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Constitutional Fundamentals of Conscription and Some Aspects of the Ordinary Legal Regulation of Constitutionality

Article 139 of the Constitution of the Republic of Lithuania is one of the constitutional fundamentals of state defense and stipulates the defense of the state as the right of citizens on the one hand and the duty on the other. This article of the Constitution gives the legislative power the right of discretion to detail by law the order of the implementation of citizens' duty to perform military or alternative country defense service. Due to the reorganization of the armed forces into a professional and volunteer army, the issue of some ordinary regulation rules concerning the constitutionality of nationwide conscription, though at present suspended but not abolished, is becoming urgent. Though the Constitutional Court of the Republic of Lithuania presented their ruling on the constitutionality of the suspension of military conscription, it does not mean that all problems related to conscription have been settled. The aim of this article is to analyze the constitutional basis of nationwide conscription as well as the constitutionality of some ordinary regulation provisions related to nationwide conscription. Therefore, the issue to be analyzed is whether nationwide conscription, if it were to be implemented, complies with the constitutional principles of human equality and military justice¹. Consequently, the question is posed how the constitutional objective of ensuring the defense of the state determines conscription. Because of the growing employment of the army abroad, yet the dwindling demand for conscripts, it should be explored whether the suspension of the nationwide conscription as a part of the defense reform is further feasible in order to guarantee the defense of the state. In answering the raised questions, the author will analyze the abundant and long-lasting constitutional doctrine of Germany which provides clarifications of the Basic Law, as the legal act of the establishing power, which can doubtless be of assistance in interpreting (nationwide) conscription as established in the Constitution of Lithuania.

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¹ It should be noted that the term "military justice" can be understood in two ways: 1) as the equality of the nationwide conscription; 2) as the justice carried out by special martial courts. However, taking the object of the research into consideration, this article will be based on military justice, perceived as the equality of the nationwide conscription.

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Introduction

Military conscription is the phenomenon when conscripts are called up to perform regular compulsory basic military service. This has not been executed in Lithuania for several years; though this does not mean that it will never be reinstated. From the perspective of the future, particularly the changing geopolitical and state's external security environment, the assumption that the Seimas of the Republic of Lithuania (further – the Seimas) can approve a larger than zero marginal number of compulsory military service personnel should not be discarded. In this case, conscription which would be actually again executed has so far been present in the Law on the Amendment of the Military Conscription Law² (further – the Law on Military Conscription) only as a “frozen” and at the same time “reserve” norm.

This article does not aim to analyze the advantages and disadvantages of compulsory military, volunteer, or professional military service, about which more than one useful article has been published³. Attempts will be made here to analyze conscription in terms of constitutionality since Lithuanian legal scholars' studies on this issue are in short supply⁴.

Another important issue which we would face, having resumed conscription, is the right to conscription equality or to the assurance of the *principle of military justice* (German: *der Grundsatz der Wehrgerechtigkeit*) which was called so already in the constitutional and scientific doctrine of Germany. Having found the answer to this problem, we would be able to resolve the issue on the constitutionality of conscription when not all the citizens of the state are called up for military service.

The theoretical probability that the compulsory military service can be resumed makes one analyze what constitutional and ordinary regulation of conscription exists at present in the national law, also how the provisions of the new Law on Conscription comply with the Constitution of the Republic of Lithuania⁵ and the doctrine of the Constitutional Court of the Republic of Lithuania. Taking into consideration the fact that conscription is being implemented on the basis of not only the compulsory service of national defense but

² Lietuvos Respublikos karo prievolės įstatymo pakeitimo įstatymas, *Valstybės žinios*, 2011-07-13, nr. 86-4150.

³ See: J. Novagrockienė, ed., *Profesionalioji kariuomenė: Vakarų šalių patirtis ir perspektyvos Lietuvoje*, Vilnius: Generolo Jono Žemaičio Lietuvos karo akademija, 2005.

⁴ See: J. Novagrockienė, ed., *Profesionalioji kariuomenė: Vakarų šalių patirtis ir perspektyvos Lietuvoje*, Vilnius: Generolo Jono Žemaičio Lietuvos karo akademija, 2005.

⁵ Lietuvos Respublikos Konstitucija. *Valstybės žinios*, 1992-11-30, nr.: 33.

also on the alternative one that is replacing it, the article will analyze military conscription as compulsory military service.

The article will also analyze the jurisprudence of the Federal Constitutional Court of Germany, which, like Lithuania, has been one of the last NATO states that has implemented the conscription reform⁶. The first resolution of the German Constitutional Court⁷, related to conscription, was adopted as early as 20 December 1960, while the doctrine of the Lithuanian Constitutional Court on this issue is neither as old nor broad⁸. Therefore, in analyzing the official constitutional doctrine of Germany, we could, in the perspective of the future, analyze by analogy the constitutional as well as ordinary regulation of conscription in Lithuania⁹. The comparative analysis could help not only identify similarities and (or) differences of the interpretation of the Constitution of Lithuania but also find out possible answers regarding the constitutionality of the current ordinary regulation of military conscription.

Thus, the first part of the article will analyze how the constitutional objective of state security assurance is related to nationwide conscription. In the second part, some aspects of the constitutional fundamentals of conscription will be explored, i.e. the constitutional conception of conscription which is determined by the constitutional requirement of military justice. The third part is devoted to the survey of the current ordinary regulation of conscription and attempts to analyze some of its provisions in terms of constitutionality.

⁶ BVerfGE 12, 45; BVerfGE 38, 154; BVerfGE 48, 127; BVerfGE 69, 1; BVerfG, 2 BvL 2/02 v. 27. März 2002; 2 BvR 821/04 v. 17 Mai 2004.

⁷ BVerfGE 12, 45, <http://www.servat.unibe.ch/dfr/bv012045.html#Opinion>, 2014 02 08.

⁸ Lietuvos Respublikos Konstitucinio Teismo 2002 m. liepos 2 d. nutarimas „Dėl karių galimybės kreiptis į teismą“, *Valstybės žinios*. 2002-07-05, nr. 69-2832; Lietuvos Respublikos Konstitucinio Teismo 2009 m. rugsėjo 24 d. nutarimas „Dėl teisės aktų, susijusių su kariuomenės pertvarka, konstitucingumo“. *Valstybės žinios*. 2009-09-26, nr. 115-4888; Lietuvos Respublikos Konstitucinio Teismo 2011 m. kovo 15 d. nutarimas „Dėl tarptautinių karinių operacijų, pratybų ir kitų karinio bendradarbiavimo renginių“ *Valstybės žinios*. 2011-03-17, nr. 32-1503.

⁹ The fact that conscription in Germany is related to strong national traditions as well as history should also be noted (e. g. During the Cold War, the aspiration to form such an army that would be capable of repelling a massive invasion of the soviet armed forces). Meanwhile, as pointed out by Tomas Jarmalavičius, in Great Britain and the United States, conscription “existed as a temporary response to emergency national-level situations and threats but not as a constant instrument of national defense policy”. Therefore, in these states, in a different way from Lithuania or Germany, the professional army system has been functioning for a long time and contributors to this were not only a favorable geographical situation of these states’ territories that had safeguarded them from the threat of the direct invasion of foreign armed forces but also the birth of the nuclear weapon which, as stated by Morris Janowitz, “changed the strategic role of the armed forces and served as the basis to question the necessity for massive army”. See: Jarmalavičius, T. Karo prievolė Lietuvoje: orientyrai diskusijai. Novagrockienė, J.; et al. *Profesionalioji kariuomenė: Vakarų šalių patirtis ir perspektyvos Lietuvoje*. Vilnius: Generolo Jono Žemaičio Lietuvos karo akademija, 2005, p. 14; Janowitz, M. US Forces and the Zero Draft. *Adelphi Paper*, 1973, No. 94, p. 4.

