Remigijus Merkevičius

GYNYBOS BAUDŽIAMAJAME PROCESE PAGRINDAI

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TURINYS

XI.
PROFESINEI PRAKTIKAI AKTUALESNĖS GYNĖJO TEISĖS BAUDŽIAMAJAME PROCESE

4. GYNĖJO TEISĖ AKTYVIAI DALYVAUTI VALSTYBINIŲ BAUDŽIAMOJO PROCESO SUBJEKTŲ ATLIEKAMUOSE PROCESO (TYRIMO) VEIKSMUOSE IR PRIIMANT PROCESINIUS SPRENDIMUS

4.1. Gynėjo teisė dalyvauti visose ginamo įtariamojo (kaltinamojo) apklausose

Gynėjo teisę dalyvauti **visose** ginamo įtariamojo (kaltinamojo) **apklausose** – bendriausia prasme, prižiūrėti ir *lydėti* įtariamąjį (kaltinamąjį) baudžiamajame procese (vok. *Betreuung des Beschuldigten*) – formuluoja BPK 48 straipsnio 1 dalies 2 punktas. Baudžiamojo proceso kodekso nuostatos, reglamentuojančios įtariamojo (kaltinamojo) apklausas, kartais pakartoja šią gynėjo teisę. Pavyzdžiui, BPK 189 straipsnio 5 dalis atskirai nurodo gynėjo teisę dalyvauti pas ikiteisminio tyrimo teisėją atliekamoje ginamo įtariamojo apklausoje, BPK 190 straipsnio 2 dalis – gynėjo teisę dalyvauti ginamo įtariamojo akistatoje. Šioje monografijoje aptariant gynėjo teisę susitikti ir bendrauti su ginamuoju jau buvo atkreiptas dėmesys ir į tai, kad kai kurios Baudžiamojo proceso kodekso nuostatos *expressis verbis* pabrėžia ir gynėjo teisę su ginamu įtariamuoju (kaltinamuoju) susitikti ir bendrauti ***dar iki apklausos***. Pavyzdžiui, BPK 10 straipsnio 1 dalis nurodo, jog teisė į gynybą, kurios dalis yra ir teisė turėti gynėją, įtariamajam turi būti užtikrinta nedelsiant nuo sulaikymo ar pirmosios apklausos momento. Pagal BPK 48 straipsnio 1 dalies 2 ir 3 punktus bei 50 straipsnio 1 dalį, teisę susitikti ir bendrauti su ginamu įtariamuoju (kaltinamuoju), taip pat ir su sulaikytu įtariamuoju gynėjas turi dar ***iki pirmosios apklausos***, ***prieš apklausą*** ar ***prieš teismo posėdį***.

Gynėjo teisę dalyvauti ginamo įtariamojo (kaltinamojo) apklausose akcentuoja ir tarptautinės bei Europos Sąjungos teisės aktai. Europos parlamento ir Tarybos 2013 m. spalio 22 d. direktyvos 2013/48/ES „dėl teisės turėti advokatą vykstant baudžiamajam procesui ir Europos arešto orderio vykdymo procedūroms ir dėl teisės reikalauti, kad po laisvės atėmimo būtų informuota trečioji šalis, ir teisės susisiekti su trečiaisiais asmenimis ir konsulinėmis įstaigomis laisvės atėmimo metu“ 3 straipsnio 1 dalyje nurodyta „bendroji“ valstybės narės pareiga užtikrinti, kad įtariamieji (kaltinamieji) turėtų teisę

turėti advokatą tokiu laiku ir būdu, kad atitinkami asmenys galėtų praktiškai ir veiksmingai pasinaudoti savo teisėmis į gynybą. Pagal direktyvos 3 straipsnio 2 dalį, bet kuriuo atveju įtariamieji arba kaltinamieji turi teisę turėti advokatą nuo toliau išvardytų momentų, atsižvelgiant į tą, kuris yra anksčiausias: **(i.) prieš juos apklausiant** policijoje, kitoje teisėsaugos institucijoje ar teisme; **(ii.)** tyrimo arba kitoms kompetentingoms valdžios **institucijoms atliekant tyrimo ar kitus įrodymų rinkimo veiksmus** pagal 3 dalies c) punktą, t. y. tokiuose tyrimo arba įrodymų rinkimo veiksmuose, jei tie veiksmai yra numatyti pagal nacionalinę teisę ir jei įtariamasis arba kaltinamasis privalo arba jei jam leidžiama dalyvauti atitinkamame veiksme: (a.) asmens atpažinimuose, (b.) akistatose, (c.) nusikaltimo atkūrimuose; **(iii.)** nepagrįstai nedelsiant nuo **laisvės atėmimo momento**; **(iv.)** kai jie **šaukiami atvykti į** jurisdikciją baudžiamosiose bylose turintį **teismą**, deramu laiku prieš jiems atvykstant į tą teismą. Direktyvos 3 straipsnio 3 dalyje pabrėžiama, kad ***teisę turėti advokatą*** **sudaro** ***inter alia*** **teisė, kad į įtariamųjų (kaltinamųjų) apklausą atvyktų ir joje veiksmingai dalyvautų jų advokatas**.

Beje, pagal nacionalinio baudžiamojo proceso įstatymo raidę, gynėjas ne tik turi teisę dalyvauti visose ginamo įtariamojo (kaltinamojo) apklausose, bet ir „bendrąją pareigą" nurodytu laiku atvykti pas ikiteisminio tyrimo pareigūną, prokurorą ar į teismą; taigi ir į ginamo įtariamojo (kaltinamojo) apklausą. Negalėdamas atvykti, apie neatvykimą ir jo priežastis gynėjas privalo iš anksto pranešti ikiteisminio tyrimo pareigūnui, prokurorui ar teismui, o jei neatvyksta be svarbios priežasties, gynėjui gali būti skiriama BPK 163 straipsnyje numatyta – iki 30 MGL (1 500 €) dydžio – bauda (BPK 48 str. 2 d. 2 p.).

Baudžiamojo proceso kodeksas nedetalizuoja ir viso labo tik fragmentiškai nurodo, kokias proceso teises ir procesines galimybes turi gynėjas, dalyvaudamas ginamo įtariamojo (kaltinamojo) apklausose, ir visiškai neatsako (žiūrint iš esmės, vargu ir ar gali atsakyti) į daugybę kasdienėje gynybos praktikoje kylančių dilemų. Pavyzdžiui, ar gali gynėjas tiesiogiai ginamo įtariamojo (kaltinamojo) apklausos metu patarti ginamajam neatsakyti į užduotą klausimą ar nurodyti, ką konkrečiai į užduotą klausimą atsakyti? Ar gali pats gynėjas atsakyti į klausimą, kuris užduodamas apklausiamam ginamam įtariamajam (kaltinamajam)? Ir pan.

Baudžiamojo proceso kodekso 48 straipsnio 1 dalies 6 punkte tenurodyta, jog dalyvaudamas įtariamojo (kaltinamojo) apklausose, gynėjas turi teisę užduoti klausimus, prašyti paaiškinimų ir daryti pareiškimus. Jei gynėjo dalyvavimui ginamo įtariamojo apklausose pagal teisės analogiją (*a simile*) taikysime BPK 178 straipsnio 5 dalį, tai gynėjas dar turi teisę apklausos metu susipažinti su ginamo įtariamojo apklausos protokolu ir teikti pastabas dėl šio protokolo turinio. Tas pats nurodyta ir BPK 179 straipsnyje. Kai kurios kitos Baudžiamojo proceso kodekso normos vardija tam tikras gana specifines gynėjo teises ginamojo apklausos metu. Pavyzdžiui, BPK 188 straipsnio 5 dalis numato gynėjo teisę prašyti, kad į nepilnamečio įtariamojo apklausą būtų pakviestas psichologas ir (ar) valstybinės vaiko teisių apsaugos institucijos atstovas bei kad būtų daromas nepilnamečio įtariamojo apklausos garso ir vaizdo įrašas. BPK 189 straipsnio 1 dalis

suteikia gynėjui teisę prašyti apklausti ginamą įtariamąjį pas ikiteisminio tyrimo teisėją, o BPK 190 straipsnio 4 dalis suteikia gynėjui teisę užduoti klausimus į akistatą suvestiems asmenims. Apklausiant kaltinamąjį teisminio baudžiamosios bylos nagrinėjimo etape, gynėjas iš esmės teturi tik „bendrąsias" nagrinėjimo teisme dalyvių teises, pavyzdžiui, „bendrąją" teisę užduoti klausimus apklausiamiems asmenims, tarp jų ir apklausiamam kaltinamajam (BPK 275 str. 1 d.), „bendrąją" teisę ar galimybę prieštarauti teisiamojo posėdžio pirmininko veiksmams (patvarkymams), taigi ir veiksmams, kurie neteisėtai pažeidžia apklausiamo kaltinamojo teises ar interesus (BPK 241 str. 3 d.), *nerašytą* teisę ar galimybę prašyti teisiamojo posėdžio pirmininko atmesti kaltinamajam užduotą klausimą, jei šis nesusijęs su byla ar yra menamas (BPK 275 str. 1 ir 6 d.) ir t. t.

