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## PROPORTIONALITY: FROM THE CONCEPT TO THE PROCEDURE

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**Abstract.** *The present paper deals with an investigation of the conception and development of the idea (principle) of proportionality, the variety of concepts and the procedure for the verification of the principle of proportionality. The genesis of the conception of coercive measures is studied by reviewing the process of the formation of the current principle of proportionality manifested in the historical sources of the law of Prussia, Germany, and the evolution of the principles consolidated in them. The principle of proportionality consolidated in the case-law of the European Court of Justice and of the European Court of Human Rights is analyzed as well.*

**Keywords:** *proportionality, principle, human rights and freedoms, coercive measures, criminal procedure.*

### Introduction

The principle of proportionality consolidated in the case-law of the European Court of Justice (hereinafter referred to as the ECJ), the European Court of Human Rights (hereinafter referred to as the ECHR) and the Constitutional Court of the Republic of

Lithuania (hereinafter referred to as the Constitutional Court) is to be acknowledged as one of the plentiful ‘safety devices’ able to assist in protecting a particular person against lawlessness or unjustified abuse of the power by public servants authorized to apply procedural coercive measures.

Although the general provision outlining the concept (principle) of proportionality is consolidated in Article 11 of the Code of Criminal Procedure of the Republic of Lithuania (hereinafter referred to as the CCP)<sup>1</sup> *de jure*, this principle is not appropriately and coherently implemented *de facto* in the practical activity of the subjects of criminal procedure who apply procedural coercive measures due to insufficient explicitness of the content of this principle. Such a situation, in its turn, creates preconditions not only for unjustified constrictions of human rights but, in certain cases, also for their abuse.

While analyzing the case-law of the ECJ, ECHR and the Constitutional Court, an attempt is made to review the development of the concept (principle) of proportionality applied in the criminal procedure and to present a survey of the procedures for its verification.

Such foreign authors as, for example, Christoffersen, Trechsel, Arai–Takahashi, Pedersen, Stern, Emiliou, Bogdandy, Reimann, Zekoll, Arnall, Thomas, Ellis, Maurer, Jacobs, Usher, Schwarze, Schmidt–Assman, Eissen, Emmerson, Ashworth, Cremona<sup>2</sup> as well as certain Lithuanian authors, such as Goda, Merkevičius, Danelienė, Švilpaitė<sup>3</sup>,

- 1 Code of Criminal Procedure of the Republic of Lithuania. *Official Gazette*. 2002, No. 37-1341.
- 2 Arai–Takahashi, Y. *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*. New York: Intersentia, 2002; Arnall, A. *The European Union and Its Court of Justice*. New York: Oxford University Press, 1999; Bogdandy, A. *European Integration and International Co-ordination: Studies in Transnational Law in Honour of Claus Dieter Ehlermann*. Hague: Kluwer Academic Publishers, 2002; Christoffersen, J. *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*. Boston: Martinus Nijhoff Publishers, 2009; Cremona, J. J. *The Proportionality Principle in the Jurisprudence of the European Court of Human Rights. Recht Zwischen Umbruch und Bewahrung*. Budapest: Max- Plack- Institut für ausländisches öffentliches Recht und Völkerrecht, 1995; Jacobs, G. F. *Recent Developments in the Principle of Proportionality in European Community Law*. Oxford: Hard Publishing, 1999; Reimann, M.; Zekoll, J. *Introduction to German Law*. 2nd ed. Hague: Kluwer Law International, 2005; Rupp-Sweinty, A. *Die Doktrin von der margin of appreciation in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte*. München: Verlag V. Florentz, 1999; Schmidt–Assman, E. Der Rechtsstaat. In *Handbuch des Staatsrechts der Bundesrepublik Deutschland*. Isensee, J.; Kirchhoff, P. (eds.). Heidelberg: C. F. Müller Verlag, 1987; Schwarze, J. *European Administrative Law*. London: Sweet & Maxwell/The Office for Official. Publications of The European Communities, 2006; Stein, T. *Proportionality Revisited – Überlegungen zum Grundsatz der Verhältnismässigkeit in internationalen Recht. Weltinnenrecht – Liber Amicorum Jost Delbrück*. Berlin: Duncker and Humplot, 2005; Stern, K. *Der Staatsrecht der Bundesrepublik Deutschland*. Vol. 1, 2nd ed. München: C. H. Beck, 1984; Stern, K. Zur Entstehung und Ableitung des Übermassverbots In *Wege und Verfahren des Verfassungslebens. Festschrift für Peter Lerche*. Badura, P.; Scholz, R. (eds.). München: C. H. Beck, 1993; Trechsel, S. *Human Rights in Criminal Proceedings*. Oxford: Oxford University Press, 2005.
- 3 Danėlienė, I. Proporcionalumo principo taikymas administracinėje ir aplinkos teisėje [The Application of the Principle of Proportionality in Administrative and Environmental Law]. *Teisė*. 2009, 72; Merkevičius, R. *Baudžiamasis procesas: įtariamojo samprata* [Criminal Procedure: Concept of the Suspect]. Vilnius: Registrų centras, 2008; Švilpaitė, E. *Nuosavybės teisės apribojimai pagal 1950 m. Žmogaus teisių ir pagrindinių laisvių apsaugos konvencijos pirmojo protokolo 1 straipsnį* [Property Rights Restrictions under the Human Rights and Fundamental Freedoms Convention of 1950, First Protocol Article 1]. Ph. D. diss. Vilnius: Mykolo Romerio universitetas, 2005; Goda, G. *Baudžiamasis procesas teisinėje valstybėje* [The criminal pro-

