

## ERRORS OF PUBLIC AUTHORITIES IN PERFORMING THE PUBLIC ADMINISTRATION DUTIES: EVOLUTION OF APPROACHES TOWARDS HUMAN RIGHTS IN THE COURT PRACTICE OF THE REPUBLIC OF LITHUANIA

### *Abstract*

*The article points to the problem of a lack of adequate mechanism for correcting errors of state institutions in their performance of public administration functions. It analyses the legal regulation and case law on the above issue. The analysis of court cases identified in the paper shows that for a long time there was a tendency to place on the citizens the burden of correcting the mistakes made by state institutions. In this way, property rights on legally acquired property were restricted or invalidated. This problem was in the Lithuanian context broadly discussed by the international courts. The aim of the article is to present the scale of the problem and the evolution of legal regulation and case law aimed at remedying it.*

**Keywords:** *public administration, Lithuania, human rights, property law, case law, state responsibility.*

### 1. Introduction

The state, when implementing the responsibilities vested in it by the Constitution, such as ensuring a safe environment, in a broad sense creates control mechanisms that should ensure the safety of persons, the safety of buildings, safe traffic conditions, etc. Understandably, the state implements its functions *via* the relevant institutions, and institutions delegate tasks to employees, to the concrete natural persons who cannot avoid mistakes. The state's governance bodies must have clear and specific mechanisms for correcting such errors and compensating for damages.

The state must be mature and responsible enough to assume responsibility for mistakes made by the public authorities and not to correct errors at the expense of its citizens. In this article, the author will analyse the evolution of the legal regulation and court practice of error correction and compensation for damages in the Republic of Lithuania. The article will analyse the following cases: i) case law on the revocation of a building

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permit; (ii) case law on the annulment of restitution decisions.<sup>1</sup>

In the domestic scientific doctrine, perhaps the only theoretical scientific work directly related to the topic is Dr U. Gailiūnienė's dissertation *Liability for Damage Done to Individuals by the Public Administration in Lithuania* (Gailiūnienė, 2013). Other authors have only fragmentarily examined in their works the issue of correcting state errors in the performance of public administration functions. The problem of state errors committed during the execution of justice and in the restoration of citizens' rights has been studied widely at the theoretical level by prof. Dr R. Valutytė (Valutytė, 2010). The problem of both state duties and mistakes was analysed in the context of criminal procedure law (e.g. Goda, 2021). This article will not address the issue of tort liability of the state and/or legal remedies based on an application for damages by the injured citizen.

This article will mainly use the methods of document analysis, comparative analysis and case analysis, as its purpose is to analyse and compare the change in legal regulation and national case law on the issue at hand. The correction of mistakes made by the Republic of Lithuania has been repeatedly examined in the case law of the European Court of Human Rights (hereinafter: ECtHR). Consequently, the case law of this court will also be the subject of the analysis.

It should be noted that the subject of the article was discussed most extensively in the judicial doctrine of the Court of Justice of the European Union, the ECtHR, and national courts. Hence, the article focuses on the judicial doctrine. It should be also noted that this article, as mentioned, will be focused on property rights guaranteed by Article 23 of the Constitution of the Republic of Lithuania, Article 17 of the Charter of Fundamental Rights of the European Union and Article 1 of Protocol No. 1 to the European Convention on Human Rights. The indicated property rights of citizens will be examined in the context of illegal (erroneous) activities of public administration entities related to the issuance of construction permits and/or the process of privatization of the real estate nationalized during the Soviet occupation.

## 2. Context of the Problem

Discussions on the inadequate resolution of state errors were widespread, with large enough number of cases against Lithuania before the ECtHR. Many cases concern the annulment of state decisions authorising construction and restitution of property rights, which *de facto* meant compulsory demolition of the real estate or its removal, in some cases even without compensation. Namely, the Supreme Court of the Republic of Lithuania in its 2015 annual report, clearly pointed out to the existing problems related to improperly corrected state errors, to the increase in the number of such cases before the national courts and to the cases which Lithuania lost before the ECtHR. According to Sigita Rudėnaitė, former head of the Civil Cases Division of the Supreme Court of Lithuania, the state's mistakes are an acute problem and it is therefore necessary to "not only recognise

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<sup>1</sup> For more information see: Ruling of Constitutional Court of Lithuanian Republic on the restoration of the ownership rights of citizens to land, 1994.

but also correct them properly and learn how to avoid them”. In addition, she pointed out that, *inter alia*, state’s mistakes undermined confidence in the state in international context, referring to the 16 cases pursued against Lithuania before the ECtHR which involved property rights on real estate (see: Press release: Supreme Court of Lithuania talks about dangerous growth trend and state errors, 2016).

