CONSTITUTIONAL JUSTICE: AN EFFECTIVE GUARANTEE OF CONSTITUTIONALISM (LITHUANIAN EXPERIENCE)

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SUMMARY: I. *Introduction*. II. *What is the Role of the Constitutional Justice in the Balance of Power (Legislature, Executive Power, Judiciary)?* III. *The Stability of the Constitution and the Possibility of its Evolution*. IV. *Legislative Omission as a Problem of the Constitutional Control*. V. *What are the Difficulties Encountered by the Constitutional Court in its Functioning and the Fulfilment of its Mission – Administering of the Constitutional Justice?* VI. *Instead the Conclusions*.

I. Introduction

The Constitution of the Republic of Lithuania[1] was adopted by referendum —the voting of the entire Nation— on 25 October 1992. The referendum in which the Constitution was adopted was organised according to the democratic legal traditions of the State of Lithuania (Constitutional Court ruling of 22 July 1994).[2] The source of the Constitution is the national community, the civil Nation, itself.

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1 The 25 October 1992 Constitution of the Republic of Lithuania (*Official Gazette* Valstybës þinios, 1992, no.. 33-1014).

2 The 22 July 1994 Constitutional Court of the Republic of Lithuania ruling "On the compliance of the provisions of items 1, 9, 12 and 39 of the Law "On Amending and Appending the Law of the Republic of Lithuania on Referendum" of 15 June 1994, by which Articles 1, 9, 12 and 32 of the Law on Referendum have been amended or appended, with the Constitution of the Republic of Lithuania" (*Official Gazette* Valstybes žinios, 1994, no. 57-1120).

The Constitution is an act of the supreme legal power. The Constitution reflects a social agreement—a democratically accepted obligation by all the citizens of the Republic of Lithuania to the current and future generations to live according to the fundamental rules entrenched in the Constitution and to obey them in order to ensure the legitimacy of the governing power, the legitimacy of its decisions, as well as to ensure human rights and freedoms, so that the concord would exist in the society. As an act of the supreme legal power and social agreement, the Constitution is based on universal, unquestionable values, which are belonging of the sovereignty to the Nation, democracy, recognition of human rights and freedoms and respect for them, respect for law and the rule of law, limitation of the scope of powers, duty of state institutions to serve the people and their responsibility to the society, public spirit, justice, striving for an open, just, and harmonious civil society and state under the rule of law. The Constitution provides the bases of relationships between a person and the state, formation and functioning of public government, the national economy, local self-government, other major relationships of life of the society and the state. Having adopted the Constitution, the civil Nation formed the standardised basis for the common life of its own, as the state community, and consolidated the state as the common good of the entire society. The Nation usually amends the Constitution directly or through its democratically elected representatives and only according to the rules established in the Constitution itself. The Constitution is supreme law. It provides the guidelines for the entire legal system—the entire legal system is created on the basis of the Constitution (Constitutional Court rulings of 25 May 2004,[3] 13 December 2004).[4]

Article 1 of the Constitution of the Republic of Lithuania provides: "The State of Lithuania shall be an independent and democratic republic".

[3] The 25 May 2004 Constitutional Court of the Republic of Lithuania ruling "On the compliance of Article 1 (wording of 4 May 2004) and paragraph 2 (wording of 4 May 2004) of Article 2 of the Republic of Lithuania Law on Presidential Elections with the Constitution of the Republic of Lithuania" (*Official Gazette* Valstybės þinios, 2004, No. 85-3094).

[4] The 13 December 2004 Constitutional Court of the Republic of Lithuania ruling "On the compliance of some legal acts whereby the relations of state service and those linked thereto are regulated with the Constitution of the Republic of Lithuania and laws" (*Official Gazette* Valstybes žinios, 2004, no. 181-6708).

The Constitutional Court in its ruling of 23 February 2000[5] noted that "in this article of the Constitution the fundamental principles of the Lithuanian State are established: the Lithuanian State is free and independent; the republic is the form of governance of the Lithuanian State; the state power must be organised in a democratic way, and there must be a democratic political regime in this country".

The provisions of Article 1 of the Constitution, as well as the principle of the state under the rule of Law established in the Preamble to the Constitution as well as in other provisions of the Constitution, determine the main principles of the organisation and activities of the state power of the State of Lithuania.

Paragraph 1 of Article 5 of the Constitution provides that in Lithuania, the powers of the State shall be exercised by the Seimas, the President of the Republic and the Government, and the Judiciary. This constitutional norm established the principle of separation of powers. This is a fundamental principle of the organisation and activities of a democratic state under the rule of Law. In its rulings the Constitutional Court has noted many times that this principle means that the legislative, executive and judicial powers must be separated, sufficiently independent, and that there must be a balance between them. Every power is exercised through its institutions which are granted the competence corresponding to their purpose.