1. The Objective of Assuring Constitutional State Security and the Duty to Form and Maintain the Armed Forces

We could probably equalize the need of each state for the assurance of military security to the hierarchy of human needs provided by Abraham Harold Maslow¹⁰ in which the physiological needs related to the human existence *per se* take the first place and are directly followed by needs pertaining to security and meant to ensure the primary need. Likewise, it is the assurance of the existence of the state (the territory surrounding it, the nation and the power) that gives rise to the need for security, one of the means of which is the military defense of the state. The establishing power approved this need through the Constitution, stipulating that “the Republic of Lithuania, [...], shall seek to ensure national security and independence, the welfare of the citizens and their basic rights and freedoms” (Article 135 Part 1 of the Constitution) and at the same time obligating the legislative power to detail the organization of national defense (Article 139 Part 3 of the Constitution). This constitutional obligation set for the legislative power comprises not only the duty to organize the armed forces but also to maintain them and ensure their effective functioning. “The independence of the state, its territorial integrity and constitutional order are among the most important constitutional values the protection of which is the priority obligation of state power and all citizens. Ensuring of the implementation of this duty is a guarantee of the security of the state”¹¹. Therefore, one could state that the legislative power cannot abolish the armed forces as a guarantor of state existence, *inter alia*, constitutional order either in amending the Constitution or passing ordinary laws, or the more so by post-legislative legal acts. Such a prohibition would also apply to establishing power and any attempt to denounce military state defense would be anti-constitutional. As it was ruled by the Constitutional Court of the Republic of Lithuania:

An imperative stems from Part 1 of Article 6 of the Constitution to the effect that no amendments to the Constitution may violate the harmony of the provisions of the Constitution or the harmony of the values consolidated by them. [...] In compliance with the Constitution, amendments that would deny at least one of the constitutional values, lying at the foundation of the State of Lithuania as the common good of the entire society consolidated in the Constitution

¹⁰ Maslow A. H., A „Theory of Human Motivation“, *Psychological Review*, 1943, 50(4): 370-396, <http://psychclassics.yorku.ca/Maslow/motivation.htm>, 2014-07-10.

¹¹ Lietuvos Respublikos Konstitucinio Teismo 2009 m. rugsėjo 24 d. nutarimas „Dėl teisės akto, susijusių su kariuomenės pertvarka, konstitucingumo“. *Valstybės žinios*. 2009-09-26, nr. 115-4888.

are not permitted – the independence of the state, democracy, the republic and the innate character of human rights and freedoms¹².

Thus, the prohibition under discussion, referring to the abolition of the armed forces, is determined by the need to foster and preserve the independence of the State established by the nation in the preamble of the Constitution and in Article 1 of the Constitutional Law “On the State of Lithuania”¹³. Taking into consideration the fact that the Constitution is an integral act and its norms and principles make up a harmonious system as well as an integral system of the constitutional regulation of country defense, on the basis of the provisions of Articles 3,139,141,142 of the Constitution “a duty stems for the legislator to establish such legal regulation that the Republic of Lithuania would have a regular well-organized armed forces, able to implement the constitutional functions”¹⁴.

The Federal Constitutional Court of Germany has stipulated that on the basis of the division of power and the constitutional order grounded on it in the Basic Law¹⁵, the legislative power as well as competent institutions of the defense system shall determine such means that are necessary in seeking to present in detail the constitutional principle of the military defense of the state. “What legal acts and laws are necessary, so that according to the Constitution and the current coordinated commitments to allies an effective defense, in terms of functionality, could be ensured, these institutions, on the grounds of broad political considerations essentially decide on their own responsibility”¹⁶. Therefore, “the establishment and effective functioning of the

¹² „[...] except the case when, in the order established in Part 1 of Article 148 of the Constitution, Article 1 of the Constitution were amended and Article 1 of the Constitutional Law “On the State of Lithuania”, which is a constituent part of the Constitution, were amended in the order established in Article 2”. See: Lietuvos Respublikos Konstitucinio Teismo 2014 m. sausio 24 d. nutarimas „Dėl Konstitucijos 125 straipsnio pakeitimo įstatymo“, TAR, 2014-01-24, nr. 478.

¹³ While preparing the case “On the constitutionality of legal acts related to the reorganization of the army” the Constitutional Court of the Republic of Lithuania, (2009 m. rugsėjo mėn. 24 d. nutarimas. *Valstybės žinios*. 2009-09-26, nr. 115-4888), received clarifications in writing from the representatives of the Ministry of National Defense Dainius Žalimas and Algminas Gutauskas in which they also emphasized that conscription is associated with one of the most important constitutional values – the defense of the independence of Lithuania and the responsibility of the state is to ensure the appropriate defense of this value.

¹⁴ Lietuvos Respublikos Konstitucinio Teismo 2009 m. rugsėjo 24 d. nutarimas „Dėl teisės aktų, susijusių su kariuomenės pertvarka, konstitucingumo“. *Valstybės žinios*. 2009-09-26, nr. 115-4888.

¹⁵ Das Grundgesetz für die Bundesrepublik Deutschland, <http://www.gesetze-im-internet.de/gg/BJNR000010949.html>, 2014 07 01.

¹⁶ „Welche Regelungen und Anordnungen notwendig erscheinen, um gemäß der Verfassung und im Rahmen bestehender Bündnisverpflichtungen eine funktionstüchtige Verteidigung zu gewährleisten, haben diese Organe nach weitgehend politischen Erwägungen in eigener Verantwortung zu entscheiden“, BVerfGE 48, 127, <http://www.servat.unibe.ch/dfr/bv048127.html>, 2014 01 22.

Bundeswehr (the armed forces – the author’s note) [...] has a constitutional status”¹⁷. The Constitutional Court of Lithuania has used a term with a broader sense – *the state defense function* – which also presupposes the constitutional principle of the military defense of the state: “in order to carry out the state defense function which involves the safeguarding of constitutional values as priorities, a separate institutional system comprising military and paramilitary state institutions is necessary”¹⁸. This once again confirms the existence of the constitutional basis for establishing and maintaining the armed forces as a means for the military defense of the state¹⁹.

From a historical perspective, on May 3, 1791, in the first Constitution of Lithuania–Poland (at the same time that of Europe) it was established that: “the nation shall defend itself from the attack and retain its inviolability”²⁰. The preamble of the Constitution of 1787 of the United States of America²¹ contains similar wording: “We, the people of the United States, [...] provide for the common defense, [...]”. The quoted provisions demonstrate the traditional function of the state: namely, safeguarding society and its members from external attacks. “For the state, even in its rudimentary forms, this activity has never been in short supply. At all times, defense from common external dangers has been the most effective motive in forming powerful unions”²². This means that in speaking about one of the security guarantees of a democratic state – the armed forces – we face the mission of regulating issues dealing with this armed force not only on the grounds of the Constitution but also in ordinary matters. However, not only the objectives, missions and employment conditions of the armed forces must be determined, but, first of all, the

¹⁷ „Einrichtung und Funktionsfähigkeit der Bundeswehr [...] haben verfassungsrechtlichen Rang“, BVerfGE 48, 127, <http://www.servat.unibe.ch/dfr/bv048127.html>, 2014 01 22.

¹⁸ Lietuvos Respublikos Konstitucinio Teismo 2009 m. rugsėjo 24 d. nutarimas „Dėl teisės akto, susijusio su kariuomenės pertvarka, konstitucingumo“, *Valstybės žinios*. 2009-09-26, nr. 115-4888.

