



## **THE PRINCIPLE OF PROPORTIONALITY AND ITS IMPLEMENTATION IN LITHUANIAN ADMINISTRATIVE LAW**

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### **ABSTRACT**

This article deals with the role of the principle of proportionality in the system of Lithuanian administrative law.

The aim of this article is to observe the implementations of the principle of proportionality in Lithuanian administrative law and the application of this principle in Lithuanian courts. This paper offers an examination of the nature of the principle of proportionality in administrative law, a review of the representation of this principle in Lithuanian legislation, and in particular makes an observation of the role of this principle in the judicial review of Lithuanian courts – specifically, the Constitutional Court of the Republic of Lithuania and the Supreme Administrative Court of Lithuania. The article reviews the recent practice of these courts.

The article consists of two main parts: a review of relevant legislation and a review of the implementation of this principle in Lithuanian courts. In connection with the place and importance of the principle of proportionality in Lithuanian administrative law, this article distinguishes two fields for the implementation of this principle: (1) the application of the principle of proportionality when the subject of public administration makes the decision on a private person and (2) an assessment of the legitimacy of the decision made by the subject of public administration in the judicial process on the basis of this principle.

**KEYWORDS**

Principle of proportionality, administrative court, administrative authorities, private person, administrative discretion

## INTRODUCTION

This article reveals the conception of one of the principles of administrative law – the principle of proportionality, and discusses the place of the principle of proportionality in Lithuanian administrative law.

The aim of this article is to observe the implementations of the principle of proportionality in Lithuanian administrative law and the application of this principle by the Lithuanian courts during the transitional period (i.e., after 1999, when the system of administrative courts of Lithuania started to function). This paper offers an examination of the nature of the principle of proportionality in administrative law, a review of how the relevant Lithuanian legislation addresses this principle, and in particular makes an observation of the role of the principle of proportionality in judicial review by Lithuanian courts – specifically, The Constitutional Court of the Republic of Lithuania and The Supreme Administrative Court of Lithuania. The article reviews the recent practice of these courts. The article also offers an analysis of the rulings of the Constitutional Court of the Republic of Lithuania, made during the period from 2002 to 2005, where the issue of the constitutionality of legal acts was resolved on the ground of the petition of administrative courts or the courts of general jurisdiction, solving administrative cases.

In connection with the place and importance of the principle of proportionality in Lithuanian administrative law, this article distinguishes two fields for the implementation of this principle: the application of the principle of proportionality when the subject of public administration makes the decision on the private person and the assessment of the legitimacy of the decision made by the subject of public administration in judicial process on the basis of this principle. The last part of the paper presents an attempt to look at the implementation of the principle of proportionality as a factor related to the Lithuanian courts' lack of practice in reviewing the exercise of administrative discretion.

The following research methods were used in this paper: a descriptive and comparative analysis, and an analysis of the source content.

### 1. THE PRINCIPLE OF PROPORTIONALITY CONCERNING THE RELATIONS BETWEEN ADMINISTRATIVE AUTHORITIES AND PRIVATE PERSONS

The way in which European law influences the Lithuanian legal system is through the application of certain principles of public administrative law in domestic law. This influence is one of the most important challenges for Lithuanian administrative justice. The principles which are a part of the European Community

law still have to find the appropriate place in domestic law and practice today. This article observes one of the substantive principles, which is at the background of the rule of law – the principle of proportionality – the main task of which is to balance means and ends. This principle is found not only in European Community law, but also in the law of the European Convention of Human Rights. The Council of Europe has already adopted legal instruments relating to different aspects of administrative action and the case law of the European Court of Human Rights also contributes to the protection of individuals in their relations with administrative bodies. The principle of proportionality must be a guide during the administrative decision making process. It is also the principle according to which administrative decisions should be assessed and evaluated. Generally speaking, the principle of proportionality means that there should be cohesion between the aim and the administrative means that are used to achieve that aim.

The Council of Europe (Directorate of Legal Affairs) has prepared a handbook about the principles of the administrative law concerning the relations between administrative authorities and private persons. In this handbook, the principle of proportionality is mentioned among other substantive principles. It is said that the principle of proportionality shall imply:

- the use of means commensurate to the aims to be pursued;
- that the measures taken should strike a fair balance between the public interests and the private interest involved, so as to avoid unnecessary interference with the rights and interests of private persons.<sup>1</sup>

According to these guidelines, the Lithuanian administrative system has had the opportunity to apply this principle for a fairly long period of time. This principle should guide public authorities in the administrative decision making process. It should be the measure against which such decision making should be evaluated by the courts.

