

**RESTRICTIONS ON IMPLEMENTATION OF FREEDOM OF
MOVEMENT IN TIMES OF COVID-19 PANDEMIC BEFORE
THE CONSTITUTIONAL COURT OF THE REPUBLIC OF
LITHUANIA: CONSTANT OR EVOLVING?**

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RESUMEN: En las sociedades democráticas, los requisitos relativos a las restricciones de la libertad de circulación siguen siendo un ámbito importante que se cuestiona en diferentes tribunales constitucionales debido a las denominadas medidas de bloqueo en tiempos de la pandemia COVID-19. Se plantea la cuestión de si en Lituania el estándar de escrutinio sobre el nivel de protección de la libertad de circulación permanece constante o evoluciona.

Con el objetivo de revelar estos requisitos, se realiza un análisis exhaustivo y una comparación de los mismos en la doctrina constitucional oficial del Tribunal Constitucional de la República de Lituania. El autor utiliza el enfoque holístico evaluando la jurisprudencia hasta la pandemia de COVID-19 y durante esta pandemia, así como después de ella. Como la jurisprudencia anterior no cambia, también sugiere una posición para el futuro proporcionando algunos requisitos adicionales para evaluar la constitucionalidad de la regulación legal que restringe la aplicación de derechos no absolutos que comprenden el derecho de circulación. Estos requisitos son: base constitucionalmente justificable de las restricciones, su necesidad, carácter temporal, proporcionalidad, igualdad, así como posibilidades para las personas de aplicar otros derechos constitucionales.

Palabras clave: libertad de circulación; restricciones; pandemia COVID-19; jurisprudencia del Tribunal Constitucional de la República de Lituania.

ABSTRACT: In democratic societies requirements on restrictions of implementation of freedom of movement remain a significant area challenged in different constitutional courts due to so-called the lockdown measures in times of COVID-19 pandemic. The question arises whether in Lithuania the standard of scrutiny on the level of protection of freedom of movement stays constant or evolves?

Aiming to reveal these requirements, comprehensive analysis and comparison of them in the official constitutional doctrine of the Constitutional Court of the Republic of Lithuania is made. The author uses the holistic approach by evaluating the case law until the COVID-19 pandemic and during this pandemic, as well as after it. As the previous case law does not change, it

also suggests position for the future providing some additional requirements for assessing constitutionality of legal regulation restricting implementation of non-absolute rights comprising the right of movement. These requirements are: constitutionally justifiable basis of restrictions, their necessity, temporal character, proportionality, equality, as well as possibilities for persons to implement other constitutional rights.

Keywords: freedom of movement; restrictions; COVID-19 pandemic; case-law of the Constitutional Court of the Republic of Lithuania.

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I. INTRODUCTION

The infectious coronavirus SARS-CoV-2 which resulted in the spread of COVID-19 pandemic (worldwide health crisis) still is not a history – after its multiple waves, its different mutations still exist (as well as other infectious diseases also are spreading) and is not known for sure whether such or other pandemic could be evaded in the future. Due to it constitutional courts of different states faced and still face requests and petitions by which so-called pandemic or the lockdown measures preventing and combating the spread of COVID-19 pandemic in order to protect the health and life of persons, are challenged¹. Lithuania is no exception.

In the scientific literature it is asserted that some courts in their decided cases have lowered the standard of review to limit some constitutional rights or, on the contrary, have made the standard stricter to give even greater protection to other constitutional rights

1 In some constitutional courts questions of the legality of these measures are raised in multiple requests. For example, in its Annual Report the German Constitutional Court states that in 2020 overall, more than 880 matters brought before the Court, including 240 applications for preliminary injunction, concerned the pandemic, https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Jahresbericht/jahresbericht_2020.pdf?__blob=publicationFile&v=6, p. 4 [accessed on 9 July 2022]. The Constitutional Court of the Republic of Slovenia in 2020 also faced a significant number of lodged requests and petitions by which pandemic measures were challenged, as well as the legislation regulating infectious diseases and the measures for tackling them, An Overview of the Work for 2020 of the Constitutional Court of Republic of Slovenia, 2021, https://www.us-rs.si/wp-content/uploads/2021/07/RSUS_LetnoPorocilo_2020_EN.pdf [accessed on 9 July 2022]. The courts in the United States also are reviewing an unprecedented number of legal claims contending that emergency executive orders issued by state governors during the coronavirus pandemic violate constitutionally protected rights. See: MARINER, W. K. "Shifting Standards of Judicial Review During the Coronavirus Pandemic in the United States". Published online by Cambridge University Press, 15 September 2021, <https://www.cambridge.org/core/journals/german-law-journal/article/shifting-standards-of-judicial-review-during-the-coronavirus-pandemic-in-the-united-states/A0A127A67AFB5D59BE8B99696800427A> (on behalf of the German Law Journal (Volume 22, Issue 6, September 2021, pp. 1039–1059. <https://doi.org/10.1017/glj.2021.51>).

during the COVID pandemic; thus, suggestion is made that the judiciary need not and should not use a pandemic to alter human rights to protect public health². Another scientific recommendation also speaks in the name of scrutiny while considering on human rights by stating that it is vital to increase the weight of human rights rules and principles in the balancing exercise between public health and freedom of movement – a coherent, holistic approach to international mobility requires a greater degree of precision about whether health measures comply with human rights standards³.

What are the implications for judicial review (standard of review, as well as content of this right and, especially, scope of restriction) in case of freedom of movement before the Constitutional Court of Lithuania? Whether there should be a different standard of review in case of this human right in times of COVID-19 pandemic?

Thus, *the object of this research* – requirements on justified restrictions in official constitutional doctrine revealed by the Constitutional Court of the Republic of Lithuania concerning the pandemic measures especially focusing on constitutional freedom of movement, which is entrenched inter alia in the Article 32 of the Constitution of the Republic of Lithuania.

The research concentrates on the essential issues of freedom of movement: requirements on restrictions of implementation of this freedom, as the questions arise – are these requirements still the same and are they applied in the same manner as it was until the pandemic (i. e. conditions, under which restrictions may be done, the necessity and scope of such restrictions, applying of a balancing test between public interests (in order to protect society from the spread of infectious disease and to secure public safety) and the rights of an individual concerned), applying of the other constitutional principles important for situations of concurring constitutional values.

The aim of the research – to reveal and compare situations of these requirements in the case-law on freedom of movement in the different periods of the Court's activities, to identify common trends about its changes or evolution and to provide insights on their future case-law situation (its potential, possibilities and perspectives).

In this research, situation of these requirements is viewed from the perspective of time, since changes in the official constitutional doctrine or its evolution due to the COVID-19 pandemic measures is concerned. Thus, the detailed analysis and comparison is made of situations until the COVID-19 pandemic and during this pandemic, as well as after it. This holistic approach distinguishes this research from the other research papers which deal only with analysis of the case-law during and after COVID-19 pandemic.

The freedom of movement (including its definition, content, but, especially, justified restrictions) is concerned because this freedom is inevitable in a democratic society and although the COVID-19 pandemic affected a variety of rights (not only civil and political, but as well social and economic rights), freedom of movement which also is a prerequisite to implement other human rights, was one of the most affected. It seems that

2 See MARINER, W. K. *Supra note* No. 2, p. 1040.

3 DIAS SIMÕES, F. (2021). "Protecting International Travelers during Pandemics: Charting the Way Forward". 31(1) *Minnesota Journal of International Law* (forthcoming 2022), The Chinese University of Hong Kong Faculty of Law Research Paper No. 2021-14, Available at SSRN: <https://ssrn.com/abstract=3795157> or <http://dx.doi.org/10.2139/ssrn.3795157> [accessed on 9 July 2022].

especially due to the posed Covid-19 restrictions freedom of movement became cherished even more than ever. This was the case in Lithuania also.

There are no doubts that the possibilities and conditions for the restrictions of constitutional rights, including freedom of movement, under which this may be done, as well as the necessity and scope of such restrictions are extremely important issues for the national constitutions and constitutional doctrine developed by the institutions of constitutional justice⁴. As the Constitutional Court of the Republic of Slovenia notes, and which is relevant also in case of Lithuania, adopting of precedential standpoints regarding the standards of protection of constitutional values, especially human rights and fundamental freedoms, are of particular importance for the development of (constitutional) law⁵. Such importance is relevant also for other countries, for example, as a source of inspiration in our interconnected world. However, only petitioners form constitutional courts' activities by filling their requests, as these courts could not initiate cases related to COVID-19 by themselves.

Since the Constitutional Court of the Republic of Lithuania in its case-law had formulated essential issues of freedom of movement until the COVID-19 pandemic, the *research is based on the hypothesis* that the Court keeps the same line – it has not lowered its standard of scrutiny on the level of protection of freedom of movement: requirements on restrictions of this right essentially are mainly still the same and they are applied in the same manner as it was until the pandemic; thus, requirements of restricting of implementation of this right also will not change and they can be applied to deal with decisions on constitutionality of measures for similar future crises.