etc. investigated the origin, evolution and conception of the idea of proportionality serving as one of the fundamental provisions for securing the protection of human rights explicated in the case-law of the ECJ and ECHR.

It must be noted that, despite the fact that sufficient attention of foreign jurisprudence scientists is devoted to the institution of procedural coercive measures, in Lithuania, scientific interest in this institution is far from being adequate. There is an obvious lack of complex research which would cover the analysis of international legal acts and the jurisprudence of the international institutions protecting human rights and freedoms, the legal acts of foreign states and the Republic of Lithuania and would reveal the essence and the peculiarities of the process of the development of the concept (principle) of proportionality while applying coercive measures and, finally, single out the procedures for the verification of this concept (principle).

The present thesis is aimed at the verification of the following hypothesis: although the concept (principle) of proportionality is widely used in judicial practice, ‘proportionality’ and the derivative principle have not obtained a clearly set content.

The historical-comparative method, the method of inductive-deductive cognition and the method of systemic and documentary analysis were applied for the verification of the set hypothesis.

## 1. Genesis of the Concept (Principle) of Proportionality

The historic analysis proves that the concept of proportionality, which is developed and analyzed as a constituent part of the conception of justice, is as old as the model of the organized society. For example, one can trace the rudiments of the concept of proportionality already in the King Hamurabio’s Statute-Book (1792-1750 BC)<sup>4</sup>, where this concept, first of all, is related to marshaling justice by imposing penalties and compensating the damage.

However, the beginning of the development of proportionality as a separate principle aimed at restricting the potential powers of state institutions is related to the principle formed by Karl Gottlieb Savarez in 1791, i.e. to the so-called principle of the public right, according to which ‘the state has the right to restrict the right of an individual only to that extent, which it is necessary for the protection of freedom and security of all the others’<sup>5</sup>. The majority of jurisprudence scientists acknowledge that the contemporary

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cess is governed by the rule]. *Teisės problemos*. 1994, 3(5); Goda, G. Nekaltumo prezumpcija: įtvirtinimas Lietuvos teisėje ir kai kurie turinio aspektai [Presumption of innocence: the consolidation of Lithuanian law and some aspects of the content]. *Teisė*. 2002, 44; Goda, G. Kardomasis kalinimas ir žmogaus teisių apsauga [Pre-trial detention and human rights]. *Teisė*. 1992, 26; Goda, G. Kardomojo kalinimo trukmė [In pre-trial detention]. *Teisė*. 1996, 30; Goda, G. Procesinės prievartos priemonės samprata [The concept of procedural coercive measures]. *Teisė*. 1998, 32; Goda, G. Procesinės prievartos baudžiamajame procese ribos [Procedural coercive measures limits in criminal proceedings]. *Teisė*. 1997, 31.

4 Christoffersen, J., *supra* note 2, p. 33.

5 Timmermann, P. *Proportionalitetspricipet*. Copenhagen: Jurist- og Økonomforbundets Forlag, 2000, p. 61.

concept of proportionality derives from the law of Prussia<sup>6</sup>, to be more precise—from sub-paragraph 10, paragraph 17, Part II of the law of Prussia of the year 1794 (*Allgemeines Landrecht*, hereinafter referred to as ALR)<sup>7</sup>, which used to regulate the power of the police. The rule of ‘necessary measures’ (*die nöthigen Anstalten*) providing the police with the possibility to act in the way ‘to maintain public order’ was consolidated in the abovementioned sub-paragraph.

At the beginning of the nineteenth century, the Supreme Administrative Court of Prussia (*Preussisches Oberverwaltungsgericht*) submitted, *in obiter dictum*, a more comprehensive explanation of the rule of ‘necessary measures’ as set in the ALR, i.e. it stated that ascertainment of the fair ratio between the consequences which might arise and the measures (deeds) selected for application was one of the conditions for the acknowledgement of the deeds of imperious institutions, i.e. of the police, as rightful. On the other hand, for the measure (deed) selected for application to be acknowledged as rightful, it should, as well, meet the second condition, i.e. the condition of efficiency, which meant that the chosen measure must assist in achieving the set objective. Such an explanation of the rule of ‘necessary measures’ paved the path for the spread of the concept of proportionality and for its development in the law of Prussia and Germany<sup>8</sup> as well as in scientific studies. For example, the term ‘proportionality’ (*Verhältnismäßigkeit*) was for the first time mentioned in a research work already in 1802<sup>9</sup>.