Justice, an open and harmonious civil society, a state under the rule of law would never be possible if whole state power becomes concentrated in a certain single institution of state power. The Constitution consolidates the organisation of the institutions executing state power and procedure of their formation, which ensures a balance between the institutions of state power, the counterbalance of the authority of certain institutions of state power to the authority of other institutions of state power, the harmonious activity of all the institutions executing state power and execution of their constitutional duty to serve the people, the solution by the Constitutional Court of disputes related to the authority ves-

[5] The 23 February 2000 Constitutional Court of the Republic of Lithuania ruling "On the compliance of 14 January 1998 Government of the Republic of Lithuania Resolution No. 36 "On the Introduction of Labels of the 1998 Standard for Marking Tobacco Products and Alcoholic Drinks" with the Constitution of the Republic of Lithuania and Part 1 of Article 8 and Part 1 of Article 12 of the Republic of Lithuania Law on Enterprises" (*Official Gazette* Valstybės þinios, 2000, no. 17-419).

ted by the Constitution in the institutions of state power, the formation of all the institutions executing state power, the Seimas, the President of the Republic, the Government, the Judiciary, as well as other state institutions only from the citizens, who without reservations obey the Constitution adopted by the Nation and who, while in office, unconditionally follow the Constitution, law, the interests of the Nation and the State of Lithuania.

II. What is the Role of the Constitutional Justice in the Balance of Power (Legislature, Executive Power, Judiciary)?

Constitutional Court of the Republic of Lithuania, according to the Constitution, is empowered to make decisions which can not be appealed and it is the last instance for constitutional cases. Under Paragraph 1 of Article 102 of the Constitution the Constitutional Court shall decide whether the laws and other acts of the Seimas are not in conflict with the Constitution and whether the acts of the President of the Republic and the Government are not in conflict with the Constitution or laws. More over, in Paragraph 1 of Article 107 of the Constitution it is established that a law (or part thereof) of the Republic of Lithuania or other act (or part thereof) of the Seimas, act of the President of the Republic, act (or part thereof) of the Government may not be applied from the day of official promulgation of the decision of the Constitutional Court that the act in question (or part thereof) is in conflict with the Constitution. Thus, the *erga omnes* model of constitutional control is consolidated in the Constitution (Constitutional Court ruling of 28 March 2006.[6] Therefore, the formal powers of Lithuanian Constitutional Court are strong enough to exercise judicial review of *inter alia* legislature.

A certain danger may arise when the authority of the state is split in several bodies and then none of them is strong enough to act constitutio-

[6] The 28 March 2006 Constitutional Court of the Republic of Lithuania ruling "On the compliance of item 2 of paragraph 1 of Article 62, paragraph 4 (wording of 11 July 1996) of Article 69 of the Republic of Lithuania Law on the Constitutional Court and paragraph 3 (wording of 24 January 2002) of Article 11, paragraph 2 (wording of 24 January 2002) of Article 96 of the Republic of Lithuania Law on Courts with the Constitution of the Republic of Lithuania" (*Official Gazette* Valstybės þinios, 2006, no. 36-1292).

nally in a possible conflict. The logic of parliamentarism would suggest that the representative body should be recognized as supreme. Then it will be the last instance in discussion of constitutional matters. However, there are some arguments supporting the position that Constitutional Court should be the final stage among the state authorities in states with written constitutions.

Despite some tendencies to non-positivistic concept of the rule of law, Lithuania always had positivistic orientation in legal tradition. The Constitution of the Republic in detail clarifies the main constitutional principles of society and state. Hence, the function of the Constitutional Court is to interpret the Constitution. Of course, there is no clear distinction between interpretation of the Constitution and making new rules. It is rather clear, that a certain degree of judicial law-making exists even in the society where legislator is working really well. General rules of the Parliament are not able to cover every particular question in detail. Otherwise, danger of the formal legality would arise, and that would be a step away from the justice. In Lithuanian the judicial interpretation of the Constitution will involve the Constitutional Court to the wide extent of the law-making and does not cause sufficient danger of concentration of too influential authority in one body.

The allocation of this function to the Parliament is not appropriate because of several reasons. Political interests may facilitate unconstitutional decisions of the Parliament. Being non competent in particular constitutional matters, the members of the Parliament may obey the order of their party and vote for a law or other legal act which does not correspond to the basic law of the state. Then it might be difficult to avoid the collision of laws and to stabilize the legal system. In any case the Parliament always has a power to say final word in these discussions. It has the power to amend the Constitution. But then the way of reaching egoistic political interests becomes more complicated.

The next question I will discuss is to what extent the Constitutional Court is a political institution and to what extent judicial. Without any doubt, the body has a hybrid nature. On the one hand, the Constitutional Court interprets laws, passes judgments and therefore it can be described as judicial body. On the other hand, this judicial body is also involved in the system of separation of powers; it participates in the system of "brakes and balances". Nevertheless, its function in political arena is exerci-

sed through the judicial function - by interpreting laws and passing judgments.