## **2. THE IMPLEMENTATION OF THE PRINCIPLE OF PROPORTIONALITY IN LITHUANIAN COURTS**

The main purpose of the principle of proportionality and its application is the promotion of the active role of courts in the review of administrative measures. In the light of this, the analysis of the examples of the judicial practice of courts in Lithuania is presented further in this article.

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<sup>1</sup> *Administration and You: Principles of Administrative Law Concerning the Relations between Administrative Authorities and Private Persons: A Handbook* (Council of Europe publishing, 1996), p. 13-20.

## 2.1. THE IMPLEMENTATION OF THE PRINCIPLE OF PROPORTIONALITY IN THE SUPREME ADMINISTRATIVE COURT OF LITHUANIA

According to the Law on the Establishment of Administrative Courts, administrative courts have started functioning in Lithuania on 1 May 1999. The system of administrative courts in Lithuania consists of five regional administrative courts and the Supreme Administrative Court of Lithuania, the rulings of which are final and are not subject to appeal. The Supreme Administrative Court is also responsible for the development of the uniform practice of administrative courts in the application and interpretation of Lithuanian legal acts.

For a long time, the Supreme Administrative Court of Lithuania did not have an opportunity to boast of numerous examples of the practice of the implementation of the principle of proportionality. Indeed, until 2002 we have not had significant examples where the principle of proportionality would be mentioned. However, on one occasion it was mentioned in the Supreme Administrative Court's consultation explaining the relation between a sanction and an infringement of the administrative law. The question of the consultation was how to differentiate the severe violation of administrative law from the less severe (unsubstantial) one. It was noted in the consultation of the administrative court that "there is a principle in administrative law that the punishment has to be proportioned to the difficulty of the violation, i.e. its danger, therefore, the difficulty of violations specified in the Code of Administrative Violations could be assessed according to the sanctions, i.e. the more severe punishment, the more difficult (dangerous) the violation."<sup>2</sup>

But this consultation cannot be viewed and valued as the example of a proper application of the principle of proportionality because it misrepresents the proper definition of the principle of proportionality (in fact, it even may be viewed as an inversion of the proper notion of the principle of proportionality). The principle of proportionality sets a number of criteria according to which administrative authorities must determine the degree of the sanction during the administrative decision making process, but it does not provide the possibility to evaluate the difficulty of the violation according to the legally settled sanctions.

During the period of 2003 the rulings of the Supreme Administrative Court had one characteristic and specific attribute: if the principle of proportionality is mentioned, the Supreme Administrative Court applied the practice of the Constitutional Court of the Republic of Lithuania. In one of the rulings of 2003 the Supreme Administrative Court assessed the criteria of how to determine a violation

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<sup>2</sup> *The Consultation of the Supreme Administrative Court of Lithuania*, the Supreme Administrative Court of Lithuania, Practice of Administrative Courts, 2001, no. 2 // <http://www.lvat.lt/default.aspx?item=admprakt> (accessed October 21, 2008).

of the proportionality principle, or to assess if this principle was not applied properly.<sup>3</sup> The Supreme Administrative Court settled the rule, that if the means can be achieved without taking any measures, or they could be less severe, these measures shall be qualified as a violation of the principle of proportionality. The Supreme Administrative Court reworded the provisions of the ruling of the Constitutional Court of the Republic of Lithuania, stating that citizens should not experience unreasonable and unjustified restrictions, and if the administrative act and the procedure exceed this standard, the principle of proportionality is violated. The violation of this principle can also be assessed, if the objective could be achieved without any compulsory measures being applied.

The phenomenon of the implementation of the principle of proportionality during the year of 2004 became more frequent in the rulings of the Supreme Administrative Court. The Supreme Administrative Court got used to the application of the principle of proportionality, and also defined the provisions which could determine the violation of this principle. These were the cases related to administrative acts where the objects of the litigation involved communication activities in Lithuania. The issue in these cases were related to the acts of the Communications Regulatory Authority (*Ryšių reguliavimo tarnyba*).<sup>4</sup> The Supreme Administrative Court has applied the practice of the European Court of Justice by applying the provision, speaking very broadly, that the requirement of proportionality entails that there shall be a reasonable relationship between a particular objective and the administrative means used to achieve that objective. The restrictions applied to legal persons by administrative authorities shall be not only proportional but also – legally reasoned, otherwise the court can assess these restrictions as illegal and violating the rights of these subjects.