Baudžiamojo proceso kodeksas nedetalizuoja net ir **apklausiamo įtariamojo (kaltinamojo) teisių apklausos metu**, tad ką jau ten plačiau bekalbėti apie įtariamojo (kaltinamojo) gynėjo teises. BPK 21 straipsnio 4 dalis ir 22 straipsnio 3 dalis, kuriose yra įtvirtintos „bendrosios" įtariamojo ir kaltinamojo teisės, teįvardina tik įtariamojo (kaltinamojo) teisę duoti parodymus, tylėti ir (ar) atsisakyti duoti parodymus apie savo paties galimai padarytą nusikalstamą veiką.

Beje, šiuo aspektu negalima nutylėti, jog **baudžiamojo proceso įstatymo akcentas „apie savo paties galimai padarytą nusikalstamą veiką" yra akivaizdžiai nepagrįstas, visiškai bereikalingas (perteklinis) ir rodo aiškų baudžiamojo proceso įstatymo įkaltinantį polinkį (kryptingumą)**. Įtariamasis (kaltinamasis) yra apklausiamas ne apie *nusikalstamą veiką* (nes buvo tokia veika ar tokios nebuvo, juo labiau ar ta veika yra įtariamojo (kaltinamojo) veika (*savo paties*) ir pan., galima konstatuoti tik įsiteisėjus apkaltinamajam teismo nuosprendžiui), o apie tam tikrą įvykį, jo aplinkybes, paties įtariamojo (kaltinamojo) atliktus veiksmus, supratimą, siekius ir pan. Baudžiamojo proceso įstatymo teiginys „apie savo paties galimai padarytą nusikalstamą veiką" – tai aiškiai įkaltinantis teiginys, išreiškiantis baudžiamojo persekiojimo institucijų požiūrį į įtariamojo (kaltinamojo) apklausą ir parodymus.

Teisių ir galimybių, kuriomis įtariamasis gali naudotis jo apklausos metu (apart jau minėtų teisių tylėti ir (ar) atsisakyti duoti parodymus „apie savo paties galimai padarytą nusikalstamą veiką"), nevardija ir BPK 187 – 189 straipsniai. Iš šių procesinių nuostatų gal tik netiesiogiai galima įžvelgti įtariamojo teisę prieš pirmąją apklausą bei visas kitas apklausas, jei keičiasi įtarimo turinys, pasirašytinai gauti pranešimą apie įtarimą ar prokuroro nutarimą pripažinti įtariamuoju (BPK 187 str.). Žiūrint formaliai, visiškai kitaip Baudžiamojo proceso kodeksas elgiasi, pavyzdžiui, su liudytoju: BPK 81 straipsnyje *expressis verbis* (viename straipsnyje ir aiškiai) yra nurodyta, kad liudytojas turi teisę *inter alia* duoti parodymus savo gimtąja kalba ir naudotis vertėjo paslaugomis, jei apklausa vyksta jam nesuprantama kalba, susipažinti su savo parodymų protokolu ir daryti jame pakeitimus bei pataisas, prašyti, kad būtų daromi jo parodymų garso ir vaizdo įrašai, pats surašyti parodymus ir t. t. Žiūrint iš esmės, situacija gal nėra tiek dramatiška, nes **šios baudžiamojo proceso įstatymo nuostatos**, nors eksplicitiškai yra *skirtos* liudytojui, ***a simile* vis dėlto**

yra taikytinos ir įtariamojo apklausoms ikiteisminio tyrimo metu. Pagal BPK 271 straipsnio 2 dalį ir 272 straipsnio 1 dalį, apklausiamas kaltinamasis turi teisę prisipažinti ar neprisipažinti kaltu padarius jam įkaltintą nusikalstamą veiką, teisę motyvuoti savo atsakymą dėl kaltinimo, taip pat teisę duoti paaiškinimus, atsakyti į klausimus arba tylėti ir (ar) atsisakyti duoti parodymus vėlgi „apie savo paties galimai padarytą nusikalstamą veiką", duoti paaiškinimus dėl teisme tiriamų įrodymų.

Nekelia nuostabos, jog esant tokiam ribotam apklausiamo įtariamojo (kaltinamojo) teisių reguliavimui, dar skurdesnis yra jo gynėjo teisių detalizavimas ir užtikrinimas.

Be to, kaip ir įvairus kitas procesinę reikšmę turintis gynėjo elgesys baudžiamajame procese, *greta* ar *už* baudžiamojo proceso, taip ir **gynėjo teisės bei galimybės ginamo įtariamojo (kaltinamojo) apklausoje yra reglamentuojamos ne tik įsakmiomis teisės normomis (*imperatyviai*), bet ir *dispozityviuoju teisinio reguliavimo metodu***, kuris leidžia gynėjui *viską, kas nėra uždrausta įstatymu*. Tad gynėjas ginamo įtariamojo (kaltinamojo) apklausoje gali atlikti visus (bet kokius) veiksmus, kurie yra reikšmingi gynybai – patarti, reaguoti, padėti ir pan., jei jie nėra tiesiogiai uždrausti baudžiamojo proceso ar kuriuo kitu įstatymu. Pavyzdžiui, gynėjo aktyvus įsikišimas į įtariamojo apklausą ir patarimas ar priminimas ginamajam apklausos metu, kad jis turi teisę neatsakyti į atskirus užduodamus klausimus ar turi teisę apskritai tylėti, netgi **gynėjo patarimas neatsakyti į konkretų užduotą klausimą, kad ir kaip nepatiktų baudžiamojo persekiojimo institucijoms, yra gynėjo teisė**, kurios nedraudžia baudžiamojo proceso ar kuris kitas įstatymas, taip pat ir profesinė advokato etika ir kuri neprieštarauja įtariamojo apklausos esmei; neprieštarauja ir baudžiamojo proceso tikslams bei principams.

Žinoma, dalyvaudamas įtariamojo (kaltinamojo) apklausoje gynėjas ne tik turi tam tikras teises, bet ir privalo laikytis įstatymų nustatytos šio proceso veiksmo ir teismo posėdžio tvarkos, vykdyti teisėtus ikiteisminio tyrimo pareigūno, prokuroro, teisėjo ir teismo reikalavimus (BPK 48 str. 2 d. 3 p.).