Although scientific researches address the issue of challenging the pandemic measures, also concerning freedom of movement, in separate national constitutional courts or from the perspective of comparative constitutional case law perspective⁶, present analysis of the legal regulation issued as a result of COVID-19 crisis and its impact in different states⁷, the researches do not include a detailed comparative analysis giving a wider picture of the case law of the Constitutional Court of Lithuania and its perspectives.

4 BIRMONTIENĖ, T. Asmens teisių ir laisvių konstitucinis įtvirtinimas. In Lyginamoji konstitucinė teisė. Vadovėlis. Mykolo Romerio universitetas, Registrų centras, 2016, p. 250, <https://www.registrucentras.lt/bylos/dokumentai/literatura/Lyginamoji%20konstitucin%C4%97%20teis%C4%97.pdf> [accessed on 9 July 2022].

5 An Overview of the Work for 2020 of the Constitutional Court of Republic of Slovenia, 2021, p. 12, https://www.us-rs.si/wp-content/uploads/2021/07/RSUS_LetnoPorocilo_2020_EN.pdf [accessed on 9 July 2022].

6 For example, KUDRNA, J. (2021) "Freedom of Movement or a Holiday in Zanzibar: the Right to Leave and Return to the Homeland". International Comparative Jurisprudence, Vol. 7, No 2, DOI: <https://doi.org/10.13165/ijc.2021.12.003>, <https://ojs.mruni.eu/ojs/international-comparative-jurisprudence/article/view/6811>; TERŠEK, A., DRAGAN, J., PAVLIN, A., NASTRAN, B., VRAŽIČ, N. (2021). "On the Legality and Constitutionality of the Measures by which the Slovenian Government Restricted Constitutional Rights and Freedoms Before and After the 2020 Coronavirus Pandemic": Part 1. Open Political Science, No 4, p. 147–173, <https://doi.org/10.1515/openps-2021-0015>, <https://www.degruyter.com/document/doi/10.1515/openps-2021-0015/html>; DI BARI, M. (2021). Let Judges Speak for Themselves: Can Comparative Constitutional Case Law Help Conceptualize Universal Standards in the Fight against COVID-19? In *Dirittifondamentali.it* - Fascicolo 1/2021, p. 200–221, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3805599 [accessed on 9 July 2022].

7 For example, HONDIUS, E., SANTOS SILVA, M., NICOLUSSI, A., SALVADOR, P., WENDEHORST, C. C., ZOLL, F. (editors) (2021). Coronavirus and The Law in Europe. Intersentia, <https://intersentia.com/en/coronavirus-and-the-law-in-europe.html> [accessed on 9 July 2022].

For example, Interim Report No. CDL-AD(2020)018-e on the measures taken in the EU member States as a result of the Covid-19 crisis and their impact on democracy, the Rule of Law and Fundamental Rights. Adopted

As it will be disclosed further, not a big number of petitions concerning the constitutionality of COVID-19 measures have been decided on the merits in the Constitutional Court of Lithuania, however, all kinds of adopted in Lithuania decisions concerning restrictions of implementation of freedom of movement due to the COVID-19 pandemic which were presented are valuable, as they could bring insights for prognosis of the future case-law situation.

In general, concerning the pandemic measures in Lithuania it should be mentioned that, as in the other countries, the tackling of the pandemic has been in the hands of the Government and Lithuania used to have changing regimes aiming to cope with this pandemic. In Lithuania there was no declaration of the state of emergency (*nepaprastoji padėtis*) provided in the Constitution of the Republic of Lithuania, where the decision should be taken by the Parliament or by the President and confirmed later on by the Parliament (Article 144 of the Constitution⁸ (according to its Article 145, some constitutional rights, including freedom of movement, could be restricted during emergency state)). Though, the Government by its Resolution No. 152 of 26 February 2020 “Regarding declaration of a state-level extreme situation“ inter alia on the basis of the Law on Civil Protection (the Law on the Prevention and Control of Contagious Diseases as the basis was introduced later) declared the state of extreme situation (*ekstremalioji situacija*) “due to the threat of the spread of the novel coronavirus (COVID-19)“⁹ and the Resolution and this extreme situation in the whole territory of Lithuania were valid till the 1st of May, 2022¹⁰. In addition, on 14 March of 2020 the Government adopted Resolution No. 207 introducing quarantine in the whole territory of Lithuania¹¹, which placed restrictions on implementation of various constitutional rights, including freedom of movement. This Resolution was inter alia based on the Law on Civil Protection and the Law on the Prevention and Control of Contagious Diseases. The initial duration of quarantine was set for 16-30 March, but it has been extended until 31 May¹². Thus, the first quarantine lasted three months (16 March to 17 June 2020). The second wave of the COVID-19 pandemic reached Lithuania in the autumn of 2020. The second quarantine was introduced on 7 November 2020 (Resolution No. 1226)¹³ inter alia on the Law on the Prevention and Control of Contagious Diseases and after several extensions lasted till June 1st of 2021. In June

by the Venice Commission at its 124th Plenary Session (Online, 8-9 October 2020), [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2020\)018-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)018-e) [accessed on 9 July 2022].

- 8 The Constitution of the Republic of Lithuania (1992). Official Gazette *Valstybės žinios*, 1992, No. 33-1014 with the further amendments.
- 9 Resolution of the Government of the Republic of Lithuania No. 152 of 26 February 2020 “Regarding declaration of a state-level extreme situation“. Register of legal acts TAR, 2020-02-26, No. 4023. Register of legal acts TAR, 2020-02-26, No. 4023.
- 10 Resolution of the Government of the Republic of Lithuania of 20 April 2022 No. 378 “Regarding the Government of the Republic of Lithuania of 2020 February 26 Resolution No. 152 “Regarding the declaration of the state-level extreme situation“ as invalid“. Register of legal acts TAR, 2022-04-21, No. 8126.
- 11 Resolution of the Government of the Republic of Lithuania of 14 March 2020 No. 207 “Regarding introducing quarantine in the territory of Lithuania“. Register of legal acts TAR, 2020-03-14, No. 5466.
- 12 DAGILYTĖ, E., PADSKOČIMAITĖ, A., VAINORIENĖ, A. “Lithuania’s Response to COVID-19: Quarantine Through the Prism of Human Rights and the Rule of Law“. 14 May 2020, <https://verfassungsblog.de/lithuanias-response-to-covid-19-quarantine-through-the-prism-of-human-rights-and-the-rule-of-law/> [accessed on 9 July 2022].
- 13 Resolution of the Government of the Republic of Lithuania No. 1226 of 4 November 2020 “Regarding introducing quarantine in the territory of Lithuania“. Register of legal acts TAR, 2020-11-05, No. 23062.

2021 Lithuania past the third wave of the COVID-19 pandemic. After this, there were the further waves of infections.

Lithuania experienced national social distancing rules (keeping two meters distance from others, and limits on public gatherings, in retail businesses, in airlines, trains, buses, worship services, and complete closures of schools, art, entertainment venues, and certain businesses and medical services. There were also provisions that people stay at home, the prohibitions to move between municipalities, limitations on travel due to vaccine passports. Restrictions on movement were established for people diagnosed with the COVID-19 and those living with them (as to avoid contacts), as well as people crossing the Lithuanian national borders and for all others living in Lithuania. Some mandatory measures were expected to be temporary. Some were lifted later in the year to allow businesses to open in order to revitalize a devastated economy. Subsequent waves of increased COVID-19 infections, however, made to continue or reimpose restrictions.

For this research it is also important that the Constitutional Court of the Republic of Lithuania has almost 30 years of work experience dealing with constitutional justice cases (it celebrates its 30th anniversary in 2023). Except some special powers¹⁴, the Court implements the review of the constitutionality and legality of concrete legal acts and decide on constitutional complaints regarding possible violations of human rights and freedoms emerging also due to pandemic measures.

In order to test the hypothesis raised in the research the article is divided into two sections. While the first section reveals the case-law of the Constitutional Court of the Republic of Lithuania on freedom of movement until the COVID-19 pandemic, the second examines its case-law on freedom of movement during the COVID-19 pandemic and after it. The third section presents the conclusive insights inter alia addresses the potential, possibilities and perspectives to develop the case-law on freedom of movement and these are left open for a future debate.

