

LEGISLATIVE DISCRETIONARY POWERS OF THE EXECUTIVE INSTITUTIONS IN THE FIELD OF REGULATION OF HIGHER EDUCATION IN LITHUANIA

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Abstract. *The article analyzes the system of legal regulation of the higher education in Lithuania with the purpose to determine the boundaries of exercising the discretionary powers of the executive institutions in the field of higher education.*

The article is made of two parts. Discretionary powers of the executive institutions in legislative field are discussed in the first part. The power of legislative discretion is described as a right to set the legal regulation by way of a subject who is granted such discretionary power. Problems may arise in cases when the law granting such discretionary powers is too abstract or declarative. The main criteria in determining the boundaries of exercise of discretionary powers are the provisions of Constitution and laws, and constitutional law principles.

The system of delegation of legislative powers in the field of regulation of the higher education in Lithuania is analyzed in the second part of the article. The permanent changes in administrative legal regulation of higher education and studies determined by a vast amount of subjects issuing post-legislative legal acts in this field, as well as rather tedious

legal regulation which, in turn, calls for frequent changes in legal acts, raises doubts regarding a possibility to implement main principles of the studies, such as freedom of creation and scientific research or academic freedom and autonomy.

Keywords: discretionary power, higher education, legal regulation, executive authorities, legislation.

Introduction

Relevance of the topic. The reform of higher education in Lithuania has been in process for several years now. Especially intensive changes in legal regulation have been taking place within the past decade. Legal regulation of higher education, in essence, was amended in April 30th, 2009 after adopting the new Law of Science and Studies of Republic of Lithuania¹ (*infra*, Law on Science and Studies). As well as in provisions of the preceding laws, this law provides that many questions (e.g., regarding requirements for the prepared study programs, minimum requirements for qualification of lecturers) are left to the executive powers (e.g., Government, Ministry of Education and Science or Center of Qualitative Evaluation of Studies) or other regulative institutions (e.g., Lithuanian Board of Science). In such a way various institutions of executive power or other regulative institutions are granted the so called right of legislative discretion to determine the legal regulation of certain issues.

The Core of the Topic. Such method of legal regulation of higher education, when the Law on Science and Studies provides, that certain questions shall be regulated on the post-legislative level without determining the boundaries of such legal regulation, and the above mentioned questions are tediously regulated by one or the other executive institution, might give way to distort the principal provisions prescribed by the legislator.

The object of the research. The system of the legal regulation of the higher education in Lithuania.

The objective of the research. To systematically analyze legal regulation of higher education in Lithuania and to determine the boundaries of exercise of legislative powers of discretion, provided by the law, by executive institutions in the field of higher education in Lithuania.

In order to achieve the determined aim the following *tasks* will be settled:

- To reveal the concept of legislative discretion and to explain the system of the delegation of legislative discretion;
- To analyze the Law on Science and Studies and to determine the cases of delegation of legislative discretion;

Methodology of the Research. In the course of reaching the objective of the research were employed the methods of systemic, analytical-critical, and linguistic analysis. In addition, the methods of documentary analysis and generalization were used.

1 The Law on Education and Science of Republic of Lithuania. *Official Gazette*. 2009, No. 54-2140.

1. Discretion of Executive Institutions in the Field of Legislation

Term „*discretion*“ (Latin, *discretio*; French; *discretion*) is understood as „freedom of action“, „opinion“.² Discretion of an institution or an official – is a right to decide any particular question, act based on an own opinion. Such discretion of an institution or an official should facilitate and ensure an effective implementation of the assigned functions of the institution.

The Constitutional Court of Republic of Lithuania has stated in its numerous decisions that the Seimas while having constitutional powers to pass laws, has discretion in this field³. However, „even by possessing such discretion, the legislator has to continuously comply with the requirements of the Constitution, as well as the principles of justice and the Rule of Law laid down by the Constitution.”⁴ In other words, the limits of freedom of action by the legislator may be defined.