It must be stated that by now Germany is considered to be one of the states where particular attention is paid to the explanation of the content of the principle of proportionality and where the principle, being abstract at the beginning, gained a certain formalized content due to the developed doctrine of constitutional and administrative law.

Although the principle of proportionality is not officially consolidated in the Constitution of Germany (*Grundgesetz*), since the first days of its existence the Federal Constitutional Court (*Bundesverfassungsgericht*) treats this principle as an unwritten constitutional principle and derives it from the maxim of the principle of ‘lawfulness’ (*Rechtsstaat*). The elaborated constitutional doctrine of Germany turned the concept of proportionality into a universally obligatory rule (principle) applied while regulating the deeds of almost all branches of state authorities. Thus, the rule of the concept of proportionality, which is sometimes called the ‘prohibition of the excessive use of coercion’ (*Grundsatz der Verhältnismäßigkeit; Übermaßverbot*)<sup>10</sup>, firstly, obliges both the executive and legislative authorities to use adequate, balanced measures while striving for the set objectives; secondly, this rule must be generally practiced in the whole sphere of legal regulation of public law and no separate branch of law (including criminal law and criminal procedure law) can forfeit it; thirdly, it pertains to all the deeds performed

6 Stern, K. *Der Staatsrecht der Bundesrepublik Deutschland*, *supra* note 2, p. 863; Emiliou, N. *The Principle of Proportionality in European Law- A Comparative Study*. London: Kluwer Law International, 1996, p. 23.

7 Engl. *The general land law*.

8 Bogdandy, A., *supra* note 2, p. 200.

9 Stern, K. *Zur Entstehung und Ableitung des Übermassverbots*, *supra* note 2, p. 165, 168.

10 Reimann, M.; Zekoll, J., *supra* note 2, 2005, p. 520.

on behalf of the state despite of their form or content.<sup>11</sup> All this means that both the legislator, who regulates the forms of coercive measures and the grounds for their application, and the representatives of the executive and judicial authorities, who practically apply the definite coercive measures, must follow the requirements of the principle of proportionality.

The concept of proportionality, developed in the doctrine of the German law, was successfully accepted and developed in the case-law of international courts acknowledging that it is ‘the rule of law, which is to be publicly applied’<sup>12</sup>. Thus, for example, proportionality, as a ‘general legal principle’<sup>13</sup> was mentioned for the first time in 1970 in the law of the European Union (in the case of the European Court of Justice *Internationale Handelsgesellschaft (International commerce)*)<sup>14</sup>. The concept of proportionality developed in the doctrine of the German law was in principle repeated in this case by stating that ‘[t]he state authorities cannot impose obligations on its citizens, except the ones which are necessary for achievement of the objectives of public interests’<sup>15</sup>. Moreover, in this case, for the first time in international law, the principle of proportionality was brought to the level of the general principles of law of the European Community.<sup>16</sup> The concept of proportionality, elaborated in the case-law of the ECJ, became a particular measure of the ‘feeling of sanity’, due to which it became possible to protect separate persons or separate social groups against the application of the perverse power of the legislative and executive authorities and against the violation of the fixed limits of their possible effect necessary for the achievement of the lawful objectives of state authorities.

Strange as it may seem, the concept of proportionality, which had been successfully elaborated and developed within a long period of time in the doctrine of jurisprudence and in the case-law of the courts, became the direct written principle of the law of the European Community only after its consolidation in the Maastricht Treaty<sup>17</sup>. Such a transformation of the concept of proportionality from an actual principle into a publicly acknowledged legal principle confirms, in essence, the fact that the existing case-law is able to elaborate, within a certain period of time, the formally unwritten legal concepts which in the long-term perspective turn into publicly acknowledged, obligatory, written legal principles.

On the other hand, the transformation of the concept of proportionality cannot be called very successful because the consolidation of this principle in the legal acts of the EU is partial and rather unsuccessful. This statement can be substantiated by the fact that the discussion of the content of the principle of proportionality is usually limited to

11 Bogdandy, A., *supra* note 2, p. 200.

12 Arnall, A., *supra* note 2, 1999, p. 199.

13 Ellis, E. *The Principle of Proportionality in the Laws of Europe*. Oxford, Portland Oregon: Hard Publishing, 1999; Jacobs, G. F., *supra* note 2, p. 2.

14 Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr – und Vorratsstelle Getreide* [1970] ECR 1125.

