios senatvės' [Athletes and performers will have no worries in their old age]. Online access: http://verslas.elta.lt/zinute_pr.php?inf_id=956938] [25 January 2015].

of payments.[370] Such fast changes of the freshly enacted provisions were an indication of the hastiness of their drafting (this one more proof that it is not by accident that the reform was labelled as 'overnight'), the superficial assessment of their effect and the lack of social dialogue before making the first amendments. On the other hand, fast corrections may be explained by the sensitive reaction of the authorities to the dissatisfaction expressed by society (first of all, the addressees of the new legal regulation) (in particular, knowing that this dissatisfaction, as it later transpired, turned into a riot by the Seimas in 2009 after some extra fuelling) and by the understanding that, as the grip of the crisis tightened, it could become highly difficult for new payers to pay social insurance contributions to the extent and under the procedure originally expected.

The first of the subsequent changes was introduced as early as February 2009.[371] It revised the provisions concerning different insurance contributions payable by farmers, laid down clearer regulation of calculation of the social insurance record of self-employed persons and linked it to the amount of the social insurance contributions paid rather than to the payment periods of the contributions (which may be irregular for newly insured persons bearing in mind the specifics of their activities and the earnings received). As it was common at that time, the changes applied retrospectively: the law amending the Law on State Social Insurance was enacted on 17 February 2009, officially promulgated (and, accordingly, became effective) on 5 March 2009 and was to be applied from 1 January 2009. In addition, the amending law adopted in July 2009[372] introduced revisions (with the effect as of 1 January 2010) in the payment base, calculation and payment procedure, reduced the burden of social insurance contributions for owners of individual enterprises, general partners of partnerships, persons engaged in individual activity and persons receiving income from sports and performing activities or under authorship agreements from subjects not associated with them by employment or equivalent relations. In addition, the so-called 'ceiling' (or 'cap') of the contribution base was set for these persons – the maximum amount from which state social insurance contributions should be paid, namely, the sum of 48 insured income amounts as approved by the Government for the particular year.[373] The 'ceiling' rule was specified in December 2009:[374] apart from the above-referred threshold, it was established that a monthly contribution base may not exceed the sum of four insured income amounts of the particular year approved by the Government.

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[370] It is beyond the question that such a situation was likely to lead to a decrease in the revenue of the State Social Insurance Fund along with its potential to ensure the contributors themselves and their families a broader social security.

[371] *Official gazette*, 2009, no. 25–972.

[372] *Official gazette*, 2009, no. 93–3981.

[373] *Official gazette*, 2009, no. 93–3981.

[374] *Official gazette*, 2009, no. 159–7209.

The crisis particularly highlighted the problem related to the employment of young persons. In the effort to solve it, in 2010,[375] the employers who offered first employment contracts to persons without any paid employment experience were temporarily (between 1 August 2010 and 31 July 2012) released from part of social insurance contributions for one year if the salaries of such employees did not exceed the amount of three minimum monthly salaries.

As in the case of compulsory health insurance, the extension of the obligation to pay state social insurance contributions eventually became the matter of constitutional justice proceedings, resulting in the Constitutional Court rulings of 15 February 2013 and 16 May 2013. These rulings have already been considered in the context of the national budget and contributions to the Compulsory Health Insurance Fund. Nevertheless, in the context of state social insurance contributions, it should be noted that the ruling of 16 May 2013 was not the first one to develop the official constitutional doctrine on state social insurance and was preceded by several other related rulings. In the ruling of 26 September 2007, the Constitutional Court held that the Constitution is not undermined where the persons who pay state social insurance contributions and are already covered by state social insurance have to pay additional contributions for their pensions from their earnings from individual activity; likewise, as held by the Court, it is compatible with the Constitution to require that persons (in that constitutional justice case, advocates) who are already receiving old-age pensions 'continue' contributing both to the basic and supplementary part of the pension.

In its ruling of 26 September 2007, the Constitutional Court pointed out that:

> 'Lithuanian laws and other legal acts consolidate such a model of funding state social insurance based on running income (the so-called pay-as-you-go model) under which state social insurance is based on compulsory contributions and is guaranteed by the funds collected during the particular period from employed persons, who give part of the income they earned to those society members who must receive statutory payouts due to the fact that they have reached the pensionable age or are disabled, or there are other reasons provided for by law *(inter alia*, when these society members cannot work and provide for themselves due to the objective reasons established by law)'.

This model is based on the principle of universality, which means that:

> '[A]ll working persons (with some exceptions) who receive insurable income from their activity must pay state social insurance contributions, while the principle of solidarity means that working persons (those pursuing active economic activity) who receive insurable income should contribute to the accumulation of social insurance funds, thus creating preconditions for disbursing payments to those persons who must receive statutory payouts due to the fact that they have reached

[375] *Official gazette*, 2010, no. 86–4517.

the pensionable age, are disabled, or there are other reasons provided for by law (*inter alia*, when these society members cannot work and provide for themselves due to the objective reasons established by law and need social assistance)'.

The Constitutional Court also stressed that this state social insurance model treats those who participate in the labour market, *i.e.* work under employment (or other) contracts, civil servants, as well as self-employed persons, equally in terms of their obligation to pay state social insurance contributions. On the other hand, the economic (labour) activity of self-employed persons is rather specific since they (often) do not receive a regular salary and guaranteed constant income; therefore, the corresponding specificity should also be associated with their state social insurance. The obligations undertaken by the state are the obligations of the whole society; hence, it should be possible to distribute this burden to all society members according to the constitutional principle of solidarity and the imperatives of social harmony and justice. On the other hand, the obligation to make payments should not become an overly heavy burden on persons that would make them in need of social assistance themselves.

This official constitutional doctrine was developed before the reform under discussion; in principle, it laid down guidelines for both the legislator and society that undertakes the commitment to finance the social insurance system it has opted for. It transpires from the ruling of 26 September 2007, that the Constitutional Court not only ruled the challenged legal regulation to have been compliant with the Constitution; it, in principle, suggests that this line of statutory regulation, where the state social insurance scheme (alternatives to which, though possibly existing, are only theoretical and hypothetical), chosen by the legislator, is based, as much as possible, on the overall participation and solidarity contributions by all working persons in pooling social insurance funds, consistently stems from and is implicitly required by the Constitution. Therefore, it may be said that the content (both the operative part and supporting reasoning) of the ruling of 16 May 2013, adopted by the Constitutional Court in the case dealing with the elements of the state social insurance system subject to the reform in late 2008, could be quite easily predicted. Apart from the arguments noted above, the Constitutional Court pointed out that self-employed persons and persons who received income under authorship agreements, from sports or performing activities, and who, under the Constitution and on their own, qualified for social security, were an economically active part of society and could contribute to the creation of the social security system; thus, the introduction (extension) of the obligation to them to be compulsorily covered by social security insurance created preconditions for the accumulation of funds necessary to pay benefits and accomplished the objective essential to society – to guarantee its members the right to social security, pensions and other social benefits.

All these considerations would hardly warrant a serious claim today that allegedly the newly introduced legal regulation was a threat to the rights and interests of certain individuals (or social groups). On the contrary, the expanded scope of social insurance solidarity reduced the gap of not necessarily objective differences in the distribution of the obligation to maintain the social insurance system between different society members – the employed and civil servants, on the one hand, and self-employed persons engaged in certain economic activity, on the other. The most serious concerns over the state social insurance regulation pertained to hastiness of the new schemes, failure to explain them to society, *etc*. and to the resultant distrust of the public of lawmaking, law and state authorities. However, such criticism could be addressed to nearly all the laws of 'the overnight reform' discussed in this part; the Law on State Social Insurance is not the worst one at all (in terms of its content following the necessary improvements) at least due to the fact that its amendments were based on the postulates of the official constitutional doctrine not only from the outset of the reform, but also because the constitutional review of its compliance with the supreme national law – the Constitution – established no deviations.

In terms of its form, however, the Law on State Social Insurance is not an example of good lawmaking. It has already been mentioned that, between December 2008 and late December 2014, this law[376] was amended more than forty times. For the sake of precision: the law 'as such' was 'directly' amended twenty-eight times, while laws amending it were modified seventeen times; therefore, such revisions were 'indirect'. With additional ten 'direct' and two 'indirect' amendments made since 2004, when this law was set out in its new wording, it is obvious that this law, enacted as early as in 1991, contains more amendments than original provisions. Such lawmaking may hardly be justified if it is sought that not only the content, but also the form of legislation would promote respect of society for law.

3.3.7. Real estate tax

The Crisis Management Plan did not envisage any fundamental changes in the taxation of property; although it had been planned to introduce a tax for owners or holders of motor vehicles, for passenger vehicles owned by legal entities (§ 18), this tax was not introduced. Most economists speak in favour of such taxes as being one of most effective and fair – it would be difficult to avoid it and its administration would be easy. Even if it is admitted that a vehicle is often a matter of luxury rather than the first necessity (though most would disagree), it is necessary to take into account the specifics of an

[376] *Official gazette*, 1991, no. 17–447.

individual country, territory and society; the introduction of the 'vehicle' tax in Lithuania would be more complicated due to a poorly developed public transport system, in particular, in smaller and more remote towns.[377]

The reform of the real estate tax is in no way related to 'the overnight tax reform'. More significant amendments to the Law on Real Estate Tax were made only in 2010 (came into force on 1 January 2011) and in 2011 (came into force on 1 January 2012), hence, at the time when the crisis was continuing. Between 2009 and the end of 2014, the Law on Real Estate Tax was amended eight times. The most significant changes, compared to the *status quo* in the beginning of 2009, were as follows: extension of the list of the taxable objects to property not used in commercial activity by natural persons, where the tax on such property was payable to the state budget rather than a municipal budget; expansion of the scope of the tax rate by granting wider discretion to municipal councils; shifting the tax burden from leasing companies to the persons using the relevant property.

From the perspective of *vacatio legis*, none of the amendments to the Law on Real Estate Tax was timely (although this fact was not connected with the then difficult economic and financial situation); all the amendments entered into force soon after the relevant law was issued. For example, the amendment to the law under which, as of 1 January 2012, the real estate tax was to apply to the immovable property owned by natural persons and their family members (residential, garden, garage, homestead, greenhouse, farm, subsidiary farm, research, religion, recreation and fish-farming structures (premises) as well as engineering structures) where its total value exceeded LTL 1 million, was passed on 21 December 2011 and officially promulgated on 31 December 2011.[378] The amendment to the law granting the right to municipalities to set the real estate tax rate within the new range of 0.3–3 per cent rather than 0.3–1 per cent (to provide municipal councils with additional financial legal leverage instruments to encourage the owners of derelict structures and buildings to take care of them)[379] was enacted on 29 June 2012 and was officially announced and became effective on 13 July 2012;[380] this, again, was before the expiration of the required six months. The same is also true about the most recent amendments to the Law on Real Estate Tax that came into force as of 1 January 2015.[381] Such disregard by the legislator of the provisions not only of the Law on Tax Administration and the Law on the Legislative Framework concerning *vacatio legis,* but

[377] 'Neapmokestintas tik žmonių turtas' [Only individuals' property is not taxed]. Online access: http://www.mzinios.lt/lt/2013-07-07/straipsniai/poziuris/neapmokestintas_tik_zmoniu_turtas.html [31 January 2015].

[378] *Official gazette*, 2011, no. 163–7742.

[379] Explanatory note. Online access: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=403709 [31 January 2015].

[380] *Official gazette*, 2012, no. 82–4265.

[381] *TAR*, no. 2014–20429, 22 December 2014.

also of the doctrine laid down in the ruling of 15 February 2013 by the Constitutional Court, detailing in what exceptional circumstances deviations from the requirement of *vacatio legis* are allowed, cannot be legally justified in any way – there are no exceptional circumstances noted in the explanatory note to the relevant draft law to warrant an urgent amendment to the legal regulation as unavoidably necessary.[382] This provokes disputes concerning the application of this tax and may eventually result in constitutional justice proceedings with the outcome that may be easily foreseen in a state governed by the rule of law.

4. Supervision over banks and financial markets

The regulatory and supervisory framework of banks and financial markets in Lithuania underwent a considerable number of changes from 2008 to 2014. Bankruptcies of two banks – bank Snoras and Ūkio bankas – need to be mentioned as they have had a significant impact on the legal regulatory and supervisory framework of banking activities (and their winding up) in Lithuania aimed at the introduction of clearer and (as at that time considered) the most appropriate mechanisms for the protection of the rights and interests of bank deposit holders, the general public and the state.[383] As of 1 January 2012, a more centralised supervisory model for the entire financial sector was phased in, by way of merging the functions of the then Securities Commission and Insurance Supervisory Commission and transferring them exclusively to the Bank of Lithuania charged with the nation-wide financial sector oversight.[384] These developments had a dual effect of consolidation and cost reduction. Upon Lithuania's accession to the euro zone as of 1 January 2015, against the background of the changing relationship between the Bank of Lithuania and the European Central Bank, the nature of the functions vested in the Bank of Lithuania also changed, involving the scope of authority to regulate and oversee the national financial market;[385] the long-standing basis

[382] Explanatory note. Online access: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=461736 [31 January 2015].

[383] *Official gazette*, 2011, no. 139–6554; 2011, no. 139–6553; 2011, no. 139–6552.

[384] 'Lietuvos banke diegiant naują finansų rinkos priežiūros modelį įkurta Priežiūros tarnyba' [During the phase-in process of the new financial market supervisory model, the Supervisory Authority was founded within the Bank of Lithuania]. The Bank of Lithuania. Online access: https://www.lb.lt/lietuvos_banke_diegiant_nauja_finansu_rinkos_prieziuros_modeli_ikurta_prieziuros_tarnyba[6 January 2015].

[385] 'Lietuvos bankas tapo Eurosistemos dalimi ir įgijo teisę dalyvauti priimant svarbiausius ECB sprendimus' [The Bank of Lithuania becomes member of the Eurosystem and is entitled to participate in the key ECB decision making]. The Bank of Lithuania. Online access: https://www.lb.lt/lietuvos_bankas_tapo_eurosistemos_dalimi_ir_igijo_teise_dalyvauti_priimant_svarbiausius_ecb_sprendimus [6 January 2015].

for the Lithuanian monetary policy – the Currency Board – ceased to exist. Although all of these processes are highly significant, not every single one of them is directly linked to the economic crisis; moreover, at this moment in time, the entire impact of the individual processes on human rights cannot be comprehensively assessed at all.

Accession to the euro zone and the ensuing redistribution of competences between the financial market supervisory authorities of the Bank of Lithuania and the European Central Bank is a direct consequence of Lithuania's EU accession and the honouring of the commitments assumed. An assessment of the termination of the activities by banks and credit unions from 2011 to 2014 demonstrates that the relevant decisions were triggered not by the 'natural' problems of solvency and liquidity in the wake of the crisis, but rather by an inappropriate fulfilment of the then effective statutory requirements (allegedly criminal acts committed by concrete individuals), an insufficient oversight of banking and credit union activities, as well as the imperfections of the then effective regulatory framework.

Experts, politicians and representatives of commercial banks, in principle, all have shared the unanimous understanding that the key underlying factor that directly determined the scale and consequences of the economic crisis in Lithuania was the lending policy pursued by commercial banks. Prior to the crisis, the national volume of money in circulation used to grow steadily by 20–25 per cent per year, and the credit portfolio of commercial banks would grow by 50 per cent every year, whereas the GDP growth, however remarkable on the European scale, was below 10 per cent. Adhering to the then effective legal acts, banks were lending money generously, while residents and businesses were borrowing actively. Mortgage credits for housing had an average maturity of forty years and could cover up to 90–100 per cent of the total value of the housing, while increasing market values of the property during the housing 'bubble' facilitated the further refinancing of the credits taken and, thus, raising additional funds for consumption or investments. Foreign capital injections (by parent banks through their subsidiaries or branches) into Lithuania's economy, which were disproportionate to the economic growth, had a huge impact on the finances, plans and behavioural patterns of residents and the state on the whole.[386] In this respect, Lithuania was no different from the neighbouring Latvia and Estonia.[387]

[386] For instance, in 2007–2008, when the GDP growth was below 10 per cent, the budget of the State Social Insurance Fund grew by 30 per cent a year. Jakeliūnas, S. *Lietuvos krizės anatomija* [*Anatomy* of Lithuania's crisis] (referred to in the Preface), pp. 48, 116–122.

[387] Indeed, Estonia stood apart from the other two Baltic States in that it accumulated additional tax revenues collected during the years of the economic 'bubble' for building up surplus budgets and accumulated this surplus as a reserve, which allowed it later to handle the consequences of the economic crisis much more easily.

4.1. Deposit insurance

To prevent the tendencies of the global economic crisis and distrust in the financial sector from spreading in Lithuania, actions were taken in October 2008 to reinforce the system of deposit insurance. In the Law on Insurance of Deposits and Liabilities to Investors[388] (initially for an interim period from 1 November 2008 to 31 October 2009), a higher level of protection was fixed in respect of insured deposits: the insured sum was increased from EUR 22 thousand up to EUR 100 thousand or its equivalent in foreign currency, the 90 per cent limitation was abolished in respect of the part of a deposit in excess of EUR 3.000. In objective terms, the new guarantees primarily served as guarantees of the banking system as such (because the system was funded from contributions of market participants), whereas the liability of the state was, in principle, limited to the appropriate legal establishment and ensuring the capacity to properly perform its functions.

After the bankruptcy of bank Snoras, which was the first and largest test to the Lithuanian deposit insurance system, it became obvious that the banking system would not be capable of resolving problems of such magnitude on its own. At that time, the Insurance Fund of Deposits and Liabilities to Investors had accumulated approximately LTL 1.7 billion, against the estimated need for LTL 4.1 billion.[389] In order to mitigate the risk of chain reaction at the time of the tensions already challenging the financial system, it was decided to maintain the viability of the system by means of relending the funds borrowed by the Government on behalf of the state, *i.e.* by means of availing of public funds, which, after selling off the assets of the bankrupt bank and satisfying the claims of the insurance fund towards deposit holders and investors, were to be returned back to the state together with the interest agreed in the credit contracts. This procedure for implementing the rights of the Insurance Fund of Deposits and Liabilities to Investors by taking over the claims of insured bank depositors against the bank, the so-called subrogation, eventually became the matter of a constitutional dispute. The petitioners in these constitutional justice proceedings believed that the legal regulation that gave priority to the Insurance Fund of Deposits and Liabilities to Investors over the other creditors, even if it aimed at ensuring the public interest, disproportionally restricted the rights of other creditors and was incompatible with the constitutional principle of the protection of ownership (Article 23), the constitutional imperative for regulating financial economic activity in such a way that it can serve the general welfare of the nation (Article 46(3)), the constitutional principle of the equality of the rights of persons (Article (1)), and the constitutional principle of a state under the rule of law.

388 *Official gazette*, 2002, no. 65–2535.

389 Explanatory note. Online access: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=41265 [10 January 2015].

In its ruling of 5 July 2013, the Constitutional Court confirmed the constitutionality of subrogation by the Insurance Fund of Deposits and Liabilities to Investors when the rights of claim of the depositors who have received insurance payments are taken over up to the amount of insurance, and their claims are satisfied second in the order of priority for the satisfaction of claims. According to the Constitutional Court, such a legal regulation, in principle, protects the interests and indirectly satisfies the claims of the depositors and investors themselves referred to in the Law on Insurance of Deposits and Liabilities to Investors held against the bank. There are essential differences between, on the one hand, the state enterprise Deposit and Investment Insurance, which ensures satisfaction of the claims of the depositors of a bank in bankruptcy proceedings (who hold in their deposits the money that is used, as a rule, to meet personal and, frequently, even the most essential needs), as well as satisfaction of the claims of non-professional investors, and, on the other, other creditors of the said bank, *inter alia*, those who rank fourth in the order of priority of creditors in the bankruptcy proceedings. Such a legal regulation shows the intention of the legislator to ensure special measures, so that the amounts paid to the depositors and investors by the insurance fund could be restored promptly and that, in cases of other insured events, it would still be possible to fulfil the insurance obligations, ensure the stability of the banking system and the entire financial system. The fact that, in the event of a bank bankruptcy, the claims concerning the payment of taxes and other payments to the budget, as well as the claims concerning the extended loans received on behalf of the state and with the guarantee of the state, are satisfied third in order of priority should be assessed as striving by the legislator to ensure the revenue necessary to perform the functions of the state and to finance the public needs of both society and the state. Therefore, the legal regulation disputed in these constitutional justice proceedings was held to be in conformity not only with the constitutional principles of the equality of the rights of persons and a state under the rule of law, but also with the constitutional imperative for regulating the economic financial activity of the state in such a way that it serves the general welfare of the nation (Article 46(3)). In this case, not only the compliance of the challenged legal regulation with the Constitution was upheld; in that ruling, in principle, the Constitutional Court made it clear that such a line of statutory regulation, when deposits are insured and potential losses are compensated from the fund established for this purpose, stems from the Constitution and constitutes an implicit requirement at least in the real economic situation of these times.

It is also evident that the Constitutional Court made effort to balance sensitively the individual and collective rights and interests of different social groups, as well as their interests and those of the whole political community of the state. The principal approach followed was that the burden of bank bankruptcy consequences, which can potentially impact the whole national

economy and cause an inevitable damage to the rights of individual persons and the entire state, should be distributed in such a way as to ensure the maximum protection of different constitutional values and interests of the whole community of the state. However, even if the rationale and balance between the values and interests invoked by the Constitutional Court in its ruling of 5 July 2013 are accepted, certain doubts regarding their universal character remain open. It follows that the 'implicit' approval by the Constitutional Court of the direction of the model for liquidating/neutralising the consequences of a bank bankruptcy, as a solution that has no realistic alternatives (in the existing Lithuanian economic and financial system) and has been chosen by the legislator and established in statutory law, does not mean the approval of the 'details' and specifics of this model. Therefore, it is possible to question whether, for example, EUR 100 thousand is indeed the minimum that is necessary to protect the interests and essential needs of depositors, below which their claims (and on the basis of subrogation, the claims of the Insurance Fund of Deposits and Liabilities to Investors) are given priority over the interests of lower-ranking creditors *(inter alia*, over the claims of the state concerning taxes and other budget payments), as well as whether this amount truly reflects a sound, fair and optimal threshold for ranking the interests of creditors in the event of a bank bankruptcy.[390] It is likely that, once the economic realities change substantially, the model for liquidating/neutralising bank bankruptcy consequences 'implicitly approved' by the Constitutional Court (with the 'ranking' of creditors discussed here as an element) would not be considered as having no alternatives and, probably, would not be judged as most reasoned and fair.

4.2. Ensuring financial sustainability

After the outbreak of the crisis, it came to light that there were no modern legal instruments in Lithuania[391] to deal adequately with the problems caused as a result of bank bankruptcies. Following the experience of other countries

[390] Theoretically, it would be possible to apply such a legal regulation where, in the event of a bank bankruptcy, while balancing the interests of different creditors and the scope of the constitutional safeguard for the protection of ownership applicable to them, priority would be given to, for example, the claims of depositors (and, accordingly, of the Insurance Fund of Deposits and Liabilities to Investors) up to EUR 50 thousand (or any other amount), whereas the insurance coverage would remain at the same level of EUR 100 thousand, and the claims concerning differences between those amounts in bankruptcy proceedings would be treated along with the claims of the respectively lower ranking creditors.

[391] Except the Law on the Issue of Government Securities for the Restructuring of Banks (*Official gazette*, 1996, no. 59–1406) and the Law on the Measures for Maintaining the Liquidity of Commercial Banks (*Official gazette*, 1995, no. 104–2326) which regulate separate issues rather fragmentarily and abstractly.

on this issue (for example, that of Latvia, where the state took over the control of the insolvent Parex bank), the Law on Financial Sustainability was enacted on 22 July 2009. It aimed at establishing the measures to enhance the financial stability of the national banking system in order to protect important interests of society. Four measures were originally foreseen: (i) state guarantee (for loans held or taken by the bank in difficulty); (ii) redemption of bank assets (increasing the liquidity of the bank, taking over its risky assets); (iii) participation of the state in the capital of the bank (extending a subordinated loan to the bank, acquiring the newly issued shares or the shares held by the shareholders of the bank); (iv) nationalising the bank – taking over for public needs.

Such measures as the establishment of the system of insurance of deposits and liabilities to investors (more so its application in practice) imply the privileged treatment of a specific economic sector, do not increase the trust of consumers in such entities, and create preconditions for bank shareholders to assume higher risk and seek higher profit knowing that the state assumes a significant part of responsibility for containing potential negative consequences of risk failures. EU law treats such situations as aid from the state, which distorts the common market.[392] Such a statutory regulation when one economic sector, *i.e.* financial one, is singled out from all other branches of the national economy (likewise impacted by the downturn) may be questioned in terms of its compliance with the Constitution as impermissible privileged treatment of some market subjects with respect to and at the expense of others. Nevertheless, it could similarly be justified by the same reasons of the security, stability, reliability of the financial system and its significance for all other areas of life of the state as those equally invoked to substantiate the necessity of the insurance system of deposits and liabilities to investors.

When the issues of bank Snoras (failing at that time with eventual collapse) came to light, the amendments to the Law on Financial Sustainability, along with the amendments to several other laws, to deal with these issues more smoothly were passed on 17 November 2011.[393] Following the international practice and the experience of individual states, they provided for one more measure to enhance the financial sustainability of the banking system, *i.e.*

[392] Hence, it is necessary to take into account the provisions of EU primary law and Communication of 13 October 2008 from the Commission On the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis (OJ 2008 C 270), Communication of 15 January 2009 from the Commission On the recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition (OJ 2009 C 10), and Communication of 25 February 2009 from the Commission On the treatment of impaired assets in the Community banking sector (OJ 2009 C 72).

[393] *Official gazette*, 2011, no. 139–6553.

the possibility for the Government to decide on establishing a bank with all shares belonging to the state by the right of ownership in order to carry out temporary activity related to the assets, rights and liabilities taken over from the bank whose financial situation threatens the stability and reliability of the banking system, *i.e.* to establish a temporary bank on the basis of the 'healthy' part of the assets of the problematic bank, to announce bankruptcy of the latter and to institute its liquidation procedure. It was sought[394] to make it possible to cease the activity of the banks that were important for the entire banking system but had run into serious financial difficulties by bringing the cost for the public sector at a lower level and minimising the damage caused by the breakdown of banks to depositors, the financial system and society on the whole. Besides, such a legal regulation would leave the risk of bankruptcy for the shareholders of a problematic bank, hence, would discipline the market and reduce moral risk.

However, none of the modern models for solving bank problems, as provided for in the Law on Financial Sustainability, were applied in Lithuania: bank Snoras was nationalised with the subsequent bankruptcy proceedings,[395] while the 'healthy' part of the assets of the bankrupt Ūkio bankas was transferred to Šiaulių bankas upon the agreement of these economic entities (not without the involvement of state authorities).[396]

4.3. Responsible lending

Experts and analysts of economics agree that one of the primary factors that determined the scope of the economic crisis in Lithuania was unsustainable growth of the national economy, foreign capital spill-over in the national market. All this reflected the global tendencies of the financial sector supervision in Lithuania, reliance on the 'invisible hand of the free market', self-regulation and the balance of private interests. This, as many times before in the world, fuelled a higher competition and more intense development of banks and other financial institutions, investment into the securities and real estate sectors.[397] Easily accessible financial resources meant a natural growth

394 Explanatory note. Online access: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=411578 [15 January 2015].

395 Vasiliauskas, V. 'AB banko SNORAS bankroto proceso apžvalga' [Overview of bankruptcy proceedings of AB bank SNORAS]. Online access: https://www.lb.lt/seimo_posedyje_ab_banko_snoras_bankroto_proceso_apzvalga_1 [20 January 2015].

396 Čiulada, P. 'Šiaulių bankas pasilieka "gerąjį" Ūkio banko turtą'. [Šiaulių bankas retains the 'good' assets of Ūkio bankas]. Online access: http://vz.lt/article/2014/1/31/siauliu-bankas-pasilieka-geraji-ukio-banko-turta-pildoma [20 January 2015].

397 Glinavos, I. *Op. cit.*

in poorly justified economic expectations of society. They were followed by the legitimate expectations of individuals about business, work, guarantees afforded by the state, *etc.*

The obvious disfunctioning of self-regulation leverage and the crisis lessons encouraged the Bank of Lithuania to approve the Responsible Lending Regulations in September 2011.[398] They aimed at promoting responsible lending by credit institutions, the market discipline and the transparency of the activities of these institutions, the mitigation of the systemic risk in the sector of credit institutions, misbalanced changes in immovable property prices, as well as the risks of a too rapid growth of the credit portfolio and excessive risk concentration, with a view to protecting consumers from disproportional financial obligations and developing habits of responsible borrowing, thus contributing to the overall stability of the financial system. These regulations fixed the maximum ratio between the loan amount and the property mortgaged (at 85 per cent), set a limitation on the borrowing of the remaining part, defined the maximum ratio between a loan instalment and the monthly income of the debtor (at 40 per cent), as well as the general assessment principles of the capacity of the debtor to repay the loan.

The Responsible Lending Regulations referred to two articles of the Law on the Bank of Lithuania[399] as to their legal basis: Article 9, where the form of activities, *i.e.* the adoption of resolutions by the Board of the Bank of Lithuania, was defined, and Article 11, which outlined the functions and activities of the Board of the Bank of Lithuania. The mandatory character of these provisions, however, only partly derived from the general statutory powers of the Bank of Lithuania to oversee and control the activities of credit institutions or, otherwise stated, from the postulates of the positive law system; much more they stemmed from the moral authority of the Bank of Lithuania, its 'soft power', which was strengthened by the silent acceptance of the mistakes made by the banks themselves, which had, to a large extent, contributed to the crisis or, at least, shaped its scope and forms. Such restrictions on borrowing (and banking activity in general) were considerably belated – had they been enacted earlier, they would have been in the position to mitigate the shocks in the national economy significantly.[400] Such reasoning is not groundless, however, the changes in the economic context and the ensuing differences in the perception of reality and the future, or even in the legal culture, should not be disregarded as well – had such measures been introduced earlier, most likely they would have been assessed as a legally unjustified restriction of the

398 *Official gazette*, 2011, no. 111–5262.

399 *Official gazette*, 1994, no. 99–1957; 2001, no. 28–890.

400 'Lietuvos bankas mokys atsakingo skolinimo' [Bank of Lithuania will teach responsible lending]. Online access: http://iq.lt/ekonomika/lietuvos-bankas-mokys-atsakingo-skolinimo [20 January 2015]; Žioba, N. 'Atsakingo skolinimo nuostatai – kertinis sistemos brandumo akmuo' [Responsible lending regulations – cornerstone in the system's maturity]. Online access: http://iq.lt/komentarai/atsakingo-skolinimo-nuostatai-kertinis-sistemos-brandumo-akmuo [20 January 2015].

economic activity and rights of ownership of the debtors rather than as a necessary (truly necessary!) preventive measure.

4.4. VILIBOR

Prior to the introduction of the euro (1 January 2015), during the times of fast economic growth as well as the downturn, the interest (where its rate was not fixed) of the mortgage loans granted in the national currency litas by Lithuanian commercial banks was directly linked with the VILIBOR index (*Vilnius Interbank Offered Rate*) calculated and published by the Bank of Lithuania – the average interbank offered rate, at which the banks operating in Lithuania were ready to lend funds in litas to other banks.[401] This index, in principle, indicated the market price of interbank lending.

With the onset of the crisis, in October 2008, the six-month VILIBOR, among most widely used in determining the interest rate for variable-rate housing loans, started suddenly growing and from 6.39 per cent in early October reached 10.44 per cent in late December of the same year; it reached the level of October 2008 only at the end of 2009. Similar developments could also be observed in the VILIBOR indexes for other periods (nightly, weekly, monthly, *etc.*) These tendencies were apparently different from those of the EURIBOR index (*Euro Inter Bank Offered Rate*).[402] Similarly, even more radical processes were also taking place in Latvia,[403] so they were not specific to Lithuania only.

Such clearly different tendencies of VILIBOR and EURIBOR and the fact that, as shown by the statistics of the Bank of Lithuania,[404] there were, in fact, no six-month and longer duration direct lending transactions on the Lithuanian interbank lending market between August 2008 and June 2009 meant that the six-month VILIBOR was estimated based on the theoretical assumptions made by commercial banks and could not be verified by the data of the specific transactions. Although, as considered by the Bank of Lithuania, the methodology for setting VILIBOR complied fully with the international practice of determining such indexes and it had no real alternatives,[405] it

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401 *Official gazette*, 1998, no. 112–3121.

402 European Money Market Institute. Online access: http://www.emmi-benchmarks.eu/euribor-org/euribor-rates.html [15 January 2015].

403 Latvijas banka. Online access: http://www.bank.lv/en/statistics/data-room/main-indicators/money-market-indexes-rigibid-and-rigibor [15 January 2015].

404 Bank of Lithuania. Online access: http://www.lb.lt/interbank/default.asp [15 January 2015].

405 Letter on the methodology for calculating VILIBOR no. S2011/(7.7–0700)–12–17). Bank of Lithuania. 4 January 2011. Online access: http://banku-naujienos.lt/wp-content/uploads/2011/01/Del-VILIBOR.pdf. [15 January 2015].

raised public concerns about potential manipulations and abuse by the banks. It is more reliable, however, to presume that such tendencies and processes reflect the natural and objective economic forecasts of the banks at that time, the approach they and their clients (first of all, depositors) had towards the risk of the exchange rate of the litas (its potential devaluation), the situation of the economic and financial system of the country and the need for financial foreign currency reserves. These tendencies were confirmed by many other indicators of the performance of the commercial banks and interbank market.

In terms of the possibilities of the legislative branch of power for action in this field, it, first of all, seems that this area is outside the remit of powers of the legislator and that its potential to influence these processes is very limited. Nevertheless, the autumn of 2010 witnessed the first legislative initiatives[406] suggesting prohibiting mortgage creditors from recovering their claims from the assets of the debtor other than the collateral, which were likely to change considerably the balance of both the general drop in real estate prices and the sharing of currency exchange risk between creditors and debtors to the benefit of the latter. In cases of the inability to keep paying mortgage instalments and interest or unwillingness to continue payments for considerably depreciated property, debtors could have been allowed simply to give the property acquired to the creditor and fulfil their obligation in this way without any risk of further losses, while, for creditors (first of all, commercial banks), this would have entailed a much higher risk of solvency (and good faith) of debtors.

Both the Legal Department of the Office of the Seimas[407] and the European Law Department under the Ministry of Justice[408] noted that such recommendation (with respect to creditors) was potentially in conflict with the provisions of Article 23 of the Constitution, Article 1 of Protocol no. 1 of the ECHR and Article 17 of the EU Charter of Fundamental Rights. Furthermore, following Article 2 of Council Decision of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (98/415/EC),[409] consultations with the European Central Bank were necessary on rules applicable to financial institutions insofar as they materially influenced the stability of financial institutions and markets. These amendments were not enacted eventually, the risk and responsibility of creditors (first of all, commercial banks) for the mortgage loans provided was not increased and no further efforts were made to look for any 'intermediate' solutions to this problem, potential compromises or alternatives.

In terms of similar experience of other countries, the most distinct

[406] Draft Law on Amending Article 4.193(1) of the Civil Code. Online access: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=380506 [15 January 2015].

[407] Online access: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=380676 [15 January 2015].

[408] Online access: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=381607 [15 January 2015].

[409] OJ 1998 L 189.

example of the opposite approach and solution (in a slightly different situation) was Hungary. Confronted with a drop in the real estate prices, high deflation of the national currency and the resultant increase in the household foreign currency mortgage loans and their interest (when assessed in national currency), which affected almost 800 thousand households, Hungary made unfaltering decisions: in 2011, it opened a five-month 'window' allowing early repayment of foreign currency mortgage loans (or their part) at a 30 per cent preferred exchange rate; part of non-performing mortgages were written off by 25 per cent and converted into the national currency – HUF; loan payments were rescheduled; state subsidies for interest and some scope for banks to deduct losses from the special bank tax were introduced. All this could, in substance, be assessed as interference with the long-standing civil relations established by the free will of the parties, with the expectations and ownership of their participants (first of all banks) and also as the weakening of the trust in the state. Nevertheless, such decisions, as underscored by the experts of the IMF,[410] were not unilateral – there were negotiations and agreements reached with the market players who were suffering losses ensuing from such decisions. To set aside any judgment on the legitimacy, suitability and acceptability of the outcome as such, it is clear that the administrative power of the state and the legal instruments applied to balance the legal and economic interests of community members (including the issues of lender responsibility for the lending policy they had pursued) in the context of major changes were openly and rather effectively combined with its 'soft power', negotiating weight and influence on financial institutions.

Conclusion

An economic crisis, first of all, inevitably grips the national financial systems, both public and private. It is through a financial system, a sudden and significant contraction of its resources, that an economic downturn most often (if not exclusively) materialises in many other areas of life. Decrease in the funds available for the state to finance state government, public administration, education, national defence and health care functions and to redistribute resources for the implementation of the social security and social welfare policies triggers changes in the legal regulation of these domains.

[410] Country report no. 12/1, Hungary, 2011, Article IV 'Consultation and second post-program monitoring discussions'. International Monetary Fund. Online access: http://www.imf.org/external/pubs/ft/scr/2012/cr1213.pdf [15 January 2015]; Hungary's compulsory mortgage relief scheme aids rich households, sets stage for further deterioration of local economy. International Monetary Fund. Online access: http://www.realdeal.hu/20120411/imf-hungarys-compulsory-mortgage-relief-scheme-aids-rich-households-sets-stage-for-further-deterioration-of-local-economy [15 January 2015].

First of all, however, this drives changes in the legal framework segment that regulates the national finance system and propels particular law-making and law-application decisions (or, conversely, their absence due to inability or unwillingness) aimed at finding the key to prevent new downturns. Lithuania was not an exception in these terms both in late 2008, when the so-called Great Recession unfolded, and throughout the whole period of the downturn of 2008–2014. It should be admitted, however (as confirmed by the public opinion survey carried out for the purposes of this research), that the crisis was often used as a justification for some of law-making and law-application decisions made in 2008–2014, whose causes and original sources derived from the potentially criminal actions of specific individuals and were linked with the flaws of the earlier established legal regulation, gaps in the administration practice or simply human errors rather than the situation of the economic downturn itself.

Late in 2008, it was already known that an economic downturn was imminent (though the crisis was, in fact, already there) and its consequences for the national economy were estimated from its initial symptoms. The discussion process that was taking place at that time concerning the national budget of 2009 and the legal acts of direct relevance to underpin the national revenue and expenditure for the upcoming budgetary year was hardly compatible with many of the imperatives imposed by the constitutional principle of the rule of law on the executive branch of power, the subjects vested with legislative initiative and the legislator. In normal circumstances, such a process for budget drafting and approval would hardly be considered as satisfying the essential principles of respect for legitimate expectations, legal certainty and security, acquired rights, *vacatio legis*, the right of persons to have access to proposed amendments and adjust to their requirements.

Starting from late 2008, the economic downturn-driven changes in the legal acts in the area of finance (and, first of all, taxation) did not slow down in pace in 2009 and 2010 and did not decrease in number. First of all, it was sought to consolidate public finances as much as possible (increase potential revenue and optimise necessary expenditure) as it was clearly understood that deficit was inevitable and that, in the absence of fiscal discipline and (on our own initiative or as required by international lending institutions) efforts to match needs with capabilities, the deficit coverage by national borrowing would hardly be possible. Dozens of amendments were made for this purpose to the laws establishing taxes, state social insurance and compulsory health insurance contributions (not to mention implementing legislation), the financing model of compulsory health insurance was revised, the circle of participants in the state social insurance system was expanded (thereby, in principle, reforming the state social insurance system) while at the same time decreasing the share of state social insurance contributions earmarked for private accumulation and further enhancing the consolidation of finances of the State Social Insurance Fund. Efforts were also eventually taken to legitimise and make *ad hoc* adaptations in the legal regulation of the

process of budget drafting and approval, which was taking place in emergency conditions and was not adapted to the political cycle arrangements (as both the legislative and the executive powers had to change at the time of budget drafting and approval). An absolute majority of such legislation enacted in late 2008 or early 2009 became effective and were to be applied immediately, at times even retrospectively. The possibilities for getting prepared for the changes in a proper manner (quite often, at least, for building awareness) were limited not only for the original addressees of these legislative provisions (residents, businesses), but also for the public administration institutions that had to ensure their implementation. As changes in the legal regulation in the area of finance (in particular, taxes) were numerous and hasty, often with the obligatory coordination procedures undertaken only formally, all this resulted in the compromised quality of such newly released legal acts, their integration into the existing legal regulation and administration practice. Therefore, freshly released legal acts would undergo almost immediate changes to correct the mistakes made, irregularities and conflicts, fill out gaps and review the rationale and validity of the decisions made, react to criticism and observations, respond to changes in the conduct of the population and businesses, as well as build a more solid legislative basis for substantial reforms in the future. It can be seen from individual amendments that the initial changes in the legal regulation were often made without a more thorough assessment of their impact on the economy, business environment, personal expectations and conduct, probably without even any vision of the final political decision or relevant outcomes.

The reaction to the changes in tax legislation was among the most sensitive (which should not be surprising). Excise duties, value added tax and, temporarily, corporate profit tax rates were increased, a large number of tax and personal income tax incentives and advantages were removed, rearrangements in the financing model of compulsory health insurance and the extension of the state social insurance obligations for self-employed persons expanded the range of persons obliged to pay such social contributions. All these changes were often (and quite often, as attested to by the survey carried out during this research, still are) viewed by society as an unreasoned, unfair and unsound increase in taxes. The pre-crisis *status quo* in the distribution of the financing burden of public expenditure among individual society members and their groups, goods and services was accepted by default without any additional arguments and justification. The changes made in the area of social contributions were, primarily, viewed as an encroachment on the specific situation and activity (natural and to be preserved) of the relevant economic and social groups (authors, performers, athletes, journalists, farmers, *etc.*) The cut downs in the number and scope of exemptions from VAT were often treated as disruption of business, as well as of entire economic sectors and culture, rather than accepted as giving up of some privileges or indirect additional subsidising, which the political community could no longer afford as a result of the objective economic and financial situation

in the state. It was seldom that anybody else but decision-makers referred to the arguments of social solidarity, shared responsibility and *res publica*, although, as it may be concluded from the survey results, they were perceived retrospectively and increasingly accepted. At that time, however, all these arguments, like many other measures that were supposed to mitigate, absorb or compensate the heavier burden placed on the most sensitive social groups in order to overcome the downturn (changes in the amount of tax-exempt income, a higher reduction of the personal income tax rate compared to the rate of unbundled compulsory health insurance contributions, the continued application of differentiated social insurance contributions for separate payer groups, *inter alia*, in relation to the tax base, its 'ceiling', payment procedure, different transitional periods, *etc*.) were most often left at the backstage of public, political and academic discourse. Most publicly discussed and accepted alternatives of public finance consolidation decisions, including such as more extensive borrowing (with criticism expressed by the same individuals concerning excessively high national debt), addressing international financial institutions for support (irrespective that such support would invoke even more radical consolidation measures) or economic boost through tax advantages (preserving, increasing, expanding them), do not easily yield to assessment by means of legal criteria. On the other hand, a considerable share of the criticism addressed to the law-making and law-application solutions in the area of public finances has had a distinct psychological dimension, involved emotions triggered by sudden, incomprehensible and unexpected economic transformations and changes in the legal regulation, and, eventually, by inability to understand or unwillingness to admit that a decrease in income was primarily caused by the economic downturn rather than changes in the regulation of taxes and contributions.

A large number of the above-referred financial legal regulations eventually became the object of constitutional justice proceedings. Their compliance with the fundamental law of the state was assessed in terms of both procedural (*i.e.* the procedure of adoption and coming into force) and material (*i.e.* content) aspects. Incompatibility of certain actions and decisions with the conventionally applicable constitutional imperatives of a state under the rule of law, such as clarity and stability of law, protection of legitimate expectations, *etc.* (in particular, in terms of the legal regulation changes between the end of 2008 and the beginning of 2009) were, in principle, obvious even at the time they were being introduced. Such an assessment, however, would be the apotheosis of legal formalism – it would disregard the fact that law is effective and operates in reality and not only forms it but also has to accommodate what is economically invincible. When investigating the constitutionality of the relevant legal acts, the Constitutional Court did not take this course – it did not place law in antithesis and confrontation with all other areas of life. Its rulings were passed with consideration of the real situation; it recognised that an absolute majority of the legislative decisions had been necessary in a

democratic society and were justified by the existing circumstances as well as the objectives pursued, *i.e.* an overriding public interest, the stability and functioning of the national financial system. In terms of the content, almost none of the decisions analysed in the area of finances (budgetary process, taxes and social contributions, the regulation of the financial sector) were held to have been incompatible with the Constitution (almost the only exception was the provision of 'technical nature' in the Law on Health Insurance, which was held to have been in conflict with the Constitution, although it was not directly linked with the crisis), *inter alia*, its imperatives for the protection of private ownership, the equality of the rights of persons, the freedom of economic activity, health care or social welfare. Quite to the contrary, the challenged novel laws were assessed as positive solutions that increased solidarity of society, responsibility of its members for the state and for the financial resources necessary for its functioning *(inter alia*, health care and social security), distributed this burden among all social and economic groups more evenly and better protected the weakest strata of society. It should also be noted that the Constitutional Court has not only provided assessment of the relevant legislative decisions in its case-law, but has also formulated the constitutional guidelines and imperatives for the future legal regulation concerning the budgetary process, taxes and contributions, as well as the financial sector, fair compensation for damage (justifiable in these circumstances) unavoidably caused to persons or social groups by anti-crisis decisions, as well as for balance restoration.

It is true that part of the decisions to keep finances in control in the face of the crisis *(inter alia*, the level of tax rates, the withdrawal of exemptions and reliefs) has not been assessed by the Constitutional Court in any way so far – on the one hand, they hardly have had or may still have any significant impact on the general standards of the protection of human rights and the rule of law in the country and, on the other, they should be held (both from the perspective of the Constitution and international human rights instruments) to belong to the domain of sovereign functioning of a state, to fall under the categories of optional policy directions and measures that may be selected for their implementation.

Whereas the causes and sources of the global economic and national financial crisis as such are, primarily, linked with the activity of the private financial sector, with predominant pre-crisis deregulation tendencies, with excessive confidence in the soundness of the markets, self-regulation, *laissez-faire,* apart from influencing the public sector finances, the economic downturn also had an unavoidable effect on the legal regulation of the financial activity of the private sector in Lithuania. Although the finance and credit institutions that operated in Lithuania may not be directly blamed for the crisis, these institutions themselves did not deny that the pre-crisis business practice had an impact on the consequences of the economic and financial crisis in Lithuania.

Most significant changes, which were prompted by the economic

downturn and were made in the legal regulation and oversight of the area under discussion, were the consolidation of the sectoral supervision, thereby saving the government costs of the state, changes in the approach to the oversight of banks and other credit institutions, increased safeguards for the insurance of deposits – from the insurance amount as such to the reinforced status and significance of the insurance system. All these changes strengthened the background necessary for the state to safeguard the legal standards of a democratic society, individual and collective rights (first of all, that of ownership, although not only) and interests of its members to a broader extent, as well as to more effectively regulate and supervise the financial sector so that it serves the overall welfare of the nation.

The increased deposit amount guarantees to depositors of the insurance system financed by the contributions of the banks themselves, on the one hand, hands over more responsibility for future actions and business practice to market participants themselves, promotes more stringent self-regulation and self-control, but, on the other hand, by means of the natural obligation to ensure the viability and functionality of this system both by financial (ensuring the accessibility of temporarily lacking financial resources, *i.e.* by loans) and legal measures (by legitimising the legal status and guarantees, *inter alia*, high priority in the ranking of creditors), leaves the relevant share of responsibility to the state that supervises this market. The lessons and experience (both direct and of foreign countries) learnt from the crisis have been utilised in the development of legal mechanisms to deal with the solvency issues of the banks significant for the entire national finance system in a way that tends to make the least possible negative effect on the national economy, allow the protection of the public interest by means of, *inter alia*, the financial resources of the state, and at the same time further discipline the market players by the threat of bankruptcy. Furthermore, being once again aware and convinced that, due to a considerable moral hazard to make potential losses at the costs of the whole society, *laissez-faire* is not the most appropriate ideology and doctrine of business regulation in the financial sector, additional legal and 'soft power' instruments of the state have started to be used to a larger extent along with traditional (although more stringent) risk mitigation norms in order to *a priori* protect both the users of financial services and customers of the banks from excessive future risks and help avoid moral dilemmas in choosing between responsible financial business practices and higher profits.