Application of the principle of proportionality also occurred when the court entered into litigation on the issues of application of the provisions of the Code of Administrative Violations. The Supreme Administrative Court of Lithuania has expressed its point of view about the manner of shortening the term to forfeit the special right by the application of Article 329 of the Code of Administrative Violations: the court has explained that “the shortening of the term of forfeiture of the special right actually means unconditional waiver from the part of administrative punishment which implements the constitutional principle of proportionality requiring not to limit the rights of the person more than it is necessary in a democratic society. It is obvious that limitations of the person’s

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<sup>3</sup> *K.Š. v State*, the Supreme Administrative Court of Lithuania (2003, no. N<sup>12</sup>-1580-03).

<sup>4</sup> *UAB Bitė v The Communications Regulatory Authority*, the Supreme Administrative Court of Lithuania (2004, no. P<sup>1</sup>-12/2004); *UAB Omnitel v The Communications Regulatory Authority*, the Supreme Administrative Court of Lithuania (2004, no. P<sup>1</sup>-13/2004).

activity which incur due to the forfeit of the special right are pointless and unnecessary even, if before the expiry of the term of the forfeit of the special right, the objectives of administrative punishment specified in Article 20 of the Code of Administrative Violations are reached.”<sup>5</sup>

The Supreme Administrative Court of Lithuania has stated in the resolution of 26 May 2008 (administrative case No. N <sup>575</sup> -1742/08)<sup>6</sup> that the “sanction specified in paragraph 3 of Article 127 of the Code of Administrative Violations – confiscation of the means (vehicle) of violation – is acknowledged as a proportional administrative punishment for the violation of the right specified in the norm of this right and such limitation of ownership rights complies with universally accepted objectives to be reached by the society and it cannot be assumed as the means limiting the person’s rights more than it is necessary to reach these goals.” In this case, the Supreme Administrative Court of Lithuania emphasized that by the resolution of 8 April 1997, the Constitutional Court has evaluated the compliance of Article 26 of the Code of the Administrative Violations and has acknowledged that the provision stating that “[o]nly the thing belonging to the violator can be confiscated, except for the thing which has been the tool of violation of administrative law or the direct object in the cases of violation of administrative law specified in Article 210 of this Code” of part one of Article 26 of the Code of Administrative Violations of the Republic of Lithuania does not contradict the Constitution of the Republic of Lithuania.

As it has been noted, the rulings and the decisions of the Constitutional Court of the Republic of Lithuania are the valid backbone of the Supreme Administrative Court rulings. Therefore the analysis of the implementation of the principle of proportionality in the practice of the Constitutional Court of the Republic of Lithuania is necessary and presented hereinafter.

## **2.2. THE PRINCIPLE OF PROPORTIONALITY IN THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LITHUANIA**

Discussions on the principle of proportionality are not rare in the rulings of the Constitutional Court of the Republic of Lithuania. One of the characteristics of these rulings is that the Constitutional Court applies this principle mostly under the influence of the practice of the European Court of Human Rights.

The analysis in the table and research below is made by calculating the Constitutional Court rulings which have been made during a four year period (2002-

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<sup>5</sup> *G.P. v State*, The Supreme Administrative Court of Lithuania (2006, no. N <sup>5</sup> -1886/06).

<sup>6</sup> *V.B. v State*, The Supreme Administrative Court of Lithuania (2008, no. N <sup>575</sup> -1742/08).

2005). The Constitutional Court collectively investigates cases and adopts rulings, decisions or conclusions. The object of this analysis is the rulings of the Constitutional Court during the period of the years 2002-2005. The decisions and the conclusions themselves are not the object of the research. The frequency of the practice of the principle of proportionality is calculated using these criteria – does the Constitutional Court apply the principle of proportionality, who was the petitioner (requesting to investigate) – the administrative court (e.g. the Supreme Administrative Court of Lithuania) or not, and was the principle of proportionality applied in these cases or not.