Similarly to the Legislative power, Executive and Judiciary powers have discretion, in implementing their functions; in other words, they have freedom of action in implementing objectives prescribed to one particular power. Modern states seek not to only give discretion legislative power to pass laws, and discretion to judiciary power to implement justice, but also give an executive power a certain scope of freedom in decision making and implementing the objectives prescribed. „Central to this sense of discretion is the idea that within a defined area of power the official must reflect upon its purposes, and then settle upon the policies and strategies for achieving them. There may be discretion in identifying and interpreting purposes; there may also be discretions to the policies, standards, and procedures to be followed in achieving these purposes“.⁵

The citizens of the democratic state delegate the right of legislation to the Parliament. The state preserves itself a legislative discretion only in exceptional cases (when referendums are carried out regarding issues of utmost importance to the state). The main legislative subject in circumstances of representative democracy is Parliament. However the Parliament is not the last instance that the legislative discretion is delegated to. After being delegated with the power of legislation, the Parliament, in turn, delegates part of its discretion to the executive branch (administration). Even though the Constitution of Republic of Lithuania provides that, the Government of Republic of Lithuania executes laws and decisions of the Seimas regarding implementation of the law⁶, it, however creates other post-legislative acts for execution of the laws, therefore

2 Vaitkevičiūtė, V. *Tarptautinių žodžių žodynas* [Dictionary of International Words]. Vilnius: Žodynas, 2001, p. 220.

3 Decision by the Constitutional Court of Republic of Lithuania February 5th, 2002. *Official Gazette*. 2002, No. 14-518; Decision by the Constitutional Court of Republic of Lithuania May 11th, 1999. *Official Gazette*. 1999, No. 42-1345.

4 Decision by the Constitutional Court of Republic of Lithuania December 6th, 2000. *Official Gazette*. 2000, No. 105-3318.

5 Galligan, D. J. *Discretionary Powers*. Oxford: Clarendon Press, 1996, p. 22.

6 Constitution of Republic of Lithuania. *Official Gazette*. 1992, No. 33-1014, 94 str.

it also becomes a subject of legislation. But that does not complete the delegation of the legislative discretion – the Government may transfer part of the discretion received from the Parliament to the ministries, and the latter, in turn, may also delegate part of the delegated discretion to a lower institution or an official. Generally, the legislature makes laws based on the policy mandates of the government. Executive institutions create detailed regulations through rulemaking. According D.J.Galligan „Powers may be delegated for the express purpose of legislating, that is of formulating general rules which are binding on decision-makers.“⁷

The Constitution of Republic of Lithuania not only encompasses the principle of separations of powers, also limits the powers of the government.⁸ “By dividing the legislative, executive and judicial branches of government, the state primarily was seeking to protect itself from the powers of the government that it has created itself, so that this government would not escape from control of the state, would not abuse its delegated powers, and would not become a threat to the rights of its creator”.⁹ Therefore, when analyzing the meaning of discretion in modern states, it is important to foresee those cases, when using such discretionary right may result in negative outcomes, and to define the principles of exercising of the discretionary powers.

It is worth mentioning, that separation of powers is not absolute and strict; in some cases an certain convergence or interception of the functions of the branches is noticed, in which case it is necessary to identify more precisely who and why may exercise the discretionary right in a particular case. According to E.Gellhorn „throughout the modern era of administrative regulation, agencies have been delegated sweeping powers“.¹⁰ And „what makes the delegations more dramatic is that these agencies typically wield powers that are characteristic of each of three principal branches of government. Many agencies operate under statutes that give them legislative power to issue rules which control private behavior, and which carry heavy civil or criminal penalties for violations, executive power to investigate potential violations of rules or statutes and to prosecute offenders, and judicial power to adjudicate particular disputes over whether an individual or a company has failed to comply with the governing standards“.¹¹ Scholars consider discretionary government to be one of the distinctive features of nowadays public administration which has its advantages and shortages: scientific literature most frequently names flexibility in decision making as the main advantage of discretionary government, and its main shortage - inconsistency.¹² There are scholars, who values „the doctrine against legislative „delegation“ of legislative power (to, for example, an administrative agency of the president), reflected (though hardly ever enforced) in court

7 Galligan, D. J., *supra* note 5, p. 28.

8 Constitution of Republic of Lithuania, *supra* note 6, Art. 5.

9 Vai vila, A. *Teisinės valstybės koncepcija Lietuvoje* [The Concept of Legal State in Lithuania]. Vilnius: Litimo, 2000, p. 543.