Part IV

SOCIAL RIGHTS

Daiva Petrylaitė
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1. The concept and issues of social rights

1.1. The concept of social rights

During economic downturns and in the aftermath, economic and social human rights and their safeguards remain one of the most relevant issues of national policies and law. Human rights are traditionally classified into two categories: (i) civil and political rights and (ii) economic, social and cultural rights. These rights were enshrined in the very first international instruments;[411] their provisions were subsequently transposed to regional[412] and national legal acts, including those of supreme power – the constitutions. In earlier scholarly works, one can come across some doubts whether social rights should be considered human rights at all since they are only political promises. The present-day science of law, however, upholds the position that, for the purposes of the proper protection of social rights, both approaches to social rights – the one that treats them as the implementation of a social policy and the other that recognises them as individual human rights – should be combined together.[413] Irrespective of discussions on the interrelation between the 'primary' and 'secondary' (social) human rights or a higher significance of the former, it is obvious that poor and deprived living conditions decrease the ability of persons to make use of their civil and political rights and participate

[411] *E.g.*, International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights; Universal Declaration of Human Rights.

[412] European Convention for the Protection of Human Rights and Fundamental Freedoms; European Social Charter (revised).

[413] For more on the development of this aproach in Lithuania, see: Baltutytė, E. 'Socialinės ekonominės teisės ir konstitucija: kai kurie lyginamieji aspektai' [Social economic rights and the Constitution: Some comparative aspects] in *Konstitucija, žmogus, teisinė valstybė* [Constitution, individual, rule of law]. Vilnius, 1998; Id. 'Europos socialinė chartija ir socialinės teisės Konstitucijoje' [European Social Charter and social rights in the Constitution] in *Jurisprudencija*, 2002, vol. 30(22).

fully in society.[414] The case-law of the Constitutional Court interprets civil and social rights as indivisible, equal in importance and safeguarded by the Constitution. Social rights are different from other rights, as their implementation is highly dependent on the economic potential of the state, although national financial resources are also necessary for the exercise of other rights. Social rights may be exercised to a certain degree; interference with these, as well as other rights, is based on the principles of proportionality, the balance of rights and the possibilities of society to guarantee these rights to individuals.[415]

The traditional approach to social rights has cardinally changed in the recent decades.[416] This change may be well exemplified by the EU Charter of Fundamental Rights, which, *inter alia*, consolidates the rights to work, social protection and health care. The *reconsideration* of social rights is necessary and unavoidable, as the social, economic and political environment where these rights had been perceived and stated (early 20th century) underwent an irreversible and essential influence as a result of modern globalisation and the evolution of the network society. The present-day era of the knowledge society has reduced the impact of national governments and laws in the areas of control over the movement of capital, finances, technologies and information as well as over human migration. On the other hand, social rights at international, regional and national levels are increasingly seen as beacons of resistance against the disempowerment of local communities, trade unions and other social organisations, which globalisation and neoliberalism entail.[417]

A desire to formulate a finite list of social rights (some authors refer to 'social and labour rights' as if making a distinction of two groups of these rights in this way)[418] most likely is characteristic of the works of many legal scholars (of constitutional, social, labour or even international law). Such a finite and all-embracing list of social rights is seemingly utopian, especially, in view of the fact that these rights are among the most dynamic rights, highly dependent on the existing political order, the ideology predominant in the government of the state or, as is evident from the situation of the last decade, on the considerable impact that globalisation, migration and the development of the knowledge society had on social rights. More so, today changes are taking place not only in the conditions of societal life, which lead to changes in the content and scope of social rights, but social rights as such

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[414] Hare, I. 'Social rights as fundamental human rights' in Hepple, B. (ed.). *Social and labour rights in a global context: International and comparative perspectives*. Cambridge, 2007, p. 180.

[415] Birmontienė, T. 'Ekonomikos krizės įtaka konstitucinei socialinių teisių doktrinai' [The influence of economic crisis on the constitutional doctrine of social rights] (referred to in the Preface).

[416] *Ibid.*, pp. 158–159.

[417] *Ibid.*, p. 2.

[418] For more, see Hepple, B. (ed.). *Op. cit.*

mean movement and evolution with the merger and mutual integration of different social groups at the core of the modern pluralistic society.[419]

The 1961 European Social Charter and the 1996 European Social Charter (revised) are the international agreements that lay down the most extensive catalogue of social rights. The rights declared in the Charter may be divided into the following major groups: (i) the rights attributed to hired employees; (ii) the rights attributed to each individual; (iii) the rights attributed to separate population groups.

The Constitution also enshrines the fundamental economic and social human rights: (i) each human being may freely choose a job or business, and has the right to have proper, safe and healthy conditions at work, to receive a fair pay for work and social security in the event of unemployment (Article 48); (ii) each working human being has the right to rest and leisure as well as to an annual paid leave (Article 49); (iii) trade unions may be freely established and function independently. They must defend the professional, economic and social rights and interests of employees (Article 50); (iv) while defending their economic and social interests, employees have the right to strike (Article 51); (v) the state guarantees to its 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 (Article 52); (vi) the state takes care of people's health and guarantees medical aid and services to the human being in the event of sickness (Article 53).

1.2. The scope of the research

As it has already been mentioned, a uniform catalogue of social rights is in practice impossible. On the other hand, the key objective of this research is to unfold and assess the legal consequences that the economic crisis and the measures used to contain it had for the social rights of individuals. In the light of this, the analysis here will focus on, *i.e.* will choose as its research object only those social rights that were directly affected by the austerity measures, labour market liberalisation and similar practices applied by the state. The choice of this research object has also been considerably determined by the so-called doctrine of crisis measures, developed by the Constitutional Court. Accordingly, the research object will cover the following social rights: (i) the right to decent work, insofar as it covers the right to work, the right to a fair pay enabling the appropriate living standard, the right to suitable working

[419] Lyon-caen, A. 'The legal efficacy and significance of fundamental social rights: Lessons from the European experience' in Hepple, B. (ed.). *Op. cit.*

conditions allowing safe and healthy work, as well as proper and quality leisure; (ii) the right to form associations and take collective action at work, including the freedom to join or form trade unions and employer organisations, social cooperation between social partners and the state, collective bargaining and collective agreements, and, certainly, the right to strike; (iii) the right to work is analysed separately to the extent it is exercised in the civil service sector because the austerity measures in this sector placed this right in a precarious and extreme situation; (iv) the right to social security, including social insurance measures and social assistance for persons.

1.3. The level of scientific analysis of the problem and the sources of reference

Social rights, their content and scope, as well as mechanisms for their implementation, have been addressed as an object of extensive research conducted abroad and at the international level. This issue has been studied from the perspectives of constitutional and international law, as well as labour and social law, by a large number of authors. In the present study, an effort has been made to embrace as many scientific works in the field as possible within the limits of the scope and object undertaken in this research. Mention should be made of the following foreign researchers whose insights into social rights have been referred to: J. King, B. Hepple, M. Weiss, C. Barnard, I. Hare and A. Lyon-Caen.[420] The Lithuanian representatives of the legal doctrine (primarily, scholars of constitutional law) have also extensively researched the general as well as specific issues of social rights: E. Baltutytė, T. Birmontienė, E. Spruogis,[421] J. Žilys, E. Šileikis, V. Tiažkijus and others.

Social rights and social guarantees, as well as measures for their implementation, have similarly received attention from the scholars of economics and social science. This topic is indeed interdisciplinary and requires an integrated research. Therefore, the present study has also been underpinned

[420] King, J. *Judging social rights*. Cambridge, 2012; Hepple, B. (ed.). *Op. cit.* Here, only some fundamental works of these authors have been referred to; references to other works of the relevant authors are provided in the relevant subchapters.

[421] Baltutytė, E. 'Socialinės ekonominės teisės ir konstitucija: kai kurie lyginamieji aspektai' [Social economic rights and the Constitution: Some comparative aspects]; Id. 'Europos socialinė chartija ir socialinės teisės Konstitucijoje [The European Social Charter and social rights in the Constitution] (both referred to above); Birmontienė, T. 'Social rights in the jurisprudence of the Constitutional Court of Lithuania' in *Jurisprudencija*, 2008, no. 9(111); Id. 'Šiuolaikinės žmogaus teisių konstitucinės doktrinos tendencijos' [Tendencies of the modern constitutional doctrine of human rights] in *Konstitucinė jurisprudencija*, 2007, no. 1; Spruogis, E. 'Socialinės asmens teisės ir jų konstitucionalizacija Lietuvoje' [Social human rights and their constitutionalization in Lithuania] in *Jurisprudencija*, 2004, vol. 59(51).

by the insights of A. Guogis, B. Gruževskis, R. Lazutka, T. Medaiskis[422] and other scholars.

The issues of the crisis and its impact on social rights have extensively been analysed both at national and international levels in the fields of law, economics and social science. In addition to the doctrinal sources, the legal instruments adopted by international organisations, other documents and positions, the legal acts of Lithuania, the case-law of the Constitutional Court and other case-laws have been widely used in the research.

For the purposes of illustration of the situation at issue, statistical data and public opinion surveys have been used.

2. The pre-crisis system of social rights

2.1. Labour relations

The rapidly changing economic and social as well as political situation highlighted the deficiencies existing in labour law and once again necessitated the renewal of labour law. Labour law is perhaps the only branch of law that underwent two stages of reforms following the restoration of independence of Lithuania: the first – right after independence was restored (1990–1993) and the second – in 1994–2003, when the new Labour Code (LC) was being drafted and enacted.

The reform of the legal regulation of labour relations in Lithuania had to embark on a difficult task – not only to create and implement new legislative norms and institutions of law but also to assess social and economic developments in the country and regulate legal labour relations in the light of the spirit of the Constitution of the independent state and the goals and objectives of the market economy. These objectives were set for the LC, which was adopted in 2002[423] and opened, as it was claimed, a new stage in the

[422] Guogis, A. 'Kai kurie socialinio solidarumo praradimo aspektai Vakaruose ir Lietuvoje' [Regarding some anti-solidaristic aspects in the West and Lithuania] in *Socialinis darbas*, 2006, no. 1; Gruževskis, B. 'Darbo rinkos pokyčių įtaka darbo teisei' [Impact of labour market developments on labour law] in Usonis, J. (ed.). *Lietuvos darbo teisės raida ir perspektyvos: Liber amicorum et collegarum profesorei Genovaitei Dambrauskienei* [Development and prospects of the Lithuanian labour law: Liber amicorum et collegarum Professor Genovaitė Dambrauskienė]. Vilnius, 2010; Gruževskis, B. and Zabarauskaitė, R. Social consequences of economic downturn (2008) in Lithuania. *Ekonomika*, 2010, vol. 89; Lazutka, R. and Skučienė, D. 'Socialinės garantijos Lietuvos mokslininkams' [Social guarantees for academics in Lithuania] in *Filosofija. Sociologija*, 2009, vol. 20, no. 2; Medaiskis, T. 'Lietuvos socialinės apsaugos sistemos elementų formavimo vingiai' [Meanders of creation of Lithuanian social protection system] in *Aktualūs socialinės politikos klausimai*, 2011, no. 9, pp. 199–228.

[423] *Official gazette*, 2002, no. 64–2569.

regulation of legal labour relations.[424] Labour law is a dynamic branch of law; it may not be set in stone and should timely respond to the developments taking place in society.[425] Right at the outset of the economic downturn, there were loud statements that Lithuanian labour law and the legal regulations of labour relations were stringent and inflexible,[426] which entailed an impediment to an effective and timely reaction to economic and social challenges.

2.2. Social partnership

After regaining its independence, Lithuania had to stand up to challenges in creating and developing its social partnership system. The most important result achieved during the first phase of the labour law reform was the withdrawal of the meticulous legal regulation of labour relations and a shift to the contractual regulation of these relations. Efforts were made to give a special role to collective agreements, *i.e.* the collective nature of labour relations as well as the existence of associated principles was recognised.

Lithuania had a very well developed tripartite social partnership both at national and territorial levels. Social partnership at branch/sector level, however, was, in principal, devoid of dialogue; there were few agreements, mostly declarative by nature.[427] Collective bargaining at enterprise level was similarly very limited. The prevalence of collective agreements in Lithuanian enterprises was lower than 10 per cent, making it the lowest indicator in the whole EU.[428] It is obvious that the changing economic, social and political life of the state necessitated a step forward in the area of social partnership and called for more emphasis being placed on bilateral social partnership to regulate specific issues related to labour relations, as well as work and social conditions, in the specific areas – economic sectors, regions and, finally, in individual enterprises.

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[424] Tiažkijus, V. 'Darbo teisė: teorija ir praktika' [Labour law: Theory and practice], vol. I, Vilnius, 2005, p. 36.

[425] Nekrošius, I. 'Darbo teisė: dabartis ir perspektyvos' [Labour law: Present and perspectives] in *Darbo ir socialinės apsaugos teisė XXI amžiuje: iššūkiai ir perspektyvos* [Labour and social security law in the 21st century: Challenges and perspectives]. Vilnius, 2007.

[426] Davulis, T. 'The fifth anniversary of the new Lithuanian Labour Code: Time to change?' in Blanpain, R. (ed.). *The modernization of labour law and industrial relations in a comparative perspective*. Alphen aan den Rijn, 2009.

[427] Petrylaitė, D. 'Socialinės partnerystės institutas: Europos Sąjungos teisiniai standartai ir jų nacionalinis įgyvendinimas' [Institution of social partnership: legal standards of the European Union and their national implementation] in Švedas, G. (ed.). *Op. cit.*

[428] Industrial relations in Europe 2012. Report of the European Commission. Online access: http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7498 [15 January 2015].

2.3. Civil service

The system of civil service (or public service) in Lithuania has been under development for many years and has already undergone several reforms. The general principles for the arrangement and functioning of civil service were laid down with the adoption of the Constitution. The initial point of the creation of the Lithuanian civil service system is considered to be the adoption of the Law on Public Servants in 1995.[429] This law was a gateway to a further stage of forming civil service; thus, only a couple of years later, the necessity for a new law was broached and the relevant steps were made.[430] With the view of creating a democratic, stable and effective Lithuanian civil service, the Law on Civil Service was enacted in 1999.[431] The new law was applicable to civil servants of state and municipal institutions and establishments, employees who provided public services in the area of education and research, culture and social work, as well as employees performing economic and technical functions in budgetary institutions. Such a choice of the civil service model was cardinally different from that provided for in the Law on Public Servants – it changed from civil service in its narrow interpretation to civil service in its broadest sense, embracing all persons on the payroll of state or municipal budgets. This model was unusual in Lithuania and was widely criticised. As a result, it was amended (set out in its new wording) earlier than it came into force. The Law on Civil Service in its new wording was adopted in 2002.[432] The latter law returned again to the narrow system of civil service – persons providing public and technical services were eliminated from the scope of civil service and referred back to the area of the regulation of labour law. This stage finalised the process of the creation of Lithuanian civil service. On the other hand, the process has never ceased: each year over a dozen of more substantive or minor corrections are made.

2.4. Social security guarantees

2.4.1. Social insurance pensions and cumulative pensions

In Lithuania, social insurance forms the bulk of the social security system. The exclusive and priority approach to social security can be witnessed as

[429] *Official gazette*, 1995, no. 33–759.

[430] See Government resolution no. 875 'On the formation of the commission for the drafting of the Law on Civil Service and other related legal acts' of 1 August 1997. *Official gazette*, 1997, no. 74–1912.

[431] *Official gazette*, 1999, no. 66–2130.

[432] *Official gazette*, 2002, no. 45–1708.

early as in the 1991 Law on the Principles of State Social Security System.[433] State social insurance of pensions constitutes the largest part of the social security system both in terms of the coverage of insured persons and the number of benefit recipients.

The system of state social insurance of old-age pensions is essential in ensuring security in the event of old-age risk. State social insurance of pensions is underpinned by the principle of the solidarity of generations and is financed under the so-called pay-as-you-go principle. One of the major challenges to the Lithuanian system of pensions before the crisis and now stems from demographic changes. Lithuanian society, like elsewhere in Europe, is ageing – people are living longer, while birth rates are declining. The forecasts for Lithuanian population show the fastest decrease in Europe in the number of residents due to a very low birth rate and high emigration.[434] For the purposes of tackling this problem, it was decided to implement the reform of pensions in Lithuania – to gradually roll out cumulative pensions (second pillar) to make them available along with the pay-as-you-go social insurance system of pensions.

The system of cumulative pensions in Lithuania is based on the principle of voluntary participation – all persons who pay contributions for social insurance pensions and have not yet reached a pensionable age may decide to transfer part of their contributions to pension funds and, in this way, accumulate their cumulative pension. According to the Law on the Accumulation of Pensions,[435] participation in the system starts after the signing of a pension accumulation agreement with the chosen pension accumulation company. Thus, Lithuania has opted for an entirely voluntary participation in the second pillar, where even young employees who enter the labour market are not obliged to participate in the accumulation of pensions.

It was envisaged that the share of contributions that could be accumulated in the chosen pension fund would increase gradually: from 2.5 per cent in 2004 to 5.5 per cent in 2007. It should be noted that the general rate of social security contributions for a person who takes part in the accumulation of pensions has not changed. According to the rate laid down in the Law on the Reform of the Pension System, the amount of a pension contribution in 2004 was 2.5 per cent, in 2005 – 3.5 per cent, in 2006 – 4.5 per cent, in 2007 and 2008 – 5.5 per cent.

The accumulation of pensions was highly popular among employed persons. According to the data of the State Social Insurance Fund Board, there were 1.133.3 thousand participants in the system in the 3rd quarter of 2014,[436] which amounted to almost 84 per cent of all employed population of

[433] *Official gazette*, 1990, no. 32–761.

[434] Demographic yearbook 2013. Statistics Lithuania, 2014. Online access: http://osp.stat.gov.lt/services-portlet/pub-edition-file?id=2992 [15 January 2015].

[435] *Official gazette*, 2003, no. 75–3472.

[436] State Social Insurance Fund Board. Online access: http://atvira.sodra.lt/lt-eur/index.html [15 January 2015].

the state.[437] Admittedly, such active participation of population in the pension accumulation system did not mean in itself the excellence of the system, nor its future success. It was already in 2009 that the pension accumulation system encountered unavoidable challenges of the economic downturn. Due to the shortage of funds in the Social Insurance Fund, in order to balance the fund, the decision was taken to decrease the maximum amount, reached in 2007, in the pension contribution to the second pillar pension funds.

One more solution opted for in order to deal with the sensitivity of the Lithuanian system of social insurance pensions to demographic issues was the raising of the pensionable age. An option for enhancing the sustainability of pension systems is an automatic adjustment by raising the pensionable age proportionately to the increase in life expectancy.[438] According to the Law on State Social Insurance Pensions,[439] until 1 January 1995, the age for receiving an old-age pension in Lithuania was 55 years for women and 60 years for men. From 1995 until 2001, the age for receiving an old-age pension was increased gradually each year until it reached 62 years and 6 months for men in 2003 and 60 years for women in 2006. It should be noted that no instrument for the automatic revision (increase) of the pensionable age has been established in Lithuania so far. Presumably, decisions concerning the pensionable age have been influenced more by political decisions rather than developments in official statistical data.

Another problem that the Lithuanian scheme of social insurance of pensions has been faced with is related to relatively low pension amounts and the fact that these amounts are adjusted as a result of political decisions rather than periodic indexing based on statistical criteria. The necessity to establish clear rules for the indexation of pensions has been emphasised on a number of occasions.[440] Yet, to date, the issue of the increase of pensions has been treated as a political decision, which has not always proved to be rational and based on prospects. Such a situation emerged in Lithuania when, on account of the improved economic indicators of 2006–2007, the long-term commitments were undertaken to pay larger pensions (as well as certain other social benefits) for many years in the future. Questionable decisions taken on the eve of the crisis concerning the increase of pensions and other benefits generated the respective expectations, which the state was unable to fulfil in the subsequent years. It was a logical outcome as the gap between the

[437] Development of Lithuanian economy. Population and social statistics. Statistics Lithuania, 2015. Online access: http://osp.stat.gov.lt/documents/10180/601214/Socialine_statistika_2014.pdf [15 January 2015].

[438] 'EU legislation, coverage and related initiatives'. SEC(2010) 830 final. Commission staff working document (accompanying document to the Green Paper towards adequate, sustainable and safe European pension systems COM(2010) 365 final), 7 July 2010.

[439] *Official gazette*, 1994, no. 59–1153.

[440] See, *e.g.*, Council recommendation of 29 July 2014 on the 2014 National Reform Programme of Lithuania and delivering a Council opinion on the 2014 Convergence Programme of Lithuania, 2014 (2014/C 247/13). OJ 2014 C 247.

commitments of the social insurance system and the existing capacities in 2009 was the highest throughout the whole period of independence.[441] Such a situation compelled the legislator to revise the amounts of pensions and other benefits and take measures that subsequently were assessed as to have been in potential conflict with individual social rights.

2.4.2. State pensions

One of the questions most often asked in Lithuania is whether the state pensions existing in the Lithuanian social security system are a justified rather than privileged treatment of specific groups of persons. Special state pensions may be justified by three objectives in Lithuania: (i) *pensions of professional groups* are designated to reward for a specific service or work of exceptional significance and value; this objective justifies those professional pensions that are based on professional considerations, *i.e.* pensions for officers and soldiers, judges and scientists; (ii) *meritorious pensions* are aimed at rewarding for specific merits to the State of Lithuania (first and second degree state pensions of the Republic of Lithuania); and (iii) *pensions as a compensation* have the purpose of compensating the victims specified in the law.

2.4.3. Social insurance allowances

Apart from pensions as long-term payments, the Lithuanian social insurance system also covers short-term (or medium duration) payments – allowances. The system of these benefits consists of: (i) sickness and maternity social insurance; (ii) unemployment social insurance; (iii) social insurance against accidents at work and occupational diseases.

During the analysed period, the majority of changes were made and most discussions centred in relation to allowances provided for in the Law on Sickness and Maternity Social Insurance.[442] The conditions of the payment of these allowances to employees involve many aspects difficult to reconcile for the legislator. For example, increases in payment duration and amounts of benefits are often viewed as a measure to boost the birth rate. However, there is no reliable data proving that it is specifically the duration and amount of allowances that influence personal determination to have children; there is hardly any direct relation between these two facts.

[441] Gruževskis, B. and Bartkus, A. *Op. cit.*

[442] *Official gazette*, 2000, no. 111–3574.

2.4.4. Social assistance benefits

Social assistance is part of the social security system ensuring that each person (family) who does not have sufficient funds for subsistence and cannot obtain such funds on their own or from other sources receives the necessary support, as well as that, in the cases provided for by law, support is available to persons (families) who suffer additional expenses due to family circumstances. For this purpose, families and children are paid social benefits and are provided with social guarantees as well as reliefs. The social assistance system in Lithuania may be characterised as consisting of two principal parts: (i) benefits paid irrespective of a person's (family's) property and income, with the larger share consisting of benefits to children; (ii) support provided for low-income persons (families), as, for example, social benefits and compensations.

Both constituents of social assistance have undergone considerable changes compared to their original provisions. One of the most significant decisions was to introduce an incremental increase in benefits to children under the Law on Benefits to Children[443] and expand the circle of their recipients. Until 2009, under the Law on Benefits to Children, depending on the number of children in the family, benefits were paid to each child at least until he or she reaches 18 years of age.

In order to ensure social assistance for persons in financial deprivation and create a uniform system of financial social assistance available upon the assessment of income and property, a new Law on Cash Social Assistance for Low-Income Families (Single Residents)[444] was drafted and came into force on 1 January 2004. A new wording of this law with a revised title – the Law on Cash Social Assistance for Poor Residents[445] – became effective on 1 December 2006. This law introduced a unified system of financial social assistance which was provided upon the assessment of income and property and ensured the minimum amount of money necessary for food and basic utilities for residents in financial deprivation.[446] Under the new law, cash social assistance was provided for all families (single persons) on low income due to objective reasons, including persons in long-term unemployment (registered at the labour exchange at least for 6 months). It was suggested to provide assistance taking into consideration not only the income of the family but also its property. Consequently, support became available to those most in need, while former abuse was prevented. At the same time, the rights of municipalities in providing support were expanded in order to decrease social exclusion among the recipients of financial social assistance.

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[443] *Official gazette*, 2004, no. 88–3208.

[444] *Official gazette*, 2003, no. 73–3352.

[445] *Official gazette*, 2006, no. 130–4889.

[446] Social report 2004. Ministry of Social Security and Labour. 2005. Online access: http://www.socmin.lt/public/uploads/5934_socialreport2004.pdf [15 January 2015].

3. Labour relations

3.1. National law

The first references to the economic downturn in Lithuania appear in the legal acts of late 2008 – in the Programme of the newly formed 15th Government.[447] It was noted in this legal act that

> 'the 15th Government is fully aware that the key task for the nearest period is to contain the economic downturn and its impact. Failure to meet the goals set out in the Crisis Management Plan will render the implementation of the remaining Government programme virtually impossible'.

This Programme also expressed the position that in the event of failure to implement the Crisis Management Plan and the possible additional measures adopted in conjunction with it in the course of the worsening economic and financial situation of the country, Lithuania would be heavily struck by a deep financial crisis, in particular affecting low-income persons, pensioners and the unemployed. Therefore, the newly formed Government undertook the commitment to take all effort to prevent such an outcome. It, admittedly, had high ambitions and aspirations to overcome the economic downturn. In the area of labour relations, the Government promised to make unfaltering steps in reforming the labour market and related institutions to ensure successful economic development and growth for the welfare of all population of the state. However, it opted for a rather primitive way to modernise the labour market and make labour relations more effective.[448]

3.2. International standards

An authority beyond questioning in developing international labour law standards and refining their catalogue is a UN specialised body – the International Labour Organisation (ILO). The ILO has been consistently, for a couple of decades developing international standards, setting minimum basic labour law standards in conventions and recommendations. More importantly, this organisation has promptly responded to a changing public, economic and even political life context. In 1998, the ILO adopted the Declaration on Fundamental Principles and Rights at Work[449] with its principal purpose to help reconcile the aspiration to promote national efforts to achieve social progress

[447] Seimas resolution no. XI-52 (referred to in the Preface).

[448] For more, see subchapter 3.3.

[449] Online access: http://www.ilo.org/declaration/lang--en/index.htm [14 January 2015].

and the need to take into consideration diverse circumstances, opportunities and priorities existing in different states. By issuing the Declaration, the ILO has assumed the task entrusted by the international community – it has laid down *the overall social minimum,* which reflects the reality of globalisation and allows moving forward with optimism into the new millennium.[450] The Declaration has reasserted the universally accepted fundamental principles of labour relations: (i) the freedom of association and the right to collective bargaining; (ii) the elimination of all forms of forced or compulsory labour; (iii) the abolition of child labour; (iv) the elimination of discrimination in respect of employment and occupation.

Paradoxically enough, the ILO Declaration on Social Justice for a Fair Globalization (2008)[451] was adopted by the ILO on the eve of the economic downturn, emphasising that the strategy for decent wok is global, facilitating the pursuit of social justice, which embraces such aspirations as full employment and the fight against poverty and inequality. The principles of decent work have been laid down in the Decent Work Agenda.[452] Decent work stands for the following four objectives: (i) promoting efficient employment; (ii) promoting compliance with the principal labour standards; (iii) developing social dialogue and engagement; and (iv) providing social protection.[453] The principle of decent work as such is built on the following six principal elements: (i) opportunity for work; (ii) productive work; (iii) freedom of choice of employment; (iv) equity in work; (v) security at work; and (vi) dignity at work.[454]

Regional legal standards are no less important. The highest relevance in this case is attached to the legal standards developed and ensured by the international organisations functioning at European level, as, for example, the ECHR, which was adopted by the CoE in 1950. The 1961 European Social Charter and the 1996 European Social Charter (revised) are also among significant and highly important documents of the CoE in the area of social

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[450] 'Decent work.' Report of the Director-General of the ILO. ILO international labour conference, 87th session. Geneva, 1999. Online access: http://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm [14 January 2015].

[451] Online access: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/genericdocument/wcms_371208.pdf [14 Jaunary 2015].

[452] See 'Decent work'. Report of the director-general of the ILO (cited above). Also see 'Decent work'. International Labour Organization. Online access: http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--en/index.htm; 'The Decent Work Agenda – Looking back, looking forward: A growing consensus'. International Labour Organization. Online access: http://www.ilo.org/global/publications/magazines-and-journals/world-of-work-magazine/articles/WCMS_101697/lang--en/index.htm [14 January 2015].

[453] Langan, M. 'Decent work and indecent trade agendas: The European Union and ACP countries' in *Contemporary politics*, 2014, vol. 20, no. 1, p. 25.

[454] Chernyshev, I. 'Decent work statistical indicators: strikes and lockouts statistics in the international context'. Online access: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/publication/wcms_087921.pdf [14 January 2015].

rights. In terms of social rights, the EU has recently been acquiring more and more powers.

All the aforementioned international and regional organisations apparently have their own, at times, different goals in terms of social and, in particular, labour rights. It would be apparent from an analysis of the social (labour) rights consolidated in both recommendatory and mandatory international documents that these rights are, in principle, equivalent in their substance. More than that, it is recognised that, irrespective of minimum differences, all international labour law standards are structured around the standards developed by the ILO, which operate like a certain central axis.[455] There are, probably, differences in their wordings or binding character; nevertheless, they may be summarised and grouped into the essential international standards underlying present-day labour relations in the following way: (i) the right to work; (ii) the right to a fair remuneration providing preconditions for creating an appropriate living standard; (iii) the right to proper working conditions allowing safe and healthy work as well as proper and quality leisure; (iv) the right to form associations and take collective action at work. Otherwise stated, these principal labour rights (principles) build the fundamental approach – the standard of decent work, which should not only be aspired for in the present-day modern society, but should also form the basis for the legal regulation of labour relations, or be the point of reference for all other values, guarantees, rights and, at the same time, the obligations of participants in labour relations.

3.3. Labour law measures to overcome the outcomes of the crisis

As mentioned before, it was noted in the Programme of the 15th Government that this 'Government is fully aware that the key task for the nearest period is to contain the economic downturn and its impact'. In the area of labour relations, the Government promised to make unfaltering steps in reforming the labour market and related institutions to ensure successful economic development and growth for the overall welfare of all population of the state. The course of the examined developments makes it clear that, although the intentions were good and there were attempts to make them work, eventually, the Government opted for a rather primitive solution to revise the legal regulation of the labour market and labour relations – it resorted to almost spontaneous solutions and measures, which eventually set participants in labour relations at variance

[455] Casale, G. 'International labour standards and EU labour law' in Countouris, N. and Freedland, I. M. (eds.). *Resocialising Europe in a time of crisis*. New York, 2013, p. 88.

and placed residents and even business representatives in opposition to any decisions of the authorities.[456]

By its first attempt in 2009, the Government aimed at improving the business environment and proposed that employers should: (i) decrease the costs of the termination of employment contracts; (ii) allow for unilateral changes of the terms and conditions of work; (iii) expand the possibilities for concluding fixed-term employment contracts; and (iv) liberalise the regulation of overtime work.[457] It was emphasised that such measures were only temporary and would stay in effect for a couple of years until the economic situation stabilised. These proposals were reasoned; however, eventually they were set aside by the Seimas and the 'air bag' was created, *i.e.* it was allowed to negotiate on the terms and conditions more favourable to employers in collective agreements.[458] Such a decision was extremely naive, in view of the fact that, even before the crisis, collective agreements covered not more than 10 per cent of enterprises in Lithuania. Thus, it is apparent that such amendments of the LC were more theoretical rather than capable of having any real impact on the flexibility of labour relations in practice.

The second attempt to liberalise labour relations was made in 2010. The Government proposed negotiating a package of 'compensatory' conditions: strengthening the position of employee representatives in companies (including their participation in corporate management bodies and the declaration of strikes), improvement of the institution of labour disputes, compliance with labour laws, and control. Employers did not, in fact, bring forward any new proposals as their position was well represented by the Government. Trade unions agreed to negotiate and put forward their suggestions. The active use of negotiations made it possible to reach a compromise – obtain approval of a new reforming law, *i.e.* the law amending and supplementing the LC of 22 June 2010.[459] Since the law was an outcome of social compromise, it was clearly seen that some of its provisions were more favourable to employers, while some others – to employees, *i.e.* those that mitigated or compensated their losses. The new provisions that may be assessed as to have liberalised labour relations were those that: (i) removed restrictions on the introduction of summary recording of working time in companies; (ii) once again liberalised overtime working allowing individual arrangements with an employee; and (iii) repeated the attempt to liberalise fixed-term contracts, which was only partly successful. In terms of the so-called 'package of compensations', the new provisions of the LC were those that: (i) facilitated the procedure for declaring strikes; and (ii) established

456 Petrylaitė, D. 'Orus darbas ekonominės krizės sąlygomis: grėsmės ir išmoktos pamokos' [Decent work in times of economic crisis: Threats and lessons learned] (referred to in the Preface).

457 Draft amendments to the LC. Online access: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=340191 [14 January 2015].

458 Amendments to the LC. *Official gazette*, 2009, no. 93–3993.

459 Amendments to the LC. *Official gazette*, 2010, no. 81–4221.

the institution of the termination of an employment contract in cases where employers fail to fulfil their obligations to the employees.

Eventually, towards the end of its term of office, the Government made an effort *for the third time* to accomplish the goals laid down in the Programme of 2008 and, in the spring of 2012, introduced a cardinal draft law liberalising labour relations.[460] The draft law aimed at increasing the flexibility of labour relations, promoting the creation of new jobs, the reduction of unemployment, the employment of youth, the reduction of administrative burden and the modernisation of the labour market, and, at the same time, at aligning the regulation of labour relations with the security of employees. When this draft law was considered at the Seimas, there was much resistance from trade unions and the public.

Thus, the efforts were made to reform the legal regulation of labour relations at least three times during the four years of the crisis and, indeed, to move them to a more liberal form; however, ultimately, it all ended in editorial and superficial changes of the legislative norms.

Consequently, in Lithuania, differently from some other EU Member States,[461] no such cardinal legislative measures were taken to reform the labour market and labour relations that could lead to the violations of employee rights. Therefore, the amendments to the LC, submitted by the Government and adopted by the Seimas, did not raise any doubts regarding their lawfulness and compliance with the employee rights as guaranteed in the Constitution and required under applicable international standards. On the other hand, such hesitation on the part of the law-making authorities may be held to be if not a specific and direct, then apparently an informal precondition for undermining, or even violating, labour rights in practice.

3.4. The attitude of society to the anti-crisis legal measures taken to regulate labour relations

The conducted public survey of employee views on the measures taken in the context of labour rights and guarantees and on the problems they encountered during the economic downturn has revealed an obvious mass disappointment, negation, pessimism and even uncertainty, disbelief and

[460] Draft amendments to the LC. Online access: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=427144 [14 January 2015].

[461] Cf.: Humblet, P. 'Neuerungen im belgischen Arbeitsrecht in den Jahren 2006 bis 2009' in *Europäische Zeitschrift für Arbeitsrecht*, 2010, Heft 2; Leccese, V. and Scanni, I. 'Änderungen im Arbeitsrecht Italiens in den Jahren 2009-2011' in *Europäische Zeitschrift für Arbeitsrecht*, 2012, Heft 4; Navarro Nieto, F. 'Spanisches Arbeitsrecht in den Jahren 2010 bis 2012: Eine Zeit bedeutsamer Änderungen' in *Europäische Zeitschrift für Arbeitsrecht*, 2012, Heft 4; Pisarczyk, L. 'Neuerungen im polnischen Arbeitsrecht' in *Europäische Zeitschrift für Arbeitsrecht*, 2010, Heft 2; Świątkowski, A. and Wujczyk, M. 'Labour law in Poland and the economic crisis – seeking legal solutions in the time of austerity' in *Verslo ir teisės aktualijos*, 2013, no. 8.

distrust in public authorities, employers and even trade unions. When asked whether their economic rights had been violated as a result of the economic downturn, 53 per cent of the respondents reported violations. When asked to detail what specific rights had been violated during the economic downturn, even 85 per cent of the respondents noted economic and social rights (the violations of personal rights were noted by 19 per cent, the breaches of cultural rights – by 8 per cent, and the violations of political/civil rights – by 8 per cent of the respondents). In reply to the question whether they had suffered any negative outcomes at work after the economic crisis broke out in 2008, as many as 66 per cent of the respondents replied positively. These data supported the above-noted statements that no cardinal measures were taken in the area of the legal regulation of labour relations, as well as that no new innovative modern methods were sought to help business survive in the unfavourable economic conditions and to prevent not only the tangible losses of employees but also threats to their legitimate expectations and the right to decent work. Thus, Lithuania may, at least partly, be considered 'unique' among other EU Member States – although it had the labour market with almost the highest level of social security, it did not take any radical legal measures to help the labour market overcome the difficulties when it encountered major consequences of the economic downturn.

3.5. Post-crisis decisions

With a view to modernising the legal regulation of labour markets, in 2013 the Government initiated the project 'Creation of the Lithuanian social model to increase employment, improve the regulation of labour relations and social insurance sustainability'.[462] The project aimed at improving the legal acts regulating labour law, employment and social security, creating the overall economically justified and balanced system of these relations to allow the increase of employment, the improvement of labour relations and the promotion of investment. The objectives were set in the area of labour law to pave the way for a more flexible regulation of labour relations and ensure the security of employment. These objectives were sought to be achieved by: (i) a more flexible regulation of working and leisure time; (ii) adapting the provisions on dismissal from work to the market conditions, *i.e.* setting shorter time limits for notification about intended dismissal from work, rationalising severance pays and revising other benefits available upon dismissal from work; (iii) reducing the administrative burden on employers, *i.e.* eliminating the formalisation of certain actions, completion of documents,

[462] For more, see 'Darbo santykių ir valstybinio socialinio draudimo teisinis-administracinis modelis' [Legal-administrative model of labour relations and the state social insurance]. Online access: http://www.socmodelis.lt.

etc.; (iv) expanding the types of employment contracts to meet the needs of employees and employers with consideration of the work specifics applicable to separate employee categories; (v) revising the mechanism for setting remuneration, reforming minimum monthly salary, *etc.* One of the expected results of this project is a new draft of the LC.

Summary

The international community has enshrined the principle of decent work in its documents and has promoted it for a couple of decades already by adhering, namely, to better employment, social security, social dialogue and labour rights. This principle implies that employees and their family members should not only have decent and meaningful work, but also expect that after work their social and personal life will be meaningful and versatile. The economic crisis that gripped the European and global markets in 2008 right away revealed the threats to the social security and economic security of employees and persons who had lost work (as a result of the crisis, in fact). The international community reacted to the situation and encouraged the states to take anti-crisis measures, first of all, to follow the principle of decent work and avoid overstepping the minimum and fundamental labour and social rights at the heart of this principle.

In order to fight the outcomes of the economic downturn and, in some sense, to prevent more serious consequences in Lithuania, the Government embarked on a number of the liberalisation measures of labour relations in 2008–2012. The lost support of social partners (primarily, trade unions) and the predisposition of society against any measures made it impossible to achieve the set objectives, cardinally reform labour law and build the basis for new quality labour relations. In the absence of decisive and cardinal decisions by the state, the market undertook the so-called self-regulation, *i.e.* employers (business) did not refrain themselves from reducing employee rights and guarantees in substance and scope, quite often even balancing on the edge of apparent unlawfulness. There is, in principle, no evidence how much this helped businesses survive. The mood prevalent in society, as well as the opinion of employees and the unemployed, was obviously pessimistic. People were feeling left on their own in the face of the crisis, confronted with the inactive and arrogant policy of the Government, on the one hand, and the violations of labour law at work, on the other.

It may be presumed that the negative moral and economic atmosphere during the economic downturn, the measures applied by employers, as well as the position of the Government warranted claims about the cases of the violation of fundamental labour rights.

4. Social partnership

4.1. National law

The first steps in Lithuania towards social dialogue were made in 1991, when the Law on Collective Agreements was adopted. In the same year, the Law on Trade Unions[463] was enacted; it provided for the right to freely join trade unions and take part in their activities. The provisions of the latter law enshrined the equality of trade unions, the freedom and independence of their activities, the right to bargain and enter into contracts (agreements) with employers or their organisations. The Constitution, which came into force in 1992, secured the right to citizens to form and join associations freely and laid down the fundamental provisions for the activities of trade unions. A strong impetus towards consolidating the principles of social partnership was the ratification of the ILO Tripartite Consultation (International Labour Standards) Convention no. 144 in 1994.[464] A highly important step towards social dialogue was made in 1995. The Government, national organisations representing employers and organisations of trade unions operating at the national level signed the agreement on tripartite partnership on 5 May 1995. By this agreement, it was decided to set up the Tripartite Council, approve its regulations and to sign tripartite annual agreements on social, economic and labour issues each year.[465] This agreement, admittedly, was the first important step towards the institutionalisation of social partnership relations. On 13 June 2005, the representatives of the Government, trade unions and employers signed a new, considerably expanded, agreement (of political nature) on tripartite cooperation.[466] It laid down the priorities of tripartite cooperation as well as the measures to implement them and underscored the necessity to engage broader cross-sections of society into dialogue.

The signing of the aforementioned agreements was a progressive indication in the development of tripartite relations. They provided for the exchange of relevant information, consultations on the methods acceptable for the parties for dealing with labour and social issues, the drafting and coordination of legal acts by following the tripartite principle, the signing of annual tripartite agreements and abiding by them in their activities. It should be noted that Lithuania has had a very well developed tripartite social partnership both at national and territorial levels – the Tripartite Council and the tripartite

463 *Official gazette*, 1991, no. 34–933.

464 *Official gazette*, 1996, no. 30–739.

465 Socialinės apsaugos ir darbo ministerija ir Trišalė taryba [The Ministry of Social Security and Labour and the Tripartite Council]. *Žingsnis po žingsnio socialinio dialogo link* [Step by step towards social dialogue]. Vilnius, 2002, p. 41.

466 *Official gazette*, 2005, no. 75–2726.

councils of counties and municipalities have been formed and have been successfully functioning and a large number of tripartite agreements have been signed. Social partnership at branch/sector level, however, has, in principal, been devoid of any dialogue and few agreements, mostly of declarative nature, have been concluded. Unfortunately, at times, Lithuania still demonstrates the limited practical interpretation of the ideas and objectives of social partnership, as well as attempts to satisfy the short-term individual goals of specific social partner organisations. The public interest tends to be forgotten; the opportunities offered by the proper implementation of social partnership relations and their outcomes in the strengthening of society and industrial democracy are underutilised. It was also the case in the wake of the economic crisis when, during the so-called first phase of the fight against the crisis, the rhetoric of the Government was more than defiant. Otherwise stated, the path chosen was a monologue, setting aside the principles of social dialogue and collective bargaining. In later stages, however, the Government softened its rhetoric and shifted to the policy of dialogue and compromises. The Government resumed its practice of submitting questions to the Tripartite Council for consideration and negotiating with social partners before making decisions of social nature. An admittedly significant outcome of such a course of actions was a certain social compromise reached in late 2009, *i.e.* the signing of the National Agreement.[467]

In regulating labour relations, the LC gives an important role to collective agreements. It is noteworthy that, in accordance with the legislative provisions in force, to make it possible to engage in collective bargaining concerning collective agreements, employees must have proper representation, *i.e.* be joined together in trade unions or have a labour council to represent them. According to the data of Statistics Lithuania (*i.e.* Department of Statistics),[468] the number of members of trade unions remained almost stable during the first years of the crisis. However, it started falling markedly already during the so-called post-crisis period; in 2011, 108.9 thousand of employees, or 8.69 per cent, were members of trade unions. The years 2012 and 2013 saw even a higher decrease. Since then, this indicator has been extremely low in Lithuania and has not even reached 8.5 per cent, while the average in other EU Member States has been 23 per cent.[469]

An analysis of another indicator of collective agreements – the prevalence of collective agreements shows that such agreements are mostly prevalent at enterprise level; however, they cover less than 10 per cent of Lithuanian enterprises, and there were no higher-level (branch, territorial) collective agreements made before the crisis at all in Lithuania.

[467] Online access: http://www.lrv.lt/bylos/Naujienos/Aktualijos/20091028_susitarimas.pdf [14 January 2015].

[468] Statistics Lithuania. Online access: http://www.stat.gov.lt/ [15 January 2015].

[469] Trade unions. Online access: http://www.worker-participation.eu [15 January 2015].

Thus, it follows that Lithuania was exposed to the crisis challenges in the area of social dialogue and collective agreements while being unprepared, *i.e.* with low membership in trade unions, the inefficient activities of trade unions (in collective bargaining), underdeveloped and ineffective (tripartite) social cooperation, *etc.*

4.2. International standards: the freedom of association

The right of employees and employers to form and join organisations or other formations has the same underlying basis – the freedom of association, which is considered one of the key principles of collective labour law. It is a constitutional freedom, which is enshrined in many international instruments and, in fact, in constitutions of almot all foreign states.

The establishment and real implementation of the principle of the freedom of association, among other things, create preconditions for social partnership. It is only with an opportunity to form and join associations that employees and employers may function as equal social partners, be able to achieve a social compromise mutually and with the state and ensure the stability of mutual relations, avoiding social conflicts in this way.

The international community has been unanimous for a couple of decades regarding the necessity and significance of fundamental social cooperation, of the principle of the freedom of associations, which is fundamental for collective labour relations, and of the individual collective rights inherent in this principle. However, changing labour market conditions, impacted by such phenomena as market globalisation and, recently, also the economic downturn, have revealed that these labour rights are under threat and are vulnerable to breaches and narrowing, if not directly then through other political or economic decisions that also have a direct impact on collective cooperation and work conditions of participants in labour relations. As pointed out by different authors, the following violations of collective labour rights were noticed and reported most often during the crisis:[470] (i) the diminution of the role or complete elimination (withdrawal) of social dialogue and its institutions; (ii) the decentralisation of collective bargaining by moving from bargaining at national/branch level to that at enterprise level; (iii) the application of the *in peius* principle in collective agreements; (iv) the reduction of the status and role of trade unions *vis-à-vis* the role of other representatives of employees, *e.g.*, labour councils.

It appears doubtful at first sight that there is a direct relation between collective labour law and economic downturn; however, the freedom of

[470] Lörcher, K. 'Legal and judicial international avenues: The (revised) European Social Charter' in Bruun, N. *et al.* (eds.). *The economic and financial crisis and collective labour law in Europe.* Oxford, 2014, pp. 266–267.

association, collective bargaining, social dialogue and quality collective labour relations are the fundamental elements of the European social model and a key to the European economic and social welfare.[471]

4.3. Social dialogue during the crisis: legal regulation

Lithuania had a rather vigorous institutional tripartite dialogue before the crisis; its legislative rules provided for free and voluntary collective bargaining that allowed the parties to labour relations to negotiate on specific working conditions on their own. On the other hand, it should be noted that the institution of collective labour relations had not been developed and the majority of labour law regulations were enacted in the form of legal acts. This was likely to be one of the reasons why there were no violations of collective labour law (separate constituent rights) specifically – the institution of collective labour law was not used in practice actively. However, on the other hand, some decisions of political authorities may reveal specific problems and the potential violations of the freedom of association.

4.3.1. Decline in role of social dialogue and its institutions

In late 2008, the Programme of the newly formed 15th Government stipulated that, with a view to implementing key reforms in the areas of labour relations and labour market, the socio-economic dialogue, at all levels, between employees, employers and society would be enhanced. To this end, the Tripartite Council would be reformed by bringing in non-governmental organisations and transforming it into the Economic and Social Council, which would be able to draft a national agreement on the modernisation of the national economy. It was also envisaged to promote cooperation of social partners in the regions by engaging social partners into the implementation process of the regional labour market policy. It was underlined that the purpose of the Tripartite Council was to regulate business relations with employees and handle their mutual conflicts, while the Economic and Social Council would be a public consultative body, as in other EU countries. The Government, however, appeared to act contrary to its Programme: in 2009, it delegated state secretaries of the ministries or secretaries of the ministries to the Tripartite

[471] Countouris, N. and Freedland, M. 'Resocialising Europe – looking back and thinking forward' in Countouris, N. and Freedland (eds.). *Resocialising Europe in a time of crisis*. New York, 2013, p. 499.

Council instead of the earlier membership of vice-ministers,[472] and several years later it was decided to lower the level of government representation to specialists of the ministries.[473] It is obvious that the Government continued in this way its rhetoric that ignored the principles of social cooperation and did not at all fulfil the objectives set in its Programme.

4.3.2. The decentralisation of collective bargaining

Western states showed the indications of a considerable decentralisation of collective bargaining during the first years of the economic downturn when collective bargaining was moved from national/branch level to enterprise level. The situation in Lithuania, however, was slightly different. Whereas historically and traditionally only enterprise-level collective agreements predominated in Lithuania, the Government, seeking to promote higher-level collective bargaining, used European funds and created the financial and organisational conditions for social partners to bargain at branch/territorial level. Otherwise stated, the movement towards centralised collective bargaining was not so much driven by the public life changes but by a rather pragmatic situation when, making use of the European structural support, social partners and their organisations signed twenty agreements with the European Social Fund in 2012.[474] As a result of the above-referred 'European' project, twenty territorial and fourteen branch-level collective agreements were signed between 2013 and 2014.[475] The analysis of the content of these branch-level and territorial collective agreements shows that most of their provisions were rewritten from legal acts and that these agreements were declarative in substance.