¹⁹ There is also another opinion that the Seimas can still abolish the armed forces by amending the Constitution. However, at present (taking into consideration the current geopolitical situation, international commitments which emerge due to the membership in NATO). such considerations are not real, rather utopian because probably only under the conditions of absolute peace in the world, could it be possible to think about the disappearance of the state defense function, *inter alia* the constitutional abolishment of the armed forces.

²⁰ „Die Nation ist sich selbst schuldig, sich gegen Überfälle zu verteidigen und ihre Unverletztheit zu bewahren“, K. Stern, *Das Staatsrecht der Bundesrepublik Deutschland: Staatsorgane, Staatsfunktionen, Finanz- und Haushaltverfassung, Notstandsverfassung*. Band II. Verlag C. H. Beck München. 1980, p. 846.

²¹ Constitution of the United States, http://www.senate.gov/civics/constitution_item/constitution.htm, 2014 07 01.

²² „Diese Tätigkeit und der ihr entsprechende Zweck haben dem Staate niemals, auch nicht in seiner rudimentärsten Form, gemangelt. Abwehr gemeinsamer äußerer Gefahr ist zu allen Zeiten das wirksamste Motiv zur Bildung mächtiger Verbände gewesen“, Jellinek G., *Allgemeine Staatslehre*, 3. Auflage, Berlin, 1924, p. 255.

decision concerning their formation on the basis of professional, volunteer or compulsory military service must be made.

In comparison to the history of humanity, the history of nationwide conscription is rather short. From 1792, the French model of nationwide conscription, based on the principle of equality of all citizens²³, was later followed by the larger part of Europe. Approximately two hundred years ago, Prussian commanders and Carl von Clausewitz, having encountered revolutionary wars, were forced to change their attitude to the established ways of fighting and the army of mercenaries and implement a military reform by introducing total conscription, and at the same time eliminate serfdom²⁴. However, after the Cold War, because of the changed security environment, the reform of the armed forces with their qualitatively different composition was carried out in some states. What also contributed to this was the membership of NATO, which is based on a collective defense principle, helping to better ensure constitutional values, *inter alia*, the defense of the independence of the state, since, in case of a military attack, a state is granted attachments of the armed forces from other member states. During the recent years, many NATO states either denounced or suspended compulsory military service and the armed forces are organized on the basis of volunteer or professional military service. Out of 28 NATO states only five (Denmark, Estonia, Greece, Norway, Turkey) actually carry out compulsory military service²⁵. Lithuania stands out in this context since military conscription has been suspended here, yet the reservation to resume it has been made, providing the Seimas sets a higher than zero margin number of soldiers.

As previously mentioned, if we acknowledge the fact that the legislative power has no right to abolish the armed forces, yet it has an extensive discretion to decide on their formation in terms of both their quantity and structure, then the question arises about the constitutional limitation for making the decision in question. Therefore we will further discuss some aspects of the constitutional fundamentals concerning conscription and helping to reveal the constitutional conception of conscription determined by the principle of the constitutional equality and requirements of military justice implied by it.

²³ Stern, (note 20) p. 880.

²⁴ Carl von Clausewitz, *Apie karą*. I dalis. (Versta iš vokiečių kalbos: Carl von Clausewitz, Vom Kriege. Ullstein-Verlag, Berlin. 1980), Vilnius: Generolo Jono Žemaičio Lietuvos karo akademija, 2008, p. 5.

²⁵ Wehrpflicht international – ein Überblick, Wehrpflicht in der NATO, http://www.bundeswehr.de/portal/a/bwde/!ut/p/c4/HcZBDoAgDAXRs3gBunfnLdRdgSI_ECTQ2OtrzOQlQyd9NX5wseJuXGmnI-2D15rxFcVOHQMtGSSrOJI-eKkLW_yOkTTWpHyj1si0v6sdIAQ!!/, 2014 07 28.

2. Constitutional Substantiation of Conscription

2.1. Constitutional Conception of Conscription

It is unambiguously acknowledged in the scientific²⁶ and constitutional doctrine of Germany²⁷ that in Part 1 of Article 12a²⁸ of the Basic Law *nationwide* military conscription is established for the implementation of which several ways of equal value have been provided for: military service (in the armed forces, federal border security service) and alternative service in a civil defense unit. In addition to that, “nationwide *military conscription* and *the principle of state peace defense* are designated by the constitution to safeguard the right to human dignity and freedom as well as the right to life and physical inviolability (from external threat)”²⁹. Therefore, any attempts to deny these principles on the basis of a constitutional guarantee of human dignity or the primary right to life and physical inviolability are impossible³⁰.

As previously noted, the constitutional fundamentals of conscription in Lithuania are established first of all in Article 139 of the Constitution the first part of which stipulates that “the defense of the State of Lithuania from a foreign armed attack shall be the right and duty of each citizen of the Republic of Lithuania”. This wording presumes the conclusion that the national duty of citizens for the defense of the state arises when passing from peace to the state of war³¹; however, it gives no basis to unambiguously decide that the nationwide military conscription, which has to be performed in peace time, does exist. Besides, the Constitutional Court of Lithuania while clarifying the content of

²⁶ See: R. Scholz, Art. 12a. Dürig, G.; Maunz; T. *Kommentar zum Grundgesetz*, <http://beck-online.beck.de/>, 2013 06 26.

J. Fleischhauer, *Wehrpflichtarmee und Wehrgerechtigkeit: Die Verfassungsmäßigkeit der allgemeinen Wehrpflicht im Blickwinkel sicherheitspolitischer, gesellschaftlicher und demographischer Veränderungen*, Hamburg: Verlag Dr. Kovac, 2007; T. Blome, *Das Grundrecht auf Wehrgleichheit*, Frankfurt am Main ; Berlin [u.a.]: Lang, 2012.

²⁷ BVerfGE 12, 45; BVerfGE 38, 154; BVerfGE 48, 127; BVerfGE 69, 1 ir t.t.

²⁸ „Vyrai, sulaukę aštuoniolikos metų amžiaus, gali būti įpareigojami tarnauti ginkluotosiose pajėgose, federalinėje pasienio apsaugos tarnyboje arba civilinės gynybos junginyje“.

²⁹ „Die allgemeine *Wehrpflicht* und das *Prinzip der wehrhaften Friedensstaatlichkeit* sind gerade von Verfassungen wegen dazu berufen, das Recht und die Freiheit der allgemeinen Menschenwürde sowie das Recht auf Leben und körperliche Unversehrtheit (vor äußerer Bedrohung) zu schützen“, R. Scholz, Art. 12a. Dürig, G.; Maunz; T. *Kommentar zum Grundgesetz*, <http://beck-online.beck.de/>, 2013 06 26.

³⁰ BVerfGE 12, 45, <http://www.servat.unibe.ch/dfr/bv012045.html#Opinion>, 2014 02 08.

³¹ However, the state of war may not be declared as it is provided for in Article 142 because actions of an armed foreign force against the state can be executed before decisions by competent institutions concerning the state of war have been taken. The more so, such the right is also granted by Part 2 of Article 3 of the Constitution.

Article 139³², did not state that the *nationwide* conscription is in force.” Article 139 cannot be interpreted as meaning <...> that the duty of each citizen is to perform such a compulsory military service which is defined in laws as the compulsory basic military service”. It is obvious that such a duty will be void under objective conditions, for example, disability, age, etc. due to which a person will not be able to perform his/her constitutional duty and, therefore, is exempt from it.