10 Gellhorn, E.; Levin, R. M. *Administrative Law and Process in a Nutshell*. Fourth edition. USA: West Publishing Co, 1997, p. 8.

11 *Ibid*, p. 9.

12 Cane, P. *An Introduction to Administrative Law*. 3rd Editon. New York, Oxford: Clarendon Press, 1996, p. 135.

decisions, requires that such authorization take the form of rules that control administrative decision. If a rule is too vague, there arises a danger that the executing official will really be a lawmaker, and the salutary elements of predictability and electoral responsibility will be impaired¹³.

When discussing the system of regulation of higher education in Lithuania, it is noted that the legislator delegates its legislative discretion right regarding regulation of many issues to the Ministry of Education and Science, Center of Qualitative Evaluation of the Studies, National Fund of the Studies, Lithuanian Board of Science, etc. When analyzing provisions of the Law on Science and Studies a tendency is observed, that the executive institution may rather freely choose options for implementation of the law, because the provisions of the law itself are rather ambiguous, and in many cases declarative. In such cases it is rather difficult to discuss discretionary control and limits of the discretionary powers of administration, even though certain limits of the freedom of action are prescribed by the Constitutional Court of Republic of Lithuania: „The essence of the constitutional principle of the Rule of Law is domination of law. The imperative of domination of constitutional law means that the freedom of government is limited by law, to which all subjects of law, not excluding neither legislative subjects, must abide. It is emphasized that discretion of all legislative subjects is limited by the highest law – the Constitution. All legal acts, all decisions by national and municipal institutions and officials must comply with the Constitution without contradiction.”¹⁴ When analyzing whether an executive institution has properly exercised its legislative discretionary powers, it necessary to evaluate compliance of the rules created by the executive institution to the Constitution and law.

2. Granting of the Discretionary Legislative Powers to the Executive Institutions Embedded in the Law on Science and Studies

First presumption related to proper exercise of the discretionary powers is that the Parliament has to grant legislative discretionary powers to an administrative institution. It is also important to clarify the intention, in other words, what is the purpose of granting such discretionary powers. Therefore, in such a case it is necessary to evaluate the law teleological. It is presumed, that the Legislator by embedding and granting the right of discretion to the administrative institution by law, does not have an intention to empower and legalize abuse of such powers. Usually such powers are granted to implement very important objectives for the state. „In practice, delegates of discretion often

13 Breyer, S. G.; Stewart, R. B.; Sunstein, C. R.; Spitzer, M. L. *Administrative Law and Regulatory Policy*. New York: Aspen Law and Business, 1998, p. 34.

14 Decision by the Constitutional Court of Republic of Lithuania, February 14th, 2011. *Official Gazette*. 2011, No. 20-967.

are taken as opportunities for specialized agencies to devise subsystems of policies and standards in order to regulate a particular matter¹⁵

The Law on Science and Studies foresees that „National policy of science and studies according to the competence set forth by this law and other laws is implemented by the Government, Ministry of Education and Science, Lithuanian Board of Science, National Fund of Studies, Center of Qualitative Evaluation of Studies, Ombudsman of Academic Ethics and Procedure, also other institutions.“¹⁶ Therefore, we see that the legislator does not foresee a finite list of all institutions that are granted the right of discretion, neither list of laws, based on which the latter are granted the right of discretion.