II. CASE-LAW ON FREEDOM OF MOVEMENT UNTIL THE COVID-19 PANDEMIC

2.1 The first decade of its activities (from 1993 until 2004)

According to the Lithuanian Constitution the freedom of movement comprises the right to choose a place of residence in Lithuania and the right to leave Lithuania freely (part 1 of the Article 32 states that „A citizen may move and choose his place of residence in Lithuania freely and may leave Lithuania freely“), also the right of a citizen of the Republic of Lithuania to return to, and reside in, Lithuania (part 3 and 4 of the Article 32 state that „A citizen may not be prohibited from returning to Lithuania“ and „Everyone who is Lithuanian may settle in Lithuania“). Thus, the Constitution provides for rights of internal movement and foreign travel (also emigration). In addition, the wording of the part 2 of Article 32 of the Lithuanian Constitution suggests that first two of the aforemen-

¹⁴ Competence of the Constitutional Court of Republic of Lithuania. The Constitutional Court of the Republic of Lithuania internet site, <https://lrkt.lt/en/about-the-court/activity/competence/182> [accessed on 9 July 2022].

tioned rights – *the right to choose a place of residence in Lithuania and the right to leave Lithuania freely – may not be restricted otherwise than by law when this is necessary for the protection of the security of the State or the health of people, or for the administration of justice.*

However, do the same restriction requirements apply to the right of a citizen of the Republic of Lithuania to return to, and reside in, Lithuania, as these rights are entrenched in the Constitution separately from the right to choose a place of residence in Lithuania and the right to leave Lithuania freely?

In connection to possible restrictions it is worth to add that the wording of the Article 145 of the Constitution reminds of the possible temporal restriction of the rights and freedoms also entrenched in Article 32 of the Constitution, upon the imposition of martial law or the declaration of a state of emergency.

In its case law of the Constitutional Court there are some important insights that could be pointed out, in dealing with evolution of the case-law in the context of circumstances in the cases (as the Court decides on issues which are “suggested“ by petitioners and not on the objects chosen on his own initiative), including on possible restrictions of implementation of constitutional human rights and especially, on the freedom of movement and its element – the right of a citizen of the Republic of Lithuania to return to, and reside in, Lithuania. First two decades of the Constitutional Court’s activities which will be analysed in this part of the research illustrate the period until the Covid-19 pandemic.

In the beginning of the first decade (from 1993 until 2004) of the Court’s activities while administering constitutional justice and guaranteeing constitutional lawfulness and the supremacy of the Constitution in the legal system the Constitutional Court’s *Conclusion of 24 January 1995*¹⁵ could be analysed as an answer to the question on the aforementioned restrictions on the right of a citizen of the Republic of Lithuania to return to, and reside in, Lithuania. While giving this conclusion on the request of the President of the Republic and stating that provisions of the international treaty of the Republic of Lithuania – Convention for the Protection of Human Rights and Fundamental Freedoms inter alia Article 2 of Protocol No. 4 of the Convention – prior to its ratification in Lithuania is not in conflict with the Article 32 of the Constitution, the Constitutional Court stated that “*the right of a citizen of the Republic of Lithuania to return to, and reside in, Lithuania is absolute.* It also emphasized that [...] under the Paragraph 3 of Article 32 of the Constitution the presence of a citizen in his/her country is always lawful. [...]. Meanwhile, the conditions for the lawfulness of the entry into, departure from, and presence in the country by foreign nationals or stateless persons are prescribed in the domestic law”.

In addition, in that conclusion the Constitutional Court also in the light of Part 1 of the Article 32 of the Constitution (“*Citizens may move and choose their place of residence in Lithuania freely, and may leave Lithuania at their own will*”), played active role in revealing *the subject of freedom of movement*. The Court after a complex comparison of the provisions of the Constitution and the Convention explained the concept of a citi-

15 Conclusion of 24 January 1995 of the Constitutional Court of the Republic of Lithuania. Official Gazette *Valstybės žinios*, 1995, Nr. 9-199. Also available in English on the Constitutional Court’s internet site, <https://www.lrkt.lt/en/court-acts/search/170/ta990/content> [accessed on 9 July 2022].

zen in the Constitution broadly as including both foreigners and persons without citizenship. Such broad interpretation of the aforementioned constitutional provision let to conclude that there is no contradiction between the Convention which uses word “everyone” (Paragraph 1 of Article 2 of Protocol No. 4 prescribes that “everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence”) and the Constitution.

Concerning restrictions of the freedom of movement it could be shortly returned to *the former Ruling of 13 April 1994*¹⁶ of the Constitutional Court on the constitutionality of the Parliament of the Republic of Lithuania (further – Seimas) Resolution on citizenship matters¹⁷. In this Ruling the Court, while investigating the impugned legal regulation inter alia especially interpreting requirement of “permanent residence on the territory of Lithuania” as a prerequisite for acquiring citizenship of Lithuania, in the context of the right to freedom of movement payed attention to the previous *restriction of one of the fundamental human rights - the right to freely move on the territory of the state and to freely choose one’s place of residence*, when such a restriction was made by an administrative measure of temporary and also permanent registration of residents (according to the previous Law on Citizenship of 1989, in order to prove permanent residence on the territory of Lithuania, it was necessary to refer to former registration of residents). However, the Court did not find violation of the impugned legal regulation to the Article 32 of the Constitution of Lithuania.

The other important *Ruling of the Constitutional Court of 29 December 2004 on the prevention of organised crime*¹⁸ is attributed to the end of the analysed decade. This Ruling makes a wide picture on the freedom of movement, as it reveals significance, content of the freedom of movement and also illuminates requirements on restrictions of implementation of constitutional human rights, including the freedom of movement (part 1 of the Article 32 of the Constitution, i. e. the right to choose a place of residence in Lithuania and the right to leave Lithuania freely). In this Ruling, the Constitutional Court while affirming that the citizen’s *freedom of movement is an important element of the constitutional status of a member of the civil community, also explained the content of this freedom*. It stated that the provisions of Article 32 of the Constitution mean that “only the citizen himself has the right to decide, in which place of the territory of the Republic of Lithuania he stays, when to leave this place and move to another place, to finally decide as to what permanent or temporary place of residence to choose, as well as to decide whether to stay in Lithuania or leave it, as well as the right to choose himself *the time of departure*. *The latter right implies also the freedom of the citizen to choose any legal manner of departure*“.

In the Ruling of 29 December 2004 the Court *also explained about the ban emerging from the Constitution concerning unreasonable restrictions for the implementation of*

16 Ruling of 13 April 1994 of the Constitutional Court of the Republic of Lithuania. Official Gazette Valstybės žinios, 1994, No. 29-524. Also available in English on the Constitutional Court’s internet site, <https://lrkt.lt/en/court-acts/search/170/ta975/content> [accessed on 9 July 2022].

17 Resolution of the Seimas of the Republic of Lithuania “On Amending Item 5 of the Resolution of the Supreme Council of the Republic of Lithuania “On the Procedure for Implementing the Republic of Lithuania’s Law on Citizenship” of 22 December 1993. Official Gazette Valstybės žinios, 1994, No. 29-524.

18 Ruling of 29 December 2004 of the Constitutional Court of the Republic of Lithuania. Official Gazette Valstybės žinios, 2005, No. 1-7. Also available in English on the Constitutional Court’s internet site, <https://www.lrkt.lt/en/court-acts/search/170/ta1281/content> [accessed on 9 July 2022].

these rights and freedoms: according to the Constitution it is not permitted to establish a procedure for the implementation of these rights and freedoms so that the citizen has to apply for a permission of any state institution to implement the freedom of movement which belongs to him, as well as the right to choose a place of residence in Lithuania, the right to freely leave Lithuania, or so that these rights and freedoms are unreasonably restricted“.

In the Ruling of 29 December 2004 restrictions of these rights were discussed because in this case the petitioners courts raised the questions if the legal regulation established in the provisions of the Law on the Restraint of Organised Crime *was not in conflict with the Paragraphs 1 and 2 of Article 32 of the Constitution*. The courts had doubts about the provisions of this Law according to which the preventive measures (aiming at restricting and reducing organised crime) provided for in this Law, were applied to some specified persons considering that these persons may commit grave (or very grave) crimes. These measures were an official warning (*oficialus perspėjimas*), and also the court injunctions in regard of the person *inter alia* not to change the permanent place of residence without a consent by the authorised supervising police officer and to remain at the place of residence at the appointed time; not to frequent the places indicated (*teismo įpareigojimai nekeisti nuolatinės gyvenamosios vietos be vykdančio priežiūrą įgalioto policijos pareigūno sutikimo ir nustatytu laiku būti gyvenamojoje vietoje; nesilankyti nurodytose vietose*). The Constitutional Court ruled that those provisions *were not in conflict with the Paragraphs 1 and 2 of Article 32 of the Constitution*. According to the Constitutional Court, *these measures were constitutionally reasoned*, established in order to guarantee the safety of society and the state, to ensure public order and the rights and freedoms of persons.

In this case the Constitutional Court reminded of the requirements (bases and conditions) for restrictions of implementation of human rights (*i.e. not absolute rights*). *Until this case, in its rulings, the Constitutional Court has held more than once that according to the Constitution it is allowed to limit the implementation of human rights and freedoms if the following conditions are followed: it is done by law; the restrictions are necessary in a democratic society in order to ensure the rights and freedoms of other persons as well as values enshrined in the Constitution, together with the constitutionally important objectives; the restrictions do not deny the nature and essence of the rights and freedoms; the constitutional principle of proportionality is followed¹⁹.*

Thus, under Paragraph 2 of Article 32 of the Constitution, the right of movement, the right to choose a place of residence in Lithuania, as well as the right to leave Lithuania freely may be subject to limitation *only by law and only when it is necessary in order to protect security of the state and health of people; they may also be subject to limitation if it is necessary while administering justice*. In the opinion of the Court, *the restrictions also must not deny the nature and essence of the freedom of movement of the person as well as the right to freely choose the place of residence in Lithuania and the right to leave Lithuania freely, and these restrictions must be proportionate to the objective sought which may not be achieved in any other manner*.