15 *Ibid.*

16 Bogdandy, A., *supra* note 2, p. 204.

17 Arai-Takahashi, Y. A., *supra* note 2, p. 188.

stressing one of its structural elements, i.e. the ‘necessity’; for example, such a tendency is also maintained in the Treaty of Lisbon, which has partially changed the Treaty on European Union and the Treaty Establishing the European Community<sup>18</sup>. Thus, the virtual content of the concept of proportionality and, simultaneously, of the legal principle can be revealed only through an analysis of the case-law of the courts. However, for the sake of impartiality it must be stated that the perception of the principle of solid proportionality is still missing. Depending on the traditions of a certain country, the perception of the principle of proportionality, its limits may assume different content or scope due to court rulings. Thus, for example, according to Christoffersen<sup>19</sup>, the content of the principle of proportionality as formed by the doctrine of the Constitutional law of Germany differs from the content of the same principle as developed by the ECHR.<sup>20</sup>

The ECHR forms a peculiar conception of the principle of proportionality, which has been supposedly<sup>21</sup> significantly influenced by the Universal Declaration of Human Rights of the year 1948 and, definitely, by Part 2 of Article 29 of this Declaration.

The ECHR had indirectly used the concept of the principle of proportionality while releasing its first ruling in the case *Lawless v. Ireland* as regards the restriction of the rights mentioned in Article 5.<sup>22</sup> The concept of proportionality was clearly and already directly expressed in the case *Belgian Linguistic*, in which the ECHR stated that the national regulation ‘should not perennially trespass the law [...] essence or should not be at variance with the other rights, fixed in the Convention’<sup>23</sup>. Moreover, the ECHR stated that, while applying the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention), it is necessary to search for a fair balance between the protection of the general public interest and the protection of the fundamental human rights, to which exceptional attention must be paid.

Later the ECHR has been developing the concept of proportionality in such cases as, for example, *Handyside v. the United Kingdom*<sup>24</sup>, *Sunday Times v. the United Kingdom*<sup>25</sup>. Finally, in the case *Sporrong and Lönnroth v. Sweden*, the ECHR stated that the search for a fair balance is typical of the whole Convention.<sup>26</sup>

Although the principle of proportionality is not specifically defined neither in the Convention nor in its protocols, the ECHR developed the concept of the principle of proportionality in the course of its practice in such a way that nowadays, with reference

18 See Treaty of Lisbon 2007, Article 3b.

19 Christoffersen, J., *supra* note 2, p. 34.

20 Rupp-Sweinty, A., *supra* note 2, p. 21; Stein, T., *supra* note 2, p. 729–731.

21 Christoffersen, J., *supra* note 2, p. 34.

22 *Lawless v. Ireland*, 1 July 1961, § 36–38, Series A No. 3.

23 *Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v. Belgium (merits)* [PL], 23 July 1968, § 5, Series A No. 6.

24 *Handyside v. United Kingdom* [PL], 7 December 1976, § 49, § 58, Series A No. 24.

25 *Sunday Times v. the United Kingdom* [PL], 26 April 1979, § 66, § 67, Series A No. 30.

26 *Sporrong and Lönnroth v. Sweden* [PL], 23 September 1982, § 69, Series A No. 52; *Rees v. the United Kingdom*, 17 October 1986, § 37, Series A No. 106; *Johnston and Others v. Ireland*, 18 December 1986, § 72, Series A No. 122; *Brogan and Others v. the United Kingdom* [PL], 29 November 1988, § 48, Series A No. 145-B; *Soering v. the United Kingdom* [PL], 7 July 1989, § 89, Series A No. 161.

to the case-law of the ECHR, it is possible to reveal the content of this concept via its separate elements. Besides, the analysis of the case-law of the ECHR proves that the concept of proportionality is used as a tool for the evaluation of the conformity of the applied measures with the pursued objective. The emergence of the concept of proportionality and its development in the case-law of the ECHR are to be considered as a well-grounded result of the development of jurisprudence, which is necessary for proper application of the provisions of the Convention and the elimination of the gaps existing in them.<sup>27</sup> To be more precise, even if the Convention allows imposing restrictions on the human rights and freedoms, the state must ascertain whether the application of certain coercive measures is proportional to the pursued objectives.

## 2. Conception of the Idea (Principle) of Proportionality: *Suum Cuique*

The term ‘proportionality’ originates from the Latin words *pro portio*, which mean the appropriate ratio between two or more elements. The term of proportionality becomes clearer when interpreted as a certain mathematical ration, for example, 1:1, 1:2, etc. However, proportionality in jurisprudence is not expressed by mathematical or other precise parameters due to objective reasons; therefore, proportionality is usually considered as a certain assessment criterion, which depends on the subjective viewpoint of the person applying it and on the particular subjects.