After systematic analysis of the law on Science and Studies of Republic of Lithuania it is even more apparent that the main subject forming the national policy, organizing, coordinating and controlling its implementation in the field of higher education is the Ministry of Education and Science. Decision by the Government of Republic of Lithuania of October 13th, 2010, No. 1457¹⁷ confirmed Regulations of the Ministry of Education and Science, which, among other, foresee that the Ministry while implementing its goals „confirms general and special requirements (description of field of study, group of fields or sphere of study) of the first stage, integral studies and master’s studies“¹⁸, „determines the competitive order of acceptance to the state financed studies of persons who have acquired education in foreign states“¹⁹, „confirms description of the order of external evaluation and accreditation“²⁰, etc. Rules created for implementation of the functions prescribed to the Ministry of Education and Science are confirmed by orders of the Minister²¹, moreover, if needed be, the Minister of Education and Science may adopt joint orders with other ministers²².

Many provisions of the Law on Science and studies point out that certain rules or regulations of the institutions implementing the policy of science and studies are assigned to be created by the Government: e.g., Art. 12.3 provide that „advisory institution of the Ministry of Education and Science regarding strategic issues of development of higher education is the Board of Higher Education. The Board of Higher Education if formed and functions according regulations confirmed by the Government.” The law clearly grants legislative discretionary powers the Government without setting any limits to such powers. The Government may, at its discretion, to model goals, principles of the activity of the Board of higher education, regulate the order of its formation and set internal rules.

15 Galligan, D. J., *supra* note 5, p. 30.

16 The Law on Education and Science of Republic of Lithuania, *supra* note 1, Art. 12.2.

17 Decision of the Government of Republic of Lithuania „Regarding Decision of the Government of Republic of Lithuania of July 21st, 1998, No. 914 „Regarding Amendment of the Confirmation of the Regulation of the Ministry of Education and Science“. *Official Gazette*. 2010, No. 123-6294.

18 The Regulation of the Ministry of Education and Science. *Official Gazette*. 2010, No. 123-6294, Art. 8.17.

19 *Ibid.*, Art. 8.18.

20 *Ibid.*, Art. 8.19.

21 *Ibid.*, Art. 15.5.

22 *Ibid.*, Art. 15.5.

The Law on Science and Studies in a similar way delegates the right to the Government to regulate the activity of the National Fund of Studies: “National Fund of Studies is a budget institution of the state. The Fund is established, its regulation and board are confirmed by the Government.”²³ The law foresees the main function of the National Fund of Studies – by order adopted by the Government to administer state loans and other financial support to the students.²⁴ However, a manner in which it is implemented and what principles are to be followed in activity of the National Fund of Studies is in detail determined by the Government, which, after coming into force of the new Law on Science and Studies, has on August 19th, 2009, confirmed the regulation of the National Fund of Studies²⁵, that were later amended on May 12th, 2010²⁶, and were amended for the last time on March 9th, 2011.²⁷ The Regulation sets forth objectives of the activity of the National Fund of Studies: to implement the policy of science and studies, seek quality and accessibility of higher education through administration of state resources allocated for this purpose. Government sets forth broader functions than those prescribed by the Law for implementation of the objectives raised, such as:

1. Administer state loans and state supported student loans;
2. Administer stipendiums of the third stage students based on the order prescribed by the board of the fund;
3. Administer social stipendiums to the students of first, second stages and integral studies;
4. Administer state resources allocated to cover the price of studies of the state financed study spots, or their return to the budget when, in cases and order foreseen by the Government of Republic of Lithuania persons are expelled from the state financed study spots, or terminate their studies, and are obligated to return the resources to the state budget; etc.

When analyzing the provisions of the regulation of National Fund of Studies it is clarified that the legislative discretion is granted to the Board of the Fund as well, because, according to the regulation, it has the right to set rules, according to which the stipendiums are to be administered to the third stage students. On November 4th, 2010, the Board of the Fund has confirmed regulations for stipendiums for the third stage students (doctoral students).²⁸

Besides, when analyzing decisions adopted by the National Fund of Studies, it can be noted that the Fund has adopted legal acts, legislative discretion for adoption of which

23 The Law on Education and Science of Republic of Lithuania, *supra* note 1, Art. 14.1.

24 *Ibid.*, Art. 14.2.