¹⁹ For the first time these requirements were enumerated in the Ruling of 14 March 2002 of the Constitutional Court of the Republic of Lithuania. Official Gazette *Valstybės žinios* 2002, No. 28-1003. Also available in English on the Constitutional Court's internet site, <https://lrkt.lt/en/court-acts/search/170/ta1197/content> [accessed on 9 July 2022].

On restrictions of implementation of human rights it is also worth to assert that the Constitutional Court also *defined the criteria according to which the compliance of the disputed legal regulation (i.e. the specified preventive measures) with the constitutional principle of proportionality was assessed.* According to the Court, *when deciding whether the law by which the implementation of the rights and freedoms of a person are limited does not infringe the constitutional principle of proportionality as one of the elements of the constitutional principle of a state under the rule of law, it is necessary to assess some issues.* These issues are: whether the measures established in the law are in compliance with legitimate objectives that are important to society, whether these measures are necessary in order to attain the specified objectives and whether these measures do not restrict the rights and freedoms of the person apparently more than necessary in order to attain the said objectives. *The Constitutional Court applied that formulated official constitutional doctrine to the disputed case while assessing the constitutionality of the preventive measures which, as it was aforementioned, were aimed at restricting and reducing organised crime and which were linked with the limitation on the implementation of the right to freedom of movement.*

In this case it was important to maintain the balance between the obligations of the State to effectively protect and defend the person and society from crimes and other dangerous violations of law and for not restricting human rights more than one needs in a democratic state under the rule of law in order to attain the important to the society and legitimate objectives or for not denying by such restrictions the essence of human rights and freedoms. The Court concluded that the preventive measures by which one strives to restrict and reduce crime, thus, organised crime as well, must be established by law in which one must provide for the bases and objectives of the application of these measures; a system of control over the imposing and applying various preventive measures, comprising, inter alia, judicial control and the right of a person to apply to court regarding the violation of his rights, must also be consolidated by law.

To sum up, it should be concluded that during the first decade of its activities the Constitutional Court of the Republic of Lithuania in the light of constitutional significance of the fundamental human rights which are established in the Paragraphs 1 and 2 of Article 32 of the Constitution (as well as an important element of the constitutional status of a member of the civil community), enumerated broadly subjects which implement these rights.

The Court also *revealed the wide content of the freedom of movement: citizen's right to decide, in which place of the territory of the Republic of Lithuania he stays, when to leave this place and move to another place, to finally decide as to what permanent or temporary place of residence to choose, as well as to decide whether to stay in Lithuania or leave it, as well as the right to choose himself the time of departure (the latter right implies also the freedom of the citizen to choose any legal manner of departure).* According to the Court, no permissions of any state institution are needed to implement the freedom of movement or no procedure could be established for implementation of these rights and freedoms which lead to its unreasonable restriction.

Besides that, *the following criteria of assessing constitutionality of legal regulation restricting the implementation of the right of movement, the right to choose a place of residence in Lithuania, as well as the right to leave Lithuania freely which have to be observed while respecting these human rights as developed by the Constitutional Court*

are: constitutionally justifiable basis of restrictions, their necessity, proportionality (also not denying the nature and essence of these rights), as well as due regard to the principle of equality. *These criteria are not applied* in case of the right of a citizen of the Republic of Lithuania to return to, and reside in Lithuania, *because this right of a citizen of the Republic of Lithuania is absolute.*

2.2. The second decade of the Constitutional Court's activities (from 2005 until 2015)

In the second decade of its activities (from 2005 until 2015) the Constitutional Court of the Republic of Lithuania has interpreted in more detail on the right of *movement in the context of the provision of Paragraph 4 of Article 32* of the Constitution that everyone who is Lithuanian may settle in Lithuania *and in the context of the constitutional principle of the equality of the rights of citizens.*

*In its Ruling of 13 November 2006 on the citizenship of the Republic of Lithuania*²⁰ the Court while investigating if the provisions of the Law on Citizenship (wording of 17 September 2002) according to the petitions of a group of members of the Seimas of the Republic of Lithuania and also the petition of the Vilnius Regional Administrative Court are not in conflict with the Constitution, also interpreted the meaning of the provision of Paragraph 4 of Article 32 of the Constitution that everyone who is Lithuanian may settle in Lithuania. The Constitutional Court recognized that *this provision is a constitutional basis to establish by law such legal regulation that Lithuanians residing abroad would have the right to become citizens of the Republic of Lithuania under different (easier) conditions* than other persons who seek for citizenship of the Republic of Lithuania (inter alia, that Lithuanians residing abroad, who seek citizenship of the Republic of Lithuania, be not applied the usual naturalisation conditions).

This conclusion was based on the fact that the State of Lithuania came into being on the basis of the ethnical nation – this fact is reflected not only in the Preamble to the Constitution, but also in other provisions of the Constitution, inter alia that everyone who is Lithuanian may settle in Lithuania (*Paragraph 4 of Article 32*). According to the Court, the latter provision *means that* all Lithuanians who reside abroad, wherever their permanent residence, have the right to come back to Lithuania, their ethnical homeland, at any time. Thus, as the Constitutional Court also stated, under the Constitution, *it is impossible to establish any such legal regulation*, which would sever the Lithuanians living abroad from the Lithuanian Nation; the Lithuanians who reside abroad cannot be deprived of the possibility of participating in the life of the Lithuanian Nation, if they seek so; lithuanians residing abroad are an inseparable component of the Lithuanian Nation.

*Different treatment of people which was recognised as being without objective justification was an issue of the Ruling of 6 February 2015 on right-hand-drive vehicles on public roads*²¹. In the case, *which was initiated by the Kaunas City Local Court, the*

20 Ruling of 13 November 2006 of the Constitutional Court of the Republic of Lithuania. Official Gazette *Valstybės žinios*, 2006, No. 123-4650. Also available in English on the Constitutional Court's internet site, <https://www.lrkt.lt/en/court-acts/search/170/ta1331/content> [accessed on 9 July 2022].

21 Ruling of 6 February 2015 of the Constitutional Court of the Republic of Lithuania. Register of legal acts TAR, 2015-02-06, No. 1856. Also available in English on the Constitutional Court's internet site, <https://www.lrkt.lt/en/court-acts/search/170/ta869/content> [accessed on 9 July 2022].

Constitutional Court adopted the Ruling recognising that the legal regulation laid down in *the Law on Road Traffic Safety*, as well as in *the Road Traffic Rules (wording of 16 July 2008)*, as approved by Government Resolution No. 1950 of 11 December 2002, was in conflict with the constitutional principles of the equality of the rights of persons and a state under the rule of law. This legal regulation established that the prohibition on driving, on public roads, motor vehicles equipped with the steering wheel on the right did not apply to the citizens of Lithuania whose permanent place of residence was in a foreign state, once they arrived in Lithuania on a temporary basis (up to 90 days per year) in vehicles registered abroad, and, at the same time, established that such a prohibition applied to the citizens of Lithuania whose permanent place of residence was in Lithuania²².

In this case the Constitutional Court *firstly only reminded* of constitutional significance of freedom of movement (Paragraph 1 of Article 32 of the Constitution) (*the freedom of movement guaranteed to a citizen is a significant element of the constitutional status of a member of a civil community*) and also repeated the doctrine formulated about *the content of freedom of movement* of provisions of Article 32 of the Constitution which was also expressed in the previous Ruling of 29 December 2004 (*“it is only a citizen himself/herself who has the right to decide in which place of the territory of the Republic of Lithuania to stay, when to leave this place and move to another place, to freely decide as to which permanent or temporary place of residence to choose, and to decide whether to stay in Lithuania or leave it, as well as the right to choose himself/herself the time of departure“*).

Besides that the Court noted that in the context of the constitutional justice case at issue the constitutional principles of the equality of rights of persons and a state under the rule of law give rise to the prohibition according to which, when establishing, by law, a legal regulation based on which a person acquires certain rights, *the legislature is not allowed, without objective justification, to consolidate a differentiated legal regulation* depending on whether a citizen, having exercised his/her constitutional *freedom of movement*, has chosen his/her permanent place of residence in the Republic of Lithuania or in a foreign state.