4.3.3. The *in peius* principle in collective agreements

In the course of one of the reform (liberalisation) phases of labour relations in 2009, temporary amendments to the LC[476] were adopted allowing deviation from the imperative provisions of labour law in certain cases, when agreed

[472] *Official gazette*, 2009, no. 22–851.

[473] *Official gazette*, 2011, no. 89–4272.

[474] Measure VP1-1.1-SADM-02-K 'Promotion of social dialogue' of Priority 1 'Quality employment and social inclusion' of the Operational programme for the development of human resources 2007–2013, as the basis for the projects funded by the European Social Fund and by the State of Lithuania.

[475] Data provided by the Ministry of Social Security and Labour.

[476] Amendments to the LC. *Official gazette*, 2009, no. 93–3993.

specifically in collective agreements. Otherwise stated, the law as such obligated to determine employment conditions *in peius* in collective agreements, *i.e.* worsening the situation of employees compared to that stipulated in the LC in respect of all other employees, working in enterprises without a collective agreement. Hence, employees without collective agreements have been protected better compared to those working under collective agreements.[477]

4.4. The public attitude to social dialogue during the crisis

Not only individual labour relations were exposed to highly painful outcomes during the economic downturn. Otherwise stated, the principle of social cooperation failed during the crisis; distrust in trade unions increased even more. This may be illustrated by the results of the conducted public opinion survey. For example, the activities of trade unions were viewed positively only by 37 per cent of the respondents, while even 41 per cent of the respondents had no opinion on this issue.

Another important indicator of democracy at work is the situation in relation to strikes. According to the data of Statistics Lithuania,[478] there were fifty-six strikes in 2000, of which twenty-one were warning strikes; in 2001, there were thirty-four strikes in Lithuania in total, of which twenty-nine were warning strikes. Meanwhile, in 2002, 2003, 2004 and 2006, there were no strikes at all in Lithuania. Only one strike was registered in 2005, while 2007 witnessed one hundred and sixty-one strikes, all of which took place in educational institutions. In 2008, the strikes of teachers continued; during the first quarter, as many as one hundred and twelve strikes were registered in educational institutions alone. Afterwards, a couple of years without strikes followed (2009–2011). It should be noted that namely this period was the period of the economic downturn and the implementation of the above-described anti-crisis measures, which, as shown by these statistical data, was endured in silence by Lithuanian employees.[479] The situation changed in 2012, when there were as many as one hundred and ninety-three strikes.

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[477] Mačernytė-Panomariovienė, I. 'Teisės į darbą užtikrinimo padėtis Lietuvoje 2008–2012 m.' [Ensuring the right to work in Lithuania in 2008–2012] in Beliūnienė, E. (ed.). *Darbas, šeima ir socialinė apsauga: žmogaus teisių užtikrinimo 2008–2012 metais problemos* [Employment, family and social security: The problems of ensuring the human rights in 2008–2012]. Vilnius, 2013, p. 31.

[478] Statistics Lithuania. Online access: http://www.stat.gov.lt/ [14 January 2015].

[479] Lithuanians apparently took 'strike' action during the crisis in a highly peculiar form – simply by emigrating from Lithuania. See, *e.g.*, Lukaitytė, R. 'Profsąjunga: mes – ne graikai ir ispanai, pas mus žmonės verkia į pagalves' [Trade union: We are not Greek and Spanish, here people sob into their pillows]. *Delfi*, 10 September 2011.

4.5. Post-crisis decisions

During the crisis, the Government highly emphasised the importance of the National Agreement and came up with the idea to sign, until the election to the Seimas, a new National Agreement between social partners and political parties to define the principles of the partnership of national business organisations, political parties and trade unions, as well as the commitments of political parties on the key economic and social issues in the country. The long-lasting discussions and negotiations resulted in the signing, in October 2012, of the Social Partnership Agreement of Lithuanian political parties and business organisations for 2012–2016. A clear-cut opinion on such an agreement and its outcomes in the context of social partnership is hardly possible, as it is obvious that it is more a political agreement with little in common with social dialogue – employees were not represented in this agreement by their trade unions. It is strange, in particular, bearing in mind that the 16th Government emphasised in its Programme that it would seek to improve social dialogue between employers, the state and employees, strengthen the impact of trade unions in decision-making and promote the signing of branch-level collective agreements.[480] This aspiration was apparently positive considering the drastic disregard of the principles of social cooperation during the time of the economic downturn. On the other hand, the Programme of the present-day Government and the implementation measures of this Programme continue to show a high degree of vague rhetoric that, unfortunately, does not allow talking about or, at least, forecasting any reforms in labour and social relations, any structural and conceptual changes.

Summary

The existing legislative provisions that regulate the relations of social partnership do not look, at first sight, democratic and expressing the fundamental principles and values of modern social market economy; nevertheless, a more thorough and detailed analysis of both this legal reality and the practical situation of these issues makes it clear that good intentions and declarative statements, unfortunately, do not yet mean that the model of social democracy accepted in Western states has been implemented in Lithuania. The economic crisis exposed individual labour relations not only to extremely painful consequences, but also a noticeable threat to the so-called *democracy at work*, *i.e.* 'the voice of people' was hardly heard. Otherwise

[480] Seimas resolution no. XII-51 'On the Programme of the Government of the Republic of Lithuania' of 13 December 2012. *Official gazette*, 2012, no. 149-7630.

stated, the principle of social cooperation failed during the crisis; distrust in trade unions increased even more. These and similar negative phenomena account for the low role of social partnership in the fight against the effects of the economic downturn. In other words, rather than facilitating the solution of the existing situation, social cooperation and search for compromise made it even more complicated.

5. Civil service

5.1. National law

Civil service is one of the key elements of public administration. The prerequisites for the effective functioning of civil service include its independence and operational stability, as well as the ensuring of social and related guarantees to civil servants and state officials. For example, the Constitutional Court has held more than once that the work remuneration of civil servants is one of the main preconditions for implementing their other legitimate interests.[481] In terms of work remuneration, the Constitutional Court invokes not only the principle of legitimate expectations, but also that of the protection of ownership. The person who has completed a commissioned task obtains a constitutional right to demand that the whole remuneration (pay) for work, due to him or her under the respective legal acts, be paid in due time. This right of a person (also on the basis of Article 23 of the Constitution) is guaranteed, protected and defended as the right of ownership.

Thus, it is apparent that the right to a fair remuneration is one of the fundamental social rights that form the basis for a fully-fledged and effective civil service and create preconditions for civil servants to have decent work and properly perform their functions. Given the extensive case-law of the Constitutional Court, where the downturn situations had been insightfully discussed even before the official beginning of the economic crisis, the Government of Lithuania apparently had all the legal means necessary to respond to the challenges of the economic downturn adequately and legitimately and take such measures to revise public finances, including the remuneration of civil servants and other state officials, that had to prevent the violations of the right to an equitable (fair) work remuneration.

[481] Constitutional Court ruling of 18 December 2001. *Official gazette*, 2001, no. 107–3885.

5.2. International standards: the safeguards of the right to a fair remuneration

The international regulation of work remuneration is rather complex and varies depending on an international organisation and the principles of its activity. Most emphasis on work remuneration, that is to say, its minimum, appears to be placed by the ILO. Under the Minimum Wage Fixing Convention no. 131, each Member State undertakes to establish a system of minimum wages, which covers all groups of wage earners whose terms of employment are such that coverage would be appropriate. The international community has also placed a considerable emphasis on ensuring equal wage for the same or equivalent work. For example, following the provisions of the European Community (EC), each Member State should ensure the application of the principle of equal pay for men and women for equal work of equal value. It means that it should be prohibited to discriminate on the grounds of gender, that is to say, to differentiate the work remuneration of men and women because of their gender – men and women who carry out the same work or work of equal value have the right to receive equal pay.

In terms of other principles of work remuneration, it should be admitted that work remuneration in the EU is not regulated by imperative legislative rules more thoroughly. Only Article 5 of the Community Charter of the Fundamental Social Rights of Workers[482] stipulates that '*all employment shall be fairly remunerated*', *i.e.* employees are entitled to a wage sufficient to enable them to have a decent standard of living, as well as to severance pays upon the termination of their employment contracts; wages may be changed only in accordance with national law. Article 23 of the EU Charter of Fundamental Rights establishes equality between men and women and their right to equal pay.

The main document that discusses a fair remuneration for work most thoroughly is the European Social Charter (revised).[483] Article 4 of the Charter contains the declaration of *the right to a fair remuneration*, *i.e.* the states are obligated: (i) to recognise the right of workers to a remuneration such as will give them and their families a decent standard of living; (ii) to recognise the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases; (iii) to recognise the right of men and women workers to equal pay for work of equal value; (iv) to recognise the right of all workers to a reasonable period of notice for termination of employment; and (v) to permit deductions from wages only under conditions and to the extent prescribed by national laws or regulations or fixed by collective agreements.

[482] Online access: http://europa.eu/legislation_summaries/human_rights/fundamental_rights_within_european_union/c10107_en.htm [14 January 2015].

[483] *Official gazette*, 2001, no. 49–1704.

The proper implementation of the right to a fair remuneration is particularly important for the welfare of each employee.[484] Work remuneration irregularities happen even when business and economic conditions are stable. Under unfavourable economic conditions, as it could be observed, this principle was potentially breached not only by individual employers but also by the state in failing to consider adequately the principle of a fair remuneration for work, its international content and the case-law of the Constitutional Court.

5.3. The right of public sector employees to a fair remuneration

In 2008, when concerns about the economic crisis were growing worldwide, increase in work remuneration was still apparent in Lithuania for some time – the gross average work remuneration in the public sector was LTL 2,329.9 and was 23.2 per cent higher than in 2007. The Government, however, decreased the basic monthly salary (applicable to calculate the salaries of employees working under employment contracts in budgetary institutions) by 4.7 per cent from 1 September 2009[485] and reduced the fund of salaries of budgetary institutions and organisations by 8 per cent.[486] The Seimas, taking into account the national budget capacity, approved the basic amount of the positional salary (remuneration), applicable to calculate the positional salaries of state politicians, judges and civil servants, twice in 2009: (i) as of 1 January 2009, the basic amount of the positional salary (remuneration) was decreased from LTL 490 to LTL 475[487] and, thus, became lower by 3.1 per cent; (ii) as of 1 August 2009, the basic amount of the positional salary (remuneration) was decreased from LTL 475 to LTL 450.[488] With the adoption of this law, the positional salaries of state politicians, judges, state officials and civil servants were reduced by additional 5.3 per cent.

In 2009, the remuneration amounts provided for by the Law on Remuneration of State Politicians and State Officials were subject to cuts three times: (i) as of 1 February 2009, the coefficients of the positional salaries of the members of the Seimas, the Prime Minister and ministers were reduced

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484 Glebovė, N. *Karjeros valstybės tarnautojo garantijos* [Guarantees of the career civil servant]. Doctoral thesis. Vilnius, 2012, p. 74.

485 *Official gazette*, 2009, no. 100–4187.

486 *Official gazette*, 2010, no. 40–1899.

487 Law on the Basic Amount of the Positional Salaries (Remuneration) of State Politicians, Judges, State Officials and Civil Servants. *Official gazette*, 2008, no. 149–6011 (as applicable in 2009).

488 *Official gazette*, 2009, no. 91–3915.

by 15 per cent;[489] (ii) as of 1 May 2009, a 12 per cent cut was applied to the coefficients of the positional salaries of state politicians (except mayors and vice-mayors), prosecutors of the General Prosecutor's Office, state auditors and the Seimas ombudsmen; the coefficient cuts of the positional salaries of other state officials (the heads and members of national commissions or councils appointed by the Seimas or the President of the Republic, the heads and members of other institutions and establishments appointed by the Seimas or the President of the Republic) ranged between 4 and 10 per cent;[490] (iii) as of 1 August 2009, there was one more reduction in the coefficients of the positional salaries: by 10 per cent – of all state politicians (including mayors and vice-mayors) and by between 2.5 and 10 per cent – of civil servants.[491]

In 2009, the coefficients of the positional salaries of judges were subject to reduction twice: (i) as of 1 May 2009, there was a 30 per cent reduction – of salaries of the Justices of the Constitutional Court and a 12 per cent reduction – of salaries of other judges;[492] (ii) as of 1 August 2009, an additional cut by 8 per cent was applied to the salaries of all judges.[493]

The Law on Civil Service was also amended twice in 2009: (i) the coefficients of the positional salaries of the highest-ranking civil servants (categories 20–15) were decreased by between 2.6 and 12.3 per cent as of 1 May 2009;[494] (ii) as of 1 August 2009, the coefficients of the positional salaries of higher-ranking civil servants (categories 11-20) were decreased by between 0.6 and 7.5 per cent; additional pay for the first qualification class was cut to 30 per cent (formerly amounting to 50 per cent), for the second qualification class – to 20 per cent (formerly, 30 per cent) and for the third qualification class – to 10 per cent (formerly, 15 per cent).[495].

Taking into account the national budget capacity as the national economic situation was deteriorating, the basic amount of the positional salaries of state politicians, judges, state officials and civil servants was approved at LTL 450 from 1 January 2010, *i.e.* the same as applied from 1 September 2009.[496]

Such changes in public sector work remuneration, as introduced through legislative means, had a considerable impact on the remuneration indicators in the country. According to the data of Statistics Lithuania, in the fourth quarter of 2009, the average monthly gross remuneration amounted to LTL 2,208.9

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[489] *Official gazette*, 2009, no. 11–398.

[490] *Official gazette*, 2009, no. 49–1935.

[491] *Official gazette*, 2009, no. 91–3916.

[492] *Official gazette*, 2009, no. 49–1940.

[493] *Official gazette*, 2009, no. 91–3917.

[494] *Official gazette*, 2009, no. 49–1937.

[495] *Official gazette*, 2009, no. 91–3918.

[496] Law on the Basic Amount of the Positional Salaries (Remuneration) of State Politicians, Judges, State Officials and Civil Servants. *Official gazette*, 2009, no. 147–6558 (as applicable in 2010).

and was by 10.4 per cent lower compared to the corresponding period of 2008. Remuneration for work continued decreasing in 2010. The downward tendency in work remuneration in 2010 was determined by the fact that the remuneration rates reduced by laws and Government resolutions in 2009 were still applicable. In order to avoid increasing state budget expenditure, the Seimas and the Government adopted the decisions to extend the validity of the reduced amounts of work remuneration in 2011. In the same year, the Seimas and the Government adopted amendments to legal acts stipulating that such reduction would also apply in 2012.

In 2012, the Seimas and the Government introduced legislative amendments providing that the amounts of public sector work remuneration, reduced since 2009 as a result of the economic downturn, would continue to be applied in 2013.[497]

In a certain sense, the Government was performing two functions, *i.e.* in its effort to prevent the disastrous effects of the economic crisis, it took measures to regulate public finances during the crisis; at the same time, as the 'employer' of public sector employees, it kept decreasing work remuneration, changing its conditions drastically and unilaterally, and, in this way, it may have potentially violated the right of its employees to a fair remuneration.

As it has been mentioned, before making decisions on the issues of remuneration reduction in the public sector, the Government had to analyse the case-law of the Constitutional Court developed between 2002 and 2006 in relation to austerity measures. It may look at first sight that it had done so; otherwise, two hasty laws would appear as an attempt to set the grounds for the lawfulness of its actions – those laws stipulated that the amount of the positional salary of civil servants, officials, politicians and judges could be lower in cases where the economic and financial situation of the state substantially deteriorated.[498] It is obvious that such legislative amendments show the effort to create, without overstepping the limits allowed by the Constitution, the legal preconditions for reducing the work remuneration of the public sector. Thus, it may be presumed to some extent that, in this case, in order to ensure the principle of the stability of public finances, the legislature resorted to its discretion to decide on the economic situation of the country and made the first preparatory steps in the fight against the economic and financial difficulties. On the other hand, however, it can clearly be seen that no heed was paid to other principles developed in the case-law of the Constitutional Court, which should be necessarily followed in resorting to austerity measures in the area of public finances so that the fundamental values, human rights and freedoms, protected by the Constitution, are not violated. Otherwise stated, there was no rational and objective assessment

[497] Law on the Basic Amount of the Positional Salaries (Remuneration) of State Politicians, Judges, State Officials and Civil Servants. *Official gazette*, 2012, no. 153–7832 (as applicable in 2013).

[498] *Official gazette*, 2008, no. 49–6008; 2008, no. 49–60109; 2008, no. 149–6010.

of such constitutionality criteria as social solidarity, non-discrimination, proportionality, as well as such aspects as the unavoidability and necessity of the austerity measures and, what is highly important, the duration of their validity.[499] Such risks soon unfolded because civil servants, officials, as well as judges, started to initiate complaints at administrative courts and request proceedings at the Constitutional Court in order to review the compliance of the aforementioned legislative decisions with the Constitution insofar as they provided for reduction in work remuneration. After 2009, when austerity measures were first applied, the Constitutional Court was extensively and consistently developing its constitutional doctrine, which had been started to be formulated as early as in 2002–2007, concerning the austerity measures applied by the state amid the times of crises. During the examined period, only two rulings were issued on these matters, *i.e.* the rulings of 1 July 2013[500] and 22 December 2014,[501] which had been preceded by the decision of 20 April 2010,[502] interpreting in greater detail and clarifying the constitutional doctrine developed between 2002 and 2007. Mention should also be made of the decision of 16 April 2014,[503] which detailed some of the provisions laid down by the Constitutional Court in its ruling of 1 July 2013. The Constitutional Court was of the opinion that, in many cases, the legislator (at the same time, also the Government, as the initiator of the relevant legislative amendments) had overstepped the limits allowed by the Constitution by decreasing the remuneration of civil servants, officials and judges. The Constitutional Court recognised, in principle, that the state was in the position (was under necessity) to take measures to contain the crisis under the existing circumstances, *i.e.* the critical economic and financial situation in the country, *inter alia*, to reduce social benefits and work remuneration, and that, in this case, the state had not infringed the so-called 'constitutional necessity and justifiability'. On the other hand, in the proceedings concerning remuneration cuts in the public sector, the Constitutional Court also invoked such principles of the constitutional doctrine as the temporary application of austerity measures, the principle of proportionality, the principles of social solidarity and non-discrimination, as well as the principle of the discretion of the legislator.

The Constitutional Court held that the legal regulation reducing, due to the economic downturn, the coefficients of the salaries (remuneration) of civil servants and judges, as well as the amount of additional pay for the qualification classes and qualification categories of civil servants, was contrary to the right to a fair pay for work, as enshrined in the Constitution,

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499 Žalimas, D. *Op. cit.*.

500 Constitutional Court ruling of 1 July 2013 (referred to in the Preface).

501 Constitutional Court ruling of 22 December 2014. *TAR*, no. 2014–20411, 22 December 2014.

502 Constitutional Court decision of 20 April 2010 (cited in Part II).

503 Constitutional Court decision of 16 April 2014. *TAR*, no. 2014–4507, 17 March 2014.

as well as to the constitutional principle of a state under the rule of law; the regulation providing for the cuts of the salaries of judges was also judged to have conflicted with the principle of the independence of judges and courts. Yet another example is the ruling recognising that there was no conflict with the Constitution in the case of the law that had reduced the basic amount applicable to calculate the salaries of judges, state officials and civil servants in the middle of 2009. The political position taken during the crisis that those who earned more should contribute more to the overcoming of the downturn was, in principle, rejected by the Constitutional Court. More than that, in its decision of 20 April 2010,[504] the Constitutional Court noted that the aforesaid requirements, which stem from the constitutional principles of a state under the rule of law, the equality of rights, justice, proportionality, the protection of legitimate expectations, legal certainty, legal security and social solidarity, must be heeded also when there is an extreme situation in the state (an economic crisis, *etc.*), due to which the economic and financial situation in the state, despite of various other measures applied for overcoming the economic crisis, has changed to the extent that, *inter alia*, the accumulation of the funds necessary for the payment of remuneration for work of officials and civil servants (other employees) is not secured, and, due to this, their remuneration is reduced. Thus, it is possible to maintain that, in the aforementioned decision, the Constitutional Court has systematised and conclusively developed the constitutional doctrine on the austerity measures applied on the national scope: (i) when there is an extremely difficult economic and financial situation in the state leading to the necessity to temporarily reduce remuneration for the work of the officials and civil servants of the institutions that are funded from the state and municipal budgets (other employees who are remunerated for their work from the funds of the state and municipal budgets), the legislator is under the obligation to establish a uniform and non-discriminatory remuneration reduction scale, which would not breach the proportions of the amounts of salaries set for all categories of officials and civil servants (other employees); (ii) the Constitution does not allow such a legal regulation whereby the remuneration of officials and civil servants (other employees) becomes reduced to an amount unable to secure the minimal socially acceptable needs and decent living conditions; (iii) only after there is an official statement that there is an extremely severe economic situation, resulting in the incapacity of the state to perform the assumed obligations, the legislator may reduce, on a temporary basis, the remuneration of officials and civil servants (other employees); (iv) only such a legal regulation is allowed whereby reduced remuneration would be paid temporarily, *i.e.* as long as the particular extreme situation in the state continues to exist making it impossible to collect the budget revenue necessary for the payment of remuneration; (v) when the extremely severe economic and financial situation comes to an end, the amounts of remuneration applicable prior to

[504] Constitutional Court decision of 20 April 2010 (referred to above).

the said situation should be applied; (vi) if, before the end of the economic downturn, it becomes possible to accumulate (receive) the funds necessary to pay the remuneration of the amount applicable before its reduction, the legal regulation that introduced the reduction should be repealed.

The underlying position of the Constitutional Court is that all the above-referred principles should be applied in an integrated manner; none of them may override another principle or deny the person access to any of the rights protected under the Constitution. Otherwise stated, the austerity measures taken in 2009, when Lithuania was exposed to the economic downturn of an unprecedented magnitude, were lawful and timely; thus, the state could reasonably expect solidarity from society. On the other hand, it is apparent that some of the measures were in breach of the principle of non-discrimination and undermined the principle of professional activities and a fair pay for a completed work of specific quality, level of professionalism and value; finally, the austerity measures were applied for a long time, and some of them still continue to be applied, which is an obvious abuse of the existing situation and a breach of the right of ownership, as the remuneration losses have not been compensated yet for a large number of persons. In terms of compensation, it should be noted that, upon holding that the reduction in the remuneration of public sector employees was contrary to the constitutional right to receive a fair pay for work, the Constitutional Court pointed out that, in order to safeguard the protection of ownership, enshrined in the Constitution, *the legislator must establish a mechanism for compensation for the losses suffered by persons*, so that the state could compensate them fairly, to the extent these losses were disproportionate, within a reasonable period of time.[505]

Considering the cuts of the remuneration of public sector employees, it should not be forgotten that the legislation of the crisis period in question applied cuts not only to the remuneration of civil servants, politicians, officials, judges and prosecutors; the Government took equivalent measures when, by its resolutions, it more than once reduced the work remuneration of the so-called 'budget financed' employees, *i.e.* all persons working under employment contracts and on the payroll of the state or municipal budgets (*e.g.*, teachers, health care specialists, social workers, employers from the sector of culture and art, *etc.*) From 1 September 2009, all these employees had their basic monthly salary (the basis for their work remuneration) reduced from LTL 128 to LTL 122;[506] and this amount has not been restored yet to most of them.[507] These examples, irrespective of the fact that the lawfulness of the aforementioned decisions of the Government, differently from the work

[505] Constitutional Court rulings of 1 July 2013 (cited above and referred to in the Preface) and of 22 December 2014. *TAR*, no. 20411, 22 December 2014.

[506] *Official gazette*, 2009, no. 100–4187.

[507] *TAR*, no. 2014–13047, 29 September 2014. On that day the equivalents of the respective amounts in euros were approved (from 1 January 2015 the basic monthly salary was set at EUR 35.5, and the basic hourly remuneration – at EUR 0.22), though the amounts themselves remained unchanged, *i.e.* the amounts reduced from 1 September 2009 remained applicable.

remuneration amounts reduced by the laws passed by the Seimas, have not been reviewed in terms of their compliance with the Constitution (no complaints have been submitted to the Constitutional Court to initiate proceedings), it is apparent from the application of the constitutional doctrinal rules that the remuneration reduction introduced by the Government in respect of employees of some budgetary institutions has breached the principles of proportionality, non-discrimination and social solidarity, whereas, in terms of the reduction applied in respect of all employees, the Government also failed to observe the rule for the temporary validity of austerity measures as well as to comply with the obligation to compensate for the losses. It follows from the above that the measures at issue were in breach of the international and constitutional right of employees of the budgetary sector to receive a fair remuneration for their work.

5.4. The public attitude to work remuneration cuts in the public sector

The public survey inquired into the view of the public on the measures taken by the state to overcome the economic downturn and aimed at finding out what the public thought about the work remuneration cuts and their outcomes.

The public opinion was rather radical. For example, in response to the question how salaries had to have been reduced during the crisis, even 52.4 per cent of the respondents said that the percentage of cuts had to have been higher for those who had earned more. Only 37.4 per cent were in favour of an equal reduction percentage, and only 5.1 per cent of the respondents were for an equal reduction amount. 4 per cent agreed that lower percentage cuts had to be applicable to those persons who had held more responsible jobs requiring higher education and/or more experience. Most of the surveyed members of society believed that the salaries reduced during the crisis should be restored to everybody and in full extent once the crisis recedes. 56.6 per cent of the respondents believed that salaries should be restored fully and to everybody; 6.6 per cent were in favour of the restoration of salaries in full but not to everybody; 20.9 per cent – to everybody, although not in full extent; 3.8 per cent – not to everybody and not to full extent; and 12.1 per cent believed that the reduced salaries should not be restored at all.

It may be said that this survey has revealed that economic rights and guarantees are definitely important. For example, two out of three respondents believed that the state had not made an effort to protect people from the negative effects of the crisis, while three out of four were of the opinion that the state, while trying to protect them, had not followed the fundamental principles of law, such as the equality of all persons, *etc.*

Hence, it was not surprising that, when asked whether their economic rights had been violated as a result of the economic downturn, 53 per cent of the respondents reported violations. In view of a larger part of the respondents, at least certain individual rights established in statutory law before the crisis should be restored; thus, the relevant expectations should be further maintained. For example, support was expressed for the restoration of the salaries reduced during the crisis, and most of the respondents thought that they should be restored to 'everyone without reservations and to the whole extent'. Such an attitude signals that the constraints of the rights related to the crisis and the anti-crisis policy are perceived as temporary by the public, hence, its impact on the whole legal system, including the concept of human rights and the standards of the rule of law.[508] Otherwise stated, the results of this survey have partly explained why society was so reserved and put up with the highly drastic anti-crisis measures of economic and social nature. The public had, in some sense, preserved some trust and belief that the measures were temporary (as partly also declared by the legislative and the executive authorities) and that their social and economic rights and, first of all, the right to a fear work remuneration would be restored.

5.5. Post-crisis decisions

As it has been mentioned, in its ruling on the legitimacy of the measures adopted to reduce work remuneration,[509] the Constitutional Court held that, in cases where the legal regulation is held to be in conflict with the constitutional right to receive a fair remuneration for work, to safeguard the protection of ownership enshrined in the Constitution, *the legislator must establish a mechanism for compensation for the losses suffered by persons,* so that the state could compensate them fairly, to the extent these losses were disproportionate, within a reasonable period of time.[510] To allow the authorities to prepare and pass the relevant decisions, the entry into force of the ruling was postponed until 1 October 2013.

Following the adoption of a number of laws, the coefficients of the positional salaries and the amounts of additional pay for the qualification classes and qualification categories were restored to civil servants, including statutory civil servants, and judges as of 1 October 2013; thus, the Constitutional Court ruling was partly implemented and, to be more

[508] See Part I, Chapter 3; see also Kūris, E. 'Ekonominė krizė ir teisinė sistema: įtampų triada' [Economic crisis and the legal system: A triad of tensions] (referred to in the Preface).

[509] Constitutional Court ruling of 1 July 2013 (cited above and referred to in the Preface).

[510] This position was reiterated in the Constitutional Court ruling of 22 December 2014 (cited above).

accurate, the legislative provisions held contrary to the Constitution were repealed following general legal logic. All this, however, did not solve a much more relevant issue, *i.e.* that of compensation for the sustained work remuneration losses. As it was necessary to compensate the difference of the unlawfully reduced work remuneration, a special law was issued at the same time (19 September 2013) obligating the Government to work out, until 1 May 2014, and submit to the Seimas a draft law regulating a mechanism for compensation for losses suffered as a result of the work remuneration (salary) reduced disproportionately in response to the economic downturn (the terms and conditions of compensation, the scope and method, the period over which the share of reduced work remuneration (salary) should be compensated, the compensation amount, *etc.*) and indicate the amount calculated under the proposed compensation mechanism as necessary for such compensation. The time limit to accomplish this task, however, was postponed until 1 May 2015 by the law of 11 September 2014. The Government, however, fulfilled the task assigned and, on 30 April 2015, submitted the draft law[511] whereby it is sought to establish a refund for part of the remuneration for work disproportionately reduced under the provisions of the above-mentioned laws due to the economic crisis to persons who are remunerated for their work from the state and municipal budget funds. The law envisages that, within the period of five years starting from 1 January 2016, civil servants, state officials, prosecutors and judges will be refunded for the unpaid part of remuneration for their work and the related payments to the extent the reduction in the remuneration for their work has been recognised as contrary to the Constitution regardless of when they took up the position in the institution or agency, *i.e.* whether they had already held the position when the remuneration (salary) for their work had been reduced or whether they took up the position after the reduction in the remuneration for their work (salary).

Summary

The right to a fair salary (remuneration for work) is one of the undisputable fundamental social rights anchored in international legal acts and in national constitutions. It is a constant value that does not appear to cause any discussions or disputes. May it also be considered a point of reference in such extraordinary situations like the economic crisis at issue, when the circumstances require much accord, social discipline and unanimity (solidarity) both from the state as such and its citizens? A clear-cut answer to this question is difficult, in particular, in terms of social human rights, which become a highly sensitive issue in the times of economic and financial difficulties. The conducted survey of the views on the remuneration cuts in

[511] When the book was on the way to the printing press, the law was adopted 30 June 2015, *TAR*. no. 2015-11101, 7 July 2015.

civil service in response to the outbreak of the economic crisis in late 2008 has revealed a certain conflict between the norms of law and morals, as well as a difference in opinions among different members of society. Without calling into question the necessity of specific austerity measures amid the economic and financial crisis, a concurrent issue that needs to be inquired into is to what extent society had to and could expect that the socially oriented state would defend their social welfare and would ensure their human dignity. Therefore, in assessing the extent to which the state complied with this obligation and secured social human rights (in particular, work remuneration in the public sector), it may be said that neither the principle of a fair work remuneration nor the securing of other social rights were decisive in making hasty and, at times, even drastic austerity decisions. As already mentioned, a progressive approach was taken in adopting decisions on austerity measures in the policy of public sector remuneration, but no efforts were made to find any softer measures to ensure the social security of more vulnerable persons to a greater degree and apply fair proportionality in cutting remuneration. Proportionality should not necessarily be absolute. Its scope may be different for different persons; where it preserves the principles of solidarity, non-discrimination and respect for human dignity, such proportionality would undoubtedly be in line with the standards of fairness established in society and law and would have ensured realistic safeguards of the right to a fair work remuneration.

6. Social security guarantees

6.1. National law

The fundamentals of the Lithuanian social security system were laid down in 1991 by the Law on the Principles of the State Social Security System.[512] Article 1 of this law provides the definition of the Lithuanian social security where social security is understood as the system of socio-economic means established by the state, which provides persons residing in Lithuania who, for reasons established by law, are unable to subsist on their work or other income, or are insufficiently provided for, with necessary finances and services. Although this definition of social security is rather concise, it unfolds the concept of social guarantees. A social security guarantee is nothing else but a socio-economic measure that ensures pecuniary funds and services in specific cases.

This law provides for the cases where social security measures are applicable. Thus, it means the establishment of the list of social security guarantees. Although social security guarantees are often described in

[512] *Official gazette,* 1991, no. 16–411.

material terms,[513] by listing specific social risks, the above-referred law defines such guarantees through the area of personal application. Consequently, social security in the cases provided for by law is available to: persons who have reached the pensionable age, the disabled, persons who have lost their breadwinner, persons temporarily incapacitated for work, the unemployed, as well as persons who are raising children.

The Constitution establishes the specific provisions underlying the whole social security system in Lithuania, *i.e.* the state is obligated to create and maintain such a social security system that would ensure the security of a person in the cases laid down in the Constitution. The constitutional provisions at issue include: (i) *Article 39* of the Constitution stipulates 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. The law shall provide to working mothers a paid leave before and after childbirth as well as favourable working conditions and other concessions; (ii) *Article 48* of the Constitution states that each human being shall have the right to social security in the event of unemployment; (iii) *Article 52* of the Constitution secures 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 the breadwinner and in other cases provided for by laws; (iv) *Article 53* of the Constitution establishes the obligation of the State to take care of people's health and guarantees medical aid and services for the human being in the event of sickness; (v) *Article 146* of the Constitution reads that the State shall take care of and provide for the servicemen who lost their health during the military service as well as for the families of servicemen who lost their lives or died during the military service. The State shall also provide for citizens who lost their health while defending the State as well as for the families of the citizens who lost their lives or died in defence of the State.

The definition and assessment of specific social security guarantees requires more than merely an identification of social risk cases and the range of subjects. In order to unfold the substance of a specific social security guarantee, a method (scheme) to ensure such a guarantee should also be detailed. Apart from two common schemes of social security guarantees (social insurance and social assistance), there is one more scheme in place in Lithuania – special social payments, which, more precisely, may be identified as state pensions.

This shows that the Lithuanian social security system embraces a large number of guarantees, ensured through the schemes of social insurance, social assistance and additional state payments. As any other social guarantees, additional payments are similarly exposed to never-ending changes in the relevant environment. Social guarantees change depending on the social policy

[513] Such a definition of social security guarantees stems from a large number of international legal instruments in the area of social security.

objectives and the social environment, *i.e.* depending on different external and internal factors.[514] The legislator has an important role – namely, to revise the legislation laying down individual rights to specific social security payments in the light of the aforementioned factors and with consideration given to the acknowledged international and national constitutional standards.

6.1.1. The principles governing the regulation of the system of pensions

The principle of the protection of ownership was not directly linked with social security rights in Lithuania for a long time. Nevertheless, the long-standing constitutional doctrine of individual states and, most importantly, the case-law of the ECtHR lead to the straightforward conclusion that the principle of the protection of ownership has moved into the area of social security law. This principle has been for the first time applied to specific payments by the Constitutional Court in its ruling of 25 November 2002, where the issue of pension cuts (limitations) for working pensioners was decided. It was noted in the ruling that a certain extraordinary situation, an economic crisis or a natural disaster may justify a temporary reduction of the granted and payable pensions. Although there were no such extraordinary situations at the time when the ruling of 25 November 2002 was delivered, the Constitutional Court reinforced this position later, when it became necessary to assess the pension cuts made during the economic downturn.[515] It should be noted that the case-law of the Constitutional Court was considerably influenced by the international safeguards of ownership rights and, more specifically, the principle of the protection of property, consolidated in Protocol no. 1 of the ECRH.

One of the questions most often asked in Lithuania is whether the state pensions existing in the Lithuanian social security system are justified rather than a privileged treatment of the specific groups of persons without any objective justification. It follows from the interpretation delivered by the Constitutional Court that state pensions *per se* do not infringe the equality of persons. Such payments, however, should be justified, as they single out the specific groups of persons. In Lithuania, special state pensions may be justified by three objectives. Firstly, they are aimed to reward for a specific service or work of exceptional significance and value. This argument justifies those professional pensions that are based on professional considerations, *i.e.* state pensions for officers and soldiers, also for judges and scientists.

[514] Kavoliūnaitė-Ragauskienė, E. 'Socialinės garantijos šeimai kaip socialinės politikos šeimos srityje įgyvendinimo teisinės priemonės' [Social guarantees to families as legal measures for implementation of social policy in the family dimension] in *Teisės problemos*, 2010, no. 4.

[515] For more, see subchapter 6.3.

The second purpose of state pensions may be a reward for specific meritorious service to the State of Lithuania. This applies to the first and second degree state pensions of the Republic of Lithuania. The Law on State Pensions provides for a large number of the potential recipients of this pension. It should be noted that the legislative policy concerning the first and second degree state pensions has lacked consistency. It was noted as early as in the Plan of the Measures of the Implementation of the Government Programme for 2001–2004 that the system of state pensions should be reconsidered and that any unjustified privileges and benefits contrary to social justice should be eliminated.[516] The draft concept paper worked out by the Ministry of Social Security and Labour in 2002 on the rearrangement of the system of state pensions foresaw limitations on state pensions: it refused the expansion of the circle of the recipients of such pensions, recommended gradually narrowing the groups of eligible persons, *etc*.[517] In 2013, however, without waiting for any conclusive decisions on the legal prospects of the system of state pensions and its individual elements, the scope of first degree state pensions was even further increased to include the winners of the Lithuanian National Culture and Art Prize.[518]

The third purpose of state pensions may be to compensate the victims specified in the law. Accordingly, state pensions have also been established in Lithuania to the victims of the war and occupations, as well as to the persons who have suffered from their consequences.

6.1.2. The specifics of the regulation of social insurance allowances

In establishing short-term allowances in the Lithuanian social security system, the greatest role is placed on social insurance. Sickness and maternity social insurance, as one of the types of social insurance, ensures sickness, maternity, paternity and parental social insurance allowances for persons who take a break from work due to their sick leave or the sickness of their family members, a childbirth or child care as a compensation for the lost income from work.[519] The Law on Social Insurance against Accidents at Work and Occupational Diseases[520] sets a group of social insurance allowances for persons who temporarily or permanently lose their capacity for work as a result of an accident at work or an occupational disease, as well as allowances

[516] *Official gazette*, 2001, no. 86–3015.

[517] Social report 2001. Ministry of Social Security and Labour, 2002, p. 92. Online access: http://www.socmin.lt/public/uploads/5939_socialreport2001.pdf [15 January 2015].

[518] *Official gazette*, 2013, no. 130–6620.

[519] *Official gazette*, 2000, no. 111–3574.

[520] *Official gazette*, 1999, no. 110–3207.

for family members in the case of the death of such persons. The Law on Unemployment Social Insurance[521] details the procedure for granting and paying unemployment insurance benefits to unemployed persons.

Although these social insurance allowances are underpinned by the same basic principles, some specifics are characteristic of each of their types. Irrespective of the regular revisions of the legislative provisions, some criticism has been addressed to specific allowances. Considerable problems have been identified in relation to each of the short-term insurance allowances. Tight constraints imposed on the entitlements to the unemployment benefit, a low 'ceiling' (or 'cap') on its amount and a very low substitution rate of sickness benefit have made short-term insurance along with the overall social insurance unattractive to a large number of insured persons although sickness and unemployment are most widespread social risks among people of the working age. Maternity, paternity and parental social insurance is excessively generous in terms of the time for which such benefits are available – it turns social insurance into social assistance for young families with small children. The excessive generosity of the insurance of accidents at work may be seen in overlapping allowances when the cause of lost income is the same.[522]

Over the recent several years, the payment procedure for parental allowances has been radically transformed at least three times in Lithuania;[523] the amendments (though not always substantial) of the coverage of sickness and maternity social insurance[524] have been even more frequent.

In line with the Implementation Measures of the Government Programme for 2006–2008,[525] as approved in 2006, changes were made in the regulation of parental allowances: easier access to these allowances and their payment procedure, higher allowance amounts, *etc*. were introduced. Starting with 2007, the payment period of the parental allowance was gradually extended and the amount of the allowance was increased: from 1 January 2007, it was increased from 70 per cent to 85 per cent of the reimbursed remuneration; from 1 July 2007, it was covered by 100 per cent of the reimbursed remuneration until the child reached the age of six months and afterwards reimbursed by 85 per cent until the child became one year old. From 1 January 2008, the allowance equal to 100 per cent of the remuneration was paid until the child reached twelve months and 85 per cent – until the child became twenty-four months old.

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[521] *Official gazette*, 2004, no. 4–26.

[522] 2012 report of the national research programme 'Social challenges to national security'. Research Council of Lithuania, 2013. Online access: http://www.lmt.lt/lt/veikla/planavimas/veikla-at/2012.html [15 January 2015].

[523] Šarlauskas, T. and Telešienė, A. 'Valstybinio socialinio draudimo motinystės (tėvystės) išmokų reglamentavimas: pašalpų gavėjų struktūra ir pasirinkimai' [The regulation of state social insurance: Structure and choices of beneficiaries] in *Viešoji politika ir administravimas*, 2014, vol. 13, no. 1.

[524] *Official gazette*, 2004, no. 171–6295.

[525] *Official gazette*, 2006, no. 112–4273.

Any improvements of social security, as it was the case with parental allowances in Lithuania, are exposed to the issue of financial resources. It may be said that one of the key drivers of more favourable security was highly favourable economic conditions in Lithuania. Some provisions of the law concerning the availability of allowances were doubtful not only in terms of their necessity but also on the grounds of their legal rationale. This may be exemplified by the provision of the law that in cases of a multiple birth, the parental allowance (as well as the maternity allowance) was to be increased according to the number of the children born at a time (twofold in the case of twins, threefold in the case of triplets, *etc.*).[526]

After the improvements introduced to the provisions regulating the payment of parental allowances in 2007 (the payment time extended to two years and the increase of the allowance rate up to 100 per cent for the first year and 85 per cent for the second year), quite a large number of allowance abuse instances occurred, such as agreements with the employer to increase remuneration specifically for the period used as a reference to calculate the parental allowance.

In order to prevent such abuse, the decision was made to apply more stringent conditions for the granting and payment of these allowances. Firstly, a longer period of sickness and maternity insurance was introduced as compulsory in order to qualify for maternity, paternity and parental allowances. Secondly, the income used to calculate the amount of the allowance was subject to a more stringent assessment.

Unemployment insurance benefits in Lithuania, like in many other countries, depend on the earlier insurance or employment periods. Yet, in Lithuania, this period is one of those of the longest duration among the European countries.[527] In addition, there is a relatively large disparity between the periods of the required social insurance payments and the periods of maximum allowance payments.

The second element worth criticism in the regulation of unemployment insurance benefits is related to the limitations on the amount of allowance – the so-called allowance ceiling. All social insurance allowances[528] are calculated with reference to the specific amounts – the insured income or the reimbursable remuneration the person had. However, the Lithuanian social security legislation sets the 'ceiling' (or 'cap') on social insurance allowances.

The social allowance 'ceiling' as such does not infringe the set-up principles of the social security system; however, it did not ensure the right proportion between the contributions paid and the allowance received even during the pre-crisis times.

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[526] Law on Sickness and Maternity Social Insurance. *Official gazette*, 2000, no. 111–3574 (as applicable until 31 December 2008).

[527] Mutual Information System on Social Protection. Online access: http://ec.europa.eu/social/main.jsp?catId=815&langId=en [9 January 2015].

[528] Except state social insurance pensions for survivors.

6.1.3. The specifics of the regulation governing social assistance entitlements

Social assistance is part of the social security system ensuring that each person (family) who does not have sufficient funds for subsistence and cannot obtain such funds on their own or from other sources receives the necessary support, as well as that, in the cases provided for by law, assistance is available to persons (families) who suffer additional expenses due to family circumstances. For this purpose, families and children are provided with social benefits, social guarantees and reliefs. Where the state budget allows, families raising children may be granted special benefits to children irrespective of the property of the family and the income it receives. Those residents who do not have sufficient income to support themselves may get support depending on their income and property. Compared to other EU Member States, Lithuanian financial support for families and children is different.[529] Most emphasis is placed on social insurance benefits, while universal benefits to support families have never received sufficient attention.

The types and amounts of benefits to children, the categories of persons entitled to such benefits, the conditions, the procedure for granting and paying such benefits as well as their financing were defined by the Law on State Benefits to Children.[530] This law established a rather broad scope of benefits to families, although it took time to introduce adequate, universal and regular benefits to children. Shortly before the crisis period, a universal benefit, ranging from 0.4 to 1.1 of the basic social benefit, was available to each child at least until 18 years of age depending on the number of children in the family. Although the amount of the benefit as such was not high, it meant that Lithuania set up the a universal system of benefits to children where a child benefit was paid irrespective of the property the family had and the income it received.

In Lithuania, individuals and families who do not have adequate funds for subsistence may also receive specific assistance upon a strict assessment of their income and property. The Law on Cash Social Assistance for Poor Residents provided that social benefits and compensations should be made available only when financially deprived persons had exhausted all other avenues for getting income and defined the types, amounts and conditions of such support. It is important that persons on social payments do not become passive but make efforts to change their situation and be able to provide for themselves on their own. Lithuania has opted to determine the level of the

529 Kavoliūnaitė-Ragauskienė, E. 'Viešosios šeimos politikos kūrimo ir įgyvendinimo Lietuvoje problemos' [Problems of creation and implementation public family policy in Lithuania] in *Teisės problemos*, 2012, no. 1.

530 *Official gazette*, 1994, no. 89-1706; 2004, no. 88–3208. (The earlier title of the law was the Law on State Benefits for Families Raising Children.)

financial support required according to two criteria: (i) the income of the person (or the income of the family per one family member); and (ii) the specific basic amount established by the state – state supported income. The state supported income, as approved by the Government,[531] amounted to LTL 350 per month per each family member, or respectively – EUR 102 at present.[532] The proportion of these criteria is decisive in deciding on the entitlement of an individual (family) to social benefit and on its amount. Such calculation methodology, however, can imply that the family status of a person is taken into consideration inadequately. Agreement can be expressed with the view[533] that such social assistance amount is likely to be inadequate to meet the basic needs of single residents without any income, as a shared household requires less income than single residence, because certain household expenditure does not depend on the number of family members.

6.2. International standards

Safeguards for social security are enshrined in the most important international and regional instruments. Article 22 of the Universal Declaration of Human Rights states that everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his or her dignity and the free development of his or her personality. Article 9 of the International Covenant on Economic, Social and Cultural Rights requires that the States Parties to the Covenant should recognize the right of everyone to social security, including social insurance. The ILO Conventions also lay down the fundamental provisions anchoring the principles for the provision of social security. The ILO Social Security (Minimum Standards) Convention no. 102 is of high importance in this regard. It was the first document to lay down an extensive list of social risks, which is still universally recognised.

The international instrument of the highest importance in the area of social rights in Europe is the European Social Charter. The 1996 European Social Charter (revised) was ratified by the Seimas on 158 May 2001; in addition to other rights, the Charter, *inter alia*, establishes: the right to protection of health (Article 11); the right to social security (Article 12), which embraces the right to social and medical assistance (Article 13); the right to

[531] *Official gazette*, 2008, no. 67–2531.

[532] *TAR*, no. 2014–12299, 15 September 2014.

[533] Social assistance system. Report no. V-A-P-10-1-5. National Audit Office, 9 May 2011. Online access: http://www.vkontrole.lt/aktualija.aspx?id=16504 [9 January 2015].

benefit from social welfare services (Article 14); the right to protection against poverty and social exclusion (Article 30), which also includes the right to housing (Article 31), *etc.*

The significance of the relevant standards is undoubted, as confirmed by the fact that they were adopted and laid down in the 1964 European Code of Social Security (ECSS). In addition, the European Code of Social Security (revised) (ETS no. 139)[534] was enacted in 1990 and sets out higher level standards compared to Convention no. 102 or the 1964 ECSS. These instruments outline the scope of coverage and the minimum amounts of social benefits. Article 12(2) of the European Social Charter (revised) obligates the States to maintain the social security system at a satisfactory level at least equal to that necessary for the ratification of the ECSS. Although Lithuania has not ratified Article 12(2) of the European Social Charter (revised),[535] this provision is relevant in terms of the consolidation of social security guarantees.

The ECSS is relevant not only at CoE level, but also at EU level – there is no equivalent instrument in the EU establishing compulsory minimum social security standards. The majority of EU Member States, as CoE Member Steates, have also signed and ratified the Code.[536]

6.3. Social security guarantees during the crisis

A lack of improvement in the demographic situation, the economic downturn, high unemployment and other negative factors compelled the legislator to make decisions that were important despite of being criticised by society. One of the first legal acts resultant in the cuts of social security benefits was the Provisional Law on Recalculation and Payment of Social Payments.[537] This law laid down the procedure for recalculating state pensions and state social insurance pensions, the procedure for the payment of them to persons with insured income; also the procedure for granting and recalculating maternity, paternity and parental allowances, unemployment social insurance allowances, for determining the new maximum amounts of reimbursable salaries in order to calculate social insurance allowances, the conditions and

[534] Online access: http://conventions.coe.int/Treaty/en/Treaties/Html/048.htm [15 January 2015].