As already mentioned, proportionality, first of all, is a polysemous category, which acquires different content and essence depending on the particular context of its usage. However, the analysis of the legal acts concerning the protection of human rights, scientific studies and case-law allows distinguishing certain tendencies and consistent patterns, which are not identical. Interestingly, the tendencies of the description of the content of the concept of proportionality in legal acts, scientific works and case-law differ as different features of the same object are stressed. Thus, for example, an attempt to define the conception of the content of the concept (principle) of proportionality in the science of jurisprudence is often described as ‘catching of the ghost’.

Seeking to define the essence of the concept of proportionality, Emiliou states that proportionality embodies ‘the principal conception of justice, which strengthens protection of individual rights both at the national and the supranational level.’<sup>28</sup> However, Emiliou also acknowledges that ‘it is difficult to define notionally the precise significance and scope of this principle.’<sup>29</sup>

According to Schwarze, the concept of proportionality is based on the selection of the appropriate balance, whereas practical implementation of the principle of justice is the result of all this.<sup>30</sup> While defining the principle of proportionality, Schmidt–Assman

27 Bogdandy, A., *supra* note 2, p. 205.

28 Emiliou, N., *supra* note 6, p. 1.

29 *Ibid.*, p. 2.

30 Schwarze, J., *supra* note 2, p. 679.

and Dreier state that it means solitary justice while fixing the balance between the rival rights, interests (benefits) and objectives.<sup>31</sup>

Up to the present moment, the Constitutional Court, which forms the constitutional doctrine, as well as the majority of the representatives of the science of jurisprudence hesitate to submit a definite conception of this principle and restrict themselves to the delineation of the content of the principle of proportionality<sup>32</sup> and to stating that the principle of proportionality derives from the principles of justice and of the state, which is governed by law; thus, the features of both abovementioned principles are typical to this principle<sup>33</sup>. This principle, as a synthesis of two main constitutional principles, i.e. the principles of justice and of the state ruled by law, is considered to be the constitutional, fundamental principle obligatory to both legislative and executive authorities as well as to the courts while performing the functions assigned to them.

The analysis of the case-law of the courts proves that the concept (principle) of proportionality is approached from the utilitarian perspective exclusively. The ECHR states that the principle of proportionality, in its wide sense, is intended to evaluate the relation between the right of the individual and the general public interest<sup>34</sup>, whereas this, in its turn, means that a fair and substantiated balance between these two opposite interests must be achieved. While explaining the essence of the principle of proportionality in its narrow sense, the ECHR states that a proportional balance between the measures applied and objectives pursued (due to which the rights of an individual are restricted for the purpose of public benefit) must be achieved.<sup>35</sup>

As it is seen from the interpretation of the meaning of the ECHR-formed concept (principle) of proportionality in its wide and narrow sense, this court, being basically ruled by another principle, i.e. by the subsidiary principle, makes an attempt to reveal the essence of the principle of proportionality. The survey of the case-law of the ECHR allows to state that the higher level of the required proportionality is, the narrower discretion freedom for the national authorities to restrict the rights of individual is left,<sup>36</sup>

31 Schmidt-Assman, E., *supra* note 2, p. 1034; also see Dreier, H. *Grundgesetz. Kommentar*. Tübingen: Mohr Siebeck Verlag, 1996, I, Vorb. § 94.

32 The Ruling of the Constitutional Court of the Republic of Lithuania on 13 February 1997 'Regarding conformity of Articles 1 and 30 of the Law of the Republic of Lithuania on Control of the Alcohol, of Articles 1, 3 and 11 of the Law of the Republic of Lithuania on Control of the Tobacco as well as regarding resolution No. 179, passed by the Government of the Republic of Lithuania on 2 February 1996 "Regarding control of advertising the alcohol" with the Constitution of the Republic of Lithuania'. *Official Gazette*. 1997, No. 15-314.

33 The Ruling of the Constitutional Court of the Republic of Lithuania on 6 December 2000 'Regarding the acknowledgement of Article 40 of the Administrative Code of the Republic of Lithuania as void and substitution of Article 251 by Articles 1 and 2 of the law and regarding conformity of Part 5 of Article 27 and Parts 3 and 9 of Article 50 of the Law of the Republic of Lithuania on the Tax Administration with the Constitution of the Republic of Lithuania'. *Official Gazette*. 2000, No. 105-3318.

34 Eissen, E. *The Principle of Proportionality in the Case – Law of the European Court of Human Rights. The European System for the Protection of Human Rights*. Dordrecht: Martinus Nijhoff Publishers, 1993, p. 125–146.

35 Arai-Takahashi, Y. A., *supra* note 2, p. 14.

36 *Ibid.*, p. 14.

i.e. the principle of proportionality should be used as a criterion in deciding whether, while applying the measures which restrict human rights, national authorities trespass the limits of discretion rights granted to them. More than once the ECHR has stated that the well-grounded ratio of proportionality or, in other words, ‘the fair balance’ between the measures applied and the objectives pursued must be established.<sup>37</sup> The principle of proportionality, perceived in such a way, should be viewed as a measure, which ‘corrects and constricts the discretion right of the states’ in cases when the rights and freedoms of an individual are gratuitously restricted or the level of restriction is inappropriate as the result of the misuse of the power of the state.