The Constitutional Court decided that *there is no legal ground for stating that citizens whose permanent place of residence is in a foreign state* where traffic drives on the *left-hand side* of the road and where, as a rule, vehicles constructed for such traffic (i.e., equipped with the steering wheel on the right) are used on public roads, *or citizens whose permanent place of residence is in a foreign state* where traffic drives on the *right-hand side* of the road, but where it is permitted to register motor vehicles designed to be driven on the left-hand side of the road, once they temporarily drive, on public roads in Lithuania, foreign-registered motor vehicles equipped with the steering wheel on the right, *pose a lower risk to traffic safety than citizens whose permanent place of residence is in Lithuania. Thus, there was no legal ground to objectively justify the different treatment of citizens falling under the aforementioned two categories.*

It should be concluded that during the second decade of its activities the Constitutional Court of the Republic of Lithuania based its case-law on the statements from

22 Summary of the Ruling of the Constitutional Court of the Republic of Lithuania of 6 February 2015. Available in English on the Constitutional Court's internet site, <https://www.lrkt.lt/en/court-acts/search/170/ta869/summary> [accessed on 9 July 2022].

previous decade concerning significance of freedom of movement. Besides that, the Constitutional Court developed in more detail *provision of Paragraph 4 of Article 32* of the Constitution that everyone who is Lithuanian may settle in Lithuania. The Court revealed that consolidation of a differentiated legal regulation requires objective justification. This requirement also is applicable in the field of legal regulation concerning protection of freedom of movement. Thus, it is important to observe the principle of equality, non discrimination when applying the requirements of restriction in cases of the analysed freedom.

In addition, in the second decade of its activities the Constitutional Court of the Republic of Lithuania had developed the *official doctrine concerning the so-called austerity measures* aiming to manage and to overcome the other challenging crisis – economic and financial crisis – which arose in 2008 within a state (and also in other states²³) could be shortly presented. While this *official doctrine* was related mainly with social rights, the question arises whether such doctrine could be applied to evaluate restrictions of implementation of freedom of movement due to COVID-19 pandemic measures?

The Constitutional Court of Republic of Lithuania had a considerable number of cases in which it assessed the constitutionality of various austerity measures, such as the sudden and significant reduction of pensions and other social benefits, as well as salaries in the public sector. Thus, these cases were mostly related to restrictions on social and economic rights, not on civil or political rights. The Court in its case-law had formulated *the following criteria that must be taken into account when assessing the constitutionality of austerity measures, in particular their compliance with human rights and also the social orientation of the State* which is also expressed in the Lithuanian Constitution: (1) the constitutionally justifiable basis of austerity measures (the existence of a particularly difficult financial situation when the income of the state budget is drastically declined); (2) their necessity (the measures in question are ultima ratio, i.e. necessary for safeguarding financial stability and saving economy from default); (3) their temporary character (the necessity of the measures is under periodic review and they are applied only as long as the difficult financial situation requires); (4) their proportionality (the measures are proportional to the need to preserve fiscal stability and do not distort the pre-crisis proportions of the same kind of benefits); (5) due regard to the limits of discretion of the legislature (the Constitutional Court is self-restrained in adjudicating on purely economic issues, i.e. as a rule, the assessment by the Government of a difficult economic situation and the ex-

23 Economic (financial) crises as the major challenges that were faced by constitutional justice institutions and that could undermine the foundations of the rule of law were provided by 20 various countries from all over the world in the responses of constitutional justice institutions to the questionnaire of the 4th Congress of the World Conference on Constitutional Justice (i. e. Belarus, Croatia, Cyprus, Democratic Republic of Congo, Estonia, Finland, Germany, Ghana, Italy, Jordan, Kyrgyzstan, Latvia, Lithuania, Mexico, the Netherlands, Portugal, Romania, Senegal, Slovenia, and Ukraine). Most of the said countries referred specifically to the global economic and financial crisis that occurred in 2008; therefore, in the replies of some countries, the global economic and financial crisis is also mentioned as an international development with repercussions on the interpretation of the rule of law. A few countries indicated the economic crises arising from a specific background (for instance, the economic crisis of 2013 (bail-in) in Cyprus; the economic recovery after the war in Kosovo; the economic crisis of 2014–2015 as the result of foreign aggression and the national political crisis in Ukraine). ŽALIMAS, D. 2-osios sesijos „Nauji iššūkiai teisės viršenybei“ pagrindinis pranešimas“ [“The keynote speech delivered at Session 2 “New challenges to the rule of law”]. Konstitucinė jurisprudencija. [The Constitutional Jurisprudence. The Bulletin of the Constitutional Court of the Republic of Lithuania]. No. 3 (47), p. 128. https://lrkt.lt/data/public/uploads/2018/07/ktb_2017-347.pdf [accessed on 9 July 2022].

pediency of the measures in question is not subject to dispute); (6) the principles of social solidarity and non-discrimination (the measures in question should be applied without discrimination except in cases where, on the basis of social solidarity, a certain minimum benefit is established, which is not subject to reduction); and (7) the duty to compensate for certain losses (in particular those that occurred due to anti-constitutional measures)²⁴.

The list of these criteria for assessing the constitutionality of austerity measures while comparing it to the list of criteria of assessing constitutionality of legal regulation restricting the implementation of the right of movement, the right to choose a place of residence in Lithuania, as well as the right to leave Lithuania freely (which was enumerated in the previous summary presented after I.B.1.), obviously presents *two additional criteria: firstly*, the temporary character of measures (the necessity of the measures is under periodic review and they are applied only as long as the difficult situation requires) and, *secondly*, the duty to compensate for certain losses (in particular those that occurred due to anti-constitutional measures). If the experienced economic and financial crisis to some extent could be equalized to the COVID-19 pandemic situation, it could be presumed that the latter criteria (the temporary character of measures and compensation for certain losses after using these measures) could be relevant also in case of restriction of implementation of the right of movement, the right to choose a place of residence in Lithuania, as well as the right to leave Lithuania freely.

To sum it up, *the official constitutional doctrine* on definition, significance and on restrictions of the implementation of the right of movement, the right to choose a place of residence in Lithuania, as well as the right to leave Lithuania freely which was *formed until the beginning of the Covid-19 pandemic, is a firm basis to further case-law to stand upon.*

2.3. Pre-pandemic time in the third decade of the Constitutional Court's activities (from 2016 until 26 February 2020)

In the third decade of its activities the Constitutional Court in his case-law has dealt with issues concerning freedom of movement, also in the context of COVID-19 measures. However, two more Rulings should be mentioned before the analysis of the COVID-19 cases.

In its *Ruling of 11 January 2019*²⁵ the Constitutional Court when deciding a case concerning the granting of a temporary residence permit in Lithuania to a foreign national who has lawfully entered into a marriage or registered a partnership abroad with a same-sex citizen of the Republic of Lithuania, has interpreted in more detail on the right of movement in light of the right of every citizen of the Republic of Lithuania to move freely (Paragraph 1 of Article 32 of the Constitution), inter alia, to choose his/her place of residence in Lithuania or to leave Lithuania; the absolute right of a citizen to return to Lithuania *and live in it* (Paragraph 3 of this Article) and the right of everyone who is Lithuanian to settle in Lithuania (Paragraph 4 of this Article).

24 ŽALIMAS, D. (2015). "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]. *Teisė* [Law], 2015, Vol. 94, p. 59, <https://www.zurnalai.vu.lt/teise/article/view/7349/5347> [accessed on 9 July 2022].

25 Ruling of 11 January 2019 of the Constitutional Court of the Republic of Lithuania. Register of legal acts TAR, 2019-01-11, No. 439. Available in English on the Constitutional Court's internet site, <https://lrkt.lt/en/court-acts/search/170/ta1915/content> [accessed on 9 July 2022].

In this constitutional justice case which was initiated by the Supreme Administrative Court of Lithuania and in which this Ruling was adopted, the petitioner maintained that, under the impugned Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law on the Legal Status of Aliens, a foreign national who had concluded a marriage or registered partnership with a person of the same sex in another state could not be granted a temporary residence permit in Lithuania; therefore, the petitioner had doubts regarding the compliance of this item with the Constitution. While developing the doctrine related inter alia to the concept of the family and freedom of movement, the Constitutional Court interpreted that, contrary to what was maintained by the petitioner, under the impugned regulation, a temporary residence permit in Lithuania may be issued to a foreign national in the event of family reunification in cases where his or her same-sex spouse or a same-sex person with whom a registered partnership has been concluded resides in Lithuania and is a citizen of the Republic of Lithuania or a foreign national holding a residence permit in Lithuania.

As the Court held, *only if the impugned legal regulation is interpreted in the way indicated above*, it is to be assessed as not violating the requirements arising inter alia from Article 32 (and Article 1 of the Constitutional Act on Membership of the Republic of Lithuania in the European Union (which is a part of the Constitution of the Republic of Lithuania), as well as from the constitutional principle of a state under the rule of law and the constitutional imperative of full participation by the Republic of Lithuania in the European Union (further – EU)).