It is worth the Constitutional Court ruling of 6 June 2006[7] in this context. In this case a group of Members of the Seimas (Parliament of Lithuania), the petitioner, applied to the Constitutional Court with a petition, requesting to investigate whether some norms of the Law on the Constitutional Court was not in conflict with Paragraphs 1 and 2 of Article 5, Paragraph 1 of Article 111, Chapters VIII and IX of the Constitution. The petition of the petitioner, requesting to investigate whether the title "The Constitutional Court - a Judicial Institution" and Paragraph 3 of Article 1 of the Republic of Lithuania Law on the Constitutional Court, under which the Constitutional Court shall be a free and independent court which implements judicial power according to the procedure established by the Constitution and this Law, were not in conflict with Paragraphs 1 and 2 of Article 5 and Paragraph 1 of Article 111 of the Constitution was based on the following arguments: in Paragraph 1 of Article 5 of the Constitution it is established that in Lithuania, state power shall be executed by the Seimas, the President of the Republic and the Government, and the Judiciary. Under Paragraph 1 of Article 111 of the Constitution, the courts of the Republic of Lithuania shall be the Supreme Court of Lithuania, the Court of Appeal of Lithuania, regional courts and local courts. According to the petitioner, the Constitutional Court is not included in this "final list", while separate Chapter VIII of the Constitution is designated to it. According to the petitioner, under Paragraph 2 of Article 5, the scope of power shall be limited by the Constitution. The fact that Chapter IX of the Constitution is designated to the Court, which executes state power, and separate Chapter VIII of the Constitution—to the Constitutional Court, certifies that under the Constitution, the Constitutional Court is not a court and it does not execute state power.

The Constitutional Court held that the courts that under the Constitution implement judicial power in Lithuania are to be attributed not to

[7] The 6 June 2006 Constitutional Court of the Republic of Lithuania ruling "On the compliance of the title "the Constitutional Court—a judicial institution" of Article 1 of the Law on the Constitutional Court of the Republic of Lithuania and of paragraph 3 of the same Article with the Constitution of the Republic of Lithuania" (*Official Gazette* Valstybės þinios, 2006, no. 65-2400).

one, but to two or more (if that, taking account of the Constitution, is established in certain laws) systems of the courts. Under the Constitution and laws, at present in Lithuania there are three systems of courts: (1) the Constitutional Court executes constitutional judicial control; (2) the Supreme Court of Lithuania, the Court of Appeal of Lithuania, regional courts and local courts, specified in Paragraph 1 of Article 111 of the Constitution, constitute the system of courts of general jurisdiction; (3) under Paragraph 2 of Article 111 of the Constitution, for the consideration of administrative, labour, family and cases of other categories, specialised courts may be established to law; one system of specialised courts, namely, administrative ones, which is composed of the Supreme Administrative Court of Lithuania and regional administrative courts, is established and is functioning at present.

The Constitutional Court provided that under the Constitution, the Constitutional Court is the institution of constitutional justice, which implements constitutional judicial control. The Constitutional Court has held in its acts more than once that when deciding, under its competence, on the compliance of legal acts of lower power (parts thereof) with legal acts of greater power, *inter alia* (and, first of all) with the Constitution, as well as when executing its other constitutional powers, the Constitutional Court - an individual and independent court - administers constitutional justice and guarantees the supremacy of the Constitution in the legal system and constitutional legitimacy. The title —the Constitutional Court— of the constitutional justice institution which is ascribed to execute constitutional judicial control is *expressis verbis* entrenched in the Constitution itself. Thus a state power institution, which is named as a court in the Constitution itself, in its constitutional nature may not be considered as not a court, i.e. as not a judicial institution.

According to the Constitutional Court the mere fact that there are separate Chapters "The Court" and "The Constitutional Court" in the Constitution, is not and may not be a basis to construe that, allegedly, as it seems to the petitioner, the Constitutional Court is not a court-part of the judicial power and is somewhere out of the limits of the judiciary system. On the contrary, the fact that there are two separate Chapters "The Court" and "The Constitutional Court" in the Constitution does not deny the fact that the Constitutional Court which, under the Constitution, executes constitutional judicial control, is a part of the system of courts,

but it emphasizes its particular status in the system of judicial power as well as in the system of all the state institutions executing state power; in this way, the peculiarities of the constitutional purpose and competence of the Constitutional Court are emphasized.

The Constitutional Court emphasized that the presumption made by the petitioner that the Constitutional Court is not a court and does not implement state power was not in line with the concept of power and the powers of the Constitutional Court established in the Constitution at all. The fact that under the Constitution, the Constitutional Court has the powers to recognize legal acts of other institutions that implement state power —the Seimas, the President of the Republic, the Government— as being in conflict with legal acts of greater power, first of all, with the Constitution, and, thus, to abolish the legal power of these acts and to remove these legal acts from the Lithuanian legal system for good, the fact that only the Constitutional Court has the constitutional powers to construe the Constitution officially - to provide with the concept of the provisions of the Constitution which is binding on all the law-making and law-applying institutions as well as on the Seimas, the representation of the Nation, obviously testify that the Constitutional Court may not be an institution not implementing state power. The presumption made by the petitioner that the Constitutional Court is not a court and does not implement state power is utterly irrational, not only is it not in line with the constitutional concept of state power implementing institutions—it strikes the *raison d'être* of the petition of the petitioner himself in this constitutional justice case, since, as states the petitioner, if the Constitutional Court is not a court and does not implement state power, it is not comprehensible why the petitioner applies namely to this court, requesting to investigate whether a legal act, passed by the Seimas—one of the institutions implementing state power (in this case—legislative power) is not in conflict with the Constitution.