In the same resolution, the Constitutional Court of Lithuania ruled that “the constitutional conception of military conscription, established in Part 2 of Article 139 of the Constitution, cannot be identified with the concept of the actual military service provided for in Article 141 of the Constitution” because “the actual military service can be organized on the basis of both professional and voluntary or compulsory military service (or on several of the above-mentioned kinds of service)”. It is obvious that the Constitutional Court, employing this clarification, not only separated the two concepts sometimes considered to be the same but also approved feasible actual military service implementation forms which are not mentioned *expressis verbis* in the Constitution. In forming armed forces, the legislative power can alternatively choose the compulsory military service, attributed to one of the actual military service forms, alongside other kinds of military service.

Moreover, another thesis of the Constitutional Court that warrants interest states that allegedly “Part 2 of Article 139 of the Constitution provides for the institute of conscription (the compulsory military service), the forms of which are not defined *expressis verbis* in Part 2 of Article 139 of the Constitution³³. This way, for the first and the only time, the Court acknowledged in this resolution the existence of conscription but not its *nationwide* nature (perhaps due to the fact that this issue was not included in the research object). Nevertheless, it is doubtful whether it is possible to consider conscription as the same as compulsory military service and also whether Part 2 of Article 139 of the Constitution does not at all provide any military conscription forms *expressis verbis*. One might believe that the wording “the compulsory military service” used in the constitutional doctrine of Lithuania and “the alternative service” replacing it and referred to in Part 2 of Article 139 of the Constitution are essentially in line with the implementation of conscription; therefore, at the same time they are two forms of the implementation of conscription. Cer-

³²“Citizens of the Republic of Lithuania must perform military or alternative national defense service according to the procedure established by law”.

³³ Lietuvos Respublikos Konstitucinio Teismo 2009 m. rugsėjo 24 d. nutarimas „Dėl teisės akto, susijusių su kariuomenės pertvarka, konstitucingumo“. *Valstybės žinios*. 2009-09-26, nr. 115-4888.

tainly, the Constitution, as previously mentioned, does not specify the forms (ways of the execution) of compulsory military service and the alternative service replacing it. However, conscription and compulsory military service are not the same; yet both the concepts are related. A person liable to military service will not necessarily carry out the compulsory military service. And vice versa, a person performing the compulsory military service will always be liable to military service.

With reference to the constitutional conception of *nationwide conscription*, according to the author, the wording chosen in Part 2 of Article 139 of the Constitution of Lithuania “*citizens must perform military [...] service*” holds more of the indication of the *nationwide quality* than Part 1 of Article 12a of the Basic Law of Germany “*men, having come of 18 years of age, can be obligated to serve in the armed forces [...]*”. Such a conclusion is first of all based on the addressees of the norm – citizens – which means that no exceptions are made on the grounds of gender as is the case in Germany where the duty may arise for men only. Second, in Part 2 of Article 139 the provision is established as a constitutional imperative for the legislative power to determine the order for the duty of citizens to be carried out whereas in the German Basic Law (Part 1 of Article 12a) the norm authorizing determination of the obligation is established.

However, if we approve of the position of the Constitutional Court of Lithuania stipulating that Article 139 of the Constitution does not imply that each citizen has the duty to perform compulsory military service, then the question arises how this statement complies with the equality of persons (Article 29 of the Constitution). Consequently, it is possible to state that alongside the constitutional substantiation of conscription, the legislative power is assigned another mission – to overcome the uncertainty of the compulsory military service and create a “feeling” of *nationwide* military conscription, even though this military service is organized alongside other kinds of services: the professional and(/or) volunteer military service. As Thomas Blome points out, “the military justice (equality) issue is as old as the armed forces” (German: *Diese Frage ist so alt wie die Bundeswehr*)³⁴. Unfortunately, this issue was not analyzed in the resolution of 24 September 2009 of the Constitutional Court of Lithuania, perhaps because it was not included into the research object; however, this does not mean that it is less urgent. Therefore, it is necessary to further determine how conscription should be interpreted and perceived in order to comply with the above-mentioned principle of military justice or how the requirements of the principle of military justice determine nationwide conscription.

³⁴T. Blome, *Das Grundrecht auf Wehrgleichheit*, Frankfurt am Main; Berlin [u.a.]: Lang, 2012, p. 1.

2.2. Military Conscription Based on the Principle of Military Justice

According to 2009 data by the Federal Defense Ministry of Germany, 70.5 percent of all persons liable to military service were exempt from military service on the grounds of military service exceptions. However, only 16.9 percent performed basic military service because out of all those liable to military service 6.2 percent were not medically examined and 6.4 percent were not even called up. Therefore, in total, 12.6 percent are considered *contra legem*. Finally, 83.1 percent did not perform any basic military service³⁵. The fact that conscription in Lithuania also lacks a nationwide character was stated in 2009 when, while preparing a case concerning the constitutionality of legal acts related to army reorganization in the Constitutional Court, a clarification in writing was received from Seimas member Juozas Olekas, stating that “only approximately 2 per cent of all young persons suited to perform the compulsory basic military service actually serve”³⁶.

This empirical conclusion clearly indicates that though conscription does exist, it is not nationwide as it is stated in the Constitution but “the conscription of the remaining part” only (German: *Restwehrpflicht*)³⁷, because more than half of persons liable to military service do not perform that duty. This is not right in terms of persons performing military conscription. Military service and other defense-related commitments considerably affect the personal lives of conscripts³⁸ since when performing the service they cannot choose a profession, receive education, in addition to certain family-related and economic inconveniences that they experience. The sense of this injustice makes us analyze whether there is actually no conflict in the constitutional requirement of *nationwide* conscription.

The principle of military justice is based on the idea that through the objective set for conscription – to ensure military defense of the state – each person is essentially granted good (e.g. an independent state which will guarantee his/her rights); therefore, conscription is the duty of all citizens. In addition, the Constitutional Court of Germany emphasized that nationwide conscription is “the expression of the idea of general equality” (German: *ist*

³⁵ *Ibidem*, p. 140–41.

³⁶ Lietuvos Respublikos Konstitucinio Teismo 2009 m. rugsėjo 24 d. nutarimas „Dėl teisės akto, susijusių su kariuomenės pertvarka, konstitucingumo“. *Valstybės žinios*. 2009-09-26, nr. 115-4888.

³⁷ Blome, (note 34), p.157.

³⁸ BVerfGE 48, 127, <http://www.servat.unibe.ch/dfr/bv048127.html>, 2014 01 22; BVerfGE 38, 154, <http://www.servat.unibe.ch/dfr/bv038154.html>, 2014 01 22.

Ausdruck des allgemeinen Gleichheitsgedankens)³⁹ and “the constitutional requirement concerning the equality of civil duties shapes military justice” (German: Verfassungsgebot der staatsbürgerlichen Pflichtengleichheit in Gestalt der Wehrgerechtigkeit)⁴⁰. It is obvious that in the presence of a military threat in a state, a person liable to military service risks his/her life while performing that service whereas those that have not been called up are as if “shown mercy” and are sheltered from such a threat. Consequently, the main duties, military conscription, inter alia, can be based exceptionally on the belonging to state community and when they are carried out seeking the aims of such community, the aims that bring benefit to all its members, it is logical that such duties should be uniformly applied to everyone. This idea could be expressed by the following scheme:

Duty → Benefit for the entire community → Equality → Nationwide character → Justice

As pointed out by the Constitutional Court of Germany, it is the idea of equal duty that personal military preparation may also be derived from⁴¹. Individual conscripts will be ready to take on a personal commitment to the community only when they are sure that this duty is imposed on all other citizens as well. Both Part 1 of Article 3 of the Basic Law of Germany and Article 29 of the Constitution of Lithuania, establishing the principal of human equality (equal rights) become, according to Jens Fleischhauer, “a structural element of the main duties and act as ‘a quazi-accessorial norm’”⁴². This was also confirmed in the jurisprudence of the Constitutional Court of Lithuania: “The constitutional principle of equality of all persons before the law requires that in law the main rights and duties be established equally to all (<...> Rulings of 18 April 1994, 30 June 2000, 23 September 2008, 24 December 2008)”⁴³. “Essentially equal cannot self-willingly be considered unequal and essentially unequal cannot self-willingly be considered the same”⁴⁴. In addition, the main duties as well as the main rights are “inimical to privileges” (German:

³⁹ BVerfGE 38, 154, <http://www.servat.unibe.ch/dfr/bv038154.html>, 2014 01 22.