In this case the Court while explaining *the significance of the freedom of movement and its content and requirements for its justified restriction (also about the absolute right of a citizen of the Republic of Lithuania to return to, and reside in, Lithuania) relied on its previous doctrine formulated in its Rulings of 29 December 2004 and 6 February 2015, as well as Conclusion of 24 January 1995.*

The Court interpreted the constitutional provisions related to the free movement of EU citizens, among them citizens of the Republic of Lithuania, within the EU, including the Republic of Lithuania, *in the light of the respective EU legal provisions*. In this context the Constitutional Court held that, unlike the constitutional concept of marriage, the constitutional concept of family is gender neutral; therefore, family reunification may not be prohibited on the grounds of the sex of the spouse or partner.

The Constitutional Court emphasised that, under the Constitution, the exercise of the right to reunification by a family founded in another state through a lawfully concluded marriage or registered partnership is not absolute. *The right of a foreign national to enter Lithuania and reside there together with his/her family member – a citizen of the Republic of Lithuania or a foreign national lawfully residing in Lithuania, with whom a marriage or registered partnership has lawfully been concluded in another state – may be limited by means of a law where necessary in a democratic society for reasons of national or public security, public order, the protection of public health, or similar constitutionally important objectives; at the same time, regard must be paid to the constitutional principles of the equality of the rights of persons and proportionality*. Such limitations must be necessary in order to reach the constitutionally important objectives, in particular in a democratic society, where respect should be given to the human dignity of everyone without discriminating, among other things, on the grounds of gender identity and/or sexual

orientation. The constitutionally important objectives may not serve as justification for a limitation on exercising the right to reunification by a family founded in another state through a lawfully concluded marriage or registered partnership if such a limitation is incompatible with Article 29 of the Constitution, under which the restriction of the rights of a person on the grounds of his/her gender identity and/or sexual orientation is prohibited, or with Paragraphs 2 and 3 of Article 21 of the Constitution, which protect human dignity and prohibit its degrading.

Taking account of this, the Constitutional Court held that, although the objective to protect the constitutional concept of marriage, as concluded upon the free mutual consent of a man and a woman, as well as the historically established model of the family based on such marriage, may be considered constitutionally important, under the Constitution, such an objective *may not serve as justification for a legal regulation whereby, solely on the grounds of gender identity and/or sexual orientation, a foreign national would not be allowed to enter Lithuania and reside there together with his/her family member* – a citizen of the Republic of Lithuania or a foreign national lawfully residing in Lithuania, with whom a marriage or registered partnership has lawfully been concluded in another state – i.e. such a legal regulation whereby a foreign national would be allowed to enter Lithuania and reside there exclusively in cases where he/she has lawfully concluded a marriage or registered partnership in another state with an opposite-sex citizen of the Republic of Lithuania or an opposite-sex foreign national lawfully residing in Lithuania.

Thus, the requirement of equality of the rights of persons in the aforementioned Ruling of 11 January 2019 also becomes very significant as in the other analysed Rulings. In this context it is worth to note that the Court also stated that the rights and freedoms entrenched in Paragraph 1 of Article 32 of the Constitution are guaranteed both for citizens of the Republic of Lithuania and for other persons who legally reside in Lithuania in cases where their legal status does not imply a different implementation of these rights and freedoms (the Constitutional Court's Ruling of 29 December 2004).

As regards the limitations of human rights including the freedom of movement it is important to emphasize that under the Constitution, *it is not allowed to establish any such legal regulation under which a person, in implementing one constitutional right, would lose the possibility of implementing another constitutional right.* In the light of protection of the interests of the child and freedom of movement in its Ruling of 8 November 2019 on the condition of permanent residence in Lithuania for the payment of child maintenance benefits²⁶ the Constitutional Court stated that the payment of the granted child maintenance benefits was to be discontinued (i. e. *the right of a child, acquired under the provisions of the Law on Child Maintenance Benefits (wording of 28 September 2017), was to be lost solely because of the change of the permanent place of residence by persons upon leaving Lithuania*), irrespective of any other circumstances, *without any preconditions for assessing an individual situation of a person concerned. Thus, also the preconditions were created for violating the interests of the child and, also, in certain cases, unjustifiably limiting freedom of movement of persons. In such a case the Constitutional Court*

26 Ruling of 8 November 2019 of the Constitutional Court of the Republic of Lithuania. Register of legal acts TAR, 2019-11-08, No. 17963. Available in English on the Constitutional Court's internet site, <https://lrkt.lt/en/court-acts/search/170/ta2054/content> [accessed on 9 July 2022].

recognised that the provisions of the abovementioned Law were in conflict with the Constitution, including the constitutional principle of a state under the rule of law.

Thus, despite the fact of recognizing unjustifiable limiting the implementation of freedom of movement of persons, the Constitutional Court expressis verbis did not constituted contradiction to the freedom of movement – the contradiction to the constitutional principle of a state under the rule of law was acknowledged.

The conducted analysis of the first, second decades and the pre-pandemic time in the third decade of the Constitutional Court's activities suggests to *add to the list one more criteria* of assessing constitutionality of legal regulation restricting the implementation of the right of movement, the right to choose a place of residence in Lithuania, as well as the right to leave Lithuania freely – *it is not allowed to establish any such legal regulation under which a person, in implementing one constitutional right, would lose the possibility of implementing another constitutional right.* The analysed periods also *additionally strengthens significance of the requirement of equality* of the rights of persons.

III. CASE-LAW ON FREEDOM OF MOVEMENT DURING AND AFTER THE COVID-19 PANDEMIC (FROM 26 FEBRUARY 2020 UNTIL NOW)

While analysing the third decade of the Constitutional Court's activities it must be stressed that from September 1 of 2019²⁷ when the institute of constitutional complaint started to function in Lithuania²⁸, *one petition filled in the Constitutional Court as an individual constitutional complaint was related to possible restrictions of freedom of movement during COVID-19 pandemic.* It was one of the first cases to reach the Court to challenge the state's power to limit this freedom of its citizens.

The application was submitted relying on Paragraph 4 (wording of 21 March 2019) of Article 106, which entrenches the right of every person to apply to the Constitutional Court concerning the acts specified in the first and second paragraphs of Article 105²⁹ if a decision adopted on the basis of these acts has violated the constitutional rights or freedoms of the person and the person has exhausted all legal remedies. The applicant argued that the provisions of Government Resolution of 14 March of 2020 No. 207 intro-

27 Lietuvos Respublikos Konstitucijos 106 ir 107 straipsnių pakeitimo įstatymas Nr. XIII-2004 [Law regarding the Amendment of Articles 106 and 107 of the Constitution of the Republic of Lithuania No. XIII-2004]. Register of legal acts TAR, 2019-04-02, No. 5330.

28 It is the institute for securing of constitutional rights and freedoms which in some of its features resembles the Spanish amparo appeal (*recurso de amparo*) settled in the Spanish Organic Law of the Constitutional Court, <https://www.tribunalconstitucional.es/es/tribunal/normativa/Normativa/LOTC-en.pdf> [accessed on 1 October 2022]. On the comparison of these institutes see BELIŪNIENĖ, L. Žmogaus teisių apsaugos stiprinimas konstitucinio skundo institutu [Enhancement of Human Rights Protection Using the Institute of Constitutional Complaint], Vilnius: Justitia, 2014, https://teise.org/wp-content/uploads/2016/07/Zmogaus_teisiu_apsaugos_stiprinimas_konstitucinio_skundo_institutu.pdf [accessed on 1 October 2022].

29 In the first and second paragraphs of Article 105 it is stipulated that the Constitutional Court shall consider and adopt a decision whether the laws of the Republic of Lithuania and other acts adopted by the Seimas are not in conflict with the Constitution of the Republic of Lithuania; the Constitutional Court shall also consider if the following are not in conflict with the Constitution and laws: 1) acts of the President of the Republic; 2) acts of the Government of the Republic.

ducing quarantine in the hole territory of Lithuania³⁰ restricted inter alia the applicant's freedom of movement. However, the Constitutional Court in its decision of July 2, 2020 No. KT116-A-S108/2020³¹ *refused to examine a petition* to investigate the compliance of this legal act with the Constitution. The petition was submitted by a person who does not have the right to apply to the Constitutional Court – the applicant did not indicate any circumstances confirming that his constitutional rights or freedoms may have been violated, only relied on the impugned legal regulation.

After this decision, the Constitutional Court has adopted *the decision of 9 February 2022³² on the ground of application of the group of the Seimas members concerning the legal regulation introducing the so-called “Green pass”* (in Lithuania it was called as “Possibilities pass”). Despite the fact that the petitioner did not expressed his doubts that this legal regulation contradicts with Article 32 of the Constitution (i. e. freedom of movement) (but argued that this regulation contradicts with inter alia Article 29 of the Constitution (i. e. constitutional principle of equality of persons and non-discrimination) and the constitutional principle of the rule of law), this case also might bring some important insights while considering about the freedom of movement and its restrictions during the COVID-19 pandemic. In this case the parliamentarians argued on the constitutionality of the legal regulation concerning “Possibilities pass” upon which only people having national or international certificate of immunisation were permitted to access the specified contact activities (i. e. those activities were forbidden for those, who don't possess the “Possibilities pass”).