An attempt is made to view the principle of proportionality purely from the perspective of its application in legal acts as well as in the case-law of courts. In this case, Lithuania may serve as a typical example: although a separate article (Article 11 of the CPC of Lithuania) is devoted to the principle of proportionality in the criminal procedure law, the content of this principle remains beyond the limits of cognition. The emphasis is put on the practical application of this principle, by stating that ‘procedural coercive measures must be applied only in cases when it is impossible to achieve the necessary procedural objectives without them. Application of any procedural coercive measure must be terminated as soon as it becomes unnecessary.’<sup>38</sup>

Taking into consideration the abovementioned statements, it can be stated that the concept (principle) of proportionality must be viewed, first of all, not as an isolated, clearly expressed legal category with its content and form, but as a certain abstract, universal legal tool, which, if used appropriately and purposefully, makes it possible to evaluate the relation between the measures which are selected for application, or the measures which are to be applied and the objectives pursued. Thus, proportionality should be viewed as a procedure of the ascertainment of the balance between the measures which are to be applied and the objectives which are pursued or already achieved.

### 3. The Procedure for the Ascertainment of Balance: Proportionality

Seeking for ascertainment whether the measures to be applied or the measures intended to be applied meet the objective pursued, first of all, it is necessary to evaluate the measures and objectives themselves. Thus, in other words, it is necessary to perform the procedure of the verification of the conformity of the concept (principle) of proportionality with the criteria of ‘appropriateness’, ‘necessity’, and proportionality. In order to formalize the procedure for the verification of the concept (principle) of proportionality, ‘vertical’ and ‘horizontal’ tests are designed.

In its case-law, the ECJ frequently uses the vertical test for the verification of the concept (principle) of proportionality; however, the primary origin of the idea of this test

37 Arai-Takahashi, Y. A., *supra* note 2, p. 125.

38 Code of Criminal Procedure of the Republic of Lithuania, *supra* note 1.

could be found not in the law of the EU, but in the Constitution and the administrative law of Germany. The performed analysis of the written sources of law and case-law of various courts allows presuming that the essence of the vertical test lies in the consistent verification of three successive elements in the course of it:

- a) ‘appropriateness’ of the measure to be applied or the measure intended to be applied. While verifying this element, it is considered whether the selected measure, which may influence the rights of an individual in one way or another, is suitable for the achievement of the objective or for the facilitation of the achievement of the desired objective;
- b) ‘necessity’ of the measure to be applied or of the measure intended to be applied. While verifying this element, it is considered whether the selected measure is really necessary, i.e. if there is no alternative for the measure to be applied or the measure intended to be applied;
- c) ‘adequacy’ of the measure to be applied or of the measure intended to be applied, i.e. proportionality in its narrow sense. While verifying this element, it is considered whether the selected measure, being ‘appropriate’ and ‘necessary’, does not ruin the fair balance between the right which is restricted and the objectives which are pursued, and/or does not annihilate the essence of the right which is restricted.<sup>39</sup>

As all abovementioned elements, starting from ‘appropriateness’ and ending with ‘adequacy’, are gradually verified in the course of this test, it received the name of the ‘vertical’ test.<sup>40</sup>

Christoffersen, who had been analyzing the verification of the concept (principle) of proportionality with reference to the case-law of the Supreme Court of Canada, singles out rather different elements of the vertical test:

- a) ‘the ‘objective’, which must be sufficiently significant to justify the restriction of the right or freedom protected by legal acts. The objective, as a minimum, must be determined by important public anxiety or insistent pressure in a free and democratic society;
- b) the essence of the coercive measure which restricts human rights, i.e. the ‘nature’ of the restriction of the rights of an individual via the coercive measure (the deed directed towards the restriction of a particular right) and the ‘scope’ (the scale of the restriction of a certain right). That is, the measure selected for application should restrict the least significant human right to the least possible extent;
- c) the ‘ratio’ between the result of the measure to be applied and objectives of sufficient significance must be evaluated. The more harmful the result of the restricting measure is, the more significant the objective should be for the measure to be well-grounded and clearly justified in a free and democratic society.

39 Christoffersen, J., *supra* note 2, p. 70; Schwarze, J., *supra* note 2, p. 687; Emiliou, N., *supra* note 6, p. 24–26; Reimann, M.; Zekoll, J., *supra* note 2; Jacobs, F. G., *supra* note 2, p. 1.