[535] Law on the Ratification of the 1996 European Social Charter (revised). *Official gazette*, 2001, no. 49–1699.

[536] Instruments of the Council of Europe. Ministry of Social Security and Labour. Online access: http://www.socmin.lt/index.php?1800069417 [15 January 2015].

[537] *Official gazette*, 2009, no. 152–6820.

amounts of benefits to children. Although the law aggravated the situation of a large number of its addressees, its adoption was justified during the crisis. As noted by the legislator, this law was based on the case-law developed by the Constitutional Court, according to which, in exceptional cases when there is an extreme situation in the state (an economic downturn, natural disaster, *etc.*) and it is impossible to accumulate adequate funds for social benefits, the legal regulation governing the relations in connection with social benefits may be temporarily adjusted and payments may, temporarily, be reduced to the extent necessary to ensure the vital interests of society and protect other constitutional values.

The right (or even the obligation) of the legislator to maintain sustainable finances for the social security system was reconfirmed by the Constitutional Court in its decision of 20 April 2010 (referred to above) by pointing out that the solidarity principle implies that the burden of the fulfilment of certain obligations should, to a certain extent, be distributed also among the members of society; however, such distribution should be constitutionally reasoned, it cannot be disproportionate and it cannot deny the social orientation of the state and the constitutional obligations of the state.

The fact that these political decisions derived as a result of the economic downturn in the state was also pointed out in the Government resolution no. 1295 'On the Economic Downturn' of 14 October 2009.[538] It reconfirmed that urgent measures to consolidate the public finances of the state, control the sovereign debt and deficit, ensure the stability of finances and boost the national economy were necessary as long as the economic downturn continued. It also provided for cuts in the national and municipal budgets, in the budgets of the State Social Insurance Fund and the Compulsory Health Insurance Fund to be implemented with the consideration of budget revenues and the possibilities of sustainable borrowing. Furthermore, the Government also assured that social benefit cuts would be temporary and would be administered following the constitutional principles of legitimate expectations and proportionality.

This political document of the Government may be viewed positively, at least, because of mapping the clear guidelines that the limitation of social benefits was to be only a temporary measure; thus, it was ensured that legal decisions would not impact the general level of social security in the future. Moreover, on 3 December 2009, the Government resolution was supplemented by the provision that, upon the recovery of the Lithuanian economy and the acknowledgement by the Government of the end of the economic downturn, the reduced state social insurance old-age pensions and work incapacity pensions would be compensated under the procedure specified by the Government.

On the other hand, such a political statement of the Government could not in itself guarantee that all legislative changes concerning payment cuts

[538] Already referred to in Part III.

were passed in line with the constitutional principles of social security (for example, a larger-scale reduction in the pensions of working pensioners). Although there was an adequate identification as well as definition of the economic downturn in the aforementioned resolution of the Government, it did not outline any prerequisites concerning the acknowledgment of the end of the crisis. It is likely that such an indefinite period of temporary reduction was the reason why the Ministry of Social Security and Labour, which was obligated by the resolution at issue to communicate by 1 July 2010 the procedure for compensating the state social insurance old-age pensions and work incapacity pensions reduced during the economic downturn, in fact, submitted the procedure only on 15 May 2014, when the Law on Compensation for State Social Insurance Old-age Pensions and State Social Insurance Work Incapacity (Invalidity) Pensions was enacted.[539]

6.3.1. Changes in the system of pensions and pension cuts

The Constitutional Court has treated a pension as the right to property and has followed the view that pensions, like any other social benefits, may be reduced only when there is an extraordinary situation in the state such as, for example, an economic crisis. When assessing the compliance of the Provisional Law on Recalculation and Payment of Social Payments with the Constitution, the Constitutional Court expressed a clear-cut position that, in an extreme situation, when an economic downturn makes it impossible to accumulate the amount of the funds necessary to pay old-age pensions, the legislator must, while reducing old-age pensions, provide for a mechanism of just compensation for the incurred losses to the persons to whom such pensions were awarded and paid, whereby, after the said extreme situation recedes, the state would be obliged to compensate these persons for the incurred losses in a fair manner and within a reasonable time.[540] Thus, temporary pension cuts are legitimate and valid if they conform to the general principles highlighted by the Constitutional Court.

The Provisional Law on Recalculation and Payment of Social Payments introduced specific limitations on the payment of pensions. Firstly, the payable parts of the state pensions and annuities granted according to effective legal acts were determined with reference to the amount of the payment due to the person. State social insurance pensions were reduced accordingly. Reduction was not applied only to those pensions which were lower than the established threshold (LTL 650). Secondly, the amounts of state and social insurance pensions were subject to higher reduction if their recipients also had insured

[539] *TAR*, no. 2014–05572, 21 May 2014.

[540] Constitutional Court ruling of 6 February 2012. *Official gazette*, 2012, no. 109–5528.

income. The lower the insured income of the person, the higher part of the pension would be paid. And, conversely, the persons who had higher insured income would be paid a lower part of the pension.

In the ruling on these provisions and their compliance with the constitutional principles, the Constitutional Court drew on the official constitutional doctrine concerning the requirements stemming from the Constitution for the amendments of the legal regulation of pensions in cases where the state is in a severe economic and financial situation. It is noted in the Constitutional Court ruling of 6 February 2012[541] that, when there is a particularly difficult economic and financial situation in the state and it is impossible to accumulate the amount of the funds necessary to pay pensions, the granted and paid pensions may be reduced following the constitutional principles of the equality of rights and proportionality, and providing that a uniform and non-discriminatory scale of reduction of pensions is ensured. Pension cuts should be temporary and there should be a mechanism for just compensation for the incurred losses. The Constitutional Court emphasised that, in order to ensure that the losses incurred due to the reduction of old-age or disability pensions, as well as due to the reduction of state pensions to a great extent, would be compensated within a reasonable time and in a fair manner after the extreme situation is over, the legislator must, without any unreasonable delay, establish, by means of a law, the essential elements (grounds, amounts, *etc*.) of compensation for the reduced pensions. According to the Constitutional Court, the provisions of Article 6(1) of the above-referred provisional law that allowed the reduction of the granted old-age pensions were not in conflict with the Constitution, as the legislator followed the constitutional requirements that such a legal regulation must be introduced on a temporary basis, in view of the extreme situation in the state and in observance with the constitutional principles of proportionality and equality. By stipulating in Article 16(4) of the provisional law that the Government should work out and approve a description of the procedure for compensating the reduced old-age pensions, the legislator undertook to define the essential elements of compensation for the reduced pensions in a law; the legislator must do so without any unreasonable delay so that once the extreme situation is over the losses resultant from the old-age pension cuts would be fairly compensated within a reasonable time.

The Constitutional Court has noted that the social orientation of the state implies the discretion of the legislator, in an extremely difficult economic and financial situation in the state, leading to the necessity to reduce social payments temporarily, to assess the resources of the state and society, material and financial possibilities and other significant circumstances and establish the exceptions applicable to specific groups of socially most sensitive persons who need special social assistance, *i.e*. to establish that for these groups of

[541] *Official gazette*, 2012, no. 26–1200.

persons social payments are not reduced or are reduced to a smaller extent in order to ensure decent living conditions; however, this should be done in line with the Constitution and the constitutional principle of the equal rights of persons.

The Provisional Law on Recalculation and Payment of Social Payments was not the only means of introducing important changes in the social security system. Some long-term solutions concerning social benefits did not evidently appear to be related to the economic downturn of that time although they had a special significance and impact on future social security measures.

The pensionable age was for the first time increased in 2012. Each subsequent year the pensionable age is to be increased by four months to women and by two months to men until it reaches the threshold of 65 years for both genders in 2026. Thus, the legislator had reached two important decisions by means of this legal regulation: firstly, the pensionable age is to be increased, and, secondly, it is to be made uniform for both men and women.[542] The main purpose of the law was to lay down the measures to help mitigate the effect of a demographic situation on the financial sustainability of the state social insurance system in the long run in view of the consequences of the economic and financial crisis.[543] The incremental increase of the pensionable age is necessary in order to ensure the legitimate expectations of individuals although it is doubtful whether a different pattern of increasing the pensionable age of women and men conforms to the principle of the equality of rights.

The impact of the decisions made during the crisis was also considerable on the pension accumulation system, as changes were made in the amounts of contributions transferred by the State Social Insurance Fund Board into the pension fund. A lack of legal consistency in the reform of the pension system (cumulative pensions) is exemplified well by the fact that the conditions of funding cumulative pensions were modified five times between 2009 and 2012. In late 2012, (possibly) final decisions were made concerning the amounts and the payment procedure of contributions to cumulative pension funds; these decisions have, in principle, drawn the system closer to the regulation of the third pillar pensions.[544]

The Constitutional Court ruled in June 2012 that the decision of the legislator to reduce contributions to accumulation funds from 5.5 to 2 per cent as of 2009 did not conflict with the Constitution[545]. The Constitutional Court stated that, while making use of the discretion to choose a system of pensions,

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[542] *Official gazette*, 2011, no. 77–3723.

[543] Explanatory note. Online access: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=375393&p_tr2=2 [15 January 2015].

[544] Daukšienė, A. 'Pensijų kaupimo sutartis: teoriniai ir praktiniai aspektai' [Pension accumulation contract: Theoretical and practical aspects] in *Teisė*, 2014, vol. 90.

[545] Constitutional Court ruling of 29 June 2012. *Official gazette*, 2012, no. 78–4063.

the legislator may establish various models of the system of old-age pensions, guaranteed in Article 52 of the Constitution, *inter alia*, those based upon the collection of the funds necessary to pay old-age pensions from the income of working persons at the given time, or based upon the accumulation of funds for future old-age pensions in special pension funds, as well as those based upon a combination of these models. The Constitutional Court pointed out that, even though the funds designated for old-age pensions and accumulated in pension funds may not be equated with the cumulative pension itself (with payable payments) whose amount depends upon the results of the economic activity (investing) of the economic entities administering the pension funds, the right of the person to the funds already accumulated in these funds is to be related with the protection of the rights of ownership under Article 23 of the Constitution. The legislator, having established that a part of the funds designated for old-age pensions is transferred to special pension funds in order to accumulate future old-age pensions, in the event of necessity (for example, during an economic downturn, *etc.*), when the economic and financial situation of the state changes so that, *inter alia*, the collection of the funds necessary to pay old-age pensions is not ensured from the income of the persons working at that time, has the power to decide to temporarily reduce the part of the funds collected from the said income and transferred to special pension funds for the accumulation of future old-age pensions; however, in doing so, the legislator must follow the constitutional imperatives of justice, reasonableness, proportionality and the equality of rights.

The Constitutional Court upheld its position on the possibility of reduction of cumulative contributions and their lawfulness in one of its subsequent rulings. It is pointed out in the Constitutional Court ruling of 19 December 2014[546] that the reduction of the part of the funds collected from the income of working persons and transferred to special pension funds in order to accumulate future old-age pensions in 2012 resulted from the economic and financial situation in the state, which, despite various measures applied in order to overcome the economic crisis in 2009–2011, was still so difficult that the collection of the funds necessary to pay state social insurance contributions, including old-age pensions, from the income of persons working at that time was not ensured. The Constitutional Court ruled that it is only the right of the person to the funds already accumulated in special pension funds that should be related to the protection of the rights of ownership and protected under the Constitution; therefore, the introduction of the reduced rate for future cumulative pension payments rather than for the payments already transferred to special pension funds (funds accumulated) in 2012 had not breached the constitutional principle of the protection of ownership.

It follows from the position of the Constitutional Court that the Constitutional Court applies less stringent criteria to the system of cumulative pensions (contributions) compared to social insurance pensions.

546 *TAR*, no. 2014–20117, 19 December 2014.

6.3.2. Limitations on social insurance allowances and other social benefits

The legislative amendments made during the crisis period concerned not only the long-term payments posing a heavy financial burden (old-age and work incapacity pensions) but also short-term or medium-term social security allowances. Considerable changes were made in parental allowances and, in particular, two social insurance benefits – unemployment insurance benefit and sickness benefit.

The Provisional Law on Recalculation and Payment of Social Payments introduced two specific limitations on parental allowances. Firstly, the amount of the allowance was reduced. As of 1 July 2010, parental allowances were reduced to 90 per cent of reimbursable remuneration during the first year of the child and down to 75 per cent during the second year.[547] Secondly, the 'ceiling' (or 'cap') on the allowance was reduced from five to four insured income amounts of the given year. Taking into account the purpose of the Provisional Law on Recalculation and Payment of Social Payments, limitations were applied not only to new parental allowances but also to those allowances that had been granted and paid prior the entry of this law into force. Such a step by the legislator stirred many discussions regarding the fairness and validity of the respective provisions.

The position of the Constitutional Court was that limitations on social allowances were allowed when there was an economic hardship. The Constitutional Court held[548] that the legislator had introduced the legal regulation providing for the reduction of the applicable maternity, paternity and parental allowances with due account of the emergency situation in the state, where a severe economic and financial situation made it impossible to raise such an amount of funds that was necessary to render the financial support provided for by law during leave granted for raising and bringing up children at home.

Irrespective of the fact that the reduction in the amounts of the allowance as such was reasoned and in line with the Constitution, some provisions of the provisional law were ruled to be in conflict with the constitutional principles. The Constitutional Court found that the constitutional principle of a state under the rule of law was not respected by the provisions of the provisional law that imposed a 'cap' on the allowances conferred and payable prior to this provision. Such regulation, in the opinion of the Constitutional Court, made it possible not only to reduce parental allowances by 10 per cent from 1 July 2010, but also to apply additional cuts to these allowances where they exceeded the specific maximum thresholds. Such reduction of the parental allowances granted before the entry of the provisional law into

[547] *Official gazette*, 2009, no. 117–4992.

[548] Constitutional Court ruling of 5 March 2013 (referred to in the Preface).

force (1 January 2010) was not uniform and, therefore, was contrary to the imperative of proportionality, which stems from the principle of a state under the rule of law.

Unemployment insurance benefits, even before the crisis, had some elements that deserved criticism: for example, discrepancy between a required long period of insurance and the period of allowance payment, as well as a very low 'ceiling' on the allowance. The 'cap' on the unemployment insurance benefit imposed by the Provisional Law on Recalculation and Payment of Social Payments was even lower – in any case, this allowance could not exceed LTL 650.[549] Such a regulation was clearly unfair in respect of those individuals who received an average or higher salary during their employment as their protection when they were unable to work became minimal. Although unemployment insurance benefits were cut drastically at the same time when many other social allowances underwent reduction (as the economic crisis started unfolding), the decisions of the state in relation to these allowances were particularly austere. The cuts on social insurance pensions managed to maintain a balance between the contribution of a person to the social insurance system and the amount of his/her income, while unemployment insurance benefits were constrained radically without considering any personal input.

The amount of the sickness benefit was extensively reduced during the crisis. Under Article 14 of the Law on Sickness and Maternity Social Insurance, which came into force in 2009, the amount of the sickness benefit reached only 40 per cent of the reimbursed remuneration of the allowance recipient from the third day through the seventh day of the sickness leave.[550] Such a considerable cut of this allowance may be viewed as inadequate in terms of the protection of social security rights. It is evident that the provision of the Law on Sickness and Maternity Social Insurance that set the amount of the sickness benefit during the economic downturn did not ensure at least minimum adequate social guarantees in the event of a sickness (temporary work incapacity).

The issue of a sickness benefit was excluded from discussions for a long time and even at the time when other social allowances were being restored. It was only on 13 November 2014 that the law amending the Law on Sickness and Maternity Social Insurance[551] introduced the sickness alloeance equal to 80 per cent of the amount of the reimbursed remuneration of the allowance recipient.[552] Although the sickness benefit was not restored to the pre-crisis level, the regulation that had not complied with the justice and minimum social security standards for five years was 'corrected' in this way.

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549 Such limitation was applicable until 31 December 2014; it was the only social insurance allowance in respect of which the provisional law applied for such a long time.

550 The allowance amounted to 85 per cent of the reimbursed remuneration of the person until 2009.

551 *TAR*, no. 2014–17047, 18 November 2014.

552 This law came into force on 1 January 2015.

6.3.3. Changes in social assistance

The crisis had a major impact on the system of support for families in Lithuania. For some time until 2009, depending on the number of children in the family, each child under 18 years of age received a benefit on the basis of the Law on Benefits to Children. The decisions made by the legislator in the face of the crisis, however, resulted in a huge step backwards in terms of benefits to children.

The payment of such benefits was discontinued for families with one or two children above three years old from 1 March 2009;[553] the Provisional Law on Recalculation and Payment of Social Payments of 1 January 2010 provided for benefits payable only to financially deprived families, irrespective of the number of children they were raising. The number of families receiving benefits to children decreased considerably from 2010[554] and has not been restored since then. The legislator amended the Law on Benefits to Children on 1 December 2011[555] and provided that benefits to children were in any case to be linked with income and were to be paid only to children in financially deprived[556] families. Benefit cuts and more stringent entitlement conditions are justified in the times of a crisis as in cases of any other social security benefits. However, a cautious approach should be taken in assessing the retrogressive modifications of the whole system as the system improvement, in particular, bearing in mind that the system of benefits to children has not been restored after the economic downturn.

The change in the regulation of another measure of social assistance provided to deprived persons should be viewed differently. First of all, it should be borne in mind that the legislator did not directly link the changes in the system of financial social assistance provided to financially deprived persons with the economic downturn and the necessity to reduce social benefits temporarily. This circumstance is witnessed by the fact that the most significant system rearrangements took place not at the beginning of the crisis but considerably later. In order to streamline available financial social assistance and increase its efficiency and rationalise the use of national budget funds, a reform of the financial social assistance was launched from

553 *Official gazette*, 2010, no. 41–1933.

554 As a result of income-based benefits in 2009, the number of the recipients of benefits to children decreased from 495 thousand to 107 thousand, or more than four times, until 2012. 'Investicijos į vaikus: Padėkime išsivaduoti iš nepalankios socialinės padėties. Nacionalinių strategijų tyrimas – Lietuva' [Investing in children: Breaking the cycle of disadvantage. A study of national policies – Lithuania]. European Commission, 2014, p. 21 Online access: ec.europa.eu/social/BlobServlet?docId=11648&langId=lt [15 January 2015].

555 *Official gazette*, 2011, no. 155–7350.

556 The law defines a financially deprived family as a family or persons living together whose general monthly income is less than 1.5 of the state supported income amount (LTL 525, *i.e.* approximately EUR 152) per person.

1 January 2012, as envisaged in the Law on Cash Social Assistance for Poor Residents.[557] The provision of financial social assistance for financially deprived residents is implemented under two schemes: as a function of the state (delegated by the state to municipalities) and as an independent function of municipalities. The outcomes of the new arrangements showed positive tendencies – financial social assistance became better targeted and more transparent, and funds started to be distributed in a more rational manner. The number of social assistance recipients in the relevant municipalities decreased by 13.6 per cent, and social assistance expenditure decreased by 20.1 per cent in 2012 compared to 2011.[558] It should be noted that lower social assistance costs were the result of a more stringent assessment of the situation of the applicants rather than the outcome of direct payment cuts; whereas some provisions were even replaced by the provisions more favourable to the recipients of this assistance.

One of the key goals of the restructuring of the financial social assistance system was to increase the motivation of socially supported persons to work. More flexible conditions to receive assistance have been made available to those who truly are in need: financially deprived residents are not required to be registered at the labour exchange in order to qualify for such assistance.

6.4. The public attitude to anti-crisis measures in the area of social security

The conducted public opinion survey aimed at revealing the view of society on the measures taken by the state to overcome the economic crisis, *inter alia*, the reduction of social guarantees. The survey shows that as many as 68.1 per cent of the respondents were exposed to negative effects of the economic downturn. 16.5 per cent reported no negative effect, while the remaining respondents did not express any view and did not reply. A more specific question on the violations of personal rights was replied positively by 53.1 per cent of the respondents (22.4 per cent replied 'yes, considerably', 30.7 per cent – 'yes, to some extent'). When asked to detail what rights had been violated, the absolute majority, even 84.9 per cent, of the respondents mentioned economic and social rights. Moreover, 58.2 per cent of the respondents thought that human dignity had been undermined during the economic downturn. As economic, social and cultural rights are indispensable for human dignity and the free development of personality (Universal Declaration of Human Rights, Article 22), it may be presumed that such an opinion was the result of the violations of social and economic rights in particular.

[557] *Official gazette*, 2003, no. 73–3352; 2011, no. 155–7353.

[558] *Official gazette*, 2013, no. 35–1702.

When asked to detail what human rights had been exposed to most negative effects of the economic crisis which began in 2008, not only the general infringements of economic and social rights, but also specific social security guarantees were indicated: salary and pension cuts were most severe for those with the lowest income as they were unable to live a decent life; reduced pensions, benefits; the right to social welfare, pension cuts; the right to decent old age, *etc*.

The survey results have showed that society undoubtedly treats economic and social rights as most relevant. It is acknowledged that an economic downturn has a considerable impact not only on democracy as such but also on the specific elements of the life of each individual. An economic crisis also has a disproportionate effect on the specific groups of persons and, in particular, those who are most deprived and in social exclusion.[559] It must be admitted that social benefit cuts and, to some extent, the Provisional Law on Recalculation and Payment of Social Payments, exacerbated the situation of a large number of social payment recipients; nevertheless, its adoption was justified considering the financial situation of the state. Certain decisions of the legislator fuelled not only political and public discussions but also undoubtedly contributed to the development of the constitutional fundamental principles underlying the right to social security guarantees.

6.5. Post-crisis decisions

In its critical rulings on social security benefit cuts, the Constitutional Court, *inter alia*, noted that pension cuts should not only be temporary and proportionate, but that, at the same time, as soon as the extraordinary situation comes to an end, the state has the obligation to take action to compensate for the losses resultant from the reduced amounts of the payable pensions.

It is true that a large majority of social security payments were restored during the post-crisis period. Some social allowances have not been restored to the pre-crisis regulation level as a new specific regulation has been introduced (*e.g.*, in relation to sickness and maternity social insurance allowances, unemployment insurance benefits). The issue of compensation for pensions, however, remains relevant and calls for the attention of the legislator.

The position of the Constitutional Court regarding the necessity to compensate for the losses suffered in the aftermath of the crisis due to the reduced pensions was determined by the approach to pensions as property. The obligation was imposed to 'compensate for the losses fairly within a reasonable period of time'.[560] The Law on Compensation for State Social Insurance Old-age Pensions and State Social Insurance Work Incapacity (Invalidity) Pensions

[559] European Parliament resolution of 18 April 2013 (referred to in the Preface).

[560] Constitutional Court ruling of 6 February 2012 (cited above).

was adopted on 15 May 2014.[561] It laid down the procedure for compensating for the losses incurred as a result of the reduced state social insurance old-age pensions and work incapacity pensions. The main provisions of this law pertaining to compensation for pensions embrace several fundamental principles. Firstly, the law sets a specific period for compensation, namely, 2014–2016, when a specific percentage of the reduced pensions should be disbursed to their recipients. Secondly, the aforementioned law obligates the state to return the whole amount of the pension cut. Thirdly, a specific amount of pension cuts is compensated only to those persons who were subject to such cuts only as a result of the payment amounts they received, irrespective of the insured income they received at that time. This means that the pensions of employed pensioners, which were subject to greater cuts, which, in their turn, were later ruled to have been anti-constitutional by the Constitutional Court, cannot be compensated according to the law at issue. Although the position of the legislator showed the willingness to comply with the conditions laid down by the Constitutional Court,[562] the provisions of the law deserve criticism from the perspective of the constitutional jurisprudence.

It should be noted that one of the requirements formulated by the Constitutional Court for the regulation of pension cuts and compensation is the principle of justice.

The Constitutional Court ruling of 6 February 2012 (cited above) reveals a clear position that the legislator must provide for a mechanism of just compensation for the losses incurred, due to the reduction of old-age pensions, by the persons to whom those pensions had been granted and paid, as well as that, under that mechanism, the state is obliged to compensate *fairly* the affected persons for the losses resultant from pension cuts within a reasonable period of time as soon as the exceptional situation comes to an end. It is namely this obligation to 'compensate fairly' that has triggered discussions as to what should be done to satisfy the interests of the persons exposed to social payment cuts while at the same time ensuring that public interests are not undermined by such actions. Such a case, apparently, implies not only legal but also economic interests which must be defended and satisfied by legitimate means. The wording 'compensate fairly' should not be understood narrowly as a direct equivalent of a specific payment amount. Regardless of the economic possibilities, such 'reimbursement' for a specific benefit amount to specific persons would meet the expectations and interests of these individuals alone and would hardly ensure a proper balance between public interests.

The effort to strike the balance between the interests of separate individuals and the remaining society members may be noticed in the Government-

[561] *TAR*, no. 2014–05572, 21 May 2014.

[562] Explanatory note. Online access: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=470153&p_tr2=2 [15 January 2015].

approved Concept of the procedure for compensating for reduced state social insurance old-age pensions and state social insurance work incapacity pensions.[563] The principles of compensation for pensions, as laid down in the concept, should ensure the implementation of the principle of justice. It should be noted that there were considerable differences between the compensation principles and methods as set out in the concept and those provided for in the Law on State Social Insurance Old-Age Pensions and State Social Insurance Work Incapacity (Invalidity) Pensions; the concept was closer to ensuring justice. Firstly, the concept stipulated that the cuts of social insurance old-age and work incapacity pensions would be compensated by pension increases, once they have been increased to the level established before the reduction, rather than by the obligation to repay the reduction amount over a specific period of time. Secondly, it was envisaged that, within 5 years after the beginning of the compensation procedure, the social insurance old-age and work incapacity pensions of the persons who were subject to such cuts would be at least 5 per cent higher than their pension in 2008. The assessment of the impact of such an increase, as estimated using life expectancy indicators, shows that it would make it possible to compensate the absolute majority for the incurred losses within 5–7 years. In addition, the concept defined the economic circumstances necessary to start the compensation process: compensation should start when the public finance situation is sufficiently good to enable the fulfilment of this obligation sustainably within the compensation period.

It should be admitted, however, that the Law on Compensation for State Social Insurance Old-Age Pensions and State Social Insurance Work Incapacity (Invalidity) Pensions no longer reflects the principal provisions laid down in the concept. Firstly, the time period specified in the law to compensate for the pensions is extremely short; secondly, the law deals not with pension increases in general but with the straightforward returning of the whole reduction amount; thirdly, the law is devoid of any economic rationale whether the public finances of the state allow for the actual compensation for pensions from 2014; and, finally, the most distinct deficiency in the provisions of the law at issue is their 'silence' on the compensation of pensions for persons whose pensions have been cut to a greater extent and who have certain insured income. In this way the legislator has generated the situation where the mechanism for compensation is clear and specific in respect of the persons who were subjected to legitimate pension cuts (as acknowledged by the Constitutional Court), while those in respect of whom the pension cuts were unlawful (in conflict with the Constitution) have been excluded from the scope of any specific commitments assumed by the state.

Such a situation should be certainly corrected. In this case, account should be taken of the interpretation provided by the Constitutional Court[564]

[563] *Official gazette*, 2010, no. 82–4333.

[564] Constitutional Court decision of 7 March 2014. *TAR*, no. 2014–2908, 10 March 2014.

that the losses incurred after old-age pensions had been reduced by means of the provisions of a law and subsequently declared to have been in conflict with the Constitution should be fully compensated for, while the losses resultant from the provisions of a law held to be in line with the Constitution should be compensated fairly, according to the capacity of the state, although not necessarily to full extent. The legislature should set the starting date for the payment of compensation and a reasonable period of time during which such losses will be compensated for. It should take account of the consequences of an extreme situation and the capabilities of the state, *inter alia*, various obligations assumed by the state in relation to financial discipline and, thus, to the imperative of balancing the revenue and expenditure of the state budget. The relevant draft law was submitted to the Seimas only on 30 April 2015. Thus, there had been legal uncertainty for almost a year after the adoption, in May 2014, of the Law on Compensation for State Social Insurance Old-Age Pensions and State Social Insurance Work Incapacity (Invalidity) Pensions. As a matter of principle, this uncertainty will continue until the provisions of the newly proposed law are enacted.

Summary

Social security guarantees, by embracing a distinct economic dimension, are highly sensitive to economic factors in place in the state. On the one hand, favourable economic conditions allow the legislator to improve the guarantees of the social security system and tailor them to personal needs. When an economic situation shows the indications of recession, some social guarantees have to be revised, their regulation has to be corrected or even cardinal measures have to be taken – to reduce the granted social benefits. The economic downturn compelled the legislator to deal with important issues in the area of social security. The regulation of social rights and individual social guarantees has received considerable public interest and reaction. One of the first legal acts resultant in the cuts of social security benefits was the Provisional Law on Recalculation and Payment of Social Payments. This law laid down the procedure for recalculating state pensions and state social insurance pensions and for paying these pensions to persons with insured income, also the procedure for granting and recalculating maternity/paternity (parental) allowances, as well as unemployment social insurance benefits, and determining the new maximum amount of reimbursable remuneration in order to calculate social insurance allowances, as well as the conditions and amounts of benefits to children, and also limitations on the amounts of other social security payments.

Although the aforementioned law aggravated the situation of a large number of benefit recipients to a certain extent, its adoption was justified

during the crisis. The Provisional Law on Recalculation and Payment of Social Payments introduced specific limitations on the payment of pensions. Pensions and their payments underwent cuts, except those below a specific threshold. Pension recipients with insured income were subject to higher pension reduction. This has been ruled to have been in conflict with the Constitution by the Constitutional Court. Although following the case-law of the Constitutional Court, just compensation for pension cuts at the end of the economic downturn was to be a measure of the legitimacy of these cuts, this issue has not been solved yet in a proper manner. The adoption of the Law on Compensation for State Social Insurance Old-Age Pensions and State Social Insurance Work Incapacity (Invalidity) Pensions has led to the situation where the mechanism for compensation is clear and specific in respect of the persons who were subjected to legitimate pension cuts, while those in respect of whom pension cuts were unlawful (in conflict with the Constitution) are still excluded from the scope of the commitments assumed by the state.

The decisions made concerning cumulative pension contributions considerably influenced the future guarantees of the recipients of pensions. The Constitutional Court applied less stringent criteria to the cumulative pension system (contributions). The Constitutional Court held that the reduction in contribution amounts was justified under the crisis conditions. Differently from pensions, however, the compensation mechanism should not be understood as the 'reimbursement' of individuals for a specific amount.

The limitations set on the amounts of sickness, parental and unemployment allowances stirred major discussions. Although the cuts in the amounts of the granted allowances were justified, the 'double' reduction of payments for some groups of persons was declared to have been anti-constitutional. Although some allowances were restored, that restoration was rather lengthy.

The crisis had a considerable impact on the system of assistance for families in Lithuania. Although an adequate universal system of benefits to children had been achieved in Lithuania by 2009, a step backwards was made in the aftermath of the crisis. The range of recipients of these benefits was narrowed with the validity beyond the crisis period. The decisions made in respect of the benefits to children remained in place after the crisis as a permanent system. In terms of the present system (as well as that of the crisis), it can be noticed that no universal scheme of benefits to children that would be independent of the property situation has been retained.

It should be recognised, however, that the solutions opted for during the crisis also had a positive effect. The improvements of the procedure for granting and controlling social assistance payments for financially deprived persons has served the purpose and survived the crisis as a permanent payment system of social benefits and compensations. The Provisional Law on Recalculation and Payment of Social Payments was not the only means of important changes in the social security system. Some long-term solutions

concerning social benefits did not appear evidently related to the economic downturn of that time; however, they have had a special significance and impact on future social security measures, such as, for example, the increase in the pensionable age.

Irrespective of the fact that society has been highly sensitive to the reduction in the scope of social security guarantees and not all measures taken by the legislator have passed the 'exam' of the Constitution, the Lithuanian lawmaking, constitutional jurisprudence and the science of law have undoubtedly learnt many lessons and received impetus for further development in the area of securing the rights, *inter alia*, social rights of individuals.

Conclusion

Economic and social human rights and their protection are always at the heart of state policies and law. In parallel to civil and political rights, economic and social rights are enshrined in multiple international, regional and national documents. One of the primary legal acts devoted exclusively to social rights is the European Social Charter (revised), which includes an almost finite list of social rights. The rights consolidated in the Charter can be broken down to several major groups: (i) individual rights of workers, such as the right to work, to safe and healthy working conditions and a fair remuneration for work; (ii) collective rights of workers, such as the right to freedom of association and the right to bargain collectively, the right to information and consultation; (iii) general social security guarantees, such as the right to health and social security, social and medical assistance, the right to protection from poverty; (iv) social welfare guarantees for individual categories, such as children and young persons, the disabled and the elderly, mothers and migrant workers; (v) other social guarantees, such as the right to housing, the right to vocational guidance and training.

Similarly, the key economic and social human rights are also enshrined in the Constitution. As a result of the economic crisis, several constitutional social rights were affected to a smaller or larger extent, and this impact has amounted to certain violations of human rights in social life. This claim is supported by the analysis of the public opinion survey presented in the study. Among the factors affecting individuals most and, thus, possibly violating human rights, the following were mentioned: remuneration cuts, decreased chances to obtain employment, excessive workloads, cuts in pensions and other social benefits. On the other hand, in the face of the economic downturn, the legislator was not only entitled, but also obliged to resort to, at times, even radical actions. However, in accordance with the doctrine of the

Constitutional Court, which draws, *inter alia*, on international standards as well as international and foreign case-law, even when acting under conditions of a compelling necessity, the legislator is still bound by the underlying principles of the rule of law, enshrined in the Constitution, and may not encroach upon individual human rights on the excuse of the common public interest.

Labour relations. During the four years of the crisis, at least three attempts were made to reform the legal regulation of labour relations. All these attempts resulted in more or less superficial amendments of legal norms, which did not create any more favourable or flexible labour market for business, but instead sparked many public debates among employees and trade unions. As the state failed to make any crucial and landmark decisions, the labour market resorted to the so-called self-regulation, *i.e.* employers (business) saw no obstacles for undermining the content and scope of employee rights and guarantees, often balancing on the brink of illegality. No evidence exists to prove whether such tactics helped businesses to stay afloat. The prevailing moods in the public, among the employed and the unemployed, were overly pessimistic. It may be claimed that a negative atmosphere, which built up at the time of the economic crisis both in moral and economic terms, the actions undertaken by employers, as well as the position of the Government, all paved the way for the fundamental breaches of labour rights.

Social partnership. At the time of the crisis, or, more precisely, during its inception phase, the Government made several steps in a wrong direction, which had tremendous consequences for social partnership relations in Lithuania. The governmental rhetoric of that time was defiant. In other words, the Government selected a one-way communication neglecting social dialogue and collective bargaining altogether. Later the Government eased its tone and an unprecedented result was the signing of the National Agreement, whereby attempts were made to agree on the measures to facilitate solutions of financial, economic and social issues emerging in the aftermath of the crisis. Unfortunately, not an inconsiderable part of social partners refused to sign up to it; later on, despite the long-lasting negotiations, it was neither extended nor led to any other new agreement.

At the time of the crisis, the institution of democracy at work was neglected; employees were divided and devoid of a single voice on core social, economic and employment issues. These factors triggered a low appreciation of work due to disregard for employee interests during decision-making processes on strategic social and economic matters, which consequently, in a certain sense, entailed a real risk of a social rather than economic crisis in Lithuania.

Civil service. The Government and the Seimas apparently ignored the principles formulated by the Constitutional Court in the constitutional doctrine, although these principles were mandatory in resorting to austerity measures in the area of public finances so as not to compromise the fundamental values and the rights and freedoms of individuals enshrined in

the Constitution. In other words, no rational or impartial consideration was given to the constitutional criteria of social solidarity, non-discrimination and proportionality. In principle, the political standpoint pursued during the crisis that those better off should contribute more to anti-crisis measures was rejected by the Constitutional Court. The essential position, as expressed by the Constitutional Court, was that the above-referred principles should be applied in an integrated manner and that none of them may deny other principles or the right of individuals to exercise their rights protected by the Constitution. The study has revealed that, as a result of austerity measures and the remuneration cuts applied to civil and public servants, certain individual rights were undermined or reduced below the constitutionally acceptable level. In other words, by way of encroaching upon the integrity of the constitutional principles, which constitute the guarantee of human rights and dignity, a real threat was posed to the social rights of individuals.

Social security. Pensions. Despite the fact that the situation of most of the recipients of pensions and benefits was considerably aggravated by the Provisional Law on Recalculation and Payment of Social Benefits during the crisis, the adoption of the law was justifiable on grounds of an extraordinary economic situation of the state. Based on the assessment of the right to pension as the right to property, as interpreted by the Constitutional Court, it follows that pensions may be reduced only in exceptional circumstances, when there is an extremely difficult economic and financial situation in the state. Any regulation introducing larger cuts to pension benefits in respect of actively retired pensioners (who receive insured income) is contrary to the constitutional principles. At the same time, the Constitutional Court has ruled that, when reducing old-age pensions, the legislator is obliged, within a reasonable period of time, to provide for a mechanism for the reimbursement of losses incurred by the individuals who have been granted and paid such pensions. The issue of reimbursement for the reduced pensions has remained highly relevant to this day.

Social insurance allowances. Legal amendments adopted at the time of the crisis also affected short-term social security benefits. The largest impact was made on parental, unemployment and sickness (sick-leave) allowances. Parental allowances were subject to two limitations: a maximum benefit was fixed and the 'cap' was decreased. Although both measures were justifiable, cases where the same allowance was reduced twice were declared unconstitutional. Account was taken of the fact that the status of parental allowances *vis-à-vis* pensions was not identical from the constitutional point of view. With regard to the former, the Constitutional Court did not set any reimbursement requirement. Unemployment benefits were not extensively ensured already in the pre-crisis period. At the time of the crisis, the 'cap' on a (maximum) unemployment benefit was further reduced to the level that can reasonably be argued as being incapable of ensuring appropriate social security in the event of unemployment. The same holds true for sickness

benefit, where part of the benefit was cut to the level hardly capable of ensuring an appropriate security.

Social assistance benefits. The crisis had a huge impact on the family social assistance system. A universal child benefit system not linked to income level, which had been completed shortly before the downturn, was abandoned during the crisis. The range of recipients eligible for child support benefits was narrowed upon the introduction of the criterion of family income assessment. Even after the crisis, the former system was not restored. A completely different situation unfolded in the area of cash support for low-income residents (social benefits and reliefs). More stringent eligibility criteria for granting benefits and control over payments were balanced with the actions facilitating the conditions of the specific groups of individuals. Among other things, the delegation of the function of social assistance organisation to municipalities passed the test of the crisis.

Part V

POLITICAL AND PERSONAL RIGHTS

Indrė Isokaitė
Vygantė Milašiūtė

1. The concept of political and personal rights. The scope of the research

1.1. The concept of political and personal rights

For the purposes of this paper, political and personal rights refer to what international human rights law defines as civil and political rights. A catalogue of these rights can be found in the International Covenant on Civil and Political Rights at UN level and in the ECHR at European level; these rights (as well as others) are also enshrined in the EU Charter of Fundamental Rights. In summary, the range of personal rights is as follows: the right to life; the right to the integrity of the person; the right to freedom from torture and inhuman or degrading treatment or punishment; prohibition of slavery and forced labour; the right to liberty and security; the right to respect for private and family life (the protection of personal data, the right to marry and to found a family); the freedom of thought, conscience and religion; the freedom of expression (and information); the freedom of assembly and of association; the right to property; the freedom of movement; the right to asylum. Political rights are: the active and passive electoral rights; the right of legislative initiative; the right to petition.

1.2. The scope of the research

It is hardly surprising that the public opinion survey, carried out for the purposes of this research, showed that the respondents believed that the crisis had most affected the economic and social rights of people, while the impact

on civil and political rights was significantly weaker in the opinion of society and the lawyers who were interviewed separately (as the target group).[565] However, there is little, if any, doubt that civil and political rights were also affected by the economic downturn, even though the crisis was not the only factor weighing on these rights, and that the impact was more likely to have been a multifaceted, complex and subtle one.

The purpose of this part of the study is to provide a review of general issues relating to the impact of the crisis on the protection of political and personal rights and an in-depth analysis of the challenges of the crisis in two specific areas: hate crimes and conditions of detention, which have been chosen for the following reasons.

First, the crisis has had a negative impact on the political climate and the perception of democratic and legal values. A typical representation of this impact has been the growing intolerance and hatred endangering the protection of all rights, including political and personal (civil) ones. Changes in the manifestation of the most serious forms of discrimination – racism and xenophobia – are mostly analysed in the context of the freedom of expression, since crossing its boundaries falls under the category of the so-called hate speech. Nevertheless, the tendencies of the prevalence of other hate crimes are also analysed.

Second, the crisis led to particular financial difficulties in securing civil (personal) and political rights insofar as financial resources are necessary for the implementation of these rights. According to the CoE human rights experts, who looked into the impact of the crisis on human rights, the most extensive rights from a financial perspective are related to the guarantee of conditions of detention in accordance with Article 3 of the ECHR and the avoidance of excessive length of court procedures under Article 6 of the ECHR.[566] Consequently, it can be assumed that protecting these two categories of rights during the crisis was the most challenging task for a number of countries, including Lithuania. Therefore, Chapter 4 will examine in more detail how Lithuania tried to ensure the adequate conditions of detention in the places of deprivation of liberty during the crisis.

In addition to these rights, the protection of the rights of vulnerable persons and the protection of private life (the protection of personal data)

[565] In response to the question 'Which of your rights were violated during the economic crisis?', only 8.4 per cent of the respondents indicated civil political rights, while personal rights were mentioned by 18.7 per cent, and as many as 84.9 per cent referred to economic and social rights. The results of the surveyed lawyers were the following: 5.9 per cent believed that their political civil rights were violated during the downturn, 41.2 per cent referred to personal rights and 90.2 per cent indicated economic and social rights (A/TAP 9, 136). During the survey, a distinction was made between personal and political civil rights without any further explanation of their concepts in order to cover all possible categories of rights and enable the respondents to identify those rights that, in their opinion, were affected.

[566] The impact of the economic crisis and austerity measures on human rights in Europe. Preliminary study on existing standards and outstanding issues, § 5; see also The impact of the economic crisis and austerity measures on human rights in Europe. Draft feasibility study (both referred to in the Preface) [14 March 2015].

are analysed from the aspects referred to in the opening subchapter and the examples of the impact of the crisis on other rights are presented.

The present research does not aim at providing a detailed and comprehensive analysis of each political and personal right. In view of the above-mentioned indirect effect of the crisis on all the rights within this category, the effect of the crisis on the rights other than those singled out in the analysis is assessed cumulatively, by highlighting the scope of the obligations of the state in this area, the organisation of the activities of authorities and the assessments of the situation in Lithuania provided by human rights organisations, state institutions and society.

1.3. The level of the scientific analysis of the problem

As already mentioned (in the Preface and previous parts of this book), researchers have stated that the economic downturn affected the right to participate in public affairs, the transparency of decision-making (mostly on austerity measures), the freedom of assembly (in the event of the suppression of social protests) and media freedom,[567] also the negative consequences of cuts in the funding of human rights institutions due to the crisis, the increased threat of the outbreaks of racism and xenophobia,[568] as well as the impact on personal freedom and security and the effect on criminal policies.[569] More generally, one author argues that the declining resources due to the indivisibility and correlation of human rights have subtle implications significant for civil and political rights in general and specifically for the rights such as the freedom of assembly, access to justice and the right to liberty and security.[570] Other scholars point out the dangers of putting up with the violations of human rights caused by the crisis (for instance, when the police use excessive force against protestors; violence against migrants; ill-treatment of asylum seekers) such as inequality, xenophobia and the legitimisation of violence against minorities and vulnerable groups.[571]

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[567] 'Safeguarding human rights in times of economic crisis'. Council of Europe Commissioner for Human Rights. Issue paper, pp. 20–22 (cited in the Preface) [11 November 2014].

[568] 'Protecting fundamental rights during the economic crisis'. European Union Agency for Fundamental Rights. Working paper, 2010, pp. 29–32, 49; 'The European Union as a community of values: Safeguarding fundamental rights in times of crisis'. Annual report. European Union Agency for Fundamental Rights. 2012, pp. 19–21.

[569] Sakalauskas, G. (ed.) *Baudžiamoji politika Lietuvoje: tendencijos ir lyginamieji aspektai* [Criminal policy in Lithuania: Tendencies and comparative aspects]. Vilnius, 2012.

[570] Urumova, I. 'When 'economic' means much more: Researching the nexus between the economic recession and the implementation of civil and political rights' in *European yearbook on human rights*, 2014, pp. 420–421.

[571] Skogly, S. 'The global financial crisis: A human rights meltdown?' in Maynard, P. D. and Gold, N. (eds.). *Poverty, justice and the rule of law*. London, 2013, p. 85.

The studies conducted in Lithuania on the situation of civil and political human rights during the crisis do not directly focus on the crisis factor, but the impact of the crisis is discussed or can be inferred in some cases. For instance, some researchers argue that the producers of public information were severely affected by the economic downturn, which began in 2008, triggering an increase in the number of amateurs preparing the media content and the expansion of the limits of the freedom of speech as the public space became accessible to every person.[572] As far as combating domestic violence is concerned, the lack of special technical devices, which should be available to police officers (a device detecting the location of the abuser or an alarm signal), has been identified as one of the reasons for failure to adequately secure the rights of victims in Lithuania.[573] However, the lack of funding has not been indicated as the most alarming factor that could be considered as the root cause of inappropriate conditions of detention. The analysis of the issue of the conditions of detention refers to the lack of financing for the renovation of all police arrest houses as the underlying cause for the decision to tackle the problem of poor conditions in police arrest facilities by reducing the number of arrest houses and closing down those in the worst physical condition, so that the available financial resources could be used to improve the physical conditions for detainees. However, again, it is not the lack of funding, but 'carelessness and slackness of the state in addressing the problems' that is identified to be the factor of most concern and the cause for poor conditions of detention, and this, according to one author, can be proven by the fact that, on its repeated visits to Lithuania, the delegation of the EU Committee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CPT) would identify the same problems, *i.e.* there was virtually no improvement in conditions, even though the problem had been identified.[574]

The CoE has identified access to justice (in particular, concerning the lack of legal aid, lengthy proceedings and failure to enforce court judgments), prison overcrowding, racism (as a consequence of 'scapegoating' for economic problems) and the situation of vulnerable groups as the problem areas of political and civil rights affected by the crisis, has drawn attention to the links between human rights violations and reduced funding, as well as the importance of the role of national human rights institutions and non-

572 Mulevičius, M. 'Įsitikinimų išraiškos ir informacijos laisvė' [Freedom of expression and information] in Beliūnienė, L. *et al*. *Aktualiausios žmogaus teisių užtikrinimo Lietuvoje 2008–2013 m. problemos: teisinis tyrimas* [The most relevant problems of ensuring of human rights in Lithuania in 2008-2013: Legal research]. Vilnius, 2014, p. 84.

573 Zaksaitė, S. 'Apsauga nuo smurto artimoje aplinkoje' [Protection against domestic violence] in *Ibid*., p. 66.

574 Nikartas, S. 'Teisė nebūti kankinamam ir nepatirti žiauraus, nežmoniško ar žeminančio elgesio ar nebūti taip baudžiamam: įkalinimo sąlygų kontekstas' [Right to be protected from torture and other cruel, inhuman or degrading treatment or punishment in the context of prison conditions] in *Ibid*., p. 37.

governmental organisations during the crisis and austerity regime.[575] The CoE Commissioner for Human Rights has drawn attention to the situation of young people, noting that high unemployment also undermines their right to equal treatment and the right to participate in public life.[576] The ECtHR has held that the austerity measures adopted to deal with the crisis affected, in individual cases, the right to property[577] and that, although the crisis has had a particular impact on certain regions of the world, throwing up new challenges for European countries in terms of immigration control, this cannot absolve a State of its obligations to ensure protection against torture, inhuman and degrading treatment.[578]

2. Political and personal rights on the eve of and during the crisis

2.1. On the eve of the crisis

As far as the level of the protection of personal and political rights on the eve of the crisis is concerned, the assessment by the UN Human Rights Committee (UN HRC), made in early 2004, of the periodic report submitted by Lithuania on the implementation of the International Covenant on Civil and Political Rights is worth noting.[579] This assessment is important in describing the protection of civil and political rights under normal conditions, as the run-up to EU membership was the period of top political priority for the protection of human rights in Lithuania, and the protection of human rights reached the highest possible level for that period.

The UN HRC welcomed the efforts of Lithuania to reform the legal system, especially the setting up of the parliamentary Human Rights Committee and

[575] The impact of the economic crisis and austerity measures on human rights in Europe. Preliminary study on existing standards and outstanding issues (cited above and referred to in the Preface) [14 March 2015]; Annual report on ECRI's activities covering the period from 1 January to 31 December 2013, doc. no. CRI(2014)32. European Commission against Racism and Intolerance, 2013.