4.1.1. Įtariamojo (kaltinamojo) apklausos ir gynėjo dalyvavimo ginamo įtariamojo (kaltinamojo) apklausoje tikslai

Baudžiamojo proceso teisės doktrina *apklausos* sampratai, juo labiau definicijai įprastai neskiria didesnio dėmesio. G. Goda, M. Kazlauskas ir P. Kuconis sako, jog *apklausa* – tai proceso veiksmas, kurio metu gaunami parodymai (Goda, Kazlauskas *et al.*, 2011, p. 311), o *parodymai* – tai apklausiamo asmens perteikiama informacija (Goda, Kazlauskas *et al.*, 2011, p. 187-191, 198). Nors naudoja įmantresnę retoriką, R. Burda ir S. Kuklianskis nepasako iš esmės nieko kokybiškai naujo ar kito: *apklausa* – tai „ypatinga verbalinio bendravimo forma" (Burda ir Kuklianskis, 2007, p. 10-12), tačiau šio verbalinio bendravimo *ypatingumas*, anot jų, pasireiškia tik tuo, jog informacija yra ne tik gaunama, bet ja

yra keičiamasi (tačiau tą *keitimąsi informacija* ar *informacijos mainų procesą* šie autoriai vėlgi suvokia gana aiškiai vienpusiškai – tyrėjas turi išaiškinti apklausiamajam, kokios informacijos iš jo laukiama, o apklausiamajam informaciją tyrėjas pateikia „per klausimus, teigimus, aiškinimus, pristatydamas save“); abi pusės per apklausą turi vienas kitą pažinti bei suvokti abipusiškai teikiamą informaciją; abipusių informacijos mainų metu perduodama ir gaunama informacija daro poveikį apklausos proceso dalyviams (Burda ir Kuklianskis, 2007, p. 11). Pasak šių mokslininkų, *apklausą* nuo *paprasto verbalinio bendravimo* skiria dvi grupės ypatybių: (i.) tai, kad bendravimą apklausos metu reguliuoja baudžiamojo proceso įstatymas ir (ii.) tai, kad bendravimo apklausos metu dalykas yra nusikalstamos veikos aplinkybės (Burda ir Kuklianskis, 2007, p. 12). Pasak P. Ancelio, apklausa – tai „procesinis įrodymų rinkimo arba jų patikrinimo būdas (metodas) tyrėjo ir apklausiamojo dialogo ir kitokio bendravimo metu“, „tiesos nustatymo vienas iš būdų“, apklausos metu yra duodami parodymai (Tyrimo veiksmai baudžiamajame procese, 2011, p. 80). Kriminalistikos vadovėlyje rašoma vėlgi iš esmės tas pats: *apklausa* – tai procesinis nusikalstamos veikos tyrimo veiksmas, kurio metu ikiteisminio tyrimo pareigūnas, ikiteisminio tyrimo teisėjas, teismas, griežtai laikydamiesi baudžiamojo proceso normų reikalavimų, ypatingo verbalinio bendravimo (apklausos) metu iš apklausiamojo asmens parodymų forma gauna ir užfiksuoja informaciją (duomenis) apie aplinkybes, turinčias reikšmės nusikalstamai veikai ištirti (Kriminalistika, 2013, p. 84). Toliau šiame kriminalistikos vadovėlyje veik pažodžiui yra perrašoma aukščiau atskleista R. Burdos ir S. Kuklianskio suformuluota *apklausos* samprata ir su ja susijusios kategorijos.

Panašiai į *apklausą* žvelgia ir kitų valstybių baudžiamojo proceso teisės mokslininkai.

Vienas žymiausių Vokietijos procesualistų H. Henkel sako, jog kadangi kaltinamasis gali geriausiai papasakoti apie įvykį, jo apklausa yra išskirtinės svarbos šaltinis ar priemonė (vok. *ein hervorragend wichtiges Mittel*), kuri padeda išsiaiškinti faktines įvykio aplinkybes (Henkel, 1968, p. 173). Jam antrina K. Peters: įrodymai yra tai, kas padeda atskleisti įvykio faktinius ir personalinius aspektus. Įvykis atskleidžiamas naudojant asmeninius ar daiktinius įrodymus (vok. *Personalbeweis* ar *Sachbeweis*). Pirmuoju atveju įrodinėjimo priemonė / įrodymų šaltinis (vok. *Beweismittel*) yra žmogus, antruoju – daiktas. Jei įrodinėjimo priemone / įrodymų šaltiniu yra žmogus, įrodymas gali būti *subjektyvus* ar *objektyvus*. Asmeninis įrodymas yra laikomas *subjektyviu*, jei yra paremtas žmogaus žinojimu, suvokimu, pojūčiais ar mąstymu. Žmogus kaip *subjektyvus asmeninis įrodymas* yra *aktyvi įrodinėjimo priemonė* (vok. *aktives Beweismittel*) – žmogus kaip įrodinėjimo subjektas veikia aktyviai, daro įtaką. Būdas, kuriuo žmogus kaip aktyvus įrodinėjimo subjektas veikia, yra jo *parodymai* (vok. *Aussage*) (Peters, 1985, p. 325).

Šiandienos Vokietijos vyraujančią baudžiamojo proceso teisės doktriną formuojančio W. Beulke retorika yra kiek labiau formali ir akademiška: *apklausą* (vok. *Vernehmung*) jis apibrėžia kaip valstybės institucijos, įgyvendinant jai priskirtas funkcijas, atliekamą asmens apklausinėjimą (vok. *Befragung*), kurio metu siekiama gauti asmens parodymus (Beulke, 2010, p. 73). *Apklausa* gali būti suprantama *formaliąja* (vok. *formeller Vernehmungsbegriff*) ir *materialiąja* (*materieller Vernehmungsbegriff*) *prasmėmis* (Beulke,

2010, p. 73); nuo *apklausų* W. Beulke atskiria *spontaniškus pareiškimus* (vok. *Spontanäußerungen*) ir *informacinį apklausinėjimą* (vok. *informatorische Befragung*) (Beulke, 2010, p. 75; Vetter, 2018, p. 120-122).

C. A. Новиков sako, kad *kaltinamojo parodymais* yra „su byla susiję bei pagal formą ir turinį leistini duomenys, kuriuos kaltinamasis pranešė (perteikė) ikiteisminio tyrimo metu ar nagrinėjant bylą teisme atliktos apklausos, akistatos, parodymų patikrinimo vietoje ir parodymo atpažinti metu“ (Новиков, 2004, p. 15).

Ankstesniame moksliniame tyrime jau esu pažymėjęs, jog Konstitucijos 31 straipsnio 3 dalyje įtvirtinta teisinė sąvoka *parodymai* turi būti suvokiama plačiau, nei tą daro Lietuvoje vyraujanti baudžiamojo proceso teisės doktrina. ***Parodymais*** Konstitucijos 31 straipsnio 3 dalies prasme yra laikytinas **bet koks** (tad tiek žodžiu, tiek raštu, tiek bet kokia kita forma išreikštas) **duomenų apie tiriamą nusikalstamą veiką ar kitas procesinę ar įrodomąją reikšmę turinčias aplinkybes pranešimas baudžiamojo persekiojimo institucijos pareigūnui ar teismui, ar bet kuriam šio pareigūno pavedimu ar su jo žinia veikiančiam privačiam asmeniui, kai tokį informacijos perteikimą iššaukė tiesioginė ar netiesioginė baudžiamojo persekiojimo institucijos pareigūno ar teismo, ar jo pavedimu ar su jo žinia veikusio privataus asmenis iniciatyva** (Merkevičius, 2008a, p. 495). Įtariamojo *apklausomis*, kurių metu įprastai ir yra gaunami įtariamojo *parodymai*, pagal Konstituciją turi būti kvalifikuojami ne tik formalūs proceso veiksmai, numatyti BPK 188 ir 189 straipsniuose, bet ir kiekvienas (bet kuris) kitas baudžiamojo persekiojimo institucijos pareigūno ar teismo (teisėjo) elgesys, kuris yra tinkamas ir kuriuo siekiama išgauti asmenį įkaltinančią informaciją (Merkevičius, 2008a, p. 496).

Skirtingai nei Lietuvoje vyraujančios baudžiamojo proceso teisės doktrinos atstovaujama *formalioji parodymų (apklausos) samprata*, ***materialusis* arba *į apklausos rezultatą orientuotas* apklausos (parodymų) suvokimas** akcentuoja ne subjektyvų apklausiamo asmens suvokimą (pojūtį, vertinimą), ar tam tikra situacija, kurioje jis yra apklausiamas apie nusikalstamą veiką, jam yra prievartinė ar ne, o konkrečią baudžiamojo persekiojimo institucijų pareigūnų ir teismų (teisėjų) įtaką, iniciatyvą, aktyvumą ir pan. gaunant tyrimui ar bylos nagrinėjimui reikšmingą informaciją. Vertinant, ar tam tikras dviejų ar daugiau žmonių bendravimas yra *apklausa*, o perteikiama informacija – *parodymai*, Konstitucijos požiūriu svarbus yra ne formalus šio bendravimo atitikimas BPK 179, 182, 188 ar 189 straipsnių reikalavimams, o paties bendravimo turinys (Merkevičius, 2008a, p. 496). Tam, kad tam tikras bendravimas būtų pripažintas *procesine apklausa*, jis nebūtinai turi atitikti visus BPK 182 straipsnyje ar kitose normose įtvirtintus formalumus (Merkevičius, 2008a, p. 496-497).