However, in its *decision* No. KT17-S17/2022 the Constitutional Court *decided to dismiss the legal proceedings* regarding the aforementioned application. It was found that there is no longer need to adjudicate on that application, as the Government by its Resolution of 2 February 2022 No. 73³³ concerning the amendments of the legal regulation declaring the state of extreme situation (*ekstremalioji situacija*) due to the virus, adopted the decision abolishing the challenged legal regulation (i. e. abolishing the Resolution of 26 February 2020 declaring the state of extreme situation (*ekstremalioji situacija*) due to this virus).

The Constitutional Court based its decision on Part 4 of Article 69 (wording of 16 July 2019) of the Law on the Constitutional Court, which prescribes that “The annulment of an impugned legal act shall constitute the grounds for adopting a decision to dismiss the instituted legal proceedings”. The Constitutional Court in this case concluded that

30 Resolution of the Government of the Republic of Lithuania of 14 March 2020 No. 207 “Regarding introducing quarantine in the territory of Lithuania“. Register of legal acts TAR, 2020-03-14, Nr. 5466.

31 Decision of 2 July 2020 of the Constitutional Court of the Republic of Lithuania No. KT116-A-S108/2020 “Regarding the refusal to consider application No. 1A-81/2020“. Available in only in Lithuanian on the Constitutional Court's internet site, <https://www.lrkt.lt/lt/teismo-aktai/paieska/135/ta2172/content> [accessed on 9 July 2022].

32 Decision of 9 February 2022 of the Constitutional Court of the Republic of Lithuania No. KT17-S17/2022 “On dismissing the legal proceedings in the constitutional justice case“. Available only in Lithuanian on the Constitutional Court's internet site, <https://lrkt.lt/lt/teismo-aktai/paieska/135/ta2610/content> [accessed on 9 July 2022].

33 Resolution of the Government of the Republic of Lithuania of 2 February 2022 No. 73 “Regarding the Resolution of the Government of the Republic of Lithuania of 26 February 2022 No. 152 “Regarding declaration of a state-level extreme situation““. [Lietuvos Respublikos Vyriausybės 2022 m. vasario 2 d. nutarimas Nr. 152 „Dėl Lietuvos Respublikos Vyriausybės 2020 m. vasario 26 d. nutarimo Nr. 152 “Dėl valstybės lygio ekstremaliosios situacijos paskelbimo“ pakeitimo““]. Register of legal acts TAR, 2022-02-03, No. 1864.

the aforementioned phrase that “shall be grounds <...> to dismiss the instituted legal proceedings” should be interpreted as establishing that, in cases where not courts and not the persons specified in Paragraph 4 of Article 106 (wording of 21 March 2019) of the Constitution, but *other subjects* specified in Article 106 of the Constitution have applied to the Constitutional Court, and where an impugned legal act (part thereof) is no longer valid – it has been declared as no longer valid (it was repealed or amended) or its validity has expired, the Constitutional Court, when taking account of the circumstances of the considered case, has the powers to dismiss the instituted legal proceedings, and it should not be interpreted as establishing that in every case when the impugned legal act (part thereof) is repealed, the instituted legal proceedings must be dismissed (inter alia the rulings of 25 November 2019, 19 April 2021, 13 May 2021).

In this decision the Constitutional Court noted that in cases where a person referred to in Paragraph 4 of Article 106 (wording of 21 March 2019) of the Constitution, after having exhausted all legal remedies and in accordance with the other conditions established in the Law on the Constitutional Court, applies to the Constitutional Court, requesting it to investigate whether a law or another legal act is in compliance with the Constitution (or another higher-ranking act) if a decision adopted on the basis of that law or another legal act has possibly violated the constitutional rights or freedoms of the person, the Constitutional Court has the duty to examine the petition of that person, irrespective of whether or not the impugned law or another legal act is in force at the time of considering the respective constitutional justice case (ruling of 25 November 2019)³⁴. It seems that this possibility to apply to the Constitutional Court is appropriate for such individual applicants who after exhaustion of all legal remedies in the other Lithuanian courts might challenge their possibly violated freedom of movement due to legal regulation concerning “Possibilities pass“.

The Constitutional Court in its decision of 9 February 2022 stressed once more on its obligation to examine the petition of such persons, irrespective of whether or not the impugned law or another legal act is in force at the time of considering the respective constitutional justice case, while emphasizing that implementation of such obligation seeks to enable the effective protection of those constitutional rights or freedoms of a person that could be violated by a decision adopted on the basis of legal acts contrary to the Constitution³⁵.

According to the Constitutional Court it has the duty to examine the petition on the constitutionality of the legal regulation which was enshrined in the Resolution of 26 February 2020 of the Government irrespective of whether or not this impugned legal act is in force also in another case. It is a situation based on the Paragraph 2 of Article 110 of the Constitution of the Republic of Lithuania, when the judge shall suspend the consideration of the case and shall apply to the Constitutional Court requesting it to decide whether this legal act in question is in compliance with the Constitution.

This decision shows that the Constitutional Court *preferred to use its usual former doctrine concerning dismiss of the instituted legal proceedings* in case where an

34 Ruling of 25 November 2019 of the Constitutional Court of the Republic of Lithuania. Register of legal acts TAR 2019-11-25, No. 18747. Available in English on the Constitutional Court's internet site, <https://lrkt.lt/en/court-acts/search/170/ta2056/content> [accessed on 9 July 2022].

35 Ibid.

impugned legal act has been declared as no longer valid, to the another possible solution. This another possibility – to decide this case on the merits by justifying the pandemic measures (including „Possibilities pass“) established by the Government basing its ruling on the protection of public interest of public health (as the freedom of movement, according to Constitution, could be restricted when it is necessary in case of protection of public health) and evaluating application of these measures in terms of their proportionality and equality. However, in its previous rulings the Constitutional Court has emphasized more than once that the innate human right to the best possible health is a constitutional value and that the constitutional obligation of the state to take care of person’s health emerges inter alia from the Article 53 of the Constitution³⁶.

In case of legal regulation establishing the “Possibilities pass“ it must be added that the Constitutional Court on 9 July 2022 by its Decision No. KT91-S82/2022³⁷ has accepted for consideration request of the Lithuanian court to decide on some provisions of the Resolution of Government of 26 February 2020 No. 152 declaring the state of extreme situation (*ekstremalioji situacija*) due to the Covid-19.

In its request the Kaunas district court expressed its doubts whether the provisions of this Resolution are not in contradiction with Part 1 of Article 20 of the Constitution³⁸ and with the Article 29 of the Constitution³⁹, as well as with the constitutional principles of the rule of law and good administration to the extent that these provisions prescribed requirements for individuals to meet established medical criteria as a condition for receiving contact-based services, conducting economic activities, commercial and non-commercial cultural, entertainment, sports events, holiday fairs, festivals or other organized gatherings of people in a public place lasting a certain time in advance to organize at the appointed time. In its request the court also expressed doubts whether the other provision of this Resolution is not in conflict with the Constitution to the extent that it established that persons who do not meet any of the specified in this Resolution criteria by contact can get only the specified services and participate only in the specified economic activities.

The court with this request applied to the Constitutional Court after suspending the criminal case, which was initiated based on the appeal of a person who was convicted for the fact that, in order to enter the premises of the shopping center, he presented a possibilities passport issued in the name of another person.

While the petitioner argues that the impugned legal regulation inter alia mostly restricts the right of a person to the freedom, *this request is also relevant in case of the freedom of movement as it raises two important questions. Firstly, whether the Gov-*

36 For example, Ruling of 16 May 2013 of the Constitutional Court of the Republic of Lithuania. Official Gazette *Valstybės žinios*, 2013, No. 52-2604. Available in English on the Constitutional Court’s internet site, <https://lrkt.lt/en/court-acts/search/170/ta892/content> [accessed on 9 July 2022]. Also, the Ruling of 15 October 2021 of the Constitutional Court of the Republic of Lithuania. Available only in Lithuanian on the Constitutional Court’s internet site, <https://lrkt.lt/en/court-acts/search/170/ta2569/content> [accessed on 9 July 2022].

37 Decision of 9 July 2022 of the Constitutional Court of the Republic of Lithuania No. KT91-S82/2022. Available only in Lithuanian on the Constitutional Court’s internet site, <https://lrkt.lt/lt/teismo-aktai/paieska/135/ta2698/content> [accessed on 9 July 2022].

38 Part 1 of Article 20 of the Constitution prescribes that “The freedom of a human being shall be inviolable“.

39 Part 1 of Article 29 of the Constitution establishes that “All persons shall be equal before the law, the court, and other State institutions and officials“ and Part 2 of Article 29 states that “The rights of the human being may not be restricted, nor may he be granted any privileges on the ground of gender, race, nationality, language, origin, social status, belief, convictions, or views.

ernment on the basis of sub-statutory legal act (not a law) could establish such a legal regulation, which directly limited the rights and freedoms of a person or established the conditions for the implementation of a person's rights. *Secondly*, whether it is constitutionally justified to establish such a legal regulation, when, according to the applicant, the restrictions of the individual's right to freedom, are valid for indefinite time of period (as they were entrenched without specifying their certain term of validity). In its request the petitioner points out that even the strictest special legal regimes, i. e. the laws governing the state of emergency and martial law establish that a person's rights may be limited only temporarily.