40 Christoffersen, J., *supra* note 2, p. 71.

Besides the vertical test, Christoffersen singles out the ‘horizontal’ test, which, according to him, is a more flexible test for the verification of the concept (principle) of proportionality.

The essence of the horizontal test lies in the fact that all the abovementioned elements are not verified in sequence, as in the vertical test; instead, an adequate number (the whole) of elements enabling to form proper conclusions about the conformity of the selected coercive measure with the objectives pursued is verified.

In its case-law, the ECHR usually applies the horizontal rather than the vertical test while settling issues regarding the proportionality of applied measures (deeds) and the aspired objective in a particular case. It may be explained by the fact that the vertical test for the verification of the concept (principle) of proportionality, in which the rights are opposed with the restrictions, positions the assessor between certain strictly structured limits, while the significance of certain elements in a particular situation is not evaluated. On the contrary, in the horizontal test such limits for the assessor are not set; the estimator may decide which elements are to be selected and verified. Thus, the application of the horizontal test for the verification of the concept (principle) of proportionality in practice is based on the following attitude: the search for a fair balance between the measures (deeds) and the objective is a multiple task including consideration of plentiful variants which, in their turn, orient the decision-maker to different directions and, therefore, it is practically impossible to strictly formalize the search.

Simultaneously, contrary to the statement above, the doctrine of the purely vertical test for the verification of the concept (principle) of proportionality is formed in the Lithuanian criminal procedure science, leaving other possible alternatives disregarded. Therefore, according to some sources dealing with the law of Lithuania, keeping to the principle of proportionality in the criminal procedure means that the subject who applies a coercive measure is responsible (prior to taking the decision related to restriction of the rights of an individual) for the verification of the extent of the restriction, which should include the consideration of the following questions:

- a) Will the objectives, for the achievement of which it is decided to apply the certain measure, be achieved by applying a particular measure of coercive nature?
- b) Could the same objectives be achieved by applying milder measures?
- c) Will the result, which is to be achieved by applying the measure, be significant sufficiently in comparison with the restrictions suffered by an individual to whom this measure is to be applied?

If the answer to at least one of the abovementioned questions is negative, the measure restricting the rights of an individual should not be applied.<sup>41</sup>

The Constitutional Court also keeps to this standpoint.<sup>42</sup>

Though there is no unanimous attitude and opinion regarding the test that must serve as the guidance seeking for the verification of the proportionality of applied measures (deeds) and the pursued objective, there exists an opinion that both tests that have

41 Goda, G.; Kazlauskas, M.; Kuconis, P. *Baudžiamojo proceso teisė* [Law of criminal procedure]. Vilnius: Teisinės informacijos centras, 2005, p. 54–55.

42 The Ruling of the Constitutional Court of the Republic of Lithuania, *supra* note 32.

been discussed could be successfully used in practical activity. Thus, various elements of proportionality can be presented vertically and investigated in sequence or presented horizontally and considered as constituent parts of the test for the ascertainment of the general balance.

According to the subsidiary principle, national authorities are rewarded the freedom of action, i.e. the prerogative to select the measures restricting human rights guaranteed under international legal acts seeking to achieve certain objectives. The possibility to make use of both the vertical and the horizontal tests for the verification of the concept (principle) of proportionality would consolidate the protection of human rights and freedoms.

While evaluating the concept (principle) of proportionality from the international systemic aspect, it must be stated that there exist democratic states which are not inclined to verify the application of procedural coercive measures by applying tests for the verification of the concept (principle) of proportionality, although they also face similar and even the same conflicts between the rival rights, interests and objectives pursued. For example, the United States of America (the U.S.) could be attributed to such states. However, the Supreme Court of the U.S., taking into consideration the protection of human rights, has developed distinctive tests, i.e. tests for the 'rational grounds', 'less constrictive measures' and 'strict exhaustive investigation'.<sup>43</sup> Thus, for example, according to the test for 'strict exhaustive investigation', state institutions must prove an important public interest and must substantiate the ratio between the measures applied and the result aspired, i.e. the efficiency of the measure and its necessity for the achievement of the objective must be substantiated. All this proves that, in spite of the fact that the concept (principle) of proportionality is not directly named in the law of the U.S., there is no significant difference between the tests for 'strict exhaustive investigation' and 'less constrictive measures' practiced in the U.S. and the concept of proportionality which is applied in the law of Germany and the EU.<sup>44</sup> Besides, the main reasons for the unwillingness to name the principle of proportionality<sup>45</sup> may be the statement by the Supreme Court of the U.S.: 'the principle of proportionality serves as an incitement for the judges to apply their personal subjective opinion'.<sup>46</sup>

Thus, in conclusion, one could state that the concept (principle) of proportionality, even if not emphasized by certain states, operates in one form or another in all democratic legal systems as a mechanism which balances human rights and freedoms and the public interest to restrict them. In order to find out whether this principle is not violated as the result of the application of certain measures (deeds), versatile tests are used in practice.