Apklausa visuomet yra **tikslingas bendravimas** (turintis konkretų tikslą – išgauti informaciją), tačiau *apklausos tikslingumas* vis dėlto nereiškia (neapsiriboja tuo), kad klausiantysis turi tikslą sužinoti tam tikrą konkrečią ar daug detalesnę baudžiamąją teisinę ar procesinę teisinę reikšmę turinčią informaciją. Daug svarbiau yra tai, **kas inicijuoja**

SUMMARY

FUNDAMENTALS OF CRIMINAL DEFENCE

This monograph continues the research on criminal procedure that started five years ago (Merkevičius, 2018). It focuses on one of the most important practical procedural institutions – "defence in criminal proceedings". There is lack of deeper analysis of said institution of criminal procedure law in Lithuania.

For user-friendly reference, this scientific monograph is divided into two parts. The first part of the book covers the basics of defence in criminal proceedings: the discourse on defence lawyers (attorneys), the historical background and development of "professional criminal defence" in criminal proceedings, its constitutional basis, the designation, aim and functions of the defence lawyer's participation in criminal proceedings, the defence lawyer's relations with the key subjects of criminal procedure, the content (essence) of defence, its concept (strategy or methodology), the objectives, positions and methods of defence, as well as the general concept of the rights of the defence lawyer, and broader analysis of two rights of the defence lawyer that are relevant to defence practice: the right to meaningful access to their clients in private before, during and after the hearings or any procedural action and the right to have access to the pre-trial investigation materials and the criminal case. The second part continues the analysis of the most important rights of the defence lawyer. It discusses the defence lawyer's right to be present during the investigative or evidence-gathering acts performed by law-enforcement authorities (e.g. interviews or searches) and procedural decisions (e.g. when remanding the defendant in custody), the right to conduct an independent investigation (to collect evidentiary data necessary for the defence) and the right (or obligation) to make a closing statement. This section also focuses on the principles of the trial (hearings) that are most important for the defence.

The analysis of attitudes towards lawyers presented in the first part of the monograph shows that this discourse is negative independently from the society that evaluate it (expert – professional or public, "people from the street") or periods of its development. With a bit of sarcasm, it can be said that only the lawyers themselves think "well" about themselves. This vector of discourse is neither correct nor justified. The monograph identifies and denies the main negative labels (procedural myths) commonly applied to lawyers. It is assumed that the negative discourse about lawyers is largely determined by the amount

of remuneration for provided legal services and the desire of law-enforcement authorities to gain more favour and power in the community by using humiliation of lawyers.

The second part of the monograph is devoted to the **historical background of "professional criminal defence" in criminal proceedings**. Although some of the elements relevant for "criminal defence" as the instrument for "defence of the stranger in court" can be traced back to the earliest Eastern civilisations, today's advocacy finds its historical roots in the traditions of ancient Greece and, in particular, ancient Rome. The ancient Roman Bar lived between two extremes of ancient Roman Republic and ancient Roman Empire. In ancient Roman Republic the legal profession was a respectable free profession based on eloquence and separated from legal representation was the most direct way to the higher state services, whereas in the ancient Roman Empire the legal profession was subject to an academic census, the number of full-time lawyers and the localisation of their practice were determined, the disciplinary responsibility of lawyers was handled by the public authorities, and the lawyer's fee was transformed from an 'honourable gift' to a contractual remuneration for services. The collapse of the ancient world, the change in the form of criminal procedure, the attitude of the political authorities towards the Bar, the authority of the Bar in the community and the self-esteem of the Bar itself, led to two main directions in the further development of the Continental European Bar – the *German* one and the *French* one. The *English Bar* made its own history.

The third part of the monograph analyses the **constitutional bases (principles) of the defence lawyer and defence**. They are presented through the analysis of the jurisprudence of Constitutional Court where concept of *defence*, the *right to defence* and the *right to have a lawyer* are revealed. In summary, the Constitution confers a dual constitutional status on the "lawyer": the lawyer (defence counsel) simultaneously represents (expresses) the rights and legitimate interests of a private individual (the suspect and/or accused) and represents the public (community) interest for a fair criminal trial. The basic (primary) measure and task of any defence lawyer's conduct is the private interest of the defendant, whereas public interest is deemed to be represented by the defence lawyer properly if timely and effective defence was provided: (a.) by effectively expressing exclusively private interest of individual defendant and for that purpose providing timely and high-quality legal assistance, the defence counsel helps the court to avoid making a mistake in reaching its final decision (the *positive expression of the public interest*); and (b.) by not defending the defendant in whatever way – by any means, ways and methods (*the negative expression of the public interest*).

The fourth part of the monograph discusses the **purpose of defence lawyer's participation in criminal proceedings**. After reviewing the strengths and weaknesses of the two main theories defining the role of the defence lawyer in criminal proceedings – (i.) the "theory of *the defence lawyer as a purely private-interest promo*ter" and (ii.) the "theory *of the defence lawyer as a sui generis law-protecting institution*" – the author agrees to the rhetoric of the Lithuanian professional discourse, which is reasonably dominant in favour of the *theory of* "the *defence lawyer as a sui generis law-protecting institution*". It is argued

in detail why the concept of the defence lawyer postulated by this theory is beneficial for the prosecution, the defence lawyer and even the community. The task of the defence lawyer in criminal proceedings is to protect and defend the person and the law (in the general sense) against arbitrariness and abuse by the law-enforcement authorities. The defence lawyer can do this most effectively because (i.) he or she has sufficient specific legal knowledge and professional experience to understand and apply the law, (ii.) he or she has sufficient time to devote to the protection and defence of the person and of the law (in the general sense), and (iii.) he or she is intrinsically motivated, determined and ready, with free will and the capacity to fulfil this social mission. In the context of the purpose of the defence lawyer in criminal proceedings, a discussion of the necessity and usefulness of the defence lawyer (i.) in relation to the defendant, (ii.) in relation to the prosecuting authorities and the court, and (iii.) in relation to the formal procedural framework, leads to the conclusion that the defence lawyer is not, and cannot conceive himself or herself to behave as "one who:" (a.) has the legal ability to assist the defendant to act in unlawful, criminal or unauthorised way, (b.) can personally professes the same criminal or immoral values and moral-ethical attitudes as his/her defendant, (c.) justifies the criminal act itself, (d.) deliberately seeks to obstruct, undermine or frustrate the criminal justice system, and (e.) feels obliged to achieve the defendant's avoidance of criminal liability "by all means". The objectives of the defence lawyer in criminal proceedings are to undertake all legally approved or acceptable actions, forms and means of defences which are not only in compliance with law but also do not breach the ethics of the legal profession. These actions aim to: (i.) assist the defendant in his/her own defence; (ii.) guarantee the autonomy (independence) of the suspected/accused person and monitor that the law-enforcement authorities do not violate the rights of the defendant or restrict his/her procedural possibilities, and (iii.) by his/her own active actions, influence the course of the proceedings and the final outcome of the proceedings against the defendant. The main functions of the defence lawyer are: (i.) to advise the defendant, (ii.) to assist the defendant in the formulation and presentation of his/her position, (iii.) to have the possibility of distributing the roles within the 'defence', (iv.) to represent/defend the defendant, and (v.) to investigate the circumstances relevant to the defendant (gathering evidence that may acquit or mitigate the defendant's responsibility) independently.