[576] 'Youth human rights at risk during crisis'. Council of Europe Commissioner for Human Rights, 3 June 2014. Online access: http://www.coe.int/en/web/commissioner/-/youth-human-rights-at-risk-during-the-crisis [27 January 2015].

[577] Tulkens, F. 'The European Convention on Human Rights and the economic crisis: The issue of poverty'. Distinguished lecture delivered on the occasion of the XXIV Human Rights Law course of the Academy of European Law on 24 June 2013. European University Institute working paper AEL 2013/8, p. 3. Online access: http://cadmus.eui.eu/handle/1814/28099 [14 October 2014].

[578] *Ibid*., p. 13.

[579] UN International Covenant on Civil and Political Rights. Consideration of reports submitted by States Parties under Article 40 of the Covenant. Concluding observations of the Human Rights Committee: Lithuania, doc. no. CCPR/80/CO/LTU, 4 May 2004.

three ombudspersons' institutions (the Seimas Ombudsmen's Office, the Equal Opportunities Ombudsman and the Ombudsman for Children). The following concerns were identified: (i) a low level (small percentage) of the implementation of the recommendations of the Seimas Ombudsmen; (ii) the potential non-compliance of anti-terrorist measures with human rights by limiting the application of the non-refoulement principle with respect to persons considered to be a threat to the state; (iii) discrimination, poverty, unemployment and exclusion from the public life of the Roma minority; (iv) insufficient protection, especially of women and children, against domestic violence; (v) the absence of a mechanism for independent investigation of complaints against ill-treatment by police officers (disproportionate use of force and other abuses of authority); (vi) the possibility of the detention of suspected and convicted minors together with adults under exceptional circumstances; (vii) insufficient support for young women to avoid unwanted pregnancies and HIV/AIDS; (viii) the possibility of detention for administrative offences, an unclear distinction between different types of detention (*e.g.*, detention for 48 hours and pre-trial detention), possible non-compliance of legislation providing for different types of detention (*e.g.*, compulsory psychiatric care, detention of immigrants) with the requirement to ensure the judicial review of detention; (ix) insufficient fight against trafficking in human beings (a low number of criminal proceedings in comparison with the number of known cases of human trafficking); (x) interference with the requests of asylum seekers from certain countries for asylum when crossing the state border; unclear criteria applicable in 'exceptional cases' where asylum seekers may be detained and a low number of satisfied asylum applications (compared to the number of the applications submitted); (xi) differences in the registration of religious communities (possible discrimination); (xii) criteria for using alternative military service and the duration of such service compared to military service; (xiii) significant restrictions on the right to strike. Many of these considerations remained relevant to the situation of political and personal rights in the subsequent two-year period before the crisis, *i.e.* in 2005–2007.

An equal implementation of personal and political human rights enshrined in international and national law, regardless of an individual's gender, age, sexual orientation, disability, racial or ethnic origin, religion, convictions and other grounds, is an essential condition for democracy, personal development and the cultural, economic and social progress of society. The annual reports of the Office of the Equal Opportunities Ombudsman, the service supervising the enforcement of equality and non-discrimination, covering the period under review indicate that the number of complaints concerning possible discrimination was growing (partly due to the fact that the Law on Equal Opportunities,[580] which entered into force on 1 January 2005, provided for the right to complain against possible discrimination not only on the grounds of gender, but also on the grounds of an individual's age, sexual orientation,

[580] *Official gazette*, 2003, no. 114–5115 (as last amended).

disability, racial or ethnic background, religion or convictions). In summary, the number of complaints and the issues raised in these complaints in 2005–2007 (as shown in the tables below) suggest that complaints relating to the violations of the equal rights of women and men (23 per cent in 2005, 24 per cent in 2006 and 26 per cent in 2007) dominated, being followed by complaints concerning discrimination on the grounds of age (22 per cent in 2005, 19 per cent in 2006 and 10 per cent in 2007), racial or ethnic background (*e.g.*, 14 per cent in 2006) and sexual orientation (*e.g.*, 11 per cent in 2007).[581]

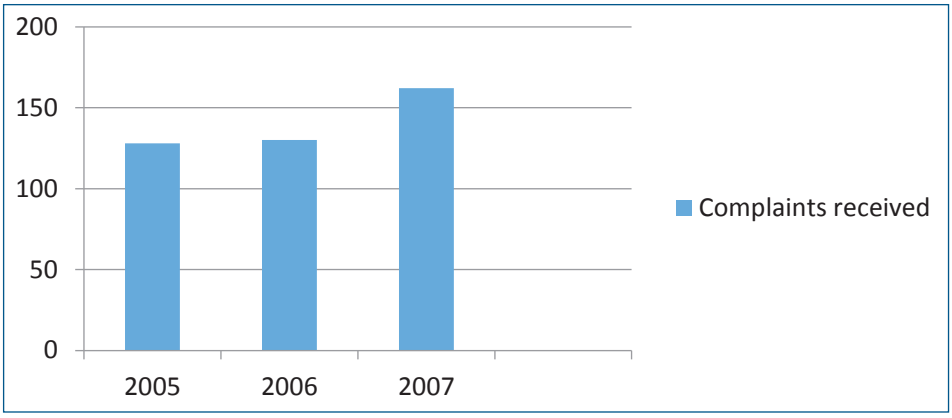

Diagram 1. *Complaints received by the Office of the Equal Opportunities Ombudsman in 2005–2007*

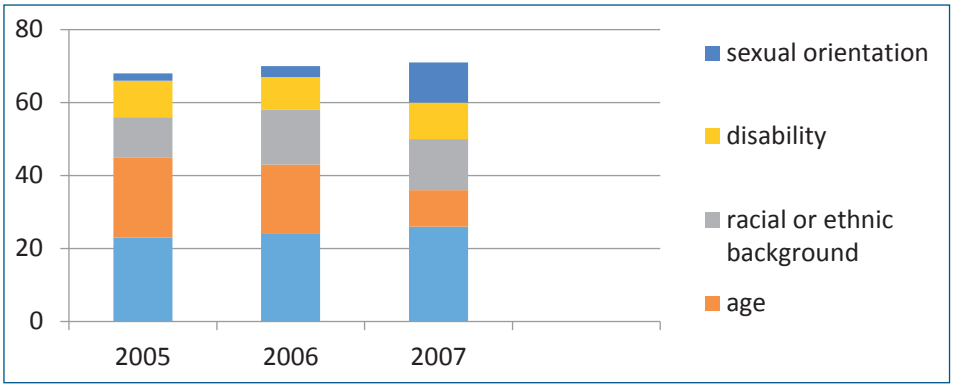

Diagram 2. *Issues raised in the complaints received by the Office of the Equal Opportunities Ombudsman in 2005–2007 (most common grounds, %)*

[581] Annual reports of 2005, 2006 and 2007 of the Office of the Equal Opportunities Ombudsman. Online access: http://www.lygybe.lt/lt/metines-tarnybos-ataskaitos.html [12 January 2015].

2.2. Response to the crisis and political and personal rights: an overview

2.2.1. Continuing process of assuming new commitments

The process of preparing to accede to international treaties providing for the obligation to ensure certain aspects of civil and political rights (*i.e.* the adoption of national legal provisions necessary to ensure the implementation of international obligations under the particular international treaty), as well as the process of acceding to such treaties (signing and ratification of these treaties), did not stop during the crisis. During this period, Lithuania acceded to the UN Convention on the Rights of Persons with Disabilities,[582] the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment[583] and the International Convention for the Protection of All Persons from Forced Disappearance[584] and signed the CoE Convention on Preventing and Combating Violence against Women and Domestic Violence.[585] In addition, the entry into force of the Treaty of Lisbon during the crisis made the EU Charter of Fundamental Rights legally binding on Lithuania as a EU Member State, and Lithuania, together with other Member States, participated in adopting and took steps in implementing the EU Strategic Framework on Human Rights and Democracy and the EU Action Plan on Human Rights and Democracy[586] (*e.g.*, drafting of the national plan for ensuring respect for human rights in business, which was aimed at implementing the UN's guiding principles on business and human rights,[587] began in 2013 and was completed in 2014).[588] Therefore, Lithuanian law provides for a wide range of human rights, including those within the

[582] *Official gazette*, 2010, no. 67–3350.

[583] *Official gazette*, 2013, no. 130–6619.

[584] *Official gazette*, 2013, no. 46–2253.

[585] 'Užsienio reikalų ministras pasirašė Europos Tarybos konvenciją dėl smurto prieš moteris' [The Foreign Affairs Minister signed the CoE Convention on Preventing and Combating Violence against Women] BNS. Online access: http://www.delfi.lt/news/daily/lithuania/uzsienio-reikalu-ministras-pasirase-europos-tarybos-konvencija-del-smurto-pries-moteris.d?id=61574708#ixzz3PX4fb3qe [22 January 2015].

[586] EU strategic framework and action plan on human rights and democracy, EU doc. no. 11855/12, 25 June 2012. It is an EU external policy document. However, since the aim is to avoid the application of different standards of human rights in EU external and domestic policies due to the universal nature of human rights, action to protect human rights at national level may be necessary for the purpose of implementing some EU external policy actions.

[587] Guiding principles on business and human rights: Implementing the United Nations 'Protect, respect and remedy' framework. Human Rights Council, doc. no. A/HRC/17/31, 21 March 2011.

[588] The actions of Lithuania in implementing the UN guiding principles on business and human rights were approved by the Government at its meeting of 18 August 2014.

category of civil and political rights; this range was not narrowed during the crisis and, on the contrary, was further expanded, *i.e.* legally, the scope of human rights did not contract during the crisis and the state continued to do what was necessary for the implementation of human rights in practice.

2.2.2. The protection of rights during the crisis: the view of international organisations

For the purposes of analysing the level of the protection of civil and political rights during the crisis, it is important to draw attention to the assessment made by the UN HRC in 2012 after considering the periodic report submitted by Lithuania on the implementation of the International Covenant on Civil and Political Rights.[589] The UN HRC welcomed the adoption of significant anti-discrimination legislation (the Law on Equal Opportunities and the amendments to the Criminal Code (CC) qualifying xenophobic, racial and discriminatory motivation as an aggravating circumstance) as well as the undertaking of additional human rights obligations under international instruments. The following aspects were identified as the principal matters of concern: (i) the absence of a national human rights institution in line with the Paris Principles;[590] (ii) insufficient funding necessary to ensure the adequate implementation of the Law on Protection against Domestic Violence; (iii) continuing discrimination, poverty, low educational attainment, high unemployment and poor living conditions of Roma; (iv) insufficient fight against the discrimination of LGBT (lesbian, gay, bisexual and transgender individuals); the possibility of interpreting laws in a discriminatory manner, with a particular emphasis on the freedom of expression and the freedom of assembly; (v) potential non-compliance of counter-terrorism measures with human rights; insufficient investigation into information on the secret rendition and detention of terrorism suspects in Lithuania; (vi) the lack of an explicit prohibition on corporal punishment in institutional settings; (vii) trafficking in human beings, with special emphasis on the vulnerability of children living in care homes and families belonging to risk groups; (viii) the frequency and length of administrative and pre-trial detention; the insufficient use of alternatives to imprisonment; (ix) restriction on the application of the non-refoulement principle in respect of persons considered to be a threat to the state and proposals to lower the threshold for the

[589] UN International Covenant on Civil and Political Rights. Consideration of reports submitted by States Parties under Article 40 of the Covenant. Concluding observations of the Human Rights Committee: Lithuania. Report of the UN Human Rights Committee, doc. no. CCPR/C/LTU/CO/3, 31 August 2012.

[590] UN Human Rights. Principles relating to the status of national institutions (The Paris Principles). Adopted by General Assembly resolution 48/134 of 20 December 1993.

recognition of persons as constituting a threat to the state; (x) insufficient legal support for persons deprived of their legal capacity; the absence of legal representation of persons in proceedings regarding their legal capacity; the absence of the right of individuals declared legally incapacitated to initiate a court procedure for the review of their legal capacity; the authority of courts to authorise procedures such as abortion and sterilisation to be performed on disabled women deprived of their legal capacity; (xi) insufficient fight against crimes committed for xenophobic, racial and discriminatory motives; widespread manifestations of hatred towards national minorities and LGBT individuals, especially on the Internet.

Compared to the pre-crisis period, it is evident that some of the issues and problems remained. In addition, new problems emerged. Interestingly, in its assessment of compliance of Lithuania with the requirements of the Covenant, the UN HRC does not refer to the challenges posed by the crisis. This reflects the theoretical position of international human rights law, as stipulated in Article 2 of the Covenant,[591] that the scope of the duty to ensure political and civil human rights does not depend on the resources available to the state.

2.2.3. The protection of rights during the crisis: the view of the State of Lithuania

In order to determine how the State of Lithuania itself (its Government) understood the challenges posed by the crisis in the area of ensuring the protection of political and personal rights, consideration should be given to the national report submitted by Lithuania to the UN Human Rights Council, which conducts the universal periodic review of the fulfilment of human rights obligations by UN Member States.[592] This report was drawn up in 2011, *i.e.* during the crisis. The scarcity of public economic resources, as a significant factor in ensuring human rights, is mentioned in the report within the context of the analysis of the right to decent conditions of detention, as well as the freedom to receive and impart information, in particular, through the media, including the new types (it is noted that the state is to ensure that the right to receive and impart information is guaranteed without prejudice

[591] On the nature of the obligations of the States to ensure civil and political rights, see UN Human Rights Committee. General comment no. 31 [80]: Nature of the general legal obligation imposed on the States Parties to the Covenant, 2004. UN doc. CCPR/C/21/Rev.1/Add. 13, § 5: 'obligation to respect and ensure the rights recognized by the Covenant has immediate effect for all States Parties'. The situation is different in the case of economic, social and cultural rights; see UN Committee on Economic, Social and Cultural Rights. General comment no. 3. on the nature of States Parties' obligations, 1990, UN doc. E/1991/23, § 1: 'the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources'.

[592] National report submitted by Lithuania for the universal periodic review to the UN Human Rights Council, approved by the Government on 29 June 2011.

to other human rights, *i.e.* to prevent publishing information that violates an individual's right to privacy (legal protection of personal data), is harmful to minors or instigates discord in society; however, the Office of the Inspector of Journalist Ethics, responsible for ensuring the protection of human rights in the media, is indicated to have faced the necessity to cope with the problem of limited resources).[593] During the discussion of this report at the UN Human Rights Council on 11 October 2011, the Lithuanian delegation referred to the economic crisis as a challenge to the protection of human rights, but underlined the impact of the crisis on economic and social rights (mentioning the reduction in salaries in the public sector and social benefits, approving of the fact that the cuts did not affect the most vulnerable groups of people)[594] and considered that the protection of civil and political rights was sufficient in Lithuania,[595] *i.e.* these rights were deemed to be the area that had not been significantly negatively affected by the crisis. The provided examples attesting to the rights within this category to be adequately protected included the right to the freedom of expression in the context of the freedom of the press[596] (the above-mentioned positive reviews by international non-governmental organisations), as well as the freedom of assembly[597] (the example of the role of Lithuanian courts in ensuring this right in the case of the March for Equality,[598] as well as the example of the rally of trade unions protesting outside the Seimas against the actions of the state[599]). It should be stressed that both

[593] *Ibid.*, § 107.

[594] Report of the Working group on the universal periodic review: Lithuania, 19 December 2011, no. A/HRC/19/15, § 14. Online access: www.tm.lt/dok/ataskaita_Lietuva.pdf [28 July 2014].

[595] *Ibid.*, § 85.

[596] *Ibid.*, § 13.

[597] *Ibid.*, § 86.

[598] See the Supreme Administrative Court ruling of 7 May 2010 in the administrative proceedings no. AS[822]–339/2010: based on Article 11 of the ECHR and the relevant case-law of the ECtHR, the security imposed by the court of first instance, *i.e.* the suspension of the contested order authorising to organise the march was withdrawn holding that it was not reasonable and proportionate to the objective sought in view of the positive duties of the state to ensure that members of minority groups can exercise their freedom of assembly efficiently. This ruling enabled the March for Equality to take place, *i.e.* the right of assembly was protected.

[599] See the Supreme Administrative Court ruling of 23 June 2011 in the administrative proceedings no. A[858]–2457/2011: the Court upheld the decision of the court of lower instance to award damages for the unlawful use of force by police officers resulting in personal injury during the rally organised by the Lithuanian Federation of Labour outside the Seimas on 16 January 2009. Relying on the case-law of the EctHR, the Court ruled that it was the duty of the defendant to prove that the actions (firing riot gun(s)) taken by it (police officers) had been lawful and justified, including conformity to the principle of proportionality in view of the claimant's conduct. The representatives of the defendant failed to provide any evidence during the trial that the use of physical coercion against the claimant had been caused by the violations of law committed by the claimant, including the evidence proving conformity of the use of such coercion to the principle of proportionality; therefore, the Court ruled that the actions of the state (officers) had been unlawful. What we find is that the Court protected from unjustified restriction to the right of freedom of assembly in the protest rally against the state economic policy, even when such a rally later turns into unrest (riots), provided that the behaviour of the person is not aggressive and does not pose a threat to the lives or health of others.

the report of Lithuania[600] and the information supplied during its discussion show the attention of the state to the situation of vulnerable groups, *i.e.* at least the efforts to ensure that the principle of equality is not violated and that vulnerable people are not discriminated against and have access to the necessary support and protection despite the economic and other challenges faced by the state.

2.2.4. The protection of rights during the crisis: the view of society

Personal and political rights are the foundations and a manifestation of democracy; therefore, the public view on democracy also shows how important the human rights in question are for people. The data of the public opinion survey carried out during the study have revealed interesting results. For instance, an absolute majority of the respondents (65.5 per cent) preferred democracy to authoritarian rule (this form of government was chosen by 8.4 per cent, and 26.2 per cent indicated 'difficult to say'). However, when choosing between democracy and economic welfare, the majority preferred economic welfare (25.5 per cent and 52.5 per cent, respectively).[601] Another interesting fact is that as many as 72 per cent of the respondents expressed their disappointment in democracy, while 28.0 per cent held the opposite view. According to the survey results, the percentage of those who still believed in democracy in Lithuania was even smaller (12.6 per cent), while 87.4 per cent of the respondents were disappointed with it. This means that a larger majority of the population prefers economic welfare and the related stable income and employment, as well as the security of social guarantees, that is to say, the majority of society considers personal and political rights less important and, most probably, insufficiently trusts the institutions of democracy to be able to ensure welfare and stability in the context of an economic downturn.

As already mentioned, a small percentage of the surveyed respondents indicated that, during the crisis, there had been a violation of their personal and political rights compared to economic and social rights, but the majority believed that the recession had led to the increased number of the violations of human dignity: 58.2 per cent of the respondents (society), as well as 58.5 per cent of the surveyed lawyers, indicated that dignity had been violated

[600] *Cf.* the structure, chosen by the reporting State, of the National report of Lithuania for the universal periodic review of the UN Human Rights Council (approved by the Government on 29 June 2011): respective chapters deal with gender equality, rights of persons belonging to national minorities, rights of the child, rights of disabled persons, conditions of detention, rights of refugees and asylum seekers, trafficking in human beings and patient rights.

[601] A/TAP 113, 480.

(either severely or slightly). The private sector and public authorities were identified by society as the offenders of dignity in almost equal proportions, 65.5 per cent and 68 per cent, respectively. Therefore, in addition to dignity, the following personal and political rights were identified as most adversely affected by the crisis: the right of the inviolability of the person – 33.6 per cent of the respondents (28.5 per cent of the surveyed lawyers), the prohibition on degrading treatment – 37.3 per cent (31.4 per cent of the surveyed lawyers), the right to liberty and security – 30.8 per cent (31.4 per cent of the surveyed lawyers), the right to respect for private and family life – 32.5 per cent (32.8 per cent, of the surveyed lawyers), the protection of personal data – 37.6 per cent (31.4 per cent of the surveyed lawyers). According to the survey, the Great Recession had had a rather minor effect on the freedom of thought, conscience and religion (the existence of the violations of this right was indicated by 14.6 per cent of the respondents and 15.7 per cent of the surveyed lawyers); in this respect, the right to the freedom of assembly was indicated by 18.6 per cent of the respondents (10 per cent of the surveyed lawyers) and the freedom of association – by 9.4 per cent (7.1 per cent of the surveyed lawyers); a relatively small percentage of the respondents pointed to negative effects of the crisis on the right to seek asylum (6.4 per cent and 8.5 per cent of the surveyed lawyers), the prohibition of discrimination (19.4 per cent and 34.3 per cent of the surveyed lawyers) and the right to participate in elections (9 per cent and 5.7 per cent of the surveyed lawyers). The analysis of the view of the respondents (society) on the changes in the number of the violations of human dignity and specific personal and political rights during the crisis shows that society is not inclined to associate the violations of human dignity with the violations of specific political and personal rights, *i.e.* it is likely that the respondents tend to associate the violations of human dignity with the violations of their economic and social rights, since these were the rights identified by the respondents as most adversely affected by the crisis.[602]

2.2.5. The peculiarities of the protection of the rights of vulnerable people

According to the public opinion poll initiated by the Human Rights Monitoring Institute in 2008, the most discriminated groups comprised the 'traditional list of individual social groups: the elderly, disabled, mentally ill persons, children, women, national and sexual minorities'.[603] The majority of these

[602] A/TAP 13–28, 141–152.

[603] How society rates the situation of human rights in Lithuania: Representative opinion poll of residents of Lithuania, 7–15 November 2008. Public opinion and market research company Vilmorus and Human Rights Monitoring Institute. Online access: https://www.hrmi.lt/uploaded/TYRIMAI/Vilmorus_apklausa_2008.pdf [30 November 2014].

groups also remained among the most vulnerable ones in the subsequent years of the crisis.

As regards the protection of the rights of persons belonging to vulnerable groups during the crisis, it should be mentioned that despite some positive aspects (attention given by the state), the economic crisis had a negative impact on the implementation of programmes for the protection of the rights of these persons. For instance, the report on the implementation of the UN Convention on the Rights of Persons with Disabilities in Lithuania recognised that the crisis slowed down the implementation of the Anti-discrimination Programme: only those measures that did not require any additional funding from the authorities applying these measures were implemented in 2009–2010.[604]

In the international and European context, *the situation of refugees* during the crisis is often described as to have been adversely affected, but the data analysed during the present research have not indicated any major negative effects on refugee rights in Lithuania. The only development that may have affected them was the suspension of the measures aimed at improving the accommodation conditions of refugees. It was recognised during the visit of the Seimas Human Rights Committee and the Seimas Ombudsmen to the Foreigners' Registration Centre on 20 February 2014 that

> 'the living conditions of the residents of the Centre are indeed not good, especially, in the wing for detainees. However, cooperation with the Ministry has been successful and the reconstruction project, which was frozen during the crisis, is underway at the Centre.'[605]

The Lithuanian Red Cross Society pointed out that the conditions for the reception and accommodation of foreigners in the Foreigners' Registration Centre failed to meet the minimum standards; the UN Committee on the Rights of the Child similarly expressed concern regarding children reception conditions in Lithuania; the CPT also recommended that appropriate reception conditions for asylum seekers with special needs should be ensured.[606]

The ECtHR has dealt with cases[607] in which the applicants alleged the violation of Article 3 of the ECHR where they were denied refugee status for reasons including a poor economic situation in the country. The ECtHR drew attention to the challenges faced by the States that form the external borders of the EU as a result of the increasing influx of migrants and applicants for

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604 The initial report of the Republic of Lithuania on the implementation of the UN Convention on the Rights of Persons with Disabilities, 2012, § 26. Online access: http://www.socmin.lt/public/uploads/1063_neigaliuju_konv_atask_2012m.pdf, [27 January 2015].

605 'Žmogaus teisių komiteto nariai lankė prieglobsčio prašytojus' [Members of the Human Rights Committee visited asylum seekers]. Online access: http://www3.lrs.lt/pls/inter/w5_show?p_r=4463&p_k=1&p_d=144824 [4 November 2014].

606 *Ibid.*

607 See, *e.g.*, *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, 23 February 2012; *Aden Ahmed v. Malta*, no. 55352/12, 23 July 2013.

refugee status but noted that economic difficulties cannot be the basis for refusing to grant refugee status or returning asylum seekers back to their country where their life and health are under threat: 'having regard to the absolute character of the rights secured by Article 3, that (*i.e.* economic difficulties and the influx of migrants) cannot absolve a State of its obligations under that provision.[608]

Generally speaking, the number of asylum applications did not decrease during the crisis (it was somewhat lower in 2009 (449) and 2013 (399) and peaked in 2012 (627) being close to five hundred on average every year. As shown in the following table, the lowest number of refugee status approvals or subsidiary protection granted was in the middle of the economic downturn (in 2010 only one person was granted a refugee status, 110 – subsidiary protection, while in 2011 seven persons were granted refugee status and eighty two – subsidiary protection); in addition, there were more cases when the processing of applications was terminated or transferred to another State. Nevertheless, these tendencies over the period of several years are not sufficient to state that the crisis made it more difficult to obtain refugee status in Lithuania (around twelve applications for refugee status were approved annually during the recession). Asylum applications were rejected for a number of reasons provided for by law, including that foreigners often failed to demonstrate that they would have a lawful source of subsistence in Lithuania; meanwhile the ability to find work was clearly impaired by the crisis, which, thus, might have had a certain impact on the number of rejected applications.

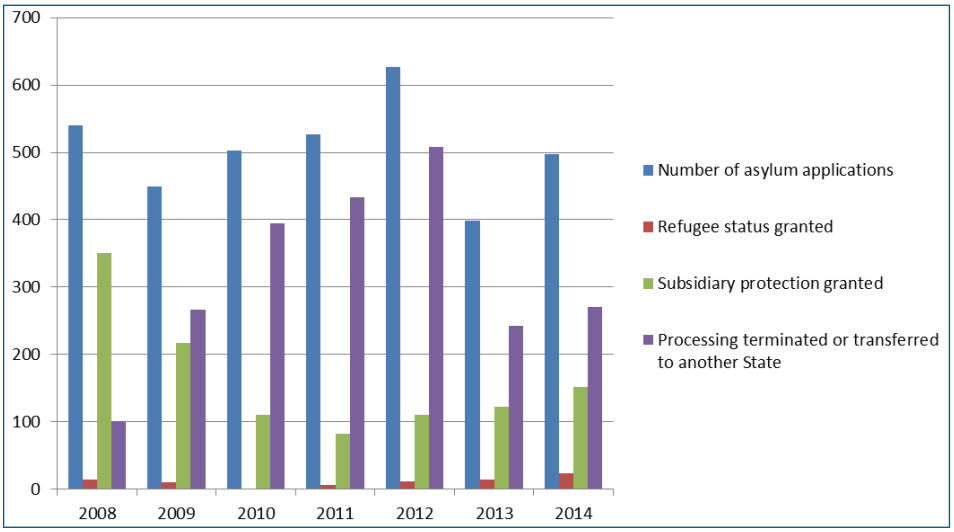

Diagram 3. *Statistics of asylum applications in 2008–2014*

608 *Hirsi Jamaa and Others v. Italy* [GC] (referred to above), § 223.

Anyway, Lithuania did not have to deal with the influx of refugees as some other European countries, and the situation of refugees does not seem to have been adversely affected by the crisis. The public opinion survey has confirmed this assertion: only 2.1 per cent of the respondents claimed that the crisis significantly worsened the situation of asylum seekers in Lithuania, 7.3 per cent thought that the situation worsened slightly, 55.5 per cent denied any such worsening, while 35.1 per cent were unable to answer this question.[609] The replies of the surveyed lawyers were quite similar (1.4 per cent indicated that the crisis severely affected the situation of asylum seekers, 7.1 per cent replied that the situation worsened slightly, 60 per cent replied in the negative, and 31.4 per cent did not know).[610]

2.2.6. The peculiarities of the decisions on the actions of institutions and the impact of these decisions on the protection of rights

The economic crisis also affected the decisions taken by the state regarding the setting up, funding and reorganisation of institutions significant for the protection of human rights. For instance, the need for austerity determined the content of the decision to set up a national human rights institution in line with the Paris Principles: it was decided to optimise the activities of the existing institutions and set up a 'coordinating structure' rather than a separate new body.[611] According to the Seimas Ombudsmen's Office, while preparing to become this type of agency, its functions had already been broadened; therefore, in principle, the decision to create such an institution had already made a certain positive impact on the protection of human rights. The same logic was followed in adopting the decision on the model of the national mechanism for the prevention of torture provided for in the Optional Protocol to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. During the crisis, Lithuania ratified this protocol and took steps to establishing a national mechanism for the prevention of torture, *i.e.* a system designed to monitor places where persons are or may be held against their will.[612] Because of the limited resources, the decision was taken to put the Seimas Ombudsmen's Office in charge of the monitoring function instead of setting up a new body.[613] This step can also be

[609] A/TAP 24.

[610] A/TAP 150.

[611] The national report of Lithuania for the universal periodic review of the UN Human Rights Council, approved by the Government on 29 June 2011.

[612] *Official gazette*, 2013, no. 130–6619.

[613] *Official gazette*, 2013, no. 130–6618.

regarded as the reinforcement of human rights institutions and a potential preparation for setting up a national human rights institution in line with the Paris Principles by further strengthening the Seimas Ombudsmen's Office. Establishing such a mechanism for the prevention of torture is conducive to assessing the existing conditions of detention and encouraging the authorities responsible for ensuring appropriate conditions for adopting decisions making it possible to achieve a sufficient level of the protection of the right to freedom from torture, inhuman or degrading treatment or punishment.

As regards appropriateness of the decisions on institutional restructuring, it should be noted that, in most cases, such expenditure-saving solutions were chosen that could not, in principle, preclude from ensuring the protection of human rights. For instance, in an effort to optimise the activities of state institutions, the Department of National Minorities and Lithuanians Living Abroad under the Government was dissolved, transferring the issues related to national minorities to the Ministry of Culture, and the issues related to Lithuanians living abroad – to the Ministry of Foreign Affairs and the Ministry of Education and Science.[614] This was done in order to cut governance expenditure ensuring, at the same time, that the same functions continued to be performed. However, in practice, this reorganisation had a negative impact on the protection of the rights of national minorities: having regard to the opinion of the representatives of national minorities themselves, the CoE Advisory Committee on the Framework Convention for the Protection of National Minorities came to the conclusion that, following the reorganisation, fewer human and financial resources were available to deal with the issues of national minorities, as well as that it became more difficult for the representatives of national minorities to participate in and affect decisions on issues related to them.[615] This conclusion has been partially confirmed

[614] Description of the conditions for the reorganisation, by division, of the Department of National Minorities and Lithuanians Living Abroad under the Government, transferring its rights and duties to the Ministry of Foreign Affairs, the Ministry of Culture and the Ministry of Education and Science, approved by Government resolution no 634 of 10 June 2009 on the reorganisation of the Department of National Minorities and Lithuanians Living Abroad under the Government and of the Information Centre for Homecoming Lithuanians (*Official gazette*, 2009, no. 77–3177); § 6 of this resolution stipulated: 'The method of reorganisation is reorganisation by division, transferring the rights and duties of the institution concerned in the field of the coordination of the issues of Lithuanians living abroad to the Ministry of Foreign Affairs of the Republic of Lithuania and increasing the maximum permissible number of the staff of this Ministry by 9 positions, transferring the rights and duties in the field of the coordination of the issues of national minorities to the Ministry of Culture of the Republic of Lithuania and increasing the maximum permissible number of the staff of this Ministry by 8 positions, and transferring the rights and duties in the field of Lithuanian formal education abroad to the Ministry of Education and Science of the Republic of Lithuania and increasing the maximum permissible number of the staff of this Ministry by 1 position'.

[615] Third opinion on Lithuania. Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities, doc. no. ACFC/OP/III(2013)005, 28 November 2013. Online access: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680099360 [12 January 2015].

by the survey, conducted within the present research project, of the lawyers dealing with the protection of the rights of national minorities, even though their replies have revealed both the positive (*e.g.*, optimisation) and negative (*e.g.*, the lack of participation of all the authorities concerned, as well as the lack of contact with the representatives of national minorities) consequences of the reform under discussion.[616]

In 2010, the Office of the Equal Opportunities Ombudsman identified these and similar reforms aimed at governance optimisation as a worsening situation of equal opportunities in Lithuania: 'the mechanism for ensuring gender equality and equal opportunities in public institutions was destroyed, as a number of bodies dealing with these issues were closed down and the funding available to the functioning services was cut. In 2010, the European Commission adopted the 2010–2015 Strategy for Equality between Women and Men. Meanwhile, the Division of Gender Equality was closed down at the Ministry of Social Security and Labour. The Special Investigations Division, specialising in cases of discrimination and incitement to hatred (under Articles 170 and 169 of the CC), was dissolved at the Prosecutor General's Office. There is no longer a structure or mechanism set up for implementing equality between women and men at national level and responsible for the functions of the Secretariat of the Commission for Equality between Women and Men, which coordinated activities in close cooperation with women organisations, gender study centres, the Office of the Equal Opportunities Ombudsman and social partners'.[617]

2.2.7. Equality of and non-discrimination against persons

An in-depth assessment of the level of the implementation of the principle of equality and non-discrimination during the crisis is difficult to carry out, as discrimination should be examined in a particular area; in addition, it is often quite hard to identify cases of discrimination, in particular, those of indirect discrimination. The public opinion survey conducted for the purposes of the present research has not revealed any increase in the manifestation of discrimination during the downturn: almost half of the respondents (48.6 per cent and 52.9 per cent of the surveyed lawyers) denied the existence of any such impact, and 32 per cent (30 per cent of the surveyd lawyers) had no opinion.[618] However, the analysis of the 2008–2014 annual reports of

[616] A/TAP 239–240.

[617] Annual report for 2010 of the Office of the Equal Opportunities Ombudsman. Online access: http://www.lygybe.lt/lt/metines-tarnybos-ataskaitos.html, pp. 3–4 [20 January 2015].

[618] A/TAP 25, 151, 152.

the Office of the Equal Opportunities Ombudsman indicate[619] that both, the number of complaints and the issues raised, were affected by the crisis.

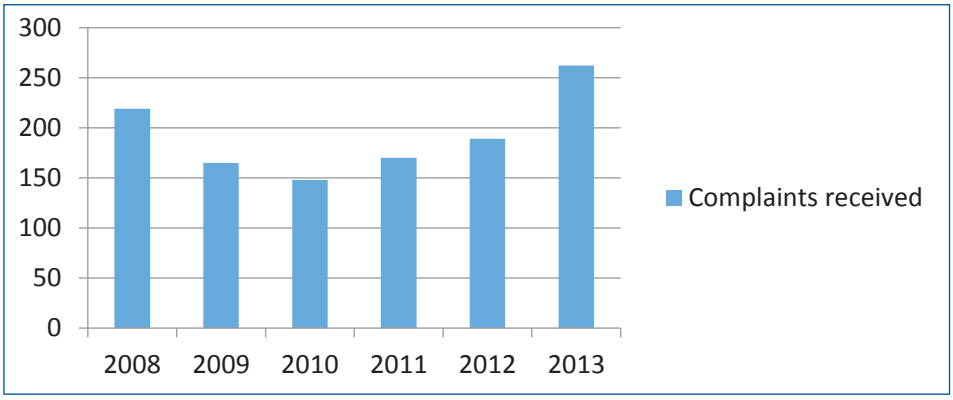

Diagram 4. *Complaints received by the Office of the Equal Opportunities Ombudsman in 2008–2013*

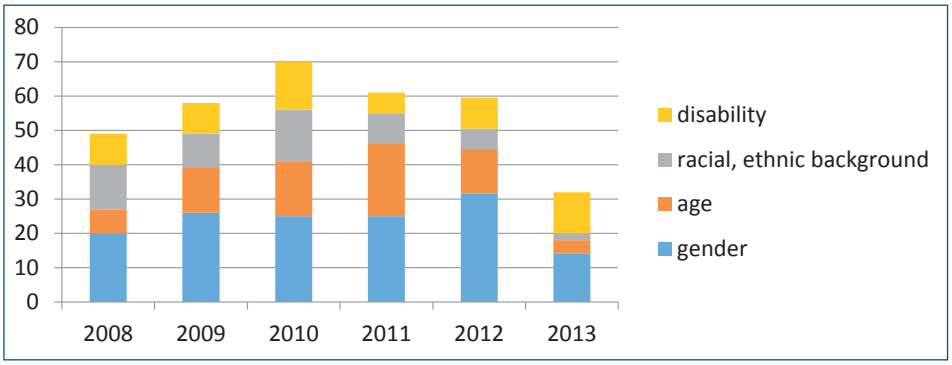

Diagram 5. *Issues raised in the complaints received by the Office of the Equal Opportunities Ombudsman in 2008–2013 (most common grounds, %)*[620]

In 2008, new prohibited grounds for discrimination were added to the Law on Equal Opportunities: they were faith, language, nationality, descent, social status and convictions. The number of complaints submitted during the

[619] Annual reports for 2009, 2010, 2011, 2012, 2013 and 2014 of the Office of the Equal Opportunities Ombudsman. Online access: http://www.lygybe.lt/lt/metines-tarnybos-ataskaitos.html [12 January 2015].

[620] The grounds for discrimination included in the Law on Equal Opportunities were changing. These changes were duly reflected by statistics. The table includes only those grounds for discrimination that were stipulated by law throughout the period in question. The number of complaints against discrimination on new grounds (social status) was rising since 2011: from 17 per cent in 2011 to 15 per cent in 2012 and jumped to 53 per cent in 2013.

downturn, as shown in the table below, indicates that people complained less frequently in the middle of the period (165 complaints were received in 2009) because of the fear of losing their job during the crisis, which, as believed by people, could happen upon complaining. The most common grounds for discrimination remained the same: gender and age, racial or ethnic background; in the middle of the crisis, there was an increase in the number of complaints related to discrimination on the basis of social status (*e.g.*, 17 per cent in 2011 and 15 per cent in 2012), as well as a considerable number of complaints concerning discrimination on the grounds of disability, while the number of complaints in relation to sexual orientation was not particularly high.

2.2.8. The protection of private life and personal data: statistics

Although there are some shared views and positions that privacy of people has become more vulnerable and less protected as a result of the crisis,[621] apparently, it would be difficult to establish the connection between certain aspects of private life and the economic situation. Nevertheless, about a third of the respondents and the surveyed lawyers (32.5 per cent and 32.8 per cent, respectively) believed that there had been an increase in the violations of their privacy during the downturn, though the majority (39.7 per cent and 41.4 per cent, respectively) gave a negative answer, and part of the respondents (27.8 per cent and 25.7 per cent, respectively) had no opinion.

During the period under discussion in Lithuania, at the pre-trial investigation stage and in courts, there was also not an inconsiderable number of cases for offences against the inviolability of private life under Chapter XXIV of the CC and, as the following tables indicate, their number was growing. *E.g.*, the number of the offences registered by pre-trial investigation authorities in relation to the unlawful collection of information about a person's private life under Article 167 of the CC stood at forty-five in 2014 (just two in 2008) and the number of offences against the inviolability of personal housing (Article 165 of the CC) was fourt-six in 2014 (just one in 2008).

[621] *E.g.*, the crisis might have affected such aspects of the right to the inviolability of personal and family life as the inviolability of housing, family and children's rights and the protection of personal data. D. Šakalienė, Director of the Human Rights Monitoring Institute, estimates that '[t]he right to the protection of privacy is still not taken seriously by society and state institutions, as confirmed by the widespread unnecessary use of sensitive personal data such as personal identification numbers and the obsession with the use of video cameras'. 'Žmogaus teisių stebėjimo instituto tyrimai teisės į privatumą srityje' [Studies by the Human Rights Monitoring Institute in the area of right to privacy]. Online access: https://www.hrmi.lt/temos/teise-i-privataus-gyvenimo-gerbima [7 January 2015]. See also Lankauskas, M. 'Teisė į privatumą' in Beliūnienė, L. *et al. Op. cit.*, p. 71.

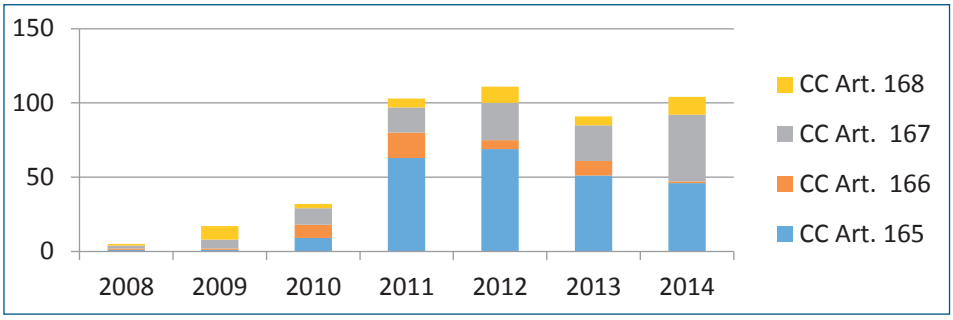

Diagram 6. *The number of pre-trial investigation cases for the offences against the inviolability of private life under Chapter XXIV of the CC in 2008–2014*

In 2013, thirty-three cases for the offences under Chapter XXIV of the CC were pending trial at courts (of first instance) and seventy-five new cases were received (seventy-six sets of proceedings were completed), while eleven cases were pending trial and forty-eight new ones were received (fourty-eight sets of proceedings were completed) in 2008.[622]

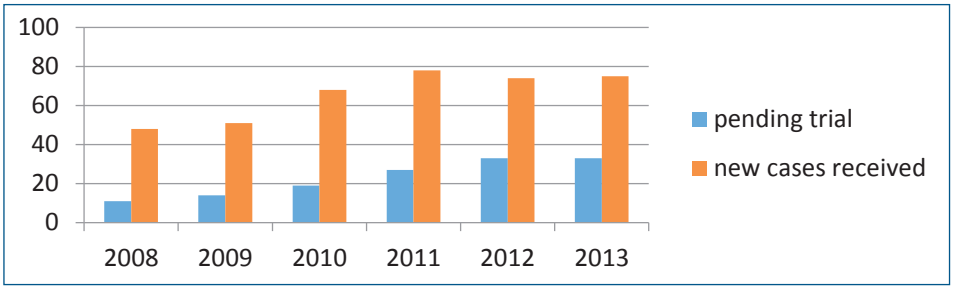

Diagram 7. *Trial cases under Chapter XXIV of the CC (offences against the inviolability of private life) in 2008–2013*

The ECtHR has dealt with cases concerning such privacy aspects as housing and the disclosure of remuneration data in the context of the crisis. The case *Nagla v. Latvia*[623] concerned the complaint filed by a Latvian journalist against a search of her home and the demands to disclose the journalistic source of information after she had published the information that the austerity measures had not affected the representatives of public authorities receiving the highest salaries in the country. The Court maintained that the State failed to prove that such actions had been necessary, and its main argument was that the public had the right to know such information,

[622] Court statistics: Report on criminal proceedings. Trials (at courts of first instance), 2008–2013. National Courts Administration. Online access: http://www.teismai.lt/lt/visuomenei/statistika/106 [2 December 2014].

[623] No. 73469/10, § 97, 16 July 2013.

i.e. remuneration in the public sector during the crisis. This interpretation is equally significant in terms of the scope of the right of journalists to impart and the right of society to receive information in cases of conflict between the right to private life and the freedom of expression under equivalent conditions in Lithuania.

2.2.9. The protection of personal data

The mechanism for the protection of personal data became operational after the principle of the protection of the private life of a person, thus, *per extentionem*, also the principle of the protection of personal data, had been enshrined in the Constitution and later, in 1996, the Law on the Legal Protection of Personal Data had entered into force and the State Data Protection Inspectorate had been established.

According to the studies of the Human Rights Monitoring Institute conducted in 2008 and 2010, 'people have become more sensitive to the violations of privacy';[624] the examples of such violations include a widespread requirement for a personal identification number (for example, in the case of the return of goods to a store), showing a child on television, the installation of video cameras in the workplace without the consent of employees, reading of e-mails and tracking of the web pages visited by employees.[625] The popularity of social networking sites and the growing use of electronic technologies, the obligation to report cyber attacks in Europe, the disclosure of data on air passengers, anti-terrorist programmes, citizen surveillance, as well as agreements with the USA on the exchange of banking data,[626] were among the challenges faced in the field of the protection of personal data.

The problems of the protection of personal data were identified in the 2008–2014 annual reports of the State Personal Data Inspectorate.[627] A large share of complaints were related to the use of personal identification numbers in using telecommunication services and paying bills, or were related to the publication on websites, or failure to comply with organisational and technical measures during the processing of personal identification numbers.

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[624] How society rates the situation of human rights in Lithuania: Representative opinion poll of residents of Lithuania (cited above) [30 November 2014].

[625] Žmogaus teisių stebėjimo instituto tyrimai teisės į privatumą srityje [Studies by the Human Rights Monitoring Institute in the area of the right to privacy] (cited above) [7 January 2015]. See also Lankauskas, M. *Op. cit.*, p. 71.

[626] 'Civil liberties, data privacy, protecting the vulnerable'. European Parliament, 29 November 2013. Online access: http://www.elections2014.eu/pdfs/news/expert/presskit/20131112PKH24415/20131112PKH24415_en.pdf [10 January 2015].

[627] Skundų nagrinėjimo veiklos apibendrinimai [Summaries of complaint investigative activities]. State Data Protection Inspectorate. Online access: https://www.ada.lt/go.php/lit/Skundu-nagrinejimo-veiklos-apibendrinimai/334 [7 January 2015].

In our view, the most significant issues to be discussed in the context of the crisis are the problems of protection of personal data arising during automatic processing of personal data and their transfer to other entities for debt management.

Online trading is believed to have accelerated during the downturn.

> 'Online trading platforms have been developing rapidly in Lithuania during the ongoing crisis. Buyers have been registering independently via electronic means in the virtual stores of companies, *i.e.* they have provided the key personal data such as their name, surname, personal identification number, also their physical, economic and social data. There are certainly some companies who decide to share this information together with trade statistics <...> with their major business partners in Lithuania and abroad. <...> another possible example of the violations of personal data processing is related to data transfer to foreign partners (located outside the EU and the European Economic Area)'.[628]

Therefore, the protection of data processed automatically needs also to be analysed.

It should be noted that, according to the summary of the most relevant case-law, as published by the Personal Data Protection Inspectorate, in 2010–2011, when the crisis was at its peak,

> 'many data controllers (banks, telecommunication companies, enterprises providing municipal services, *etc.*) would transfer personal data of defaulting customers to third parties for the purposes of debt management and solvency assessment; such transfers often entailed certain negative consequences for data subjects (*e.g.*, financial institutions refused to issue credits to such data subjects, or such persons were refused telecommunication service contracts, *etc.*)'.[629]

For instance, in one of such cases,[630] the energy utility company *Vilniaus energija* transferred the applicant's personal data on his indebtedness to the third party *Skolų rizikos sprendimai* under a cooperation agreement between these companies. The Inspectorate maintained that the transfer of personal data to the third party was lawful, but the applicant disagreed. In this and other similar cases, the Supreme Administrative Court made it clear that

> 'the person assuming the right of claim is an interested person, *i.e.* a creditor; therefore, if the parties are unable to come to an agreement, *i.e.* if the debtor refuses to acknowledge the debt, it is not the creditor who has the sole authority to decide on the validity of its claim';[631]

whereas if a person considers that his or her right has been violated, he or

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628 Ramanauskas, G. 'Mažos baudos negąsdina, bet gali atsirūgti' [Low fines do not deter, and may backfire]. Online access: http://laikrastis.vz.lt/index.php?act=mprasa&sub=article&id=24522 [7 January 2015].

629 Summary of relevant court judgments (2011). State Data Protection Inspectorate. Online access: https://www.ada.lt/images/cms/File/naujienu/apibendrinimasteism%20sprend%202011.pdf [7 January 2015].

630 See Vilnius Regional Administrative Court decision of 6 June 2011 in the administrative proceedings no. A^{858}-2235/2011.

631 Summary of relevant court judgments (2011)] (cited above).

she has the right to apply to court for a remedy rather than to engage in self-defence. Therefore, if it was determined during the proceedings that the applicants owed any money to data controllers and that the reminders of the accrued debt had been sent to the applicant but the debt remained outstanding (payment had not been deferred or debts had not been contested reasonably), the personal data of the applicants as debtors (including their personal identification numbers) were handed over to debt collection companies without prejudice to the Law on the Legal Protection of Personal Data.[632]

With rapid improvement of technologies, the amount of data processed automatically (by computers, communication networks) has grown. The period of 2008–2012, audited by the National Audit Office,[633] overlapped to a large extent with the crisis. A report of the National Audit Office indicates that the protection of the right to the inviolability of private life and the security level of processed personal data were insufficient in this area, lagged behind the progress of information and communication technologies, and the organisation and management of personal data processing in the public sector was inadequate (as many as 84 per cent of the audited entities failed to comply with the requirements for the legal protection of personal data and only 47 per cent were reported to have correctly implemented the right of the data subject to the inviolability of private life).[634]

3. The crisis and hate crimes

3.1. From 'the culture of intolerance' to hate crimes

Violence, force and hatred manifested in various forms and at various levels are the facts of life reported by international organisations and institutions, such as the Organisation for Security and Co-operation in Europe (OSCE) Office for Democratic Institutions and Human Rights,[635] the EU Agency for Fundamental Rights,[636] the CoE,[637] as well as national and international

632 *Ibid*., p. 3.