*Table 1*

Year	All rulings during one year period	The petitioner – the court, adjudicating administrative case	Principle of proportionality was applied	Principle of proportionality was applied (the administrative case is petitioned)
2002	18	5 (28 %)	5	5
2003	13	8 (61 %)	5	3
2004	12	7 (58 %)	4	3
2005	13	7 (54 %)	8	5

When the issue of the balance of private and public interests occurs, the Constitutional Court applies “the constitutional principle of proportionality”.<sup>7</sup> In comparison with the Supreme Administrative Court, the Constitutional Court applies the principle of proportionality in a large part of its rulings. This principle is applied mostly in these investigations, where the petitioner is the administrative court. In the year 2002, all rulings in the cases where the petitioner was the administrative court were made by application of the principle of proportionality; in the year 2003 – three cases out of five were settled using it; and in the year 2004 – three cases out of four. These results allow drawing a conclusion that the Constitutional Court considers the principle of proportionality as an important instrument in the issues of administrative law. Although this practice of the Constitutional Court is a good model for the administrative courts of Lithuania, the practice of administrative courts does not reveal a considerable influence.

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<sup>7</sup> *Ruling on State Social Insurance Pensions*, The Constitutional Court of the Republic of Lithuania (2002, no. 41/2000).



Although the administrative court does not apply the principle of proportionality in the administrative cases frequently, as a subject, the administrative court has become a very active petitioner at the Constitutional Court. As mentioned above in the table, the proportions of rulings in the practice, where the petitioner has been an administrative court and all of the rulings of the Constitutional Court has been increasing, and provide evidence that the activity of administrative courts is likewise increasing. The petitioner must formulate and frame the petition and provide a motivation, and these motivations must be legitimate and reasonable. This work is considered as an important and significant one, which settles the foundation for the forthcoming ruling, decision or conclusion. And the preparation of a good petition is an essential part of the investigation process as well.<sup>8</sup>

Any observation of the application of the principle of proportionality in the Constitutional Court of Lithuania cannot be exhaustive without consideration of the ruling of 2 October of 2001<sup>9</sup>. The petitioner –the Vilnius Regional Administrative Court – was investigating an administrative case. The court suspended the investigation of the case and appealed to the Constitutional Court, requesting an assessment if the provision of the Code of Administrative Violations of Law, stating that, in the cases of decisions to impose a fine, the driving license shall not be returned until the payment of the imposed fine, complies with Paragraph 5 of Article 31 (*No one may be punished for a second time for the same crime.*) and Paragraph 1 of Article 32 (*A citizen may move and choose his place of residence in Lithuania freely, and may leave Lithuania freely.*) of the Constitution of the Republic of Lithuania. The Constitutional Court stated that the administrative measure of ensuring the legal proceedings in legal cases established in the disputed provision of Paragraph 4 of Article 269 of the Code of Administrative Violations of Law is not in line with the principle of proportionality, and therefore not in accordance with the constitutional principle of a law-governed state as well. The Constitutional Court has held that the measures for the violations of the law, established by the state, must be proportional and adequate to the violation, must be in conformity with legitimate and commonly important objectives, and must not restrict or bind the person more than is reasonably necessary to achieve these objectives.

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<sup>8</sup> Egidijus Kūris, "Constitution of the Republic of Lithuania and the challenges of the Community law," *Justitia* 6 (2004): 33.

<sup>9</sup> *Ruling on not returning of the driving licence as a measure of ensuring administrative proceedings*, The Constitutional Court of the Republic of Lithuania (2001, no. 11/2000).

### 3. A REVIEW OF RELEVANT LEGISLATION

Seeking to understand why the principle of proportionality is not a very frequent expression in the decisions of Lithuanians courts while judging the disputes between the private persons and the administrative institutions, it is necessary to observe the legislative conditions concerning the principle of proportionality. The principle of proportionality is not mentioned in the Code of Administrative Violations and in the Law of the Administrative Legal Proceedings<sup>10</sup>. One of the Lithuanian laws in which this principle is mentioned is the Law on Public Administration<sup>11</sup>. This principle is mentioned in the fourth article of this law among the other substantive principles which should guide public administration, such as *lawfulness, objectivity, inter-institutional co-operation and impartiality, conformity to statutory aims*. The principle of proportionality is named as the principle of a democratic state administration. Proportionality, according the Law on Public Administration, shall mean that the scope and severity of an administrative decision must be in proportion to the purpose of administration. Concerning the main provisions (e.g., those mentioned in the handbook of the Council of Europe, referenced above), defining the principle of proportionality, we can observe the similarities and differences of this provision's definitions:

Table 2

Principle of proportionality <sup>12</sup>	The Law on Public Administration (3 Article)
<b>The principle of proportionality implies:</b>	<b>Proportionality, meaning that:</b>
the use of means commensurate to the aims to be pursued; (balancing means and ends)	the scope and severity of an administrative decision must be in proportion to the purpose of administration. (balancing means and ends)
that the measures taken should strike a fair balance between the public interests and the private interests involved, so as to avoid unnecessary interference with the rights and interests of private persons. (balancing between the public and private interests)	<i>The Law on Public Administration does not provide the protection of rights and interests of private persons in the proportionality principle definition.</i> (balancing between the public and private interests)

<sup>10</sup> Law of the Administrative Legal Proceedings, Official Gazette (1999, no. 13-308).

<sup>11</sup> Law on Public Administration, Official Gazette (1999, no. 60-1945).

<sup>12</sup> Administration and You: Principles of Administrative Law, *supra* note 1, p. 16-17.

Comparison of the provisions of principle of proportionality settled in the recommendation of the Council of Europe and in the Law on Public Administration show that they are almost similar. But the provision of the principle of proportionality in the Law implies only the requirement for the use of means, which shall be commensurate to the aims to be pursued, and there is no demand for public authorities to avoid unnecessary interference with the rights and interest of private persons. Whether such an absence be viewed as a deficiency, which causes a weak protection of the rights and interests of private persons, is a question that still needs empirical research. But this review of legislation also could suggest that such legislation represents a rather feeble implementation of the principle of proportionality in the Lithuanian administrative law system.

#### **4. ADMINISTRATIVE DISCRETION AND THE PRINCIPLE OF PROPORTIONALITY**

The term *discretionary power* means a power and an opportunity which leaves an administrative authority some degree of liberty. This power enables the administrative authority to choose from among several admissible and legal solutions the one which it finds to be the most appropriate. When the issue of weighing and striking a balance between the private and public interest occurs, the discretionary power (as well as the principle of proportionality) shall be a useful instrument. Although many European administrative law systems have gone further in subjecting discretionary powers to judicial review, Lithuanian administrative law system cannot be viewed as the most advanced one in this regard. In an Assessment of Administrative Justice in Lithuania, an expert concluded that “apparently the practice of Lithuanian courts is not, in general, to review the exercise of administrative discretion beyond ensuring that the administrative body acts within its authority and complies with the relevant procedures described in the enabling legislation.”<sup>13</sup> A parallel between this assessment of the judicial review of administrative discretion in Lithuanian administrative law and the implementation of the principle of proportionality is possible. The lack of the implementation of the principle of proportionality can be viewed as a factor related to the practice of the judicial review of the exercise of discretion. Due to lack of practice of Lithuanian courts reviewing the exercise of administrative discretion, there is no opportunity for the principle of proportionality to be implemented, as well.

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<sup>13</sup> Daniel A. Bilak, “Administrative Justice in Lithuania,” *An Assessment, United Nations Development Programme* (Vilnius, November 2003), p. 22.

## CONCLUSIONS

1. The implementation of the principle of proportionality became more frequent in the rulings of the Supreme Administrative Court after 2004. The rulings and the decisions of the Constitutional Court of the Republic of Lithuania constitute the backbone of the Supreme Administrative Court rulings.

2. The Constitutional Court of the Republic of Lithuania applies the principle of proportionality in a large part of its rulings. This principle is applied mostly in those investigations where the petitioner is an administrative court. It allows drawing the conclusion that the Constitutional Court of the Republic of Lithuania considers the principle of proportionality as an important instrument in resolving issues of administrative law.

3. The status of the legal acts, adopted by the Parliament of Lithuania, represents a feeble implementation of the principle of proportionality in the Lithuanian administrative law system.

4. The lack of the implementation of the principle of proportionality can be viewed as related to the situation in Lithuania where administrative courts avoid reviewing the exercise of administrative discretion.

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