III. The Stability of the Constitution and the Possibility of its Evolution

It is universally recognized that one of the most important features of the stable democracy and the state under the rule of Law is the stable Constitution and the legal order which is based on the Constitution. It is

often emphasized that guarantees of the Constitution's stability are fixed in its text while establishing the complicated procedure of it's amending (Chapter 14 of the Constitution of the Republic of Lithuania). This fact is noted even by the initiator of the constitutional doctrine Albert Venn Dicey.[8] However, it is urgent to stress that this is only formal characterization of the Constitution's stability. But it is more important to understand the notional, valuable stability of the Constitution which means that the Constitution is the system of permanent values of Law. This is an evident fact because of the priority of the contemporary constitutional and international law and their main institution – the protection of human rights. The evolution of the institution of constitutional human rights also stimulates formation and establishment of other constitutional institutions and principles (for example, the limitation of powers and the separation of powers, the independence of courts, the rule of Law and the others) in democratic states and their international policy and law. This notional or valuable stability of the Constitution is guarantied differently; *i. e*. not only establishing the complicated procedure of it's amending. At first, the stability of the Constitution is guarantied by the interpretation of the valid Constitution: this interpretation is realised by the Constitutional Court which formulates the constitutional doctrine of Lithuania. However, the powers of the Constitutional Court are limited by the text of the Constitution itself if this text allows only limited guarantee of one or the other value (from standpoint of the comparative constitutional or international law).

The valuable stability of the Constitution is also guaranteed by the measures of the legislative power, but with such a condition that they don't overstep formal and notional limits of the Constitution. Besides, the stability of the Constitution is guaranteed by proper and legal activities of courts of general competence or administrative courts, but with such a condition that courts and the other institutions are active and really defend constitutional human rights. While estimating that fact, it can be said that the stability of the Constitution is it's reality at the same time – it must be realised, but not be formal or even fictitious. Can the constitutional provision, which guarantees human rights in the less proportion than the European Convention for the protection of human rights

[8] Dicey, A. V., *An Introduction to the Study of the Law of the Constitution*, 10th. ed., Houndmills, Basingstoke, Hampshire: Macmillan Education Ltd., 1993.

and fundamental freedoms and the jurisprudence of the European Court for human rights do, be real and proper? Of course, it can not be. So it is an evident fact that the constitutional provisions must be amended and improved for the aim that they (and the Constitution itself) would be real and at the same time stable when some constitutional provisions are not notionally proper.

Democracy and law are not only universal values; they are also social values of every nation which are based on the historical experience of the state's self-dependence and constitutional traditions. Thus, the universal experience of nations of the world and Europe must be harmonized with traditions of every nation and perspectives of democracy and development of the constitutionalism. It can be and must be done through the comparative constitutionalism or through the comparative constitutional law and it's relation with the international law. Thus, the conclusion can be done, that the amendments of the Constitution are possible and even necessary sometimes because of the change of the system of internal and international values of democracy and constitutionalism.

The formation of the Constitution is not a single act. The Constitution is adopted only by a single act. The development of the Lithuanian Constitution didn't finish with the adoption of it. Every step of the constitutional development is significant for the protection and defence of the human liberty and welfare.

> Thus, it is to be emphasized that the formulation of the official constitutional doctrine (both as a whole and on every individual issue of the constitutional legal regulation) is not a one time act but a gradual and consecutive process. This process is uninterrupted and is never fully finished because-since the nature of the Constitution as the act of the supreme legal power itself and the idea of the constitutionality imply that the Constitution may not have, nor does it have any gaps or internal contradictions (Constitutional Court rulings of 25 May 2004[9] and 13 December 2004)[10] - while construing the norms and principles of the Constitution, which are expli-

[9] The 25 May 2004 Constitutional Court of the Republic of Lithuania ruling "On the compliance of Article 1^1 (wording of 4 May 2004) and paragraph 2 (wording of 4 May 2004) of Article 2 of the Republic of Lithuania Law on Presidential Elections with the Constitution of the Republic of Lithuania" (*Official Gazette* Valstybės þinios, 2004, No. 85-3094).

[10] The 13 December 2004 Constitutional Court of the Republic of Lithuania ruling "On the compliance of some legal acts whereby the relations of state service and those

> citly and implicitly entrenched in the text of the Constitution and which constitute a harmonious system, the possibility, if it is necessary because of the logic of the considered constitutional justice case, to formulate the official constitutional doctrinal provisions (*i. e*. to reveal such aspects of constitutional legal regulation) which have not been formulated in the acts of the Constitutional Court adopted in previous constitutional justice cases, never disappears. When the Constitutional Court considers new constitutional justice cases every time subsequent to petitions of petitioners, the official constitutional doctrine formulated in the previous acts of the Constitutional Court (on every individual issue on the constitutional legal regulation which is important to a corresponding case) is every time supplemented by new fragments. Thus, by formulating new official constitutional doctrinal provisions the diversity and completeness of the legal regulation entrenched in the Constitution-the supreme legal act-is revealed (Constitutional Court ruling of 28 March 2006).[11]

The Constitutional Court has held that the Constitution, as supreme law, must be a stable act (Constitutional Court rulings of 16 January 2006[12]

linked thereto are regulated with the Constitution of the Republic of Lithuania and laws" (*Official Gazette* Valstybės þinios, 2004, no. 181-6708).

[11] The 28 March 2006 Constitutional Court of the Republic of Lithuania ruling "On the compliance of item 2 of paragraph 1 of Article 62, paragraph 4 (wording of 11 July 1996) of Article 69 of the Republic of Lithuania Law on the Constitutional Court and paragraph 3 (wording of 24 January 2002) of Article 11, paragraph 2 (wording of 24 January 2002) of Article 96 of the Republic of Lithuania Law on Courts with the Constitution of the Republic of Lithuania" (*Official Gazette* Valstybės þinios, 2006, no. 36-1292).