633 Protection of automatically processed data. Report no. VA-P-90-3-21. National Audit Office, 11 December 2013. Online access: http://www.vkontrole.lt/failas.aspx?id=3088 [20 January 2015].

634 *Ibid*.

635 'Tolerance and non-discrimination'. Organisation for Security and Co-operation in Europe. Office for Democratic Institutions and Human Rights. Online access: http://www.osce.org/odihr/tolerance [2 November 2014].

636 'Hate crime'. European Union Agency for Fundamental Rights. Online access: http://fra.europa.eu/en/theme/hate-crime [2 November 2014].

637 European Commission against Racism and Intolerance (ECRI). Council of Europe. Online access: http://www.coe.int/t/dghl/monitoring/ecri/default_en.asp [2 November 2014].

non-governmental organisations.[638] As mentioned before, the reports of these organisations and institutions have noted that an economic downturn triggers a growing number of signs of racism, xenophobia and discrimination. However, with the view of giving a fair picture of the dynamics and tendencies of relevant criminal acts, it is very important not to limit the scope of the analysis to a bare overview of the prevalence of incidents, as it is even more relevant to appreciate other factors (such as regulatory changes, reforms of law enforcement institutions), as well as to 'test' scientific theories in practice (to examine statistical data on crimes), because not everything that happens at the time of a crisis can be attributed to the crisis alone.

In the absence of a universally recognised definition of hate acts, it has become a standard practice to identify these acts within the meaning of the concept developed by the OSCE: hate crimes are criminal acts committed out of hatred.[639] There is more than one recommendation from the CoE that calls upon the States to adopt legal acts to fight against racism and discrimination;[640] pursuant to the Council Framework Decision 2008/913/JHA of 28 November 2008, Member States are obliged to impose sanctions against certain forms and expressions of racism and xenophobia by means of criminal law.[641] The ECtHR has also held that

> 'State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones <...> may constitute unjustified treatment irreconcilable with Article 14 of the Convention'.[642]

In Lithuania, an absolute majority of all incidents investigated[643] have

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638 'Discrimination'. Human Rights Monitoring Institute. Online access: http://www.hrmi.lt/temos/kova-pries-diskriminacija [2 November 2014]; see also: Human Rights Watch. Online access: http://www.hrw.org/topics [2 November 2014]; various topics: Refugees and migrants; LGBT rights, *etc.*

639 Hate crimes in the OSCE region: Incidents and responses. Annual report for 2012, p. 7. Online access: http://www.osce.org/odihr/108395 [2 November 2014].

640 *E.g.*, General policy recommendation no. 7 of 13 December 2002 of the European Commission against Racism and Intolerance on National Legislation to Combat Racism and Racial Discrimination. Online access: http://www.coe.int/t/dghl/monitoring/ecri/activities/gpr/en/recommendation_n7/ecri03-%20recommendation%20nr%207.pdf [2 November 2014]; recommendation no. R(97) 20 of 30 October 1997 of the Council of Europe on 'Hate speech'. Online access: http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec%281997%29020&expmem_EN.asp [2 November 2014].

641 OJ 2008 L 328.

642 *Nachova and Others v. Bulgaria*, nos. 43577/98 and 43579/98, 6 July 2005, § 160; see also *Milanović v. Serbia*, no. 44614/07, 20 June 2011, §§ 96–100.

643 'Hate crimes (criminal acts) do not mean instigation alone against individuals who meet certain group characteristics specified by the criminal law, or who are categorised, whether reasonably or not, as members belonging to a certain group, or against groups of such individuals, or the incitement of hatred against them, or their humiliation or any other type of degrading, or psychological or physical violence against them; but hate crimes also mean crimes against the property of such groups of

constituted incitement to hatred,[644] which is criminalised under Article 170 of the CC (Incitement against any national, racial, ethnic, religious or other group of persons). Creation of groups and organisations aiming at discrimination and incitement to hatred falls under the scope of Article 170[1] of the CC; much rarer in occurrence have been the acts of publicly condoning, denying or grossly trivialising international crimes and the crimes committed by the USSR or Nazi Germany against the Republic of Lithuania or its citizens (Article 170[2] of the CC); the cases of disturbance of religious ceremonies or religious celebrations (Article 171 of the CC) have amounted only to isolated incidents. In practice, not many charges have been brought on the grounds of discrimination under Article 169 of the CC; the latter acts of discrimination, together with other crimes and criminal offences against the equality of the rights of persons and the freedom of conscience, as covered in Chapter XXV of the CC, are commonly categorised as hate acts; the more so as racism and xenophobia are considered to be the most extreme forms of discrimination. A motive of hatred, if proved, may be the reason for qualifying health impairment or homicide as a qualified crime[645] or may become an aggravating circumstance where a person has committed any other type of crime. An investigation into such acts is more problematic due to the shortage of statistics on hate-instigated crimes in Lithuania and difficulties with classification (related to proving the presence of a motive of hatred). To the best of our knowledge, such acts have not been frequent in occurrence.

Hate acts are specific: they disclose and represent a broader social phenomenon, often known as the phenomenon of hatred or the 'culture (or rather the anti-culture) of hatred'. These acts are exceptional in terms

individuals or the members of these groups, which are manisfest in the acts of vandalism, various attacks against the centres, houses of prayer, *etc*. of certain groups (communities) of individuals'. Prosecutor General's Office. Methodological recommendations no. 12.14–40 of 23 December 2009 on the peculiarities of the organisation, directing and performance of pre-trial investigation of criminal acts commited for racial, national, homophobic, xenophobic or other discriminatory motives, § 15. Online access: http://www.prokuraturos.lt/LinkClick.aspx?fileticket=Kr5pGEdlAH0=&tabid=166 [2 November 2014].

644 In accordance with data of the Information Technology and Communication Department under the Ministry of the Interior, 101 hate acts falling under Chapter XXV of the CC were registered in 2008; out of them, there were 99 incidents of incitement to hatred (Article 170 of the CC) and two cases of discrimination (Article 169 of the CC); no other hate acts covered under Chapter XXV of the CC were registered in 2008; in 2009, there were registered 37 acts of incitement to hatred and one case of discrimination; in 2010, there were registered as many as 158 acts of incitement to hatred, one case of discrimination and one case of publicly condoning the USSR regime or Nazi crimes (Article 170[2] of the CC); in 2011, there were registered 328 cases of incitement to hatred, four cases of discrimination, two cases of publicly condoning the USSR or Nazi crimes and one case of disturbing religious ceremonies (Article 171 of the CC). From 2012 to 2014, the most prevalent type of hate crimes was also incitement to hatred (Article 170 of the CC). Statistics on crime rate and pre-trial investigations. Information Technology and Communication Department under the Ministry of the Interior. Online access: http://www.ird.lt/viewpage.php?page_id=197 [2 November 2014].

645 *Editor's note.* In Lithuanian criminal law terminology, a qualified crime is a criminal offence which has features increasing the dangerousness of that offence, as opposed to a so-called privileged crime which has features decreasing the said dangerousness. A criminal offence which has no features increasing or decreasing its dangerousness is called an ordinary, or a principal, crime. True, such professional jargon may sound macabre to an outsidrer, especially a victim of a crime.

of social harm they inflict and the feelings of confrontation, insecurity and humiliation they evoke. The concept and record of hate acts vary from country to country; hate acts are linked to more complicated developments within respective societies, as well as to the hatred motivation generating within an individual consciousness. It can be assumed that partly due to this, there are different opinions on the role played by the crisis on a growing number of hate crimes. For instance, Alan Krueger and Jitka Malečková believe that neither cyclical downturns nor longer-term regional disparities in the standards of living appear to be correlated with a wide range of hate crimes.[646] Such accounts of the situation, however, are not very common. Mark Austin Walters distinguishes two dominant theories: Robert Merton's strain theory and Barbara Perry's structured action theory of 'doing difference'. According to strain theory, minority group members cause frustration, anger and the sense of unfairness and become 'scapegoats' for the woes felt by the 'dominant' members of society.[647] A representative of structured action theory Barbara Perry argues that hate crimes are an extreme form of discrimination emanating from segregation and marginalisation. Those falling outside the majority of society create the sense of insecurity, because they encroach upon the national identity and cultural norms.[648] Christopher J. Lyons also supports the impact of a weak economy on a higher prevalence of hate acts.[649] At *micro* level, the authors argue that the hate motivation is nurtured under the influence of parents, friends, the mass media, politicians, by 'labelling' groups of individuals, while a 'hatred perpetrator' often lacks self-control, is intolerant, impulsive, probably lacks socialisation, is jobless, has no income or education.

646 Krueger, A. B. and Malečková, J. 'Education, poverty and terrorism: Is there a causal connection?' in *Journal of economic perspectives*, 2003, vol. 17, no. 4, p. 124.

647 Walters, M. A. 'A general theories of hate crime? Strain, doing difference and self control in *Critical criminology*, 2011, vol. 19, no. 4, p. 316.

648 *Ibid.*, p. 318.

649 He invokes: (i) the so-called social disorganization theory, which holds that hate crimes are more prevalent in places with a low level of social capital, disadvantaged economy and unstable communities; (ii) the traditional resource competition theory, whereby hate crimes are more likely to occur whenever there is a growing competition between racial groups, in particular, at the time of an economic downturn because of scarcity of resources; (iii) the defended community perspective, which is different from the previous two theories and which implies that interracial antagonism is most likely in economically and socially organised and rich communities, which are able to use the available resources to exclude racial outsiders. Lyons, C. J. 'Community (dis)organization and racially motivated crime' in *American journal of sociology*, 2007, vol. 113, no. 3. This study mainly focusses on conflicts between black and white people.

3.2. Hate acts in Lithuania: statistics, potentially causal factors and the examples of incidents

At the time of the crisis, the statistical curve of hate acts, criminalised under Chapter XXV of the CC, against the equality of the rights of persons and the freedom of conscience (an absolute majority of which were the acts of incitement to hatred) was fluctuating from one hundred and one (in 2008) to one hundred and thirteen (in 2013) hate crimes; in 2014, the curve started to go down, with one hundred and two hate acts being registered under the said chapter of the CC.[650] The number of cases referred to courts was also growing: in 2008, the courts of first instance received twenty-sevevn cases initiated on the grounds criminalised as hate acts under Chapter XXV of the CC, twenty-six out of which were decided the same year; towards the end of the crisis, *e.g.*, in 2013, forty cases in this category were received and decided.[651]

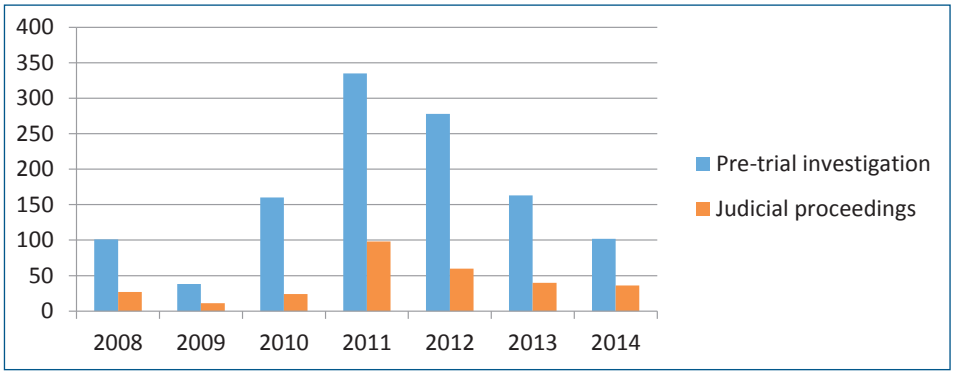

Diagram 8. *Statistics on the pre-trial investigation cases and ongoing judicial proceedings of hate crimes under Chapter XXV, 2008–2014*

For the sake of comparison, it can be noted that, up until 2008, the number of registered hate acts was considerably lower. In 2000–2002, prosecutor's offices instituted only two pre-trial investigations on the grounds of incitement against national minorities; in 2003–2006, the number of the annually registered criminal acts against the equality of the rights of persons

[650] The number of hate acts registered in 2009 was 38, 160 in 2010, 335 in 2011, 278 in 2012 and 163 in 2013. Statistics on crime rate and pre-trial investigations (cited above) [2 November 2014].

[651] Statistics on judicial proceedings. Information Technology and Communication Department under the Ministry of the Interior. Online access: http://www.ird.lt/infusions/report_manager/report_manager.php?lang=lt&rt=3 [10 November 2014]; Court statistics: Report on criminal proceedings. Trials (at courts of first instance), 2008–2013 (cited above) [2 December 2014]. At the time when the present study was nearing its completion, the 2014 data were not yet officially aggregated; however, the official search engine for court judgments available at the website of the National Courts Administration yielded thirty-six cases in this category that were heard in 2014 under Chapter XXV of the CC. In 2009, there were eleven cases received and sixteen cases decided, in 2010 – twenty four and twenty one cases, in 2011 – as many as ninety-eight and ninety-six, and in 2012 – sixty and sixty-two cases, respectively.

and the freedom of conscience never exceeded twenty instances.[652] According to the statistics on judicial hearings in Lithuanian courts, in 2001–2003, there were no cases instituted on the grounds of acts criminalised under Chapter XXV of the CC; in 2004–2007, there were already 109 cases in this category (approximately twenty cases per year).[653]

Nevertheless, a record of criminal acts is directly dependant on criminalisation under the criminal law; in addition, the tendencies in crimes might have also been caused by other factors. During the crisis, the provisions contained in Chapter XXV of the CC were amended more than once. The content of Article 170 dealing with incitement to hatred remained unchanged; three paragraphs of this article (defining the forms of incitement to hatred) remained almost the same, but one form of hate acts was added, *i.e.* distribution, producing, acquisition, sending, transporting or storing the items ridiculing, expressing contempt for, urging hatred of or inciting discrimination against a group of persons or the person belonging thereto on grounds of sex, sexual orientation, race, nationality, language, descent, social status, religion, convictions or views or inciting violence, a physical violent treatment of such a group of persons or the person belonging thereto.[654] In 2009, Chapter XXV of the CC was supplemented with a new Article 170[1] 'Creation and activities of the groups and organisations aiming at discriminating a group of persons or inciting against it';[655] in 2010, it was further supplemented with Article 170[2] 'The public condoning, denial or gross trivialisation of international crimes and crimes committed by the USSR or Nazi Germany against the Republic of Lithuania or its residents'.[656] In 2009, the 'general' motive of hatred was included in the CC as an aggravating circumstance,[657] as well as a circumstance qualifyng a crime in the case of

[652] 'Internete daugėja neapykantos nusikaltimų, piliečių netolerancija įgauna nusikalstamą pobūdį: statistinius rezultatus komentuoja generalinio prokuroro pavaduotojas Gintaras Jasaitis' [There is an increasing prevalence of hate crimes on the Internet,intolerance of citizens is starting to show signs of a criminal nature: Statistics are commented by Deputy Prosecutor General Gintaras Jasaitis]. Prosecutor General's Office Online access: http://www.prokuraturos.lt/Naujienos/Savait%C4%97stema/tabid/68/ItemID/2434/Default.aspx [12 November 2014]; Activity report of 2010 of the Special Investigation Division. Prosecutor General's Office. Online access: http://www.prokuraturos.lt/nbspnbspNusikaltimai%C5%BEmoni%C5%A1kumui/tabid/221/Default.aspx [2 November 2014].

[653] LITEKO: Information system of Lithuanian courts. Online access: http://liteko.teismai.lt/viesasprendimupaieska/detalipaieska.aspx [12 November 2014].

[654] *Official gazette*, 2009, no. 87–3663.

[655] *Official gazette*, 2010, no. 75–3792.

[656] Criminalisation of the new *corpora delicti* of criminal acts was introduced in response to the Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (OJ 2008 L 328). See *Official gazette*, 2010, no. 75–3792.

[657] Article 60(1) of the CC was supplemented with Item 12: 'criminal acts committeed with the aim of expressing contempt for a group of individuals or a member of such a group on the grounds of age, gender, sexual orientation, disability, race, nationality, language, descent, social status, religion, convictions or views'. *Official gazette*, 2009, no. 77–3168.

health impairment or homicide.[658] Notwithstanding the above, the acts under the newly established provisions of the CC have been of a very rare occurrence and have constituted only isolated instances, compared to the *corpus delicti* of incitement to hatred covered under Article 170 of the CC.

In January 2011, as it was claimed at that time, in order to 'optimise' the organisational set-up and functions of the Prosecutor General's Office, its Special Investigation Division, which, *inter alia*, used to investigate into criminal acts falling under Chapter XXV of the CC, was dissolved. The functions of coordinating pre-trial investigations into the equality of the rights of persons and the freedom of conscience, as well as the functions of forming the case-law and methodological guidance in this area, were transferred to the Criminal Prosecution Division of the Prosecutor General's Office.[659] According to the findings from the public opinion (including target groups) survey carried out during the present research project, the aforementioned reform did not have any material impact on the investigation of hate acts; some respondents did, however, refer to the fact of larger workloads, which might have affected (*i.e.* compromised) the quality of investigation into hate acts.[660] The Methodological recommendations prepared by the Prosecutor General's Office on the characteristics of organising, directing and performing pre-trial investigation of criminal acts committed for racial, nationalistic, xenophobic, homophobic or other discriminatory motives[661] prove that investigations into the criminal acts of this category require specialised training and conclusions by experts (the Office of the Inspector of Journalist Ethics,[662] *etc.*). It is noteworthy that as the number of cases in this category was growing, non-

[658] An element of hatred was added to the *corpus delicti* of three crimes against human health or life: Article 129(2) on murder of the CC was supplemented with Item 13, Article 135(2) on severe health impairement was supplemented with Item 13, and Article 138(2) on non-severe health impairement was supplemented with Item 13. *Official gazette*, 2009, no. 77–3168.

[659] 'Nusikaltimai žmoniškumui. Nusikalstamos veikos asmens lygiateisiškumui ir sąžinės laisvei' [Crimes against humanity. Criminal acts against the equality of the rights of persons and the freedom of conscience]. Prosecutor General's Office. Online access: http://www.prokuraturos.lt/nbspnbspNusikaltimai%C5%BEmoni%C5%A1kumui/tabid/221/Default.aspx [2 November 2014].

[660] A/TAP 148.

[661] Methodological recommendations no. 12.14–40 of 23 December 2009 on the characteristics of organising, directing and performing the pre-trial investigation of criminal acts commited out of racial, nationalistic, homophobic, xenophobic or other discriminatory motives. Prosecutor General's Office Online access: http://www.prokuraturos.lt/LinkClick.aspx?fileticket=Kr5pGEdlAH0=&tabid=166 [2 November 2014].

[662] Competence of the inspectors defined as follows: on the basis of the conclusions of expert groups (experts), the inspector establishes whether public information published in the mass media incites discord on grounds of sex, sexual orientation, race, nationality, language, descent, social status, religion, convictions and views (Article 50(1)(8) of the Law on the Provision of Information to the Public. *Official gazette*, 2009, no. 89–3804). See also: 2013 Activity report of the Office of the Inspector of Journalist Ethics (Part 3): 4. Expert evaluation in pre-trial investigations. Online access: http://www.lzs.lt/lt/naujienos/aktualijos_354/zurnalistu_etikos_inspektoriaus_tarnybos_2013_metu_veiklos_ataskaita_3_dalis.html [2 November 2014].

governmental organisations became more active in reporting more frequently about the incidences of incitement to hatred, while the mass media also became more vigilant in screening readers' comments posted online.[663]

The analysis of the case-law of the period under discussion has demonstrated that most often hatred was incited against immigrants, also national and sexual minorities. Certain circumstances pertaining to the cases considered by courts at the time illustrate that statements inciting to hatred give a direct reference to a grave economic situation of the state, and negative attitudes towards certain groups of individuals or members of such groups are voiced namely in the context of the crisis: these groups are blamed for allegedly contributing to the negative economic situation in the country, or even for causing the economic downturn, because solution to the problems and issues related to these groups (*e.g.*, conditions for stay and work of immigrants, marches of homosexuals, which need to be supervised and secured) require financial and other resources, which are already scarce due to the crisis. Sometimes intolerance towards certain groups of individuals (members of such groups) was fuelled by general public tensions, exasperation with poverty, unemployment or other problems, which emerged or became more severe at the time of the crisis. A typical example of this situation is presented below.

On 3 June 2011, the Alytus District Court held a person criminally liable for inciting to violence against people on grounds of their sexual orientation. In 2010, in connection with the article 'The court permitted holding a homosexual march for equality' on the internet portal www.lrytas.lt. E.M. under the nickname 'egutis', from the computer owned by another person O.G. posted a comment in which he claimed there was poverty in the country and urged others to commit acts of violence against homosexuals in disapproval. The extracts of the posted comment read as follows (language not edited; italics added by the authors):

> 'I can't stay cool seeing such a mess all around, there is no point in thinking 'pro-European' when life for them is much easier, whereas we're *living in poverty, pensions have been cut, mothers have been committing suicide from despair for not being able to feed their children, men jumping off bridges after remaining jobless*, <...> at the same time the gays' organisation *is being given hundreds of thousands for holding parades,* isn't it ridiculous...hey, people!!! Stand up

[663] By its judgment of 10 October 2013 in *Delfi AS v. Estonia*, no. 64569/09, in which the company (Delfi) appealed against violation of the freedom of expression, the ECtHR (chamber, First section) upheld the judgment of the Supreme Court of Estonia in the case of *Vjatšeslav Leedo v. AS Delfi* of 10 June 2009, where the Supreme Court of Estonia held the internet portal Delfi Estonia liable for the comments posted by readers, noting that in cases where reader-posted comments are defamatory, vulgar, humiliating or threatening, it is the duty of the portal administrator to prevent such comments or, where such comments have already been posted, the portal administrator must take actions to remove them as soon as possible. The case was referred to the EctHR's Grand Chamber, which found against the applicant and for the respondent CoE Member State (*Delfi AS v. Estonia* [GC], no. 64569/09, 16 June 2015).

against it!!! Show no mercy to perverts, beat them with your full strength <...> roads could be blocked with heavy machinery <...> enough of sitting timidly on your hands!!!'[664]

In some cases, the impact of the crisis on the particular criminal act was 'even more direct'. For instance, the 11 February 2013 criminal order of the Kėdainiai District Court demonstrates that the reason for the loss of self-control, which triggered the defendant's hate motivation, had been the reduction of pensions as part of economic austerity measures during the crisis: defendant G. L. partially admitted his guilt and indicated that he had posted a comment on the Internet article and expressed a negative attitude towards Polish nationality, since (the language not edited; italics added by the authors) *'he lost his temper because his pension had been cut, which was the reason why he posted such a comment,* without feeling any hatred against the Polish, nor having any motive or goal to incite people against Polish nationality or commit acts of violence against the Poles'.[665]

Summary

In conclusion, it should be noted that most of the theories described above illustrate that the number of hate crimes is affected by economic factors: immigrants and other minorities are disliked as the sources of a threat to social and economic stability, increasing competition for the distribution of resources, which are already scarce. At the time of the economic downturn in Lithuania, the number of hate criminal acts grew up from several dozen to several hundred pre-trial investigations per year; the number of these cases received by the courts was similarly considerably bigger than during the pre-crisis period. Despite the fact that during the period when the crisis was not even halfway through, Chapter XXV of the CC was supplemented with several new *corpora delicti*, the number of criminal acts subsequently registered (investigated) under the newly introduced provisions would reach only several incidents per year as the crisis was unfolding further; whereas an absolute majority of criminal acts against the equality of the rights of persons and the freedom of conscience continued to constitute incitement to hatred (particularly, on the Internet), covered under Article 170 of the CC even before its supplementing. The dissolution ('reorganisation') of the special division of the Prosecutor General's Office that used to investigate hate criminal acts also appeared to play no significant role on the tendencies in the occurrence of hate criminal acts. During the crisis, the judicial proceedings in Lithuania's courts, dealing with the statements inciting hatred namely in the context of

[664] Alytus Disctrict Court judgment of 3 June 2011 in the criminal case no. 1-173-448/2011.

[665] Kėdainiai District Court criminal order of 11 February 2013 in the case no. 1-82-188-2013.

the economic downturn, mainly in expressing negative attitudes towards immigrants, national, sexual or other minorities, can be viewed as a direct proof that the crisis exacerbated intolerance towards the specific groups of individuals. Despite the general tendency of increasing hate criminal acts, the interplay between the crisis and hate crimes is far more complex, given the abundance of circumstances hindering impact assessment, such as the latent nature of criminal acts, a wide range of their types, versatile perceptions of these acts and, last but not least, a 'dual' uneven impact of the crisis at macro and micro levels. Considering the specifics of hate criminal acts, it may be presumed that despite a growing number of hate criminal acts during the economic downturn, the crisis is neither a direct nor a single root cause for such developments (this does not apply to all specific criminal acts), even though it is one of the undisputed factors triggering the mood of hatred in society and inducing the acts of hate. The so-called 'hatred culture' or the hatred phenomenon is a highly complicated matter, which can be rightfully held as one of the most pressing challenges faced by contemporary societies. Unfortunately, it does not cease to exist after economic crises recede.

4. The crisis and the conditions of detention

4.1. The need for austerity and the impossibility of applying less stringent standards

The economic crisis and limited resources are not deemed to be a justifiable excuse for inappropriate conditions of detention or failure to safeguard other civil and political rights.[666] Funds necessary for ensuring appropriate conditions of detention in Lithuania during the crisis were reduced against a growing number of detainees.[667] Hence, at the onset of the crisis and as it

[666] With regard to the fact that resource scarcity may not be accepted as a justification for the inappropriate conditions of detention below the requirements set by the provisions of Article 3 of the ECHR, see also the ECtHR case *Poltoratskiy v. Ukraine* (referred to in the Preface), § 148: 'lack of resources cannot in principle justify prison conditions which are so poor as to reach the threshold of treatment contrary to Article 3 of the Convention'; see also Recommendation of the Committee of Ministers of the Council of Europe to Member States no. Rec(2006)2 of 11 January 2006 on the European prison rules, § 4: 'Prison conditions that infringe prisoners' human rights are not justified by lack of resources'. Online access: http://www.coe.int/t/dghl/standardsetting/prisons/EPR/EPR_Lithuanian.pdf] [28 October 2014].

[667] '[T]he economic downturn has also had an impact on the system of the enforcement of sentences. The appropriations from the national budget to the Prison Department and subordinate institutions dropped from LTL 234 million (2008) to LTL 195 million (2011), despite the fact that the number of persons convicted and detained increased radically. As a result of the reduced funding of the system, the allocated daily sum of finances per one person held in the places of deprivation of liberty was also reduced. In 2008, it amounted to LTL 65.47, whereas in 2012 – LTL 47.02. In parallel

was unfolding, the state had to choose to adopt such decisions and resort to such actions that could ensure that, even under the conditions of resource scarcity or decreased funding, at least the minimum required level of the right to appropriate conditions of detention would be safeguarded.

The Government sought to address the issue of the management of the crisis and possible consequences on human rights by adopting an integrated approach to planning and undertaking wide-ranging reforms.[668] Attention should be drawn to those statements included in the Action Programme of the 15th Government (drawn up at the end of 2008) that were highly significant in terms of the right to appropriate conditions of detention. The Programme included the Crisis Management Plan providing in its first part for austerity measures (reduction in budget appropriations) and an efficient use of revenues collected from taxpayers. The part of the Plan dealing with the enforcement of sentences and penal policy contained the aim to ensure the principle of justice and resocialisation. In order to prevent human rights violations during the period of serving a sentence of deprivation of liberty, the living conditions of the persons serving such a sentence were planned to be improved not imposing any additional financial burden on the state and compromising the principle of punishment. The part of the Programme on economic issues included, *inter alia*, the aim to promote public and private capital partnership projects so as to ensure a more efficient performance of public functions and to attract private investments into the areas of activity regulated by the public sector. In conclusion, the foreseen major reforms were expected to have a positive impact throughout all the areas of activity regulated by the Government and to facilitate the achievement of the targets set for specific areas.

In the subchapters that follow, a further analysis will be undertaken to verify whether the specific public government reforms initiated by the Government for the purposes of (i) attracting private investments into the areas of activity regulated by the public sector and (ii) reducing management costs had, in fact, the anticipated positive effects on ensuring the right to appropriate conditions of detention (this right is understood in broader terms, *i.e.* as encompassing resocialisation).

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to the lowered appropriations, the operating practices prevailing in certain detention facilities made the system particularly vulnerable.' Ministry of Justice. Reply to the interpellation questions, doc. no. (3.22) 7R-3327 (reply to question no. 3). 27 April 2012.

668 Scholars believe that an integrated approach is also necessary to address the problem of prison conditions. See Nikartas, S. *Op. cit.*, p. 41: 'it should be presumed that for the purpose of improving the situation with regard to safeguarding human rights in imprisonment facilities, two strategies, more lenient sentences and the modernisation of prison facilities, have to be combined'.

4.2. Strengthening cooperation between the public and private sectors: the strategy for the modernisation of the places of deprivation of liberty

As the crisis was unfolding, the Strategy for the Modernisation of the Places of Deprivation of Liberty, as approved by the Government,[669] provided for the construction of new facilities (to address the issue of overcrowding in the places of deprivation of liberty) following the public-private partnership principle, *i.e.* by supplementing limited available public resources with private sector funds. The solutions that foresee improvement of conditions of detention through private sector funds are generally viewed positively by experts[670] and may be expected to yield good results in the long run. However, assessing success of the principle of public-private partnership for the modernisation of the places of deprivation of liberty at the time of the economic crisis, it should be noted that, due to the reduced funding, the works foreseen under the aforementioned strategy slowed down during the crisis,[671] resulting, in 2014, in the decision on the extension of the time limit for the implementation of the strategy by an additional 5 years until 2022.[672] In addition, the findings of the conducted opinion survey of the lawyers engaged in this area[673] have showed that so far there are no signs of real cooperation between the private and public sectors. The absence of the results that would be sufficient to complete the strategy on time was also acknowledged by the Ministry of Justice, which was in charge of coordinating the process.[674] In other words, the adoption of

669 *Official gazette*, 2009, no. 121–5216.

670 Twelfth UN Congress on Crime Prevention and Criminal Justice. Workshop on strategies and best practices against overcrowding in correctional facilities. Background paper, UN doc. A/CONF.213/16, 25 January 2010, § 48. In Lithuania's context, the prospect of privatising part (but not all) of services related to the activities of detention facilities is viewed positively. See: Nikartas *et al.* 'Įkalinimo įstaigų privatizavimas: užsienio šalių patirtis ir perspektyvos Lietuvoje' [Privatization of penitentiaries: Experience of foreign countries and prospects in Lithuania] in *Teisės problemos*, 2008, no. 3, p. 75.

671 Motion of the Ministry of Justice to the Government no. 13-2155-01(3) of 16 July 2014 on the project 'Modernisation of the places of deprivation of liberty': 'as a result of the reduced funding, only 2.5 per cent of all the funds necessary for the implementation of the Strategy were allocated and utilised from 2009 to 2013'. Online access: http://www.lrs.lt/pls/proj/dokpaieska.showdoc_l?p_id=248121&p_fix=n&p_gov=n [28 October 2014].

672 *TAR*, no. 2014–10619, 29 July 2014.

673 A/TAP 250, 254: 'Public-private partnership is believed by the respondents to be an advanced method for addressing the issue of the modernisation of detention facilities. The utilisation of private capital funds speeds up the modernisation process, reduces costs and relaxes bureaucratic requirements. However, the respondents also note that this mechanism is still in its initial stage and that any evaluations would be still premature (the target group consisted of lawyers whose activites were directly related to the activities of the police, pre-trial investigation and/or detention facilities)'.

674 Motion of the Ministry of Justice to the Government on the project 'Modernisation of the places of deprivation of liberty' (cited above): 'due to lengthy periods required for drafting and approving investment projects for new places of deprivation of liberty under the Strategy, as well as the selection procedures for the contractors of these projects, the measures foreseen under the Strategy will not be implemented by the deadlines initially planned'.

an advanced new-type strategy and the actually implemented related interim tasks did not help to counter the growing threat to ensuring the right to appropriate conditions of detention at the time of the economic crisis.

In terms of the content and relevance of the Strategy under discussion for better ensuring the appropriate conditions of detention in the long run (provided that funds required for its implementation are made available), it is noteworthy that the choice of certain elements of the strategy at issue was driven by the austerity rationale applied to the sentence enforcement system. In this respect, the question may be raised if this goal did not compromise another strategic aim, *i.e.* to ensure the efficient performance of this system.[675] Thus, at this point, the following two elements of this Strategy should be reviewed.

First of all, one of the aims of the Strategy was to cut down costs per inmate.[676] Perhaps this goal was set in expectation of reducing overall inmate detention costs. On the other hand, the statistics on public prisons collected by the CoE experts (SPACE I) illustrate that the states where costs per inmate per day are highest have the smallest number of inmates per 100.000 of population.[677] Even though there is no reason to believe that there is a causal relation between the two (*i.e.* that by increasing the costs per inmate, the number of inmates per 100.000 of population would drop resulting, ultimately, in the drop of the total number of inmates and the total costs of all inmates), these facts may, nevertheless, be seen as the evidence of the possibility of establishing a system that would ensure respect for the rights of individual inmates (by allocating sufficient funds and maintaining appropriate conditions of detention), as well as the possibility of ensuring that respect for human rights would not impose an unbearable burden on the national budget. It may be presumed that any plans on the reduction of costs per inmate should be based on the analysis of the sufficiency of such funds for ensuring appropriate conditions of detention, with all due account

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675 See, for instance, the Strategic action plan for the areas governed by the Ministry of Justice for 2011–2013, Minister of Justice order no. 1R–67 of 7 March 2011, which, in penal and punishment enforcement policy, provided for the following strategic goal: to transform the enforcement of punishments into a cost-effective and efficient system. Online access: http://www.tm.lt/dok/VEIKLA/planai/strplanas2011-2013m(1).pdf) [10 February 2015].

676 In this Strategy, one of the 'criteria of effect' was described as follows: 'In the places of deprivation of liberty, the daily costs per inmate (under 2009 prices): the current value (in the places of deprivation of liberty planned to be relocated) – LTL 55.7; the target value (in new places of deprivation of liberty) – LTL 40'.

677 Aebi, M. F. and Delgrande, N. SPACE I 2012: Executive summary 2014. Online access: http://www3.unil.ch/wpmu/space/files/2014/05/ENG_Executive-Summary_SPACE-2012_140505.pdf [28 October 2014]. Statistics collected under the SPACE I project allow the identification of the states that have successfully balanced the detention costs of inmates and the number of inmates; this information should stimulate comparative scientific research on penal policies of those states, which could help to explore the possibilities of transposing the relevant successful foreign practices in Lithuania.

of scientific research findings. Scholars believe that a growing number of persons whose correction is placed under the charge of certain institutions and at the same time decreasing resources for implementing the relevant services and programmes may negatively affect public safety.[678]

Secondly, the Strategy under discussion had as one of its goals the aim to reduce the number of staff working in the places of deprivation of liberty.[679] On the other hand, the UN Committee Against Torture, after evaluating the 2014 periodic report from Lithuania and the submitted additional information, came to the conclusion that a high level of inter-prisoner violence was due to inappropriate prison management and understaffing, compared to the number of prisoners; hence, the prisoner-prison staff ratio was said to need to be reviewed[680] (in other words, were the number of prisoners to increase, the prison staffing level should go up as well). After its visit to Lithuania in 2012, the CPT made the conclusion that, at the time, the prisons were understaffed and that the staffing had to be increased.[681] After its visit in 2013 to Pravieniškės Correction Facility–Open Prison Colony, the Seimas Ombudsman recommended that the third board of the open colony should consider the possibility of increasing the staffing levels.[682]

The problem of ill-treatment of prisoners, inter-prisoner violence and the staffing levels in Alytus Correction Facility, which was also singled out by the CPT, is worth a special mention. After the 2012 inspection visit to Lithuania, the CPT submitted an immediate observation on the basis of Article 8(5) of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment and Punishment with regard to ill-treatment of

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678 Subramian, R. and Tubulitz, R. 'Realigning justice resources: A review of population and spending shifts in prison and community corrections'. Vera Institute of Justice. Center on Sentencing and Corrections, September 2012. Online access: http://www.vera.org/files/Full%20Report.pdf [28 October 2014]. The study analysed the activities of probation services, but it can be believed that the same logic should apply to work related to persons sentenced to deprivation of liberty.

679 This Strategy provided, *inter alia*, for the following 'criterion of result' in the places of deprivation of liberty: a share of physical security posts replaced by modern technical security solutions – the current value (2009) – 5.7 per cent, the target value (2017) – at least 70 per cent; this means lay-offs in practical terms. On the introduction of modern surveillance and security technologies as one of the most straightforward ways for cost reduction in private prisons see Nikartas, S. *et al. Op. cit.*, p. 63.

680 UN Committee against Torture. Concluding observations on the third periodic report of Lithuania. Advance unedited version, 2014, § 20.

681 Report to the Lithuanian Government on the visit to Lithuania carried out by the European Committee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CPT) from 27 November to 4 December 2012, doc. no. CPT/Inf(2014)18. Council of Europe, 4 June 2014. Online access: http://www.cpt.coe.int/documents/ltu/2014-18-inf-eng.pdf], §§ 74–75 [28 October 2014].

682 Certificate no. 2013/1-16 of 15 June 2013 from the Seimas Ombudsmen's Office regarding the inspection of the 3rd board of Pravieniškės Correction Facility–Open Prison Colony. Online access: http://old.lrski.lt/files/492.pdf [28 October 2014].

prisoners by prison staff, inter-prisoner violence and the staffing levels in Alytus Correction Facility and recommended undertaking a full and far-reaching inquiry into how this establishment functioned and was managed, as well as urged to submit proposals on necessary corrective actions so as to eliminate the deficiencies identified by the CPT.[683] This inquiry (inspection of the levels of the environment security for prisoners and special measures) was conducted in February 2013 by the Seimas Ombudsmen's Office. Following the inspection, the Prison Department was recommended to allocate additional human resources and funds to improve the security levels for prisoners. The administration of Alytus Correction Facility was recommended: (i) to instal security and surveillance posts in all local sectors of the establishment; (ii) to introduce locking devices in the living quarters of prisoners at night; (iii) to increase security in the non-living quarters; and (iv) to reduce the number of prisoners kept in groups. Implementation of these recommendations is underway. Implementation of part of the recommendations requiring more substantial resources was postponed until later (2014) subject to increase in funding. In compliance with the recommendations of the Seimas Ombudsmen's Office, the said establishment had its funding increased (by 9 per cent) and additional 15 supervising staff vacancies were created.[684] On the basis of this particular case, the conclusion can be drawn that ensurance of appropriate conditions of detention within a specific establishment requires a certain level of funding and staffing; therefore, the decisions made during the crisis to reduce funding and the staffing levels of correctional facilities, where these measures were universally applied without due account taken of the specific needs of individual facilities and without providing for exceptions from the rule, inevitably compromised ensurance of appropriate conditions of detention.

While assessing the content of the Strategy at issue, it should be admitted that the aforementioned decision to cut the staffing levels in the future could be justified by plans to construct new-type facilities that will require fewer staff. The planned innovation of such facilities (compared to the conditions present in 2009, at the time of the adoption of this Strategy) will mainly originate from two features: firstly, these facilities should become

683 Report to the Lithuanian Government on the visit to Lithuania carried out by the European Committee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CPT) from 27 November to 4 December 2012 (cited above) [28 October 2014].

684 Report of the Government on actions (to bBe) taken in response to the recommendations listed in the Report to the Lithuanian Government on the visit to Lithuania carried out by the European Committee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CPT) from 27 November to 4 December 2012, doc. no. CPT/Inf(2014)19. Council of Europe, 4 June 2014. Online access: http://www.cpt.coe.int/documents/ltu/2014-19-inf-eng.pdf [28 October 2014].

larger and fewer in number;[685] and, secondly, inmates should be kept not in dormitory-type, but rather in cell-type premises, the security level of which will be ensured by technical means.[686] As a result of the first feature, one might expect the need for a smaller number of managerial and servicing staff, whereas the second innovation could reduce the necessary security staffing levels.[687] Despite the fact that a decrease in the number of security staff is understandable, it remains unclear whether in new-type establishments, with inter-prisoner contacts and the security staffing levels brought to minimum, there should be a reverse increase in the number of staff in charge of care and education, *i.e.* resocialisation, of prisoners in order to ensure the efficiency of the system of the enforcement of sentences and to reach the goals sought through punishment of specific individuals by depriving them of their liberty and the goal of public safety after release of these prisoners.[688]

The above-discussed elements of the content of the examined Strategy and the identified features of these elements, *i.e.* focus on cost-effectiveness of the system and lack of focus on efficiency issues, may be regarded as the evidence in support for a more general assumption that the economic crisis coincided with the law-making crisis, as legal acts could be drafted and adopted while giving a higher priority to the economic growth rather than to human rights interests.[689] At this point, it is necessary to clarify that when addressing the issue of human rights, *i.e.* overcrowding in prisons, the chosen solutions favoured both the promotion of the right to engage in business (construct and utilise new prisons) and the right to safeguard minimum appropriate conditions of detention (the right to serve a sentence in new

[685] § 23.2 of the Strategy for the modernisation of the places of deprivation of liberty provides for a more rational distribution of these facilities. In terms of the 'criterion of effect', the target was set at six modern facilities (*i.e.* fewer than at the time of adopting the Strategy). The Strategy Implementation Plan provided for construction plans of specific facilities, including their capacity, *e.g.,* Vilnius Remand Prison–Correction House was envisaged to accommodate 1.620 inmates, Klaipėda Remand Prison–Correction House – 800 inmates, and Šiauliai Remand Prison–Correction House – 1.180 inmates.

[686] § 23.1 of this Strategy reads: 'to gradually place inmates not in dormitory-type, but in cell-type accommodation to ensure a larger degree of security with fewer staff needed; § 23.3: 'to install modern security systems in the places of deprivation of liberty'.

[687] The issues of the capacity and number of establishments are covered in the next subchapter.

[688] Pocienė, A. *et al.* 'Dėl *Laisvės atėmimo vietų modernizavimo strategijos*' [On the mondernisation strategy of prison facilities]. The Law Institute, 11 August 2010: 'The installation of technological security measures minimises personal contacts between inmates and prison staff and does not facilitate reaching resocialisation goals'. Online access: http://www.tm.lt/dok/Stud_analiz_kiti/Laisves_atemimo_vietu_modernizavimo_strategija.pdf [28 October 2014]; Nikartas, S. *et al. Op. cit.*, p. 64: 'The importance of qualified staff is underlined in many international recommendations, whereas appropriate relationship between prison staff and prisoners is considered as an important precondition facilitating the social integration of prisoners back into society'.

[689] A/TAP 173, 240. Of all the surveyed lawyers more agreed rather than disagreed with the opinion that the number of law-making cases that favoured economic growth over human rights increased during the crisis.

facilities with appropriate physical conditions rather than in emergency-type dilapidated prisons), without focussing on the issues of a broader character, *i.e.* the purpose of punishments (to enable particular individuals to return to society, deter them from repeated offences, enhance public security); thus, the chosen solutions lacked a more comprehensive and integrated approach as far as human rights are concerned.

4.3. The reduction of management costs: the expansion in capacity of the establishments of deprivation of liberty

In 2010, the Government decided to reorganise the places of deprivation of liberty (through consolidation); the following goals of the reorganisation were identified: 'to optimise the number of budgetary institutions, cut the costs of their governance, utilise material and financial resources in a rational manner for the performance of the set objectives and improve the quality of the performed functions'.[690] Therefore, the reorganisation was undertaken with the aim to save expenditure and improve the quality of functions of the places of deprivation of liberty, *i.e.* thus, also improve conditions of detention through lower management costs (due to a lower need for managerial and service staff) and a more rational utilisation of material and financial resources.

Since this reorganisation has already been completed, its efficiency can be assessed. Indeed, the reorganisation allowed saving costs: 55 job positions were removed and this resulted in the annual economic effect of LTL 1.5 million.[691] Not aiming (due to a limited scope of the present study) at making a thorough analysis and assessment as to whether the reorganisation has successfully reached the targets set, nevertheless it is obvious that the reorganisation has failed to address several issues identified earlier in relation to conditions of detention.

For instance, the reduction of management costs has not brought about any progress as far as the provision of health care to prisoners is concerned. In 2008, after the conducted inquiry, the Seimas Ombudsman immediately recommended to transfer the Central Prison Hospital from Vilnius to Pravieniškės.[692] The inadequacy of this health care establishment had already

[690] *Official gazette*, 2010, no. 88–4648.

[691] Ministry of Justice. Reply to the interpellation questions (reply cited above; to question no. 3).

[692] Annual activity report 2008. Seimas Ombudsmen's Office, p. 35–36. Online access: http://old.lrski.lt/files/353.pdf [28 October 2014].

been pointed out by the CPT.[693] During the 2010 reorganisation of the places of deprivation of liberty, the Hospital of Prisoners and Pravieniškės Medical Treatment and Correction House were merged into one legal body – the Central Prison Hospital with branches in Vilnius and Pravieniškės. Considering that management costs were to be and were saved as a result of the merger, these saved costs could be directed towards the improvement of health care services and access to medical care for prisoners. Nevertheless, as the inquiries made by the Seimas Ombudsmen's Office in 2013 show, in terms of access to and the quality of health care services, conditions of detention remain to be a problematic issue in Lithuania, with no evident progress made so far.[694] Likewise, after its inspection visit in 2012, the CPT did not note any progress in this area and recommended to address issue regarding the Vilnius branch of the Central Prison Hospital, which had already been identified earlier, as well as to improve the quality of health care services provided to prisoners by more involving in this process the Ministry of Health.[695]

With regard to expediency of enlarging the places of deprivation of liberty, it should be noted that experts and scholars have voiced their doubts as to whether large establishments are appropriate for the attainment of the objectives of the sentences of deprivation of liberty. According to statistics, inmates are likely to suffer more violence from prison staff and other inmates in large establishments. In addition, large establishments are known for higher suicidal or self-injury tendencies.[696] Large establishments of deprivation of liberty are at a higher risk of large disturbances; they are less suitable for accommodation of different special needs of specific groups of inmates (females, juvenile offenders); they are more vulnerable to managerial difficulties arising from a large number of staff and differences between various groups of inmates.[697] The studies conducted in the United Kingdom and Norway illustrate that smaller prisons function better than

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693 Report to the Lithuanian Government on the visit to Lithuania carried out by the European Committee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CPT) from 27 November to 4 December 2012 (cited above), with reference, in § 63, to reports of 2006 and 2009 [28 October 2014].

694 Annual activity report 2013. Seimas Ombudsmen's Office, p. 124–126. Online access: http://www.lrski.lt/images/dokumentai/nuotraukos/SK%20ataskaita%20INT.pdf [28 October 2014].

695 Report to the Lithuanian Government on the visit to Lithuania carried out by the European Committee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CPT) from 27 November to 4 December 2012 (cited above), [28 October 2014]

696 Hussain, I. *et al. Titan prisons: A gigantic mistake.* Briefing paper. London, 2008. Online access: http://www.prisonreformtrust.org.uk/Portals/0/Documents/Titan%20prisons%20-%20a%20gigantic%20mistake.pdf [28 October 2014].

697 Lord Carter of Coles. *Securing the future: Proposals for the efficient and sustainable use of custody in England and Wales.* London, 2007. Online access: http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/05_12_07_prisons.pdf [28 October 2014].

larger ones.[698] Hence, the expediency of larger capacity establishments of deprivation of liberty in Lithuania is highly questionable, if the objectives sought include not only the cost-effectiveness of the system of punishments, but also the efficiency of sentences of deprivation of liberty. Even those Lithuanian criminologists who believe that there is only a weak link between the capacity of a place of deprivation of liberty and its efficiency (because allegedly there is no empirical evidence to the contrary[699]) had proposed (in 2010), it was proposed to reduce the capacity of a prison in Lithuania (*i.e.* the average number of prisoners held within one establishment) slightly less than two times (in order not to exceed the EU average)[700] instead of enlarging or keeping the average capacity.