On the other hand, the listed negative trends are not the only ones in the analysed area. Sometimes, improper prosecution of a particular state official becomes another negative tendency, where the state categorically refuses to assume responsibility, and adverse consequences of such mistake are corrected at the expense of natural persons (citizens, permanent residents). In such cases, the property right of persons is restricted or persons are even deprived of them, which means that both the principles of legitimate expectations and proportionality are violated, and financial interests of natural persons are harmed. It is considered that in the national law this aspect began to be examined in the case law more widely after the ECtHR adopted several decisions unfavourable to the Republic of Lithuania, such as *Albergas and Arlauskas v. Lithuania*, *Paplauskienė v. Lithuania* and *Digrytė Klibavičienė v. Lithuania*.

### **3. The Concept of a Public Administration Entity and Its Activities in the Lithuanian Legal Framework and the Case law of Its Courts**

The Republic of Lithuania, as a state, implements the functions assigned to it by the Constitution through the state institutions, including the provision of various services to citizens, such as the issuance of construction permits or decisions to restore property rights. In one case, the creation of a new object of real estate is allowed, in another case, property rights that were forcibly taken away from relatives (only in direct lineage<sup>2</sup>) during the Soviet occupation are returned. In order to implement the property rights, it is necessary to ensure high-quality public services.

In this chapter, the Law on Public Administration of the Republic of Lithuania (hereinafter: “the LPA”) and its regulation of the concept, duties and activities of a public administration entity will be reviewed.

In this context, the terms used in LPA should be first defined. A public administration entity is defined as a public legal entity, a collegial or one-person institution without legal personality, or a natural person with a special status established by law, authorized to perform public administration services through the procedure established by this Law (Art. 2, para. 20). An administrative service is understood as an activity related to the issuance of documents or the provision of information (Art. 2, para. 1). The administrative procedure is understood as the obligatory action performed by a public administration entity under the LPA in examining *inter alia* a complaint about a possible violation of the rights and legitimate interests of a person named in the complaint, caused by actions,

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<sup>2</sup> Article 3.132 part 1 of the Civil Code of the Republic of Lithuania: “There is a direct lineage between the ancestor and the descendants (great-grandparents, grandparents, parents, children, grandchildren, great-grandchildren, etc.)”.

omissions or administrative decisions of a public administration entity (Art. 2, para. 2). An administrative decision, understood as *ad hoc* obligation of a public administration entity regarding the application of the law, expressed in a manner and/or form regulated by legal acts, is binding and addressed to a specific person or an individually defined group of persons (Art. 2, para. 5). Thus, the definitions provided by LPA allow us to understand that the institutions of the Republic of Lithuania issuing documents authorizing the construction of real estate and the institutions deciding on the issue of restoration of real estate ownership rights are to be treated as public administration entities.

Accordingly, the Constitutional Court of the Republic of Lithuania has imperatively clarified in this respect that strict legal requirements for honesty and legality of activities are binding as well on the specified institutions, such as entities of public administration. The court has also ruled that a literal application of legal acts can be formally lawful, but it can be incorrect in constitutional terms. The principle of justice, enshrined in the Constitution of the Republic of Lithuania, coupled with the rule that justice is administered by the courts, implies that the constitutional value is not the adoption of a decision by the court, but the adoption of a just court decision. The constitutional concept of justice presupposes not a formal, nominal justice administered by the court, nor the external appearance of justice administered by the court, but, primarily, such court decisions which are not incorrect in terms of their content; justice administered formally by a court alone is not the justice that is enshrined, protected and defended by the Constitution.<sup>3</sup>

Thus, the problem in question, which has been a consequence of the formalistic application of the law, was widespread. The development of the doctrine of administrative courts and, ultimately, the development of the constitutional concept of justice in ordinary law, are believed to have contributed to the resolution of this problem, and state errors are no longer being corrected at the expense of citizens' property and non-property interests on such a large scale.