[12] The 16 January 2006 Constitutional Court of the Republic of Lithuania ruling "On the compliance of paragraph 4 (wording of 11 September 2001) of Article 131 of the Code of Criminal Procedure of the Republic of Lithuania with the Constitution of the Republic of Lithuania, on the compliance of paragraph 5 (wordings of 10 April 2003 and 16 September 2003) of Article 234, paragraph 2 (wordings of 10 April 2003 and 16 September 2003) of Article 244, Article 407 (wording of 19 June 2003), paragraph 1 (wording of 14 March 2002) of Article 408, paragraphs 2 and 3 (wording of 14 March 2002) of Article 412, paragraph 5 (wording of 14 March 2002) of Article 413 and paragraph 2 (wording of 14 March 2002) of Article 414 of the Code of Criminal Procedure of the Republic of Lithuania with the Constitution of the Republic of Lithuania and on the petitions of the Šiauliai district local court, the petitioner, requesting to investigate whether Article 410 (wording of 14 March 2002) of the Code of Criminal Procedure of the Republic of Lithuania is not in conflict with the Constitution of the Republic of Lithuania" (*Official Gazette* Valstybės þinios, 2006, no. 7-254).

and 14 March 2006).[13] The stability of the Constitution is such its feature which, together with its other features (inter alia and first of all with the special, supreme legal power of the Constitution) makes the constitutional legal regulation different from the legal (ordinary) regulation established by legal acts of lower legal power (Constitutional Court ruling of 14 March 2006)[14] and the Constitution-different from all the rest legal acts. The stability of the Constitution is a great constitutional value.

One of the conditions ensuring the stability of the Constitution as a legal reality is the stability of its text. It was mentioned that the nature of the Constitution, the idea of constitutionality implies that the Constitution may not have and has no gaps or internal contradictions. Thus, the text of the Constitution should not be corrected, for example, only after the terminology, inter alia legal terminology, has changed (Constitutional Court ruling of 16 January 2006).[15] The meaning of the Constitution as an extremely stable legal act would also be ignored if the intervention to its text would be made every time when certain social relations which are regulated by law undergo changes (for example, technological possibilities of certain kinds of activity expand so much, which maybe were impossible to predict at the time when the text of the Constitution was created).

[13] The 14 March 2006 Constitutional Court of the Republic of Lithuania ruling "On the compliance of the provisions of the Republic of Lithuania Law on Protected Territories, the Republic of Lithuania Forestry Law, the Republic of Lithuania Law on Land, and the Regulation for construction on private land approved by Government of the Republic of Lithuania Resolution No. 1608 "On approving the Regulation for construction on private land" of 22 December 1995 with the Constitution of the Republic of Lithuania, on the compliance of the provisions of the Republic of Lithuania law on Protected Territories and the Republic of Lithuania Law on Land Reform with the provisions of the Constitutional Law on the entities, procedure, terms and conditions and restrictions of the acquisition into ownership of land plots provided for in paragraph 2 of Article 47 of the Constitution of the Republic of Lithuania (wording of 20 June 1996) as well as on the compliance of item 2 of the Regulation for construction on private land approved by Government of the Republic of Lithuania Resolution No. 1608 "On approving the Regulation for construction on private land" of 22 December 1995 with the provisions of the Republic of Lithuania Forestry Law and the Republic of Lithuania Law on Land" (*Official Gazette* Valstybės þinios, 2006, No. 30-1050).

[14] *Idem*.

[15] Dicey A. V., *An Introduction to the Study of the Law of the Constitution*, *cit*., note 8.

In this context it is particularly to be emphasized that the further construction and development of the official constitutional doctrine, *inter alia* the reinterpretation of the official constitutional doctrinal provisions, also such, when the official constitutional doctrine is corrected, in the acts of the Constitutional Court adopted in new constitutional justice cases, allow to reveal the deep potential of the Constitution without changing its text and in this aspect to apply the Constitution to the changes of social life, to constantly changing living conditions of society and the state and to ensure the viability of the Constitution as the fundamental of life of society and the state. The formation and development of the official constitutional doctrine is a function of constitutional justice. In the acts of the Constitutional Court adopted in new constitutional justice cases, by further construing and developing, inter alia reinterpreting, the official constitutional doctrinal provisions, also so that the official constitutional doctrine is corrected, it is prompted not to make any intervention to the text of the Constitution when such intervention is not legally necessary. Alongside, thus one contributes to the ensuring of the stability of the text of the Constitution and the constitutional order.

IV. Legislative Omission as a Problem of the Constitutional Control

It is no doubt that legislative omission is one of the most problematic issues in a modern constitutional jurisprudence. Probably no one will argue that each Constitutional Court or other relevant institution executing the function of constitutional control has faced in one or another way the difficulties solving the question of compliance of legal act with Constitution or another legal act of higher power than the legal act which is argued in a view of legislative omission. It should be noted that usually there is no special explicit legal provisions (at least in Lithuania) which Constitutional Courts could follow in such cases. That is why in many cases it is up to these Courts to construe (interpret) norms and principles of Constitution and other legal documents, to formulate legal doctrine of legislative omission executing constitutional control.