As far as the reorganisation of the places of deprivation of liberty is concerned, it should be noted that the consolidation of the physical location of the facilities remains the same and helps to eliminate part of the deficiencies typical for big capacity establishments; however, the reorganisation of this kind could be considered as a relevant measure for the improvement of conditions of detention only where savings in management costs can be proved to have been redistributed so as to enhance the performance of other functions necessary to ensure relevant conditions of detention. The findings of the opinion survey have revealed various interpretations of the implemented reorganisation: on the positive side, it was credited for optimising the number of establishments and cutting down their management costs whereas on the downside, it was discredited for increasing the workloads for officers, for missing reorganisation at the highest level (*i.e.* at governance level), for no improvements in conditions of detention and for reducing the staffing levels.[701] Such an account of the reform may bring into question the positive role of the implemented costs reduction at governance level for distribution of resources as far as at ordinary officers in direct contact with inmates level, or for improvement of physical conditions of detention. As stated before, places of deprivation of liberty need a certain number of staff in order to function properly. Whenever this number is reduced or additional functions are delegated to the same number of officers, this may negatively affect surveillance, education of inmates and their preparation for reintegration

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698 Leibling, A. 'Titan prisons: Do capacity, efficiency and legitimacy matter?' in Hough, M. *et al.* (eds.). *Tackling prison overcrowding: Build more prisons? Sentence fewer offenders?* Bristol, 2008, p. 68; Johnsen, B. *et al.* 'Exceptional prison conditions and the quality of prison life: Prison capacity and prison culture in Norwegian closed prisons' in *European journal of criminology*, 2011, vol. 8. no. 6, pp. 515–529.

699 Dobrynina, M., *et al.* 'Išvada dėl rekomenduotinų laisvės atėmimo įstaigų dydžių' [Opinion on recommended capacitys of prison facilities]. The Law Institute, 14 July 2010. Online access: http://www.tm.lt/dok/Isvada_kalej_dydis.pdf [28 October 2014].

700 *Ibid.*, p. 22.

701 A/TAP 253, 254 (the target group consisted of lawyers whose work is related to the activities of police, pre-trial investigation and/or detention establishments).

into society. The reality of such threats can be illustrated by the content of complaints submitted by prison officers regarding the consequences of the reform carried out at the establishments of deprivation of liberty.

For instance, at the end of 2012, as a result of merging the security and surveillance divisions in Pravieniškės Correction Facility–Open Colony, the complainant (prison officer) claimed that, from then on, he was supposed to perform dual functions of surveillance and security. Until the reorganisation the complainant acted as a prison officer of the surveillance division in charge of non-armed indirect surveillance of inmates within the living quarters. Security division officers used to be in charge of armed surveillance of the establishment while serving on duty in security towers and having no direct contact with inmates. Following the merger of these two divisions into a joint security and surveillance division, the complainant was delegated additional functions of armed security. The complainant, who refused to take up the duties under the new job description, requested to be dismissed from service and be paid a severance pay on account that his position had been removed. The administration informed the complainant that his request to be dismissed with entitlement to a severance pay was groundless as his functions had not changed. The court considering this case did not establish that the administration had committed a violation because only the title of the complainant's position had been modified slightly but the tasks or functions remained the same; hence, the complainant's position had not been removed. In this case, it is important to note that when the case was heard in the court of first instance, 'the complainant addressed the court 4 months after the approval of the new job description failing to submit to the court any evidence that his regular workload had increased. During the court hearing, the complainant emphasised that the performance of other functions had constituted only a theoretical possibility and that he had not been performing them in real terms. Hence, the complainant did not prove an extended scope of the workload, resulting from the assignment of new functions; nor did the court, at its own initiative, establish any circumstances in support of the arguments filed by the complainant'.[702] Without assessing the specific circumstances pertaining to the case at issue, it can, nevertheless, be noted that if the functions of a supervisor, who has a direct contact with inmates, and the functions of a security officer, who guards the perimeter of the establishment from the armed security post, are considered as homogenous, analogous and equivalent activities; such an approach, if followed, does not facilitate achieving, through a sentence of deprivation of liberty, any positive impact on the inmate's personality for the purposes of rehabilitation and resocialisation. Despite the fact that, in this case, the consequences of merging separate divisions within one rather than merging independent facilities,

[702] Supreme Administrative Court ruling of 5 March 2014 in the administrative case no. A[438]–316/2014.

have been analysed, it may be presumed that similar consequences of the examined reforms may also have been experienced by officers as well as by detained persons, in the merged establishments of deprivation of liberty.

Summary

During the crisis, no decisions were made that would have lowered the standards applicable to conditions of detention in the places of deprivation of liberty. The crisis triggered structural reforms that were undertaken in order to combat the crisis and prevent a negative impact on the right to be protected from inhuman or degrading treatment or punishment that might have been caused by austerity measures. The anticipated positive impact of these reforms on conditions of detention was actually minimal. Cooperation between the public and private sectors in the process of modernisation of the places of deprivation of liberty in the short term, *i.e.* during the economic crisis, contributed no improvement in conditions of detention. In the long run, such public and private partnership might prove to be a worthwhile undertaking; meanwhile, doubts are raised by the fact that, while implementing such projects, focus has been put more on the cost effectiveness of the criminal justice system instead of its overall efficiency. Cuts in management costs during the reorganisation (consolidation) of the places of deprivation of liberty made it possible to redistribute the resources and raise the quality of other functions; the research findings of this study, however, illustrate that no progress has been achieved so far in certain problematic areas, *i.e.* neither improvements in the provision of health care services to inmates have been reported nor the quality of the activities of prison officers supervising inmates has been improved.

Conclusion

The scope of the duty to safeguard political and personal human rights does not depend on resources available in a state. Lithuanian law provides for a wide catalogue of human rights, including, *inter alia*, those falling under the category of political and personal rights. During the crisis, this catalogue was not narrowed, quite to the contrary, it was further expanded, *i.e.* the scope of human rights enshrined in statutory law was maintained while the state continued its activities in the area of safeguarding human rights.

However, proceeding from the observations on statutory law to the final assessment of its implementation, it should be stated that the crisis

posed serious challenges in the course of actually implementing political and personal rights. Firstly, the crisis had a negative impact on the political landscape and appreciation of democratic and legal values, adding to the general sense of insecurity and discontent among the members of society. Secondly, it brought about financial difficulties related, in principle, to all political and personal rights, insofar as financial resources were necessary for their implementation. Despite the fact that the state put focus on the protection of the rights of vulnerable groups and sought to safeguard the appropriate functioning of the human rights institutions, the targets set or the reforms undertaken were not always achieved or completed to the extent that would have made the measures undertaken successful at the same time without disrupting the performance of other functions of state institutions in safeguarding political and personal rights.

On the other hand, it can be observed that, during the crisis, political and personal rights were safeguarded in Lithuania to a relatively better extent than economic or social rights, which are much more state funding-intensive. Among other things, it is worth mentioning that Lithuania did not experience any major difficulties related to growing immigration (flows of asylum seekers), which was a serious issue in several European states, and, hence, it did not have to allocate additional funding to address this problem, *i.e.* the country could continue usual activities in the area of ensuring human rights. In addition, with regard to human rights protection, on a positive note, it should be mentioned that people showed if not heightened then at least not decreased sensitivity to the experienced human rights violations and active resolve in defending their rights through the available remedies. In this respect, it needs also to be admitted that some categories of individuals tend to be more actively involved in the protection of human rights than others, as well as that not all human rights violations are equally reported. Society does not place all rights on the same footing: during the economic crisis, personal and political rights were deemed as less important than economic and social rights.

Part VI

THE INDEPENDENCE OF COURTS AND LEGAL DISPUTE RESOLUTION

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There is hardly any society, if at all, which can exist without disputes arising among its members over the violations of their rights or statutory interests; to put it in other words, no society may exist without legal disputes, the parties to which disagree on an issue of law and/or a fact of legal significance. The legal maxim *ubi jus ibi remedium* dating back to the Roman times is, most probably, the best reflection of the importance of instruments used to resolve legal disputes: in the absence of effective legal remedies for the defence of rights, rights as such may become meaningless. The most efficient and best-known instrument for dispute resolution as well as the defence of rights is courts. In addition to courts, there are also other institutions of legal dispute resolution, which may be a faster and even more professional alternative in specific areas. Nevertheless, courts are an exceptional instrument for legal dispute resolution because courts have a final word in legal disputes. In addition to a high level of competence, judges are obliged to adhere to the requirement of independence. It would not be an overstatement to argue that the independence of courts, including the independence of judges in judicial proceedings,[703] is the underlying pillar of human rights and the fundamentals of the rule of law.

The significance of legal dispute resolution instruments and, especially,

[703] In this part the most often used concept of the independence of courts is understood also to include the independence of judges, although legal literature sources mainly refer to the term (and, hence, the principle) of the independence of judges and courts. The independence of courts is perceived as encompassing the independence of judges and courts (institutional independence).

of the independence of courts becomes all the more profound at the times of various upheavals within society, which are usually marked by a growing number of legal disputes, *inter alia*, disputes between individuals and the state. The most recent economic crisis was no exception in this respect. From 2008 to 2012, some EU Member States, Lithuania included, suffered the most severe economic downturn since the previous Great Depression of the 1920s and 1930s. It is often argued that a crisis in one area (*i.e.* this time – in economy) has a negative spill-over effect on other areas, leading, *inter alia*, to European identity crisis, ethical and psychological crisis, political crisis, crisis of the public trust of authorities, cultural crisis, environmental crisis, crisis of democracy and the rule of law.[704] As the crisis was unfolding in Lithuania, the law-making initiatives focussing mainly on public spending savings hit painfully various areas of the economic and public life, not excluding the administration of justice and the legal dispute resolution. Thus, this chapter of the present study is primarily dedicated to the assessment of the impact of the crisis on the efficiency of legal dispute resolution instruments, on the independence of courts in particular and at the same time – through the latter element – on respect for human rights and the principles of the rule of law.

The area of legal dispute resolution is closely linked with the whole triad of tensions stemming from the relationship between an economic crisis and a law-governed state.[705] The most visible tensions, in this sense, can be identified as stemming from (i) the relationship between law and politics in cases where courts adopt judgements defending human rights and proclaiming certain political authority decisions, *e.g.,* those related to cuts in social guarantees as illegal; and (ii) the relationship between law and society in cases of public discontent, at times fuelled by politicians, with certain court judgements, especially those defending the independence of courts.

1. The independence of courts and legal dispute resolution: the concept and the scope of the study

Considering the role of courts as described above and, in particular, the importance of the independence of courts, the primary focus of research in this part will fall on the independence of courts and the impact made on it by the economic crisis.

[704] European Court of Human Rights. *Dialogue between judges 2013* (referred to in the Preface), p. 7.

[705] See Part I, Chapter 3; see also Kūris, E. 'Ekonominė krizė ir teisinė sistema: įtampų triada' [Economic crisis and the legal system: A triad of tensions] (referred to in the Preface).

1.1. The importance of the independence of courts in a law-governed state

In a democracy and a state governed by the rule of law, independence is part and parcel of the concept of a court: a court dependent on the legislative or executive branches of power may not be considered a court at all.[706] Therefore, the actual situation of a court and the status of its independence reflect the democratic maturity of the state, show the extent to which the protection of human rights and fundamental freedoms is consolidated in the state and indicate whether the state has the characteristics typical of the rule of law as, *e.g.*, whether the principle of the separation of powers has been implemented in the state and whether human rights are respected. Therefore, it is not accidental that the Constitutional Court has held the principle of the independence of judges and courts as one of the underlying features of a democratic state.[707] The Constitutional Court has also noted that the independence of courts is a vital guarantee for ensuring human rights and fundamental freedoms, as well as the main precondition for a fair consideration of a case, hence, for trust in the judiciary.[708] Indeed, in the absence of an independent court any judicial protection of the rights of individuals would be rendered impossible: thus, a threat would be posed to human rights in general.

Independence is a specific characteristic of courts as a third branch of state power. It is related to another feature typical of the judiciary: within a democracy, courts are formed not on the basis of political trust but rather exclusively on the basis of professional competences and, thus, are different from the other two branches of power. Judges must meet high standards pertaining to their professional qualification and are bound by certain limitations, which are set on their activity and are determined by the necessity to ensure independence and impartiality. Whereas politicians are not and, perhaps, could not be subject to any professional qualification requirements or the requirements for independence or impartiality. It is namely the aspect

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706 *E.g.*, following the Russian Federation Constitutional Court ruling of 19 March 2014 (case no. 6-П/2014), which set the preconditions for the formal completion of the annexation of Crimea, that institution can no longer be considered to be a court within the true meaning of the word. By recognising that the marionette formation of the 'Republic of Crimea' has the status of a legal subject of international law, as well as declaring that the agreement between this formation and the Russian Federation is an international treaty, it completely ignored international law, as well as the Russian Constitution which proclaims that the universally recognised international legal norms are an integral part of the national legal system. By the aforementioned ruling the said institution demostrated its status of an obedient puppet in the hands of Russia's President. Were this 'court' indeed independent to the extent that it could have followed the law, it would have prevented the annexation of Crimea and the further aggression of Russia against Ukraine, with its death toll now reaching thousands of people.

707 *Inter alia*, Constitutional Court ruling of 6 December 1995. *Official gazette*, 1995, no. 101–2264.

708 Constitutional Court ruling of 12 February 2001. *Official gazette*, 2001, no. 14–445.

of professional qualification and independence that makes the judiciary superior: its superiority is manifest in the fact that neither the legislative nor the executive branches of power have any formal right to interfere with the activities of the judiciary, whereas the judiciary has all the power to influence the former two.[709] It should not be forgotten, though, that courts exert this influence not on their own initiative but only upon an application necessary to institute proceedings; in other words, the judiciary may not choose to control other branches of power at its own discretion.

On the other hand, the independence of the judiciary from the political authority, just like the authority of the judiciary to control actions undertaken by the legislative and executive branches, pre-programmes a certain degree of permanent tension between the judiciary and other branches of state power (the tension stemming from the relationship between law and politics). This tension is unavoidable given that the primary purpose of the judiciary is to ensure justice and defend individuals from abuse by the other two branches of state power.[710] The violations of the principle of the independence of courts is, to a lesser or greater extent, a fact of reality in, most probably, all European states; but more difficulties related to ensuring the independence of judges and courts have been encountered by the relatively new democracies of Central and Eastern Europe, Lithuania included. Because of the lack of the traditions of democracy and legal culture politicians sometimes cannot resist the temptation of seeking to exert influence over courts by resorting to various means and measures as, *e.g.*, by way of interfering in the process of the selection of candidates to judicial office and the appointment of judges, by trying to influence the establishment of the remuneration and other social guarantees of judges, by making public statements expressing the aims to limit the powers of courts, as well as by not complying with, or ignoring, court judgements.

In this context, consideration should be given yet to another aspect of the independence of courts in administering justice – independence from the public opinion, which has already evolved or is under the process of formation, on the specific proceedings in progress; the independence of judges and courts may also be influenced through the mass media.[711] Even though every single individual is entitled to criticise or express an opinion on a court judgement or rightfully comment on the ongoing judicial proceedings,

[709] Kuconis, P. and Nekrošius, V. *Teisėsaugos institucijos* [Law enforcement institutions]. Vilnius, 2001, p. 30.

[710] Valančius, V. *Teismo ir teisėjo nepriklausomumo principo įgyvendinimas* [Implementation of the principle of independence of judges and the judiciary]. Doctoral thesis. Vilnius, 2000, p. 104.

[711] In this context, it is important to note that the case-law of the ECtHR applies much stricter requirements to the criticism of judges than of any other officials, recognising that, in the case of conflict, priority must be given to the independence and impartiality of courts rather than to the freedom of the press or expression; see, *e.g.*, *Barfod v. Denmark*, no. 11508/85, 22 February 1989; *Prager and Oberschlick v. Austria*, no. 15974/90; 26 April 1995. But *cf.*, *e.g.*, *Mustafa Erdoğan v. Turkey*, nos. 346/04 and 39779/04, 27 May 2014.

any criticism of a court before it delivers its judgement, or the 'sentencing' of one or another party to the proceedings before their official completion, constitutes interference with the administration of justice.[712]

It should be noted that, in the event of an economic crisis, in addition to the challenges that can be accounted for by the lack of certain traditions common to democracies and by insufficient legal culture, there may be other specific challenges, such as those linked to austerity measures, aimed at reducing public expenditure and lowering the level of social guarantees, including the funding necessary to perform state functions (thus, also in the area of the administration of justice), salaries, pensions and other social benefits. It is believed that a global economic crisis also causes a crisis in human rights.[713] Even though this statement can hardly be verified and proved the fact that an economic crisis poses a serious challenge to democracy, the rule of law and human rights is beyond any doubt. Rather often it happens so that the goal of economic stabilisation marginalises human rights and freedoms and, at the same time, the independence of courts, which is one of the most significant guarantees for ensuring respect for human rights and freedoms.

1.2. The content of the principle of the independence of courts

Articles 109 and 114 of the Constitution provide that judges and courts remain independent when administering justice; when considering cases judges obey only the law; interference by institutions of state power and governance, members of the Seimas and other officials, political parties, political and public organisations or citizens with the activities of judges or courts is prohibited and gives rise to liability provided for by law. The significance of this principle is also testified by its *presence in international legal acts*. The principle of the independence of courts has been enshrined in Article 10 of the Universal Declaration of Human Rights, Article 14 of the International Covenant on Civil and Political Rights, and Article 6 of the ECHR. The focus on the principle of the independence of courts is stressed in particular in the Basic Principles on the Independence of the Judiciary[714], adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders (Milan) and approved by resolutions no. 40/32 of 29 November 1985 and no. 40/146 of the General

[712] Laužikas, E. *et al. Civilinio proceso teisė* [Civil procedure law], vol. I. Vilnius, 2003, p. 76.

[713] Ward, B. 'Europe's own human rights crisis'. Online access: http://www.hrw.org/world-report-2012/europe-s-own-human-rights-crisis [16 January 2015].

[714] Online access: http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx; http://www.teismai.lt/dokumentai/naudinga_informacija/kita%20informacija/pagrindiniai%20teismu%20nepriklausomumo%20principai.doc [16 January 2015].

Assembly of 13 December 1985[715]. The necessity to take measures to ensure the independence of the judiciary is also stressed in recommendation no. R(94)12 on the independence, efficiency and role of judges of the Committee of Ministers of the CoE[716] of 13 October 1994. In this respect, the European Charter on the Statute for Judges[717], drafted by the experts of the CoE and adopted during the multilateral meeting organised by the CoE in Strasbourg on 8–10 July 1998 is worth to be mentioned; despite the fact that the Charter is not legally binding, the principles of the activity of judges and courts, enshrined therein, constitute guidelines for the legislature of CoE Member States. These principles were further elaborated in Recommendation no. (2010)12 on judges: independence, efficiency and responsibilities[718] of the CoE Committee of Ministers to Member States of 17 November 2010. The content of the principle of the independence of courts is also revealed in the documents of international judicial organisations. The Central Council of the International Association of Judges, at its meeting in Taipei in 1999, approved the Universal Charter of the Judge;[719] the independence of judges is the key focus of the Magna Carta of Judges (Basic Principles)[720], adopted by the Consultative Council of European Judges in Strasbourg on 17 November 2010.

The universal recognition of the principle of the independence of courts does not raise any greater doubts. What is being questioned is *the content of the principle*. Perhaps the most common way used to reveal the content of the principle of the independence of courts (and judges) is to categorise it into the internal and external elements.[721] Internal independence means the capacity of a judge (a panel of judges) investigating into the case to distance himself or herself from any potential influence on the judicial proceedings or ultimate resolution of the dispute exerted by parties to the case or their representatives, the court management, relatives and other individuals close to him or her; in addition, such independence presupposes the capacity of a judge (panel of judges) to distance himself or herself from his or her own subjective beliefs, convictions, personal prejudices and moods. This element is highly difficult

[715] Online access: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/40/32; http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/40/146 [6 February 2015].

[716] Online access: http://www.lat.lt/lt/teises-aktai-0/tarptautiniai-dokumentai/rekomendacija-nr.-r-8kgk.html [16 January 2015].

[717] Online access: https://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges_EN.pdf [16 January 2015].

[718] Online access: https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Rec(2010)12&Language=lanEnglish &Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383 [16 January 2015].

[719] Online access: http://www.lat.lt/lt/teises-aktai-0/tarptautiniai-dokumentai/visuotine-teisejo-chartija.html [16 January 2015].

[720] Online access: https://wcd.coe.int/ViewDoc.jsp?id=2138347&Site=COE [16 January 2015].

[721] Masnevaitė, A. and Šinkūnas, H. 'Teismų nepriklausomumo samprata' [Concept of judicial independence] in Kūris, E. (ed.). *Lietuvos teisinės institucijos* [Lithuanian legal institutions]. Vilnius, 2011, p. 147.

to regulate, if at all. Therefore, external independence becomes all the more relevant; it is often referred to as institutional or functional independence and, in its essence, is based on the prohibition for any person to interfere with the administration of justice.

Obviously, challenges caused by an economic crisis primarily compromise the external independence of courts. In order to appreciate this level of independence it is important to take into account the Constitutional Court ruling of 21 December 1999,[722] which identified two interrelated aspects of the independence of judges and courts: (i) the independence of judges and courts in administrating justice, *i.e.* procedural independence which is a prerequisite for an impartial and fair resolution of a case; and (ii) the independence of courts as the system of the institutions of the judiciary branch of power (as held by the Constitutional Court, while being independent the judiciary may not be dependent on other branches of power, *inter alia*, because it is the single branch of state power formed not on the political but on the professional basis; only while being autonomous and independent from other branches of state power, the judiciary may implement its function – to administer justice).

1.3. Guarantees for the independence of courts in the jurisprudence of the Constitutional Court

Some authors believe the differentiation of court independence into elements to be rather relative as it cannot fully reflect the content of the principle of the independence of courts; therefore, this principle is better represented by the guarantees attached to it.[723] When interpreting the provisions contained in Articles 5, 109, 112 and 115 of the Constitution, the Constitutional Court, *inter alia*, formulated a rather broad official constitutional doctrine of the guarantees of the independence of judges and courts: the inviolability of the term of powers of judges; the personal inviolability of judges; the reality of social (material) guarantees for judges; the self-government of the judiciary as a fully-fledged branch of state power; as well as guarantees for the financial and material-technical maintenance of courts (organisational independence).[724] It is noteworthy that the identical guarantees of the independence of courts and judges are disclosed in international legal acts, such as, *e.g.*, in the Magna Carta of Judges.

For the purpose of the analysis in this chapter, the most relevant provisions of the official constitutional doctrine of the Constitutional Court are those on

722 *Official gazette*, 1999, no. 109–3192.

723 Valančius, V. *Op. cit.*, p. 26.

724 Birmontienė, T. 'Konstitucinė teismų nepriklausomumo garantijų sistema' [Constitutional system of guarantees of judicial independence] in *Teismų nepriklausomumo garantijos* [Guarantees of judicial independence]. Vilnius, 2013, p. 18.

the *material guarantees of the independence of judges and courts,* which are most vulnerable at the time of an economic crisis, *i.e.* the social and material guarantees of judges, as well as material guarantees for the maintenance of courts and their protection from pressure by other branches of state power. As it is clear, *inter alia,* from the Constitutional Court decision of 14 January 2015,[725] these guarantees are not an end in themselves and are not considered as privileges under the Constitution; the provision of these guarantees is related to an exceptional constitutional status of judges and the requirement for the independence of judges as stipulated, *inter alia*, in Article 109 of the Constitution. It is obvious that in order to ensure the independence of courts during an economic crisis from the influence of the institutions of political authority applying austerity measures it is necessary to maintain a sufficient level of social and material guarantees for courts (and judges).

The material guarantees of judges and courts are derived from constitutional provisions. The Constitutional Court has ruled that the constitutional imperative to *secure the remuneration and other social (material) guarantees of judges* derives from the principle of the independence of judges and courts (enshrined, *inter alia*, in Article 109 of the Constitution), which is meant to protect judges, vested with the powers of the administration of justice, from the influence of the legislative and executive branches of power, as well as the influence of other state power institutions, officials, political and public organisations, commercial economic structures, and any other legal and natural persons.[726] The Constitutional Court has also repeatedly held that the constitutional imperative to secure the social guarantees of judges stems not only from the very principle of the independence of judges, but also from the explicit prohibition, stipulated in Article 113 of the Constitution, on receiving any remuneration other than remuneration established for judges or payment for educational or creative activities; where this prohibition is compared against the requirement for dignity and high professional standards applicable to the profession of judges, it follows that the Constitution is the source of the imperative to secure not only the social guarantees of judges but also the reality of such guarantees.[727]

The official constitutional doctrine on the remuneration of judges, as formulated by the Constitutional Court, is based, *inter alia*, on the following requirements: the remuneration of judges must be laid down exclusively by means of a law; the Constitution prohibits reduction in the remuneration of judges, except in the event of a severe economic and financial situation in the state, provided that any such reduction is imposed only on a temporary and statutory basis in compliance with the constitutional principle of proportionality, which presupposes that the remuneration of judges may not be reduced to the extent that would make courts incapable of fulfilling

[725] *TAR*, no. 2015–650, 15 January 2015.

[726] Constitutional Court ruling of 29 June 2010. *Official gazette*, 2010, no. 134–6860.

[727] *Inter alia*, Constitutional Court rulings of 29 June 2010 and 14 February 2011. *Official gazette*, 2010, no. 134–6860; 2011, no. 20–967 (respectively).

their constitutional function and obligation – to administer justice; these constitutional guarantees of the remuneration of judges are determined by the constitutional status of judges implementing the powers of the judiciary; and the constitutional status of judges is derived from the constitutional function of the administration of justice.[728]

Other guarantees that are important for the independence of judges are the social guarantees of judges upon the termination of their powers. When interpreting the provisions contained in Article 109 of the Constitution, the Constitutional Court has formulated the requirement for the legislator to establish such a legal regulation that would ensure the independence of judges and courts, *inter alia*, the social and material guarantees of judges not only at the time of acting in judicial capacity but also upon the termination of judicial powers.[729]

The imperative for the reality of the social (material) guarantees of judges is derived from the Constitution. The Constitutional Court has held on more than one occasion that the social (material) guarantees that are provided for (applied to) judges upon the termination of their judicial powers (in particular, guarantees related to certain regular payments such as pensions) could become (under a different economic and social situation) not only unreal but, in fact, even nominal, *i.e.* fictitious, where judges whose powers already ceased were to be granted such guarantees that, once fixed, were not to be reviewed despite the fact that for other judges of the same system and the same level of courts, whose powers would cease at some point in the future, the corresponding guarantees were to be higher (in view of the changing economic and social situation).[730]

The most relevant doctrine from the point of view of the impact of an economic crisis on the independence of courts is the doctrine formulated in the jurisprudence of the Constitutional Court on the adjustment (limitation) of social rights at the time of an economic crisis as the provisions of this doctrine are equally applicable to the social guarantees of judges. In relation to ensuring the independence of courts, this doctrine contains *two principal provisions*. Firstly, judges do not represent any exceptional social group which should stay immune to austerity measures; just like any other individual receiving remuneration from the state or municipal budget and just like any other recipient of state pensions, judges should be subject to reduction in remuneration and pensions at the time of an economic crisis; just like any other area of the activity of the state, the judiciary should also be subject to proportionate reduction in appropriations allocated from the state budget. In its ruling of 1 July 2013,[731] the Constitutional Court held that

[728] Constitutional Court ruling of 15 January 2009. *Official gazette*, 2009, no. 6–170.

[729] See, *e.g.*, Constitutional Court ruling of 29 June 2010. *Official gazette*, 2010, no. 134–6860; and decision of 14 January 2015 (cited above).

[730] *Ibid*.

[731] Referred to in the Preface.

the constitutional principle of social solidarity presupposes the proportionate distribution of losses arising from a severe economic and financial situation of the state among the members of society, *inter alia*, among civil servants and judges:

> '[I]n the event of an extremely severe economic and financial situation, the funding of all institutions implementing state power and funded from budgetary allocations from the state budget, as well as the funding of various other areas funded from the state or municipal budget, should normally be subject to review and reduction; where such a legal regulation were put in place whereby, in the event of an extremely severe economic and financial situation in the state, the funding of courts and the remuneration of judges were exceptionally not subject to reduction, this approach would mean that courts are groundlessly singled out among other institutions that implement state power, and judges – among other individuals involved in implementing the powers of the respective institutions implementing state power; where such a special situation of courts (judges) were established, such a practice would be against the requirements stemming from the imperatives for an open, just and harmonious civil society and justice'.

Secondly, the reduction of the level of social guarantees for judges and the worsening of the material maintenance of courts in the absence of any economic crisis, as well as any disproportionate and discriminatory reduction or worsening of such social (material) guarantees during an economic crisis, should be regarded as an encroachment upon the independence of courts (and judges).[732] Consequently, any attempts to reduce the remuneration and other social guarantees of judges and the funding of courts are deemed to constitute an encroachment upon the independence of judges and courts.[733] The Constitutional Court decision of 14 January 2015 (referred to above) emphasised that 'otherwise, if the level of the social (material) guarantees of judges could be reduced in other cases as well, *i.e.* when there is no extremely difficult economic and financial situation in the state, the independence of judges would be endangered; in other words, the preconditions for exerting influence on judges by means of the decisions of the legislative or executive branch, the preconditions for the institutions of state power and governance or their officials or other persons to interfere with the activities of judges, the preconditions for taking the decisions of the legislative, executive, or public administration subjects by means of which the social (material) guarantees of judges would be reduced by putting pressure on the decisions taken while administering justice, as well as the preconditions for increasing the risk of corruption, would be created'.

The doctrine of the Constitutional Court does not establish any exhaustive list of guarantees aimed at ensuring the independence of judges

[732] See, *e.g.*, Constitutional Court ruling of 1 July 2013 (cited above and referred to in the Preface).

[733] Butkevičius, L. *et al.* 'Teisėjų asmeninio nepriklausomumo garantijos' [Personal independence guarantees of judges] in Kūris, E. (ed.). *Op. cit.*, p. 195.

and courts (which would be impossible to do given a certain degree of discretion enjoyed by the legislator to fix certain types of guarantees without reducing their sizes);[734] the official constitutional doctrine only establishes the basic guarantees and interprets their constituent elements.[735] In academic literature, guarantees aimed at ensuring the independence of judges and courts are grouped into the personal independence guarantees of judges and the institutional independence guarantees of the judiciary (which cover the guarantees of courts as individual institutions and as the entire branch of the judiciary).[736]

In summary of the above and in order to disclose the content of the principle of the independence of courts in a nutshell, it may be necessary to concur with the opinion of the authors who identify two key elements of this principle:[737] (i) the independence of judges; (ii) the (institutional) independence of courts encompassing the independence of the entire system of the judiciary.[738] In the following chapters, the impact of the economic crisis will be analysed further from the point of view of these two elements of the external independence of courts and, in particular, the related guarantees which, as earlier mentioned, are most vulnerable at the time of an economic crisis, *i.e.* the social and material guarantees of judges, as well as the material guarantees of court maintenance and protection from influence exerted by other branches of state power.

1.4. The scope of the research

Thus, the *research object* in this part of the study covers challenges posed by the economic crisis of 2008–2014 in Lithuania to the key elements of the principle of the independence of courts: the independence of judges and the institutional independence of courts. These challenges are mainly related to the following dual tension: (i) the tension in the relationship between law and politics as a result of the control exercised by the judiciary over not always legitimate decisions of the political authority aimed at overcoming the economic crisis; and (ii) the tension in the relationship between law and society, arising from the fact that society has not always welcomed (or has

734 *Cf.* Constitutional Court decision of 14 January 2015 (cited above).

735 Birmontienė, T. 'Konstitucinės teismų nepriklausomumo doktrinos bruožai' [Features of the constitutional doctrine of independence of the judiciary] in *Konstitucinė jurisprudencija,* 2013, no. 3, p. 261.

736 Masnevaitė, A. and Šinkūnas, H. *Op. cit.*, pp. 150–151.

737 See: Shetreet, S. 'Judicial independence: New conceptual dimensions and contemporary challenges' in Shetreet, S. and Deschenes, J. (eds.). *Judicial independence.* Dodrecht, Boston & Lancaster, 1985, p. 590; Stevens, R. *The independence of the judiciary*. Oxford, 1993, p. 183.

738 Ginter, J. 'Guarantees of judicial independence' in *Juridica international*, 1996, pp. 75–76. Online access: http://www.juridicainternational.eu/?id=12423 [21 October 2014].

even been encouraged to oppose) the decisions adopted by the judiciary concerning the legitimacy of the decisions adopted by the political authority in its attempt to overcome the economic crisis.

In addition, the research object analysed in this part of the present publication also includes the impact of the economic crisis on the efficiency of legal dispute resolution instruments other than courts. First and foremost, these are pre-trial dispute resolution institutions: the Commission on Tax Disputes and the Chief Administrative Disputes Commission.

The hypothesis of the research undertaken here coincides with the general hypothesis on the impact of an economic crisis on human rights to the effect that a recession is the reason behind the narrowing of the scope of human rights guarantees and legitimate interests: *i.e.* the research is aimed to verify the hypothesis that, at the time of the recession, guarantees for the independence of courts and for the efficiency of other instruments for legal dispute resolution, including a human right to a judicial remedy as well as other forms of legal remedies, were narrowed.

2. The impact of the crisis and anti-crisis measures on the independence of courts

As mentioned, this part of the study focuses, first of all, on the impact of the economic crisis on two elements of the external independence of courts – the independence of judges and the (institutional) independence of courts and, in particular, on the material guarantees in relation to these elements.

2.1. The impact of the crisis on the independence of judges

It is obvious that the most serious challenge posed by the economic crisis which called for extreme austerity measures was to preserve the sufficient level of social and material guarantees necessary to ensure the independence of judges. The most relevant guarantees in this category are the remuneration received by judges while in office and the pensions of judges granted upon the termination of the term of judicial powers.[739] Both these guarantees were subject to reduction.

[739] At present, the laws provide for the following social guarantees of judges: (i) a salary; (ii) a state pension; (iii) a severance pay; (iv) annual leave; (v) training and qualification enhancement; and (vi) reimbursement for losses and costs incurred. See Butkevičius, L. *et al. Op. cit.*, p. 195.

2.1.1. The assessment of the reduction in the remuneration of judges

Most probably no elaborate explanation is needed to prove the fact that the most essential social guarantee enjoyed by a judge is *the appropriate remuneration*; however, in the wake of the recent economic crisis in Lithuania, the remuneration of judges[740] was temporarily reduced and this reduction was extended every following budgetary year as the crisis was evolving. Nevertheless, it should be noted that remuneration was subject to reduction throughout the entire public sector, *i.e.* including civil servants, officials and politicians. Therefore, the reduction *per se* in the remuneration of judges could not be treated as an encroachment upon their independence.

As indicated by the Venice Commission, in the absence of any specific constitutional provisions explicitly and unconditionally prohibiting reduction in the remuneration of judges, the legislator has certain discretion as regards reduction in the remuneration of judges at the time of an economic crisis.[741] However, the Venice Commission also argues that, whenever the remuneration of judges is reduced at the time of an economic crisis, account must be taken of the fact whether remuneration thus reduced is still commensurate with the dignity of the profession of judges and the burden of their responsibility.[742] Therefore, whenever analysing reduction in the remuneration of judges at the time of an economic crisis, the key element to consider is whether such an austerity measure complied with the requirements derived from the Constitution, in other words, whether it was applied adequately. Consequently, it was mainly due to the details, *i.e.* the procedures for reducing remuneration and the persons directly affected by such procedures, that the reduction applied to the remuneration of judges at the time of the economic crisis was ruled unconstitutional.

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[740] The Law on Courts and other laws establishing social guarantees for judges had been subject to several amendments until the entry into force of the Law on Remuneration of Judges on 15 November 2008, which laid down the sizes of the remuneration of all judges and the procedures for calculating them. As of 1 January 2009, the Law on Compensation for the Unpaid Part of the Remuneration of Judges has been in effect; the latter law is meant to address a deep-rooted problem of a large proportion of Lithuanian judges in litigation with the state on the grounds of the reduction in remuneration at the end of 1999 and the accrued indebtedness of the state.The transitional period, which is characterised by a certain degree of uncertainty and a vacuum of legal regulation before the entry into force of the Law on Remuneration of Judges, is analysed in greater detail in the Constitutional Court ruling of 8 May 2014. *TAR,* no. 2014–5188, 8 May 2014.

[741] *Amicus curiae* brief for the constitutional court of 'The former Yugoslav Respublic of Macedonia' on amendments to several laws relating to the system of salaries and renumerations of elected and appointed officials. European Commission for Democracy Through Law. Venice, 2010. Online access: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)038-e [16 January 2015].

[742] *Ibid.*

Such a verdict was delivered by the Constitutional Court in its ruling of 1 July 2013.[743] The verdict itself did not stem from the fact that allegedly no such an austerity measure as reduction in the remuneration of judges could, in principle, be applied in order to save public spending but rather from the specific nature of this measure – from the fact that the scope of the reduction in the remuneration of judges was disproportionate and even discriminatory. In particular, the legal regulation established by the challenged addendum to the Law on Remuneration of Judges (the wording of 28 April 2009 which entered into force on 1 May 2009, and the wording of 17 July 2009) had such an impact on the remuneration of judges during the economic crisis: (i) the coefficients of the positional salaries (remuneration) of judges were subject to various reduction rates in percentage points: from 17.69 per cent (judges of the Court of Appeal, chairpersons of the divisions of regional courts, vice-presidents of regional administrative courts) to 35.06 per cent (justices of the Constitutional Court); (ii) the coefficients of the positional salaries of judges were subject to much higher reduction rates in percentage points compared to the coefficients of the positional salaries of most of civil servants in categories 11–20; the coefficients of the salaries of the President and justices of the Constitutional Court were subject to much higher reduction rates in percentage points than the coefficients of the positional salaries of civil servants; (iii) the coefficient of the salary of the President of the Constitutional Court was reduced by 34.98 per cent and that of a justice of the Constitutional Court – by 35.06 per cent, *i.e.* these coefficients were obviously reduced at much higher rates in percentage points than the coefficients of the positional salaries of any other judge; as a result of this extent of the reduction, the coefficients of the salaries of the President and justices of the Constitutional Court were made almost identical to the coefficient of the positional salary of the President of the Supreme Court; considering that no additional pay is established for the President and justices of the Constitutional Court for the years served for the State of Lithuania, the preconditions were put in place for, in principle, making the salaries of the President and justices of the Constitutional Court approximate or equal to, or even lower than, the salaries of some judges of the courts of general competence or specialised courts who are paid the maximum currently possible additional pay for the years served for the State of Lithuania.

Therefore, these reduction measures, in principle, totally ruined the remuneration system of judges. In view of this, the Constitutional Court had to rule in its ruling of 1 July 2013[744] that such measures introduced a disproportionate scale of reduction in the salaries of judges, violated the proportions of the salary rates applicable before the extremely severe economic and financial situation of the state to different categories of judges,

[743] Cited above and referred to in Part IV.

[744] Cited above and referred to in the Preface.

as well as the proportions of the amounts of the salaries of judges and other individuals (civil servants, state politicians and officials, prosecutors), *i.e.* these measures were not in compliance with the constitutional criteria formulated in the previous jurisprudence of the Constitutional Court in relation to the reduction of the salaries of individuals receiving salaries from the state or municipal budgets (at the same time, no regard was paid to the provision of Article 48(1), which stipulates that 'each human being <...> shall have the right <...> to receive fair pay for work'). Ultimately, the Constitutional Court emphasised that such a reduction in the remuneration of judges should be deemed to be an encroachment upon the independence of judges and courts.

The Constitutional Court ruling of 1 July 2013 includes sufficient details as to why the above-discussed reduction in the salaries of judges should be regarded as an encroachment upon the independence of judges. It remains unclear as to why the justices of the Constitutional Court were the only ones among judges, civil servants and officials who were subject to such a large scale of reduction in salaries (by approximately 35 per cent). As regards the judges of the courts of general competence and specialised courts, their salaries (coefficients of the positional salaries) were subject to a reduction of approximately 18 per cent; politicians (members of the Seimas and the Government) – by almost 21 per cent; various civil servants – approximately from 5 to 30 per cent. These data may give rise to different considerations: as, *e.g.*, whether the fact that politicians reduced the salaries of justices of the Constitutional Court by more than one and a half time than their own salaries and almost twice as much as the salaries of other judges could not be interpreted as a certain 'retaliation' for the allegedly disagreeable and unfavourable activities of the Constitutional Court. Another telling example is that, yet at the time of the payment of the reduced salaries of judges, some 'privileged' groups of civil servants, officials and politicians (some prosecutors, heads and members of some state bodies and councils) were singled out in 2012 to benefit from the salaries (coefficients of positional salaries) re-established to the pre-crisis level, or even increased above the pre-crisis level. Hence, there remains a rhetorical question whether the economic crisis reached its end for certain categories of state officials sooner than for other state officials, civil servants, politicians and judges. Generally speaking, it should be noted that the scale of the reduction in the salaries of judges (by the above-mentioned 18 and 35 per cent) was significantly higher than it would have been necessary to save the same amount of budgetary appropriations had the salaries been reduced to all civil servants, officials, politicians and judges at the same rate (the Constitutional Court held that, in accordance with the data of the Ministry of Finance, the salaries of all officials in the aforementioned categories would have had to be reduced uniformly by approximately 4.5 per cent).

It is noteworthy that it follows from the Constitutional Court ruling of 1 July 2013 that the legislator had applied the above-discussed procedure for reducing the salaries of judges and other individuals receiving salaries from the state or municipal budgets apparently knowing that this particular approach

to reduction in salaries would be non-compliant with the constitutional requirements but had failed to take any action to rectify deficiencies in this legal regulation before this measure was declared unconstitutional.

It is quite ironic that, as the details disclosed in the Constitutional Court ruling of 1 July 2013 illustrate, in applying reduction to salaries paid from the state or municipal budgets, the introducers of these measures failed to respect the concept of social solidarity and proportionality which they promoted themselves and which implied that individuals benefiting from larger salaries should be subject to proportionately higher salary reduction rates.[745] It is rather easy to confirm this claim: as, *e.g.*, the salary of a justice of the Constitutional Court was reduced at a slightly higher rate (in percentage points) compared to the salary of the President of this court, which had been higher by more than one thousand litas; the salaries of the judges of the courts of general competence and specialised courts were reduced more or less by the same percentage, even though the salary of the President and justices of the Supreme Court were respectively higher by one and a half times and almost by one third than the salary of a judge of a district court.

2.1.2. Regulatory challenges related to the pensions of judges

As mentioned before, another significant social (material) guarantee for the independence of judges is *a pension of judges,* available for judges upon the termination of their judicial powers. The economic crisis had a negative impact on the guarantees of pensionary maintenance of judges not only as a result of active measures taken by the legislator (in reducing the state pensions of judges) but mainly as a result of a lack of action to address the issues connected with the regulation of the state pensions of judges. Such an omission to act was related to the avoidance on the part of the legislator to implement the Constitutional Court ruling of 29 June 2010, obliging the legislator to amend the legal regulation of the state pensions of judges, which had been declared anti-constitutional. Consequently, a gap emerged in the legal regulation of the state pensions of judges, which has up till now been filled by *ad hoc* judicial and administrative decisions.

In particular, in its ruling of 29 June 2010, the Constitutional Court held as anti-constitutional, *inter alia*, the following legal regulatory procedures for calculating the amounts of the state pensions of judges, namely: (i) the regulation of the amounts of the state pensions of judges that failed to take due account of the length of service as a judge and the specific features of different court systems and, thus, set the preconditions for levelling the amounts of

[745] The extent to which this concept is compatible with the concept of proportionality formulated in the doctrine of the Constitutional Court, as well as with the provision contained in the Constitutional Court ruling of 1 July 2013, that social solidarity may not be taken to mean social leveling, might well merit a separate discussion.

the state pensions of judges whose lengths of service considerably differed as well as the preconditions for granting the state pensions of a considerably different amount to judges whose lengths of service were similar; (ii) the limitation on the amount of the state pensions of judges whereby a 'cap' was put on the sum total of a state pension of judges and an old-age state social insurance pension, thus creating the preconditions for transforming a state pension of judges into a nominal (if not fictitious) guarantee because it could be very small or not be payable at all where the person was eligible for a large old-age state social insurance pension.

Noteworthy is the fact that the Constitutional Court postponed the official publication of its ruling of 29 June 2010 for more than four months but the legislator did not take any actions either during that period or following its termination up until the present day to amend the laws so as to bring them in line with the Constitution. Therefore, the amount of the state pensions of judges at present is fixed on the basis of the Regulations on Granting and Paying the State Pensions of Judges, as approved by the Government resolution no. 68 of 21 January 2003, and the orders of the Director of the National Courts Administration.[746] Obviously, such a situation, where the key issues related to the state pensions of judges are not regulated by means of a law, does not contribute to the material security and certainty about the future of judges: judges may never definitely know what their pension entitlement could be upon the termination of the term of their judicial office. Moreover, this omission of action by the legislator may be deemed to be not only a threat to the independence of judges but also as a real threat to the institutional independence of the Constitutional Court due to the non-compliance with and disregard of the Constitution Court ruling, *i.e.* a certain legal nihilism at a high political level.

2.2. The impact of the crisis on the institutional independence of courts

2.2.1. Challenges posed by the crisis to the activity of the courts of general competence and administrative courts

Increased workload and reduced funding. The negative social phenomena exacerbated by the economic crisis caused the respective increase in caseload of various types in courts. According to the survey of the activity of courts and

[746] Orders by the Director of the National Courts Administration no. 9F-1-1(4.46) 'On the State Pensions of Judges' of 22 January 2013 and no. 9FB-1-(4.46) 'On the State Pensions of Judges' of 16 January 2014.

judicial self-government institutions, in 2006–2009, the number of cases brought before the courts of first instance increased by 46 per cent and the number of cases decided by the courts of appellate instance – by 47 per cent.[747] The 2010 analysis of activity processes in the Lithuanian judicial system[748] maintained that the main reason behind the considerably increased caseload in the system of courts was a deteriorating financial and economic situation of the country which triggered numerous cases of insolvency.[749]

The impact of the increased caseload on the judicial system was not even. The aforementioned analysis of activity processes contended that, over the two-year period from early 2007 until early 2009, the workload in district courts went up by 52.2 per cent, and in regional courts – by 64.1 per cent. The number of civil cases filed at first instance in these courts grew by 218 per cent, and criminal cases at first instance increased by 18.8 per cent. At the level of the entire judicial system, the workload of the Court of Appeal expanded most: the number of civil and criminal cases received by this court in 2009 was respectively 79.5 per cent and 21.6 per cent higher than in 2007. Meanwhile, the workload of the Supreme Court reduced in 2009 as did the number of cases brought before regional administrative courts where it was almost half the number of cases received in 2007. However, the Supreme Administrative Court in 2009 received 42 per cent more cases than in 2007. Although this statistics was partially accounted for by the amendments in the legislation on jurisdiction over the cases of administrative violations, the increased workload of the Supreme Administrative Court and the resulting extended duration of the consideration of cases once again led to the proposals expressed in public to eliminate this court by transferring its competence to the Supreme Court, and to introduce the institution of cassation in administrative proceedings.[750]

In the context of increased workload, the appropriate funding of the activity of courts, as well as their material and technical maintenance, is certainly an important aspect of the independence of courts. However, in the time of the economic hardship, the state reduced its budgetary allocations for both the whole judicial system and every court individually. Some courts expressed negative views over this situation in their annual activity reports and in other deliverable information pointing to, *inter alia*, the fact that the

747 Online access: http://www.teismai.lt/dokumentai/teismu%20maketas.pdf [16 January 2015].

748 *Ibid.*

749 The total number of cases was mostly increased by cases related to the law of obligations; the number of such cases in 2009 was 119 per cent higher than in 2006.

750 Jarušević̆ius, A. 'Administraciniai teismai: laikas reformuoti' [Administrative courts: Time to reform]. Online access: http://lzinios.lt/lzinios/Lietuvoje/administraciniai-teismai-laikas-reformuoti/155661 [16 January 2015].

growth in workload was in disproportion to the existing human resources and available funds (*i.e.* budget allocations to defray activity expenses and to pay salaries),[751] as well as to the fact that, in this situation, it was impossible to administer justice properly or to ensure the right to justice and the right to a fair trial as the reduced budget funds hindered courts from hearing cases within a reasonable time, ordering expert examinations, sending summonses to attend hearings, serving the copies of judgements, paying suppliers for services, *etc*.[752]

It must be noted that, under the official constitutional doctrine of the Constitutional Court, it is permitted to reduce funding for courts in cases where the state is in a particularly grave economic and financial situation and has an objective shortage of funds to meet the economic and financial needs of courts.[753] Nevertheless, it may be assumed that, in view of the increased caseload in courts and the curtailed material (social) guarantees of judges, the reduced funding for the activity of the judicial system during the economic crisis was a disproportionate measure which may be deemed as to have endangered the institutional independence of courts and, in some cases, even restricted the possibilities of courts to administer justice properly.