⁴⁰ BVerfGE 48, 127, <http://www.servat.unibe.ch/dfr/bv048127.html>, 2014 01 22.

⁴¹ BVerfGE 48, 127, <http://www.servat.unibe.ch/dfr/bv048127.html>, 2014 01 22.

⁴² „Ein Strukturelement der Grundpflichten und wirkt als ‘quasiakzessorische Norm’“, Fleischhauer J., Wehrpflichtarmee und Wehrgerechtigkeit: Die Verfassungsmäßigkeit der allgemeinen Wehrpflicht im Blickwinkel sicherheitspolitischer, gesellschaftlicher und demographischer Veränderungen, Hamburg: Verlag Dr. Kovac, 2007, p. 96.

⁴³ Lietuvos Respublikos Konstitucinio Teismo 2009 m. kovo 2 d. nutarimas „Dėl nacionalinio investuotojo steigimo teisėtumo“, *Valstybės žinios*, 2009-03-05, nr. 25-988.

⁴⁴ „Man darf nicht willkürlich wesentlich Gleiches ungleich und.

Privilegienfeindlich)⁴⁵. Therefore, one should fully accept Fleischhauer's idea that the rejection of the postulate of the equality of duties would mean a renunciation of the principle of democracy and, at the same time, a return to a class-based society⁴⁶.

However, the principle of human equality does not deny the possibility of establishing by law unequal legal regulation regarding categories of certain persons who are in different positions. Nevertheless, this differentiated legal regulation calls for objective justification or aims at seeking positive and socially significant purposes⁴⁷. According to the Constitutional Court of Germany, a decision is self-willed when "obviously objective fundamentals are no longer recognizable to such an extent that a universal sense of justice is infringed"⁴⁸; consequently, "no heed is taken of the essential universal understanding of community justice"⁴⁹. While regulating the relations of military service and at the same time establishing conditions for exemption from compulsory military service, the legislative power has to substantiate the aforementioned by objective circumstances, such as, for example, age, state of health, etc., i.e. circumstances due to which citizens cannot perform such service.⁵⁰ Therefore, "in order to preserve citizens' equality and military justice, it is essential that the conscription be not self-willed"⁵¹. Following this constitutional doctrine, practically each ordinary (statutory) reason for the exemption from conscription or individual postponing of compulsory military service would be justified because it would be possible to find an objectively grounded reason for practically each case of exemption or postponing⁵². The more so since, based on the Constitution, the legislative power has extensive discretion to make decisions on conscription, *inter alia*, on exemptions from it.

⁴⁵ Fleischhauer, (note 42), p. 96.

⁴⁶ *Ibidem*, p. 97.

⁴⁷ Lietuvos Respublikos Konstitucinio Teismo 2009 m. kovo 2 d. nutarimas „Dėl nacionalinio investuotojo steigimo teisėtumo“. *Valstybės žinios*, 2009-03-05, nr. 25-988.

⁴⁸ „Sachlich einleuchtende Gründe schlechterdings nicht mehr erkennbar sind, so daß ihre Aufrechterhaltung einen Verstoß gegen das allgemeine Gerechtigkeitsempfinden darstellen würde“, BVerfGE 3, 58, <http://www.servat.unibe.ch/dfr/bv003058.html>, 2014 07 05.

⁴⁹ „Die fundierten allgemeinen Gerechtigkeitsvorstellungen der Gemeinschaft mißachtet werden“, BVerfGE 42, 64, <http://www.servat.unibe.ch/dfr/bv042064.html>, 2014 07 05.

⁵⁰ Lietuvos Respublikos Konstitucinio Teismo 2009 m. rugsėjo 24 d. nutarimas „Dėl teisės akto, susijusio su kariuomenės pertvarka, konstitucingumo“. *Valstybės žinios*. 2009-09-26, nr. 115-4888.

⁵¹ „Zur Wahrung der staatsbürgerlichen Gleichheit und Wehrgerechtigkeit ist es deshalb von entscheidender Bedeutung, daß die Einberufungen nicht willkürlich vorgenommen werden“, BVerfGE 48, 127, <http://www.servat.unibe.ch/dfr/bv048127.html>, 2014 01 22.

⁵² Because of the limited scope of the research, this article will not explore particular reasons for the exemption from service or postponing of it in detail since such an analysis would call for a separate article.

Additionally, the Lithuanian scientific doctrine⁵³ contains the idea that in order to retain the impression of a nationwide character of conscription, the list of exceptions may be extended, the duration of compulsory military service shortened or opportunities for alternative national defense service expanded. The principle of military justice requires that a sufficient number of normative exemptions from conscription be determined⁵⁴. According to the doctrine of the Constitutional Court, this means that “the establishment of exceptions may expand only as far as a strictly limited and understandable circle of persons which is existing at present, whereas in the future it may expand only to such cases that practically should not be too numerous”⁵⁵. If the number of exceptions from nationwide conscription is not consistent, understandable and predictable in size, defense capabilities may face a serious threat due to a steadily increasing number of exceptions and incapability to equalize that loss (a lack of persons liable to military service) in a defense situation⁵⁶. Yet, according to Fleischhauer, this cannot be dealt with in case of war by simply changing the existing legal regulation⁵⁷ (legal regulation should be stable), because if even in peace time the number of persons liable to military service drastically decreases due to exemptions from conscription (or postponing of military service), defense capabilities (the armed forces) of the state consequently also weaken. This inevitably makes an impact in case of war or military threat.

Military justice also allows the regulation of the duration of military service, yet within narrow limits. The duration of military service, though in the constitutional discretion of the legislative power, can in any case not be measured haphazardly, at the discretion of the legislative power alone or only for the reason of balancing military justice and guaranteeing nationwide conscription. The decision to shorten the duration of basic military service so that a greater number of persons liable to military service could be called up would only be constitutional in case a balance between this and other constitutional values (e.g. state economy (economic) capacity, the guarantor of collective security due to the membership in NATO) is achieved and the geopolitical situation and the

⁵³ R. Šapronas, „Ar vis dar reikia Lietuvai šauktinių karių?“ See: J. Novagrockienė, ed., *Profesionalioji kariuomenė: Vakarų šalių patirtis ir perspektyvos Lietuvoje*, Vilnius: Generolo Jono Žemaičio Lietuvos karo akademija, 2005, p. 44.

⁵⁴ See: BVerfGE 38, 154 <http://www.servat.unibe.ch/dfr/bv038154.html>, 2014 01 22.
BVerfGE 48, 127, <http://www.servat.unibe.ch/dfr/bv048127.html>, 2014 01 22.

⁵⁵ „Die Ausnahmebestimmung erstreckt sich nur auf einen eng begrenzten und überschaubaren Personenkreis. Dieser Kreis steht bereits in der Gegenwart fest und vermag sich in der Zukunft nur noch auf solche Fälle zu erweitern – die in der Praxis nicht allzu zahlreich sein dürften“, BVerfGE 38, 154, <http://www.servat.unibe.ch/dfr/bv038154.html>, 2014 01 22.

⁵⁶ BVerfGE 38, 154, <http://www.servat.unibe.ch/dfr/bv038154.html>, 2014 01 22.