Exchange of experience between Constitutional Courts in this particular question is of great importance and relevance. This fact can be proved just saying that the Circle of Presidents of the Conference of European

Constitutional Courts on 7 September, 2006 (in Vilnius) *inter alia* established that the topic for discussion in the XIVth Congress of the Conference of European Constitutional Courts will be "Problems of Legislative Omission in Constitutional Jurisprudence".

I would like to share the experience of the Constitutional Court of the Republic of Lithuania, which from my point of view has already made important steps for clarity of constitutional control in the view of legislative omission.

In the jurisprudence of the Constitutional Court of the Republic of Lithuania (*inter alia* the ruling of 25 January 2001,[16] the decisions of 6 May 2003,[17] 13 May 2003,[18] 16 April 2004,[19] the ruling of 13 December

[16] The 25 January 2001 Constitutional Court of the Republic of Lithuania ruling "On the compliance of Article 23, Paragraph 2 of Article 38, Paragraph 5 of Article 41, Paragraph 5 of Article 152, Paragraph 4 of Article 155, Paragraph 5 of Article 156, Article 180, Paragraphs 4 and 11 of Article 208 and Paragraph 3 of Article 231 of the Statute of the Seimas of the Republic of Lithuania with the Constitution of the Republic of Lithuania" (Official Gazette Valstybės þinios, 2001, no. 10-295).

[17] The 6 May 2003 Constitutional Court of the Republic of Lithuania decision "On the request of the Panevėþys regional administrative court to investigate the compliance of norms of the Republic of Lithuania Law on Levies with the Constitution of the Republic of Lithuania as well as the compliance of provisions of Government of the Republic of Lithuania Resolution No. 1458 "On the confirmation of the List of Objects of State Levy and its amounts as well as the Procedure for its payment and returning" of 15 December 2000 with the Constitution of the Republic of Lithuania and Laws" (Official Gazette Valstybės þinios, 2003, no. 45-2031).

[18] The 13 May 2003 Constitutional Court of the Republic of Lithuania decision "On the petition of the Supreme Administrative Court of Lithuania requesting to investigate whether the Republic of Lithuania Law on the amendment of Article 24 and the recognition of Articles 23 and 32 of the Law on Social Insurance Pensions as no longer valid is not in conflict with the Constitution of the Republic of Lithuania" (Official Gazette Valstybės þinios, 2003, no. 48-2133).

[19] The 16 April 2004 Constitutional Court of the Republic of Lithuania decision "On the petition of a group of members of the Seimas, the petitioner, requesting to investigate whether Chapter XXXVIII of the Statute of the Seimas of the Republic of Lithuania and certain provisions of this Chapter, as well as Seimas of the Republic of Lithuania Resolution No. IX-1954 "On the formation of the special investigation commission" of 23 December 2003 are not in conflict with the Constitution of the Republic of Lithuania, also whether the Regulation of the special investigation commission formed by Seimas of the Republic of Lithuania Resolution No. IX-1954 of 23December 2003, approved by Decision No. 1 of 30 December 2003 of the special investigation commission in order to investigate the reasonableness and seriousness of the charges brought against the President of the Republic Rolandas Paksas and to draw up a conclusion regarding the proposal to

2004[20]) there is the provision that the Constitutional Court enjoys the constitutional powers not only to hold that there is a legal gap, *inter alia* legislative omission, in the investigated legal act of lower power (part thereof), but also by its ruling adopted in the constitutional justice case it can recognise such legal regulation as being in conflict with legal acts of higher power, *inter alia* the Constitution.

One of the latest decisions of the Constitutional Court of the Republic of Lithuania concerned with the topic that is analysed here was adopted on 8 August, 2006.[21] Therein the Constitutional Court has precisely formulated definition (the concept) of legislative omission. It also expressed very clear position how to distinguish legal gaps as legislative omissions and other legal gaps. The criteria of this distinction should encourage courts of general jurisdiction and specialized courts to solve cases con-

institute the impeachment proceedings formed by Seimas of the Republic of Lithuania Resolution No. IX-1954 and certain provisions of this regulation are not in conflict with the Constitution of the Republic of Lithuania, the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, and of the Statute of the Seimas of the Republic of Lithuania" (Official Gazette Valstybės þinios, 2004, no. 57-2006).

20 The 13 December 2004 Constitutional Court of the Republic of Lithuania ruling "On the compliance of some legal acts whereby the relations of state service and those linked thereto are regulated with the Constitution of the Republic of Lithuania and laws" (*Official Gazette* Valstybės þinios, 2004, no. 181-6708).