#### 4. Finding a Balance between Public and Private Interest

It should be noted that the essence of the analysed problem is not the fact that public administrations make mistakes which harm the public and/or private interest, but rather the legal measures and their effectiveness in trying to defend mistakes of the state administration bodies at the expense of citizens and the general inconformity of the given mechanism with recognized human rights standards.

In this article, the human rights' guarantees include the human rights catalogue contained in the Constitution of the Republic of Lithuania (1991) and the rights laid down in the European Convention on Human Rights (1950) and its protocols to which the Republic of Lithuania is a signatory.

According to doctrine, the liability of the state against citizens for damage arises from the general constitutional principles inherent to the legal systems of the EU member states:

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<sup>3</sup> Ruling of Constitutional Court of Lithuanian Republic on the restoration of property rights in state parks and reserves 2007, para. 5.1

“Based on its right to interpret Community law and to develop uniform practice, to ensure the *effet utile* of Community law, the Court of Justice has completed the EC Treaty *lacuna legis* on the protection of individuals and in *Francovich* the doctrine of violations. The ‘sources of inspiration’ of the Court of Justice include the principle of state liability for non-compliance with international obligations, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the victim’s right to fair compensation based on the principle of effective judicial protection. Article 10 of the EC Treaty has been chosen as the legal basis for the intervention in national procedural autonomy” (Tamavičiūtė, 2007).

According to the Constitutional Court of Lithuania, “[t]he constitutional principle of the rule of law is inseparable from the principle of justice and *vice versa*; it follows from the constitutional principle of a state under the rule of law and other provisions of the Constitution that a person who believes that his or her rights or freedoms are violated has the right to an independent and impartial court that would resolve the dispute; if the constitutional rights of a person to apply to a court were not ensured, the universally recognized general principle of law ‘*ubi ius, ibi remedium*’ would be disregarded – if there is any right (freedom), there must be a means of its protection” (Ruling of Constitutional Court of Lithuanian Republic, 2020).

In this context, it should be noted that there is no legal remedy in the Lithuanian legal doctrine regulating the correction of errors of state institutions due to the revoked construction permit or the revoked decision to return the Soviet-era nationalized real estate. Meanwhile, the general rules on the invalidity of a transaction and the protection of the public interest are non-harmonized legal rules which allow the court to *de facto* divest somebody of a property without even reimbursing its value according to the market prices at the time when the decision is passed, or to revoke the building permit and order the mandatory demolishing of the built structure.

In the event of a dispute over state errors affecting the right to property, the problematic aspects are as follows: (i) the annulment of a document authorizing the construction of the real estate, lawfully obtained, together with an order to remove at own expense any buildings which were constructed on the basis of this document, *i.e.* to demolish such buildings; (ii) the forfeiture of restored property rights through the actual deprivation of a real estate, without any compensation, or with a compensation that does not correspond to the market value of a real estate.

In either scenario, in all the cases analysed below: (i) the property rights holders acted *bona fide*: no illegal actions have been identified in the process of restoring the building permit or property rights; (ii) the public authorities cancelled decisions on granting a building permit or a decision on the restoration of property rights.

In order to form an overall picture, it is worth looking at the statistics from 2014 until now, which show that 25 cases have been brought against Lithuania for violation of property rights and/or legitimate expectations in the analysed context. In most of the

ECtHR judgments (17)<sup>4</sup> it was found that Lithuania had violated the Convention. In 8<sup>5</sup> cases no infringements were found, and the reasoning was essentially that the holder of the property rights himself was not sufficiently active or that he himself committed some of the allegedly illegal acts found by the public authority.

Despite the first lost cases and flawed practice, the lower Lithuanian courts continued to rule contrary to the ECtHR judgments. It can be assumed that the percentage of cases brought before the ECtHR and the amounts of compensation paid under the decisions of the ECtHR resulted in fewer costs than it would have been the case if the fair compensation for property damage was awarded to the affected individuals.

The errors of the state, in themselves, are an exception to the general principles of public administration and presuppose a violation of legitimate expectations: “The principle of protection of legitimate expectations presupposes the obligation of the state. This principle also implies the protection of acquired rights, *i.e.* persons have the right to reasonably expect that the rights acquired by them by the laws or other legal acts in force, which are not in conflict with the Constitution, will be maintained for a specified time and may be realistically exercised” (Ruling of Constitutional Court of Lithuanian Republic, 2010). Thus, the mere annulment of a building permit or a decision to restore property rights infringes legitimate expectations. Whether such an infringement may be justified in the public interest, the length of time since such an act is justified and how citizens’ rights should be restored or compensated is another issue (Beliūnienė *et al.*, 2015).