The fifth part of the monograph discusses the **relations of defence lawyer with most important subjects in the criminal procedural space**: the defendant, the victim, pre-trial investigators, prosecutors and judges, and other defence lawyers. The analysis starts with the definition of basic values that ensure the effectiveness of the defence: (i.) defence lawyer is *biased* and defence *is one-sided*, (ii.) defence is never a "useless" job, (iii.) the defender defends "individual person" and "law" in a general sense, (iv.) the aim of the defender (defence) is the defendant, (v.) the defender does not help neither the "guilty" nor the "criminal" to "avoid criminal responsibility", (vi.) the key defence decisions are taken by the defendant, (vii.) the defence lawyer is a "lone fighter" in practice, (viii.) the defence lawyer is *independent*, must preserve and defend his or her *independence* both

from the influence of the state authorities and from the prosecuting authorities and the court, must maintain a professional distance from the defendant, etc., (ix.) the defence lawyer must have confidence in himself and demonstrate this confidence to the defendant, (x.) the defence lawyer's approach must be critical, rational and "flexible", but at the same time "firm", (xi.) the defence lawyer must not act unlawfully, and (xii.) the defence lawyer must always remain professional and tactful, without displaying any personality, emotion or disapproval. The relationship between the defender and the defendant is based on two key elements: (i.) *mutual trust* between the defender and the defendant and (ii.) the need for the defender to establish a 'safe' 'professional distance' from the defendant *ab initio*. The *trust between* the defence lawyer and the defendant must be *'reciprocal'*, broadly conceived and combining: (i.) the *defendant's expectation that*, in certain situations, the defence lawyer will behave in a manner that the law and the ethics of the profession require, and (ii.) the *defence lawyer's expectation that* the defendant will not require from the defence lawyer anything contrary to or prohibited by the law or the ethics of the profession. A defence lawyer cannot promise the defendant anything more than a diligent and high-quality defence. In particular, in his/her dealings with the victim, the defence lawyer must not contribute to the secondary (re-)victimisation of the victim. A stricter, more categorical or even slightly "pressurising" tone is justified only in cases where the defence lawyer: (i.) has an inner subjective conviction and (ii.) has objective data that prove that the person who has been granted the procedural status of victim is not really a "victim"; and (iii.) only in cases where such conduct by the defence lawyer is genuinely capable of contributing to the defence. The victim's will and decisions have a significant impact on the initiation, conduct and outcome of the criminal proceedings, and a respectful and constructive relationship between the defence lawyer and the victim can therefore be of direct and real practical benefit to the defendant and the defence. Despite the different procedural functions, roles, aims (objectives) and interests to be defended between the defence lawyer and the public prosecuting authorities, and the resulting mistrust and lack of caution, openness and cooperation, the primary aim of the defence lawyer in his/her relations with the prosecuting authorities and the judges is to establish a respectful professional contact based on the principle of parity and to establish a businesslike mutual trust. Of course, the mutual trust among the defence lawyer and the pre-trial investigator, prosecutor and judge does not imply a renunciation of the defendant or of the defence as a procedural function, nor can it be understood as an attempt to 'sacrifice' the defendant or to avoid the contentious and even conflict situations that inevitably arise in criminal proceedings, in order to preserve a good personal or business relationship with the pre-trial investigator, prosecutor or judge. Mutual trust between defence lawyer and the law-enforcement authorities is impossible without mutual professional integrity. In this context, it is noted that the professional relationship between the defence lawyer and the public prosecutor and the judge is closer than the relationship between the defence lawyer and the pre-trial investigation officer, even though the situation where the suspect/accused chooses a lawyer proposed by the pre-trial investigation

officer, the public prosecutor or the judge to act as his/her defence lawyer is discussed. In relations with prosecuting authorities, prosecutors and judges, the defence lawyer must both maintain his or her full independence from them and establish professional respect for himself or herself as a procedural figure who seeks to fulfil realistically and effectively one of the main procedural functions in criminal proceedings – defence. The defence lawyer's response to a violation of his or her rights or those of the defendant must be effective, but at the same time adequate and ethical. Regardless of whose interests a lawyer represents or defends in criminal proceedings, lawyers must always remain colleagues, "friends of the profession", members of a single professional corporation which unites them, and who not only wear identical robes during the trial, but also, and above all, profess, unconditionally protect and defend the common values of the profession. Of course, a lawyer's communication with his colleagues must not be prejudicial to the objectives or interests of the defence.

The sixth part of the monograph introduces the **concept of "defence" in criminal proceedings**. After reviewing the most important aspects of the content of the concept of "defence", which are highlighted in the jurisprudence of the Constitutional Court, as well as various approaches in the doctrine of criminal procedure law, the author formulates a possible concept of "professional criminal defence" (as one of the possible ones), and discusses justification of the division of defence into *substantive* and *formal defence*, which is common for the prevailing doctrine of criminal procedure law, as well as the validity of the argument that defence is only available against a official prosecution or formulated charges and not possible until there is no formal prosecution or charge given. Especially critically author argues the rhetoric that confronts 'defence' with the search for 'truth', where the 'defence' is presented as an obstruction of the desire of the law-enforcement authorities to achieve 'truth'.

The seventh part of the monograph looks at professional – procedural – practical categories such as the **defence concept and the defence strategy**. A cognitive concepts of these are presented.

The eighth part of the monograph focuses on **defence objectives (purposes)**. The term 'defence objective' can be given different content and scope. The author understands the 'defence objective' as the result which the defence seeks at a relatively independent stage of the criminal proceedings, and therefore separately analyses the defence objectives: (i.) during the pre-trial investigation, (ii.) during the trial before the court of first instance, and (iii.) during the appeal stages. There is a consensus that the three most important objectives of the defence at the pre-trial stage are: (i.) the termination of the pre-trial investigation, (ii.) if it is not possible to achieve the termination of the pre-trial investigation, the completion of the pre-trial investigation by initiating the adoption of the court's order, and (iii.) the preparation for the trial of the case. The analysis of the objectives pursued by the defence in the 'pre-trial phase' (Chapter XVIII of the CCP) further discusses the concept of 'impediments to trial' and the issues of impartiality created by the identity of the judge who "prepares the case for trial" and the judge who "hears"

the case. Although the termination of a criminal case/proceeding is also a primary objective of the defence at the "preparation of the case for hearings" stage, the grounds for its termination should be approached in a differentiated manner. A review of the concept of acquittal, the grounds for acquittal and the effects it produces leads to the preliminary conclusion that, notwithstanding the compensation for damages and some other aspects which produce negative legal effects for the accused, the grounds for acquittal, as defined in Article 303(5)(1) of the CCP, are in general the most favourable to the defendant, and can be regarded as a maximum task for the defence at the first instance stage of the proceedings in the criminal case. It should be borne in mind that a court decision to terminate the criminal proceedings is a significant alternative to acquittal of the accused. The analysis of defence purposes in the appeal stages concludes the section.

The ninth part of the monograph focuses on the concept of **defence positions** and the criteria for choosing them. Five main defence positions (alternatives) are distinguished and discussed in more detail: (i.) total denial/non-confession**,** (ii.) admitting / denying part of the charges, (iii.) full admission of charges, (iv.) refusal to give a position on the charges (total, absolute silence), and (v.) a defence position based exclusively on (only) legal arguments. More attention is paid to the suspect's (accused's) "silence" as a defence position, its benefits and threats, the decision to testify or not, and the structure of the choice of the defence position is formulated: (i.) the defence lawyer's conversation with the defendant, (ii.) the analysis of the allegations (accusations, charges), (iii.) the analysis of the material of the pre-trial investigation (criminal case), (iv.) the presentation of all *in concreto* relevant defence positions (alternatives), the analysis/assessment of their advantages/strengths and threats/weaknesses, (v.) the selection of one defence position and the formulation of a clear "defence line" ("defence or defence thesis"), (vi) Identification, content analysis and summarisation of the evidentiary data (gathered during the pre-trial investigation or in the criminal case) and the legal arguments that support/confirm the "defence line" ("defence thesis"), (vii) identification, content analysis and summarisation of the evidentiary data (which have been collected during the pre-trial investigation or in the criminal proceedings) and the legal arguments which contradict the 'defence line' ('defence thesis'), (viii.) searching for and consolidating (recording) evidentiary data that can fill in the gaps in the evidence of the 'defence' or that would provide additional or stronger substantiation of the 'defence', (ix.) the search for and fixing of additional evidence which would refute or weaken the "accusations" and (x.) the final detailed description of the "event" charged against the defendant in the "defence brief or statement".