21 The 8 August 2006 Constitutional Court of the Republic of Lithuania decision "On dismissing the legal proceedings in the case subsequent to the petition of the Third Vilnius city local court, the petitioner, requesting to investigate as to whether paragraph 3 (wording of 24January 2002) of Article 11 of the Republic of Lithuania Law on Courts is not in conflict with paragraph 2 of Article 5, paragraphs 2 and 3 of Article 109, paragraph 1 of Article 114 of the Constitution of the Republic of Lithuania and the Constitutional Principle of a state under the rule of law, whether the Republic of Lithuania Law on Remuneration for Work of State Politicians, Judges and State Officials (wording of 29 August 2000 with subsequent amendments and supplements) is not in conflict with Article 5, paragraph 1 of Article 30, paragraphs 2 and 3 of Article 109 and paragraph 1 of Article 114 of the Constitution of the Republic of Lithuania and the constitutional principle of a state under the rule of law, and whether item 1 of Government of the Republic of Lithuania Resolution No. 1494 On the partial amendment of Government of the Republic of Lithuania Resolution No. 689 On Remuneration for work of chief officials and officers of law and order institutions and of law enforcement and control institutions" of 30 June 1997 of 28 December 1999 is not in conflict with Article 1, paragraph 1 of Article 5, paragraphs 2 and 3 of Article 109 and paragraph 1 of Article 114 of the Constitution of the Republic of Lithuania and the constitutional principle of a state under the rule of law (Official Gazette Valstybės þinios, 2006, no. 88-3475).

cerned with legal gaps which are not recognized as legislative omission directly *ad hoc* when administering justice. It is also a practical mean for other petitioners (not less than one fifth members of the Parliament, the Government and the President of the Republic of Lithuania) who according to the Constitution can raise the issue of the constitutionality of a legal act. Identifying legal gaps of non legislative omission nature in legal regulation they should not aply to the Constitutional Court with petitions but take necessary legislative measures themselves to improve legal regulation (legislation) first. It should be particulary noted that this question is solved even in the scope of such legal gaps which can appear because the Constitutional Court executing his functions excludes unconstitutional legal regulation from legal system. So I would like to present some ideas in more detailed way, using some quotes from aforementioned decision where it is necessary to be precise.

Concerning the Constitutional definition of legislative omission the Constitutional Court held that

> ...a legal gap, *inter alia* legislative omission, always means that the legal regulation of corresponding social relations is established neither explicitly nor implicitly, neither in the said legal act (part thereof) nor in any other legal acts, even though there exists a need for legal regulation of these social relations, while the said legal regulation, in case of legislative omission, must be established, while heeding the imperatives of the consistency and inner uniformity of the legal system stemming from the Constitution and taking account of the content of these social relations, precisely in that legal act (precisely in that part thereof), since this is required by a certain legal act of higher power, inter alia the Constitution itself... Legislative omission means that the corresponding legal regulation is not established in that legal act (part thereof), although, under the Constitution (or some other act of legal act of higher power, the compliance of the investigated legal act (part thereof) of lower power with which is assessed), it must be established precisely in that legal act (or precisely in that part thereof).

So holding that, the Constitutional Court notes that „it is necessary to distinguish legislative omission, as a consequence of an action by the law-making subject that issued a corresponding legal act, from the legal gaps that appeared due to the fact that the necessary law-making actions were not undertaken at all, neither one nor another law-making subject

issued a legal act designated for regulation of certain social relations, and due to this these social relations remained legally not regulated".

The Constitutional Court is able to recognise corresponding legal regulation as being in conflict with legal acts of higher power, inter alia the Constitution, but it is necessary to follow certain conditions, which are defined in the jurisprudence of the Constitutional Court (inter alia in the aforesaid Constitutional Court rulings and decisions), namely:

1) if the laws and other legal acts (parts thereof) of lower power do not establish certain legal regulation, the Constitutional Court has constitutional powers to recognise these laws or other legal acts (parts thereof) as being in conflict with the Constitution or other legal acts of higher power in cases when due to the fact that the said legal regulation is not established in precisely the investigated laws or other legal acts (precisely in the investigated parts thereof), the principles and/or norms of the Constitution, the provisions of other legal acts of higher power might be violated;

2) in the cases when the law or other legal act (part thereof), which is disputed by the petitioner and which is investigated by the Constitutional Court, does not establish certain legal regulation which, under the Constitution (and if a substatutory act (part thereof) of the Seimas, and act (part thereof) of the President of the Republic or the Government is disputed—also under the laws) need not be established precisely in the disputed legal act (precisely in that part thereof), the Constitutional Court holds that the matter of investigation is absent in the case on the petition of the petitioner—this is the basis to dismiss the instituted legal proceedings/ case.

The Constitutional Court held that it is also necessary to take account of how the said legal gap appeared: whether it is legislative omission, created by a law-making action of the subject who passed a corresponding legal act *(i. e. due to the fact that, in the course of passage of this legal act, the legal relations that should have been regulated precisely in that legal act (precisely in that part thereof), were not regulated precisely in that legal act (precisely in that part thereof)),* whether this legal gap appeared due to other circumstances, for example, due to the fact that by its ruling the Constitutional Court had recognised that the legal regulation in a certain legal act (part thereof) of lower power was in conflict with the Constitution or other legal act of higher power. In the latter

case there are no grounds to state the presence of legislative omission; to the contrary, in this situation, under the Constitution, a corresponding subject of law-making (provided corresponding legal relations have to be legally regulated) is under obligation to change the no longer valid legal regulation so that the newly established legal regulation would not be in conflict with a corresponding legal act of higher power, inter alia (and, first of all) with the Constitution.