Positive developments. It must be admitted that the legislator did take some efficient measures to reduce the increased workload of courts. First, procedural and other laws were amended seeking to stimulate the concentration and efficiency of judicial proceedings. Among these, in 2011, amendments were made to the Law on Courts[754] to introduce the institution of an electronic case, which streamlined, accelerated and cheapened judicial proceedings; in the same year, extensive amendments were also adopted to the Code of Civil Procedure[755] and the Law on the Proceedings of Administrative Cases;[756] in 2013, amendments were made to the Code of Criminal Procedure,[757] through which the legislator, *inter alia*, expanded the possibilities for the IT-assisted serving of procedural documents, the possibilities for using a written

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751 'Overview of the activity of the district court of Kretinga district in 2012'. Online access: http://www.google.lt/url?url=http://www.klat.lt/lt/kretingos-rajono-apylinkes-teismas/veikla-krtra/metineapzvalgakrtra/172/download/1128.html&rct=j&frm=1&q=&esrc=s&sa=U&ei=PtUbVKebMaOCzAPbxYLQCQ&ved=0CBgQFjAB&sig2=kGcpUW2mfooinuj9maHu6w&usg=AFQjCNGTnfsy5wt6g9ROqeCgP8BvUNZhBg [16 January 2015].

752 'Strategic activity plan of the district court of Trakai district for 2011-2013'. Online access: http://traku.teismas.lt/veikla/Strategija%20_2011-2013.doc [16 January 2015].

753 *Inter alia*, Constitutional Court ruling of 14 February 2011. *Official gazette*, 2011, no. 20–967.

754 *Official gazette*, 2011, no. 153–7826.

755 *Official gazette*, 2011, no. 85–4126.

756 *Official gazette*, 2011, no. 85–4131.

757 *Official gazette*, 2013, no. 75–3769.

procedure,[758] abandoning the practice of taking written minutes of court hearings, *etc.* These changes received a positive response in the research papers of legal proceduralists.[759]

A second positive development was the reorganisation of the district courts of Vilnius, Kaunas and Šiauliai regions, *i.e.* the so-called 'small court reform' finalised in 2013. The reform was aimed at the optimisation of work resources and resulted in the system of joined district courts in the three cities concerned; the number of district courts in Lithuania was reduced from 54 to 49. The reform was positively received by judges who claimed that it allowed for a more even distribution of workload.[760] Thus, the economic crisis did encourage certain positive changes in the judicial system, which might not have been undertaken had the situation been different.

2.2.2. Challenges posed by the crisis to the activity of the Constitutional Court

During the time of the economic crisis, the Constitutional Court encountered both challenges common to other courts due to cuts in the funding of its activity and increased workload and certain specific challenges related to the constitutional assessment of the measures taken to overcome the crisis.

The demise of the individual constitutional complaint initiative. The reduction of the state budget allocations for the Constitutional Court had one specific outcome, *i.e.* an actual failure of the individual constitutional complaint initiative, which had seemed rather feasible before the crisis. The difficult economic and financial situation in the country necessitated the decision not to allocate any additional state budget funds for the introduction of the individual constitutional complaint, *i.e.* 'having regard to the difficult economic and financial situation in the state, [the decision was made] not only to revise, but also to postpone, the terms for the implementation of the said institution'.[761] In this context, it must be noted that the establishment of

[758] According to the 2014 targeted survey of lawyers, 38.6 per cent of the respondents stated that the possibility of using a written procedure significantly improved the quality of the activity of courts, and 41.4 per cent said this possibility had some positive effect on quality.

[759] See, *e.g.*, Nekrošius, V. '2011 metų civilinio proceso novelos: Ar pasiekti tikslai?' [Innovations of the civil proceedings of 2011. Have the goals been achieved?] in Švedas, G. (ed.). *Nepriklausomos Lietuvos teisė: praeitis, dabartis ir ateitis: Liber amicorum profesoriui Jonui Prapiesčiui* [The law of independent Lithuania: The past, the present and the future: Liber amicorum Professor Jonas Prapiestis]. Vilnius, 2012.

[760] 'Teismai džiaugiasi, bylos nagrinėjamos sparčiau' [The courts rejoice at that the consideration of cases has become faster]. Online access: http://www.delfi.lt/news/daily/law/teismai-dziaugiasi-bylos-nagrinejamos-sparciau.d?id=64393942 [16 January 2015].

[761] Seimas resolution no. XI-577 'On amending the Seimas resolution 'On the approval of the concept of the consolidation of the institution of the individual constitutional complaint" of 17 December 2009. *Official gazette*, 2009, no.152–6823.

the individual constitutional complaint institution is a European tendency; as a specific procedural instrument for protecting the constitutional rights and freedoms of citizens, the individual constitutional complaint has become an increasingly widespread and proven remedy. More or less extensive models of the individual constitutional complaint have been introduced in Albania, Andorra, Austria, Croatia, the Czech Republic, Cyprus, Macedonia, Germany (both at the federal and land levels), Hungary, Latvia, Liechtenstein, Malta, Montenegro, Poland, Russia, Serbia, Slovakia, Spain, Switzerland, Ukraine and Kosovo. If established, the individual constitutional complaint would not only present an efficient additional national instrument in protecting human rights but it could also function as an efficient additional filter of cases before they reach the ECtHR thus reducing the workload at the ECtHR. According to the ECtHR statistics, a relatively lower number of applications reach the ECtHR from the countries where the individual constitutional complaint mechanism has been implemented.[762] It is also important to point out that, according to the ECtHR, the individual constitutional complaint is an efficient domestic remedy to be exhausted before applying to the ECtHR.[763]

Yet another factor due to which the individual constitutional complaint initiative, at least for the time being, can be considered to have failed is the unfavourable situation that has developed in society and even in the community of lawyers after the attempts to implement this mechanism within the envisaged time framework proved to be unsuccessful. As a result, there is no favourable environment to renew former discussions neither on the introduction of the individual constitutional complaint nor its possible model. Paradoxically, but society has not been much interested in the additional remedy for protecting human rights: according to a public opinion survey, 33.2 per cent of the respondents would support the establishment of the individual constitutional complaint at the Constitutional Court, 25.5 per cent would be against this, and as many as 41.3 per cent had no opinion on the issue. It is interesting to note that the majority of the respondents (43.1 per cent) believed there should be no pre-established conditions for an individual to address the Constitutional Court. An even greater paradox is presented by the fact that the community of lawyers was the group that most disapproved of the idea: only 28.6 per cent of the respondents in the target group of lawyers were in favour of it, while as many as 57.1 per cent were against. Perhaps, this phenomenon could be explained by the fact that 81.4 per cent of the respondents were convinced that the introduction of the individual constitutional complaint would result in an even greater delay in the consideration of pending cases in the Constitutional Court (the same opinion was shared by 53.1 per cent of the surveyed Lithuanian population).

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762 'On individual access to constitutional justice'. Study, CDL-AD (2010) 039rev. European Commission for Democracy through Law (Venice Commission), January 2011. Online access: http://www.venice.coe.int/webforms/documents/CDL-JU(2010)004-e.aspx [16 January 2015].

763 See, *e.g.*, *Larionovs and Tess v. Latvia* (dec.), nos. 45520/04 and 19363/05, 25 November 2014.

Process optimisation. The number of petitions filed with the Constitutional Court considerably increased in the time of the economic crisis. According to the statistics presented on the website of the Constitutional Court,[764] the Court received 48 petitions regarding the constitutionality of legal acts in 2008, 67 such petitions – in 2009, and as many as 167 – in 2010, which was the peak year in terms of the number of legal disputes during the time of the crisis. The majority of the petitions concerned the provisions of the legislation that were adopted during the years of the crisis and whereby the state sought to cut the state budget expenditure, *inter alia*, expenditure for social benefits, as well as the state budget allocations for institutions implementing state power and the remuneration of public sector employees.

Responding to the increased workload of the Constitutional Court, the legislator applied similar concentration-focused and efficiency-oriented measures as in the case of the courts of general competence and administrative courts. At the end of 2011, the Seimas amended the Law on the Constitutional Court[765] with the aim of accelerating the consideration of constitutional justice cases and ensuring a more operative constitutional judicial process.[766] These amendments allowed for the use of a written procedure in constitutional justice cases examining the compliance of a legal act with the Constitution or laws and repealed the regulation prohibiting the Constitutional Court from considering more than one case at a time (*i.e.* while considering one specific case it may not start concurrently considering other cases). Such changes introduced to constitutional justice proceedings proved to be efficient: in 2013, the year when the Constitutional Court marked the twentieth anniversary of its activity, the Court passed twent-five rulings,[767] *i.e.* the highest number of rulings per year throughout the whole period of its activity.[768] At the beginning of 2015, the number of pending petitions was below sixty, which, after joining certain petitions, may be further reduced to comprise about thirty pending cases. Thus, it is very likely that, in a short period of time, the time required for a case to be decided at the Constitutional Court will be significantly reduced.

Attempts of political pressure. The Constitutional Court had to consider the constitutional compliance of austerity measures, *i.e.* legal provisions adopted by the legislative and executive powers to manage the crisis, and

[764] Online access: http://www.lrkt.lt/Statistika.html. [16 January 2015].

[765] *Official gazette*, 2011, no. 154–7262.

[766] Explanatory note. Online access: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=404623&p_query=&p_tr2=2 [16 January 2015].

[767] For comparison, in 2012 the Constitutional Court passed 16 rulings and in 2011 – 14.

[768] In 2013, the Constitutional Court also issued two decisions on interpreting the rulings of the Court and three decisions on refusing to accept for consideration petitions requesting an investigation into the compliance of a legal act with the Constitution or laws, or on dismissing the instituted proceedings in a particular case.

ruled some of them to be in conflict with the Constitution. To put it mildly, not all these rulings were favourably received by some politicians. *E.g.*, after the Constitutional Court adopted its ruling of 1 July 2013 (discussed above), the media released a number of statements by politicians not only claiming that the Constitutional Court allegedly took over the legislative and executive powers over the economic policy (which, in fact, can be recognised as false statements by any individual who is, at least to some extent, familiar with constitutional law and the constitutional doctrine developed by the Constitutional Court),[769] but also threatening to restrict the competence of the Constitutional Court[770] or even to eliminate this institution altogether.

There were repeated public calls to follow the example of Hungary,[771] which limited the powers of its Constitutional Court in adopting decisions on budget formation and tax policy issues in 2010.[772] More than once proposals were voiced to prohibit the Constitutional Court from interfering with the fiscal measures applied by the Government during the times of economic hardship. One member of the *Seimas* even started collecting the signatures of other MPs for the amendment of the Constitution to eliminate the Constitutional Court by transferring its functions to the Supreme Court.[773] It is important to note that European legal scholars have emphasised in their publications that there is no other country in the world that has imposed similar restrictions on their constitutional courts like Hungary, and that such restrictions of the powers of a constitutional court are not welcome and should be viewed as a 'constitutional counter-revolution'.[774]

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769 The Constitutional Court has no power, on its own initiative, to start considering cases without a petition from a subject(s) entitled to apply to the Constitutional Court. In addition, the Constitutional Court follows the self-restraint doctrine and does not decide on the issues of economic policy, *i.e.* the Court does not consider whether economic decisions are justified or expedient; the Court relies on information from the legislator and the Government on these matters. Thus, the Constitutional Court has never decided whether the country is really in a difficult economic and financial situation or whether the austerity measures are really necessary (*i.e.* whether they are expedient and there are no alternatives). The Constitutional Court assesses austerity measures only in terms of legal proportionality. See Constitutional Court ruling of 31 May 2006. *Official gazette*, 2006, no. 62–2284.

770 Vireliūnaitė, L. 'Seime sklando idėja apriboti Konstitucinio Teismo galias' [An idea of limiting the powers of the Constitutional Court is lingering in the Seimas]. Online access: http://www.lrt.lt/naujienos/ekonomika/4/29475/seime_sklando_ideja_apriboti_konstitucinio_teismo_galias [16 January 2015].

771 'Premjeras norėtų apriboti Konstitucinio Teismo galias' [The Prime Minister would like to limit the powers of the Constitutional Court] Online access: http://www.veidas.lt/premjeras-noretu-apriboti-kt-galias [16 January 2015].

772 See subchapter 3.2, Part I.

773 In one interview, the said member of the Seimas indicated the aforementioned Constitutional Court ruling of 1 July 2013 as one of the reasons behind the initiative. See 'Konstitucinė krizė' [Constitutional crisis]. Online access: http://www.tiesos.lt/index.php/tinklarastis/straipsnis/aurelija-stancikiene.-konstitucine-krize.

774 Halmai, G. 'From the 'rule of law' revolution to the constitutional counter-revolution in Hungary' in *European yearbook on human rights 2012*, pp. 375–377.

The economic crisis and the post-crisis period saw not an inconsiderable number of draft laws being tabled to amend the Law on the Constitutional Court; these legislative amendments can be regarded as unconstitutional attempts to limit the powers of the Constitutional Court and otherwise encumber its activities. Among those proposals, the following can be mentioned: draft Law no. XIIP-1788,[775] which contained the proposal to provide that the rulings of the Constitutional Court and decisions regarding the interpretation of the rulings come into effect only after their implementation following the procedure set out in the Statute (*i.e.* rules) of the Seimas; draft Law no. XIIP-1815[776] which included the requirement that the results of voting on the final acts of the Constitutional Court be announced publicly; draft Law no. XIIP-1134[777] which proposed changing the present quorum of 2/3 justices required for considering cases and adopting rulings, conclusions or decisions by increasing it to eight justices; and draft Law no. XIIP-664(2)[778] which proposed to reduce the distance for staging rallies, pickets and other actions from 75 to 25 metres of the building of the Constitutional Court. As none of the above initiatives have been implemented, they may not yet be viewed as posing a direct threat to the institutional independence of the Constitutional Court; nevertheless, proposals of this nature can be identified as a certain political pressure upon the Constitutional Court in deciding constitutional justice cases.

It must be noted in this context that all of the above political initiatives to eliminate the Constitutional Court, to limit its powers or encumber its activities are clear manifestations of the attempts by some politicians either to control the Constitutional Court so that it remains completely obedient to them or to have freedom to act without any constitutional control over them in certain areas of economy and finances. It is rather ironic as this reminds us of pitiful Soviet regime, where there was no constitutional control whatsoever, and courts were under control of the omniscient Communist Party.

However, the public opinion survey suggests that the criticism of the Constitutional Court voiced by some politicians in public, as well as the political initiatives to restrict the powers of the Constitutional Court, are not supported by society at large. *E.g.*, 28.2 per cent of the respondents disagree with the statement that the Constitutional Court assumes the legislative and/or executive powers to implement economic policy by deciding cases regarding the lawfulness of austerity measures (the statement was supported

[775] Online access: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=470667&p_tr2=2 [16 January 2015].

[776] Online access: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=470973&p_tr2=2 [16 Janaury 2015].

[777] Online access: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=458441&p_tr2=2 [16 January 2015].

[778] Online access: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=466664&p_tr2=2 [16 January 2015].

by only 10.4 per cent of the respondents); 38.9 per cent disagree with the idea of the courts being deprived of their powers to control the decisions of political authorities on managing the economic crisis (only 21 per cent support this idea); 42.5 per cent do not approve if such decisions could not be contested in court (only 16.5 per cent approve), and an even greater percentage of the respondents (56.1 per cent) do not approve if individuals were deprived of the possibility of contesting the decisions of political authorities to overcome the economic crisis in violation of their rights (only 12.6 per cent consent to that).

2.2.3. Challenges posed by the crisis to the appearance of the independence of courts in society

According to Barak, in a democracy judges have two major functions: bridging the gap between law and society and protecting the Constitution and democracy. For these functions to be implemented, several preconditions are necessary; one of them is the trust of society in courts.[779]

No doubt, the above-discussed challenges posed by the economic crisis to the institutional independence of courts also have had an impact on the attitude of society to the judiciary as a branch power in general and on trust of society in courts in particular. According to the quantitative representative public survey conducted in Lithuania in the summer of 2014, the question 'Do you trust courts?' was answered as follows: 3 per cent – 'totally trust'; 24.9 per cent – 'more likely trust than not trust'; 28.5 per cent – 'neither trust nor distrust'; 23.4 per cent – 'more likely not trust than trust', and 20.3 per cent – 'not trust at all'. To the question 'Are judges and courts independent when they administer justice?', most of the respondents (26.5 per cent) replied that most of the time they are not independent.

On the other hand, the survey also revealed that a large part of society does not quite understand the meaning of judicial independence. *E.g.*, the replies to the question 'Should judges and courts be subordinate to the President of the Republic, the Seimas and (or) the Government?' were as follows: as many as 21.5 per cent of the respondents indicated that courts should be subordinate to the President of the Republic, and 14.2% said they should be subordinate to all the three institutions. Furthermore, 56 per cent also pointed out that judges and courts should be accountable for their activities to 'some subject', and 66.3 per cent gave an affirmative answer to the question 'Should the subject to which judges and courts are accountable have the right to impose

779 Barak, A. 'Teisėjo vaidmuo demokratinėje valstybėje' [The role of a judge in a democracy] in *Konstitucinė jurisprudencija,* 2006, no. 1. For more, see Id. *The judge in a democracy*. Princeton, 2006.

sanctions against judges and courts if it finds their activity unsatisfactory?'. The survey results in the target group of lawyers were much more positive: the question 'Are judges and courts independent when they administer justice?' was answered by 52.9 per cent of the lawyers surveyed as 'most of the time independent', and by 21.4 per cent – as 'independent'. Moreover, 54.3 per cent of the lawyers indicated that judges should not be accountable to any political authority, although 17.1 per cent believed, which is rather strange, that judges should be accountable to the President of the Republic. It could appear that the responses by society witness an obvious denial of democracy and a clear tendency towards authoritarianism, but this impression is wrong: as many as 65.5 per cent of the respondents favour democracy, not authoritative rule.

Actually, as many as 77 per cent of the respondents of the survey, which ultimately revealed low public trust in courts and a seemingly closed nature of the judicial system, had never had any direct contact with courts. This is an indication that the public opinion is mostly based on the criticism of the judicial system as expressed in public by some politicians and part of the media, rather than on personal experience. Whatever the case, the situation where the trust of society in courts, along with the perception of the purpose and independence of courts, is low, may be potentially threatening to the appearance of the institutional independence of courts which, as mentioned before, incidentally is an important criterion against which the ECtHR determines whether a court may be considered to be independent.

The independence of courts would not be reinforced by the frequently voiced but hardly (if at all) implementable idea of introducing the institution of court assessors. *E.g.*, on the eve of the economic crisis in 2007, thirty-eight members of the Seimas tabled a draft Law Amending Articles 109, 110 and 112 of the Constitution,[780] which contained a proposal to set up the institution of court assessors; however, after experts submitted their conclusions, this proposal was not considered. The idea has not received any particular public support or interest, either. According to the public opinion survey, 34.6 per cent of the respondents support the introduction of the institution of court assessors, while 28.9 per cent oppose it. In the target group of lawyers, the opposition was even greater (54.3 per cent). Most of the respondents (52.3 per cent) were not willing to act as court assessors; neither were 77.1 per cent of the respondents in the group of lawyers.

The idea of introducing court assessors was widely discussed and even drew the attention of scientific research. The Law Institute of Lithuania concluded in its study that there was no need to introduce the institution of court assessors in Lithuania[781] as it would undermine the isolation of courts

[780] Online access: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=387030&p_tr2=2 [16 January 2015].

[781] 'Dėl tarėjų instituto Lietuvos Respublikoje įsteigimo tikslingumo ir galimybių' [On the purposefulness and feasibility of introducing the institution of court assessors in the Republic of Lithuania]. A study by the Law Institute of Lithuania, 2004. Online access: http://www3.lrs.lt/owa-bin/owarepl/inter/owa/U0125360.doc [16 January 2015].

from daily political pressures or changes of societal powers and governments. In terms of raising public trust in courts, serious doubts arise as to whether the institution of court assessors would actually improve the situation because decisions in complicated court cases would be based on feelings or vague understanding of what is 'right' or 'wrong', not on special legal knowledge. It is also very likely that non-professional assessors would tend to succumb to pressure from the defendants and the media.

In general, the institution of non-professional court assessors strongly reminds of the legacy from the occupant Soviet totalitarian regime. The institution of court assessors is not part of the Lithuanian legal tradition; it was introduced during the years of Soviet occupation in the Soviet 'people's' courts, and they had nothing in common with the independence of courts. It should be remembered that, at the time shortly preceding and following the restoration of independence (1990–1992) when Lithuania still had the institution of 'people's' assessors one of the major challenges faced by the judicial system was the lack of discipline and professionalism of assessors; it was difficult to ensure their attendance in court hearings, professional judges had to negotiate with assessors to ensure their presence in courts throughout the required time and to explain to them the basic concepts of law so as to prevent them from imposing unreasonable penalties.[782] After the restoration of its independence, Lithuania sought to become free of the legal legacy that was associated with the occupant regime, even more so that the institution of court assessors was perceived to be a 'performance' of democracy and an attempt to simulate the openness of courts to society.[783]

3. The impact of the crisis and crisis-response measures on pre-trial dispute resolution institutions

As mentioned before, this part of the study also deals with the impact of the economic crisis on the activity of pre-trial dispute resolution institutions, *i.e.*, in particular, the Commission on Tax Disputes and the Chief Administrative Disputes Commission. It could be presumed that, as a result of the economic crisis, these authorities faced the same challenges as courts due to the reduction in the funding of their activity.

The Commission on Tax Disputes could not avoid the impact of the crisis at the very least for the reason that, in late 2008, 'the overnight tax reform'

782 Griškevič, L. *Autentiškos teismų sistemos sukūrimas Lietuvoje* [Creation of an authentic judiciary system in Lithuania]. Doctoral thesis. Vilnius, 2013, pp. 99–100.

783 *Ibid.*, p. 102.

was carried out and brought about the amendments to over sixty tax-related laws and regulations.[784] As it transpires from the 2008–2012 activity reports of the Commission on Tax Disputes[785], the impact was dual, involving, on the one hand, the increase in workload and, on the other hand, the reduction in human and, respectively, financial resources. Undoubtedly, this had to have a negative impact on the efficiency of the activity of the Commission on Tax Disputes. *E.g.*, prior to the crisis, in 2007, the Commission received 285 applications and complaints, whereas in the wake of the crisis, in 2008, their number reached 339 (which was a 19 per cent increase compared to 2007), in 2009, the number was 442 (which meant a 55 per cent increase compared to 2007 or a 30 per cent increase compared to 2008), and in 2010, the number of applications and complaints dropped to 356 (whereas it was still 25 per cent above the level of 2007).[786] Only at the end of the economic crisis, in 2012, the number of applications and complaints received by the Commission dropped to its pre-crisis level, amounting to 248. In contrast, the number of staff working at the Commission of Tax Disputes shrunk at the time of the economic crisis. During 2008, the maximum permissible number of civil servant and contractual employee positions in the Commission was cut from twenty-eight to twenty-two posts.

Despite these circumstances, the Commission on Tax Disputes managed to cope with a growing workload with scarce resources and achieved good results both from the quantitative and qualitative point of view. Every year it examined more applications and complaints than it received (318 in 2007, 394 in 2008, 506 in 2009, 429 in 506, and 295 in 2012) and remained at a stable percentage of the repealed and changed decisions of the tax administrator (23 per cent in 2007 and 2008, 14 per cent in 2009, 21 per cent in 2010 and 27 per cent in 2012). Therefore, the presumption concerning the negative impact of the increase in the workload and the reduction in financial resources on the effectiveness of the Commission on Tax Disputes is only partially true: the changes brought about by the economic crisis also contributed to increasing its effectiveness.

The system of the non-mandatory out-of-court settlement of administrative disputes comprises two elements, including (i) the Chief Administrative Disputes Commission and (ii) municipal public administrative dispute commissions.[787] No legal act at the statutory level stipulates the independence of these authorities,[788] yet, considering the way they are formed, as well as that

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[784] For more details, see Balčiūnienė, S. *Mokesčių sistemos reforma krizės kontekste*. [The tax reform in the crisis context]. Master's thesis. Vilnius, 2011. Online access: http://vddb.laba.lt/fedora/get/LT-eLABa-0001:E.02~2011~D_20110705_125405-37135/DS.005.0.01.ETD [24 January 2015].

[785] Online access: http://www.mgk.lt/veiklos-ataskaitos [24 January 2015].

[786] The 2011 activity report of the Commission on Tax Disputes was not published.

[787] See the Law on Administrative Dispute Commissions. *Official gazette*, 1999, no. 13–310 (as later amended).

[788] *Cf.* the Law on Public Administration. *Official gazette*, 2006, no. 77–2975 (as later amended).

their procedural activities are strictly regulated (including, among others, the procedural law, *i.e.* the Law on the Proceedings of Administrative Cases)[789] and that their decisions have the force of *res judicata* (which is particularly relevant with regard to the Chief Administrative Disputes Commission), there are no grounds to presume otherwise. In other words, it is possible to maintain that administrative dispute commissions also enjoy a certain level of independence, which is in no way equal to the independence of courts.

Similarly to other analogous authorities, the Chief Administrative Disputes Commission experienced a reduction in the budgetary funds allocated to it. In addition, statistics reveal the increase in its workload. In 2007, 2008 and 2009, the Chief Administrative Disputes Commission received a similar number of applications and complaints (547, 531 and 604, respectively), whereas in 2010, the number of applications and complaints received increased to 715 and remained more or less stable until 2012.[790] However, there are no data to ascertain the weakened effectiveness of the Commission. Thus, as in the case of the Commission on Tax Disputes, it is possible to draw the following conclusion: the Chief Administrative Disputes Commission mobilised its internal resources and managed to cope effectively with the increased workload at the lower costs.

Conclusion

It is hardly possible to overestimate the importance of the effectiveness of legal dispute resolution instruments and, in particular, the independence of courts with regard to human rights and the fundamentals of a law-governed state. Without effective remedies for the defence of rights these rights may become meaningless; and, in general, independent courts may be viewed to constitute a pillar of a law-governed state. If courts were dependent on political authorities, in such courts, individuals could not defend their rights violated as a result of the actions taken by those political authorities; in such cases, the rights of the individuals would become declarative; thus, the law-governed state would be fictitious as well.

A permanent tension of a certain degree between the judiciary and the other branches of state power is determined by, on the one hand, the independence of courts from political authorities and, on the other hand, their role in controlling the actions taken by the political authorities and in protecting human rights. Such a tension becomes particularly visible at a time of social upheavals, including economic crises, when courts have to assess the

789 See, *e.g.*, Articles 23 and 27–31. *Official gazette*, 1999, no. 13–308; 2000, no. 85–2566 (as later amended).

790 Online access: http://www.vagk.lt/lt/body.php?c=1198246909&p=1203925467 [25 January 2015].

anti-crisis measures adopted by the legislative and executive branches where these measures involve the restriction and limitation of human (in particular, social and economic) rights. In such cases, the tension stemming from the relationship between law and society can become particularly acute, especially when court decisions do not satisfy the expectations of all social groups and such a tension is further fuelled by criticism voiced by some politicians with regard to court decisions that acknowledge certain anti-crisis measures to be unlawful.

The principle of the independence of courts is universally recognised, enshrined in a number of the international legal acts and documents of international judicial organisations. It is also enshrined in the Constitution and legislation of Lithuania, as well as elaborated in the jurisprudence of the Constitutional Court. The content of this principle has been developed in both Lithuanian and international law along similar lines, yet the official constitutional doctrine formulated by the Constitutional Court provides a more elaborated interpretation by highlighting the aspects that are more pertinent to Lithuania and that becomes evident in the light of the challenges faced during certain periods, including an economic crisis.

The most relevant aspect at a time of an economic crisis is the external independence of courts and the related material guarantees. These guarantees are not an end in themselves and are not considered to be privileges since they are one of the means to ensure the independence of judges: only when actual, rather than nominal, social and material guarantees are provided, it is possible to ensure the protection of courts and judges from the impact of the decisions made by political authorities and from interference with their work by the institutions and officials or other persons and from such possible political decisions that put pressure on the administration of justice; eventually, such guarantees would contribute to the reduction of corruption risks. Therefore, the preservation of a sufficient (and actual) level of the social and material guarantees of courts (and judges) is a necessary precondition for judicial independence from political authorities applying austerity measures at a time of an economic crisis.

Two principal provisions of the official constitutional doctrine can be identified in relation to ensuring the independence of courts in cases where austerity measures are applied during an economic crisis. Firstly, judges are not a special social group immune from the application of austerity measures; similarly to other persons receiving their remuneration from the state or municipal budgets or to other recipients of state pensions judges should be subject to the reduction in their remuneration and pensions during an economic crisis. Courts should have proportionate budgetary cuts like other areas of state activity. Secondly, the reduction in the level of social guarantees enjoyed by judges and the worsening of the material maintenance of courts in the conditions other than an economic crisis, as well as the disproportionate or discriminatory reduction or worsening of such social (material) guarantees during an economic crisis, should be considered to be an encroachment upon the independence of courts (and judges).

Under the conditions of an economic crisis when social tensions dominate, the traditional challenges that are common to the independence of courts and are determined by the lack of democratic traditions and legal culture become even stronger (a threat to the appearance of the independence of the judiciary as a result of a stronger criticism by politicians and some groups of society). Yet the most serious threat to the independence of courts is posed by specific challenges arising at the time of an economic crisis in relation to anti-crisis austerity measures aimed at reducing the expenses of the administration of justice and the level of the social guarantees of judges.

Consequently, two main elements of the external independence of courts can be identified; they are undoubtedly affected by the measures applied in order to cope with an economic crisis. These elements are the following: (i) the independence of judges (first and foremost, the social and material guarantees provided for them); and (ii) the institutional independence of courts which also covers the independence of the entire judicial system. This element entails the guarantees that are most vulnerable at a time of an economic crisis. They include the material maintenance of courts and the related protection of courts against pressures from political authorities. The economic crisis increased threats to both elements of this external independence of courts.

A reduction in the remuneration of judges as such does not constitute a violation of their independence because, under the Constitution, judges are not considered to be an exclusive social group to be immune from the application of austerity measures. Similarly to other persons receiving their remuneration from the state and municipal budgets, judges should also be subject to salary cuts at a time of an economic crisis. However, there are sufficient reasons to believe that the reduction in the salaries of judges as applied during the economic crisis was not only unconstitutional (as declared by the Constitutional Court ruling of 1 July 2013) due its disproportionate and even discriminatory nature but it also constituted an interference with the judicial (procedural) independence. The way the austerity measures were applied contributed to increasing the vulnerability of the material independence and protection of judges from the pressure of other branches of state powers. The main reasons for making such a conclusion are the following: firstly, the applied reduction in the salaries of judges substantially destroyed the previously applied hierarchical system of the remuneration of judges; secondly, the salaries of justices of the Constitutional Court were lowered exceptionally severely, one and half times more than the salaries of state politicians; thirdly, at the time when the reduced remuneration levels still applied to judges, civil servants, officials and politicians, certain groups of 'privileged' officials were singled out to whom remuneration higher than that of the pre-crisis level was established; fourthly, the scope of cuts in the salaries of judges was considerably greater than necessary – the same budget amount could have been saved by introducing the remuneration cuts at the same level to all civil servants, officials, politicians and judges; fifthly, the

legislator applied the cuts to the salaries of judges and other persons who received remuneration from the state or municipal budgets while being supposedly aware that such cuts would not be in line with the Constitution and, prior to the recognition that such measures were unconstitutional, it had not made any efforts to rectify the shortcoming of the legal regulation; sixthly, the details disclosed the Constitutional Court ruling of 1 July 2013 show that the introducers of the reduction in the salaries paid from the state and municipal budgets violated the concept of solidarity and proportionality that was promoted by the introducers themselves and according to which individuals receiving a bigger salary had, allegedly, to experience a proportionately greater reduction in their work remuneration.

Since the nature and type of the state pensions of judges are different from state social insurance pensions the Constitution allows to decrease them more substantially than state social insurance pensions and to compensate the losses incurred as a result of their reduction to a smaller extent. Therefore, in contrast to the reduction in the remuneration of judges, no major disputes arose with regard to decreasing the scope of state pensions: the Constitutional Court acknowledged the constitutionality of the measures introduced. However, the economic crisis showed a negative impact on the guarantees of pensionary maintenance of judges due to the legislator's inactivity to address the issue of the legal regulation of the state pensions of judges, *i.e.* its failure to implement the Constitutional Court ruling of 29 June 2010. A situation when the key issues of the state pensions of judges are not regulated by means of a law does not increase the material security of judges and certainty about their future. As a result, judges are not sufficiently protected from the possible political pressure on their work.

Almost all courts had to cope with an increase in their workload caused by the crisis. They had to seek ways to ensure the right of individuals to a judicial remedy under the conditions of scarce financial resources. Under such conditions, it was a challenge for some courts to properly administer justice and hear cases within reasonable time limits. Therefore, cuts in the funding of courts, in view of the increased workload as well as the reduced social and material guarantees of judges, had a negative impact on the activity of courts and, in general, could be considered as a disproportionate measure to cope with the crisis which threatened the institutional independence of courts.

Apart from these challenges faced by almost all courts, the Constitutional Court encountered additional difficulties due to its specific remit and special role in assessing austerity measures. Firstly, as a result of the economic crisis, the almost realistic idea of the individual constitutional complaint was fully abandoned. A decision was taken not to allocate any state funds for implementing this initiative. Later, the conditions to pursue it became unfavourable (it did not receive a sufficient back-up either by society or the community of lawyers). This had a negative effect on the protection of universal human rights as an additional national instrument for protecting

human rights before cases reach the international level (in particular the ECtHR). Secondly, the Constitutional Court had to face extremely fierce and legally unfounded criticism from politicians (which, as a matter of fact, was not particularly supported by society). There was an increasing number of political initiatives proposing to limit the powers of the Constitutional Court and, at the same time, the opportunities to defend human rights or otherwise obstruct the functioning of the Court. All of this could be considered as political pressure exercised over the Constitutional Court and its justices with regard to the decisions adopted or to be adopted by it in constitutional justice cases. Such a pressure is considered to be greater than the pressure put on other courts because the Constitutional Court is the main institution responsible for the constitutional control over the actions of political authorities. The independence of the Constitutional Court as an institution has been threatened to a certain extent when legal nihilism was demonstrated by refusing to implement its ruling of 26 June 2010 concerning the state pensions of judges.

Noteworthy, the economic crisis revealed some phenomena threatening the appearance of the independence of the judicial power, *i.e.* a low level of public trust in the judiciary, poor understanding of the purpose of courts and their independence, unfounded criticism by some politicians and manipulation of public opinion, outspoken initiatives, not fully supported by the public, to limit the judiciary power. Some political initiatives (*e.g.*, to limit the powers of the Constitutional Court in deciding on the constitutionality of decisions made by political authorities, the introduction of the institution of the so-called court assessors, who would be similar to the former 'people's' judges) are clearly reminiscent of the legacy of the Soviet regime and the longing for the days when courts were controlled by the regime.

The economic crisis also brought about certain positive reforms in the system of courts which might have not been undertaken under different circumstances. Firstly, the legislator took effective measures to solve the problem of the increased workload in courts (including the Constitutional Court) and adopted the legislative amendments that led to more streamlined and effective court proceedings (*e.g.*, the use of modern technologies in the course of proceedings, greater possibilities for using a written procedure). Secondly, district courts operating in some major towns were reorganised; as a result, the work resources of such courts were used more efficiently (the so-called 'small court reform').

Therefore, the hypothesis of the research proved only partially true. This means that, despite some threats to the independence of courts, the economic crisis also opened up some opportunities for optimising the functioning of courts and increasing their effectiveness in defending human rights.

During the economic crisis, pre-trial dispute resolution institutions faced challenges similar to those encountered by courts with regard to cuts in their funding (and sometimes the related shortage of human resources)

and the expanded workload. However, the presumption that the economic crisis had to have a negative impact on the activities of pre-trial dispute resolution institutions can be considered to be proved only partially. Firstly, in contrast to courts, no significant attempts to undermine the independence of these institutions were noted (obviously, bearing in mind only a certain level of their independence which is not equal to the independence of courts administering justice). Secondly, as it transpired from the examples of the Commission on Tax Disputes and the Chief Administrative Disputes Commission, the financial cuts and increased workload brought about by the economic crisis also contained a positive element with regard to the activities of these commissions as they had to mobilise their internal resources and coped with higher workload at smaller costs.

CONCLUDING REMARKS

Egidijus Kūris

Summarising the research results in a few sentences is not easy for two reasons. Firstly, the scope of the research is very broad, embracing highly diverse areas – from the management of economy to political and personal rights, as well as the administration of justice, and these areas appear to be linked by the fact that all of them were to a larger or lesser degree affected by the economic crisis that gripped Lithuania in 2008 – the Great Recession. It is the 'dimension of breadth'. In general, the crisis forced the authorities to resort to harsh austerity measures (reduce public financing) in all these areas, limit the commitments (in particular, social) the state had undertaken and had been fulfilling to different groups of society, and, in some areas, increase the obligations of different legal subjects to the state – impose new obligations (such as taxes) and, in this way, at least to some extent, shift the burden of the crisis onto the shoulders of various members of society. Decisions regarding the application of these measures were extremely hasty, taken overnight, without providing for any, even short, preparatory periods (there was simply no time for that), and giving little explanation to the addressees, except that these measures were 'necessary as there was no other way out'. Economists will go on arguing for long whether there was indeed 'another' way, but this will be *post factum*. From the perspective of 'breadth', the difference among all the areas covered by the research is not so vast. The crisis pervaded all law-governed domains of the life of society, although some areas have been affected less than others. An exception that should be mentioned in this regard applies to political and personal rights, which were constrained less than other segments of the human rights catalogue as a result of the crisis (although the decreased financial capacity precluded the changes necessary, for example, to improve the conditions of detention).

Another dimension is that of 'depth'. Each of the areas researched has revealed not only 'belt-tightening' measures, but also the efforts to reform – the attempts to reform the specific areas of governance so that their financing and management could become more effective. Such reforms (at times successful, at times not) sought several interrelated objectives that (if they had been achieved) would have made it possible to state the effectiveness of financing and management in the particular area to be higher than before the crisis. (The delimitation of these objectives is undoubtedly relative.) The first objective was to ease the burden that (in the opinion of the authorities of that time) was too heavy for the state and, hence, should no longer be carried in terms of the commitments with regard to certain groups of society where such

commitments drain the system of public finances without the desired return. The second objective was to rectify the deformations, established in positive law before the crisis, in the distribution of public goods and, thus, at least partly restore distributive justice by withdrawing from specific obligations that, in their substance, meant granting privileges (privileges, by the way, are prohibited by the Constitution). The third objective was, through changes in legal regulation, to create not only substantive, but also institutional and procedural preconditions to contain crises and mitigate their effects in the future. Structural reforms are necessary for the achievement of these objectives. As it has been shown by the research, in some areas, such reforms were more or less successful (for example, the reform of the law-making process, although it was not always marked by achievements); in some other areas, reforms were not undertaken (here mention should be made of the renovation of buildings, which was hopelessly stalled and hardly made any progress during the entire term of office of the 16th Government), or seemed to have been intended but were abandoned halfway through due to the lack of initiative and/or consensus (for example, in liberalising labour relations) or failure to take system relations into consideration (for example, in the realignment of municipal functions); while still in other areas, the efforts of reforms were erratic and arrogant, leading to the loss of the trust of potential partners (in the case of social partnership) and, in this way, compromising the very idea of the relevant reforms. Ultimately, in order to be carried out, reforms require financial resources, which were depleted at the time of the crisis (as, *inter alia*, in the event of the financially unsecured transfer of new functions to municipalities).

There can hardly be a clear-cut assessment of all these changes. General conclusions on each of the areas researched can be found at the end of each part of the book and will not be repeated here except to add several additional observations. First of all (as noted by all authors of the book in one way or another), the anti-crisis measures have increased the gap between the authorities and the public. It should be underlined that this was the outcome of the anti-crisis measures rather than the crisis itself – resultant not so much from hasty and, at times, spontaneous and unreasoned measures, but from the lack of social dialogue, insofar as the introduction of these measures was limited to monologue (according to the authors of Part IV), or, otherwise stated, from the arrogant imposition of decisions on society. The lack (rejection?) of dialogue not only exacerbated the economic shock (which could not be avoided given the magnitude of the crisis); it also caused social shock. Moving to law, the lack of dialogue decreased (inevitably) the trust of society in law as a social institution and strengthened the growing perception of law not as a safeguard of the coexistence of the whole society and the protection of an individual, but rather as a political instrument used where the individual members of society are sacrificed for the sake of 'overriding' public goals and the expectations, rights and previously protected interests of an individual are disregarded or curtailed. In addition, respect for law was compromised by the fact that some of the overly drastic measures were immediately subject to corrections (which may be a perfectly positive development in itself), without,

as a rule, any acknowledgement (at least at official level) of the irrationality or other deficiency, such as, among other things, a discriminatory nature of the former decisions. The authors believe that the rule of law in Lithuania was hit more severely not by the crisis as such and the anti-crisis measures, but by the pattern applied to overcome the crisis and implement these measures: in order to overcome a crisis (in particular, of great magnitude), the potential of support for overcoming the crisis should be enhanced rather than depleted, let alone destroyed.

The fact that the 'belt-tightening' policy was imposed and set in statutory law often without a rational explanation does not mean that there were realistic alternatives, at least, to certain austerity measures. In most of the cases, most probably there were none. This is also confirmed by the subsequent case-law of courts and, in particular, that of the Constitutional Court. Far more than one legislative decision, which, if it had been adopted under 'normal conditions', would have probably been assessed as a severe deviation from the standards of the rule of law (as, for example, 'the overnight tax reform', which was nothing else but an increase of tax burden without any *vacatio legis),* was justified and approved under the judicial procedure as unavoidable in that economic context. If the overriding principle is *pereat mundus, fiat iustitia,* it should be asked what *iustitia* is worth where *mundus perit*. Neither the Constitutional Court nor other courts opted for this path – they applied the standards of the rule of law flexibly; if these standards had been applied inflexibly, submitting to the letter of the law alone and disregarding the actual situation of the addressees of that letter, this would have placed society, whom the law with its standards of the rule of law is designed to serve, in a situation where rights would have existed formally but could not be implemented in reality, thus, meaning that these rights would not *really* have existed. If it is true that *lex non cogit ad impossibilia*, then this maxim has to be applied, at least to some degree, to the state, too.

But have these standards as such changed? Would it be possible to give a positive answer to the question asked at the beginning of the research (to confirm the hypothesis): whether the economic crisis and the anti-crisis measures taken in Lithuania led to lowering (softening) of the universally recognised standards of the rule of law, *inter alia*, those of human rights protection in the public and professional perception, as well as in the law-making and law-implementation practice? Certain expectations, which had previously been safeguarded and protected as rights, are undoubtedly protected and defended to a lesser extent these days. Yet, as the research has shown, the transformative effect of the crisis has stopped somewhere on the verge of expectations and interests, more precisely, has slightly stepped over it, although its interference in the area of rights has not been irreversible in most cases. The economic necessity, which has been so widely explored in writings, has not (yet?) changed the views of society – at least to the extent to weaken the belief that the rights curtailed should be restored and the losses incurred should be compensated for after the crisis (although it is understood that they may not be compensated for to the full extent). The political establishment

also did not resort to curtailing, because of the economic inevitability, specific rights so drastically that there would be no way back – to restore them at least to some extent (some hothead and, from the long-term perspective, very harmful political initiatives, as, for example, to restrict the power of the Constitutional Court to investigate into the constitutionality of the so-called economic laws, have been shelved as proposals and considerations, although this does not mean they will never return to life again)[791]. In some areas, however, economic inevitability induced the authorities to streamline the financing of public needs and opened up avenues for more social justice (where it was refused to extend privileges or where exclusivity of certain social groups was recognised as constitutionally unjustified). It is true that success areas were not so numerous during the crisis period, but they have laid the groundwork for further reflection and implementation of some of the reforms after the crisis (for example, the reform of labour relations – most active discussions and, possibly, legislative decisions on this issue may be expected in 2015 if the determination of the political authorities does not fade away as a result of the upcoming election to the Seimas in 2016, as it has already happened on more than one occasion, when the implementation of even prepared reforms was put off until after elections). In summary, it should be noted that the presumption formulated rather pessimistically at the outset of the research has been confirmed to a much lower extent than expected even by some authors of this book. Hence, it has been more unconfirmed rather than confirmed.

Nevertheless, it may not be denied that the crisis and the measures taken to overcome it have had an impact on the legal system and, in particular, on the legal mentality of the public and political authorities. This impact is multiple. On the one hand, at least one area is disappointing: in the public consciousness, economic welfare is preferred to democratic procedures, hence, consequently, to a democratic legal process, too (this element revealed by the public opinion survey has been bewildering to more than one of the authors). On the other hand, a better understanding was developed of the potential

[791] One would wish that this assumption expressed as a cautious reservation would not hold true. But, seemingly, ghosts do revive. At the time when this book was almost ready for publication, the initiative was once again undertaken in the Seimas to prohibit the Constitutional Court to examine the constitutionality of the so-called economic laws. Such was a response to the Constitutional Court ruling of 11 June 2015 (its entry into force has been postponed until it is officially published in the *TAR*, scheduled for 2 January 2016). The Court found that an important 'economic law' was anti-constitutional. That statute allowed for state budget allocations to municipalities in, to put it plainly, a totally voluntaristic manner, depending on whether the political composition and/or the head of a municipal council were acceptable or unacceptable to the central authority: where unacceptable, less funds could be allocated. Several years ago, this ill-advised anti-legal (thus, consequently, anti-state and anti-national) initiative, aimed at 'showing the Constitutional Court its place', was undertaken by the right political wing; the political majority of that time was particularly criticised for such an initiative by the then left-wing opposition. Meanwhile, in 2015, the same initiative was put forward already by the left-wing camp holding the majority in the Seimas. This confirms once again that *where you stand depends on where you sit*. Indeed, *pereat mundus,* where law is inconvenient for those holding the political majority, if such a majority allows for a free show of proactive short-sighted politicians, who consider that their calling is to be grave diggers of the rule of law.

of law, *i.e.* more precisely, the limits of that potential; although an absolute majority of the members of society considered that the rights they and others held had been infringed by the crisis and *due* to the crisis, there was more understanding that not all statutory rights (including social) had been fully legitimate. The standards of the rule of law as such, despite their flexibility in some highly complex constitutional proceedings, have, nevertheless, withstood the pressure of the crisis; the researchers have not identified any single case where any of these standards had completely faltered, had been set aside or retained as declarative or nominal only, except legal certainty – to the extent it pertained to the shortening of *vacatio legis* of the legislation amended during 'the overnight tax reform' to an utterly unacceptable minimum. There were infringements – quite many, as our research has shown, many more than could be tolerated, including the violations of the imperatives of transparent and responsible lawmaking, the equality of the rights of persons, *etc.;* at times, it was openly avoided to implement the acts issued by the courts, among them, first of all, by the Constitutional Court, that ruled on such infringements (see, for example, Part VI). Such infringements, however, are treated *as violations of law* and, at times, as ongoing ones. It should be underlined in this context that, despite the fact that a large part of society was put off their stride, the crisis prompted a more active protection of the rights of an individual (see, for example, Part V), including their defence in courts. It is undoubted that the individual constitutional complaint, that is to say, the possibility of direct recourse to the Constitutional Court (this will have to be allowed sooner or later), will make such active efforts more visible. The fact that this avenue for appeal has not been opened (despite the European and worldwide tendency and despite the fact that readiness for this was in place yet in 2007) is one more indication of the persistent unwillingness of the political power (not only of the crisis period Seimas majority, but also of the preceding and succeeding majorities) to allow law to control politics to a greater degree and to legitimise one more safeguard of the rule of law.

And one more, truly final, observation should be made. The crisis of 2008–2014, which is hardly the last one, put to the test not only the capacity of the Lithuanian economy and societal democratic choices but also the legislative framework of the state. We should not be deceived by the relief that follows a downturn. Likewise, the problems of the recession and, at times, questionable methods to overcome it should not obscure the achievements. One of the major achievements for lawyers and not only them, but also for the entire society, is that the universally accepted standards of the rule of law, despite the above-described economic necessity-driven and, hence, indispensable twists and turns in the application of these standards, as well as despite, at times, the irrational or bad faith initiatives to defy these standards, have not been downgraded to the extent to make it impossible to speak about Lithuania as a country with the rule of law established not only as a slogan, but as a legal reality. If one recalls that less than three decades ago the concept of the rule of law or a state governed by the rule of law as such was not even referred to by any lecturer of the only in those times in Lithuania Faculty of Law, this is not so insignificant.

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