The tenth part of the book deals with **defence methods**. It discusses in detail six of them, which are of great practical importance: (i.) continuation (delay or protraction) of the criminal proceedings, (ii.) complete (absolute) silence of the defendant, (iii.) testimony of the suspect/accused, (iv.) the defence lawyer's requests for performance of procedural/investigative actions or application of coercive measures, (v.) the defence lawyer's participation in procedural/investigative actions carried out by the law-enforcement

authorities, and (vi.) the defence lawyer's independent gathering and submission of evidentiary information. Although the word "delay" *in abstracto* creates a certain negative impression, this defence is neither "worse" nor "better" than other defence methods. Defence based on this method alone are often untenable and sometimes even disastrous, but the rational and tactically wise use of this method often results in significant defensive benefits. The decision to speak or remain silent depends on the individual circumstances of the particular offence and the particular criminal proceedings, the personality of the defendant, and the experience, skills and intuition of the defence lawyer. The silence of the defendant can both benefit and create various risks and threats to the defence. From the defence position, what is relevant in modern procedure is not so much related to whether the suspect/accused has the right to give evidence (this right is no longer in question), but the content of the evidence given by the defendant (what evidence to give), the form of expression of the position and the justification for that position (how to disclose the position in what form or by what means), the procedural timing or moment of the evidence (when to speak), and, to some extent, also the state authority in the criminal proceedings to whom the evidence is being given (to whom it is to be spoken). The fundamental principle of *primum non nocere* presupposes the primary rule of defence that the defence lawyer has no right (may not) ask the prosecution for anything that he/she is able to obtain or to do by his/her own strength and efforts. Any request to perform a procedural (investigative) action or to apply a measure is possible only if the defender himself cannot obtain the desired positive result for the defence in any way and by any means available for him. Before making a request, the defence lawyer must consider not only the likelihood of obtaining the beneficial for the defence data, but also properly chose the moment for making such a request. In considering the timing of a request, the defence lawyer should (in the most general sense) focus on two important criteria: (i.) the request should be made (at the latest) when there is still a possibility of obtaining defence-relevant evidentiary information; and (ii.) the request should be made by assessing whether and how at that moment or later in the proceedings, the prosecuting authorities or the court still have (will still have) a realistic opportunity to verify that information and to refute, undermine or prove its unreliability. Defence lawyer should also note that the later a request that broadens the subject matter of the evidence or prolongs the proceedings is made, the more likely the prosecuting authorities will reject the request simply because it was made choosing improper timing. By participating in the conduct of the procedural/investigative actions involving the defendant, the defence lawyer should: (i.) ensure the defendant's procedural subjectivity, (ii.) controls and reacts appropriately to any illegality in the conduct of law-enforcement officers or other persons involved in the conduct of the particular actions, (iii.) be able to directly influence the outcome of the particular procedural/investigative actions, and thus of the criminal procedure *per se*, (iv.) learn various information that can be used for the purposes of the defence, and (v.) by structuring the facts heard or learned, by comparing them with those already known, by assessing the positions of the various persons involved in the procedural/investigative

action, the defence lawyer gains the possibility of forecasting the general scope and direction of the procedural investigation, predicting the nature and, to some extent, the content of the incriminating information, the future procedural steps, the interests of the proceedings, etc.., and, in the light of this, he or she is able to formulate the most rational defence response to them. The main threat and risk posed by the participation of the defence lawyer in proceedings conducted by the public prosecution authorities is that the participation of the defence lawyer creates the illusion of the legality of the proceedings or of the procedural coercion, and, therefore, the defence lawyer, having decided to participate in proceedings conducted by law-enforcement authorities, must be particularly attentive and considerate, and must react immediately to any irregularity in the conduct of the proceedings or the investigation. The defence lawyer's independent gathering of evidentiary information is discussed separately in this monograph.

The eleventh and most comprehensive part of this monograph discusses **individual rights of the defence lawyer in criminal proceedings that are more relevant to professional practice**. This part first of all defines the content of the category "rights of the defence lawyer", which includes: (i.) the procedural rights and legal possibilities that the Code of Criminal Procedure, the Law on the Bar and other legal acts grant (attribute) directly to the defence lawyer as a separate, independent subject of the criminal proceedings, or to the lawyer as a representative of the liberal profession; (ii.) procedural rights and legal possibilities, which, formally speaking, *expressis verbis* do not seem to be attributed to the defence lawyer as a separate subject of criminal proceedings, but are attributed to the defence as a procedural function, (iii.) the possibility, based on *a dispositive approach to legal regulation*, to carry out any action that is not expressly prohibited by criminal procedure or any other law, and (iv.) the corresponding duties of all possessors of state powers – first of all, the legislator, then the law enforcement authorities and the courts who implement this law – towards these procedural rights. This part of the monograph elaborates on the following five rights and legal possibilities of the defence counsel: (i.) the right to meet with the defendant in private without any interference, (ii.) the right to have access to the materials of pre-trial investigation and/or criminal case file and to make/receive copies or extracts of these data/materials, (iii.) the right to actively participate in the proceedings (investigation) and procedural decisions of the state subjects of criminal proceedings as follows: (a.) in all interrogations of the defended suspect (accused), (b.) in all actions carried out with the suspect or accused person, actions carried out at the request of the suspect, accused person or defence lawyer and any other action for the collection of evidence, if authorised by the pre-trial investigation officer, prosecutor or judge, (c.) the right to be present during the proceedings for the imposition of custody on the defendant, for the determination or extension of the time limit and for the hearing of appeals against custody, and (d.) during the search of the defendant's premises or of any other premises, place or area in the presence of the defendant, (iv) the right to gather evidence in support of the defence, and (v.) the right or obligation to make a closing speech at the trial.

The right of the defence lawyer and the defendant to meet in private and to communicate without interference implies the possibility of meeting "one to one", without participation of any person and communicating in other ways, without prohibition, restriction, observation or other control or recording, without limitation as to the number and duration of such meetings and other acts of communication. This right is absolute and categorical directly defined in the Code of Criminal Procedure and the Law on the Bar, without any reservations or exceptions, and without leaving any legitimate possibility for the law enforcement authorities to limit or restrict this right of defence, whether the suspect/accused person is free or in custody/arrest. This aspect of national law is also important because the right of the accused to meet with lawyer in private and to have unhindered access to his defence lawyer is protected by Articles 6 and 8 of the Convention. In the context of the right of defence, the monograph discusses separately the moment of the lawyer's intervention as the suspect's defence lawyer, the meaning and content of the first conversation of the defence lawyer and the defendant, the legal regulation of temporary detention and the procedural status of the "detained suspect", the importance of the explanation of the suspect's rights, and the concept of the waiver of lawyer. It is argued that, notwithstanding what is explicitly manifested in Article 48(1)(3) of the CPC, the right of the defence lawyer and the defendant to meet in private without any interference and to communicate unhindered is not unrestricted and therefore undermines the effectiveness of this right. The right of the defence lawyer and the suspect/accused to meet in private is guaranteed by the immunities of the defence lawyer or the defence and by a number of other procedural and substantive legal instruments. Separate analyses are made of the defence lawyer's (i.) "testimonial immunity", (ii.) "immunity from inspection and recording of his correspondence, telephone conversations, electronic and other communications, as well as any other communication", (iii.) "immunity from searches, seizures, inspection, seizure and recording of the documents and other data in his possession", and (iv.) "immunity from control over the professional activities of the defender (lawyer)" and (v.) other procedural and substantive legal instruments which guarantee the right of the defender and the suspect (defendant) to meet in privacy and to communicate unhindered, the confidentiality of the communication between the defender and the defendant, and the defender's (lawyer's) professional (client's) confidentiality generally. In this context, more attention is paid to the competition between the Criminal Intelligence Act and the Law on the Bar, and to the Prosecutor General's "explanatory notes" of questionable legal legitimacy. It is noted that Article 45(2) of the Law on the Bar *expressly* prohibits the use of data from a meeting or communication between a lawyer and his/her client as evidence, but this does not imply that this categorical prohibition protects the suspect/accused and the suspect's/accused person's defence lawyer in the same way. The rights and interests of the defence lawyer as a person and a subject of the proceedings are protected in this respect only within the limits set out in Article 46(3), in part, and (4) of the Law on the Bar.