⁵⁷ Fleischhauer, (note 42), p. 88.

external security environment of the state are assessed. As Rupert Scholz rightly points out, in establishing the duration of military service, “the legislative power must ensure that the security situation will be correspondingly affected, that the functionality of the Bundeswehr will be guaranteed and even individual conscripts will gain qualification that will provide them with military skills”⁵⁸. Thus, a constitutionally substantiated requirement emerges that persons liable to military service, persons who in case of an armed attack put their lives at risk for their state and its defense, must be not only well-armed, but also provided during the military service with appropriate military training that would guarantee individual effectiveness of servicemen in defense.

Finally, it should be pointed out that if the principle of military justice (and the requirements implied by it: 1) military conscription is a duty of all citizens, 2) reasons for exemption from conscription or individual postponing of compulsory military service must be based on objective circumstances due to which citizens cannot perform compulsory military service, 3) the duration of military service must ensure adequate training of the conscript and also contribute to the effectiveness of the armed forces) for some reason can no longer be ensured, then the nationwide compulsory military service should be suspended and the armed forces should be formed on the basis of professional and volunteer military service. Yet this conclusion should not be seen as definitive since the legislative power has an extensive discretion to regulate the organization of the national defense system. Nationwide conscription with regard to potential threats to state security does not necessarily have to be implemented through compulsory military service. (More details on this are provided in Part 3 of this article.)

Having clarified that it is important for military justice that exceptions from conscription (or postponing of military service) be based upon objective circumstances due to which citizens cannot perform compulsory military service and that constitutionally the duration of military service cannot be established only for the balancing of military justice—*inter alia*, nationwide military conscription—it is important to further understand the selection of persons liable to military service established in ordinary legal acts and see how it complies with the constitutional principle of human equality. In case of an infringement of military justice, an issue concerning the unconstitutionality of the conscription under execution could also be raised.

⁵⁸ „Der Gesetzgeber muß dafür Sorge tragen, daß der sicherheitspolitischen Lage entsprechend gehandelt wird, daß die Funktionsfähigkeit der Bundeswehr gesichert wird und daß auch der einzelne Wehrdienstleistende eine Qualifikation erhält, die ihn wehrtüchtig macht“, Scholz, (note 26).

3. Conscription in Ordinary Legal Acts

At present, the Law on Military Conscription provides that persons liable to military service are called up for compulsory basic military service (regular compulsory basic military service or basic military training, Part 1 of Article 4) if the Seimas approves a higher than 0 margin number of servicemen (Part 1 of Article 6). At first, persons liable to military service are called up on a volunteer basis, and only in case of their shortage, those who have not volunteered are called up in turn; then, using a computer program, they are randomly included in the list of persons liable to military service (Parts 4–5 of Article 6, Parts 4–5 of Article 9). This order presupposes that the armed forces are formed on the basis of the need for military personnel. However, in this case, no above-mentioned infringement of military justice can occur either.

As it has been stated by the Constitutional Court of Germany, “if the numbers of those who can perform military service and available conscripts are higher than the required need for military personnel, no violation of the principle of equality is committed when not all conscripts of the same birth year are called up for basic military service”⁵⁹. One cannot agree with Thomas Blome’s standpoint that “the optimal coverage of the need for the personnel of the armed forces is not based on the differences between the called up and not called up persons”⁶⁰, because the Court ruled that it is necessary to rely upon the army requirements related to the selection criteria, such as the results of a special qualification examination or suitability level⁶¹. Nevertheless, it may be assumed that such selection criteria as the grounds for exemption from conscription or postponing of military service must be explicitly defined in the law rather than applied at self-will.

The Law on Military Conscription does not provide an unambiguous statement, whether, prior to the compilation of the above-mentioned list, the suitability of persons liable to compulsory basic military service has been assessed or not. Still, Part 6 of Article 6 and Part 6 of Article 9 suggest that this assessment is carried out only after persons liable to military service are randomly selected, because they may be assigned to compulsory basic military service only after they undergo medical examination in the order established

⁵⁹ „Sind mehr wehrdienstfähige und auch verfügbare Wehrpflichtige vorhanden als nach den Personalanforderungen der Truppe benötigt werden, so wird der Gleichheitssatz nicht schon dadurch verletzt, daß nicht alle Wehrpflichtigen eines Geburtsjahrgangs zur Ableistung des Grundwehrdienstes herangezogen werden“, BVerfGE 48, 127, <http://www.servat.unibe.ch/dfr/bv048127.html>, 2014 01 22.

⁶⁰ „Optimaler Deckung des Personalbedarfs der Bundeswehr erklärt sich aber nicht aus der Verschiedenheit der herangezogenen bzw. nicht nicht herangezogenen Personen“, Blome, (note 26), p. 148.

⁶¹ BVerfGE 48, 127, <http://www.servat.unibe.ch/dfr/bv048127.html>, 2014 01 22.

by legal acts and when they are found suited to perform military service.

According to Law Nr. V-1154 of 13 October 2011 by the Minister of National Defense “On the Approval of the Description of Call-up Procedures to Compulsory Basic Military Service”⁶², it is also provided for that first of all, a general list of persons liable to military service for the current year is made up. Then, using a computer program, a certain number of conscripts (calculated according to a special formula) are randomly selected from the above-mentioned list and they are included in a preliminary list of persons liable to military service. And only then, from this list, the medical suitability of conscripts for the compulsory basic military service is assessed. Those conscripts who have been examined and considered suited for military service, are again, using a computer program, put on the list in a random order and then assigned regular compulsory basic military service or basic military training, unless there is a sufficient number of persons liable to military service who are willing to perform the above-mentioned service.

However, as previously mentioned, this order presupposes that the armed forces are formed on the basis of the need for military personnel. It should be noted that this legal regulation may be in conflict with the constitutional principle of human equality since at first the selection of persons liable to military service is determined only by happenstance and not by an attempt to form the armed forces with the most suited servicemen through applying the selection criteria concerning physical abilities or health suitability. Therefore, it may be assumed that such legal regulation when not all persons included in the general list of the current year of persons liable to military service (after the reasons for the exemption from conscription or individual postponing of the compulsory military service that are objectively grounded, i.e. are based on circumstances due to which citizens cannot perform military service are applied) are examined as to their suitability to undergo the above-mentioned training could possibly violate the principle of human equality (Article 29 of the Constitution) and the principle of military justice which is related to it.

Taking into account the margin numbers for servicemen determined by the Seimas, the Minister of National Defense specifies for the calendar year concerned the number of servicemen who are to perform the regular compulsory basic military service or participate in basic military training. So far, the number of servicemen who until 2020 will have to perform the regular compulsory basic military service is set at 0, and from 2012 it is set from 700 to

⁶² Krašto apsaugos ministro 2011 m. spalio 13 d. įsakymas nr. V-1154 „Dėl šaukimo į privalomąją pradinę karo tarnybą tvarkos aprašo patvirtinimo“. *Valstybės žinios*, 2011-10-25, nr. 128-6098.

1,000 servicemen in basic military training. The correlation between practice and margin numbers is presented in the table.

Table 1. The number of servicemen who participated in basic military training

	2011	2012	2013
The number of servicemen participating in basic military training approved by the Seimas*	500-700	700-1,000	700-1,000
The number of servicemen participating in basic military training determined by the Minister of National Defense**	-	-	700
The factual number of servicemen who participated in basic military training***	481	613	634

It is evident from the table that reality does not correspond to ordinary legal acts. Lower normative numbers of persons than determined by the Minister of National Defense show their willingness to perform military service in basic military training, which is one of the ways of performing compulsory basic military service. In accordance with the discussed legal regulation, beginning with 2011, 19–87 additional servicemen had to be called up annually⁶³. If this tendency continues, according to the law, in 2016, the number of servicemen participating in basic military training will have to be from 1,000 to 1,200,

* Lietuvos Respublikos principinės kariuomenės struktūros 2013 metais, planuojamos principinės kariuomenės struktūros 2018 metais nustatymo, krašto apsaugos sistemos karių ribinių skaičių ir statutinių valstybės tarnautojų ribinio skaičiaus 2013 metais ir 2018 metais patvirtinimo įstatymas, *Valstybės žinios*, 2012-10-31, nr. 126-6325.