Thus, in this case such requirement on restrictions of human rights, including the freedom of movement, as the *requirement of the temporary character of pandemic measures* remains relevant (i. e. the necessity of the measures is under periodic review and they are applied only as long as the difficult pandemic situation requires).

Returning to the other decisions of the Constitutional Court, the decision to dismiss the initiated proceedings was also adopted in another COVID-19 related constitutional justice case in which Decision of 25 May 2022 No. KT67-S61/2022⁴⁰ was issued concerning possible restrictions of the freedom of movement, because the challenged legal regulation also was abolished. In this case the petitioner (also a group of parliamentarians) contested the provision of Resolution of Government of 4 November 2020 No. 1226 "On introducing of quarantine in the territory of the Republic of Lithuania" (wording of 5 March 2021 with subsequent amendments).

The contested provision stated that all persons returning or arriving in the Republic of Lithuania on regular, special and charter passenger transport routes (all types of transport) must have a document proving the negative answer of Covid-19 test made not later than 72 hours prior to the arrival; all carriers must ensure that passengers or tourists who do not have a negative Covid-19 test do not enter vehicles (with some exceptions). The petitioner relied not only on the Part 3 of the Article 32 of the Constitution stating that „A citizen may not be prohibited from returning to Lithuania“, but also on constitutional principles of the rule of law and good administration. According to the petitioner, the contested provision regulating that anyone entering the territory of Lithuania by plane or by bus must present the proof of the negative COVID-19 test result violates the constitutional right of the citizens of the Republic of Lithuania who have this disease to return to Lithuania; the right to return to homeland (Part 3 of the Article 32 of the Constitution) is an absolute right and it could not be restricted under the Constitution.

Although the final constitutional assessment in this constitutional justice case was not presented due to the reason that the initiated proceedings in this case were dismissed, the Constitutional Court of the Republic of Lithuania *used the opportunity to pay the petitioner's attention to the fact that not all means of returning to Lithuania were restricted and persons had the right to cross the border by means of a private car.* The disputed provision included the obligation to the carrier not to take passengers without the negative COVID-19 test, but this requirement did not affect private journeys. Thus, it would be

40 Decision of 9 July 2022 of the Constitutional Court of the Republic of Lithuania No. KT91-S82/2022. Available only in Lithuanian on the Constitutional Court's internet site, <https://lrkt.lt/lt/teismo-aktai/paieska/135/ta2669/content> [accessed on 9 July 2022].

complicated to assert that the right to return to Lithuania under the Article 32 of the Constitution of the Republic of Lithuania should absolutely be secured by all chosen means.

However, if the possibility of changing the formulated official constitutional doctrine on restrictions of the implementation of the freedom of movement could be considered, it is worth to add that restrictions on corrections of constitutional doctrine were revealed in the former case-law of the Constitutional Court. The Constitutional Court in its Ruling of 28 March 2006 emphasised that it may be possible to deviate from the Constitutional Court precedents created while adopting decisions in cases of constitutional justice and new precedents may be created *only in the cases when it is unavoidably and objectively necessary, constitutionally grounded and reasoned. It is impossible and constitutionally impermissible to reinterpret the official constitutional doctrine if by doing so the system of values entrenched in the Constitution is changed, their compatibility is denied, the protection guarantees of the supremacy of the Constitution in the legal system are reduced, the concept of the Constitution as a single act and harmonious system is denied, the guarantees of rights and freedoms of the person entrenched in the Constitution are reduced and the model of the separation of powers enshrined in the Constitution is changed.* Thus, hypothetically, if absolute character of the citizen's right to return to homeland could be changed by justifying its restriction due to the pandemic measures (although this change is only possible if the parliament adopts the amendments of the Constitution), this change will be a change of a systemic nature which is not tolerated by the Constitution as it could reduce the constitutional guarantees of this right.

In addition, the correction of official constitutional doctrinal provisions could be used only in such circumstances as the necessity to increase possibilities for implementing the innate and acquired rights of persons and their legitimate interests, the necessity to better defend and protect the values enshrined in the Constitution, the need to create better conditions in order to reach the aims of the Lithuanian Nation declared in the Constitution on which the Constitution itself is based, the necessity to expand the possibilities of the constitutional control in this country in order to guarantee constitutional justice and to ensure that no legal act (part thereof) which is in conflict with legal acts of higher legal force, would have the immunity from being removed from the legal system. If one of these circumstances is in place, the correction of official constitutional doctrinal provisions could be used also in COVID-19 cases.

IV. CONCLUSIONS

1. The analysed case-law of the Constitutional Court of the Republic of Lithuania provides for a few tendencies which are identified in respect of requirements on restrictions of implementation of freedom of movement. These tendencies have a basis on not changed over the whole three decades of the Court's activities significance of this freedom in the democratic society based on the rule of law and protection of human rights. The official constitutional doctrine evolves over time, as the content of this freedom fills up on a case-by-case basis, but this doctrine does not change.

2. As it was identified already from the first decade of the Constitutional Court's activities, the two rights comprising the freedom of movement which are entrenched in Part 1 of the Article 32 of the Constitution of the Republic of Lithuania are not absolute ones. These rights are: right to choose a place of residence in Lithuania and the right to leave Lithuania freely. The analysed case-law confirms that these rights may be limited by means of a law where necessary in a democratic society for reasons of public interest – not only for protection of the security of the State or for the administration of justice, but also for the health of people. The restrictions also must not deny the nature and essence of these rights. At the same time, regard must be paid to the constitutional principles of proportionality and also equality of the rights of persons. The necessity to respect the requirement of equality emerged especially in the second decade of the Court's activities and acknowledgment of importance of this requirement in the Constitutional Court's practice continues until nowadays. (The equality of the rights of persons also stays important in COVID-19 cases). Thus, the Constitutional Court's doctrine concerning the restrictions of these non-absolute rights could be treated as constant enough.
3. The aforementioned restrictions are not applied to the right of a citizen of the Republic of Lithuania to return to, and reside in, Lithuania according to Part 3 and 4 of the Article 32 of the Constitution, because this right is absolute. This position is *expressis verbis* confirmed in the Constitution and constitutional doctrine and also remains constant through the three decades of the Constitutional Court's activities.
4. This affirms the hypothesis of this research – the Constitutional Court of the Republic of Lithuania has not lowered its standard of scrutiny on the level of protection of freedom of movement: requirements on restrictions of the right to choose a place of residence in Lithuania and the right to leave Lithuania freely essentially are mainly still the same and they are applied in the same manner as it was until the pandemic; thus, requirements of restricting of implementation of these rights also will not change and they can be applied to deal with decisions on constitutionality of measures for similar future crises.
5. Neither the experienced economic and financial crisis nor pandemic COVID-19 crisis have yet changed the requirements on restriction of the implementation of non-absolute rights comprising the content of freedom of movement. The previous official constitutional doctrine suggests position for the future providing some additional requirements for assessing constitutionality of legal regulation restricting the implementation of the right of movement, the right to choose a place of residence in Lithuania, as well as the right to leave Lithuania freely. These requirements are: constitutionally justifiable basis of restrictions (including health of people), their necessity, temporal character, proportionality (also not denying the nature and essence of these rights), as well as due regard to the principle of equality and non-establishing of such legal regulation under which a person, in implementing one constitutional right, would lose the possibility of implementing another constitutional right. The correction of the

aforementioned official constitutional doctrinal provisions in COVID-19 cases could be justified only in such circumstances which are strictly defined by the Constitutional Court of the Republic of Lithuania.

6. However, the case-law revealed during the three decades of the Constitutional Court's activities on the freedom of movement and its components, especially in the COVID-19 cases could be developed when this Court considers much more cases on the merits, for example, if it accepts for consideration an individual constitutional complaint as regards the constitutionality review of COVID-19 related measures (in case of possible limitations of implementation of freedom of movement also). In case of these complaints persons despite the fact that their impugned legal act is no longer valid (such as, for example, which is entrenched in the Resolution on the declaration of extreme situation due to the COVID-19 pandemic), could apply to the Constitutional Court and this Court in their cases cannot terminate the initiated legal proceedings or refuse to examine their requests, taking into account the circumstances of the case under consideration, that if the constitutional justice case under consideration is not resolved, it could basically be assumed to violate the values enshrined in the Constitution, including the public interest protected by the Constitution.

Such situation seems to be natural, because potential applicants must have exhausted all other legal remedies before they can apply to the Constitutional Court and they possibly still have not done this. However, it seems that indicating circumstances confirming that constitutional rights or freedoms of applicants, including freedom of movement, may have been violated could be the most serious obstacle to apply to the Constitutional Court challenging restrictions of these rights or freedoms, including the freedom of movement, due to the COVID-19 pandemic.

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