25 Decision of the Government of Republic of Lithuania Regarding Confirmation of Regulation of Lithuanian National Fund of Science and Studies. *Official Gazette*. 2009, No. 102-4256.

26 Decision of the Government of Republic of Lithuania Regarding Confirmation of Regulation of Lithuanian National Fund of Science and Studies. *Official Gazette*. 2010, No. 59-2901.

27 Decision of the Government of Republic of Lithuania Regarding Confirmation of Regulation of Lithuanian National Fund of Science and Studies. *Official Gazette*. 2011, No. 31-1449.

28 Decision by the National Fund of Studies Regarding Confirmation of Stipendiums of the Third stage Student (doctoral students). *Official Gazette*. 2010, No. 131–6716.

was not granted neither by law, nor by the regulation (e. g., Art. 7.3 of the Regulation sets forth that the National Fund of Studies „administers social stipendiums of students of first, second stage, and integral studies), however the Fund has nevertheless confirmed the rules on January 14th, 2010²⁹, according to which it administers the stipendiums. Similar situation is concerned with other function of the National Fund of Studies foreseen in Art. 7.1 of the Regulation of the Fund: „administers state loans and state supported loans to students“. Even though neither Law on Science and Studies nor Regulation of the National Fund of Studies foresee according to which rules the state loans should be administered, yet the rules confirmed by order of August 24th, 2009³⁰ demonstrate similar tendency, which witnesses the will of the executive institution to administer according to its own rules, by granting itself powers of legislative discretion. This tendency, when the executive institution grants powers to it, may create certain danger by distorting the intention of the legislator.

A law that grants powers of legislative discretion tends to be rather ambiguous: for instance, Art. 47.7 of the Law on Science and Studies foresee that „the Government determines the scope (length) of the doctoral studies. “The law is rather laconic in regard to the third stage studies, it is noted in general, that „higher university education – is education obtained in higher education school of Lithuania after completing programs of university studies or doctoral studies.“ Art. 39.2 provides that third stage student, i. e., doctoral students are required to have scientific research (art) activity.

Art. 46 of the Law on Science and studies describes the structure of the study system, indicating that the studies may consist of three stages – third of which are the doctoral studies. According to Art. 48.4 of the Law on Science and Studies third stage studies are carried out in the doctoral programs of science and art. Art. 48.5 provides the purpose of science doctoral studies – to prepare scientists, who would be able selfsufficiently carry out scientific research and experimental (social, cultural) development tasks, as well as solve scientific problems. The right of doctoral studies for universities and universities together with scientific research institutes, where high level scientific research corresponding to the field of science is carried out, or for universities together with foreign science and study institutions is granted by Ministry of education and Science. The right is granted based on evaluation of the level of certain scientific research that is carried by institutions that apply for doctoral studies; such evaluation of carried out according to the order prescribed by the regulation of Doctoral studies. The regulation of Doctoral studies is proposed by the Lithuanian Board of Science and confirmed by the Government. „A person is granted a degree of a doctor of science after defending the dissertation.”³¹

29 Order of the National Fund of Studies Regarding Confirmation of Social Stipendiums. *Official Gazette*. 2010, No. 9-477.

30 Order of Lithuanian National Fund of Science and Studies Regarding Confirmation of Regulation of Student Loans. *Official Gazette*. 2009, No. 102-4278.

31 The Law on Education and Science of the Republic of Lithuania, *supra* note 1, Art. 48.5.

However, when analyzing legal acts related to regulating doctoral relations, it is noted that not only the Government³², but also Lithuanian Board of Science regulates certain questions, for instance, Lithuanian Board of Science on December 6th, 2010, has adopted a decision regarding confirming of an order of evaluation of requests to obtain a right to doctoral studies.³³ Likewise, the Ministry of Education and Science grants itself a right of legislative discretion by adopting rules. According to which requirements are set for members of panels of doctoral dissertation defense.³⁴ Without judging of the limits of discretionary right foreseen by the Constitution of the legislator itself, it is doubtful that such order of legislature adopted by the Ministry of Science and Education is in compliance with the system of discretion the limits if discretionary powers possessed by the Ministry of Education and Science.