The defence lawyer's right of **access to "pre-trial investigation data" during pre-trial investigations and to "criminal case files" during criminal proceedings**

before the courts, as well as the right to make or receive copies of these data/materials, as well as other rights of the defence lawyer is a 'substantive' right, a 'result-oriented right', whereby the defence lawyer has access to objects and documents of procedural significance in order to know their content and to be able to assess their probative value, persuasiveness and reliability. The formal right and actual access of the defence lawyer to the pre-trial investigation data and the materials of the criminal case in a timely and effective manner is one of the most important conditions for the effective exercise of the defence (*conditio sine qua non*), without which, most probably, it is impossible to exercise any of the rights of the defence effectively: to advise and assist in the formation of the defence, to make a request or lodge a complaint, to ask questions of the persons under questioning, and to gather the evidentiary data necessary for the defence independently. The jurisprudence of the European Court of Human Rights explains this right of defence lawyer as integral part of the *right to have sufficient time and opportunity to prepare one's defence,* defined in Article 6(3)(b) of the Convention, and as one of the elements of a *fair trial*, as it is defined in Article 6(1) of the Convention. The author of the monograph also presents briefly the concept of "*pre-trial investigation data (material)*", discusses the eclecticism in using the terms "*pre-trial investigation data*" and "*pre-trial investigation material*", the procedural significance of the "investigative plans, minutes of deliberations, written instructions, other documents of organisation and control of the pre-trial investigation" highlighted by the Prosecutor General's Recommendations, as well as the issue of the "right of the suspect to buy copies of the pre-trial investigation materials (documentation)". The Code of Criminal Procedure distinguishes several forms of implementation of the defence lawyer's right of access to pre-trial investigation data (material) and to make copies or extracts of pre-trial investigation material, and establishes different groups (types) of pre-trial investigation data (material), which the defence lawyer may access differently. The monograph separately discusses (i.) the "general" model of the defence lawyer's right of access to the data (material) *of the ongoing* (*ongoing*) pre-trial investigation as a *lex generalis for* other forms of access, as well as the defence lawyer's right of access to (ii.) the materials of *the refusal to open a* pre-trial investigation, (iii.) the data (material) of *a suspended* and (iv.) *terminated* pre-trial investigation, and/or to make copies or extracts of this material, (v.) the data (material) of a pre-trial investigation *that ends in an indictment*, (vi.) the individual data (documents) of the pre-trial investigation explicitly identified *de lege lata, as* well as (vii.) the right of the defence lawyer to take part in certain procedural/investigative actions and to have access to the minutes of these procedural/investigative actions and the annexes thereto and (viii.) the right of the defence counsel to have access to all pre-trial investigation data (material) submitted by the prosecutor to the pre-trial judge and/or the court, to decide on the imposition of a pre-trial detention order, the determination of the period of pre-trial detention or the extension thereof, and to hear appeals against pre-trial detention. Special attention is given to key procedural concepts and categories on which the effectiveness of this right of defence depends, such as the "success of the

pre-trial investigation". In this respect, it is argued that the limitation of the defence lawyer's right of access to all or part of the data (material) of the pre-trial investigation is determined by a "procedural algorithm" consisting of the following essential elements: (a.) an individual decision on each specific, individual source of information (evidentiary data), (b.) the specific public interest in preserving the secrecy (confidentiality) of a particular source of information, (c.) the specific threat to a particular source of information, (d.) the overriding importance (significance) of the public interest in relation to a particular source of information overriding the right of the defence to know the content of the source of information and to use it for the purpose of the defence, and (e.) the proportionality principle. The discussion is focused on whether and to whom the defence lawyer may disclose information learned or documents obtained through the access to pre-trial investigation data (material). Also author criticises the interpretation of the Supreme Court of Lithuania of the "renewal of the pre-trial investigation *per se* time limit" as well as of the definition of the procedural competence of the pre-trial judge (the court) who is deciding on the pre-trial detention measure. The right of the defence lawyer to have access to the materials of a criminal case and to make copies or extracts of those materials is not directly defined in the Code of Criminal Procedure, but they are acknowledged in legal regulation on the access to the materials of a criminal case, to making copies, extracts or extracts of those materials or to the transcripts of those documents adopted by heads of the courts. In latter the "criminal case file" are divided into three groups, which are subject to a different regime of procedural access: (i.) documents contained in a file (including a file maintained in electronic form), i.e. (ii.) the minutes of court hearings and audio recordings of court hearings, and (iii.) other material in the case (of course, a separate distinction is also made between "personal data stored separately from other pre-trial investigation material", as referred to in Article 237(3) of the CCP). The author emphasises that some of the restrictions on access to or copying of criminal case files by defence lawyer, as set out in said legislation adopted by the heads of the courts, are "natural" and legally justified, the legitimacy of others is doubtful. According to the author, prohibitions to access to investigative/case materials which do not derive from the law as a normative document of supreme legal force, such as Article 237(3) of the CPC, but which are formulated in sub-legislative orders issued by the heads of the courts, constitute an *ultra vires* action of said subjects.

The defence lawyer's objectives of **attending all testimonies (questionings) of the suspect/accused are** primarily determined by the concept and objectives of the interview/examination of the suspect/accused: before and during the questioning, the defence lawyer must, on the one hand, protect and defend the suspect against arbitrariness, abuse and manipulation by the law enforcement authorities (in simple terms, against false accusations against oneself and others), and, on the other hand, he/she must assist the defendant in the active exercise of the right of the defence during the questioning, and in the exercise of his/her rights of defence and of the right to be heard, by presenting in the course of the questioning, to the maximum extent possible, accurately and fully,

what is useful for the defence. The monograph discusses in more detail the various negative practices that are widespread in Lithuania, whereby the prosecuting authorities exert undue influence on detained or arrested suspects in order to "hunt for a confession". The ability of defence lawyer to effectively protect and defend the defendant during interrogations is also significantly limited by the fact that various sub-legislative acts prevent defence lawyer from using technical means of recording the interrogation of the defendant. While emphasising the defence lawyer's exclusive duty to examine carefully the record of the interrogation of the defendant, this duty of the defence lawyer must also be seen in the light of the effectiveness of the defence: the defence lawyer not necessarily in all cases should seek to ensure that the record of the interrogation of the suspect is drawn up in a precise, accurate and detailed manner. It is the duty of the defence lawyer to ensure that the record of the testimony of the defendant fully, accurately and fairly discloses and records only those facts, arguments or simply words of the suspect which are of positive assistance to the suspect's defence.

The discussion of the defence lawyer's **right to participate in "actions carried out with the defended suspect or accused person", "actions carried out at the request of the suspect or accused person or their defence lawyer"**, and "with the permission of the pre-trial investigation officer, prosecutor or judge **at any other actions for the gathering of evidence"**, first of all, begins with the analysis of the content of said procedural categories. The defence lawyer shall have the right to participate in all (any) acts or measures organised or carried out by the law enforcement authorities in which the defended suspect/accused person is actually present or entitled to participate, irrespective of the name given to the act or measure by the criminal procedure law and the procedural status or role of the suspect/accused person in the course of that particular act or measure. 'Actions taken at the request of the suspect or accused person or his/her defence lawyer mean (include) all (any) 'actions' or 'measures' organised or taken by the law enforcement authorities and carried out at the request of the suspect or accused person or his/her defence lawyer by a pre-trial investigating officer, a public prosecutor, or a judge (court). This include all forms of requests or complaints, irrespective the definition of this 'act' or 'measure' in criminal procedure law, who is involved in its performance, the status or procedural role of the persons involved, etc. Separate attention is given to the objectives that the defence lawyer sets for himself by participating in these procedural/investigative acts, as well as to the benefits that the defence lawyer may derive from this activity, and the risks that may arise from it.