Lietuvos Respublikos principinės kariuomenės struktūros 2012 metais, planuojamos principinės kariuomenės struktūros 2017 metais nustatymo, krašto apsaugos sistemos karių ribinių skaičių ir statutinių valstybės tarnautojų ribinio skaičiaus 2012 metais ir 2017 metais patvirtinimo įstatymo 2 ir 3 straipsnių pakeitimo įstatymas, *Valstybės žinios*, 2012-07-04, nr. 78-4019.

Lietuvos Respublikos principinės kariuomenės struktūros 2011 metais, planuojamos principinės kariuomenės struktūros 2016 metais nustatymo, krašto apsaugos sistemos karių ribinių skaičių ir statutinių valstybės tarnautojų ribinio skaičiaus 2011 metais ir 2016 metais patvirtinimo įstatymas, *Valstybės žinios*, 2011-07-13, nr. 86-4171.

** Krašto apsaugos ministro 2012 m. lapkričio 15 d. įsakymas nr. V-1274 „Dėl karo prievolinkų šaukimo į privalomąją pradinę karo tarnybą 2013 metais“, *Valstybės žinios*, 2012-11-22, nr. 135-6927.

*** Krašto apsaugos sistemos personalo skaičiaus pokytis, http://www.kam.lt/lt/personalo_politika_512/skaiciai_ir_faktai_537.html, 2014 07 31.

⁶³ On the other hand, while a lack of the number of servicemen who participate on a voluntary basis in basic military training (and alongside perform constitutional conscription) is rather insignificant, the fact that the resolution on the call-up to carry out constitutional conscription on a compulsory basis (participate in basic military training) is not adopted may be justified. However, if the tendency remains as it is and the number of servicemen participating in basic military training in 2016 will by law be from 1,000 to 1,200, the discrepancy between *de jure* and *de facto* may be considerably greater.

and therefore the discrepancy between *de jure* and *de facto* may be noticeably greater. However, legal regulation cannot be an end in itself; it should make a real impact on corresponding relations. This means that non-implementation of legal (ordinary) norms occurs: such as, on the one hand, when citizens do not enjoy the right granted to them (to be prepared for state defense), or, on the other hand, when competent state institutions do not apply legal (ordinary) norms, i.e. do not obligate citizens to execute the duty (i.e. to participate in basic military training in order to be ready to perform their constitutional duty to defend the state in case of an armed attack).

The Constitutional Court of Lithuania has ruled that “while regulating the organization of military service by laws, the institute of military conscription (the compulsory military service) provided for in Part 2 of Article 139 of the Constitution must be ensured”⁶⁴. Besides, Part 1 of Article 139 and Article 142 stipulate that when mobilization is announced as well as in case of a foreign armed attack, a constitutional duty stems for citizens to perform the compulsory military service⁶⁵. Thus, the institute of conscription cannot be abolished, yet in peace time, i.e. having assessed potential threats to state security, it may be suspended⁶⁶ or performed on a volunteer basis as, for example, in Germany⁶⁷, and this would be in compliance with the discussed principle of military justice. Therefore, consideration could be given to the issue of whether it is expedient to determine margin numbers of servicemen invited to perform the compulsory basic military service when such a service is based on a voluntary principle and those liable to military service are not called up on a compulsory basis to cover the shortage. However, while regulating the relations concerning national defense—*inter alia*, the organization of the army—the legislative power should also take into account other constitutional values, such as the capability of the state (economy) or the collective security guarantor, resulting from the membership in NATO, and find a balance between these values defended by the Constitution. As has repeatedly been pointed out by the Cons-

⁶⁴ Lietuvos Respublikos Konstitucinio Teismo 2009 m. rugsėjo 24 d. nutarimas „Dėl teisės aktų, susijusių su kariuomenės pertvarka, konstitucingumo“, *Valstybės žinios*. 2009-09-26, nr. 115-4888.

⁶⁵ *Ibidem*.

⁶⁶ By the way, the Constitutional Court of the Republic of Lithuania has argued for the constitutionality of the suspension of conscription in the Ruling of 24 September 2009 „Dėl teisės aktų, susijusių su kariuomenės pertvarka, konstitucingumo“, *Valstybės žinios*. 2009-09-26, nr. 115-4888.

⁶⁷ It may be noted that according to § 2 of the Law on Military Conscription of Germany it is established that provisions regarding the implementation of nationwide conscription (from § 3 to § 53) are in effect in situations of tension and defense. Nevertheless, persons liable to military service can by law voluntarily perform it in the way chosen (§ 4 (3)). See: Wehrpflichtgesetz in der Fassung der Bekanntmachung vom 15. August 2011 (BGBl. I S. 1730), das zuletzt durch Artikel 2 Absatz 8 des Gesetzes vom 3. Mai 2013 (BGBl. I S. 1084) geändert worden ist, <http://www.gesetze-im-internet.de/wehrpflg/BJNR006510956.html>, 2014 07 28.

titutional Court, the Seimas cannot disregard such a significant change in the economic and financial condition of the state when particular circumstances within the state lead to an extremely difficult economic and financial situation when for objective reasons the state may get short of resources to perform state functions⁶⁸, *inter alia*, to form a well-organized and trained army capable of defending the state from a foreign armed attack or performing international commitments related to the membership in NATO. Thus, having assessed the needs and capabilities of society and the state and approved the state budget by law, the Seimas plans to allocate to state defense a certain portion of the accrued national revenue that will enable the formation of the armed forces according to the aforementioned need for military personnel; therefore, the possibility will not necessarily be provided for all citizens to perform compulsory military service⁶⁹ as one of the forms of the implementation of nationwide military conscription.

It may seem that a citizen is prevented from acquiring certain (basic) military training, yet it is possible to defend the state not only bearing a weapon and, as it was ruled by the Constitutional Court, “the notion of the preparation of citizens to defend the state is rather broad” where “the preparation to defend the state may not be understood only as service for gaining military preparation”⁷⁰. Taking into consideration the fact that the call-up for compulsory military service is only one of the means of ensuring mobilization, the legislative power must also establish such legal regulation whereby legal preconditions would be created to properly prepare citizens *in advance*, even those who do not perform the actual military service of defending the state (also in case of mobilization). This would be in coordination with the conception of nationwide conscription which is determined by the principle of military

⁶⁸ See: Lietuvos Respublikos Konstitucinio Teismo 2006 m. kovo 28 d. nutarimas „Dėl Konstitucinio Teismo įgaliojimų peržiūrėti savo nutarimą ir nutraukti pradėtą teiseną, taip pat dėl teismų finansavimo peržiūrėjimo“. *Valstybės žinios*, 2006-03-31, nr. 36-1292; Lietuvos Respublikos Konstitucinio Teismo 2007 m. spalio 22 d. nutarimas „Dėl policijos pareigūnų gyvybės ir sveikatos privalomojo draudimo valstybės biudžeto lėšomis“. *Valstybės žinios*, 2007-11-24, nr. 121-4965, atitaisymas - 2007.12.01, nr.: 125; Lietuvos Respublikos Konstitucinio Teismo 2007 m. lapkričio 13 d. sprendimas „Dėl bylos nutraukimo“, *Valstybės žinios*, 2007-11-17, nr. 118-4830; Lietuvos Respublikos Konstitucinio Teismo 2009 m. gruodžio 11 d. „Dėl apmokėjimo už darbą vidaus tarnybos sistemos pareigūnams“, *Valstybės žinios*, 2009-12-15, nr. 148-6632.