Theory of law provides that a principle of „what is provided by law is allowed“³⁵ is applicable to the public law, which also includes regulation of higher education. Therefore a tendency is observed when an executive institutions selfishly decides to adopt a certain pots-legislative act, adoption of which was not foreseen by the law nor was it foreseen that precisely the above mentioned institution has a right to adopt such a law; such tendency should be considered distortive to the legal system, and the latter post-legislative legal acts should be considered as adopted by way of exceeding the limits of discretionary powers of the executive institution.

Of course, a situation when the subject of public administration grants itself a power of legislation may be viewed upon positively: a subject grants itself a legislative discretion by flexibly reacting to realities and demands of public life. On the other hand, if executive institutions continuously amend the existing administrative legal regulation, they may diminish legal certainty and stability in the field of higher education.

A certain hierarchical model of delegation of legislative discretion was discussed until now, where the law provides that the function of legislation is executed by the Government, and the Government, in turn, delegates it to a certain executive institution. However, it should be noted that the Law on Science and Studies foresees a direct delegation of legislative discretion to the Ministry of Education and Science: for instance, Art. 48.3 of the Law on Science and Studies provides that „General and special requirements for the first stage studies, integral studies and master’s studies programs are adopted by the ministry of Education and Science“. On April 9th, 2010, the Ministry

32 Decision of the Government of Lithuania Regarding Confirmation of the Regulation of Doctoral Studies. *Official Gazette*. 2010, No. 59–2900.

33 Decision of the Lithuanian Board of Science Regarding Confirming of an Order of Evaluation of Requests to Obtain a Right to Doctoral Studies. *Official Gazette*. 2010, No. 145–7481.

34 Order of the Minister of Education and Science Regarding Confirmation of Qualification Requirements of Member of Boards of Dissertation Defense, Professors of Doctoral Students, Consultant, Opponents and other Scientists. *Official Gazette*. 2010, No. 150–7690.

35 Vaišvila, A. *Teisės teorija* [Theory of Law]. Vilnius: Justitia, 2009, p. 160–161.

of Education and Science by way of law has confirmed a description of general requirements of first stage and integral studies that provide a degree³⁶ (that was amended on July 15th³⁷, 2010, and January 14th, 2011³⁸), and a description of general requirements for master's studies programs on June 3rd, 2010.³⁹

Both general and special description requirements for first stage and integral studies programs, as well as description of master's studies program, are legal acts that describe what a study program should consist of in a very tedious and detailed manner. Besides, when a university is preparing a study program it must abide to other laws as well, because the Law on Science and Studies foresees that the Ministry of Education and Science adopts study fields, field groups or study sphere description for the first stage, integral and master's studies programs, as well as abide to requirements of description of continuous and extended form of studies⁴⁰ and description of legal studies.⁴¹

Such detailed regulation tendency raises doubts regarding implementation of goals foreseen by the Law on Science and Studies. Universities often practically do not have a possibility for creative preparation of new study programs, only by following a plethora of legal acts (that indicate quantity, characteristics, and scope of the programs that have to be created), they in essence „prepare“ by way of following a recipe a study program projected by executive institutions. In such a way universities lose an opportunity to act according to the principles of creativity and freedom of academic research, and autonomy embedded in the Law on Science and Studies.

Conclusions

1. The right of legislative discretion in the field of higher education is possessed not only by the Parliament, but also by the Government, Ministry of Education and Science, other ministries, Lithuanian Board of Science, National Fund of Studies, Center of Qualitative Evaluation of Studies, ombudsman of academic ethics and procedure, as well

36 Order of the Minister of Education and Science of Republic of Lithuania Regarding Confirmation of Description of General Requirements of First Stage and Integral Studies. *Official Gazette*. 2010, No. 44-2139.