According to the settled case law of the ECJ, even though any institution of the European Union which finds that a measure which has recently been adopted is unlawful has the right to revoke it retroactively within a reasonable time, that right may be limited by the need not to impinge on the trust in its legitimacy, or on legitimate expectations (Beliūnienė *et al.*, 2015). The duration of reasonable time can vary considerably. The scholars indicate that the concept of a reasonable time should be clarified in the case law of the Court of Justice in order to ensure legal certainty. For example, in the case law of the ECJ, two and a half months has been deemed as an unreasonable term. When it comes to delays in dealing with agricultural support, concerning the time within which the Commission would decide whether the aid was lawful, the reasonable time was recognized to amount to as much as two years. In the area of social security for officials the deadlines are much shorter in the ECJ case law – in the *De Compte* case, for example, deadlines of almost three months were considered as an unreasonable delay. In this context, it should be noted that the ECtHR has reviewed cases in which irregularities occurred more than five years, in some cases ten years from the adoption of the administrative acts granting the rights. Thus, *de facto* a person lives in a 10-year-old dwelling and then receives a one-day notice stating

<sup>4</sup> *Albergas, Arlauskas v. Lithuania*, 2014; *Paplauskienė v. Lithuania*, 2014; *Digrytė, Klībavičienė v. Lithuania*, 2014; *Paukštis v. Lithuania*, 2015; *Noreikienė, Noreika v. Lithuania*, 2015; *Tunaitis v. Lithuania*, 2015; *Žilinskienė v. Lithuania*, 2015; *Grigaliūnienė v. Lithuania*, 2016; *Misiukonis v. Lithuania*, 2016; *Grigolovič v. Lithuania*, 2017; *Činga v. Lithuania*, 2017; *Beinarovič v. Lithuania*, 2018; *Geglis v. Lithuania*, 2018; *Truchanovič v. Lithuania*, 2018; *Bykova v. Lithuania*, 2018; *Veromej v. Lithuania*, 2019; *Puišys v. Lithuania*, 2021.

<sup>5</sup> *Valančienė v. Lithuania*, 2017; *Britaniškina v. Lithuania*, 2018; *Bartkus, Kulikauskas v. Lithuania*, 2018; *Tumeliai v. Lithuania*, 2018; *Palevičiūtė ir Dzidzevičienė v. Lithuania*, 2018; *Kristiana LTD v. Lithuania*, 2018; *Černiak v. Lithuania*, 2018; *Kaminskas v. Lithuania*, 2020.



that the building permit has been revoked and that the dwelling is to be demolished at his or her own expense. The person is then forced to initiate a lawsuit resulting in a process that lasts for many years.

With regards to the “correction” of errors, the case law of the ECtHR emphasizes that, when errors made by public authorities are corrected, it is important to ensure during the restitution process that their correction does not lead to disproportionate new infringements (*Moskal v. Poland*). State errors must be detected and corrected through appropriate legal procedures – the restriction of a person’s right to unimpeded use of property resulting from its deprivation must be enforced under “conditions laid down by law” prohibiting arbitrary action by national authorities, “in the public interest”, and by finding a fair balance between the rights of the owner and the public interest. In other words, public authorities that fail to implement or follow the procedures should not be allowed to benefit from their mistakes or evade their duties. The need to rectify an old “injustice” should not disproportionately restrict a new right acquired by a person in good faith, based on the lawfulness of the authority’s actions (*Lelas v. Croatia*). The required balance will not be established if a person incurs an individual and excessive burden as a result of the correction of state errors. The risk of mistakes made by the state and a mistake itself should not be corrected at the expense of individuals (*Gashi v. Croatia*; *Trgo v. Croatia*).

## 5. *Status quo* and Regulatory Perspectives

The problematic relationship reviewed to date shows that there is no legal regulation governing the elimination of the consequences of the revocation of a construction permit; however, general non-specialized legal norms apply, and they are in turn individualized by the courts. It must be noted that, in the present case, the national courts have an excessive margin of appreciation, and that the absence of regulation must be regarded as a legislative omission.