⁶⁹ As ruled by the Constitutional Court of Lithuania, “state budget planning, assessment of society and state needs, their balancing with society and state capabilities are the issues of social and economic feasibility” (that are based on the political will and decision), but not the issue of the compliance of the state budget law with the Constitution. See: Lietuvos Respublikos Konstitucinio Teismo 2002 m. sausio 14 d. nutarimas „Dėl valstybės ir savivaldybių biudžetų rodiklių“, *Valstybės žinios*, 2002-01-18, nr. 5-186.

⁷⁰ Lietuvos Respublikos Konstitucinio Teismo 2009 m. rugsėjo 24 d. nutarimas „Dėl teisės aktų, susijusių su kariuomenės pertvarka, konstitucingumo“, *Valstybės žinios*. 2009-09-26, nr. 115-4888.

justice. “The needs [having assessed the economic capability of the state and its international commitments pertaining to its membership in NATO – the author’s note] and means may be very diverse, <...>. This diversity also determines a variety of specific ways of preparing citizens for the defense of the state”, the established system of military service and preparation of citizens to defend the state comprises the institute of the compulsory military service⁷¹. It is stipulated not only in Part 1 of Article 139, but also in Part 2 of Article 3.

However, as early as 2009, taking into account the fact that the call-up for the compulsory basic military service in 2013 and 2014 was to be postponed, the Constitutional Court of Lithuania ruled that the Seimas must “until that time, enshrine in laws concrete ways (which are different from compulsory basic military service) of preparation of citizens to defend the state against a foreign armed attack, the procedure of their implementation, etc.”⁷².

As previously mentioned, at present the Law on Military Conscription stipulates that compulsory basic military service may be carried out in one of the following ways: 1) by performing the regular compulsory basic military service; 2) by participating in basic military training; 3) by participating in junior staff officers’ training. It is obvious that only a formal amendment has been made to the law where the previously valid *compulsory basic military service* was replaced by the *regular compulsory basic military service* and whose margin number of military personnel is still 0; therefore, it is not in fact being carried out. The previously discussed situation concerning basic military training when persons liable to military service are still not called up on a compulsory basis only shows that the legislative power has not yet implemented its constitutional obligation “to establish such legal regulation that legal preconditions would be created to properly prepare citizens to perform [...] the constitutional obligation” – to defend the State of Lithuania from a foreign armed attack (*inter alia*, in case of mobilization) as provided for in Part 2 of Article 3 and Part 1 of Article 139 of the Constitution, because in the opposite case, “a groundlessly big threat for the health and/or life of the citizens who, while being not prepared properly, were called up to defend their country against a foreign armed attack”, besides “such citizens would be unable to perform the obligation which stems for them from the Constitution [...] and thus, the duty which is enshrined in Part 1 of Article 139 of the Constitution would be denied”⁷³.

However, the “Strategy of the Preparation of Citizens of the Republic

⁷¹ Lietuvos Respublikos Konstitucinio Teismo 2009 m. rugsėjo 24 d. nutarimas „Dėl teisės akto, susijusių su kariuomenės pertvarka, konstitucingumo“, *Valstybės žinios*. 2009-09-26, nr. 115-4888.

⁷² Ibidem.

⁷³ Ibidem.

of Lithuania for Armed Defense of the State” approved by Order Nr. V-873 of 23 August 2010 of the Minister of National Defense is not in compliance with the requirement to regulate by law concrete ways of the preparation of citizens to defend the state from a foreign armed attack, the procedure of their implementation, etc. Therefore, to this extent, the Ruling of 24 September 2009 of the Constitutional Court has not so far been implemented.

I would like to conclude this article with Roman Herzog’s⁷⁴ generalizing idea:

Conscription is such a deep intrusion into individual freedoms of young citizens that a democratic state governed by the rule of law may demand it only when it is called for by the external security of the state. Therefore, it [conscription – the author’s note] is not a universal eternal principle, but it is also dependent on a concrete security situation. Its retention, suspension or abolition as well as the duration of the basic military service must be based on security policy⁷⁵.

Conclusions

The legislative power has a constitutional obligation to form the armed forces, whose primary function is to defend the state from a foreign armed attack; therefore, it is prohibited to abolish the armed forces as the guarantor of the existence of the state. Also, the legislative power has an extensive discretion to regulate the organization of the national defense system—including the determination of types of military service—while preserving military conscription and the two forms of its implementation (the compulsory military service and the alternative national defense service), requirements for persons liable to military service, reasons for postponing or exemption from military service, etc.

Nationwide conscription is provided for in Part 2 of Article 139 and Article 29 (human equality) of the Constitution of Lithuania and serves as an expression of the equality of civil duties and at the same time embodying military justice. Military justice, implied in the constitutional principle of hu-

⁷⁴ Former Judge of the German Federal Constitutional Court and Ex-President of the Federal Republic of Germany.

⁷⁵ “Die Wehrpflicht ist ein so tiefer Eingriff in die individuelle Freiheit des jungen Bürgers, dass ihn der demokratische Rechtsstaat nur fordern darf, wenn es die äußere Sicherheit des Staates wirklich gebietet. Sie ist also kein allgemein-gültiges ewiges Prinzip, sondern sie ist auch abhängig von der konkreten Sicherheitslage. Ihre Beibehaltung, Aussetzung oder Abschaffung und ebenso die Dauer des Grundwehrdienstes müssen sicherheitspolitisch begründet werden.”Zahlenspiele mit der Wehrgerechtigkeit, *Frankfurter Allgemeiner Politik*, <http://www.faz.net/aktuell/politik/inland/wehrpflicht-debatte-zahlenspiele-mit-der-wehrgerechtigkeit-1464645.html>, 2014 07 31.

man equality, would be violated if the legislative power set conditions for the exemption from conscription (postponing of the compulsory military service on individual basis) which are not based on the criterion of objectivity (circumstances due to which a citizen cannot perform such service). Therefore, when citizens liable to compulsory military service are called up to perform military conscription (even on the basis of the need for military personnel), it should not be merely by happenstance that determines who is called up for the compulsory military service and who is not before the suitability for military service is assessed. Otherwise, the constitutionally protected right to human equality would be violated (Article 29 of the Constitution).

In addition, the Constitutional Court of Lithuania confirmed the existence of the constitutional institute of conscription (the compulsory military service) the assurance of which is a constitutional obligation of the legislative power. While forming the armed forces and determining the type of military service—*inter alia*, nationwide conscription (the diversity of the forms of its implementation) or the duration of military service—it is important to assess the geopolitical situation and the external security environment of the state, harmonize several constitutional values (state economy (economic) capacity, the guarantor of collective security), take into consideration the constitutional aspiration to guarantee the effectiveness of the armed forces not only in peace time but also in case of a military threat (armed attack) as well as ensure the effectiveness of individual persons liable to military service in defense. Therefore, in accordance with the Constitution, the legislative power may form the armed forces on the basis of the need for military personnel, i.e. using margin numbers for servicemen invited for basic military training as one of the ways of performing the compulsory basic military service which has to be implemented.

The fact that at present in Lithuania compulsory basic military service (basic military training) is organized on a volunteer basis is not in conflict with the constitutional principle of human equality. However, the legislative power has not yet implemented the obligation laid out in the constitutional doctrine to establish by law concrete ways of the preparation of citizens not performing the compulsory basic military service to defend the state from a foreign armed attack that would be different from compulsory basic military training and diverse by nature.

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