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43 Tribe, L. H. *Constitutional Law*. New York: The Foundation Press, 1978, p. 991; Brugger, D. *Grundrechte und Verfassungsgerichtsbarkeit in den Vereinigten Staaten von Amerika*. Tübingen: J.C.B. Mohr, 1987, p. 42.

44 Bogdandy, A., *supra* note 2, p. 208.

45 *Ibid.*

46 *Ibid.*, p. 48.

## Conclusions

1. The historical analysis proves that the transformation of the concept (principle) of proportionality from an actual into a legal principle is still in process. In spite of the fact that the concept (principle) of proportionality is consolidated in separate legal acts, due to court rulings the manifestation and form of its content may differ depending on the traditions of a certain state.

2. Presently, the concept (principle) of proportionality should be viewed not as an isolated, clearly expressed legal category with its content and form, but rather as a certain abstract, universal legal tool, which, if used appropriately and purposely, allows evaluating the relation between the measures selected for application and the objectives pursued.

3. Although for an essential formalization of the procedure for the verification of the concept (principle) of proportionality two independent tests, i.e. the ‘vertical’ test and ‘horizontal’ test, are applied in theory and practice, none of them has been acknowledged as the most efficient for the verification of the proportionality of the applied measures (deeds) and the pursued objective.

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## PROPORCINGUMAS: NUO IDĖJOS IKI PROCEDŪROS

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**Santrauka.** *Europos Teisingumo Teismo (toliau – ETT), Europos Žmogaus Teisių Teismo (toliau – EŽTT), Lietuvos Respublikos Konstitucinio Teismo (toliau – Konstitucinio Teismo) jurisprudencijoje įtvirtintas proporcingumo principas yra laikytinas vienu iš daugelio „saugiklių“, galinčiu padėti apsaugoti konkretų žmogų nuo pareigūnų, įgaliotų taikyti procesines prievartos priemones, savivalės arba nepagrįsto piktnaudžiavimo jiems suteiktas įgaliojimas.*

*Nors Lietuvos Respublikos baudžiamojo proceso kodekse de jure yra įtvirtinta bendra nuostata, turinti apibrėžti proporcingumo idėją (principą), tačiau dėl šio principo turinio nepakankamo apibrėžtumo šis principas de facto nėra tinkamai bei nuosekliai įgyvendinamas procesines prievartos priemones taikančių baudžiamojo proceso subjektų praktinėje veikloje, o tai savo ruožtu sudaro prielaidas ne tik žmogaus teisių nepagrįstiems suvaržymams, bet kai kuriais atvejais net ir pažeidimams.*

*Pateiktame straipsnyje nagrinėjant ETT, EŽTT, Konstitucinio Teismo jurisprudenciją siekiama apžvelgti proporcingumo idėjos (principo), kuri yra taikoma baudžiamajame procese, plėtrą, šios idėjos sampratą bei pateikti proporcingumo idėjos (principo) patikrinimo procedūrų apžvalgą.*

*EŽTT, plėtodamas savo praktiką, išplėtojo proporcingumo principo idėją taip, kad dabartiniu metu, vadovaujantis EŽTT teismų praktika, galima per atskirus elementus atskleisti šios idėjos turinį. Tiesa, objektyvumo dėlei reikia pažymėti, jog ir čia proporcingumo principo turinys suvokiamas nevienodai – priklauso nuo šalies tradicijų ir teismų sprendimų. Be to, iš EŽTT praktikos analizės galime pastebėti, jog šis Teismas naudoja proporcingumo idėją kaip priemonę, kuria įmanoma įvertinti taikytų veiksmų ir siekiamo tikslo atitiktį.*

*Manytina, jog proporcingumo idėją (principą) visų pirma reikėtų vertinti ne kaip izoliuotą, aiškiai išreikštą turinį bei formą, turinčią teisinę kategoriją, o kaip į tam tikrą abstraktų, universalų teisinį įrankį, kurį tinkamai ir pagal paskirtį panaudojus įmanoma įvertinti santykį tarp pasirinktų taikyti arba jau taikytinų priemonių bei siekiamų tikslų. Taigi patį proporcingumą reikėtų vertinti kaip balanso tarp pasirinktų taikyti arba jau taikytinų priemonių ir siekiamų ar pasiektų tikslų nustatymo procedūrą. Šios procedūros metu tikrinama, ar proporcingumo idėja (principas) atitinka stricto sensu prasme tinkamumo, būtinumo ir proporcingumo kriterijus. Teisės doktrinoje siekiant formalizuoti proporcingumo idėjos (principo) patikrinimo procedūrą formuojami vertikalūs bei horizontalūs testai.*

**Reikšminiai žodžiai:** *proporcingumas, principas, žmogaus teisės ir laisvės, prievartos priemonės, baudžiamasis procesas.*

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