As the Constitutional Court has repeatedly held, the constitutional principle of a state under the rule of law is universal; its content is revealed in various provisions of the Constitution; the essence of this principle is the rule of law; the constitutional principle of a state under the rule of law is extremely broad in scope and it includes many different interrelated imperatives; it must be followed in both the creation and implementation of the law. The Constitutional Court has also held that one of the essential elements of the principle of a state under the rule of law entrenched in the Constitution is legal certainty. The imperative of legal certainty presupposes mandatory requirements for legal regulation: they must be clear and coherent, legal norms must be formulated precisely, they must not contain ambiguities (see: Ruling of Constitutional Court of Lithuanian Republic, 2008; Ruling of Constitutional Court of Lithuanian Republic, 2009; Ruling of Constitutional Court of Lithuanian Republic, 2010). Meanwhile, the lack of legal regulation leads to varying solutions and balances between public and private interests.

Following the case law that full compensation and restitution for damage caused by the state should be required only if it does not cause undue harm to the citizen, the

issue of costs has been decided and resolved. Again, the issue of reimbursement of costs was raised following ECtHR finding of an infringement by the non-award of such costs. In the case of *Černius v. Lithuania* in 2020, the ECtHR concluded that by refusing to reimburse individuals for legal costs (irrespective of the amount of such costs) incurred in administrative proceedings in which they challenged fines and won a dispute, Article 6, para. 1 of the Convention was violated. In 2021, this interpretation prompted the Constitutional Court of the Republic of Lithuania to clarify the duty of awarding litigation costs, both in administrative and criminal cases, if it is established that there are no signs of administrative misconduct or of a criminal act being committed. Until this decision of the Constitutional Court, after the state acknowledged its mistakes, the costs of proceedings in the administrative or criminal proceedings (revoked fines, acquittals) were not reimbursed to the person unreasonably persecuted. This decision of the Constitutional Court is to be considered a progressive and self-critical approach of the state as to the mistakes made by the public administration bodies and provides hope for the development of this line of the practice of ordinary courts in areas other than criminal or administrative liability.

## 6. Conclusion

It is therefore worthwhile outlining the key issues analysed in the paper. From the case law of the ECtHR it clearly stems that absence of specific rules on the abolition of building permits and decisions on the restoration of property rights is incompatible with the property rights guaranteed by Protocol 1 to the ECtHR, and the principle of legitimate expectations.

In the context of the national law of the Republic of Lithuania, the absence of rules that should govern the application of the general principles of the Constitution is considered a legislative omission used by public administration entities in the analysed area and renders administrative decisions incompatible with legitimate expectations and the rule of law.

However, recent decisions of the Supreme Court of the Republic of Lithuania offer hope for the “establishment” of a mechanism for correcting state errors, at least in precedent-setting court practice. This may raise questions about the implementation of the principle of separation of powers, but this issue was not addressed in the case law so far.

It should also be noted that the correction of errors by state institutions, *inter alia*, at the account of business entities, may damage Lithuania’s international reputation and reduce investment in the Lithuanian industry. This is an issue that should be taken into account in moving forward with both in practice and in potential further regulatory interventions.

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**GREŠKE ORGANA JAVNE VLASTI U VRŠENJU OVLAŠĆENJA JAVNE UPRAVE:  
EVOLUCIJA PRISTUPA LJUDSKIM PRAVIMA U SUDSKOJ PRAKSI U  
REPUBLICI LITVANIJU**

**Sažetak**

U radu se ukazuje na problem nedostatka odgovarajućeg mehanizma za ispravljanje grešaka državnih organa koje načine u vršenju svojih ovlašćenja iz domena javne uprave. Rad analizira pravni okvir i praksu u vezi sa navedenim pitanjem. Analiza sudskih predmeta identifikovanih u radu pokazuje da je dugo dominantna tendencija bila prebacivanje tereta ispravljanja grešaka koje načine državni organi na građane. Na taj način su imovinska prava na zakonito stečenoj imovini ograničavana ili poništavana. Ovaj problem je u kontekstu Litvanije bio predmet široke rasprave pred međunarodnim sudovima. Cilj ovog rada je da ukaže na razmere ovog problema i da se predstavi evolucija propisa i prakse usmerenih na njegovo rešavanje.

**Ključne reči:** javna uprava, Litvanija, ljudska prava, imovinska prava, sudska praksa, odgovornost države.

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