37 Order of the Minister of Education and Science of Republic of Lithuania Regarding Amendment of Order of the Minister of Education and Science of April 9, 2010, No. V-501 „Regarding Confirmation of Description of General Requirements of First Stage and Integral Studies“. *Official Gazette*. 2010, No. 88-4676.

38 Order of the Minister of Education and Science of Republic of Lithuania Regarding Amendment of Order of the Minister of Education and Science of April 9, 2010, No. V-501 „Regarding Confirmation of Description of General Requirements of First Stage and Integral Studies“. *Official Gazette*. 2011, No. 9-399.

39 Order of the Minister of Education and Science of Republic of Lithuania Regarding Confirmation of Description of General Requirements of Master's Studies Program. *Official Gazette*. 2010, No. 67-3375.

40 Order of Ministry of education and Science of Republic of Lithuania Regarding Confirmation of Description of Forms of Continuous and Extended studies. *Official Gazette*. 2009, No. 59-2325.

41 Order of Ministry of education and Science of Republic of Lithuania Regarding Confirmation of Description of Legal Studies. *Official Gazette*. 2010, No. 102-5306.

as other institutions empowered by the Government and the Ministry of Education and Science. The legislator does not provide a complete list of subjects that carry out the legislative function in the above mentioned field.

2. The right of legislative discretion is often delegated to various subjects that issue post-legislative legal acts based on the provisions of the Law on Science and Studies; however, it is not the only law that sets ground for delegation of legislative discretion. The legislator does not provide with a complete list of legal act, based on which the executive institutions acquire the right of discretion of legal regulation in the field of higher education.

3. After systematic analysis of legal acts a conclusion is made that executive institutions are deprived of the right of discretion to determine the mission of higher education as well as principles of science and studies. National policy of science and studies is formulated by the Seimas that is implemented according to the competence set by law by institutions of public administration.

4. Discretionary powers for implementation of the legislative function by public administration institutions are granted by Law on Science and Studies by simply stating that a certain questions are to be regulated on the level of post-legislative legal acts. However, the limits of legal regulation nor their direction are not provided. That sets ground for rather tedious legal regulation that does not comply with the basic principles of science and studies and, at times, even preventing implementation of the mission of higher education.

5. After analyzing legal acts regulating the system of higher education a tendency was observed witnessing intention of the executive institution to administer questions delegated to it by way of rules created by itself; with that intention the executive institution grants itself powers of legislative discretion.

6. Regulation of higher education in Lithuania is implemented by setting a certain hierarchy of delegating of legislative discretion, delegating the right of discretion prescribed by law to the Government, which, in turn, delegates it to an executive institution or directly to the Ministry of Education and Science. Executive institution can frequently change post-legislative legal acts that, on one hand, is responsive to realities of public life, on the other hand, is diminishing towards legal certainty and stability.

7. Delegation of discretionary powers in the field of legal regulation of higher education is characterized by grating of discretionary powers without setting limits to these powers, by distinguishing that any particular question is delegated to the Government, Ministry or other executive institution. In such cases it is difficult to determine whether the post-legislative regulation complies with intentions of the legislator.

8. A tendency is observed, when an executive institution selfishly decides to adopt certain post-legislative act which was not foreseen by the law nor was it determined that precisely that institution has a right to adopt such an act; such tendency should be considered distortive to the legal system, and adoption of such post-legislative acts should be evaluated as overriding the limits of the discretionary powers of an executive institution.

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LIETUVOS VYKDOMOSIOS VALDŽIOS INSTITUCIJŲ TEISĖKŪROS DISKREČINĖS GALIOS AUKŠTOJO MOKSLO REGULIAVIMO SRITYJE

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Santrauka. Straipsnyje analizuojama Lietuvos aukštojo mokslo teisinio reguliavimo sistema, siekiant nustatyti įstatyme numatytas vykdomosios valdžios institucijų legislatyvinės diskrecijos teisės aukštojo mokslo srityje įgyvendinimo ribas.