The analysis of the **right of** the defence lawyer to **participate in the proceedings for the imposition of pre-trial detention on a defended suspect/accused person, for the determination or extension of the time limit, and for the examination of complaints concerning pre-trial detention** starts with the meaning of pre-trial detention for the defence. The role of the defence in the process of imposing and prolonging of pre-trial detention is divided into (i.) defence before the imposition of pre-trial detention and the establishment or prolongation of pre-trial detention, and (ii.) defence against pre-trial

detention. The main objectives of the defence against the imposition and/or continuation of pre-trial detention are three: (a.) to prevent the prosecutor from approaching the pre-trial judge or the court with request on imposition or continuation of pre-trial detention, (ii.) to prepare arguments and evidence to avoid or minimize the period of detention, and (iii.) to prepare the defendant for the upcoming trial on the remand in custody. The issue of provisional detention is also discussed in the context of the defence against arrest. In detailing the defence in proceedings for the imposition or extension of pre-trial detention, the main (a.) procedural and (b.) substantive legal aspects which determine the effectiveness of the defence are identified. The following four factors concerning the conduct and roles of the defence lawyer and the other participants in the proceedings are among the most important procedural aspects: (i.) the suspect's (defendant's) personal participation in the proceedings where the question of imposition of detention or its extension for another period is to be decided; (ii.) the personal presence of the defence lawyer of the suspect/accused person in the proceedings for the imposition of a detention and for the extension of the detention period, (iii.) access by the defence lawyer and the suspect/accused person to the pre-trial investigation data (criminal case file) and (iv.) the independence (impartiality) of the judge who decides on the imposition of a detention or on the extension of the detention period, or who hears a complaint against the detention. The monograph focuses more on issues of judicial impartiality that are not usually discussed in the prevailing doctrine of criminal procedure law: the principle *nemo esse judex in sua causa potest*, the *objective* impartiality of the judge who imposes detention on the defendant or of the court which also hears the merits of the criminal case, and the duty of the appellate court to extend the term of the remand in custody. From the substantive point of view, the defence against detention can be based on "anything" which *in abstracto* determines the imposition of a detention or the extension of the term of custody, and therefore the monograph also discusses in more detail the conditions for the imposition of a detention (its extension), namely: (a) suspicion and its validity; and (b.) proportionality, and the grounds for imposing (extending) a pre-trial detention measure – (a.) the risk of absconding, (b.) the risk of interfering the proceedings, and (c.) the risk of committing new criminal offences. It is recalled that detention is often ordered on so-called *apocryphal* grounds.

While there is no doubt that *ex lege* defence lawyer has the **right to be present during a search of** the defendant's premises, or any other premises, place or area, if the defendant is present, the practical reality and effectiveness of this right of defence lawyer raises serious doubts. After analysing the general characteristics of searches relevant to the defence, the monograph also covers issues that have received less attention in the prevailing doctrine, such as the legitimacy of a search where a long period of time has elapsed since the judge's order authorising the search was issued, and the search for, and the seizure of, *electronic data* stored on various electronic media or systems. Traditionally, the objectives of the defence lawyer in participating in the search, as well as the threats and risks involved in the participation of the defence lawyer are discussed. It is recalled that the realism and

effectiveness of the defence also depend on whether and to what extent the defendant is prepared in advance for the possibility that his/her premises may be searched.

Although the **right** of the defence lawyer **to independently collect the evidentiary data necessary for the defence** or, in other words, the **right to carry out an independent investigation,** is currently directly defined in the Code of Criminal Procedure, the legal basis for this right, and thus the scope of the content of this right, is still relevant. The justification for this right is also important for the doctrine of criminal procedure law. The author discusses extensively the limits of the legality of the independent investigation carried out by the defence lawyer, drawing attention to the Criminal Code, the Code of Criminal Procedure, the Law on the Bar and other laws, the principles of criminal procedure law, the method of regulation of legal relations in criminal procedure and the jurisprudence of the Supreme Court of Lithuania. The core procedural categories analysed there are "*prohibition of the use of procedural coercive measures*", "*prohibition of the use of unlawful means of defence*" and "*prohibition of obtaining/collecting data in a manner directly prohibited by law*". In the context of the legitimate/illegitimate conduct of the defence lawyer, the legitimacy of the use of evidentiary data obtained by a private person, including factual information collected in confidence, in criminal proceedings was also recalled. Separate forms of the defence lawyer's right to conduct an independent investigation are also discussed, such as the defence lawyer's right and actual factual possibility to: (i.) obtain from companies, institutions and organisations and individuals documents and objects necessary for the defence, (ii.) talk to persons about the circumstances of the incident known to them (in this context, the necessity to prepare a defendant for interview is noted), (iii.) inspect and/or record the scene of crime and/or the means of transport, and (iv.) "otherwise record information necessary for the defence". The right of the defence to call in a specialist or expert and to obtain his opinion or advice is also of particular relevance to defence practice. In this context, attention is drawn to the issue of the probative value and use of a private expert's "consultative report" retained by the defence. The evidentiary data obtained from an independent investigation must be used by the defence in a wise and timely manner.

In order to disclose in more detail the purpose, role and actual possibilities of the defence lawyer in the trial process (in court hearings), the analysis of **the defence lawyer's final speech (closing statement)** also includes the classic (traditional) principles of the trial process, such as *publicity, direct* examination of the evidence in court, *adversarial proceedings, equality of arms*, or *the accused person's/defendant's right to be heard and to be listened to*. The monograph reveals the changed, true content of these principles. After presenting the various approaches to the defence lawyer's closing speech (final statement), discussing the requirements for its content, structure, preparation and external expression (presentation), the author supports a trinitarian – as simplified as possible – structure of the defence lawyer's final speech (closing statement), consisting of the following: (i.) an introduction, (ii.) the defence position and its justification, and (iii.) the summarised final statements. Also author emphasises the need to prepare a written text

of the defence final statement and to include it as a separate document in the file of the criminal proceedings (case).

Keywords: Lithuanian law, criminal defence, criminal proceeding, defence lawyer, attorney

Advokato įgyvendinama gynyba baudžiamajame procese neabejotinai yra viena kontraversiškiausių teisinių profesijų. Julius Glaser dar 1885 m. pagrįstai teigė, jog „baudžiamojo proceso istorija – tai gynybos baudžiamajame procese istorija, o gynybos baudžiamajame procese istorija – tai gynėjo procesinio statuso istorija“. Gynybai baudžiamajame procese skirtos diskusijos Vokietijoje neretai yra pradedamos ar lydimos šios šalies advokatūrai „kultiniu“ Hans Dahs teiginiu, jog „Gynyba yra kova. Kova už kaltinamojo teises, konfliktuojant su valstybės institucijomis, kurios siekia įvykdyti joms priskirtą užduotį persekioti nusikaltimus“. Nepaisant tokio gynybos pobūdžio ir reikšmės ginamo žmogaus likimui, būsimų advokatų „niekas nemoko būti gynėjais baudžiamajame procese“.

Lietuvoje vyraujanti baudžiamojo proceso teisės doktrina niekada nemėgo advokatūros, gynėjų ir gynybos funkcijos baudžiamajame procese. Šioms temoms niekada neskyrė didesnio dėmesio, jų šalinosi, laikė ir vis dar tebelaiko kažkokiomis „svetimomis“.

Atsižvelgiant į tai, kad užsibrėžus tikslą išsamiai aptarti gynybos baudžiamajame procese sampratą, labai lengva pamesti horizontą, šioje mokslinėje monografijoje siekiama atskleisti tik „gynybos baudžiamajame procese pagrindus“: „profesionaliosios gynybos“ istorines išeitas, konstitucinį pamatą, gynėjo dalyvavimo baudžiamajame procese paskirtį ir santykius su svarbiausiais baudžiamosios procesinės erdvės dalyviais, gynybos tikslus, pozicijas ir metodus, taip pat gynybos praktikai aktualias gynėjo teises ir galimybes baudžiamajame procese.

Šioje mokslinėje monografijoje pristatomas ne teorinis, „sterilus vadovėlinis“ vertinimas, o asmeniškai išgyventas ir apmąstytas praktinis požiūris į „tikrą“ baudžiamąjį procesą, „gyvą procesinę veiklą“, nevengiama kelti ir mėginama atsakyti į nepatogius klausimus, stengiamasi paneigti baudžiamosios valdžios išgalvotus procesinius mitus.

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