The Constitutional Court does not investigate *inter alia* such legal gaps or other indeterminacies, which could appear after the Constitutional Court recognised by its ruling that a certain legal act (part thereof) is in conflict with a legal act of higher power, inter alia the Constitution, otherwise the essence of legislative omission as the consequence of an action of the law-making subject that issued the corresponding legal act would be denied. The essence and meaning of constitutional review and constitutional justice would be also distorted in essence or denied, because it would mean would mean that the Constitutional Court, while acting within its constitutional competence created the legal situation (*i.e*. that it virtually created new legal regulation instead of that recognised as conflicting with a legal act of higher power, inter alia the Constitution), which is incompatible with the Constitution or other legal act of higher power.

V. What Are the Difficulties Encountered by the Constitutional Court in its Functioning and the Fulfilment of its Mission – Administering of the Constitutional Justice?

It is necessary to emphasize that the acts of the Constitutional Court, which recognize that certain legal acts are not contrary to the Constitution do not require any specific implementation. They can be taken as a realizable. Such an interpretation is especially worth if judicial power and influence of the decisions of the Constitutional Court are associated only with their resolution. On the other hand, it was mentioned that all the subjects have to follow not only the resolution of the acts of the Constitutional Court, but also the motives and arguments of the acts of the Constitutional Court. The Constitutional Court sometimes allows understanding the Parliament and the other subjects of the legislation that it

is necessary to change legal regulation that is "incorrect" or even "without constitutional background", which is not recognized as unconstitutional or just allows itself "to menace (somebody) softly".

It is more difficult situation when it is necessary to implement the acts of the Constitutional Court that have recognized legal acts as unconstitutional. Usually unconstitutional legal acts have to be eliminated from the legal system (they are eliminated by the institutions that adopted these legal acts), although there are some opinions (K. Lapinskas and etc.[22]) that judgment of the Constitutional Court actually terminates legal power of the unconstitutional legal act and considering legal consequences of such a decision this is equal to abolition of such legal act. On the other hand, in this case their emerge gaps of legal regulation, even vacuum, therefore the judgments of the Constitutional Court, which recognize questionable legal acts as unconstitutional have to be implemented enacting new legal acts that are not contrary to the Constitution. So sometimes the Constitutional Court postpones the publication of its rulings (see Constitutional Court ruling of 24 December 2002).[23] Under the Constitution, the Constitutional Court, having *inter alia* assessed what legal situation might appear after a Constitutional Court ruling becomes effective, may establish the date when this Constitutional Court ruling is to be officially published; the Constitutional Court may postpone the official publishing of its ruling if it is necessary to give the legislator certain time to remove the *lacunae legis* which would appear if the

[22] Lapinskas K. Acts of the Constitutional Court. – Jaraðiûnas et al. Constitutional Justice in Lithuania. Vilnius: The Constitutional Court of the Republic of Lithuania, 2003, p. 171-201.

[23] The 24 December 2002 Constitutional Court of the Republic of Lithuania ruling "On the compliance of paragraph 3 of Article 3 (wording of 12 October 2000), paragraph 4 of Article 3 (wording of 12 October 2000), item 2 of paragraph 1 of Article 5 (wording of 12 October 2000), paragraph 1 of Article 18 (wording of 12 October 2000), items 2, 3, 4, 8, and 15 of paragraph 1 of Article 19 (wording of 12 October 2000), items 1, 5, 7, 9, 12, 15, 16, 17, and 18 of paragraph 1 of Article 21 (wording of 12 October 2000), item 6 of the same paragraph (wordings of 12 October 2000 and 25 September 2001), and item 14 of the same paragraph (wordings of 12 October 2000 and 8 November 2001) of the Republic of Lithuania Law on Local Self-Government, as well as the Republic of Lithuania Constitutional Law on the Procedure of the application of the law on the alteration of article 119 of the Constitution, and the Republic of Lithuania Law on the entering into the List of Constitutional Laws of the Constitutional Law on the Procedure of the application of the law on the alteration of article 119 of the Constitution, with the Constitution of the Republic of Lithuania" (Official Gazette Valstybës þinios, 2003, no. 19-828).

relevant Constitutional Court ruling was officially published immediately after it had been publicly announced in the hearing of the Constitutional Court and if they constituted preconditions to basically deny certain values protected by the Constitution. The said postponement of official publishing of a Constitutional Court ruling (*inter alia* a ruling by which a certain law (or part thereof) is recognised as contradicting to the Constitution) is a presumption arising from the Constitution in order to avoid certain effects unfavourable to the society and the state, as well as the human rights and freedoms, which might appear if a relevant Constitutional Court ruling was officially published immediately after its official announcement in the hearing of the Constitutional Court and if it became effective on the same day after it had been officially published.

Besides, the great problem is not that it is necessary to adjust legal regulation that has been recognized as unconstitutional, but that sometimes decisions of the Constitutional Court may "require" providing financial resources in the budget of the state in order to fulfill obligations of the state towards its citizens.

VI. Instead the Conclusions

The influence of the acts of the Constitutional Court to the legal system is significant. These legal acts cleanse legal system from unconstitutional legal acts; also the Constitution becomes "alive". Moreover, acts of the Constitutional Court have the judicial power of the Constitution, they have the *erga omnes* effect, which integrates all legal system and thanks to the values established in the Constitution – all the society and the state. Yet more, the acts of the Constitutional Court sometimes intervene into the area of accomplished legal relations (*ex tunc* effect), it is most often related with the aim to guarantee legal values, from which the most important are human rights.