Straipsnį sudaro dvi dalys. Pirmojoje aptariamos vykdomosios valdžios institucijų diskrecinės galios teisėkūros srityje. Legislatyvinės diskrecijos teisė suprantama kaip teisė nustatyti teisinį reguliavimą subjekto, kuriam suteikta diskrecijos teisė, nuožiūra. Pastebima, kad legislatyvinės diskrecijos teisę aukštojo mokslo srityje turi ne tik Parlamentas, bet ir Vyriausybė, Švietimo ir mokslo ministerija, kitos ministerijos, Lietuvos mokslo taryba, Valstybinis studijų fondas, Studijų kokybės vertinimo centras, akademinės etikos ir procedūrų kontrolierius, taip pat kitos Vyriausybės bei Švietimo ir mokslo ministro įgaliotos institucijos. Įstatymų leidėjas neapibrėžia baigtinio teisėkūros funkciją šioje srityje vykdančių subjektų sąrašo. Taip pat įstatymų leidėjas nenumato baigtinio teisės akto, kurių pagrindu vykdomosios institucijos įgyja diskrecijos teisę aukštojo mokslo teisinio reguliavimo srityje, sąrašo. Vykdomosioms institucijoms nėra suteikiama diskrecijos teisė nustatyti aukštojo mokslo misiją bei mokslo ir studijų principus. Valstybės mokslo ir studijų politiką, kurią pagal teisės aktuose nustatytą kompetenciją turi įgyvendinti viešojo administravimo institucijos, formuoja Seimas.

Antroje dalyje analizuojama teisėkūros galių suteikimo sistema Lietuvos aukštojo mokslo reguliavimo srityje. Nurodoma, jog daugeliui klausimų sureguliuoti legislatyvinės diskrecijos teisė įstatymo leidėjo suteikiama Švietimo ir mokslo ministerijai, Studijų kokybės vertinimo centrui, Valstybiniam studijų fondui, Lietuvos mokslo tarybai ir kt. Diskrecinių galių perdavimas aukštojo mokslo teisinio reguliavimo srityje pasižymi legislatyvinių diskrecijos galių suteikimu, nenustatant jokių šių galių ribų, pažymint, jog vieno ar kito klausimo suregulavimas pavedamas Vyriausybei, Ministerijai ar kitai vykdomajai institucijai.

Tokiais atvejais labai sudėtinga vertinti, ar įstatymų įgyvendinamųjų aktų reglamentavimas atitinka įstatymo leidėjo intenciją. Permanentiniai aukštojo mokslo ir studijų administracinio teisinio reguliavimo pokyčiai, nulemti gausaus įstatymų įgyvendinamuosius teisės aktus šioje srityje leidžiančių subjektų rato, taip pat ir pernelyg smulkmenišką teisinį reguliavimą, savo ruožtu reikalaujantis dažnų teisės aktų pakeitimu, kelia abejonių dėl galimybės įgyvendinti pagrindinius, tokius kaip kūrybos ir mokslinių tyrimų laisvės ar akademinės laisvės ir autonomijos, mokslo ir studijų principus. Pastebėta tendencija, kai vykdomoji institucija savavališkai nusprendžia priimti tam tikrą įstatymo įgyvendinamąjį aktą, kurio priėmimas nebuvo nurodytas įstatyme ir nebuvo numatyta, jog būtent minėtoji institucija turi teisę tokį aktą priimti, turėtų būti vertintina kaip iškraipanti teisės sistemą, o tokie įstatymų įgyvendinamieji teisės aktai turėtų būti vertintini kaip priimti peržengiant viešojo administravimo institucijos diskrecinių galių ribas.

Reikšminiai žodžiai: *diskrecinės galios, aukštasis mokslas ir studijos, teisinis reguliavimas, vykdomosios institucijos, teisėkūra.*

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